VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 21-ENV-00121

Vermont Permanency Initiative, Inc. Denial

## ENTRY REGARDING MOTION

Titles: Motion for Summary Judgment; Motion Miscellaneous Appellants' Motion for Summary Judgment, Statement of Undisputed Material Facts + Memorandum of Law; Concerned4Newbury's Response to Motion for Summary Judgement and Cross Motion and Motion to Dismiss (Motion: 1; 2)
Filers: Jon T. Anderson; Nicholas AE Low
Filed Dates: February 2, 2022; June 15, 2022.

## DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Vermont Permanency Initiative, Inc. (VPI) and the Vermont Agency of Human Services (AHS) Department for Children and Families (DCF) (collectively, the Appellants) appeal the Newbury Developmental Review Board's (DRB) November 12, 2021 decision denying VPI's application for the proposed project (Project).[1] Currently pending before the Court are Appellants' Motion for Summary Judgment and Concerned4Newbury's (C4N) Cross Motion for Partial Summary Judgment and Motion to Dismiss. Appellants' move for Summary Judgment with regards to Question 1, or in the alternative, move for Partial Summary Judgment with regards to Question 4. Both the Town of Newbury (Town) and C4N opposed the motion. In addition to its opposition, C4N filed a Cross-Motion for Partial Summary Judgment, which similarly concerns Question 4, as well as a motion to dismiss DCF for lack of standing.

[1] The exact characterizations of the Project are in dispute. Appellants assert that the Project will convert a building in Newbury's CD-10 Residential district to a "group home (1) to be operated under State licensing or registration and (2) serving up to six adolescent youths who have a disability as defined in 9 V.S.A. § 4501." Appellants' Mot. for Summ. J. at 1 (filed Feb. 2, 2022). Interested parties, the Town of Newbury (Town) and Concerned4Newbury, Inc. (C4N), dispute that the Project is a "group home," and C4N disputes that the Project will be licensed by the State of Vermont pursuant to AHS's "Licensing Regulations for Residential Treatment Programs," and that it will serve youths with a disability. As such, the Appellants call the Project a "group home" while Town and C4N call the Project a "secure juvenile detention facility."

In this proceeding, VPI is represented by Attorney Jon T. Anderson, AHS/DCF is represented by Attorney Ryan P. Kane and Melanie Kehne. C4N is represented by Attorneys Nicholas AE Low and Ronald A. Shems. The Town is represented by Attorney James W. Barlow.

**UNDISPUTED FACTS**

On February 2, 2022, Appellants filed a Statement of Undisputed Material Facts within their Motion for Summary Judgment. The Town responded with their Statement of Disputed Facts on June 15, 2022. On June 16, 2022, C4N filed its response disputing Appellants' Statement of Undisputed Material Facts. C4N filed their Statement on Undisputed Material Facts, contained in their Motion for Summary Judgment. See C4N's Mot. for Summ. J. at 11–12.

The Town and C4N litigiously dispute the material facts. Many of C4N and the Town's disputes do not flow from the assertions contained in the statement itself, but rather from the statement's implication or identification of the Project as a "group home." The Court acknowledges that Town and C4N disputed whether the Project is a "group home" or a "juvenile detention facility" but otherwise accepts the ancillary undisputed factual assertions without accepting either party's legal conclusion regarding the Project's characterization. Several other disputes flow from the assertion that the Appellants' statement of an undisputed material fact is (1) not supported by admissible evidence, (2) vague, or (3) otherwise insufficient to establish the absence of a genuine dispute. The Court considered the arguments and the party's accompanying exhibits and made these determinations based on the evidence provided for the purposes of this summary judgment motion only, with the more substantive determinations getting explained in footnotes.

The Court sets out the following facts for the sole purpose of deciding the pending motions. What follows is not a list of the Court's factual findings. See Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) ("It is not the function of the trial court to find facts on a motion for summary judgment").

1. The proposed Project is designed to and will be staffed to provide treatment, support and nurturance in a small, residential setting. Appellants' Ex. 5, Brown Aff. ¶ 10.
2. Group homes are commonly recognized as the best form of residences for most individuals with mental disabilities. Appellants' Ex. 4, Sampson Aff. ¶ 4.
3. To best serve and protect the residents at the Project and to protect society, this particular Project will be a secure facility. Appellants' Ex. 5, Brown Aff. ¶ 10.

4. While the parties agree that the Project is not yet licensed, there is no dispute that if the Project obtains the necessary permits and gets the facility ready for operation, the Project will be licensed by the State of Vermont pursuant to the AHS/DCF Licensing Regulations for Residential Treatment Programs. Id. ¶ 7.
5. The Licensing Regulations for Residential Treatment Programs in Vermont (Licensing Regulations) define the licensing procedure. Appellants' Ex. 6, Licensing Regulations; Appellants' Ex. 5, Brown Aff. ¶ 7; see Suppl. Brown Aff. ¶ 1 (filed Apr. 20, 2022).
6. Since at least 1992, the Licensing Regulations have recognized that at least some licensed facilities will be secured or locked. Appellants' Ex. 6, Licensing Regulations at 42–43. The Regulations define "secure program" as "a buildings secure Residential Treatment Program which employs locked or unopened doors and windows to prevent residents from leaving the buildings, i.e., a detention program or hospital." Id. at 49.
7. The Licensing Regulations adopted in 1992 defined "Secure Care" as "a form of residential care [licensed by the regulations] which employs, on a regular basis, locked doors or any other physical means to prevent children in care from leaving the facility." Appellants' Ex. 7, at 5.
8. DCF anticipates the individuals who will be served at the facility to have disabilities or disorders (mental, social-emotional, developmental, etc.) or need assessments for such based on their behaviors and needs at time of presentation.[2] Appellants' Ex. 5, Brown Aff. ¶ 8.
9. The Project will serve a State-function—namely, the residential treatment of those justice-involved adolescents in need of secured services. Id. ¶ 5.

