VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00051

Sportsmen, Inc. Permit 2W1334

ENTRY REGARDING MOTION

Title: Motion to Stay (Motion: 1); Neighbor's Proposed Discovery Stipulation and Order

Filer: Hans G. Hussey (Motion 1); Ronald A. Shems (Neighbor's Discovery Stipulation and Order)

Filed Date: September 8, 2022 (Motion 1); September 19, 2022 (Neighbor's Discovery Stipulation and Order)

The Motion for Stay is DENIED; this Court's review will be by TRIAL DE NOVO.

DECISION ON MOTION FOR STAY AND SCOPE OF REVIEW

Sportsmen, Inc. (Appellant or Sportsmen Inc.) appeals the District Environmental Commission's (District Commission) May 2, 2022 Memorandum of Decision and Order re Motion to Alter Appellant's Act 250 Permit Conditions. Currently pending before the Court is Appellant's Motion for Stay, as well as an intrinsic issue regarding the scope of this Court's review, arising from disagreements contained in the Parties' Proposed Discovery Schedules. Interested Parties, Kathy Cooke (Neighbor) and the Vermont Natural Resources Board (NRB), both opposed Appellant's Motion for Stay, arguing the Appellant applied the wrong standard and failed to meet their burden. Regarding the intrinsic issue arising from the Parties' Proposed Discovery Schedules, Neighbor argues that the scope of this Court's review is limited to an on-the-record review of the evidence that was before the District Commission, while the Appellant and the NRB both agree that the scope of review is de novo.

In this proceeding, Appellant is represented by Attorney Hans G. Huessy. Attorneys Stephen A. Reynes and Ronald A. Shems represent Neighbor, and Attorney Allison Milbury Stone represents the NRB.

Procedural History

Sportsmen Inc. has been in operation since 1940. Sportsmen Inc. is a nonprofit organization promoting fishing, hunting, trapping, archery, and shooting sports on their 47-acre parcel in Guilford, VT. In 1971, the District Commission reviewed the applicability of Act 250 to construction of an archery course, road alteration, and construction of a backstop, rifle range, and trap house. The District Commission did not find an Act 250 permit was required but notified the Sportsmen Inc. that future construction would require approval from the District Commission. Throughout the years, there have been a number of improvements made to the facility, including in 2013 when the Sportsmen Inc. was awarded a $34,000 grant to build several safety berms on the property. After the installation of the berms, Neighbor contacted the District Commission asserting that the construction of the berms had created "a dramatic change in the sound level." Neighbor had lived next to the range for 35 years prior to reaching out to the District Commission for a Jurisdictional Opinion. Sportsmen Inc. provided no documentation as to the noise levels before and after the improvements.

The District Commission concluded that, while there is no doubt that Sportsmen Inc. qualifies as a preexisting development, a substantial change had occurred triggering Act 250 Jurisdiction. The District Commission found that there were numerous physical improvements to the facility, including increasing the size of the clubhouse, adding wastewater systems and restrooms, altering a pond, and the construction of the backstops and berms. The District Commission also found those changes had the potential to create significant impacts under several Act 250 criteria, specifically Criterion 1(B) Waste Disposal, 1(G) Wetlands, and 8 Aesthetics. The District Commission issued its Jurisdictional Opinion on June 15, 2015.

Sportsmen Inc. filed a complete application for an Act 250 permit on March 4, 2021.[1] The application sought approval of the previously completed construction at the facility, including the berms, pond, wastewater, and other additions to the facilities. The application was approved with several conditions for new staffing and construction responding to the Act 250 criteria, as well as requirements that Sportsmen retrofit some of its earlier construction so that meets the specifications that would have been required had it applied for permits before construction commenced. Specifically, the permit conditions include a sound mitigation plan, a Sunday operations limitation, increased staffing requirements, and plumbing and lighting retrofitting to comply with Act 250 requirements. Act 250 Permit No. 2W1334 (Jan. 12, 2022) (Permit) (Neighbor's Opp. to Mot. for Stay, Ex. (filed Sept. 22, 2022).

