STATE OF VERMONT

SUPERIOR COURT Environmental Division Unit	ENVIRONMENTAL DIVISION Docket No. 100-7-17 Vtec
Town of Colchester, Plaintiff v. Dane P. McGrath, Patrick J. McGrath, Defendants	

Decision on Motions for Default Judgment and to Dismiss Third Party

By its Complaint, the Town of Colchester ("Town") seeks injunctive relief and monetary penalties against Defendants Dane P. McGrath and Patrick J. McGrath ("Defendants") for alleged zoning violations on Defendants' property, located at 801 Creek Farm Road in Colchester. The Town specifically alleges that Defendants installed a gravel driveway within the minimum five-foot setback directed in the Town of Colchester Zoning Regulations ("Regulations"), and that they failed to cure the zoning violation after receiving notice from the Town.

Defendants have appeared in this action, but have failed to respond to the Town's Complaint. In response, the Town has filed a motion for default judgment against Defendants. The Town is represented by Claudine C. Safar, Esq. Defendants are self-represented.

Two neighbors, Karen and Edmund Richard ("the Richards"), have also filed appearances in this zoning enforcement action, as self-represented litigants. The Town has filed a motion to dismiss the Richards as parties, alleging that they lack standing as interested parties to appear in this enforcement action.

Factual Background

1. Defendants own property located at 801 Creek Farm Road, in Colchester, Vermont ("the Property").

2. In 2011, Defendants paved the Property's driveway ("the Driveway") up to the side yard boundary line without first receiving a building and zoning permit from the Town, as required by

Sections 10.01.C.6 and 11.03A of the Regulations and 24 V.S.A. § 4449(a)(1). Regulation § 10.01.C.6 provides that "[p]arking spaces, aisles, and circulation or other associated driveways shall be setback five feet from the property boundaries unless a shared drive or shared parking is proposed."

3. At some point thereafter, Defendants removed the paving from the Driveway. Defendants continued to use the now unpaved Driveway, which was then within one foot of the side yard boundary.

4. On August 4, 2016 Defendants applied for, and were granted, a building and zoning permit from the Town to add gravel to the Driveway; this approval was conditioned upon Defendants respecting the minimum five-foot side yard setback when they installed the gravel. However, Defendants caused the gravel to be installed to within one foot of the side yard boundary line. Defendants also widened the Driveway curb cut such that the curb cut also encroached into the side yard setback to within one foot of the boundary line.

5. On or about January 26, 2017, Lisa Riddle, Town Zoning Administrator, sent Defendants a Notice of Zoning Violation ("NOV") via certified mail for work completed on the Driveway and widening the Property's curb cut, adding to the shed, and installing a chain link fence without permits or approvals, all in violation of the Zoning Regulations, and for failing to relocate the Driveway to be at least five feet from the side yard boundary line, as required by the August 4, 2016, zoning permit condition. The Town advised Defendants that they were in violation of Regulations §§ 10.01.C.6 and 11.03A.

6. Defendants were given 15 days to cure the violation by obtaining a permit for the fence, shed extension, and curb cut extension and either reducing the width of the Driveway to be in compliance with the Regulations or applying for and receiving a variance of the side yard setback.

7. Defendants were also notified of the right to appeal the NOV to the DRB. They chose not to appeal the NOV.

8. On or about April 4, 2017, Defendants applied for a four-foot variance to permit the Driveway to be only one foot from the side yard boundary line.

9. On May 10, 2017, the DRB found that the five criteria for a variance were not met and denied Defendants' variance request. Defendants have not brought the Driveway into compliance. Defendants chose not to appeal that DRB variance denial, either.

10. The Town filed its zoning enforcement Complaint with this Court on July 31, 2017, alleging that Defendants have violated Regulations §§ 10.01.C.6 and 11.03A by allowing their Driveway and curb cut to encroach into the five-foot side yard setback.

11. Defendants were served with the Town's Summons and Complaint on August 14, 2017.

12. On August 28, 2017, both Defendants filed their appearance as self-represented litigants in this action. However, neither Defendant has filed an answer or other responsive pleading to the Town's Complaint.

13. On August 30, 2017, the Richards entered their appearances as self-represented litigants in this zoning enforcement action. The Richards own and reside at property two doors down from the McGraths; the Richards property is located at 843 Creek Farm Road in Colchester.

14. The Richards have submitted an un-sworn statement, not in affidavit form, in which they reference certain circumstances from many years ago that may have contributed to confusion about the respective boundary lines in their neighborhood. The Richards' unsworn statement does not contradict the factual assertions contained in the Town's Complaint.

15. The Richards have not provided an explanation as to why they believe that they have legal standing to appear and participate in this zoning enforcement action. Other than the un-sworn statement concerning boundary lines, mentioned above, the Richards have not responded or objected to the Town's motion to dismiss the Richards as parties in this enforcement action.

Discussion

Now pending before the Court are two motions by the Town: the first requests that the Court enter default judgment against Defendants, due to their failure to respond to the Town's Complaint. The Town's second motion seeks to have the Richards dismissed as parties to this action, due to their lack of legal standing. In its first motion, the Town also requests that the Court impose injunctive relief by ordering Defendants to narrow the Driveway and the curb cut so that neither is less than five feet from the side yard boundary line, pursuant to 24 V.S.A.