[2] While C4N disputes whether the *purpose* is to serves specifically those justice-involved youths with a disability, their evidence is insufficient to raise a genuine dispute of material fact, even accepting all reasonable inferences in their favor. See C4N's Ex. B, Brown Depo. at 47, ¶¶ 11–19 (Q: "is it possible that they – that person arrives at the facility, they are assessed, and it's determined that they have no disability and no disorder?" A: "It's possible. Highly Unlikely." Q: "And so in that situation what happens to that person?" A: "We would make arrangements to have that youth moved to another setting."); see also C4N's Ex. C, Brown Aff. ¶ 3 ("The purpose of the proposed facility is to serve adolescent boys, some of whom will or may have a disability that limits one or more major life activities. The individuals who will be served by DCF in this facility are anticipated to have disabilities or disorders (mental, social-emotional, development, etc.) or are in need of assessments for such based on their behaviors and needs at time of presentation. The proposed facility is to be used primarily for individuals who DCF, based on actual diagnosis or their history or record at the time of presentation, are deemed to require treatment, including diagnostic assessment.").

10. Most youths residing at the Project will have been formally diagnosed with a mental health disability and/or learning difficulties prior to being sent to the Project. Id. ¶ 11.[3]
11. Some youths may be placed at the Project with the belief that the youth has a mental health disability in order to receive assessment and diagnosis. Id.
12. Vermont sees a high percentage of youth involved with juvenile justice who also experience mental disorders, emotional disturbance, and learning challenges. Based on known diagnoses, and educational and clinical indicators, approximately 98 percent of Vermont youth placed at the Woodside Juvenile Rehabilitation Center from July 2018 through May 2021 met criteria for a disability as defined in 9 V.S.A. § 4501. Id. ¶ 9.[4]
13. After diagnosis, a youth will either remain in the program at the Project or be referred to the most appropriate treatment setting as soon as practicable. Any relocation would be so that a bed, and the associated and expensive resources, in the Project's treatment facility could be made available to youth who require these specialized services. Id. ¶¶ 12–13.
14. The Project satisfies all dimensional standards in the Newbury Zoning Regulations. Appellants' Ex. 1, Wasser Aff. ¶ 7.
15. There are no residential group homes, as defined by 24 V.S.A. § 4412(1)(G), located within 1,000 feet of the Project. Id. ¶ 17.
16. If the Project is permitted, the Project will be leased by DCF with an option to renew or purchase.[5] Appellants' Ex. 5, Brown Aff. ¶ 4. The lease has not yet been executed. C4N's Ex. A.

[3] The Town does not dispute. C4N disputes on the basis that "most" is vague and unclear, and that Appellants have stated that "DCF anticipates that youth admitted to the program at the facility *may* have a record . . . ." For purposes of this motion, the Court does not find C4N's vagueness assertion sufficient to create a genuine dispute of material fact, nor does it find Appellants response in the interrogatories inconsistent with this statement. See C4N's Ex. A, Resp. 6.h.ii–iii ("DCF anticipates that youth admitted to the program at the facility may have a record at the time of admission of having been previously assessed and diagnosed as having a disorder or a disability (i,e, a mental health disorder, a learning disability) as discussed in the previous responses. Following admission to the expected program all youth will be assessed pursuant to the Program Description, see Response 6.e.").

[4] The Town and C4N dispute this as not supported by admissible evidence. The Court finds this statement is supported by the affidavit of Sean Brown, Commissioner for the Department of Children and Families, and that this information is consistent with what he would have personal knowledge to provide testimony over, as consistent with his statutory duties. See, e.g., 3 V.S.A. § 3053(4); 3 V.S.A. § 3084; 33 V.S.A. §§ 104–105.

[5] Both the Town and C4N dispute the legal implications of ownership that would flow from such a future lease, but do not dispute that it is DCF's and VPI's intent to enter into such an arrangement.

17. Appellants' Ex. 1, Attachments 1 and 2 contain a copy of the Application and the floor plans for the Project, respectively. Ex. 1, Wasser Aff., Attach. 1–2. The floor plan shows that the Project will have 6 private bedrooms for residents at the Project.
18. Residents will have access to shared areas, including places to relax, eat, study, and recreate both indoors and outdoors. Residents will not have access to the kitchen area, where cooking utensils and sharp items may be kept. Id. ¶¶ 13–15.
19. The Project will be implementing the best and most current practices for housing, programming, and addressing the needs of troubled adolescent youths with disabilities. Ex. 4. Sampson Aff. ¶ 5.
20. The Project will also be secured to protect non-residents. The Project includes well-secured windows (that look almost like regular windows), a room secured from residents where an employee will continuously monitor security, and a securely fenced area for: (1) outdoor recreation, (2) to minimize the possibility of an elopement during intake, and (3) to provide an area for kids to stay in the unlikely event the building must be evacuated. Security measures will also include infrared cameras designed to detect passage across the envelope of the building. Ex. 1, Wasser Aff. ¶ 16.
21. Adolescent youths will be placed at the Project for a short period as therapeutically indicated. The Project aims to provide the youths with intensive support so that they will soon be ready for less intense and less secure residential treatment options.[6] As youths are prepared for other residential treatment options and appropriate options are identified, the bed spaces at the Project will be used to serve other youths who need the specialized services the Project was designed to provide. Ex. 5, Brown Aff. ¶ 13.
22. The Vermont Administration and Legislature seek to apply best practices by making a place available for justice-involved children with disabilities in Vermont. Id. ¶ 14.
23. Presently, Vermont lacks such a facility for justice-involved children with disabilities. The Project has been identified as a critical need and is a high priority of Vermont's leadership. The Joint Child Protection Oversight Committee, including members of both the House and Senate Judiciary Committees, reviews progress on the Project at almost each meeting. Id.
24. In § E.316 of Act 154 of 2020, the Legislature required that DCF submit a long-term plan for residential treatment and services for justice-involved youths in DCF

[6] While the Town disputes this sentence, it is premised on their responses contained to Appellants SUMF ¶¶ 1–2. Those assertions and supporting evidence, however, only raises disputes regarding whether the project should be classified as a "group home." See Town's SDMF ¶¶ 25, 1–2. C4N does not dispute beyond the characterization as a group home. C4N's SDMF ¶ 25.

custody. This Act set forth specific requirements for that plan and required that the Joint Legislative Child Protection Oversight Committee and Joint Legislative Justice Oversight Committee meet jointly to review the plan and report to the Joint Fiscal Committee on whether to approve the plan. Id. ¶ 15.

