State of Vermont
Superior Court—Environmental Division

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ENTRY REGARDING MOTION

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In re Caleb Temple dba Kirby Mtn Landscaping **Docket No. 107-8-11 Vtec**
(Appeal of Zoning Board of Adjustment Conditional Use Approval)

Title: Motion to Dismiss for Lack of Party Status (Filing No. 6)

Filed: May 25, 2012

Filed By: Applicant/Appellee Caleb Temple

Response filed on 6/12/12 by Appellants Alan McNaughton, Helene McNaughton, James Flaherty, and Laura Flaherty

Reply filed on 6/14/12 by Applicant/Appellee

Supplemental response filed on 6/27/12 by Appellants

___ Granted _X_ Denied ___ Other

Alan McNaughton, Helene McNaughton, James Flaherty, and Laura Flaherty have appealed a decision by the Town of Kirby Zoning Board of Adjustment (ZBA) granting conditional use approval to Caleb Temple d/b/a Kirby Mountain Landscaping (Applicant) to use his property to operate a landscaping business, a sanding and snow plowing business, and a firewood business. Applicant has moved to dismiss Alan McNaughton and Helene McNaughton as appellants, arguing they do not meet the requirements set forth in 24 V.S.A. § 4465(b) and § 4471(a) to qualify as an interested person with standing to appeal the ZBA's decision.

A prospective appellant whose standing has been challenged must demonstrate to the Court that she does, in fact, meet the requirements for standing. See Brod v. Agency of Natural Res., 2007 VT 87, ¶¶ 2, 9, 182 Vt. 234; V.R.E.C.P. 5(d)(2) (establishing that the receipt of a motion to dismiss a party triggers the Court's review of that party's ability to appear in the appeal of another). Standing, or lack thereof, affects the Court's subject-matter jurisdiction. Bischoff v. Bletz, 2008 VT 15, ¶ 15, 183 Vt. 235. Thus, we review the parties' filings under the standard of review afforded by V.R.C.P. 12(b)(1), which governs motions to dismiss for lack of subject matter jurisdiction. That is, we accept as true all uncontroverted factual allegations and construe them in a light most favorable to the nonmoving party (here, the McNaughtons). Rheaume v. Pallito, 2011 VT 72, ¶ 2 (mem.).

To have standing to appeal a decision of a municipal panel, a prospective appellant must (1) have participated in the proceeding below, and (2) demonstrate that he or she is an "interested person" as defined in 24 V.S.A. § 4465(b). See 24 V.S.A. § 4471(a). Applicant contends that the McNaughtons meet neither of these conditions.

By statute, participation consists of offering "oral or written testimony, evidence or a statement of concern related to the subject of the proceeding." 24 V.S.A. § 4471(a). The

McNaughtons have submitted to the Court two letters addressed to the ZBA in which they discuss their concerns with Applicant's property use. They mailed both letters, one dated May 24, 2011, and one dated March 29, 2011, to the ZBA in connection with the ZBA's June 2, 2011 hearing on Applicant's conditional use application. The court agrees with the McNaughtons that these letters, as submitted in connection with the June 2, 2011 hearing, are statements of concern that constitute participation in the proceeding below under 24 V.S.A. § 4471(a).

Turning to the definition of "interested person" in 24 V.S.A. § 4465(b), while there are five definitions, or categories, listed therein, both the McNaughtons and Applicant focus on the third:

> A person owning or occupying property in the immediate neighborhood of a property that is subject to any decision or act taken under [24 V.S.A., Chapter 117], who can demonstrate a physical or environmental impact on the persons' 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). Thus, in order for the Court to conclude that the McNaughtons have standing to appeal the ZBA's decision, they must demonstrate that they (1) own or occupy property in the "immediate neighborhood" of Applicant's, (2) that the ZBA's decision has a physical or environmental impact on them that is related to the Town of Kirby's conditional use criteria under which Applicant's proposed project was reviewed, and (3) that the ZBA's decision is not in accord with these criteria. Applicant does not refute that the McNaughtons have met the third requirement, and we conclude that the McNaughtons' statements of concern are sufficient to satisfy the requirement.

Looking to the first and second requirements, Applicant asserts that the McNaughtons property is not in the immediate neighborhood because their residence is one mile from Applicant's property, 200 feet higher than Applicant's property, and separated from the property by a heavily forested area. Applicant implies, but does not explicitly state, that he believes this distance prevents the McNaughtons from being impacted by his proposed project.

The McNaughtons respond that, because of the difference in elevation, they can hear disruptive noise near their house from Applicant's property use. They also assert that they own additional vacant property on the opposite side of the road from Applicant's, that views from this property are impacted by a shed on Applicant's property, and that noise from Applicant's property use impacts use of their vacant property and decreases its property value.

The close proximity of McNaughtons' property, particularly their vacant property, to Applicant's, and the lack of information showing that, despite this proximity, the properties are in distinguishable areas with truly distinct characteristics, leads us to conclude that the properties lie in the same immediate neighborhood. Cf. Bostwick Road Two-Lot Subdivision, No. 211-10-05 Vtec, slip op. at 4–5 (Vt. Envtl. Ct. Feb. 24, 2006) (Durkin, J.), aff'd, No. 2006-128 (Vt. Jan. 2007) (unpublished mem.) (concluding that the appellant was not an interested person under 24 V.S.A. § 4465(b)(3) partially because the appellant's residential property had a significantly different physical and social character from that of the tourist-oriented area along Vermont Route 7 where the proposed development, a vineyard, was to be located). Thus, we conclude that the McNaughtons have demonstrated that they meet the first requirement in § 4465(b)(3).

Turning to the final requirement, the second, we note that the McNaughtons' Statement of Questions raises questions about the compliance of Applicant's proposed project with the Town of Kirby's conditional use criteria concerning the character of the surrounding area and noise. The noise impact that the McNaughtons allege is a physical impact on their interests that are related to these criteria. Thus, we conclude that the McNaughtons have demonstrated that they meet this final requirement, and therefore, qualify as interested persons as defined by 24 V.S.A. § 4465(b)(3). Because we conclude that the alleged noise impact satisfies the physical or environmental impact requirement, we decline to review the alleged property value impacts as this is not necessary to reach our conclusion. We also clarify for the parties that the record before us does not indicate that the application before the ZBA, and now before us in this appeal, includes a shed, and therefore, we do not take into account the McNaughtons' reference to the interference by Applicant's shed on their views.

Because we conclude that the McNaughtons participated in the proceeding below as required by 24 V.S.A. § 4471(a) and qualify as interested persons as defined by 24 V.S.A. § 4465(b)(3), we conclude that they have standing to appeal the ZBA's decision granting conditional use approval to Applicant. We therefore **DENY** Applicant's motion to dismiss the McNaughtons as Appellants in this appeal.

Thomas G. Walsh, Judge

September 5, 2012
Date

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Date copies sent: 9/5/12 Clerk's Initials: MT

Copies sent to:

Steven A. Adler, Attorney for Applicant/Appellee Caleb Temple

Thomas R. Paul, Attorney for Town of Kirby

Charles D. Hickey, Attorney for Appellants Alan McNaughton, Helene McNaughton, Jeremy Flaherty, and Laura Flaherty