VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 21-ENV-00035

Evans Clearing Limits

ENTRY ORDER

Title: Motion to Reconsider (Motion # 4)

Filer: Nicholas Low, attorney for Applicants/Appellants David and Donna Evans

Filed Date: June 17, 2022

Memorandum in Opposition filed on July 14, 2022, by Joseph McLean, attorney for the Town of Stowe.

David and Donna Evans ("Applicants") have moved the Court to reconsider its May 11, 2022, decision on the Town of Stowe's motion to remand. While we ultimately denied the motion to remand—a motion Applicants had opposed—in doing so, we explained our understanding of how the Town of Stowe Subdivision Regulations ("Regulations") treat applications to amend subdivision permits. We offered this understanding as part of our explanation for why the Town's contention that the Development Review Board (DRB) had skipped a necessary step in its analysis of the Evans' application—namely the Hildebrand analysis for amendments to the conditions of municipal zoning approvals—was correct. Applicants take issue with our interpretation of the Regulations and ask us to modify our decision to reflect their interpretation.

I. The Legal Standard for Reconsideration

"Neither the Vermont Rules of Environmental Court Proceedings (V.R.E.C.P.) nor the [Vermont Rules of Civil Procedure] requires us to address motions to reconsider or alter interlocutory orders or decisions that do not conclude a case. We have inherent power to do so, however." In re Bennington Wal-Mart Demolition/Const. Permit, No. 158-10-11 Vtec, slip op. at 3 (Vt. Sup. Ct. Envtl. Div. Aug. 17, 2012) (Walsh, J.). "Further, we also have explicit authority to consider such motions under V.R.C.P. 54(b)." Id. at 4.

V.R.C.P. 54(b) provides that in the absence of a final judgment by this Court, any interlocutory decision adjudicating fewer than all of the claims of fewer than all the parties in an action "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." In addressing a motion to alter made pursuant to Rule 54(b), we apply the legal standard applicable to ruling on a Rule 59(e) motion to alter or amend a final judgment. Id. It is ultimately within the Court's discretion whether to grant a Rule 59 motion, and we have identified four principal reasons for doing so: (1) to correct manifest errors of law or fact; (2) to allow a party to provide "newly discovered or previously unavailable evidence"; (3) to "prevent manifest injustice"; and (4) to respond to an "intervening change in the controlling law." Lathrop Ltd. P'ship I, Nos. 122-7-04 Vtec, 210-9-08 Vtec, and 136-8-10 Vtec, slip op. at 10–11 (Vt. Super. Ct. Envtl. Div. Apr. 12,

2011) (Durkin, J.) (quoting 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1) (*partially reversed on other grounds by* In re Lathrop Ltd. P'ship I, 2015 VT 49, 199 Vt. 19). Granting a Rule 54(b) motion is viewed by this Court as an "extraordinary remedy." Bennington Wal-Mart, No. 158-10-11 Vtec at 4 (Aug. 17, 2012).

II. Discussion

This is an appeal by Applicants of the Stowe Development Review Board's denial of their request to retroactively approve changes to the clearing limits on their property. Those clearing limits were formalized in the subdivision permit creating the parcel on which Applicants now seek to build a home. Although the DRB denied Applicants' request to amend the clearing limits, it did not first conduct what is known as a "Stowe Club Highlands" or "Hildebrand" analysis of the proposal to amend the subdivision permit. *See* In re Stowe Club Highlands, 166 Vt. 33, 38 (1996); In re Hildebrand, 2007 VT 5, ¶13, 181 Vt. 568. Hildebrand is a threshold analysis that the Supreme Court has indicated applies to applications to amend the conditions of municipal zoning permits, unless the municipality has an equivalent threshold test that plays the same role of protecting the finality of land-use permitting decisions while permitting appropriate flexibility. In re Application of Lathrop Ltd. Partnership I, 2015 VT 49, ¶ 66 n.19, 199 Vt. 19. The Town asked that we remand the matter so that the DRB might conduct this analysis in the first instance. We agreed with the Town that the Regulations do not establish an equivalent test to Hildebrand and that the DRB therefore skipped a step in its analysis. However, in the interests of the efficient administration of justice, we declined to remand at that time, choosing instead to review the DRB decision and to remand only if we reached a different conclusion from the DRB on the merits of the application. Evans Clearing Limits, No. 21-ENV-00035, slip op. at 3–4 (Vt. Super. Ct. Envtl. Div. May 11, 2022) (Durkin, J.) (hereinafter "Entry Order").

