VERMONT SUPERIOR COURT
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
www.vermontjudiciary.org

ENVIRONMENTAL DIVISION
Docket No. 24-ENV-00004

Kendall Road CU Denial	**DECISION ON MOTIONS**

This is an appeal of a Town of Strafford Development Review Board (DRB) decision, dated December 28, 2023 (the Decision), denying Rachel Kendall's (Applicant) application for a conditional use permit. Applicant appealed the Decision to this Court. Neighboring landowners Robert and Gertrude Fondren and Linda Titus (together, Neighbors) have appeared in this action to oppose the application.

In this matter, Applicant is represented by Jon. T. Anderson, Esq. Neighbors are represented by Christopher Boyle, Esq. The Town of Strafford is represented by David K. Mears, Esq.

Presently before the Court is Neighbors' motion to dismiss this appeal and remand the application back to the DRB. In response to this motion, Applicant filed a motion for partial summary judgment seeking a determination regarding the scope of this appeal and the applicable zoning regulations. Applicant also moved to amend her Statement of Questions.

Legal Standards

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5(a)(2). In determining whether there is any dispute over a material fact, "we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted).

In contrast, when reviewing a motion to dismiss under V.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, we accept as true all uncontroverted factual allegations and construe them in a light most favorable to the nonmoving party. Rheaume v. Palito, 2011 VT 72, ¶ 2, 190 Vt. 245.

Undisputed Material Facts

We recite the following factual background and procedural history, which we understand to be undisputed unless otherwise noted, based on the record now before us and for the purpose of deciding the pending motion for partial summary judgment.[1] The following are not specific factual findings relevant outside the scope of this decision on the pending motion. See Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.)).

1. On February 21, 2023, Rachel Kendall (Applicant) applied for a Conditional Use Permit (the Original Application) to the Strafford Development Review Board (DRB) for certain land uses at property located at 20 Kendall Road, Strafford, Vermont (the Property).

2. At the time that Applicant submitted the Original Application, the Strafford Zoning Ordinance, adopted June 1, 2005 and amended January 10, 2007 (the 2007 Ordinance), was in effect.

3. The Original Application sought approval to use the land and structures at the Property for "business, women's wellness, retreats, gatherings, events, weddings, [and] continued living space."

4. After receiving the Original Application, the DRB held a series of hearings.

5. On November 16, 2023, the Town adopted the Strafford Vermont Unified Bylaw (the 2023 Unified Bylaw), replacing the 2007 Ordinance.

6. On December 20, 2023, Applicant sent an email to the DRB with an attached document entitled "Proposed Conditional Use Permit Conditions" (the December 20 Document).

7. The December 20 Document described the project for the first time as an accessory on farm business.

8. In a decision dated December 28, 2023, the DRB denied Applicant's Original Application for a Conditional Use Permit (the Decision). The DRB reviewed the Original Application under the 2023 Unified Bylaw.

9. On January 18, 2024, Applicant appealed the Decision to this Court. Applicant's Notice of Appeal describes the project as a "Lodge/Inn, Restaurant, rural small enterprise and/or indoor/outdoor recreation facility for wellness retreats, yoga, weddings and events and two principal buildings." Applicant's Notice of Appeal (Filed January 18, 2024).

[1] Some of these undisputed material facts are based on materials that were not cited in either parties' statement of undisputed material facts but are supported by other materials in the record. V.R.C.P. 56(c)(5). The Court relies on these materials, in part, due to the nature of Applicant's combined filings, and we understand this to be an accurate accounting and the undisputed procedural history based on statements and exhibits filed by all three parties.

10. The Notice of Appeal also lists a co-applicant, Meredith Kendall (Co-Applicant), and a new 166.97-acre parcel of land located at 17 Kendall Road.

11. On February 9, 2024, Applicant filed a Statement of Questions describing again differently a project that includes "a single-family home with an inn with eight rooms in two buildings, each built with a central entrance. The Inn may provide meals for guests and up to 200 members of the general public, including hosting events such as weddings and small group meetings…"

12. On March 6, 2024, the parties stipulated to dismissal of the appeal without prejudice to allow Applicant to file a new conditional use application with the DRB.

13. Applicant filed a new application for conditional use and site plan review. This application was rejected for failure to submit requested information.

14. On November 4, 2024, Applicant moved to reopen this appeal.[2]

Discussion

As a preliminary matter, we address the form in which Applicant, through her attorney, has filed entire motions, memorandum, and responses to other parties' motions within a single document. This Court's practice is to promptly render a decision and move cases forward with deference to an Applicant's desire for prompt resolution of an appeal. When a party files a single document raising multiple motions and replying to motions by other parties, it becomes difficult for the Court to promptly issue a decision. This is because the Court must sort through the various motions and replies to ensure that everything is addressed and all motions are sufficiently briefed before a decision is rendered. Moving forward, the Court expects parties to separately file individual motions, as well as legal memorandum, replies, and other responsive filings to ensure efficient issuance of decisions. See V.R.E.F. 5(g)(1)(A), (B) (directing an efiler to file motions and responses in separate documents). We now turn to the pending motions.

