

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 23-ENV-000074

Baron Land Use Permit Appeal

ENTRY ORDER

Title: Motion for Party Status (Motion: 1)
Filer: Alexander J. LaRosa, Esq.
Filed Date: July 24, 2023

Appellant's Memorandum in Opposition and Motion to Dismiss filed by George E. Gay, Esq. on September 22, 2023.

The motion for party status is GRANTED. The motion to dismiss is DENIED.

This is an appeal of a June 22, 2023 decision of the District #5 Environmental Commission (District Commission) granting Land Use Permit amendment #5W0082-7 to Robert and Nancy Baron (Applicants or the Barons) authorizing the construction of a single-family home on two lots identified as Lots 19 and 21 owned by Applicants along Anne Burns Road, Warren, Vermont (the Project). The District Commission processed Applicants' application as a minor application pursuant to Act 250 Rules, Rule 51. Susan Hemmeter (Appellant or Ms. Hemmeter) owns Lot 21 and is an adjacent property owner. Appellant requested that the District Commission hold a hearing on the Project. The District Commission denied that request and, in so doing, did not specifically address whether Appellant had party status under any requested Criteria. As such, Appellant moved for party status pursuant to V.R.E.C.P. Rule 5 if the lack of ruling could be construed as a denial of party status. Presently before the Court is this motion. Applicants oppose the motion and in so doing move to dismiss due to Appellants' lack of standing.

Discussion

In the Act 250 context, any person aggrieved by an act or decision of a district commission may appeal that act or decision to this Court provided that the person (1) was granted party status by the district commission, (2) participated in the proceedings before the district commission,

and (3) retained party status at the end of the district commission proceedings. 10 V.S.A. § 8504(a), (d)(1). A person may “only appeal those issues under the [Act 250] criteria with respect to which the person was granted party status.” 10 V.S.A. § 8504(d)(1). Notwithstanding subdivision (d)(1), however, a person may appeal a district commission decision if this Court determines that the person satisfies one of the exceptions listed in 10 V.S.A. § 8504(d)(2), including that the decision being appealed is the district commission's grant or denial of party status.

In failing to grant her hearing request, Ms. Hemmeter was functionally denied party status before the District Commission. Pursuant to V.R.E.C.P. Rule 5(d)(2), she filed the pending motion.

To have standing in this Court as a “person aggrieved” by a district commission decision, an appellant must allege “an injury to a particularized interest” protected by Act 250 that is attributable to the decision and that can be redressed within the context of the appeal. 10 V.S.A. § 8504(a); 10 V.S.A. § 8502(7). Specifically, the person asserting party status must first allege an interest protected by Act 250 that is particular to them, rather than a general policy concern shared with the public. In re Pion Sand & Gravel Pit, No. 245-12-09 Vtec, slip op. at 7 (Vt. Super. Ct. Env'tl. Div. July 2, 2010) (Durkin, J.). An interest may be particularized even if it is shared with multiple members of the general public. Re: McLean Enters. Corp., No. 2S1147-1-EB, Mem. of Decision at 7 (Vt. Env'tl. Bd. Sept. 19, 2003) (noting that it is irrelevant if others are similarly affected by a development if the impacts on the parties are “particular to them, concrete, and [are not impacts] affecting the common rights of all persons”). Second, the appellant must show a reasonable possibility that the Commission decision may affect its particularized interest. In re Bennington Wal-Mart Demolition/Constr. Permit, No. 158-10-11 Vtec, slip op. at 9–10 (Vt. Super. Ct. Env'tl. Div. Apr. 24, 2012) (Walsh, J.) (citations omitted). However, we have rejected the application of any “heightened evidentiary standard, more akin to a merits review” when considering a party’s standing. Id. at 10 n. 5.

Ms. Hemmeter has moved for party status under Criteria 1 and 1(B) (Water Pollution), 1(G) (Wetlands), 4 (Soil Erosion), 8 (Aesthetics), and 10 (Town Plan). We address each criterion in turn.¹

I. Criteria 1 and 1(B)

Criterion 1 requires that a project “not result in undue water . . . pollution.” 10 V.S.A. § 6086(a)(1). Criterion 1(B) states that applicants must demonstrate that “in addition to all other applicable criteria, the development or subdivision will meet any applicable Health and Environmental Conservation Department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.” 10 V.S.A. § 6086(a)(1)(B).

Ms. Hemmeter argues that she has party status under these criteria because the development of the driveway on a “steep” or “very steep” slopes would cause “undue” water pollution in the wetland on Lot 20 downhill from the driveway, which continues onto the Hemmeter property and increase the risk of sedimentation and contamination in the wetland. Further, she argues that the driveway will cause discharges into seeps and springs in the area between the driveway and Anne Burns Road, which flows towards her property.

Ms. Hemmeter has satisfied the threshold required by statute to be entitled to party status with respect to Criteria 1 and 1(B). Applicants, in opposing the motion, seek to address the merits of Ms. Hemmeter’s claims. This is not the standard applicable to motions for party status. See In re Snowstone LLC Stormwater Discharge Authorization, 2021 VT 36, ¶¶17–19, 215 Vt. 587 (citations omitted). To the extent that Applicants argue that the injuries are speculative in that they will not occur due to the fact that the Barton property slopes away from the Hemmeter property, such that the alleged injuries may be speculative or frivolous, the Court disagrees.² It appears uncontested that there is a wetland downhill from the driveway that

¹ The Court notes prior to addressing the merits of the motion, that this decision is limited to whether Ms. Hemmeter has party status to sustain her appeal. This decision does not address whether the application should have a hearing pursuant to Act 250 Rules, Rule 51(D). Compare 10 V.S.A. § 8504(a) and 10 V.S.A. § 8502(7) (setting forth the standing requirements) with Act 250 Rules, Rule 51(D) (requiring a determination of whether or not “substantive issues have been raised under the criteria . . .”).

