

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00092

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| Wheeler Parcel Act 250 Determination |
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DECISION ON MOTION TO DISMISS

Title: Motion to Dismiss (Motion: 10)
Filer: Christopher Roy, Esq.
Filed Date: May 22, 2023

Appellants' Response to Motion to Dismiss filed on June 6, 2023, by James Leas.

The motion is DENIED.

This appeal was filed on September 22, 2022. The matter challenges an Act 250 permit approval issued by the District 4 Environmental Commission (District Commission) to Blackrock Construction, LLC (Blackrock) for the development of a 32-unit residential project at the intersection of Dorset Street and Park Road in South Burlington, Vermont (the Project). Inverness Homeowners' Association, Glen Eagles Homeowners' Association, Villas at Water Town Hill Homeowners' Association, Neighbor's Committee to Stope Neighborhood Blasting, and James Leas (together, Appellants) have appealed the District Commission's decision to this Court. Presently before the Court is a motion to dismiss this appeal due to Appellants' failure to file a Statement of Questions consistent with this Court's rules. Appellants oppose the motion.

Since September 2022, the Court has addressed a handful of preliminary motions filed by the parties. Pursuant to the Environmental Division Disposition Guidelines, a complex Act 250 matter such as this should be resolved within 18 months of the appeal being filed. We are now 9 months into this appeal and remain at the preliminary stages of this matter because the scope of review, as defined by Appellants' Statement of Questions, is still in dispute. The Court therefore undertakes specific action in this decision to move the matter forward.

This is the second time that concerns related to Appellants' Statement of Questions have been before the Court on pre-trial motion. Appellants original Statement of Questions was filed on November 27, 2022 and was 12 pages long and contained 26 Questions, many of which with multiple subparts. In a December 29, 2022 motion by Blackrock, Blackrock asked the Court to strike Appellants' Questions and replace them with five proposed Questions addressing the Project's compliance with the five specific Act 250 criteria that Appellants retained party status under: Criterion 1 (air), Criterion 5(A) (traffic), Criterion 8 (aesthetics and noise), and Criterion 10 (municipal and regional plans). The Court denied Blackrock's request to strike on the grounds that "it appears possible for Appellants to revise their Questions" in a manner that strikes a balance between clarity and specificity. In re Wheeler Parcel, No. 22-ENV-00092, slip op. at 11 (Vt. Super. Ct. Envtl. Div. Apr. 11, 2023) (Walsh, J.). This Court afforded Appellants the opportunity to file revised Questions consistent with practice and procedure.

Appellants filed their revised Questions on May 9, 2023. The revised Statement of Questions is 8 pages long and contains 27 Questions. The revised Questions remain very lengthy with many Questions having multiple sub-parts. The revised Questions do not conform to this Court's practice or procedure and are, much like Appellants' first Statement of Questions, not a "short, concise and plain statement." In re Northeast Materials Group, LLC, No. 143-10-12 Vtec, slip op at 3 (Vt. Super. Ct. Envtl. Div. May 9, 2013) (Walsh, J.) (citing V.R.C.P. 8(a)). A large majority of Appellants' revised Questions ask this Court to make factual findings. Presumably, Neighbors believe that these factual issues will weigh against a conclusion that the Project complies with various Act 250 criteria before this Court. This is not the purpose of a Statement of Questions. A Statement of Questions is meant to provide notice of the "issue[s] to be adjudicated at trial." V.R.E.C.P. 5(f). The purpose of a Statement of Questions is not to direct the Court to make specific factual findings which may weigh in favor or against the adjudication of a legal issue properly before the Court.

The Court denies the motion to dismiss the entirety of this appeal. The Court, however, concludes that the revised Statement of Questions is inconsistent with this Court's practice, applicable rules, and the stated purpose of the Statement of Questions. Appellants' revised

Questions fail to heed the directive of the Court's April 11, 2023 order. As such, the Court strikes the revised Questions and replaces them with the following 5 restated Questions:

1. Does the Project comply with Act 250 Criterion 1 (air) with respect to noise, particulates, exhaust, and chemicals?
2. Does the Project comply with Act 250 Criterion 5A with respect to traffic?
3. Does the Project comply with Act 250 Criterion 8 for aesthetics?
4. Does the Project comply with Act 250 Criterion 8 for noise?
5. Does the Project comply with Act 250 Criterion 10 with respect to the relevant municipal and regional plans?

We believe that these Questions inherently include all of the legal issues Appellants have attempted to raise in their revised Statement of Questions. In light of the unique circumstances presented here, the Court specifically grants Appellants leave to move to amend or alter the Questions as restated herein. Such motion must be filed, if at all, on or before July 21, 2023.

For the reasons set forth herein, we **DENY** Blackrock's motion to dismiss. For the above reasons, Appellants' revised Questions are stricken and replaced with the above 5 Questions.

Electronically signed July 12, 2023, pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is stylized, with the first name "Tom" and the last name "Walsh" written in a cursive-like script.

Thomas G. Walsh, Judge
Superior Court, Environmental Division