STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 29-3-16 Vtec

Korrow Real Estate, LLC Act 250 Permit Amendment Application	DECISION ON MOTION

Decision on Motion to Reconsider

This is an appeal concerning an Act 250 land use permit amendment application. On February 12, 2016, the District 5 Environmental Commission denied the as-built permit amendment application for a propane truck storage building filed by Korrow Real Estate, LLC. The matter is now before us on the Vermont Natural Resources Board's ("NRB") motion to reconsider the decisions we previously issued in response to the pre-trial motions noted below.

Appellant is represented by Atty. L. Brooke Dingledine, and the NRB is represented by Atty. Peter Gill. Atty. Melanie Kehne entered an appearance on behalf of Interested Persons Division for Historic Preservation (DHP) of the Vermont Agency of Commerce and Community Development's Department of Housing and Community Development, and the Vermont Agency of Natural Resources (ANR), and filed a memorandum in support of the NRB's motion to reconsider.

Background

Appellant Korrow Real Estate LLC ("Korrow") filed its original Statement of Questions on April 13, 2016. The original six Questions raise the issues of whether the project triggers Act 250 jurisdiction (Questions 1–3); whether the project is located within a designated and protected Act 250 Floodway (Questions 4–6); whether the project complies with the applicable Act 250 Shoreline criteria (Question 6) and whether the project complies with the applicable Local and Regional Plans criteria (Question 6). The originally-filed Questions raise no issues related to Act 250 Criterion 8 in general, or to the specific part of Criterion 8 that deals with historic sites.

The Court held a pretrial conference on May 9, 2016, issued its initial Scheduling Order on June 10, 2016, and amended that Scheduling Order on July 28, 2016 by extending the pretrial motion deadline.

NRB sent discovery requests to Korrow on June 29, 2016, well before the September 30, 2016 scheduling deadline, and Korrow sent timely responses to these requests. The discovery requests did not touch on Criterion 8, because that criterion was not raised in the Statement of Questions. After engaging in discovery, NRB filed a motion for partial summary judgment on Questions 1–3 on August 25, 2016. Korrow did not respond to the motion, but subsequently filed a motion to voluntarily dismiss Questions 1–3, which we granted. NRB asserts that because these Questions were dismissed, it did not disclose any expert witnesses, and the deadline for such disclosure passed on October 31, 2016. NRB further asserts that it did not file trial unavailability dates with the Court based on representations that Korrow intended to move to voluntarily dismiss the remaining Questions: Questions 4–6.

Korrow filed a motion to dismiss Questions 4–6 on November 14, 2016. The motion also asked to amend the Statement of Questions by adding one new question (Question 7) related to the part of Criterion 8 that addresses historic sites, specifically in relation to the preservation of a barn on the project site. We granted that motion by Entry Order the following day. NRB subsequently filed this motion to reconsider, and ANR and DHP jointly filed a memorandum in support of that motion. In its response to the motion to reconsider, Korrow clarifies that its offer to voluntarily dismiss Questions 4–6 is conditioned on the addition of Question 7, and that if Question 7 is not added, it wishes to withdraw its voluntarily dismissal of Questions 4–6.

Discussion

Civil Rule 59(e) "codifie[s our] inherent power to open and correct, modify, or vacate [our prior] judgments." In re SP Land Co., LLC, 2011 VT 104, ¶ 16, 190 Vt. 418 (quoting Drumheller v. Drumheller, 2009 VT 23, ¶ 28, 185 Vt. 417). The Rule allows us "considerable discretion" in considering such a motion. Id.

Having read the representations set out by NRB in its motion to reconsider, some of which appear to be at odds with representations made by Korrow in its motion to amend, and because

the NRB did not have an opportunity to respond to the motion to amend before we ruled on it,[1] we have decided to reconsider our November 15, 2016 Entry Order.

A Statement of Questions "functions as a cross between a complaint filed before the Civil Division and a statement of issues filed before the Vermont Supreme Court." In re Conlon CU Permit, No. 2-1-12 Vtec, slip op at 1 (Vt. Super. Ct Envtl. Div. May 10, 2012) (Durkin, J.) (citation omitted). Like a civil complaint, it puts other parties on notice of the issues to be decided during litigation; like a supreme court appeal, it also limits the scope of issues to be addressed. Id.

