VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 151-11-17 Vtec

Snowstone, LLC JO 2-308

ENTRY REGARDING MOTION

Title: Motion to Reopen Docket and for Further Hearing on Lot-Size Issue
Filer: Merrill Bent, attorney for Appellee Neighbors
Filed Date: July 8, 2022

Joint Memorandum in Opposition filed by Lawrence Slason, attorney for Applicant Snowstone, LLC and David Cooper, attorney for Intervenors Maureen and Justin Savage.

The Motion is DENIED.

Presently before the Court is a motion filed by the Appellees/Neighbors to "reopen" this docket. While Neighbors do not cite any authority for the Court's ability to take such action in their motion, they cite to Vermont Rule of Civil Procedure (V.R.C.P.) 60(b) in their reply brief in support of motion.

This litigation concerns a proposed dimensional stone quarry in the Town of Cavendish, Vermont. The project developer, Snowstone, LLC, requested a Jurisdictional Opinion (JO) from the Act 250 district coordinator for the project, which is sited on a 0.64 acre parcel of land. That parcel was conveyed out of a much larger 176 acre parcel from landowners Maureen and Justin Savage (Savages) to Snowstone. The district coordinator determined that the project required an Act 250 permit, a decision that Snowstone appealed to our Court. A group of Neighbors (Neighbors) participated in that appeal as interested parties.

On appeal, Snowstone argued that Act 250 jurisdiction was not triggered because the total amount of land on which development would occur was less than the statutory one-acre threshold: the 0.64 parcel itself and 0.29 acres of road over which Snowstone had acquired an easement from the Savages (a total of 0.93 acres). It argued that the transaction by which it acquired rights to that land was conducted at arm's length, and therefore the surrounding 176-acre parcel was controlled by a separate person and not part of the acreage determination. Neighbors contested this argument and further argued that counting the amount of land which Snowstone would need to construct its stormwater management system would increase the total development acreage over one acre.

At the parties' request, we agreed to bifurcate the matter: first we would rule on whether the transaction was arms-length and whether the concept of "involved land" independently required us to consider the entire 176-acre parcel. Separately, Snowstone would apply for any stormwater permits it needed from the State; after it received such permits, and the parameters of its stormwater management system were known, we would revisit the issue of total project acreage, but only if a party timely requested that we do so.

Accordingly, we proceeded to take evidence and rule on the arms-length nature of the transaction and whether the concept of "involved land" applied. We ultimately determined that the transaction was at arm's length and created a separate parcel on which development was to occur. We therefore did not need to reach the issue of whether the doctrine of "involved land" applied to determine that the project did *not* constitute development on more than one acre. Snowstone, LLC JO #2-308, No. 151-11-17 Vtec, slip op. at 13–15 (Vt. Super. Ct. Envtl. Div. Feb. 21, 2019) (Durkin, J.) (amending Nov. 27, 2018 decision)).

In this initial Merits Decision, we ordered Snowstone to apply for any necessary stormwater permits and to inform Neighbors and the Court within ten days of the Department of Environmental Conservation (DEC) ruling on the application. We further ordered, "Within thirty (30) days of [the stormwater permit] determination or withdrawal, any Party to this jurisdictional opinion appeal may request that the Court conduct a further hearing on whether any stormwater permit determination has a relevancy to the legal issue of whether all activities necessary for the operation of the proposed dimensional stone quarry can occur within the 0.93 acres that Snowstone proposes to purchase." Snowstone, LLC JO #2-308, No. 151-11-17 Vtec at 17 (Feb. 21, 2019). We warned the parties, "In the event that no Party requests a further hearing, then this Court will issue a final entry of judgment, noting that its initial determination concerning this jurisdictional opinion appeal has then become final, subject to any rights of appeal." Id.

The Supreme Court's decision on appeal in this matter succinctly summarizes what happened next:

> Snowstone applied for the stormwater permit and neighbors intervened in those proceedings, filing questions and comments. On June 12, 2019, the Department of Environmental Conservation granted Snowstone a multisector general permit (MSGP), authorizing the discharge of stormwater with all treatment activities contained within the 0.93 acres. Neighbors submit that they never received Snowstone's notification of the permit determination, and the record does not reflect that the notification was provided to the court or to neighbors. However, we take judicial notice that on July 5, 2019, neighbors filed a notice of appeal from the grant of the permit to the Environmental Division in a separately docketed matter (the MSGP appeal). . . . Despite neighbors' knowledge of the permit determination by at least July 5, the thirty-day deadline to request a hearing in the JO appeal passed, and neighbors did not request a further hearing. On July 26, 2019, forty-four days after the permit determination, neighbors moved to consolidate the JO and MSGP appeals. . . . In a subsequent order, the Environmental Division rejected neighbors' contention that their motion to consolidate qualified as a request for a further hearing in the JO appeal, noting that the motion did not specify a request for further hearing and in any event was filed beyond the thirty-day deadline. It dismissed the MSGP appeal for lack of standing.[1] The Environmental Division then entered judgment for Snowstone in the JO appeal, ruling that, for the reasons noted in its initial merits order, the proposed project did not require an Act 250 permit. In re Snowstone, LLC Act 250

[1] The decision to dismiss the MSGP appeal was subsequently reversed by the Supreme Court in In re Snowstone LLC Stormwater Discharge Authorization, 2021 VT 36.

Jurisdictional Opinion, 2021 VT 72A, ¶ 11 (amending earlier decision in 2021 VT 72).