[1] Sportsmen Inc. initially filed an incomplete application on May 16, 2016, which was not deemed complete until March 4, 2021, upon the receipt of the required supplemental information. See District 2 Environmental Commission, Findings of Fact, Conclusions of Law and Order at 1 (Jan. 12, 2022).

Sportsmen Inc. then filed with the District Commission a motion to alter the Permit. Relevant to the present Motion for Stay, Sportsmen Inc. requested the requirement that a 65-foot sound mitigation berm be completed by October 1, 2022, be altered to be left open as to the height and only required if other noise mitigation measures were insufficient. The District Commission denied the requested modification, but ultimately modified the condition to require construction be completed on May 30, 2023. Other alteration requests were outright denied. Sportsmen Inc. then appealed the District Commissions denial of its Motion to Alter.

Scope of Court's Review

The parties agree that the scope of this appeal is limited to the issues raised in the Statement of Questions as related to the District Commission's Memorandum of Decision and Order on Appellant's Motion to Alter, dated May 2, 2022. The parties, however, disagree on the standard of review. Neighbor suggests that because this is an appeal of a decision on a Motion to Alter—in which the District Commission's consideration was limited to the record before the District Commission pursuant Act 250 Rule 31(A)—this Court's review standard is similarly limited to an on-the-record review of the District Commission's record. See Neighbor's Proposed Schedule at 1 (Sept. 19, 2022) (citing 10 V.S.A. § 8504(h)). Appellant and the NRB disagree, pointing to the Vermont Rules for Environmental Court Proceedings Rule 5(g), which generally provide that all appeals to the Environmental Court shall be by trial de novo, subject to enumerated exceptions which do not apply here. V.R.E.C.P. 5(g)–(h).

Vermont Rules for Environmental Court Proceedings Rule 5 applies to appeals to the Environmental Court from a district commission determination made pursuant chapter 151 of Title 10. V.R.E.C.P. 5(a). "All appeals under this rule shall be by *trial de novo*," except for appeals from appropriate municipal panels or appeals from the Commissioner of Forest, Parks, and Recreation pursuant 10 V.S.A. § 2625. V.R.E.C.P. 5(g), (h)(1)–(2) (emphasis added). "In an appeal by trial de novo, all questions of law or fact as to which review is available shall be tried to the court, which shall apply the substantive standards that were applicable before the tribunal appealed from." V.R.E.C.P. 5(g); 10 V.S.A. § 8504(h). The scope of questions of law or fact before the court is limited by the Statement of Questions. V.R.E.C.P. 5(f) ("The appellant may not raise any question on the appeal not presented in the statement as filed . . . .").

Neighbor argues that "de novo *review* has many flavors, most of which do not involve new evidence." Neighbor's Reply Mem. Re Scope of Appeal at 2 (filed Oct. 12, 2022) (emphasis added). In support of their argument, Neighbor offers the analogy of the Supreme Court's review of an appeal from a Civil Division's decision on a Motion for Summary Judgment. Neighbor's argument, however, fails to recognize the distinction between de novo trial and de novo review. The Environmental Court's procedural rules do not describe a "de novo review" but rather a "de novo trial" or "de novo hearing." V.R.E.C.P. 5(g) ("In an appeal by trial de novo,

all questions of law or fact as to which review is available shall be tried to the court, which shall apply the substantive standards that were applicable before the tribunal appealed from."); 10 V.S.A. § 8504(h). The Vermont Supreme Court has "distinguished between the terms 'hearing de novo' or 'trial de novo' and the term 'review de novo.'" State v. Madison, 163 Vt. 360, 368–70 (1995). By requiring a "de novo trial," the Rules for Environmental Court Proceedings are contemplating a trial "where the case is heard as though no action whatever had been held prior thereto." Madison, 163 Vt. at 369. The Vermont Supreme Court explicitly noted that "'de novo review,' a procedure that might not require a retrial or extensive judicial record making, is not the standard required" in the environmental appeal statutes, which require a de novo trial or de novo hearing. Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 n. 2 (1989). As such, Neighbor's attempts to analogize this appeal to an appeal of a Summary Judgment decision to the Vermont Supreme Court falls short. The Environmental Court applies different rules and standards.

