VERMONT SUPERIOR COURT
Environmental Division
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Burlington, VT 05401
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Docket No. 22-ENV-00069

2078 Jersey Street CU Reconsideration Denial

ENTRY REGARDING MOTION

Motion 3: Motion to Dismiss

Filer: Liam L. Murphy, Esq.

Filed Date: April 28, 2023

Interested Parties' Opposition to Motion to Dismiss, filed by Donna A. Ebel and Frederick Ebel, pro se, on May 19, 2023

Applicants' Reply Memorandum in Support of its Motion to Dismiss Parties, filed by Liam L. Murphy, attorney for Applicants, on May 31, 2023

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Motion 5: V.R.A.P. 5(b) Motion for Permission to Appeal

Filer: Kevin L. Kite, Esq., attorney for the Town of Ferrisburgh

Filed Date: May 23, 2023

Applicants' Memorandum in Opposition to Motion for Permission to Take Interlocutory Appeal, filed by Liam L. Murphy, Esq., attorney for Applicants, on May 31, 2023

Reply Memorandum in Further Support of V.R.A.P. 5(b) Motion for Permission to Appeal, filed by Kevin L. Kite, Esq., attorney for the Town of Ferrisburgh, on June 13, 2023.

The Motion to Dismiss is DENIED. The Motion for Permission to Appeal is DENIED.

Kevin Sullivan and Sarah Stradtner (collectively Applicants) applied for a conditional use permit to construct a driveway/access road (the Project) to an existing quarry on the property at 2078 Jersey Street in Vergennes Vermont (the Property). The Town of Ferrisburgh Zoning Board of Adjustment (ZBA) denied the permit on May 20, 2022. On June 15, 2022, Applicants filed a

request for reconsideration to the ZBA, which the ZBA denied on July 11, 2022. Applicants appealed to this Court on July 15, 2022.

There are two motions presently before the Court: (1) the Applicants' Motion to Dismiss Donna and Frederick Ebel (collectively the Ebels) as interested parties in this action for lack of statutory standing, and (2) the Town's Motion for Permission to Take Interlocutory Appeal. Because this Decision addresses two separate motions, each with its own legal standards and relevant facts, the Court addresses each motion separately. In doing so, the Court sets forth the applicable legal standards, and any factual background relevant thereto, separately within this Discussion.

In these proceedings, attorney Kevin L. Kite represents the Town, and attorney Liam L. Murphy represents the Applicants. Interested Parties, Donna and Frederick Ebel, are self-represented.

Motion to Dismiss Interested Parties

Applicants file a motion to dismiss the Ebels as interested parties in this action for lack of statutory standing. Applicants' argue that the Ebels lack statutory standing because they do not own or occupy property in the immediate neighborhood, nor can they demonstrate a physical or environmental impact on their interest under the applicable criteria reviewed, as required pursuant 24 V.S.A. § 4465(b)(3). The Ebels oppose the motion.

I. Legal Standard

A party's standing is a question of subject matter jurisdiction. Brod v. Agency of Nat. Res., 2007 VT 87, ¶ 8, 182 Vt. 234 (citation omitted). Therefore, the Court reviews the motion under the standard of review afforded by Vermont Rules of Civil Procedure ("V.R.C.P.") Rule 12(b)(1). On a motion to dismiss for a lack of subject matter jurisdiction, the Court may consider evidence outside the pleadings if necessary to resolve the motion. Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11. The Court accepts as true all uncontroverted factual allegations and construes them in a light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245.

II. Factual Background

The Court sets out the following facts for the sole purpose of deciding the pending motion, adopting those facts that are uncontroverted and construing them in the light most favorable to the Ebels. Id. What follows is not a list of the Court's factual findings, since findings of fact may only be announced after a merits hearing. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000).

1. The subject Property is located at 2078 Jersey Street in Vergennes. It is part of a long hillside and ridge that is quarried for the local "Panton Stone" on several properties. Panton Stone has been removed from the Property for decades.

2. The Ebels own the property at 1496 Jersey Street in Vergennes. They use their property as a residence. Their property is approximately one half-mile from the subject Property.

3. Both properties on Jersey Street are in the Rural Residential 5 District (RA-5 District).

4. Much of the land between the two properties is forested such that the Ebels cannot view the subject Property from their home.

5. There are two quarries between the Ebels' Property and the subject Property. There is a third quarry directly behind the Ebels' Property.

6. Applicants now seek to install a new driveway that would allow stone to be removed more easily and provide better access to the western part of the Property. Applicants applied for a conditional use permit for the construction of the driveway. The new driveway will be partially visible from Jersey Street.