§ 4452. Finally, the Town requests penalties be awarded against Defendants pursuant to 24 V.S.A. § 4451. We address each motion in the order in which they were filed.

Motion for Default Judgment

Based upon the motion for default judgment and supporting affidavits filed on behalf of the Town, the Court finds the Defendants were properly and legally served with the Summons and Complaint in this matter. The Town has presented an affidavit and supporting documentation, evidencing that neither Defendant is in the military service and therefore protected from the entry of a default judgment, pursuant to V.R.C.P. 55(b)(5). Following service, Defendants failed to answer or file a responsive pleading. The factual allegations contained in the Town's Complaint are therefore treated as admitted. See DeYoung v. Ruggiero, 2009 VT 9, ¶ 22, 185 Vt. 267. We conclude that the Town has made sufficient allegations showing that it is entitled to judgment as a matter of law.

Based upon the foregoing, the Town's motion for default judgment is **GRANTED**.

Judgment is hereby entered in the Town's favor and against Defendants, who are further ordered to narrow the Driveway and the curb cut to be no less than five feet from the side yard boundary line. Defendants are further directed to complete these curative measures within 30 days of service of the final Judgment Order envisioned by this Decision.

The Town appears to request that the Court impose a fine of $300.00 and direct that Defendants reimburse the Town for its attorney's fees incurred as a direct result of this enforcement action. However, the Town does not make a specific fine request in its motion, and has not supplied an affidavit representing what attorneys' fees and other expenses it has incurred as a result of Defendants' zoning violations. We therefore decline to rule on the Town's request for fines and reimbursement, but will take up these requests once the Town has supplied an affidavit evidencing the costs incurred. We direct that the Town, if it wishes the Court to incorporate penalties and reimbursement into its Judgment Order, to file such an affidavit within 30 days.

Motion to Dismiss Party

By its second motion, the Town challenges the Richards' legal standing to appear and participate in this zoning enforcement action. We are at a disadvantage in understanding the

Richards' standing, since they have chosen to offer no explanation or response to the Town's dismissal request. Nonetheless, we review the legal standards governing when a party has the legal right to participate in certain litigation.

Standing is a "necessary component of the court's subject-matter jurisdiction." Bischoff v. Bletz, 2008 VT 16, ¶ 15, 183 Vt. 235. Thus, we review the motion challenging the Richards' standing under the standard of review afforded by V.R.C.P. 12(b)(1) to motions to dismiss for lack of subject matter jurisdiction. We will accept as true all uncontroverted factual allegations, and we will construe those factual allegations in the light most favorable to the nonmoving party. See Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245 (mem.).

Section 4465(b) of title 24 of the Vermont Statutes Annotated sets forth five definitions of "interested person," one of which the Town references in support of its motion:

> (3) A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.

24 V.S.A. § 4465(b)(3).

The Town argues that the Richards cannot establish standing under subsection (b)(3) and that they therefore must be dismissed as parties to this litigation. The Court must first determine if a person seeking party status owns or occupies property in the "immediate neighborhood" of the project. 24 V.S.A. § 4465(b)(3). "[T]he determination of whether an appellant lives in the 'immediate neighborhood' is made on a case-by-case basis and largely depends on the physical environment surrounding the project property and its nexus to a particular [party] and their property." In re Bostwick Rd. Two-Lot Subdivision, No. 211-10-05 Vtec, slip op. at 2–3 (Vt. Envtl. Ct. Feb. 24, 2006) (Durkin, J.), *aff'd* No. 2006-129 (Vt. Jan. 1, 2007) (unpub. mem.), *available at https://www.vermontjudiciary.org/sites/default/files/documents/eo06-128.pdf* (holding that an appellant living on property adjoining a proposed development, but whose home was 2,000 feet flies away from the proposed development, was not impacted by the proposed development and was not in the "immediate neighborhood").

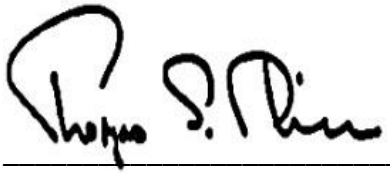
The Richards reside at 843 Creek Farm Road in Colchester (the "Richard Property"). The Richards' Property and Defendants' Property are separated by a single residential lot. Based upon these undisputed facts, we conclude that the Richards reside in the "immediate neighborhood," as that term is used in § 4465(b)(3).

While the Richard Property is in the immediate neighborhood based on its nexus to the Property, the Richards must next demonstrate the possibility of a physical or environmental impact on an interest of theirs, under the criteria to be reviewed in this litigation. Neither of the Richards allege any physical or environmental impacts on their interests that could be caused by the activities on Defendant's Property. The Richards therefore have not established standing under subsection (b)(3). We therefore **GRANT** the Town's motion to dismiss the Richards for lack of standing.

Conclusion

For the reasons discussed above, we conclude that the Richards do not have standing in this appeal because they have failed to meet the criteria for standing as interested persons under 24 V.S.A. § 4465(b)(3). The Town's motion to dismiss for lack of standing is **GRANTED**. Further, we **GRANT** the Town's motion for default judgment. We direct that the Town, on or before **Monday, January 22, 2018**, file an affidavit with the Court, with a copy served upon Defendants, that details the Town's attorneys' fees and other expenses incurred in this litigation. The Court will thereafter issue its judgment Order.

Electronically signed on December 22, 2017 at Newfane, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge
Environmental Division