Neighbor's suggestion that this Court is limited to an on-the-record review because it must "apply the *substantive* standards that were applicable" before the District Commission similarly falls short. Neighbor's Reply Mem. Re Scope of Appeal at 2 (emphasis added). Neighbor's argument confuses the "substantive standards" the Court must apply with the *procedural* standards it must follow. See In re: Unified Buddhist Church, Inc., No. 191-9-05 Vtec, slip op. at 6 (Vt. Envtl. Ct. Mar. 20, 2006) (distinguishing a procedural determination from a substantive one); compare SUBSTANTIVE LAW, Black's Law Dictionary (11th ed. 2019) ("The part of the law that creates, defines, and regulates the rights, duties, and powers of parties.") with PROCEDURAL LAW, Black's Law Dictionary (11th ed. 2019) ("The rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves."). While Neighbor is correct that, procedurally, the District Commission was limited to review of the existing record, it is not the District Commission's procedural standards that this Court must apply on review, but rather its substantive ones. Indeed, the law is clear on this Court's procedural standards: appeals from the District Commission "shall be by trial de novo," in which "all questions of law or fact as to which review is available shall be tried *to the court* . . . ." V.R.E.C.P. 5(g); 10 V.S.A. § 8504(h) (requiring the Environmental Division to "hold a de novo hearing on those issues that have been appealed").

Moreover, without a de novo trial, this Court would have no record to consider. There is no authority to have the District Commission certify and send its record to the Court for an on-the-record review here. Cf. V.R.E.C.P. 5(h)(1)–(2) (describing the procedures for certifying and transmitting the record in appeals from either an appropriate municipal panels or the Commissioner of Forests, Parks, and Recreation); cf. also 10 V.S.A. § 8504(p)(2) (authorizing the Secretary of Natural Resources to certify and transfer the administrative record to the

Environmental Division only when "there is an appeal of a decision of a District Commission, and the applicant used a decision of the Secretary based on that record to create a presumption under a criterion of subsection 6086(a) of this title that is at issue in the appeal"). Because the legislature has contemplated express and limited exceptions for this Court to conduct an on-the-record review—as well as provisions of limited application for certifying and transferring those records to this Court—it follows that if the legislature had intended for the present appeal to be on-the-record, it would have provided the authority to certify a record. See In re D.C., 2016 VT 72, ¶ 31, 202 Vt. 340 (*expressio unius est exclusio alterius*).

The Court concludes that this appeal "shall be by **TRIAL DE NOVO**," in which the Court will try "all questions of law or fact" properly raised in the Appellant's Statement of Questions. V.R.E.C.P. 5(g); 10 V.S.A. § 8504(h).

Motion for Stay

The Court does not find that Appellant has met its burden of establishing that a stay is proper, and accordingly **DENIES** the motion for stay. Generally, an act or decision of a District Environmental Commission is not automatically stayed on appeal. V.R.E.C.P. 5(e); see 10 V.S.A. § 6086 ("Following appeal of the District Commission decision, any stay request must be filed with the Environmental Division pursuant to the provisions of chapter 220 of this title."); see also 10 V.S.A. § 8504(f)(1)(A)–(B) (enumerating the limited circumstances where a stay is automatic). A party, however, may move to request a state from this Court. V.R.E.C.P. 5(e); 10 V.S.A. § 8504(f)(2). In these instances, a stay is considered "an extraordinary remedy appropriate only when the movant's right to relief is clear." In re Howard Center Renovation Permit, No. 12-1-13 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 12, 2013).

