VERMONT SUPERIOR COURT
Environmental Division
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
www.vermontjudiciary.org

Docket No. 22-ENV-00092

Wheeler Parcel Act 250 Determination

ENTRY REGARDING MOTION

Title: Permittee's Motion to Dismiss Appeal as Untimely; Appellants' Motion for Extension of Time (Motions: 1; 2)
Filer: Christopher D. Roy; James M. Leas, Gene Cloutier, Amy Caldwell, Alan Luzzatto, John Bossange
Filed Date: September 23, 2022; October 6, 2022

Appellants' Memorandum in Response to Blackrock's Motion to Dismiss Appeal as Unlimely and Motion for Hearing, filed October 16, 2022 by James Leas, Gene Cloutier, Amy Caldwell, Alan Luzzatto, and John Bossange

Permittee's Reply Memorandum in Support of its Motion to Dismiss Appeal as Untimely, filed October 18, 2022 by Attorney Christopher D. Roy

Permittee's Memorandum in Opposition to Motion for Extension of Time for Filing Notice of Appeal, filed October 19, 2022 by Attorney Christopher D. Roy

NRB's Response to Permittee's Motion to Dismiss, filed October 24, 2022 by Attorneys Jenny E. Ronis and Alison M. Stone

Appellants' Surreply to Newly Raised Factual and Legal Arguments in BlackRock's Reply Memorandum and Ordinary Reply in Support of Appellants' Motion for Extension of Time, filed November 2, 2022 by James Leas, Gene Cloutier, Amy Caldwell, Alan Luzzatto, and John Bossange[1]

The motion to dismiss is DENIED; the motion for extension of time is MOOT.

[1] Appellants' filed a motion to file this surreply. It was not responded to. The Court considered the surreply.

DECISION ON MOTIONS

Blackrock Construction, LLC (Blackrock) seeks Act 250 approval for a 32-unit residential project at the intersection of Dorset Street and Park Road in South Burlington, Vermont (Project). The District 4 Environmental Commission (DC) approved the Project on July 20, 2022, and issued its Findings of Fact, Conclusions of Law and Order and associated Land Use Permit Amendment 4C0923-5A (Permit Decision). Acting in concert, Inverness Homeowners' Association, Glen Eagles Homeowners' Association, Villas at Water Tower Hill Homeowners' Association, Neighbor's Committee to Stop Neighborhood Blasting, and James Leas (Appellants) timely filed a motion to alter with the DC on August 4, 2022—15 days after the Permit Decision. The DC denied the motion to alter in an August 25, 2022 decision (MA Decision). Appellants filed a notice of appeal on September 22, 2022—28 days after the MA Decision. The notice of appeal expressly states that Appellants are appealing the Permit Decision, the MA Decision, "and all prior decisions of the District Commission in this matter." Notice of Appeal (filed Sept. 22, 2022).

Presently before the Court is Blackrock's Motion to Dismiss Appeal as Untimely, filed September 23, 2022.[2] The timeliness of Appellants' appeal turns on the interpretation of how the deadline for filing a notice of appeal is impacted by a motion to alter pursuant to Act 250 Rule 31(A).

Blackrock offers that Rule 31(A) only entitles Appellants the time remaining from the original 30-day period, including the days before the intervening motion to alter—i.e., the days from the date of the Permit Decision to the date of the motion to alter are tallied into the 30 days to file an appeal. As such, Blackrock asserts the 15 days are subtracted from the Appellants' 30-day appeal period, and Appellants only had 15 days from the MA Decision to file their notice of appeal. Appellants assert that they are entitled to a new 30-day appeal period following the MA Decision as based on the statutory language, or in the alternative, move the Court for an extension of time to file an appeal. Appellants' Mem. In Resp. to Mot. to Dismiss (filed Oct. 6, 2022); Appellants' Mot. for Extension (file Oct. 6, 2022). Blackrock opposes Appellants' request of an extension, arguing that they've failed to show good cause or excusable neglect. Blackrock's Mem. in Opp. to Mot. for Extension (filed Oct. 19, 2022).

[2] Blackrock acknowledges that Appellants' appeal of the MA Decision is timely, and its motion is, therefore, focused on whether the appeal of the Permit Decision is timely.

Motion to Dismiss Appeal as Untimely

The issue is whether Appellants are entitled to (1) the statutory 30-day appeal period calculated from the date of the decision on the motion to alter or (2) 30-days from the issuance of the original Act 250 permit with a tolling between the filing of a motion to alter and issuance of decision. The parties agree this is an issue of first impression.[3] The operative statute requires appellants to file an appeal "[w]ithin 30 days of the date of the act or decision" by the District Commission. 10 V.S.A. § 8504(a) (Act 250 and Agency appeals); see also V.R.E.C.P. 5(b)(1) (an appeal shall be taken "within 30 days of the date of the act, decision, or jurisdictional opinion appealed from, unless the court extends the time as provided in Rule 4 of the Vermont Rules of Appellate Procedure."). When a motion to alter is filed with the District Commission, Act 250 Rule 31(A)(3) provides:

> The District Commission shall act upon motions to alter promptly. *The running of the time for filing a notice of appeal is terminated* as to all parties by a timely motion to alter. It is entirely within the discretion of the District Commission whether or not to hold a hearing on any motion.