Like motions to amend complaints pursuant to V.R.C.P. 15, we generally take a liberal view to granting a motion to amend a Statement of Questions. Buchwald Home Occupation CU Permit, No. 181-12-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Apr. 1, 2014) (Walsh, J.). In doing so, we will consider "whether there has been undue delay or bad faith by the moving party, whether the amendment will prejudice other parties, and whether the amendment is futile." Id. (citing Colby v. Umbrella, Inc., 2008 VT 20, ¶ 4, 184 Vt. 1[2]). We may deny a motion on grounds of prejudice, "for example, where a motion to amend [is] submitted after trial, after a statement of questions [has] already been amended, or after a motion for summary judgment [has been] denied." In re All Metals Recycling, Inc. Discretionary Permit Application, No. 171-11-11 Vtec, slip op. at 10 (Vt. Super. Ct. Envtl. Div. Apr. 23, 2012) (Walsh, J.).

Despite the principal for liberally allowing amendments, the circumstances and facts presented here cause us to reconsider our prior determination and to now deny the motion to amend as to the addition of Question 7.

I. Undue Delay

In determining whether a delay in filing a motion to amend is undue, we have in the past considered the amount of time that has passed since the litigation began, the steps that have

[1] NRB had a right to respond to the motion pursuant to V.R.C.P. 78.

[2] Under the civil rule, a motion to amend is generally granted, and is only to be denied in cases of "(1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposition party." Colby v. Umbrella, 2008 VT 20, ¶ 4, 184 Vt. 1 (quoting Perkins v. Windsor Hosp. Corp., 142 Vt. 305, 313 (1982)). Colby also discusses the reasons underlying the liberal allowance for amendments: to provide a "maximum opportunity for each claim to be decided on its merits rather than on a procedural technicality"; to provide notice of the "nature of the claim or defense"; and to "enable a party to assert matters that were overlooked or unknown to him at an earlier stage in the proceedings." Id. (quoting Bevins v. King, 143 Vt. 252, 255 (1983)).

been taken by the court and the parties in moving the litigation forward, and the reason for the delay.

We are more likely to grant a motion to amend a statement of questions filed "at [an] early stage of the litigation." In re Northeast Materials Group, LLC, No. 35-3-13 Vtec, slip op. at 1 (Vt. Envtl. Ct. Jul. 2, 2013) (Walsh, J.) (concluding no undue delay where motion to amend was filed less than three months after notice of appeal). We may also grant a motion to amend that is filed, as in this case, later in the litigation, provided that the moving party has "a reasonable explanation for the delay." E.g. In re Huntington Remodeling Application, No. 210-10-07 Vtec, slip op. at 4–5 (Vt. Envtl. Ct. Nov. 5, 2008) (Durkin, J.) (granting motion filed seven months after original Statement of Questions, in part because of moving party's reasonable explanation).

Here, as in Huntington, the motion has been filed later in the proceedings, seven months after the original Statement of Questions. We are less inclined to grant such a motion absent a reasonable explanation.

We also look to the steps taken by the parties to move the litigation forward. For example, we are more likely to find there is no undue delay if the parties have not yet engaged in discovery. See, e.g., All Metals Recycling, No. 171-11-11 Vtec at 11 (Apr. 23, 2012) (allowing amendment in part because "no discovery has occurred"). We may even grant a motion to amend while discovery is ongoing, provided the parties will be able to incorporate the amended issue into ongoing discovery efforts. See B & M Realty Act 250 Application, No. 103-8-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Nov. 26, 2013) (Walsh, J.).

Here, Korrow suggests that discovery may be ongoing, or incomplete, because the NRB has not made any discovery requests regarding Questions 4–6. Our reading of the NRB's motion to reconsider, however, indicates that discovery has been completed. The NRB states in its motion that it issued its discovery requests, Korrow responded, and that the NRB later refrained from filing its unavailability dates for trial on the understanding that Korrow was going to move to dismiss Questions 4–6, which were then the only remaining Questions to be considered in this appeal. This suggests that the NRB completed all discovery it intended to carry out on all of the questions on appeal, and that it was ready to go to trial. That the parties have completed discovery suggests that allowing new legal issues into matter will likely cause undue delay.

A motion to amend is more likely to succeed if the parties have not yet engaged in pre-trial motion practice. E.g. Appeal of Town of Fairfax, No. 45-3-03 Vtec, slip op. at 5 (Vt. Envtl. Ct. June 13, 2005) (Wright, J.) (denying motion to amend as prejudicial, in part because summary judgment motion had already been filed and ruled on); B & M Realty, No. 103-8-13 Vtec at 2 (Nov. 26, 2013) (granting motion to amend, noting that parties still have nearly five months before reaching deadline to file pretrial motions).

Here, the parties have already engaged in pretrial motion practice. The NRB filed a partial motion for summary judgment on Questions 1–3 on August 25, 2016. Korrow subsequently filed a motion to voluntarily dismiss those Questions, and we granted both motions. That the parties have engaged in motion practice weighs against finding that the delay here is reasonable.