To prevail on a motion to stay, "the moving party must demonstrate: (1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public." Gilbert v. Gilbert, 163 Vt. 549, 560 (1995); see also In re Route 103 Quarry, No. 205-10-05 Vtec, slip op. at 3, (Vt. Envtl. Ct. Sept. 14, 2007) (quoting same). When there is a possibility that a stay will harm another party, the movant "must make out a clear case of hardship or inequity in being required to go forward." Morrisville Hydroelectric Project Water Quality, No. 103-9-16 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Aug. 26, 2020) (quoting In re Woodstock Cmty. Tr. & Hous. Vermont PRD, 2012 VT 87, ¶ 36, 192 Vt. 474). "Courts disapprove stays . . . when a lesser measure is adequate to protect the moving party's interests." Woodstock Cmty. Tr. & Hous. Vermont PRD, 2012 VT 87, ¶ 36. "The criteria are flexible in as much as the court may consider varying strengths and weaknesses as to each in determining the necessity of a stay." White v. State, No. 14-1-21, slip op. at 1 (Vt. Super. Apr. 28, 2021).

1. *Likelihood of Success on the Merits*

First, the Court cannot find that Appellant has demonstrated a *strong* likelihood of success on appeal. Gilbert, 163 Vt. at 560. At best, as represented by Appellant, "[i]t is very possible that [Appellant] will obtain a favorable ruling on one or more of these conditions." Appellants Reply in Supp. of Mot. to Stay at 1 (filed Sept. 27, 2022). First, a "very possible" favorable outcome fails to meet the requirement that there is a "strong likelihood" of success on the merits. Second, Appellant offers the Court no legal or evidentiary support for their assertion that it is "very possible" they may prevail on the merits. See Id. As such, the Court concludes that Appellant fails to meet their burden under this prong.

2. *Possibility of Irreparable Injury*

Second, this Court cannot find that Appellant will suffer an irreparable injury if a stay is denied. Appellant asserts that denying a stay will cause irreparable injury because of the financial costs associated with imposing the Act 250 permit conditions. Appellants Reply in Supp. of Mot. to Stay at 1 ("The sole purpose in appealing these conditions is to avoid the associated costs.").

The Court finds this proffer inadequate. First, monetary damages are generally inadequate for establishing irreparable harm. See Salinger v. Colting, 607 F.3d 68, 80 (2d Cir. 2010) (quoting eBay Inc. v. MercExchange, LLC., 547 U.S. 388, 391 (2006)) (noting courts should pay "particular attention to whether the 'remedies available at law, such as monetary damages, are inadequate to compensate for that injury.'"). Second, there is grant funding available for shooting range improvements, which includes funding for the installation of noise abatement or safety berms.[2] Additionally, as noted by Appellant, the Act 250 condition requiring the installation of the 65-foot berm does not go into effect until May 30, 2023. The Court encourages the parties to agree to a schedule that could resolve this appeal before the Appellant is required to have the berm installed. See Woodstock Cmty. Tr. & Hous. Vermont PRD, 2012 VT 87, ¶ 36 ("Courts disapprove stays . . . when a lesser measure is adequate to protect the moving party's interests."). As such, Appellant has not demonstrated that it will suffer irreparable harm if a stay of the permit conditions is not granted. To the extent that Appellant may be harmed by any lost revenue during the pendency of this appeal, the Court finds this possible harm overweighed by the other prongs in the analysis, specifically the harm to other parties and the best interests of the public.

[2] See Neighbor's Sur-Reply to Appellant's Mot. to Stay Reply at 2–3 (filed Oct. 11, 2022) (referencing Shooting Range Improvement Grant, VT. AGENCY OF NAT. RES., https://vtfishandwildlife.com/get-involved/apply-for-a-grant/shooting-range-improvement-grant (last visited Oct. 20, 2022)).

3. Substantially Harm Other Parties

Third, the Court cannot find that Appellant has demonstrated that the stay will not substantially harm other parties, and Appellant has not made out "a clear case of hardship or inequity in being required to go forward." Id. Appellant asserts that the stay will not substantially harm Neighbor because the stay is only "a few more months . . . ." Appellants Reply in Supp. of Mot. to Stay at 1. Additionally, Appellant argues hardship in the costs associated with implementing the permit conditions, and inequity in that Neighbor came to the nuisance. Id. ("[Neighbor] purchased property located in the vicinity of a shooting range."). The Court disagrees.