25. DCF submitted its long-term plan to the legislative committees. The plan included DCF's recommendation to contract with VPI to renovate VPI's property in Newbury for use as a residential treatment facility for some of the justice-involved youths in DCF custody. Id. ¶ 16.
26. On November 12, 2020, the Joint Legislative Justice Oversight Committee met jointly with the Joint Legislative Child Protection Oversight Committee to review DCF's long-term plan and unanimously voted to approve the proposal to contract with VPI to operate a secure residential treatment facility, with the following conditions:
    a. Work with the local government of Newbury and hold community meetings regarding the use of the facility;
    b. All juveniles in state's custody shall reside and receive treatment in the least restrictive setting;
    c. Only justice-involved youth shall be placed at the facility, which will use a "no eject/no reject" policy;
    d. A person with PhD level clinical experience will have oversight of facility and program; and
    e. In negotiating the lease, DCF will ensure that state's financial investment in the facility be recaptured if the plan for the facility falls through.

    Id. ¶ 17(a)–(e).
27. On November 20, 2020, the Joint Fiscal Committee met and approved the plan with the conditions set forth above in the preceding paragraph. Id. ¶ 18.
28. In § 51a, Act 3 of 2021, relating to fiscal year 2021 budget adjustments, the Legislature required that the Department of Buildings and General Services review and approve any design documents prior to the State issuing a proposal for any project to renovate housing to make it building-secure for justice-involved juveniles, and that the State secure a warranty bond on the entire cost of the project. Id. ¶ 19.
29. DCF has been pursuing the Project with VPI. Id. ¶ 20. VPI is a registered agent of Becket Family of Services. C4N's Ex. I.

**DISCUSSION**

In Appellants' motion for summary judgment, they argue that the undisputed facts entitle them to judgment as a matter of law on Question 1, or in the alternative, partial

summary judgment on Question 4 limiting the scope of this court's review. The Town and C4N oppose both bases of Summary Judgment. C4N also moves for partial summary judgment on Question 4. Additionally, C4N moves the Court to dismiss AHS/DCF for lack of standing.

The Court first addresses whether AHS/DCF has standing pursuant the "interested party" requirements established in V.R.E.C.P. 5(d)(2). Next, the Court addresses whether the undisputed material facts entitled Appellants to judgment as a matter of law as pursuant 24 V.S.A. § 4412(1)(G). This issue turns on whether the Project is (1) a "group home," and (2) serving youths with statutorily defined disabilities, which the Court addresses in relevant subparts. Third, in the interest of Judicial Efficiency, the Court addresses sua sponte the undisputed material facts related to Question 2, and absent objection from the parties, intends to grant partial summary judgment to Appellants on Question 2 pursuant V.R.C.P. 56(f). Finally, because the Court concludes that 24 V.S.A. § 4412(1)(G) applies to this Project, it does not reach Appellants' or C4N's motion for partial summary judgment regarding whether 24 V.S.A. § 4413(a)(1) limits the scope of the Town's zoning authority.

## I. C4N's 12(b)(1) Motion to Dismiss DCF

C4N moves to dismiss DCF from these proceedings pursuant to V.R.E.C.P. 5(d)(2). Vermont Rules of Environmental Court Proceedings Rule 5(d)(2) provides that "an appellant who claims party status as an interested person pursuant to 10 V.S.A. § 8504(b)(1)[] will be automatically accorded that status when the notice of appeal is filed unless the court otherwise determines on motion to dismiss." Section 8504(b)(1) authorizes "an interested person, as defined in 24 V.S.A. § 4465, who has participated as defined in 24 V.S.A. §4471[7] in the municipal regulatory proceedings" to appeal a decision made by the development review board to the Environmental Division. 10 V.S.A § 8504(b)(1). C4N asserts that DCF does not meet the statutory definition of an "interested person" pursuant § 4465(b), and therefore must be dismissed for lack of standing. The Court disagrees and finds that DCF meets the statutory criteria for an "interested person" pursuant § 4465(b)(5) in this matter and therefore DENIES C4N's Motion to Dismiss.

Appeals from zoning board decisions to the Environmental Division are governed by statute. See 24 V.S.A. § 4471 (allowing an "interested person" to appeal to the environmental court). The Legislature has restricted the legal relief available in zoning appeals by specifically

[7] C4N does not challenge whether DCF "participated" in the municipal regulatory proceedings. "Participation in a local regulatory proceeding shall consist of offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding." 24 V.S.A. § 4471(a). The Court reaches the determination that DCF has standing in this appeal as based on the arguments and evidence before the Court as it relates to whether DCF is an "interest person," as that is the only prong challenged here, and therefore, the only prong this Court has evidence to consider.

defining "interested persons" with standing to appeal. Garzo v. Stowe Bd. of Adjustment, 144 Vt. 298, 302 (1984).[8] The statute defines "interested person," *inter alia*, to include "[a]ny department and administrative subdivision of this State owning property or *any interest in property* within a municipality" that has the bylaw at issue in an appeal. 24 V.S.A. § 4465(b)(5) (emphasis added).