Neighbors appealed our decision not to reopen hearings in the JO appeal, along with our initial merits order to the Supreme Court. The Supreme Court affirmed our decision on the arms-length nature of the transaction. Id. at ¶ 22. It further affirmed our decision to enforce the deadlines established in our initial merits order and our conclusion that Neighbors had failed to timely request that we reopen hearings on the acreage of land being developed pursuant to that order. Id. at ¶ 26. The Court therefore finally decided the issue Neighbors here seek to relitigate and affirmed our determination that Act 250 jurisdiction did not attach to the project.

The appeal of Snowstone's stormwater permit, meanwhile, has continued. In January 2022, the parties jointly stipulated to remand of the stormwater permit application to the Department of Environmental Conservation to consider amendments thereto. Those amendments concerned principally the identified "receiving waters" for any stormwater runoff from the project. DEC issued a revised permit authorization for the amended application on June 10, 2022. Neighbors appealed this new authorization in docket No. 22-ENV-00057. On July 8, Neighbors filed the present motion seeking to re-open the Act 250 JO docket. They argue that it would be "prejudicial and unfair" to allow Snowstone to amend its application for a stormwater permit while not allowing Neighbors to revisit the issue of project acreage for purposes of Act 250 jurisdiction. They also argue that certain criteria for revisiting or vacating a judgment under Rule 60(b) apply. Snowstone and the Savages oppose the motion.

As a preliminary matter, Neighbors only cite to 60(b) as the authority that would allow the Court to grant their request for the first time in their reply brief. The Vemont Rules of Civil Procedure are not as strict as the Rules of Appellate Procedure in forbidding parties from raising a legal argument for the first time in a reply brief. *Compare* V.R.C.P. 7(b)(4) (implying it is permissible to raise issues for the first time in a reply by allowing a surreply in such cases) with Bigelow v. Dep't of Taxes, 163 Vt. 33, 37 (1994) ("It is a basic rule of appellate procedure that issues not briefed in the appellant's or the appellee's original briefs may not be raised for the first time in a reply brief."). Assuming, therefore, that these arguments were not waived, none of the 60(b) criteria cited to by Neighbors compel us to vacate the judgment affirmed by the Supreme Court.

First, we note that federal cases on federal rule 60(b) are authoritative sources for the interpretation of the "substantially identical" Vermont provision. In re Benoit Conversion Application, 2022 VT 39, ¶ 15 (Vt. Aug. 19, 2022) (quoting V.R.C.P. 60 and Reporter's Notes to V.R.C.P. 1). We also note that "exceptions to finality rule set forth in Rule 60(b) should be applied guardedly and only in extraordinary circumstances given the important interest in finality of judgments," which is in part an "institutional value . . . that transcends the litigants' parochial interests." Id. at ¶ 16.

Neighbors argue that three of the criteria under Rule 60(b) apply: 60(b)(2), newly discovered evidence; 60(b)(4), voidness of initial judgment; and 60(b)(6), "any other reason justifying relief from the operation of the judgment." We address each argument in turn.

The only new evidence neighbors purport to have discovered since the order they seek to set aside is that stormwater discharges will initially be to a different receiving water than the

original application indicated, and perhaps that a silt fence will be moved.[2] Neighbors have not argued (nor, that we are aware, could they plausibly do so), however, that this evidence is germane to their failure to timely request that we reopen hearings on Act 250 jurisdiction after the initial discharge authorization issued in 2019. They have not, for example, alleged that they decided not to request that reopening based on representations in the initial stormwater plan or authorization to discharge. Nor have they alleged that had they possessed the new information at the time that they would have made a different decision. Put simply, they have not alleged, much less demonstrated why this new evidence is relevant to the events that led to the final decision on the JO. The change in receiving waters and silt fence relocation therefore does not qualify as the sort of evidence justifying vacating a judgment under 60(b)(2). *See, e.g.* Beugler v. Burlington N. & Santa Fe Ry. Co., 490 F.3d 1224, 1229 (10th Cir. 2007) (affirming denial of motion under 60(b) because the purported new evidence was "irrelevant to the dispositive question in this case.").

Next, we turn to the purported voidness of the original determination and the Supreme Court's decision affirming it. Neighbors' only argument as to this point is that our judgment "concerned a different discharge authorization based upon a different application." While largely true, this does not indicate that the decision was void. A decision is void for purposes of 60(b)(4) "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." In re C.L.S., 2020 VT 1, ¶ 17, 211 Vt. 344 (quoting 11 C. Wright & A. Miller, Federal Practice & Procedure § 2862 (3d ed. 2019)). Neighbors have not argued that any of these criteria are satisfied. In fact, our decision to consider the JO litigation concluded had nothing to do with the substance of the original discharge authorization, but only with Neighbors' failure to timely move to reopen hearings following its issuance. That decision is not void simply because Applicant subsequently amended and the DEC reconsidered the stormwater permit application.

Finally, Neighbors have not presented any other reason that would justify the extraordinary step of reversing or vacating our earlier judgment. *See* McCleery v. Wally's World, Inc., 2007 VT 140, ¶ 10, 183 Vt. 549 (mem.) (explaining that while the language of Rule 60(b)(6) is broad, the "interests of finality necessarily limit when relief is available" and this provision "may not substitute for a timely appeal or provide relief from an ill-advised tactical decision or from some other free, calculated, and deliberate choice of action."

The motion is therefore **DENIED.**

Electronically signed September 15, 2022 pursuant to V.R.E.F. 9(D).

Tom Walsh

Thomas G. Walsh, Judge
Superior Court, Environmental Division

[2] The "circumstances of the new application and discharge authorization" as referred to in Neighbors' Reply in Support of Motion are not new evidence but merely new procedural history.