7. The ZBA denied Applicants' conditional use permit application, and Applicants appealed to this Court on July 15, 2022, raising three questions. Relevant to the present issue of the Ebels' standing is Question 2: "Should conditional use approval be granted under Section 10.9(C)(5) for the Proposed Access Road to use the rock quarry at levels consistent with pre-existing usage?"

8. The Ebels participated in the permitting hearing before the ZBA.

9. The Ebels timely entered an appearance as interested parties in this appeal on July 27, 2022.

10. The Ebels hear noise from quarrying in the neighborhood. They believe they can hear quarrying activity that occurs a half-mile away.

11. The Ebels assert that Jersey Street has experienced an increase in traffic and noise in the area as the existing quarrying operations expand. The Ebels are concerned that this expansion of the subject Property's operation will represent another increase in noise or traffic.

12. The Ebels enjoy the rural residential agricultural setting of their RA-5 neighborhood and wish to have the purpose of their neighborhood and its applicable zoning laws applied in a manner that protects that setting and purpose.

III. Discussion

The Applicants moved to dismiss the Ebels, who timely entered their appearance in this appeal, asserting they lack statutory standing because they are not "interested person[s]" as defined in 24 V.S.A. § 4465(b)(3). The Court accords a person that files a timely appearance "party status unless the court otherwise determines on its own motion, on motion to dismiss a party, or on a motion to intervene." V.R.E.C.P. 5(d)(2). If challenged, the party must demonstrate that they are vested with constitutional and statutory standing to remain as a party before the Court in the pending appeal. See, e.g., Bischoff v. Bletz, 2008 VT 16, ¶ 15, 183 Vt. 235. The parties do not dispute that the applicable statutory standing provision to apply is defined in 24 V.S.A. § 4465(b)(1), which defines an interested person as

> [1] 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, [2] who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and [3] 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 Court concludes that the second and third elements of interested person statutory standing encompasses the constitutional standing elements. Cf. Hinesburg Sand & Gravel Co., Inc. v. State, 166 Vt. 337, 341 (1997) (describing constitutional standing as requiring, at an the irreducible minimum, "(1) injury in fact, (2) causation, and (3) redressability). Thus, the Court applies this statutory standing standard to these non-appellants' standing in this Court.

Here, the Court finds that Ebels own and occupy property in the immediate neighborhood of the subject Property. To determine whether a party's property lies within the "immediate neighborhood," we consider the proximity of the property to the proposed project, as well as the "physical environment surrounding the project and the nexus between the project, the appellant, and the appellant's property." In re Farmer Mold & Mach. Works, Inc. CU Permit, No. 15-2-14 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Jan. 7, 2015) (Walsh, J.). We have considered intervening vegetation and roadways, sight lines, and the character of the neighborhoods of the two properties as part of this evaluation, among other factors. See, e.g., In re Bostwick Rd.-2 Lot Subdivision & Final Plan Application, No. 211-10-05 Vtec, slip op. at 2–4 (Vt. Envtl. Ct. Feb. 24, 2006) (Durkin, J.) *aff'd*, No. 2006-128, 2007 WL 5323083, at *2-3 (Vt. Jan. 2007) (unpub. mem.).

While the Ebels cannot see the subject Property from their home due to the intervening vegetation, their home is only one half-mile away from the subject Property. This proximity weighs in favor of an immediate neighborhood finding. Cf. In re SP Land Co., LLC Golf Course PUD, No. 74-5-10 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. Jan. 27, 2011) (Durkin, J.) (concluding appellant to be in the immediate neighborhood, because a half-mile represents a "close proximity of the properties"). Further, the Ebels' home and the subject Property are both on Jersey Street, which is the main road connecting the neighborhood and the road used by trucks coming and going to the subject Property, providing an obvious nexus between the Project property and the Ebels's property. Finally, in looking at the character of the neighborhood of the two properties, the Court finds that both properties are located in the RA-5 District in an area speckled with several pre-existing non-conforming quarries. The rural nature of the neighborhood, large, minimum-lot sizes, and uniformity of the area all support the conclusion that the Ebels are in the immediate neighborhood of the proposed project.