The standard of review of a motion to dismiss for lack of standing is whether "it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Wool v. Office of Professional Regulation, 2020 VT 44, ¶ 8, 212 Vt. 305. The Court "assume[s] as true the nonmoving party's factual allegations and accepts all reasonable inferences that may be drawn from those facts." Id. In applying this standard, however, the Courts strictly adheres to the statutory standing requirements outlined in 24 V.S.A. § 4465. See Garzo, 144 Vt. at 302 ("We must observe the legislature's restrictions on the legal relief available in zoning cases and may not judicially expand the class of persons entitled to such review." (citations omitted)). If Appellants do not fit within an enumerated provision of § 4465(b), they lack standing to contest a decision made by a zoning board. See Town of Sandgate v. Colehamer, 156 Vt. 77, 82 (1990) (applying § 4464(b)(1)).

C4N argues that DCF's investor, developer, or lease-holder status is insufficient to support standing under the statute to give DCF standing to appeal a permit decision. C4N cites Mad River Valley Enterprises, Inc. v. Town of Warren Board of Adjustment and Town of Sandgate v. Colehamer, to support this assertion. Mad River, 146 Vt. 126 (1985); Sandgate, 156 Vt. 77 (1990). Neither case, however, considered whether a State agency was an "interested person," but rather discussed the standing of the private individuals bringing the appeal. Mad River, 146 Vt. at 129 (applying § 4464(b)(1) to determine a developer did not have standing despite the "shared interest" with the title-owners); Sandgate, 156 Vt. at 82 (applying § 4464(b)(1) to determine that appellant did not have standing even though he was making mortgage payments on the land). As such, the Court was considering whether the appellants were "[a] person *owning title to property* affected by a bylaw who alleges that such regulation imposes on such property unreasonable or inappropriate restrictions of present or potential use under the particular circumstances of the case." Mad River, 146 Vt. at 128 (quoting 24

[8] Garzo v. Stowe Bd. of Adjustment cites 24 V.S.A. § 4464(b) rather than § 4465(b). See 144 Vt. at 302. The applicable statutory section was amended in 2004. See 2003, Adj. Sess., No. 114, § 106. The operative language, however, is functionally identical. Compare 24 V.S.A. § 4464(b)(5) (1989 Michie) ("an interested person means . . . [a]ny department and administrative subdivision of this state owning property or any interest therein within a municipality") with 24 V.S.A. § 4465(b)(5) (2022 West) ("an interested person means . . . [a]ny department and administrative subdivision of this State owning property or any interest in property within a municipality"). All other subsections defining an interested person in the precursor § 4464(b) and the current § 4465(b) are similarly comparable. Compare 24 V.S.A. § 4464(b)(1)–(5) (1989 Michie) with 24 V.S.A. § 4465(b)(1)–(5) (2022 West). As such, the Court finds case law citing the operative subsections of § 4464(b) prior to 2004 to be helpful in guiding its analysis.

V.S.A. § 4464(b)(1)); Sandgate, 156 Vt. at 82 (same). As such, in these matters, the Court was applying the category of interested person which requires actual title to the affected property. But see Sandgate, 156 Vt. at 83 ("[S]omething less than record title to land may be sufficient to confer standing . . . ."). Under the plain language of the statute, the operative section to apply to DCF authorizes standing to State departments or agencies with "*any* interest in property within a municipality." 24 V.S.A. § 4465(b)(5); see United States v. Ballistrea, 101 F.3d 827, 836 (2d Cir. 1996) ("[I]t is unnecessary to go beyond the plain language of the statute. 'Any' means any.").

The Court finds that there are facts and circumstances that support that DCF has an interest in the property. See Wool, 2020 VT 44, ¶ 8. The proposed Project, if applicant obtains the necessary permits and gets the facility ready for operation, will be licensed by the State of Vermont pursuant to the AHS/DCF Licensing Regulations for Residential Treatment Programs to serve justice-involved adolescents with a disability. Brown Aff. ¶ 7 (Commissioner of DCF). The Project will serve a State-function. Id. ¶ 5. While DCF is contracting with VPI to operate the Project, DCF will still supervise the Project and the Project will be part of DCF's system of care for the provision of services for justice-involved youth and/or youth in DCF's care or custody. Id. The Project is part of DCF's long-term plan for providing residential treatment and services for justice-involved youths in DCF custody. Id. ¶¶ 14–20. Further, if the Project is permitted, DCF and VPI will enter into a long-term lease and other necessary contractual relationships, providing that DCF will have both ownership and operational interests in the Project for its duration. Id.; cf. Wynkoop v. Stratthaus, 2016 VT 5, ¶¶ 9–10, 201 Vt. 158 (concluding a long-term lease was sufficient to create a property interest for purposes of Vermont partition of real estate statutes). The Court concludes that DCF has an interest in the property sufficient for to establish "interested person" status necessary under the statute. As such, C4N has failed to meet its burden on its motion to dismiss for lack of standing, and the motion is **DENIED**. See Wool, 2020 VT 44, ¶ 8.

## II. *Summary Judgement*

"Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996). When considering cross-motions for summary judgment, the court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 186 Vt. 332.

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. Couture v. Trainer, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). Where "the moving party does not bear the burden of persuasion at trial," however, "it may satisfy its

burden of production by indicating an absence of evidence in the record to support the nonmoving party's case." Mello v. Cohen, 168 Vt. 639, 639–40 (1998) (mem.). Once the moving party has made that showing, the burden shifts to the non-moving party. Id. The non-moving party may not rest on mere allegations but must come forward with evidence that raises a dispute as to the facts in issue. Clayton v. Unsworth, 2010 VT 84, ¶ 16, 188 Vt. 432. The evidence, on either side, must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8.

A. Statement of Questions

In the Environmental Division, the Statement of Questions "functions as a cross between a complaint filed before the Civil Division and a statement of issues filed before the Vermont Supreme Court." In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.). It provides notice to other parties of the issues to be determined within the case, while also limiting the scope of the appeal. Id.

