VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 20-ENV-00010

Burton Corporation Conditional Use Appeal
(Burlington DRB Approval of #20-0854CA/CU)

ENTRY REGARDING MOTION

Title: Motion to Clarify and Amend Appellants' Statement of Questions (Motion: 5)

Filer: James A. Dumont, attorney for CRZ Group

Filed Date: March 18, 2022

Response in Opposition, filed on April 1, 2022, by Malachi T. Brennan, attorney for Burton Corporation

Reply in Support of Motion, filed April 15, 2022, by James A. Dumont, Attorney for the CRZ Group

The motion is GRANTED IN PART.

The CRZ Group ("Appellants") seek to amend the Statement of Questions they filed in this appeal from the City of Burlington Development Review Board ("DRB") decision approving the Burton Corporation's ("Burton") application for a conditional use permit. The application concerns Burton's proposal to convert a portion of its developed property at 266 Queen City Road into a performing arts center. Appellants initiated this appeal and filed their original Statement of Questions without representation by counsel, prior to Attorney Dumont's notice of appearance. In their Amended Statement of Questions, Appellants propose changes to the wording of Question 6 and the addition of new questions numbered 6.1, 6.2, 6.3, 6.4, and 28. Burton opposes Amended Questions 6.1 (in part), 6.2, and 6.3, but does not object to the other amendments in Appellants' motion.

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 limits the scope of issues to be addressed. Id; V.R.E.C.P. 5(f). Appellants to the Environmental Division may also amend their Statement of Questions once as a matter of course in accordance with V.R.C.P. 15(a) as with a complaint in a civil proceeding. Blue Flame Gas Co. Inc. Site Plan & Conditional Use Application, No. 20-ENV-00011, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Dec. 6, 2021) (Durkin, J.).

After the time period provided by V.R.C.P. 15(a) passes, as it has in this matter, the Court may still allow amendments through pretrial orders. *See* V.R.E.C.P. 5(f); In re Laberge Shooting Range,

No. 96-8-16 Vtec, slip op. at 2 – 3 (Vt. Super. Ct. Envtl. Div. Jan. 4, 2017) (Walsh, J.). While remaining "mindful of the Vermont tradition of liberally allowing amendments to pleadings," the Court evaluates the appropriateness of proposed amendments in relation to certain factors. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 4, 184 Vt. 1. We may deny a motion where "there has been undue delay or bad faith, prejudice will result, or the amendment is futile." Burns 12 Weston Street NOV, No. 75-7-18 Vtec, slip op. at 2 (Aug. 8, 2019) (citing Colby, 2008 VT 20, ¶ 4). An amendment may be futile, for example, if it would not survive a motion to dismiss. Werner Conditional Use, No. 44-4-16 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Aug. 31, 2016) (Durkin, J.) (citing Prive v. Vt. Asbestos Grp., 2010 VT 2, ¶ 13, 187 Vt. 280) ("[T]he Court may deny motions to amend if the amendment would be 'futile,' i.e., if the added claims would not survive a motion to dismiss"); In re Zlotoff Foundation Inc. NOV (2), No. 69-6-19 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Sept. 24, 2020) (Durkin, J.) (denying leave to add questions raising issues outside the scope of our Court's jurisdiction).

Burton objects to Appellants' Amended Question 6.1 to the extent that it asks about Burton's entitlement to an entertainment permit, and Amended Questions 6.2 and 6.3 in their entirety, on the grounds of futility. Burton argues that they would be subject to dismissal for lack of jurisdiction and because they are not ripe for review. These three Amended Questions relate to the issue of noise, and ask the Court to opine as to whether Burton's proposal will qualify for an entertainment permit:

> 6.1. Does the Burlington Noise Ordinance, Ordinance § 21-13, prohibiting "plainly audible" noise after 10 pm from music and social gatherings, apply to the proposed use -- or is the proposed use exempt because Burton will obtain an Entertainment Permit under Ordinance § 19-18?
>
> 6.2. May an Entertainment Permit be issued to a use other than the uses specified by Ordinance § 19-18 -- "any bar, cabaret, club, hotel or restaurant?"
>
> 6.3. If the Burton land use will be a "bar, cabaret, club, hotel or restaurant," must the permit be denied because each of these uses are prohibited in the ELM district pursuant CDO Appendix A-Use Table and § 5.1.1?

