

State of Vermont
Superior Court—Environmental Division

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ENTRY REGARDING MOTION

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In re Saman ROW Approval
(Appeal from ZBA decision)

Docket No. 176-10-10 Vtec

Title: Motion to Dismiss (Filing No. 5)

Filed: May 17, 2011

Filed By: Thomas Hayes, Attorney for Appellee/Applicant Peter Saman

Response in Opposition filed on 6/7/11 by Elizabeth McGill, Attorney for Appellant William Basa

Response in Opposition filed on 6/7/11 by Brice C. Simon, Attorney for Interested Person Brenda Lindemann

Reply filed on 6/20/11 by Thomas Hayes, Attorney for Appellee/Applicant Peter Saman

☐ Granted

☒ Denied

☐ Other

Per Applicant Peter Saman's ("Applicant") request, we have understood his filing entitled "Applicant Peter Saman's Response to William Basa's Statement of Questions" to be a Rule 12(b) motion seeking dismissal of all of the Questions in Appellant William Basa's ("Appellant") revised Statement of Questions. See V.R.C.P. 12(b); V.R.E.C.P. 5(a)(2). Because Applicant does not supply identifiable reasons for dismissal of Questions 2 and 4, Applicant's motion to dismiss is **DENIED** as it pertains to those Questions.¹

Turning to the remaining Questions—Questions 1, 3, and 5—the Court would need to reference material outside of the pleadings in order to determine the merit of Applicant's argument that we cannot, in this proceeding, address these Questions. On their face the Questions appear within our subject matter jurisdiction. Consequently, we must treat Applicant's motion to dismiss as one for summary judgment on Questions 1, 3, and 5. See V.R.C.P. 12(b) ("If, on a motion . . . to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . .").

If we were undertaking a de novo review of the decision on appeal, we would now take up the motion as one for summary judgment and provide the parties with the opportunity to file supplemental materials. *Id.* Because we are conducting an on-the-record review of the decision below, however, ruling on Applicant's motion for summary judgment is not a proper procedural step. Instead, the next step in this on-the-record appeal is for parties to submit legal briefs on the merits of Applicant's Questions. Our review of the decision below, in conjunction with the briefs parties submit, will consist of considering the record made before the municipal panel to determine whether the panel's factual findings are supported by "substantial evidence" and reviewing the legal questions in this appeal anew, unless deference is warranted to the panel based on its area of expertise. See *In re Stowe Highlands Resort PUD and PRD Application*, 2009 VT 76, ¶ 7, 186 Vt. 568 (citation omitted). We will not hear new evidence or complete our own determination of the facts.

Because summary judgment is not proper here, we **DENY** Applicant's motion. We direct the parties to file legal briefs on the merits of the Questions remaining in this appeal as instructed in our Scheduling Order of May 25, 2011. That is, Applicant should file his brief no later than 20 days from today, or no later

¹ The Town has also filed a motion to dismiss, pertaining only to Question 2 of Appellant's revised Statement of Questions, which is addressed in a separate Entry Order issued today. In that Entry Order we dismiss Question 2.

than **Thursday, September 22, 2011**, and the other parties should file their reply briefs no later than 15 additional days beyond that, or by **Friday, October 7, 2011**.

_____ Thomas S. Durkin, Judge	_____ September 2, 2011 Date
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Date copies sent to: _____	Clerk's Initials _____
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Copies sent to:

- Thomas Hayes, Attorney for Appellee/Applicant Peter Saman
- Elizabeth H. McGill, Attorney for Appellant William Basa
- Robert Halpert, Attorney for Interested Person Town of Plainfield
- Brice C. Simon, Attorney for Interested Person Brenda Lindemann