Appellants' Statement of Questions presents the following four questions for the Court's review:

> 1. Is the Project eligible for consideration as a single-family residential use as provided by 24 V.S.A. § 4412(1)(G)?
>
> 2. Does the Project satisfy all dimensional standards of the Town of Newbury Unified Zoning and Subdivision Regulations ("NZR") as shown below?

| | Required | Provided |
|---|---|---|
| Minimum Lot Area (Acres) | 10 | 278.5 +/– |
| Minimum Lot Frontage (Feet) | 500 | 800 +/– |
| Minimum Width/Depth (Feet) | 500 | 900 +/– |
| Minimum Front Setback (Feet) | 65 | 851 +/– |
| Minimum Side/Rear Setback (Feet) | 50 | 892/2067 +/– |
| Maximum Buildings Height (Feet) | 40 | 35 |

> 3. Should the Administrative Officer be ordered to issue a permit for the Project upon payment of a filing fee set by the Newbury Selectboard as provided by the NZR, p. 16?
>
> 4. If the Project is not eligible for consideration as a single-family residence as provided in 24 V.S.A. § 4412(1)(G), is the Project a

> State- or community-owned and operated institution or facility as such terms are used in 24 V.S.A. § 4413(a)(1)?
>
> 5. If so, does the Project comply with such standards as the Town of Newbury is allowed to regulate?
>
> 6. Is the project a conditional use within the relevant zoning district (Conservation District – CD10), and does the Project comply with the applicable conditional use and site plan standards listed by the NZR in NZR §§ 4.10 and 4.12?

Statement of Questions (filed Dec. 14, 2021) (omitting provided text of NZR § 4.10).

B. Whether the Project is eligible for consideration as a single-family residential use as provided by 24 V.S.A. § 4412(1)(G)

Appellants argue that the undisputed material facts require the municipality to, by right, consider this Project as a single-family residential use of the property pursuant 24 V.S.A. § 4412(1)(G). Appellants argue that they are entitled to this right because the Project (1) is a "group home," (2) will be operated under State licensing, and (3) serving not more that eight persons (4) who have a disability. The Town and C4N oppose the motion, arguing that there remains a dispute of material fact regarding whether the project (1) is a "group home" or a "juvenile detention facility," and (2) whether its purposes is to serve youths "who have a disability as defined in 9 V.S.A. § 4501" or whether it is merely incidental that many of these youths may have a disability.

Section 4412(1)(G) provides that the certain land development provisions apply to every municipality. Among those statewide land development provisions,

> A residential care home or group home to be operated under State licensing or registration, serving not more than eight persons who have a disability as defined in 9 V.S.A. § 4501, shall be considered by right to constitute a permitted single-family residential use of property. This subdivision (G) does not require a municipality to allow a greater number of residential care homes or group homes on a lot than the number of single-family dwellings allowed on the lot.

24 V.S.A. § 4412(1)(G). The legislature's purpose in enacting this zoning statute was to protect residential care facilities and group homes from exclusionary zoning. In re S-S Corp./Rooney Hous. Devs., 2006 VT 8, ¶ 22, 179 Vt. 302 (citing repealed but substantively identical 24 V.S.A.

§ 4409(d)). "Because land use regulation is a derogation of the common law, any ambiguity is resolved in favor of the landowner." In re Bennington School, Inc., 2004 VT 6, ¶ 12, 176 Vt. 584.

Here, there is no dispute that the facility (1) will be operated under State licensing, or (2) will serve not more than eight youths at a time. The application turns on whether the undisputed material facts require this Court to conclude that (1) the Project is a "group home" within the meaning of the 24 V.S.A. § 4412(1)(G), and (2) the Project will serve youths with a disability as defined by 9 V.S.A. § 4501.

*1. Group Home*

Appellants argue that the undisputed material facts demonstrate that the Project is a "group home" within the plain meaning of 24 V.S.A. § 4412(1)(G). Town and C4N both contest this assertion, arguing that there remains a genuine dispute of material fact concerning whether the Project is a "group home" or a "juvenile detention facility." The Court finds this conclusion not grounded in a dispute of fact, but rather a debate of statutory interpretation, and questions of statutory interpretation are a matter of law for the court to consider. See In re Vill. Assocs. Act 250 Land Use Permit, 2010 VT 42A, ¶ 7, 188 Vt. 113.

In construing this statute, the general rule applicable to statutory construction applies. The Court's "primary objective in construing a statute is to effectuate the Legislature's intent." Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 14, 177 Vt. 287. To accomplish this, Court's first examine the statute's language because Courts presume that the Legislature intended the plain, ordinary meaning. Id. If a statute is clear on its face, Courts accept its plain meaning. In re Hinsdale Farm, 2004 VT 72, ¶ 5, 177 Vt. 115. If the language creates ambiguity or uncertainty, however, Courts utilize tools of statutory construction to ascertain the legislative intent. Id. In construing legislative intent, the court "must consider the entire statute, including its subject matter, effects and consequences, as well as the reason for and spirit of the law." Id.; see Bennington School, Inc., 2004 VT 6, ¶ 12 ("Because land use regulation is a derogation of the common law, any ambiguity is resolved in favor of the landowner.").

Section 4412(1)(G) applies to residential care homes or group homes to be operated under State licensing or registration. While not defined in this statute, "residential care home" is defined in Title 33 (Human Resources). "'Residential care home' means a place, however named, excluding a licensed foster home, that provides, for profit or otherwise, room, board, and personal care to three or more residents unrelated to the home operator." 33 V.S.A. § 7102(10). Residential care homes are further divided into two groups as based on the level of care they provide. Id. Both groups of residential care homes assist with daily needs such as

meals, dressing, movement, bathing, grooming, or other personal needs. Id. They differ in the degree of nursing overview and medication management provided. Id.

