VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00051

Sportsmen, Inc. Permit 2W1334

ENTRY REGARDING MOTION

Title: Motion for Permission to Appeal Interlocutory Order

Filer: Ronald A. Shems, Esq, and Stephen A. Reynes, Esq.

Filed Date: November 11, 2022 (Reply to Memo in Opposition November 18, 2022)

Memorandum in Opposition: Filed by Hans G. Huessy, Esq. November 14, 2022

The Motion is DENIED.

DECISION ON MOTION FOR PERMISSION TO TAKE INTERLOCUTORY APPEAL

Sportsmen, Inc. (Appellant or Sportsmen Inc.) appeals the District Environmental Commission's (District Commission) May 2, 2022 Memorandum of Decision and Order re Motion to Alter Appellant's Act 250 Permit Conditions. In initial pre-trial pleadings, Interested Party Kathy Cooke (Neighbor) asserts that this matter must be conducted On-The-Record (OTR) of the District Commission proceedings. Sportsmen Inc. and the Vermont Natural Resources Board (NRB) offer that this matter must proceed by trial de novo. In an October 25, 2022 Decision, the Court concluded that this matter shall proceed trial de novo.

Currently pending before the Court is Neighbor's motion for permission to take an interlocutory appeal regarding the method of this Court's review, trial de novo or OTR.

In this proceeding, Sportsmen Inc. is represented by Attorney Hans G. Huessy. Attorneys Stephen A. Reynes and Ronald A. Shems represent Neighbor, and Attorney Allison Milbury Stone represents the NRB.

Standard for Considering a Motion for Interlocutory Appeal

When considering a motion for permission to take an interlocutory appeal, the Superior Court "must permit an appeal from an interlocutory ruling or order" if it finds that: "(A) the order or ruling involves a controlling question of law about which there exists substantial

ground for difference of opinion; and (B) an immediate appeal may materially advance the termination of the litigation." V.R.A.P. 5(b)(1)(A)–(B). Although the order to be appealed must meet all criteria, "[t]he three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." In re Pyramid Co. of Burlington, 141 Vt. 294, 302, (1982) (quoting 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3930, at 156 (1977)).

1. Controlling Question of Law:

It is within the Court's discretion to certify the controlling question of law on interlocutory appeal and doing so at the outset will help clarify the Court's analysis. Brown v. Tatro, 134 Vt. 248, 249–50 (1976). The question of law here is whether the proper procedure for this Court's review of the Appellant's Statement of Questions is by trial de novo or by OTR review. See Neighbor's Mot. for Permission to Appeal Interlocutory Order at 4 (filed Nov. 7, 2022). The Court concluded, in its October 25 Order, that this appeal "shall be by **TRIAL DE NOVO**," in which the Court will try "all questions of law or fact" properly raised in the Appellant's Statement of Questions. V.R.E.C.P. 5(g); 10 V.S.A. § 8504(h).

"A question of law is one capable of accurate resolution by an appellate court without the benefit of a factual record." Pyramid Co. of Burlington, 141 Vt at 304. To determine whether it is a "controlling" question of law, however, requires the Court to consider "the potential consequences of the order at issue." Id. at 303. There is a spectrum to this consideration, for example, an order that determines the ultimate outcome of litigation is certainly controlling. Id. Conversely, an order may also "be 'controlling' if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial." Id.

Neighbor's position is that the scope of this Court's review is limited to an OTR review of the evidence that was before the District Commission, while Sportsmen Inc. and the NRB both agree that the scope of this court's review is by trial de novo. Whether this appeal must proceed by de novo trial or OTR review is, no doubt, a question of law capable of accurate resolution without the benefit of a factual record. Whether this procedural question of law can be considered "controlling," however, is debatable. The Court need not reach a conclusion on this prong for purposes of this motion, however, as the Court's consideration of "the potential consequences of the order at issue" is considered and dispositive in the third prong. Id.; see Primavera Familienstifung v. Askin, 139 F. Supp. 2d 567, 570 (S.D.N.Y. 2001) ("Although technically the question of whether there is a controlling issue of law is distinct from the question of whether certification would materially advance the ultimate termination of the litigation, in practice the two questions are closely connected.").

2. Substantial Grounds for Difference of Opinion:

In reviewing the filings on the motion for permission to file an interlocutory appeal, it is clear that the parties have a difference of opinion. Whether the difference of opinion is based on "substantial ground," however, is debatable.

V.R.A.P. 5(b) does not displace this Court's authority and responsibility to decide debated legal issues. Pyramid Co. of Burlington, 141 Vt. at 306. Courts should not be "bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression." Id. (quoting Federal Practice and Procedure § 3930). "[A] standard consistent with the policy underlying this criterion would require a trial court to believe that a reasonable appellate judge could vote for reversal of the challenged order." Id. at 307.

The Court is confident in the soundness of the reasoning set forth in the October 25 Decision. The Court provided several details of why this matter will proceed by Trial de Novo. While Neighbor advances reasons she argues "demonstrate[] substantial disagreement," Neighbors Mot. at 5–6, all these arguments were considered by this Court. See Pyramid Co. of Burlington, 141 Vt. at 306 ("Thus, in interpreting this criterion, the courts should place little stock in the vehemence of disagreeing counsel."). The Court does not again analyze that conclusion nor does it further consider this prong, as the Court finds the final prong dispositive. Given the Court's confidence in the reasoning of the October 25 Order and the fact that Neighbor has failed to identify actual grounds for uncertainty in the law, however, the Court cannot conclude this prong merits granting permission for filing an interlocutory appeal.

