STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No.: 12-1-13 Vtec

Howard Center Renovation Permit

APPELLANT'S MOTION TO STRIKE CITY OF SOUTH BURLINGTON'S RESPONSE TO HOWARDCENTER'S REQUESTS FOR ADMISSION

NOW COMES the Appellant, the SOUTH BURLINGTON SCHOOL DISTRICT ("District"), by and through its attorneys, Lynn, Lynn & Blackman, P.C., and hereby moves to strike the City of South Burlington ("City") Response to Applicant HowardCenter, Inc.'s Requests for Admission. In support of its motion, the District submits the following memorandum of law.

Memorandum of Law

This matter arises from the HowardCenter's application for a permit to establish a methadone clinic at 364 Dorset Street, Suite 101, South Burlington, VT. The District timely appealed the City of South Burlington Development Review Board's ("DRB") decision affirming the issuance zoning permit ZP-12-292 and the HowardCenter and the City have entered their appearances. On February 17, 2013, pursuant to V.R.C.P. 36, the HowardCenter served Requests for Admission on the City. On February 21, 2013, the City served its Response.

As the discovery parameters of the present appeal have not been addressed by the Court, HowardCenter's Requests for Admission are premature, and the Court should strike the City's Response to the Requests. Moreover, because the present appeal is by a trial *de novo*, the City's Response is not necessary for a full and fair determination of the proceeding and the Court should strike it.

I. The HowardCenter's discovery request and the City's Response, issued prior to the Court's scheduling conference and order, are premature.

Under the statute establishing the Environmental Division of the Superior Court, "[n]o other discovery or depositions, written interrogatories or requests to admit shall be permitted except that which is necessary for a full and fair determination of the proceeding." 4 V.S.A. § 1004(b). V.R.E.C.P 2(c) states "[u]nless the parties otherwise agree, the court in a pretrial order issued under paragraph (d)(3) of this rule shall establish the type, sequence, and amount of discovery available under Rules 26-37 of the Vermont Rules of Civil Procedure, limiting the discovery permitted to that which is necessary for a full and fair determination of the proceeding."

"Under this Court's procedural rules, we either establish the scope of discovery by a pretrial order, limited by 'that which is necessary for a full and fair determination of the proceeding,' or allow parties to reach an agreement on their own." *In re Schwarzkopf Sub. Application*, No. 94-6-10 Vtec at 1 (Vt. Envtl. Ct. Feb. 15, 2011) (quoting from V.R.E.C.P. 2(c) and citing 4 V.S.A. § 1004(b)). "Here, no discovery order was issued by the Court." *Id.* (denying motion for pre-trial discovery).

In the present case, the Court has not held an initial conference or issued a written order pursuant to Rule 2(d) determining whether any discovery, particularly Requests for Admission, will be permitted. The District does not agree that such requests are necessary in the present case. As such, Applicant HowardCenter's Requests for Admission to the City are premature and the Court should strike the City's Response.

II. The Requests for Admission and Response are not necessary for the full and fair determination of the proceeding because this is a trial *de novo*.

In the interests of efficiency, the District further states that the HowardCenter's Requests for Admission and the City's Response are not necessary for the full and fair determination of the proceeding here because this is a trial *de novo* and the City's past

practice and interpretation of the Land Development Regulations ("LDR") are not entitled to deference.

"Appeals from decisions of local zoning boards are governed by 24 V.S.A. § 4472(a), which provides that a party 'shall be entitled to a *de novo* trial in the superior court.'" *Chioffi v. Winooski Zoning Bd.*, 151 Vt. 9, 11, 556 A.2d 103, 104-05 (1989). "A *de novo* trial 'is one where the case is heard as though no action whatever had been held prior thereto.'" *Id.* (quoting from *In re Poole,* 136 Vt. 242, 245, 388 A.2d 422, 424 (1978)) (Court not required to give deference to the Board's decision). *See In re: Appeal of Sabin*, Docket No. E95-120 (Vt. Envtl. Ct., Apr. 15, 1996) (Court is obligated to determine the application *de novo* on the issues that were appealed and may not apply a deferential standard of review to the board's decision); *In re: Appeals of Robert W. Wimble and Carl R. Wimble*, Docket Nos. 105-6-98 and 106-6-98 Vtec (Vt. Envtl. Ct., Mar. 1, 1999) (Court has authority to do whatever ZBA and planning commission could have done with applications and is not bound by their rulings); *In re: Appeal of Manchester Shopping Center, Inc.*, Docket No. 72-4-98, *In re: Appeal of Vanderbilt MPD Corp.*, Docket Nos. 110-6-98 and 115-6-98 Vtec (Vt. Envtl. Ct., Oct. 13, 1998) (Court's ruling *de novo* on the merits may turn out to vary from, modify or entirely depart from what was done by ZBA or planning commission).

Here, the HowardCenter's Requests for Admission ask the City to admit that City employees have traditionally interpreted the LDR a certain way. However, the LDR speaks for itself, and the role of the Court is to look at the ordinance anew, without deference to the DRB decision below. As is evident from the appeal, the District disagrees with the City's interpretation, and that interpretation is evident from the DRB's decision. Since the Requests for Admission are not necessary to the full and fair determination of this trial *de novo*, the Court should strike the City's Response.

Finally, it is not clear that Applicant HowardCenter is permitted to serve Requests for Admission on the City. Under V.R.C.P. 36(a), "[a] party may serve upon any other party a written request for the admission[.]" (emphasis added). "By its terms, Rule 36 applies to parties. The term 'party' is to be taken in its ordinary significance." *Al-Jundi v. Rockefeller*, 91 F.R.D. 590, 592 (W.D.N.Y. 1981). "Normally, of course, admissions would not be sought from a person not a party, since admissions by such a person would have no significance in the disposition of the case." *Id.* (citing 4A Moore's Federal Practice, P 36.03(2)). *See also* Grenig, Kinsler, Handbk. Fed. Civ. Disc. & Disclosure § 11:6 [Actions in which requests for admission may be used] (3d ed.) ("Information required from a non-party may be obtained by oral deposition or by a deposition upon written questions . . . [and] documents and tangible things may be obtained from non-parties under Fed. R. Civ. P. 45. Non-parties, however, are not subject to Fed. R. Civ. P. 33, 34 or 36.").

Here, the HowardCenter is the Applicant and the District is the Appellant. Given the posture of the appeal, it is unclear whether the City is a "party" that can be served with requests for admission. Regardless, such admissions have no significance in the disposition of the case and are not necessary for its full and fair disposition.

Conclusion

For the foregoing reasons, the District respectfully requests that the Court grant its Motion to Strike the City of South Burlington's Response to the HowardCenter's Requests for Admission.

DATED in Burlington, Vermont this 22nd day of February, 2013.

SOUTH BURLINGTON SCHOOL DISTRICT

BY: _____

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