First, the Court finds that Appellant has failed to demonstrate that the requested stay would not substantially harm other parties. The Court finds a stay "would give the Appellant an incentive to drag out the appeal process," as it would effectively grant a temporary license to continue their use without noise mitigation. See Neighbor's Reply to Appellant's Mot. to Stay at 3 (filed Sept. 22, 2022). Thus, a stay would further "extend[ ] the already years-long period in which the shooting range [has] operate[d] without the subject noise mitigation." Id. As such, the Court concludes a stay would substantially harm not only Neighbor by depriving her of the right to quiet use and enjoyment of her property for several additional months—possibly a year—but also harm both Neighbor and the NRB from the possible increased time and costs associated with a litigation dragged out to delay the application of permit conditions.

Additionally, the Court finds that Appellant has failed to demonstrate that hardship or inequity demand a stay despite these harms to other parties. To the extent that Appellant argues hardship from the loss of revenue and cost of installing the noise mitigation, the Court finds Appellant's proffer inadequate for many of the same reasons discussed under the irreparable injury prong. See Supra, *Possibility of Irreparable Injury* at 6 (discussing built in implementation timeline, alternative remedies, and other funding possibilities). Regarding Appellant's assertion that equity supports granting a stay because Neighbor came to the nuisance when she purchased land in the vicinity of a shooting range, the Court disagrees. According to Neighbor, she did not make any complaints about the noise from 1980 until 2013, when the Appellant altered the berms on the shooting range, this being the trigger for the need of Act 250 review and the imposition of the noise mitigation conditions. These and other improvements gave rise to the Act 250 substantial change Jurisdictional Opinion, because, *inter alia*, the berms substantially changed the Criterion 8 aesthetics with respect to noise. See Act 250 Permit No. 2W1334 (Jan. 12, 2022) (Permit) (Neighbor's Opp. to Mot. for Stay, Ex. (filed Sept. 22, 2022). Thus, the Court cannot conclude that the Appellant "ma[d]e out a clear case of hardship or inequity in being required to go forward." Woodstock Cmty. Tr. & Hous. Vermont PRD, 2012 VT 87, ¶ 36.

4. The Best Interests of the Public

Fourth, the Court cannot find that Appellant has demonstrated that granting a stay will serve the best interests of the public. At best, Appellant argues that stays generally serve the interest in the public, because stays serve public confidence in the judiciary by enabling an appeal to reach resolution before challenged condition is imposed. See Appellant's Reply in Supp. of Mot. to Stay at 1 ("If the Court insists that all these improvements be made prior to determining whether they are required, such a ruling would completely eliminate the underlying purpose of this appeal."). The Legislature, however, did not make stays the general rule, but rather the extraordinary remedy. 10 V.S.A. § 6086(f); 10 V.S.A. § 8504(f)(1)(A)–(B); see V.R.E.C.P. 5(e); Howard Center Renovation Permit, No. 12-1-13 Vtec at 1 (Apr. 12, 2013).

Moreover, the Court concludes that granting the requested stay would not serve the public's best interests. If the Court were to grant the stay, Neighbor will likely continue to suffer substantial harm from her continued loss of quiet use and enjoyment of her property, and the stay would provide Appellant an incentive to prolong litigation. "Such an unfortunate outcome would be in degradation of several public interests, not the least of which is the fair and efficient adjudication of land use disputes." Route 103 Quarry, No. 205-10-05 Vtec at 6 (Sept. 14, 2007).

Accordingly, this Court hereby **DECLINES** to issue the stay requested by the Appellant. Appellant is permitted to operate the Sportsmen's Shooting Range under the terms and conditions of the altered Land Use Permit 2W1334 issued on January 12, 2022 (with amendments issued May 2, 2022). Alternatively, Appellant may choose to not operate until there is a final decision in this appeal of the motion to alter and in so doing is not required to complete the noise mitigation conditions.

CONCLUSION AND ORDER

For the forgoing reasons, the Court **DENIES** Appellant's Motion to Stay Permit Conditions pending appeal and concludes the scope of this Court's review on appeal will be by **TRIAL DE NOVO**, as required by law.

Electronically signed October 25, 2022 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division