Appellants seek these amendments out of their concern that Burton could apply for the entertainment permit and be exempted from the "plainly audible" noise standard that Appellants argue is part of the conditional use review through Section 5.5.1 of the Burlington Comprehensive Development Ordinance (CDO) and which they argue would be hard for Burton's proposal to satisfy. However, the City Council is charged with reviewing entertainment permit applications under the Burlington Code of Ordinances § 19-18, not the DRB, and Burton asserts that it has not applied for an entertainment permit. The DRB did not discuss an entertainment permit application in the decision on Burton's conditional use application and Appellants have not provided a reason to think the DRB otherwise relied on it during their review.

In a *de novo* appeal, the scope of the Court's review is defined by the scope of review of the municipal panel below. V.R.E.C.P. 5(g); 10 V.S.A. § 8504(h); In re Torres, 154 Vt. 233, 235 (1990). Here, we take the place of the DRB to consider anew the conditional use application that was before it, "applying the substantive standards that were applicable before the DRB." In re Feeley Constr. Permits, Nos. 4-1-10 Vtec, 5-1-10 Vtec, slip op. at 11-13 (Vt. Super. Ct. Envtl. Div. Jan. 3, 2011) (Wright, J.).

An entertainment permit application was not before the DRB and as a separate application, to be considered by a separate municipal body, for which Burton had not even applied, it was not part of the DRB's review. The Court therefore lacks jurisdiction to consider whether Burton could obtain

an entertainment permit for its proposal or otherwise interpret the provisions of the entertainment permit as Appellants seek to ask.

Further, Amended Questions 6.1 (to the extent that it concerns a possible entertainment permit), 6.2, and 6.3 are not ripe for review given that there is no suggestion that Burton has applied for an entertainment permit. Appellants argue at most that Burton intends to apply for the permit while Burton asserts that it has not, and that it provided evidence to the DRB that it complies with all applicable standards without relying on the exception. With these proposed SoQ amendments, Appellants present a hypothetical that is not before the Court, effectively "soliciting legal advice in anticipation of issues." Baker v. Town of Goshen, 169 Vt. 145, 152 (1999). We decline to provide such advisory opinions, as it would not be proper and would be outside of our jurisdiction. *See* In re Opinion of the Justices, 115 Vt. 524, 529 (1949) (explaining principle that courts are constitutionally prohibited from providing advisory opinions).

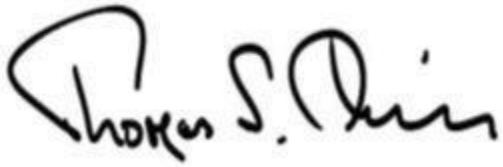
Appellants can raise the issue of whether Burton's proposed use will comply with applicable noise standards without asking about the entertainment permit. *See* id. at 151 – 52 ("[A]n appellate question must not be premature, in that it must be a necessary part of the final disposition of the case to which it pertains") (internal quotations removed) (citing Wood v. Wood, 135 Vt. 119, 121 (1977)).

It would be futile to allow questions that the Court could not address, and that would later need to be dismissed. The Court therefore **DENIES** Appellants' motion as to Amended Question 6.1, as it relates to the entertainment permit, and Amended Questions 6.2 and 6.3 in their entirety.

Regarding the remaining amendments in Appellants' motion, Burton has not objected to the changes to the wording of the original Question 6, the first part of Amended Question 6.1, or the introduction of Amended Questions 6.4 and 28. The Court has no reason to find that it would be futile to allow these amendments, or that Appellants have requested them in bad faith. Though Appellants filed the original Statement of Questions on October 27, 2020, and their instant motion on March 18, 2022, the delay was not undue as proceedings were stalled for much of that time while the parties awaited a decision from the District 4 Environmental Commission on Burton's Act 250 permit application for the proposal at issue. Appellants filed this Motion to Amend and Clarify soon after the District Commission issued its Act 250 decision at the beginning of March 2022. We therefore conclude that Burton will not be prejudiced by the allowed amendments at this time, given that the parties have not started formal discovery, and prior motions to dismiss have not regarded the substance of Appellants' notice of appeal.

The Court **GRANTS** Appellants' motion as to Amended Question 6, the first part of Amended Question 6.1 (up to the word "or"), Amended Question 6.4, and Amended Question 28. Appellants' motion is **DENIED** in all other respects. In light of our rulings here, we request that Appellants submit, within the next ten calendar days, an Amended Statement of Questions in accordance with this Order.

Electronically signed at Newfane, Vermont on Monday, May 2, 2022, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division