

¶ 7 (citing Houston v. Town of Waitsfield, 2007 VT 135, ¶ 5, 183 Vt. 543 (mem.) (noting that "the Vermont Constitution, . . . like its federal counterpart, limits the authority of the courts to the determination of actual, live controversies between adverse litigants" (citation omitted))). When courts decide cases that are outside these constitutional limits, they act beyond their jurisdictional authority. Id.

The statutory framework that limits a person's right to appeal a land use determination finds its foundation, in part, in these constitutional limitations. Our Legislature further determined that a person may only appeal a land use determination, such as the amended indirect discharge permit issued by DEC in this case, when they may be deemed to be a "person aggrieved."² The Legislature has defined a "person aggrieved" as "a person who alleges an injury to a particularized interest protected by the provisions of law [applicable to state land use determinations], attributable to an act or decision by [DEC or others] that can be addressed by the environmental court." 10 V.S.A. § 8502(7). We therefore review Appellant's claims to be such a "person aggrieved," as that term is used in this statutory context. For the reasons expressed below, we conclude that Appellant has not put forth sufficient evidence to support a finding that she is a "person aggrieved," or otherwise shown another factual basis to support a finding of party status or standing. For these reasons, we conclude that her appeal must be DISMISSED.

First, we note that because the Permittee has chosen to file a motion to dismiss Appellant as a party, it has set for itself a high standard of factual review. We are directed when considering a motion to dismiss a party or their pleading to regard as true "all well-pleaded factual allegations . . . and all reasonable inferences to be drawn from them, and take[] as false all contravening assertions in the movant's pleadings." Knight v. Rower, 170 Vt. 96, 98 (1999) (citing Thayer v. Herdt, 155 Vt. 448, 456 (1990)). Motions to dismiss are "not favored and rarely granted." Gilman v. Maine Mutual Fire Ins. Co., 2003 VT 55, ¶ 14, 175 Vt. 554 (citing Ass'n of Haystack Prop. Owners v. Sprague, 145 Vt. 443, 446-47 (1985) and 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 598 (1969)).

Even in this favorable light, we have been unable to discern facts that could conceivably support a legal conclusion that Appellant has standing in these permit proceedings. Amended Permit No. ID-9-0043-5 appears to provide authority for extensive spraying and land application of dairy manufacturing by-product. However, Appellant appears to allege that her home is no closer than three and a half miles from the project sites. Appellant complains of damage she previously incurred when her vehicle was sprayed by Permittee's trucks, but does not provide any connection to the damage she once may have suffered, or a fear of that occurring again, and the activities authorized by the permit now under our review. Similarly, Appellant appears to express sincere concerns regarding the impact from Permittee's truck traffic. However, the challenged permit does not authorize that truck traffic. In fact, a challenge to Permittee's underlying Act 250 permit would have been a more appropriate proceeding in which to raise traffic impact concerns; Appellant acknowledges that she was a party to those Act 250 proceedings, suffered an adverse determination at the hands of the District Commission, and chose not to appeal. Those District Commission determinations have therefore become final.

In summary, Appellant appears to raise sincere and perhaps legitimate concerns about the general operation of the Cabot Creamery, but has failed to provide us with a factual basis for addressing those concerns in this proceeding

² 10 V.S.A. § 8504(a)

to determine whether Cabot's application for an amended indirect discharge permit should be granted. Without a factual foundation to support her standing to raise those concerns, we are without the jurisdictional authority to address her concerns in this proceeding. For these reasons, we must DISMISS her appeal.

Thomas S. Durkin, Judge

July 20, 2010
Date

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Date copies sent to: _____ Clerk's Initials _____

Copies sent to:

- Appellant Jessica Miller
- Attorney Ross A. Feldmann for Appellee Agri-Mark, Inc.
- Attorneys Catherine Gjessing and Cielo Marie Mendoza for the Vermont Agency of Natural Resources