² Applicants do not address the allegation that the driveway will impact springs and seeps in the area between the driveway and Anne Burns Road, which Ms. Hemmeter alleges will impact her property due to flows along Anne Burns Road.

extends onto the Hemmeter property. It is neither speculative nor frivolous to allege that increased discharges uphill from the wetland may impact the entire wetland downhill from the driveway. Ms. Hemmeter has provided an engineer's affidavit in support of her motion. While the discharges may ultimately not occur due to project design or not be in violation of Criteria 1 or 1(B), that determination will be made on the merits.³

Thus, Ms. Hemmeter's motion for party status with respect to Criteria 1 and 1(B) is **GRANTED**. Further, for the same reasons, we must conclude that Ms. Hemmeter has party status under Criteria 1(G)⁴ as it relates to wetlands, because she has alleged an injury and Applicants' opposition seeks to challenge the merits of that injury, which is not proper at this time. Thus, Ms. Hemmeter's motion for party status with respect to Criterion 1(G) is **GRANTED**.

II. Criterion 4

Criterion 4 requires that a project "will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result." 10 V.S.A. § 6086(a)(4). Ms. Hemmeter alleges that the driveway will discharge water, roadway material, and other debris into a ditch running along Anne Burns Road, which flows towards her property. Further, she alleges that during storms, the driveway will contribute to washouts of Anne Burns Road, which will impact her property through the ditch and her use of the roadway generally. Applicants strongly dispute the merits of this allegation. Again, this is not a reason to deny Ms. Hemmeter party status at this time. Again, Ms. Hemmeter has provided an engineer's affidavit in support of her motion. Thus, Ms. Hemmeter's motion for party status under Criteria 4 is **GRANTED**.

³ To the extent that Applicants argue that Ms. Hemmeter cannot raise issues related to wetlands as they are in the public trust, this is inconsistent with this Court's precedent. See In re N.E. Materials Grp. LLC, No. 35-3-13 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Aug. 21, 2013) (Walsh, J.) (recognizing that a private party had party status under Criterion 1(B) in part due to concerns related to impacts to wetlands).

⁴ Criterion 1(G) requires that a project "will not violate the rules of the Secretary of Natural Resources, as adopted under chapter 37 of this title, relating to significant wetlands." 10 V.S.A. § 6086(a)(1)(G).

III. Criterion 8

Criterion 8 requires that a project “will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.” 10 V.S.A. § 6086(a)(8).

The Hemmeter property and Applicants’ property are both located within the same subdivision, which largely consists of three acre lots. Ms. Hemmeter argues that the inclusion of the driveway over two lots is inconsistent with the subdivision, which consists of 3-acre lots. She alleges that, when she looks at the Property, she would be aware that the development extended over two 3-acre lots, rather than a single 3-acre lot, and that would have an undue adverse effect on aesthetics. In response, Applicants have provided a viewshed analysis that shows that Ms. Hemmeter cannot see the project site.

Ms. Hemmeter’s proposed injury is very thin, particularly because it is largely philosophical because the Barons own both Lots 19 and 20. For example, if the Barons were to place the driveway wholly on Lot 19, the Barons would still retain Lot 20 and, absent reference to a survey or plat, the distinction between Lots 19 and 20 would likely appear unclear or not exist. Even so, Ms. Hemmeter has alleged a reasonable possibility that her interests may be impacted under Criterion 8 such that the Court’s will **GRANT** her motion for party status under the criterion at this time. In so doing, however, we note that Ms. Hemmeter will need to show that there are “substantive issues” under Criterion 8 to warrant a hearing. See Act 250 Rules, Rule 51(D).

IV. Criterion 10

Criterion 10 requires that a project conform with a duly adopted local or regional plan or capital program under 24 V.S.A. Ch. 117. 10 V.S.A. § 6086(a)(10). Every resident of a town has a particularized interest under Criterion 10 to ensure that a project complies with the relevant town plan. Re: John J. Flynn Estate, No. 4C0790-2-EB, Mem. Of Decision, at 7 (Vt. Env’tl. Bd. Oct. 8, 2003). Ms. Hemmeter points to a number of provisions in the Town of Warren Town Plan that she argues Applicants must conform with in this matter. Applicants disagree with this assessment and present the case that the provisions are not binding upon them. It is undisputed that Ms. Hemmeter is a resident of the Town and, therefore, has a particularized interest under Criterion

10. The Court declines to address the merits of her claims currently, however. Thus, we **GRANT** Ms. Hemmeter's motion for party status under Criterion 10.


V. Applicants' Motion to Dismiss

Having reached the above conclusions, Applicants' motion to dismiss is **MOOT** as Ms. Hemmeter has party status under Criteria 1, 1(B), 1(G), 4, 8, and 10.

Conclusion

For the foregoing reasons, we **GRANT** Ms. Hemmeter's motion for party status under Criteria 1, 1(B), 1(G), 4, 8, and 10. Because we grant her motion, the Baron's motion to dismiss Ms. Hemmeter due to lack of party status is **MOOT**.

Electronically signed this 6th day of October 2023 pursuant to V.R.E.F. 9(D)

A handwritten signature in black ink, appearing to read "Tom Walsh", with a stylized, cursive script.

Thomas G. Walsh, Judge
Superior Court, Environmental Division