STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 96-8-16 Vtec

Laberge Shooting Range JO	DECISION ON MOTION

Decision on Motion to Amend Statement of Questions

This appeal from an Act 250 Jurisdictional Opinion comes before the Court on Appellant Laberge & Sons, Inc.'s (Appellants or Laberge) motion to amend and clarify its Statement of Questions. Laberge filed its motion on November 10, 2016. The Firing Range Neighborhood Group, LLC (Neighborhood Group), filed an opposition to the motion on November 18, 2016, and Laberge filed a reply to that opposition on November 21, 2016. Laberge is represented by Hans Huessy, Esq., and the Neighborhood Group is represented by Austin D. Hart, Esq. and Justin B. Barnard, Esq.

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.

The Environmental Rules allow us to grant a motion to amend a Statement of Questions. V.R.E.C.P. 5(f). As with motions to amend complaints pursuant to V.R.C.P. 15, we generally take a liberal view in 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.).

The Neighborhood Group cites In re Garen, 174 Vt. 151, 156 (2002) for the proposition that "the rule of liberal amendment that governs pleadings in traditional civil cases has 'no applicability' to the statement of questions in environmental appeals." Neighborhood Group's Opposition at 1.

We disagree that Garen prevents us from taking a liberal view on granting motions to amend statements of questions, because the Supreme Court holding in that case addressed a rule that predates, and which was different from, the rule that is now in place. Garen addressed the question of whether an intervening interested party could submit a Statement of Questions in place of that filed by the original appellants, thereby effectively amending the original Statement of Questions. Garen, 174 Vt. at 155. To answer this question the Supreme Court looked to Civil Rule 76, which at that time governed appeals to what was then the Environmental Court. Id. at 156. The Court noted that, pursuant to the rule, "[w]ithin 30 days after the filing of the notice of appeal . . . the appellant shall file a statement of the questions that the appellant desires to have determined . . . . *No other paper or pleading shall be transmitted or filed*." Id. (quoting V.R.C.P. 76(e)(4)(B)) (alterations in original). The Court took this to mean that Rule 76 "explicitly forecloses th[e] possibility" that "[t]he rules governing pleading in traditional civil cases" are applicable in Environmental Court proceedings, "including the rule allowing for liberal amendment of pleadings." Id. (citing V.R.C.P. 15(a), which states that leave to amend should be freely given).

Three years after Garen, in 2005, the newly-adopted Vermont Rules for Environmental Court Proceedings abrogated Civil Rule 76. Reporter's Notes, V.R.E.C.P. 1; Reporter's Notes—2005 Amendment, V.R.C.P. 76. The Environmental Rules require an appellant to file a Statement of Questions within 20 days of filing a notice of appeal and do not include the statement forbidding the submission of other documents. See V.R.E.C.P. 5(f). The Rules also include the following directives: "No response to the Statement of Questions shall be filed. The appellant may not raise any question on the appeal not presented in the statement as filed, unless otherwise ordered by the court in a pretrial order entered pursuant to subdivision (d) of Rule 2." Id.

In short, while Rule 76 explicitly stated that nothing further could be filed apart from the initial statement of questions, the rules now explicitly allow a statement of questions to be amended by order of the court. Id.; V.R.E.C.P. 2(d). We began to apply the liberal amendment standard to motions to amend statements of questions shortly after the enactment of the

Environmental Rules. See, e.g., Appeal of Town of Fairfax, No. 45-3-03 Vtec, slip op. at 5 (Vt. Envtl. Ct. June 13, 2005) (Wright, J.). We have consistently applied this standard since then.

The Neighborhood Group next argues that the Environmental Rules restrict the scope of an amended statement of questions. Environmental Rule 5(f) allows us to grant a motion to amend a Statement of Questions by a pretrial order entered pursuant to Rule 2(d). V.R.E.C.P. 5(f). Rule 2(d) in turn refers to allowing the "clarification of the Statement of Questions" and "narrow[ing] the issues to be heard." V.R.E.C.P. 2(d)(2)(iv) and (vi). The Neighborhood Group interprets this language to restrict an amended Statement of Questions to issues included, explicitly or implicitly, in the original Statement of Questions, and to prohibit the addition of issues not raised in the original Statement of Questions. This argument is not dispositive here because, as discussed below, amended Questions 5, 6, 7, and 8 are encompassed by original Question 3. Nevertheless, we note that given the short timeline to file a Statement of Questions, the complexity of issues the appellant often confronts, and the fact that the appellant may not have been represented by counsel in the proceedings below, we are reluctant to develop a hard rule preventing a party from raising a new issue.

Starting from this liberal perspective towards granting amendments, 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[1]). 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.).

[1] 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)).