Through their respective motions, the parties essentially seek a ruling on the scope of this appeal. Neighbors and the Town argue that Applicant's Notice of Appeal seeks approval for new uses outside the scope of the Original Application, adds a new co-applicant and new land, none of which were considered in the Decision. According to Neighbors, these filings created a so-called "New Application" that this Court lacks jurisdiction over. In response, and as a threshold issue,

[2] The Court understands that a third application has since been filed with the Town. The Town points to this third application as grounds for the Court to remand the present appeal. However, this appeal concerns the Original Application, which remains pending for adjudication. The mere fact that an applicant submits a subsequent application is not sufficient grounds to remand an appeal of a previous decision.

Applicant seeks a determination that her Original Application has a vested right in the 2007 Ordinance.

We begin by addressing the issue of vested rights. The Decision reviewed the Original Application under the newly adopted 2023 Unified Bylaw. The Town now argues that when Applicant submitted the December 20 Document to the DRB, this created a substantially revised application that extinguished Applicant's vested right to review under the 2007 Ordinance. This position is inconsistent with the Decision, which contains no reference to the December 20 Document.[3] Rather, the Decision references the Original Application, which was submitted on February 21, 2023, for approval of use of the Property for wellness retreats, yoga, weddings, and events. The Decision offers no explanation for why it reviewed the Original Application under the 2023 Unified Bylaw.

Vermont follows the minority rule that rights vest under existing regulations and laws as of the time when a proper application is filed. In re Diverging Diamond Interchange SW Permit, 2019 VT 57, ¶ 29. "Permit applications are often complex, and they routinely require revisions and supplemental information before being finalized." Id. at ¶ 27. This Court has distinguished between vested rights with respect to a substantially revised application and cases where an applicant withdraws an application and submits an entirely new one. Diverging Diamond Interchange SW Permit, No. 50-6-16 Vtec, slip op. at 60 (Vt. Super. Ct. Envtl. Div. June 1, 2018) (Walsh, J.). Because this is a bright line rule, even substantially revised applications have a vested right in the earlier bylaws. Id. Therefore, the Town is incorrect as a matter of law when it suggests that any substantial revisions to the Original Application extinguished Applicant's vested rights under the 2007 Ordinance.

It is undisputed that the Original Application has a vested right in the 2007 Ordinance. Neighbors do not dispute that Applicant gained vested rights with the filing of the Original Application. Nor do Neighbors dispute that the 2007 Ordinance was in effect when Applicant filed the Original Application. Because there is no genuine dispute regarding these facts, we **GRANT** partial summary judgment in favor of Applicant and conclude that the Original Application has a vested right to review under the 2007 Ordinance.

We now turn to the scope of the appeal. Neighbors and the Town characterize Applicant's Notice of Appeal and Statement of Questions as creating a so-called "New Application." This cannot

[3] The Town points to the December 20 Document as seeking permission for an accessory on farm business. An application for an accessory on farm business, however, is not subject to conditional use review. 24 V.S.A. § 4412(11)(D). Despite this, the Decision reviews the Original Application for compliance with conditional use review standards without reference to the December 20 Document.

be the case, and we agree that this Court lacks jurisdiction to review entirely new uses and structures that were not properly warned and considered by the DRB. In re Maple Tree Place, 156 Vt. 494, 500 (1991) (citing In re Torres, 154 Vt. 233, 235 (1990)). A new application, containing the significantly broader scope of land uses and amount of land subject to those uses, must be made with the Town in the first instance, not with this Court.[4]

In response, Applicant has conceded that the Notice of Appeal and Statement of Questions impermissibly broadened the scope of the application beyond what was proposed in the Original Application. Applicant, however, has since clarified that she merely seeks judicial review of the Original Application under the 2007 Ordinance. This, the Court certainly has jurisdiction over.

This Court's jurisdiction is guided by the Decision and the application before it. The Decision reviewed the Original Application, which was for "business, women's wellness, retreats, gatherings, events, weddings, [and] continued living space." Thus, this appeal is limited to consideration of only those uses listed in the Original Application. We conclude that this Court has jurisdiction over the Original Application and those matters decided in the Decision. Accordingly, we **DENY** Neighbors' motion to dismiss and/or remand.

The Court understands that this ruling will lead to a dispute regarding the scope of the Original Application and the materials submitted therewith. Since none of the pending motions fully address this issue, we decline to consider the scope of the Original Application at this time. Rather, the Court expects this issue to be the subject of future argument and briefing by the parties.

Finally, we turn to Applicant's motion to amend the Statement of Questions. The proposed amendment clarifies that the scope of this appeal is limited to those uses listed in the Original Application. Applicant also seeks to add a "deemed approval" argument relating to previously submitted site plans. Neighbors oppose the motion on mootness grounds but take no position on the substance of the proposed revisions. The Town does not object to the motion.[5] Accordingly, we **GRANT** Applicant's motion to amend the Statement of Questions.

---

[4] The Court recognizes that an application may be amended, including during the pendency of an appeal. This Court distinguishes between substantial changes to the form or type of an application, and non-material changes, when determining whether to remand a revised application back to a town. In re Wright & Boester Conditional Use Application, 2021 VT 80, ¶ 22.

[5] The Town asks the Court to read Question 4 broadly so that it may challenge whether Applicant submitted site plans with the Original Application. At this time, it would be premature to offer an interpretation of the amended Question 4.

The Court will set this matter for a follow-up status conference to discuss how best to move this matter towards resolution. At the conference, the parties should be prepared to discuss potential remand to allow the DRB to review the Original Application under the 2007 Ordinance.

Electronically signed March 14, 2025 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division