Next, the Court finds the Ebels can demonstrate a physical or environmental impact on their interests under the criteria reviewed, and adequately represent that those impacts will not be in accord with the policies, purposes, or terms of the Town's plan or zoning regulations if the permit is granted. Applicants raise the issue of whether the proposed Project should be approved under Section 10.9(C)(5) of the Town of Ferrisburgh Land Use Regulations

(Regulations). Section 10.9(C)(5) provides that a nonconforming use "may not increase the degree of nonconformity except with the approval of the ZBA subject to conditional use approval." Conditional use review requires that the Project comply with all applicable standards provided in the Regulations, plus that the project proponent demonstrate that the proposed conditional use will not result in an undue adverse effect on, among other things, the "character of the area affected as defined by the purposes of the zoning district within which the project is located and specifically stated policies and standards of the Town Plan," or "[t]raffic on roads and highways in the vicinity." See Regulations § 10.8(B)(2)–(3). Finally, among the performance standards, the Regulations limit noise to 70 decibels, as measured at the property line. Regulations § 9.1. Thus, the Ebels demonstrate that a potential impact to noise, traffic, and character of the area, which are all review criteria the Court will consider.

At one half-mile from the project, it is reasonable that the Ebels may hear noise from the proposed Project's expanded quarrying and trucking operations. Additionally, because Applicants and the Ebels both live on Jersey Street, it is reasonable for the Ebels to be concerned that improving accessibility on the Applicants' Property will result in an increase in truck traffic (and truck noise) on Jersey Street and the Property. Finally, the Ebels are concerned that authorizing another pre-existing non-conforming use in their district to expand will further delay achieving the primary purpose of zoning: "to bring about the orderly physical development of the community by confining particular uses to defined areas." Vermont Brick & Block, Inc. v. Vill. of Essex Junction, 135 Vt. 481, 483 (1977) (citation omitted). The Regulations inform the court that the RA-5 District is "best suited for agricultural use, on-farm business, agricultural enterprises. Home occupations and businesses are encouraged. Other compatible uses would be open space, conservation and forestry." Regulations § 4.2(A) (RA-5 District Purpose). Quarrying is not a permitted or conditional use in this district, but is otherwise prevalent in the neighborhood as pre-existing non-conforming uses. As nonconforming uses, they are inconsistent with the purpose of zoning and the RA-5 District, and "[a] goal of zoning is to gradually eliminate these [non-conforming] uses." Id.; see Badger v. Town of Ferrisburgh, 168 Vt. 37, 40 (1998) (noting that there is a strong public interest in regulating and phasing out nonconforming uses, and "zoning provisions allowing nonconforming uses should be strictly

construed"). Thus, the Ebels have sufficiently demonstrated a concern that the conditional use permit, if granted, may not be in accord with the policies, purposes, or terms of the Regulations.

Thus, the Court concludes that the Ebels have demonstrated their interested party status such that they have statutory and constitutional standing. The Court, therefore, **DENIES** the Applicants' Motion to Dismiss the Ebels.

Motion for Permission to Take Interlocutory Appeal

The Town moves for permission to file an interlocutory appeal. The Town asserts that the Court should permit an interlocutory appeal so the Supreme Court can review this Court's March 14, 2023 Entry Order denying Town's earlier Motion to Dismiss. Applicants oppose the motion, arguing that there are no substantial grounds for difference of opinion.

Interlocutory appeals are an exception to the normal rule limiting appellate jurisdiction to the review of final judgments. In re Pyramid Co. of Burlington, 141 Vt. 294, 300 (1982). Interlocutory appeals are disfavored because they sidestep the "weighty considerations that support the finality requirement," and result in "[p]iecemeal appellate review [which] causes unnecessary delay and expense, and wastes scarce judicial resources." Id. For these reasons, the Vermont Rules of Appellant Procedure authorize this Court to permit such appeals if the Court finds that: (1) the order "involves a controlling question of law;" (2) there is "substantial ground for difference of opinion" about that question; and (3) "an immediate appeal may materially advance the termination of litigation." V.R.A.P. 5(b)(1). "The three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." Pyramid, 141 Vt. at 302 (quoting 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3930 (1977)). In weighing "[t]he level of uncertainty required to find a substantial ground for difference of opinion," the Court should adjust the degree of uncertainty "to meet the importance of the question in the context of the specific case." 6 Federal Practice and Procedure § 3930. For example, if a matter is likely to endure for several years, and the question requested for interlocutory appeal relates to an initial question of jurisdiction, "certification may be justified at a relatively low threshold of doubt." Id.

The application of such interlocutory appeals, however, does not give the Court license to abuse the interlocutory appeal mechanism. Pyramid, 141 Vt. at 302. This Court still has a responsibility to decide difficult legal issues, and "should not be bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression." Id. at 306. The Court must "place little stock in the vehemence of disagreeing counsel." Id.