"Group home" is not defined by Vermont statute. However, "group home" is frequently and repetitively included in other statutory lists that include "residential care home," as well as therapeutic community residence, developmental home, boarding home, assisted living residence, nursing home, correctional facility, or psychiatric unit at a designated hospital. See, e.g., 14 V.S.A. §§ 3072(a)(2), 3073(a)(1); 33 V.S.A. § 6903(a)(5). As consistent across these other examples, the Court therefore interprets the "group home" characterization to apply to facilities, usually located in a residential neighborhood, that provide an alternative group living arrangement and care to a vulnerable population, be that population foster children, delinquents, disabled persons, or others with special needs.[9] See Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116, 126 (2d Cir. 2000) (quoting West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 100 (1991)) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."); see also Vermont Hum. Rts. Comm'n v. State, Agency of Transp., 2012 VT 45, ¶ 5, 191 Vt. 485 (noscitur a sociis). This definition is consistent with the Legislatures' purpose in enacting the statute, as this was to protect residential care facilities and group homes serving disabled persons from exclusionary zoning.

The Court agrees with Appellants that the undisputed material facts support that the Project is a group home for purposes of 24 V.S.A. § 4412(1)(G). It is undisputed that the Project will provide an alternative living accommodation for up to six justice-involved adolescent boys. Wasser Aff. ¶ 4. While residents at this facility, the justice-involved adolescent boys will have their own bedroom, id. at Attach. 2, as well as access to shared areas to relax, eat, study, and recreate both indoors and outdoors, id. ¶¶ 13–15. These undisputed material facts clearly demonstrate to the Court that the Project provides an alternative group living arrangement.

The court does not find it relevant, for purposes of establishing a genuine dispute, that the residents at the facility will be justice-involved adolescents, and that the facility will be secure. Appellants' Ex. 5, Brown Aff. ¶¶ 8, 10. Under the Courts construction of what characterizes a group home, the level of security has no bearing in the determination. See In re HCRS Nov, No. 16-2-13 Vtec, slip op. at 4 (Vt. Super. Env. Div. Aug. 19, 2013) ("Town cannot place a burden on the owners of residential care homes like Hilltop that it does not place on the owners of other single-family residential uses."); see also Bennington School, Inc., 2004 VT 6,

[9] The court notes that these categories are not mutually exclusive. It is possible that a group home's purpose is to serve juvenile delinquents that require additional care or supervision due to a disability as defined in 9 V.S.A. § 4501.

¶ 14 (finding the Environmental Court's conditional use application for the school/group home a clear error, because the group home met the statutory requirements). Such a limitation would conflict with the plain language and intended purpose of the statute. Further, the parties do not dispute that the Licensing Regulations recognize that some licensed facilities and group homes will be secured or locked. Appellants' Ex. 6, Licensing Regulations at 42–43. If municipalities were authorized to treat group homes differently based on the level of security the residents required, it would defeat the purpose of the statute as applied to vulnerable populations with heightened security needs. Thus, a "group home" finding is not in conflict with the finding that the program is secure or that it will house justice-involved youths.

Further, the undisputed fact that this facility is secure further supports that the residents will be of a vulnerable population. Vermont Statutory Law limits which juveniles may be placed in such a secure facility. The DCF Commissioner has the authority to place a child in their legal custody "who is or may be the subject of a petition brought under the juvenile judicial proceedings chapters" in a secure "treatment, rehabilitative, detention, or educational facility or institution . . . ." 33 V.S.A. § 5106(4). While courts also have the authority to place a child in a secure facility, the court may not do so unless DCF recommends that placement and the court finds "that no other suitable placement is available and the child presents a risk of injury to himself or herself, to others, or to property." 33 V.S.A. § 5291(a). Thus, the undisputed material facts demonstrate that those housed in this secure facility will be members of a vulnerable population—i.e., juvenile delinquents, many with no other suitable placement available and at a risk of harm to themselves, others, or property.

Finally, while residing at the facility, it is undisputed that the staff will provide treatment, support, and nurturance to the residents. Appellants' Ex. 5, Brown Aff. ¶ 10. The Project aims to provide the youths with intensive support so that they will soon be ready for less intense and less secure residential treatment options. Id. ¶ 13. As youths are prepared for other residential treatment options and appropriate options are identified, the bed spaces at the Project will be used to serve other youths who need the specialized services the Project was designed to provide. Id. These undisputed material facts clearly demonstrate to the Court that the Project facility will provide care to this vulnerable population while they reside at the facility.

Thus, the Court concludes that the undisputed material facts demonstrate that this Project is a group home under the plain meaning of 24 V.S.A. § 4412(1)(G). The Project will provide an alternative group living arrangement and care to a vulnerable population.

*2. Serving Youths with a Disability as Defined in 9 V.S.A. § 4501*

Appellants argue that the undisputed material facts demonstrate that the Project is serving justice-involved youths "who have a disability as defined in 9 V.S.A. § 4501" as consistent with the requirement stated in 24 V.S.A. § 4412(1)(G). Town and C4N both contest this assertion, arguing that there remains a genuine dispute of material fact concerning whether the Project's intended purpose is to house "youths with a disability." In support, Town and C4N both assert that (1) housing disabled youths is not the intended purpose of the secure group home, but rather incidental to the purpose of the secured group home, and (2) it is possible that youths without disabilities are placed in the secure group home. Additionally, C4N argues that the Project cannot qualify under § 4412(1)(G) because (3) DCF will not have absolute control over who is placed in the secured group home.

Again, the operative statutory language requiring a group home to be considered as a permitted single-family residence use is a "group home to be operated under State licensing or registration, serving not more than eight persons who have a disability as defined in 9 V.S.A. § 4501 . . . ." 24 V.S.A. § 4412(1)(G).