First, we wish to thank Applicants for calling our attention to a mistake in our choice of words in the Entry Order. On several occasions in the opinion, we refer to a "minor alteration," when, in fact, we meant to refer to a "minimal alteration," which is a term used and defined in the Regulations and which we also use in our order. *See, e.g.,* Entry Order at 3 ("These provisions define "minor alterations" to subdivision permits and indicate that truly minor alterations may be approved by the Zoning Administrator."); *see also* Entry Order at 3 ("[Applicants'] principal argument is that the procedures established by the Subdivision Regulations for minimal alterations to subdivision permits take the place of a Stowe Club Highlands/Hildebrand analysis."). Our mistake can be attributed to the fact that the definition of a "subdivision, minimal alteration" in the definitions section of the Regulations refers to a "minor alteration" when describing a change to approved clearing areas, which, when small enough, is one sub-category of minimal alteration.[1] Nevertheless, we agree that "minimal alteration" is the overarching term and the term we should have used. We therefore **GRANT, IN PART**, Applicant's motion to alter. However, while we agree to substitute "minimal alteration" for "minor alteration" in the Entry Order, we decline, for the reasons expressed below, to adopt Applicants' other claims of error.

Applicants argue in their present motion that "the Subdivision Regulations do not allow for 'minor' amendments and other, or non-minor, amendments. Instead, they only allow for 'minimal alterations,' which are clearly and objectively defined." This is similar to arguments Applicants presented in their extensive briefing on the motion to remand, and is an interpretation which we now reject.

[1] In fact, this is the sub-category that would apply here, if Applicants' ultimate arguments in their appeal are correct.

As we summarized in the Entry Order, sections 3.1.4 and 3.4.1 of the Regulations "require applications to alter a subdivision to be evaluated against certain Planning and Design Standards, contained at Section 5 of the Regulations. They dictate that the Zoning Administrator [("ZA")] may conduct this evaluation in the case of truly [minimal] alterations. However, the Regulations also direct the ZA to refer the application to the DRB should they find a likely impact under those standards or determine that the alteration, regardless of how presented by the applicant, is 'substantial'." Entry Order at 2–3 (internal citations omitted). In other words, the Regulations expressly contemplate "substantial" alterations to subdivision permits. Substantial is not a defined term in the Regulations. We therefore apply its ordinary meaning. E.g., Webster's II New College Dictionary (3rd ed., 2005), substantial: "Being of considerable importance, value, degree, amount, or extent." We conclude that substantial alterations are those that are more than "minimal," as defined by the Regulations. In other words, substantial alterations are those that exceed the quantitative limits expressed in any of the three subcategories of "minimal alteration" or otherwise do not fall within one of those categories. Substantial alterations must be reviewed by the DRB.

Under our interpretation, § 3.4.1 directs the ZA on how to handle an exceedingly common situation in the land-use permitting process: a mislabeled application. The land-use process frequently requires applicants to initially categorize their proposal by type of approval sought and the uses involved. Permitting officials must determine whether the applicant has chosen the correct label for their project in order to apply the proper procedural and substantive rules. A prominent example is an application claiming to be for a permitted use that actually proposes a conditional use in the relevant zoning district.

A zoning administrator must not be bound by the label chosen by applicants for a subdivision permit amendment. Instead, the ZA must be free to conclude that an application for a "minimal alteration" actually describes a "substantial alteration." In such a scenario, we read § 3.4.1 to direct the ZA to refer the application to the DRB for review, just as the ZA must refer a truly minimal alteration that the ZA nevertheless concludes is likely to lead to significant impacts under the Section 5 standards. Our interpretation is buttressed by § 3.4.1's reference to the Zoning Administrator reviewing minimal alterations under the Section 5 standards "in lieu of the DRB," which clearly indicates, contra Applicants' argument, that the Regulations contemplate non-minimal alterations, which are not reviewed by the ZA.

As we highlighted previously, the Regulations do not establish different substantive criteria for minimal and substantial alterations; they merely distinguish between who must undertake the review. Entry Order at 3. Therefore, this categorization of an alteration as minimal or substantial clearly does not equate to a Hildebrand analysis.

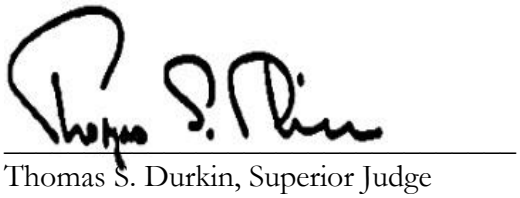
The remainder of Applicant's brief details what they allege would be an overly cumbersome process if the distinction between minimal and substantial alterations and a Hildebrand analysis are both in play. Applicants also argue that our interpretation imbues the ZA with powers beyond what the statute provides. We find both arguments unconvincing. What is in effect a three-step process—the ZA deciding whether or not to refer an application to the DRB; the ZA or DRB reviewing the application against the Hildebrand test; and the ZA or DRB reviewing the application against the Section 5 standards if it "passes" the Hildebrand test—is not notably unwieldy, nor does it grant the ZA new powers.

Nothing in Applicant's arguments convinces us that our prior Entry Order contains "manifest errors of law or fact" or causes a "manifest injustice," or that any of the other bases for reconsideration are met. The motion is therefore **GRANTED** in part as we will issue a new entry order on the motion

to remand, correcting references to "minor alterations" to read "minimal alterations." The present motion is, in all other respects, **DENIED.**

So Ordered.

Electronically signed on July 29, 2022, at Burlington, Vermont, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Environmental Division