We will further consider steps that the Court has taken to move the litigation forward, including issuing a scheduling order. Buchwald, No. 181-12-13 Vtec at 2 (Apr. 1, 2014) (granting motion to amend in part because it was filed within the time frame for such motions established by the Court).

Here, the original Scheduling Order instructed that any pretrial motions, "except those based on circumstances that arise after the cut-off date or a motion to dismiss for lack of subject matter jurisdiction, shall be filed by August 1, 2016." Korrow's motion to amend was filed after this deadline. Korrow argues that its motion to amend falls into the Scheduling Order's allowance for pretrial motions based on newly-arising issues.

This brings us to our last, and perhaps most important, point: we may determine whether a delay is undue based on the reason for the delay. Here, Korrow submits that it only recently investigated why the barn preservation condition was included in the permit in the first place, and that investigation led it to question whether the condition is warranted. We do not believe that this justifies the delay. Korrow could have looked into why the condition was included as soon as the District Commission issued the permit on February 12, 2016. If Korrow then wanted to challenge that condition, it could have done so either before the District Commission or in its original Statement of Questions, which it filed with this Court two months after the permit was issued. Instead, Korrow has waited nine months since the permit was issued, and seven months

since it filed the original Statement of Questions, to decide that it wants to challenge the barn preservation condition.

Because of the amount of time that has passed since this matter was appealed to this Court, because the parties have already engaged in discovery and pretrial motion practice, because the motion to amend was filed beyond the deadline set in the Scheduling Order, and because the delay was not due to any newly-discovered information or other emergent circumstance, we conclude that the delay in filing the motion to amend is undue.

II. Prejudice

Second, we conclude that the reconsidered motion to amend must be denied on grounds of prejudice. This stems in part from the issue of undue delay described above. Granting the motion would prejudice the NRB by forcing it to go through discovery and pretrial motion practice a second time, and possibly securing an expert witness. Because less than a month remains until trial,[3] NRB would also be prejudiced by trying to prepare for a new issue in a short time; or, if we move the trial date back, the NRB will be prejudiced by not obtaining a speedy resolution.

Granting the motion to amend may also be prejudicial to DHP. DHP entered an appearance in this matter, after NRB informed it of Korrow's motion to amend, because proposed Question 7 raises an "issue of direct concern to DHP." DHP's Memorandum in Support of Motion to Reconsider at 1. NRB points out in its motion to reconsider that it, too, would be prejudiced by DHP's lack of involvement in this case, because NRB would have relied on DHP's expertise on historic sites to address any questions related to Criterion 8.

The prejudice that would arise if we were to allow our granting of the motion to amend to remain unchanged is due in part to the fact that the issue raised in Question 7 is not related to any of the legal issues set out in the original Statement of Questions. See Huntington Remodeling, No. 210-10-07 Vtec at 4–5 (Nov. 5, 2008) (holding that amendment would not be prejudicial, in part, because "the issues raised by [the] amended Statement of Questions are closely related to the issues raised in the initial Statement of Questions"). As the NRB points out, raising an entirely new legal issue is akin to filing a new appeal, and would in some respect return

[3] The merits hearing was recently rescheduled, on Korrow's motion to continue, from February 9, 2017 to March 9, 2017.

the parties back to the start of the litigation process. It would undermine the purpose of the Statement of Questions, as set out above: to put the parties on notice of the issues on appeal at the start of the appeal, and to limit the scope of appeal.

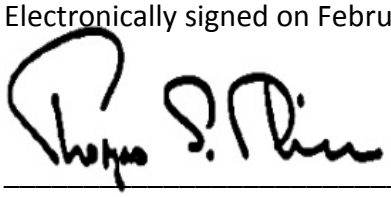
Because of the delay in filing the motion to amend, and the relatively short time remaining until trial; because of the late notice of the new issue to DHP; and because Question 7 raises an issue not addressed, either explicitly or implicitly, in the original Statement of Questions, we conclude that granting the motion to amend would prejudice the NRB and DHP.

III. Conclusion

For all the reasons stated above, the Court does hereby **GRANT** the motion for reconsideration filed by the NRB and, as a consequence of that reconsideration, we do hereby **STRIKE** our November 15, 2016 Entry Order granting Appellant Korrow's motion to amend its Statement of Questions by adding Question 7 and dismissing Questions 4, 5, and 6.

This Decision therefore leaves Questions 4, 5, and 6 for adjudication. A final pre-trial conference has already been set for Wednesday, February 22, 2017; the trial had already been scheduled for Thursday, March 9, 2017 at the Civil Division of the Washington Superior Court. The parties are asked to plan accordingly.

Electronically signed on February 15, 2017 at Newfane, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Judge
Environmental Division