

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 91-8-16 Vtec

Lafarr WW & WS Permit

DECISION ON MOTION

Decision on Motion for Summary Judgment

This is an appeal by Michael Gingras (Appellant or Mr. Gingras) challenging the Agency of Natural Resources' (ANR) decision to grant a wastewater system and potable water supply permit to Michael and Diane Lafarr for their property in the Town of Swanton (the Town). Appellant filed a motion for summary judgment on November 22, 2016, and the LaFarrs and ANR filed timely responses.

The Lafarrs are represented by Brian P. Hehir, Esq.; Mr. Gingras is represented by Nicole A. Killoran, Esq.; and ANR is represented by Diane M. Sherman, Esq.

Discussion

This matter comes before us pursuant to 10 V.S.A. §§ 1977 and 8503(a)(1)(K), and V.R.E.C.P. 5. Our review is de novo. V.R.E.C.P. 5(g).

We grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The moving party must support factual assertions with

specific citations to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.

Id. 56(c)(1)(A).

In determining whether there is any dispute over a material fact, "we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted). "Further, the nonmoving party receives the

benefit of all reasonable doubts and inferences.” Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted).

The LaFarrs’ response makes no allegations related to the material facts set out in support of the summary judgment motion.¹ We therefore accept the facts as presented by Appellant for the purposes of deciding this motion.

Factual Background

1. Appellant owns property at 173 Lakewood Drive in Swanton (the Gingras property), and the Lafarrs own adjacent property at 181 Lakewood Drive (the Lafarr property). The eastern edge of the Lafarr property shares a boundary line with the western edge of the Gingras property.

2. In 2014, Appellant applied for, and was granted, a permit for a wastewater disposal system for the Gingras property (the Gingras Permit). Mot. Summ. J. Ex. C (permit application), D (plans for permit application), and F (approved permit).

3. The Gingras Permit is for a mound system, and the site plan includes an “isolation zone” extending in an oval 200 feet from the mound system.² Id. Ex. D at sheet C-2, C-3. The isolation zone extends onto the Lafarr property. The system is designed for a flow of 490 gallons per day.

4. The Lafarrs appealed the Gingras Permit, but that appeal was dismissed by stipulation in January 2015. Mot. Summ. J. Ex. H (notice of appeal) and I (stipulated motion to dismiss).

5. In June 2016, the Lafarrs applied for an amendment to an existing wastewater and water supply permit for the Lafarr property. Mot. Summ. J. Ex. A (permit application) and B (plans for permit application). The application includes plans to add a drilled well for potable water (the Lafarr Well). The plans depict a 100-foot circle around the Lafarr Well which extends onto the Gingras property. The well is designed for a flow of 420 gallons per day, and a maximum daily demand of 0.58333 gallons per minute.

6. The Lafarr plans do not depict any wastewater systems on the Gingras property. However, a comparison of the Gingras plans and the Lafarr plans appears to show that the Lafarr

¹ The response calls into question whether a subdivision plat for the Gingras property was properly filed. This is not material to the issue on appeal, and we therefore do not address it in the statement of facts recited here. We discuss the subdivision issue in further detail below.

² The source, significance and relevance of the 200-foot “isolation zone” is unclear from the record now before us.

plans propose to place the Lafarr Well within the 200-foot isolation zone of the Gingras mound system. Mot. Summ. J. Ex. E (side-by-side comparison of portions of plans showing Lafarr Well and Gingras mound system).

7. The Lafarrs' application, including for the Lafarr Well, was approved in July 2016 as #WW-6-0345-2 (the Lafarr permit). Ex. G (approved permit).

Analysis

I. Failure to Comply with Required Isolation Distances

Vermont's Wastewater Rules require specific isolation distances between parts of a wastewater system and various landscape features and improvements. Wastewater System and Potable Water Supply Rule § 1-807, 16-3 Vt. Code R. § 300:1-807 (WL) (2016).

To determine the isolation distance between potable water supplies and leachfields,³ the Wastewater Rules instruct one to refer to Appendix A of the Vermont Water Supply Rule. Id. note (b).

Appendix A of the Water Supply Rule requires certain "horizontal isolation distances between wells and potential sources of contamination." Water Supply Rule App. A § 11.4.0, 16-3 Vt. Code R. § 500. Pursuant to the Rule, water sources that provide fewer than 2,000 gallons per day with a maximum daily demand of less than 1.9 gallons per minute, such as the Lafarr Well, must be located at least 100 feet from "sewage system disposal fields." Id. Table A11-2.

In his motion for summary judgment, Appellant argues that the Lafarr permit should not have been approved, because the Lafarr Well is within the 200-foot isolation zone of the Gingras septic mound. We are unaware, however, what this 200-foot isolation zone signifies or how it applies to the facts before us.⁴ As explained above, the Wastewater and Water Supply Rules

³ The Gingras permit is for a mound system. The Wastewater Rules' definition of "leachfield" includes "mound system" as an example of a leachfield. Wastewater System and Potable Water Supply Rule § 1-201(a)(35). The Rules also explain that isolation distances between water supplies and mound systems are measured "from the edge of the minimum required effective basal area of the mound wastewater disposal system or from the edge of the absorption trench or bed within the mound system, whichever is closer." Id. § 1-913(b)(5).