Laberge's original Statement of Questions, filed September 16, 2016, included four questions. Question 3 asks: "Did the District Coordinator err in determining that the construction of the berm and shooting benches required an Act 250 permit?" In the motion to amend, Laberge requests permission to add five questions that set out specific points. Laberge argues that each new question elaborates on the broader, general Question 3. The five additional questions are as follows (numbered Questions 5–9, following the original four questions):

5. Does the replacement/repair of the shooting benches constitute routine maintenance and repair?
6. Is the replacement/repair of the benches and the construction of the berms exempt from the definition of development as *de minimus*?
7. Are there less than 10 acres of involved land?
8. If jurisdiction over the alleged improvements is found, is it limited to the alleged improvements?
9. If the alleged improvements are voluntarily removed, will jurisdiction no longer attach?

First, we note that there has been no undue delay in filing the motion to amend. We are still in the early stages of litigation on this matter. Since the notice of appeal was filed, the parties and the Court have been focused on a motion to dismiss the appeal as untimely. Partly because we are at such an early stage in litigation, there is no indication that granting the motion to amend will prejudice the Neighborhood Group. There has been no prior amendment, no discovery, and no substantive motion practice; in fact, a scheduling order has yet to be issued. This early stage is the appropriate time to narrow and clarify the statement of questions, as doing so will help focus the parties and the Court. See Buchwald, No. 181-12-13 Vtec at 2 (Apr. 1, 2014) (explaining that granting motion to amend Statement of Questions will help focus parties and provide greater clarity on the relevant legal issues on appeal).

Next, there is no indication that the motion was filed as a dilatory tactic or otherwise in bad faith. Likewise, there is no suggestion that amending the complaint would be futile. See Verizon Wireless Barton Act 250 Permit, No. 6-1-09 Vtec, slip op. at 11 (Vt. Envtl. Ct. Feb. 2, 2010) (Durkin, J.) (denying a motion to amend on basis that doing so was futile, "[b]ecause the issues

raised in Appellants' Motion to Amend were fully discussed . . . in our decision on summary judgment").

Whether the District Coordinator erred in concluding that construction of the berm and shooting benches requires an Act 250 permit calls into question whether the District Coordinator should instead have concluded that the work done constituted "maintenance," and not improvements or construction; or that the work was *de minimus*. Questions 5 and 6 are therefore clearly contained in Question 3. The motion to amend is therefore **GRANTED** as to revised Questions 5 and 6.

Likewise, asking whether construction of the berm and shooting benches requires an Act 250 permit implies that the Act 250 permit is required primarily because of the berm and shooting benches, and that Act 250 jurisdiction is not triggered without them. We therefore agree that revised Question 8 is implicit in the original Question 3. The motion to amend is therefore **GRANTED** as to revised Question 8.

Question 3 also implicitly raises the issue set out in revised Question 7, whether the shooting range triggers the Act 250 jurisdictional threshold of ten acres, because the District Coordinator's conclusion that Act 250 jurisdiction applies indicates that the ten-acre jurisdictional threshold has been met. To the extent the Neighborhood Group contends that Laberge may not raise the ten-acre-threshold argument on appeal because it was not raised in the proceedings below, we note that in a de novo appeal of an Act 250 decision we sit in the place of the tribunal appealed from and may consider any argument that could have been raised before that tribunal. 10 V.S.A. § 8504(h); see also In re Killington Village Master Plan Act 250 Application Appeal, No. 147-10-13, slip op. at 5–6 (Vt. Super. Ct. Envtl. Div. Aug. 6, 2014) (Durkin, J.). In addition, the Neighborhood Group argues that Question 3 is too broad for them to have anticipated a specific challenge to the ten-acre jurisdictional threshold. This is a reason to allow the motion to amend—to narrow the scope of the appeal and focus the parties on the specific issues being

appealed—not a reason to deny the motion.[2] For these reasons, the motion to amend is **GRANTED** as to revised Question 7.

While Question 9 may also be implicit in Question 3, it asks us to give an advisory opinion on a hypothetical factual scenario that is not before us. Question 9 asks [i]f the alleged improvements are voluntarily removed, will jurisdiction no longer attach? Because we are not permitted to issue advisory opinions, Laberge's motion to amend is **DENIED** as to revised Question 9. See Baker v. Town of Goshen, 169 Vt. 145, 151–52 (1999).

In conclusion, the motion to amend and clarify the Statement of Questions is **GRANTED** as to Questions 5, 6, 7, and 8, and **DENIED** as to Question 9.

Please see the enclosed notice of status conference.

Electronically signed on January 04, 2017 at 02:46 PM pursuant to V.R.E.F. 7(d).

Tom Walsh

Thomas G. Walsh, Judge
Superior Court, Environmental Division

[2] We note that it is not unusual for parties to initially file very broad questions, and subsequently to narrow and clarify those questions. See, e.g., Atwood PUD - Jericho, No. 170-12-14 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Feb. 4, 2016) (Walsh, J.) (explaining that the Court ordered appellants to file amended Statement of Questions where the original, single question presented was very broad). At the same time, questions should not be so broad that they lose sight of the function of the Statement of Questions: "to limit the issues that are to be heard on the appeal." Reporter's Notes, V.R.E.C.P. 5(f).