The Court concludes that there is no genuine dispute of material fact; DCF's intended purpose for the project is to serve justice-involved youths with a disability. See Ex. 5, Brown Aff. ¶¶ 8–11. Appellants concede that some youths may be placed at the Project with the belief that the youth has a mental health disability in order to receive assessment and diagnosis. Id. ¶ 11. After that diagnosis, however, the youth will either remain at the program or be referred to a more appropriate treatment setting as based on their assessment. Id. ¶¶ 12–13; compare Id. ¶ 8 (describing the purpose of the Project as "to serve justice-involved adolescents who have a disability") with C4N's Ex. C, Brown Aff. ¶ 3 (describing the purpose of the project as "to serve adolescent boys, some of whom will or may have a disability that limits one or more major life activities. The individuals who will be served by DCF in this facility are anticipated to have disabilities or disorders (mental, social-emotional, development, etc.) or are in need of assessments for such based on their behaviors and needs at time of presentation.") and C4N's Ex. B, Brown Depo. at 47, ¶¶ 11–19 (Q: "is it possible that they – that person arrives at the facility, they are assessed, and it's determined that they have no disability and no disorder?" A: "It's possible. Highly Unlikely." Q: "And so in that situation what happens to that person?" A: "We would make arrangements to have that youth moved to another setting."). Thus, the purpose of the group home is to house justice-involved youths with a disability, and if youths are found not to have a disability, they will be moved to a more appropriate setting.

The Town of Newbury does not dispute that this is the case but rather argues that just because the Project serves disabled youth does not make the project a "group home." See Town Resp. in Opp. to Appellants' Mot. for Summ. J. at 7 (filed June 15, 2022). This, however, confuses two of the elements of § 4412(1)(G). As discussed above, this Court has already

determined the Project is a group home, and the Town does not challenge the assertion that the Project will serve youths with a disability. Id.

C4N argues that there remains a dispute of material fact as to whether the purpose of the group home is to exclusively serve youths with a disability. In support of their argument, C4N argues that (1) Appellants definition of disability is "over-inclusive" and will lead to the housing of nondisabled individuals who have engaged in criminal behavior, (2) some of the youths placed at the secure group home will not have diagnosed disabilities or disorders, (3) Appellants will not have sole control of who is placed in the facility, and (4) Legislative directives and planning materials show the purpose of the facility is not to serve disabled people. The Court is not persuaded, as these arguments all fail to raise a genuine dispute of material fact.

First, C4N's argument that Appellants definition of disability is over-inclusive is a legal argument. Furthermore, the Court disagrees. Section 4501 defines disability broadly. "'Disability,' with respect to an individual, means a physical or mental impairment that limits one or more major life activities," and includes those who have a history of physical or mental impairment, and those merely "being regarded as having such an impairment." 9 V.S.A. § 4501(2)(A)–(C); cf. 42 U.S.C. § 12102(1) (defining disability in the same way, and explaining that "regarded as having such an impairment" means the individual was treated a certain way because of "an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."). Vermont's statute also defines "physical or mental impairment" broadly, to include:

> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; or endocrine.
>
> (B) Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental condition, and specific learning disabilities.
>
> (C) The term "physical or mental impairment" includes diseases and conditions such as orthopedic, visual, speech, and deafness or being hard of hearing, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, developmental disability, emotional disturbance, and substance use disorders, including drug addiction and alcoholism. An individual with a disability does not include any individual with a

> substance use disorder who, by reason of current alcohol or drug use, constitutes a direct threat to property or safety of others.

9 V.S.A. § 4501(3)(A)–(C).[10] While the Vermont statute does not define "major life activities," its Federal counterpart does. The Americans with Disabilities Act (ADA) defines "major life activities" broadly to "include but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as impairments that limit major bodily functions on a more physiological level. See 42 U.S.A. § 12102(2)(A)–(B).

Moreover, the substantially similar Federal enactment includes "[r]ules of construction," that require "disability" to be interpreted broadly. See 42 U.S.C. § 12102(4). "The definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]." Id. § 12102(4)(A). Thus, the Court finds that the State's substantially similar disability definition of disability is intentionally broad, and the definition espoused by the Appellants is consistent with that intended definition so that they can evaluate the youth's needs on a case-by-case basis. Cf. LeFebvre v. Astrue, No. 1:05-CV-255, 2008 WL 570942, at *6 (D. Vt. Feb. 28, 2008) (explaining that in the context of discrimination claims, "[w]hether a disability exists must be determined on a 'case-by-case' basis").

Second, for similar reasons, the fact that some youths may be placed at the secure group home without having a prior diagnosed disability does not give rise to a genuine dispute of material fact. Appellants concede that these youths will be placed at the secure group home with the belief that the youth has a mental health disability in order to receive assessment and diagnosis. Appellants' Ex. 5, Brown Aff. ¶ 11. Thus, these youths are already "regarded as having such an impairment." Further, Appellants go on to explain that after diagnosis, the youth will either remain in the program at the secure group home or be referred to the most appropriate treatment setting as soon as practicable. Id. ¶¶ 12–13; C4N's Ex. B, Brown Depo. at 47, ¶¶ 11–19 (Q: "is it possible that they – that person arrives at the facility, they are assessed, and it's determined that they have no disability and no disorder?" A: "It's possible. Highly Unlikely." Q: "And so in that situation what happens to that person?" A: "We would make arrangements to have that youth moved to another setting.") This is consistent with the projects purpose of serving youths with a disability.