⁴ Vermont's Indirect Discharge Rules call for a 200-foot isolation distance between a mound disposal system and a drilled well. Indirect Discharge Rules §§ 14-1501, 14-1401 Table 21, 16-3 Vt. Code R. § 302 (WL) (2016). However, this only applies to systems with over 6,500 gallon-per-day capacity, and therefore does not apply to the Gingras septic mound, which has a 490 gallon-per-day capacity. Id. § 14-101.

require a 100-foot separation between the Lafarr Well and the Gingras septic mound. It is unclear, based on the evidence before us, whether the Lafarr Well and the Gingras septic mound are more than 100 feet apart.

Because the evidence is unclear on this point, we must infer that it is possible that the Lafarr Well complies with the proper isolation distances. Robertson, 2004 VT 15, ¶ 15 (on summary judgment, reasonable doubts and inferences are construed in favor of non-moving party). We are therefore unable to grant summary judgment based on the theory that the Lafarr Well is too close to the Gingras septic mound.

II. Failure to Identify and Describe Adjacent Wastewater Systems

Under the Wastewater Rules, applications for water supply permits must include a description of permitted wastewater systems on adjacent properties “that may be potentially affected by the project or that may potentially affect the project design.” Wastewater System and Potable Water Supply Rule Appendix 6-A, § 6-A-01(a)(11). Similarly, the Water Supply Rule requires water source site plans to include “potential sources of contamination within the distances listed in Appendix A Part 11 Tables 11-1 and 11-2.” Water Supply Rule App. A. § 11.2.2(c). As noted above, Table 11-2 requires a 100-foot separation between the Lafarr Well and any septic mound. Included below Table 11-2 is a sample, labeled Figure 11-1, of how the minimum separation distance should be depicted on site plans.

While the evidence before us does not show the exact distance between the Lafarr Well and the Gingras septic mound, it does show that the well and mound are close enough to conclude that the mound may potentially affect the well. The septic mound—as a permitted wastewater system on an adjacent property which may potentially affect the Lafarr Well project design, and which may be inside the minimum isolation distance—should have been included in the site plan for the Lafarr permit.

Failure to include such information is grounds for revoking the permit. See Wastewater System and Potable Water Supply Rule § 1-404. We are reluctant, however, to summarily deny the application based on this lack of information. While the fact of the omission is undisputed, we do not believe that the omission requires us to deny the permit application as a matter of law at this stage of the case before evidence is offered at trial. Instead, we will resolve the question

on the merits by allowing the Lafarrs to offer evidence at trial showing that their permit application should be approved. See In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199, 2009 VT 124, ¶ 9, 187 Vt. 142 (in a de novo hearing before the Environmental Division, permit applicant bears the burden of showing the permit should be approved).

For these reasons, the motion for summary judgment is **DENIED**.

III. The Lafarrs' Request for Abeyance

The Lafarrs argue that the Gingras permit “is predicated upon valid subdivision approval by the Town of Swanton.” Resp. to Mot. Summ. J. at 1. They contend that Appellant’s subdivision approval is invalid, and they appear to suggest that this renders the Gingras wastewater and water supply permit invalid. The Lafarrs ask the Court to hold the current matter in abeyance until the subdivision question is resolved. Appellant responds that the subdivision approval is valid, but adds that this is not material to the question at hand.

Although this fact is disputed, we agree with Appellant that it is not material to the matter before us, because failure to perfect subdivision approval does not render the wastewater and water supply permit invalid. Rather, the Gingras wastewater and water supply permit requires the permittee to obtain all necessary state and local permits prior to construction of the permitted wastewater system. There is no suggestion that this permit condition has been violated.

While the validity of the Gingras wastewater and water supply permit is material to determining whether the Lafarr permit is valid, the evidence and argument presented by the Lafarrs regarding subdivision approval does not put the validity of the Gingras permit into question. The issue of subdivision approval is therefore neither material nor relevant to determining whether the Lafarr permit application should be approved. The Lafarrs’ request for abeyance is therefore **DENIED**.

IV. ANR Request for Stay

In its response to the motion for summary judgment, ANR asks the Court to stay the Lafarrs’ permit pending the resolution of this matter.

We consider four factors in determining whether to grant a request for a stay:

(1) likelihood of success on the merits; (2) irreparable harm to the moving party should the stay be denied; (3) substantial harm to other parties should the stay be granted; and (4) the best interests of the public.

110 East Spring Street CU, No. 11-2-16 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Apr. 22, 2016) (Walsh, J.) (citing In re Tariff Filing of New England Tel. and Tel. Co., 145 Vt. 309, 311 (1984)).

Here, ANR argues that a well which is drilled too close to a wastewater system may become contaminated and thereby become dangerous to any potential users, and notes that the impact of a stay on the Lafarrs will be minimal, as they are unlikely to attempt to drill a well in the middle of the winter. Because of the potential contamination risk, and because of the minimal impact a stay would have on the Lafarrs, the request for a stay is **GRANTED** until further order from the Court.

Conclusion

Mr. Gingras' motion for summary judgment is **DENIED**. The Lafarrs' request for abeyance is **DENIED**. ANR's request for a stay is **GRANTED** until further order from the Court.

Please see the enclosed notice of status conference. The parties should be prepared to establish a pre-trial schedule at the status conference.

Electronically signed on January 06, 2017 at 01:46 PM pursuant to V.R.E.F. 7(d).



Thomas G. Walsh, Judge
Superior Court, Environmental Division