The issue the Town seeks permission to file an interlocutory appeal on is simple and jurisdictional: whether a motion to reconsider filed before the appropriate municipal panel resets the appeal period. The parties do not dispute, and the Court agrees, that the Town's motion to dismiss the appeal as untimely contains a controlling question of law, and an immediate appeal has the potential to materially advance the termination of litigation. Nevertheless, the Applicants oppose the interlocutory appeal, noting that there are no substantial grounds for disagreement in this action.

The Court concludes that, while there are grounds for difference of opinion, those grounds are not substantial, such that this Court cannot shy away from its responsibility to decide the legal issue before the Court and authorize a piecemeal appellate review. See id. ("Trial courts should not be 'bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression.'"). The Court notes that, in so considering, we do somewhat lower our threshold of uncertainty in searching for a substantial ground for difference of opinion in light of the importance of the question, one of this Court's jurisdiction. 6 Federal Practice and Procedure § 3930. This lowering, however, is tempered in light of the particular case, which is a simple zoning dispute with relatively few questions before the court. The Court's disposition guidelines support that these matters should take no longer than 10 months. Thus, while the question is jurisdictional, in weighing the gains and losses of immediate appeal, on balance, it only supports a slight lowering of the uncertainty threshold.

Turning to the grounds for the difference of opinion, the Court finds that the Applicants are relying on the express procedural rules of this Court, more than 20 years of the Court's practice applying those rules and statutes, and sound public policy rational behind that approach, while the Town is relying on one 24-year-old persuasive authority, see In re: Appeal of

Janet C. DUNN, et al., No. 2-1-98 Vtec, slip op. at 5 (Vt. Envtl. Ct. Mar. 08, 1999) (Wright, J.),[1] an attenuated interpretation of 24 V.S.A. § 4472's finality provision, and a limited interpretation of the applicability of V.R.A.P. 4 that runs counter to the Vermont Rules of Environmental Court Proceedings, judicial efficiency,[2] and the Supreme Court's application of V.R.A.P. 4.[3] Thus, despite the Town's vehemence in arguing its position, the Court cannot conclude these grounds for a difference of opinion are substantial, nor can the Court find that it creates enough uncertainty even under our lowered threshold. While the Court would benefit today from on-point binding authority on this issue, the Court cannot find sufficient grounds or uncertainty to abandon its responsibility to determine what the law is. The Town's motion must be **DENIED**.

Conclusion

For the foregoing reasons, the Court **DENIES** Applicants' motion to dismiss the Ebels, and **DENIES** the Town's motion for permission to take an interlocutory appeal.

The Court concludes that the Ebels have adequately demonstrated that they meet the statutory standing criteria required by this Court. They own property in the immediate neighborhood, can demonstrate a physical or environmental impact on the their interest under the Regulations review criteria, and have alleged that approving the Project may be in accord with the policies, purposes, or terms of the Regulations of the Town.

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[1] Further, the Court in Dunn relied on no law, persuasive or otherwise, in crafting the rule in which the Town now relies. It is not the role of the Court to create law, but rather, to apply the law to the facts. Marbury v. Madison, 5 U.S. 137, 177 (1803). As such, the Court does not find this persuasive authority particularly persuasive.

[2] Adopting the rule argued by the Town would functionally foreclose an appropriate municipal panel's ability to reconsider its decisions. Many municipal review panels only meet once a month, making it impossible for a review panel to vote to reopen and provide the interested parties and the public with proper notice of the hearing within the 30-day appeal period. Such a rule would not serve the interests of judicial efficiency. See 2078 Jersey Street CU Reconsideration Denial, No. 22-ENV, slip op. at 2–3 (Vt. Super. Ct. Envtl. Div. Mar. 14, 2023) (Walsh, J.) (discussing public policy interest in the efficiency of review board's authority to reconsider its own decisions prior to an appeal); see also 2078 Jersey Street CU Reconsideration Denial, No. 22-ENV, slip op. at 3 (Vt. Super. Ct. Envtl. Div. May 10, 2023) (Walsh, J.) (same).

[3] While not directly on point, the Court is aided by Vermont Supreme Court's decision in In re Beach Properties, Inc., in which the Supreme Court insinuated that the tolling principals of V.R.A.P. 4(b)(5) applied to motions to reconsider filed before a review board, and were thus not limited to those filed in the superior court. See 2015 VT 130, ¶ 8, 200 Vt. 630 (noting that if a party's motion to reconsider had been timely filed before the Public Service Board, it would have reset the appeal period pursuant the tolling provisions of V.R.A.P. 4(b)(5)).

The Court also concludes that there are not "substantial ground for difference of opinion" about the timeliness of the Applicants appeal to this Court, making it improper for this Court to authorize and interlocutory appeal.

Electronically signed July 28, 2023 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division