Third, that a judge or the Department of Corrections (DOC) may have limited authority to place youths in the secure group home does not create a genuine dispute of material fact. As discussed above, Vermont Statutory Law limits a judge's ability to place juveniles in such a

[10] See 29 C.F.R. § 1630.2(J)(ii) ("An impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.").

secure facility. Those limitations require both the recommendation from the DCF and the finding "that no other suitable placement is available and the child presents a risk of injury to himself or herself, to others, or to property." 33 V.S.A. § 5291(a). This finding, along with DCF's recommendation on placement, are sufficient to support that the juvenile is regarded as having a disability required this secure placement. Further, DOC has the ability to place youths in this secure group home "who would have historically been placed a Woodside pursuant to [a Memorandum of Understanding (MOU)] between DCF and DOC." C4N's Ex. F at 5. The parties do not dispute that approximately 98 percent of Vermont youth placed at the Woodside Juvenile Rehabilitation Center from July 2018 through May 2021 met criteria for a disability as defined in 9 V.S.A. § 4501. Appellants' Ex. 5, Brown Aff. ¶ 9. "Under the terms of this MOU, Woodside will also serve certain youth who are the legal responsibility [DOC] and are appropriate for the services offered at Woodside." C4N's Ex. F, App. A at 11 (MOU Between FSD and DOC). A justice-involved youth is eligible for placement if they meet certain requirements, including the requirement that a "youth meets medical necessity as determined by the Certificate of Need." Id. (Eligibility Requirements). Furthermore, the DCF Commissioner may recommend the termination of a DOC placement when the youth does not meet this requirement. Id. at 12 (Discharge). Thus, even if placed by a Judge or DOC, the youth likely has a disability, and DCF has the final say on whether the youth is eligible to placed or remain at the group home.

Finally, Legislative directives and planning materials do not give rise to a genuine dispute of material fact. See 2019, Adj. Sess., No. 154, § E.316 (eff. Oct. 2020) ("Long-Term Plan for Justice-Involved Youths"). The Legislative directives provide for the "long-term plan to provide ongoing *residential treatment and services*" to "Vermont youths who are in custody of [DCF], are adjudicated or charged with a delinquent or criminal act, and who require secure placement (target population)." Id. § E.316(b). The goals are to adequately fund alternative programs for these youths, and to "provide placements for all youths under 18 years of age who are in the custody of the Department of Corrections and who have historically been placed at Woodside Juvenile Rehabilitation Center" pursuant to the MOU. Id. § E.316(b)(1)–(2). As noted above, these goals are wholly consistent with the conclusion that this secured group home's purpose is serving justice-involved youths with a disability. See C4N's Ex. F, App. A at 11–12 (discussing Woodside MOU).

Thus, the Court concludes that the undisputed material facts demonstrate that the group home serves not more than eight youths with a disability as defined by 9 V.S.A. § 4501. Because the undisputed material facts demonstrate that this project is (1) a group home (2) to be operated under State licensing or registration, and (3) serving not more than eight persons (4) who have a disability as defined in 9 V.S.A. § 4501, the Court **GRANTS** summary judgment to the Appellants on Question 1.

C. Whether the Project satisfies all dimensional standards of the Town of Newbury Unified Zoning and Subdivision Regulations.

While no party moved the Court for summary judgment on question 2 in Appellants' Statement of Questions, the Court notes that there is no dispute of material fact that the Project satisfies all dimensional standards set forth in the Town's Zoning Regulations. See Appellants' SUMF ¶ 15; C4N's SDMF ¶ 15; Town's SDMF ¶ 15; see Appellants' Ex. 1, Wasser Aff. ¶ 7 (establishing the Project dimensions alongside the Zoning requirements); see also Town's Ex. 1, Wasser Aff. ¶ 7 (same). Thus, in the interest of judicial efficiency, unless the parties respond within 10 days of the issuance of this decision, the Court will conclude that the Project satisfies all dimensional standards in the Newbury Zoning Regulations and GRANT partial summary judgment to Appellants on Question 2. V.R.C.P. 56(f); Burns 12 Weston Street Nov, No. 75-7-18 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Oct. 25, 2019) ("Under [56(f)] authority, this Court would normally have to give notice and a reasonable time of 10 days from the filing of this Order for the [party] to respond.").

## CONCLUSION AND ORDER

For the forgoing reasons, the Court **DENIES** C4N's Motion to Dismiss DCF and **GRANTS** Appellants' Motion for Summary Judgment.

Regarding C4N's Motion to Dismiss, the Court finds that DCF meets the statutory criteria for an "interested person" pursuant 24 V.S.A. § 4465(b)(5) in this matter and therefore **DENIES** C4N's Motion to Dismiss.

Regarding Question 1 in Appellant's Statement of Questions, the Court concludes that the Project is eligible for consideration as a single-family residential use as provided by 24 V.S.A. § 4412(1)(G). The Court finds that the Project satisfies the following elements: (1) the Project is a group home or residential care home, (2) the Project is "to be operated under State licensing or registration," and the Project is (3) "serving not more than eight persons," (4) "who have a disability as defined in 9 V.S.A. § 4501 . . . ." 24 V.S.A. § 4412(1)(G). As such, the Court **GRANTS** Appellants' Motion for Summary Judgment.

Regarding Question 2, the Court notes that there is no dispute of material fact that the Project satisfies all dimensional standards set forth in the Town's Zoning Regulations. See Appellants' SUMF ¶ 15; C4N's SDMF ¶ 15; Town's SDMF ¶ 15; see Appellants' Ex. 1, Wasser Aff. ¶ 7 (establishing the Project dimensions alongside the Zoning requirements); see also Town's Ex. 1, Wasser Aff. ¶ 7 (same). Thus, in the interest of judicial efficiency, unless the parties respond within 10 days of the issuance of this decision, the Court will conclude that the Project satisfies all dimensional standards in the Newbury Zoning Regulations and **GRANT** Appellants Summary Judgment on Question 2. V.R.C.P. 56(f). The Court will also remand this matter to

the town to consider the Project, "by right to constitute a permitted single family residential use of property." 24 V.S.A. § 4412(1)(G).

Finally, because the Court found the undisputed material facts regarding Question 1 dispositive, the Court does not reach the merits of Appellants' and C4N's Cross-Motions for Partial Summary Judgment with regards to Question 4.

It is hereby ordered that:

1. C4N's Motion to Dismiss DCF (Motion 2) is DENIED.
2. Appellants' Motion for Summary Judgment (Motion 1) is GRANTED.
3. Parties have 10 days from the date of this decision to file regarding any dispute that the Project satisfies all dimensional standards set forth in the Town's Zoning Regulations.

Electronically signed October 18, 2022 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division