3. Materially Advance Termination of Litigation:

Finally, the Court cannot conclude that the interlocutory appeal may materially advance the termination of the litigation. "An interlocutory appeal is proper only if it may advance the *ultimate* termination of a case." Id. at 305. It is not only the theoretical time savings of not convening a trial de novo that the Court must consider, but also the time expended on appeal. Id. at 302, 305 (directing the Court "to consider the probable gains and losses of immediate appeal"). Additionally, in balancing this factor, the Court "must be mindful of this Court's well-established policy of avoiding piecemeal appeals." Id. at 305 (quoting Castle v. Sherburne Corp, 141 Vt. 157, 162 (1982)).

In her motion, Neighbor offers interlocutory appeal will materially advance the termination of the litigation because "by determining the appropriate scope of review at the outset, and the scope of the Environmental Division's jurisdiction in this matter, the matter will be appropriately restricted to only those matters over which the Environmental Division has jurisdiction and will be more expeditiously resolved." Neighbor's Mot. for Permission to Appeal Interlocutory Order at 6–7. Whether considering this matter by trial de novo or OTR, the

Environmental Division's scope of review and jurisdiction are the same. The Court will consider the issues raised in the Statement of Questions. Considering the Statement of Questions by trial de novo does not somehow expand our jurisdiction. Rather, the difference relates to whether the Environmental Division holds a trial or uses a record from the District Commission.[1] Both the scope of review and our jurisdiction is unchanged. Thus, the outcome does not significantly narrow the range of issues, claims, or defenses on review. Pyramid Co. of Burlington, 141 Vt. at 303.

Additionally, the speed by which the Environmental Division concludes a non-complex trial de novo matter as compared to an OTR matter is not significantly different. The Environmental Division's Disposition Guidelines for these methods of review are only a few months apart. As such, the theoretical time savings of not convening a trial de novo is substantially outweighed by the delay from the time expended on appeal. See id. at 305.

Lastly, even if the Court considers this matter OTR, based upon briefs and argument regarding the pending motion, it is very likely that Sportsmen Inc. will move that the Court open the evidence pursuant to Act 250 Rule 31(A)(1) to consider additional evidence. Should such a motion be granted, this will be akin to a mini trial de novo within an OTR review.

Considering the possibility of appeal(s) to the Supreme Court, the efficiency gained from granting the present motion is uncertain and at best, de minimis. If the present motion is granted, the matter would transfer up to the Supreme Court. After briefing and argument, the Supreme Court will decide this limited dispute and the matter would come back down to the Environmental Division for trial. Once the Environmental Division concludes its review and issues the decision, it is very likely that this matter would again be appealed up to the Supreme Court on the merits of what is decided.

If the present motion is denied, however, the Environmental Division would conduct a trial de novo, issue a written decision, and the matter may be appealed up to the Supreme

[1] The Court is unsure how the record is preserved or by what statute or rule the record would be conveyed to the Court. There is no authority to have the District Commission certify and send its record to the Court for an on-the-record review. Cf. V.R.E.C.P. 5(h)(1)–(2) (describing the procedures for certifying and transmitting the record in appeals from either an appropriate municipal panels or the Commissioner of Forests, Parks, and Recreation); cf. also 10 V.S.A. § 8504(p)(2) (authorizing the Secretary of Natural Resources to certify and transfer the administrative record to the Environmental Division only when "there is an appeal of a decision of a District Commission, and the applicant used a decision of the Secretary based on that record to create a presumption under a criterion of subsection 6086(a) of this title that is at issue in the appeal"). Because the legislature has contemplated express and limited exceptions for this Court to conduct an on-the-record review—as well as provisions of limited application for certifying and transferring those records to this Court—it follows that if the legislature had intended for the present appeal to be on-the-record, it would have provided the authority to certify a record. See In re D.C., 2016 VT 72, ¶ 31, 202 Vt. 340 (*expressio unius est exclusio alterius*).

Court. The trial de novo versus OTR review issue, as well any substantive issues that arose during the trial, would then be before the Supreme Court in one single appeal.

Both options have inherent inefficiencies. First, if the matter goes up on interlocutory appeal and the Supreme Court affirms our October 25 Order, all time up at the Supreme Court is lost. Second, if no interlocutory appeal is considered and the Environmental Division considers the matter trial de novo, and then on appeal, the Supreme Court reverses and remands for an on-the record review, then the first trial time is lost.

As such, there is no clear answer as to whether an Interlocutory Appeal will materially advance termination of litigation. Thus, the Court is left giving strong weight to the principle that "[i]nterlocutory appeals are an exception to the normal restriction of appellate jurisdiction to the review of final judgments." Pyramid Co. of Burlington, 141 Vt. at 300. Furthermore, the Court is concerned that piecemeal appellate review causes unnecessary delay and expense and wastes scarce judicial resources. Id. As such, this prong supports denying Neighbor's motion for permission to file an interlocutory appeal.

CONCLUSION

Based on our reasoning above, the Court concludes that the probable gains of an immediate appeal are uncertain and outweighed by the probable losses. Accordingly, the Court **DENIES** Appellant's motion for permission to take interlocutory appeal.

Electronically signed November 22, 2022 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division