

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 130-11-18 Vtec

Hettinger Telecommunications Facility

ENTRY REGARDING MOTION

Count 1, Municipal DRB Other (130-11-18 Vtec)

Title: Motion to Amend Statement of Questions (Motion 1)

Filer: John Luongo

Attorney: Laura L. Wilson

Filed Date: January 23, 2019

Response filed on 01/25/2019 by Attorney William J. Dodge for Applicant Black Diamond Consultants, Inc., and Interested Person Rising Tide Towers, LLC

The motion is GRANTED.

Applicant Black Diamond Consultants, Inc., and Interested Person Rising Tide Towers, LLC, (together, Project Proponents) seek a conditional use permit for a communications tower project, which includes a 190-foot lattice tower (the Project).¹ Project Proponents apply to construct the Project on property owned by Ronald and Donna Hettinger, located at Church Hill Road, Lot 03043, in Norton, Vermont (the Property). The Town of Norton Development Review Board (DRB) approved Project Proponents' permit on November 8, 2018. John Luongo, an adjacent property owner, timely appealed that decision to this Court on November 30, 2018. Mr. Luongo submitted a Statement of Questions posing a single Question on December 17, 2018. A couple of days later, he filed a supplemental Statement of Questions, which introduced another Question.² Presently before the Court is Mr. Luongo's motion for leave to file an amended Statement of Questions (Proposed Statement of Questions).³

We first consider Mr. Luongo's motion to amend with regards to Question 1 of the Proposed Statement of Questions. At a January 14, 2019 status conference, the parties resolved to work together to clarify the single Question in Mr. Luongo's original Statement of Questions.

¹ Our records currently indicate that Black Diamond Consultants, Inc., is the applicant (and appellee) in this matter, while Rising Tide Towers, LLC, is participating as an Interested Person. The filings of these two entities show that they conceive of themselves as co-applicants.

² Project Proponents have filed a motion to dismiss the single Question in Mr. Luongo's supplemental Statement of Questions. We discuss and deny this motion in a contemporaneous Entry Order.

³ Mr. Luongo's amended Statement of Questions includes three Questions, which we read (to paraphrase) to ask: (1) whether the Project will adversely affect the character of the area and is thus inconsistent with the standards in the Agricultural and Forest District; (2) if the Project is actually located in the Rural Residential District, whether it will adversely affect the character of the area and is thus inconsistent with the standards in that district; and (3) if the Project is in the Agricultural and Forest District, whether the proximity of the Rural Residential District to the Project requires the Project to satisfy the standards of both districts. We do not provide this description as a definitive statement of the issues on appeal, but merely for contextual purposes.

Question 1 of the Proposed Statement of Questions is the result of those efforts. Project Proponents encourage us to permit the amendment. Accordingly, we **GRANT** Mr. Luongo's motion to amend with respect to Question 1 of the Proposed Statement of Questions.

Project Proponents do not agree with Questions 2 and 3 of the Proposed Statement of Questions. These Questions are premised on Mr. Luongo's assertion that the Project is either located in the Rural Residential District, or is close enough to it, so that the standards of that district must be considered by this Court when evaluating the merits of the application. Project Proponents argue that because the Project is within the Agricultural and Forest District, and Mr. Luongo has not shown why the standards of nearby districts, no matter how proximate, should be applied to a project in a different district, the proposed Questions are futile.⁴

This Court has interpreted V.R.E.C.P. 5(f) to allow an appellant to amend the Statement of Questions. See, e.g., Laberge Shooting Range JO, No. 96-8-16 Vtec, slip op. at 1 (Vt. Super. Ct. Env'tl. Div. Jan. 4, 2017) (Walsh, J.), *aff'd*, 2018 VT 84. As with motions to amend complaints pursuant to V.R.C.P. 15, "motions to amend a Statement of Questions are to be liberally granted, so long as they do not prejudice the other party" In re Ridgewood Estates Homeowners' Ass'n & Indian Creek Homeowners' Ass'n, No. 57-4-10 Vtec, slip op. at 7 (Vt. Super. Ct. Env'tl. Div. Jan. 26, 2011) (Wright, J.); see also V.R.C.P. 15(a) (mandating that leave to amend "shall be freely given when justice so requires."). Along with considering whether an amendment is prejudicial, we also consider whether it might be frivolous or in bad faith. B & M Realty Act 250 Application, No. 103-8-13 Vtec, slip op. at 2 (Vt. Super. Ct. Env'tl. Div. Nov. 26, 2013) (Walsh, J.) (citations omitted), *rev'd on other grounds by* 2016 VT 114, 203 Vt. 438.

Project Proponents do not assert that any prejudice would result from this amendment. Indeed, at this early stage of the proceedings, before discovery, we can conceive of none. See In re All Metals Recycling, Inc., No. 171-11-11 Vtec, slip op. at 11 (Vt. Super. Ct. Env'tl. Div. Apr. 23, 2016) (Walsh, J.) (finding no prejudice because the proceedings were at an early stage, before hearings were set or discovery occurred), *aff'd*, 2014 VT 101, 197 Vt. 481. Project Proponents also do not argue that the amendment is in bad faith. Instead, they draw on the arguments presented in their motion to dismiss Mr. Luongo's supplemental Statement of Questions, which they filed with their response to the present motion, to argue that the similar Questions in the Proposed Statement of Questions are frivolous for lack of merit.⁵

By this Court's assessment, Questions 2 and 3 of the Proposed Statement of Questions raise issues that could be of importance to our review of the merits in this appeal and are dependent on a factual record. Thus, we cannot conclude that they are frivolous. See Bevins v. King, 143 Vt. 252, 256 (1983) (concluding that a motion to amend an answer was not frivolous because the new defense, if applicable, would have a large impact on the case). At this early stage of the proceedings, with the limited information before us, we cannot conclude that it is

⁴ To the extent Project Proponents also argue that Questions 2 and 3 impermissibly expand the scope of the only Question in Mr. Luongo's supplemental Statement of Questions, we note that this Court has previously concluded that amendments to Statements of Questions can raise new issues not contained in the original Statement of Questions. See Laberge, No. 96-8-16 Vtec at 3 (Jan. 4, 2017). We apply the same reasoning to conclude that amendments can raise new issues beyond the supplemental Statement of Questions, subject to the standards governing motions to amend discussed above.

⁵ The single Question in Mr. Luongo's supplemental Statement of Questions appears to raise the same issue as Question 2 in his subsequent Proposed Statement of Questions. Contrary to Project Proponents' implicit assertion, however, this Court does not apply the motion to dismiss standards when evaluating motions to amend, nor do we consider this the opportunity to resolve the merits of the application.

just to bar Mr. Luongo's Proposed Statement of Questions. Accordingly, we **GRANT** Mr. Luongo's motion to amend in its entirety.

So ordered.

Electronically signed on March 14, 2019 at 11:03 AM pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink, appearing to read "Tom Walsh", with a stylized flourish at the end.

Thomas G. Walsh, Judge
Superior Court, Environmental Division

Notifications:

Municipality Town of Norton

Laura L. Wilson (ERN 4042), Attorney for Appellant John Luongo

Interested Person Michael Branham

For Informational Purposes Only Gina Vigneault

Interested Person Town of Norton

William J. Dodge (ERN 4634), Attorney for Appellee Black Diamond Consultants, Inc.

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