Act 250 Rules, Rule 31(A)(3) (emphasis added). As written, the rule does not define "terminated," and is silent as to how the appeal deadline should be calculated when the motion to alter is decided.

This court's standard of review when interpreting the language of the Act 250 rules is well-settled. "In reviewing the rules governing Act 250, we apply familiar principles of construction, including a presumption that the drafters of the rules intended 'the plain ordinary meaning of the language

[3] Appellants initially proffered that the issue Laberge Shooting Range addresses the issue almost directly but conceded during the motion hearing that it was not directly controlling. Mot. Hr'g at 10:05:44–11:10 (Nov. 3, 2022) (referencing Laberge Shooting Range JO, No. 96-8-16 Vtec, slip op. (Vt. Super. Ct. Envtl. Div. Oct. 20, 2016)). The Court reviewed the decision in Laberge and did not find it particularly helpful for the issue presently before the Court. First, Laberge involved a Jurisdictional Opinion (JO), not an Act 250 Permit. Laberge Shooting Range JO, No. 96-8-16 Vtec at 1 (Oct. 20, 2016). Second, the altered JO was issued sua sponte to correct an error in the in the JO number. There was no motion to cause a tolling or otherwise create a reasonable expectation for delay. Id. Third, the alteration was merely an administrative amendment, which the District Commission has authority to correct pursuant Rule 31(A)(4) and may do so on its own motion, without a hearing, to correct mistakes, or typographical errors. Id.; see also Act 250 Rule 34(A)(4). As such, the issue in Laberge is not presently before the Court.

To the limited extent the Court finds Laberge helpful, however, it supports that the operative time for filing an appeal following the issuance of a decision on motion to alter is 30-days. While the Court did ultimately rule that the altered JO in Laberge did not restart the clock, the question before the Court was whether Appellants received 30-days from the issuance of the District Commission's denial of Appellants' Motion for Reconsideration of the JO, or from the issuance of the administratively altered JO. See id. at 1–2 (procedural history). Built into the issue was the presumption that the Appellants received a full 30-days to file their appeal following the District Commissions decision on the Motion to Reconsider. Cf. V.R.A.P. 4(b)(5), (7) (considering Motions to Reconsider with the same tolling as Motions to Alter). The Court finds that of limited persuasive value, however, as it was not the issue litigated by the parties in that matter.

used.'" In re CVPS/Verizon Act 250 Land Use Permit Nos. 7C1252 & 7C0677-2, 2009 VT 71, ¶ 14, 186 Vt. 289; In re 1650 Cases of Seized Liquor, 168 Vt. 314, 319 (1998) ("We apply the same rules of statutory construction to a regulation as we do to a statute."); see also In re Vitale, 151 Vt. 580, 584 (1989) ("The primary rule when reviewing [the] construction of an administrative rule is to give language its plain, ordinary meaning."). The court will avoid a statutory construction that leads to absurd or irrational results. Bergeron v. Boyle, 2003 VT 89, ¶ 11 n.1, 176 Vt. 78.

The Court finds that the plain and ordinary meaning of "terminate" means to stop, conclude, or put to an end. See TERMINATE, Black's Law Dictionary (11th ed. 2019) ("1. To put an end to; to bring to an end. 2. To end; to conclude."). If a different result was intended, we would expect to see the use of "paused, placed on hold, or suspended." Blackrock offers that terminated means that it terminates "the *running* of the appeal period" not the "appeal period." Mot. Hr'g at 10:33:50 (Nov. 3, 2022) (stating "terminated applies to running, not the appeal period itself").[4] The Court does not find this argument dispositive. Regardless of whether it is the appeal period itself, or the "running of time for filing a notice of appeal," the rule terminates—not pauses—the running of time and provides no mechanism for restarting the running of time for filing notice of appeal.

Although the Court does not believe the plain language of Act 250 Rule 31(A)(3) is ambiguous, the Court considers further constructions aids. If the plain language of the rule cannot be discerned or is deemed ambiguous, the "court may then rely on subordinate rules of construction in order to interpret the meaning of the disputed terms." Isbrandtsen v. N. Branch Corp., 150 Vt. 575, 579 (1988). For example, it is understood that "an amendment of the statute shows a legislative intent to change the effect of existing law." Montgomery v. Brinver Corp., 142 Vt. 461, 464 (1983) (citing Jones v. Department of Employment Security, 140 Vt. 552, 555 (1982); Diamond v. Vickrey, 134 Vt. 585, 589 (1976)). This canon, however, "routinely yields to the corollary principle that contrary evidence may reveal a legislative intent to clarify rather than change existing law." Perry v. Vermont Med. Prac. Bd., 169 Vt. 399, 406 (1999).

The language of Rule 31(A)(3) was amended in 2013. The 2013 amendment

> Substituted "The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion to alter" for "The running of any applicable time in which to appeal to the environmental court or supreme court shall be terminated by a timely motion filed under this

[4] Blackrock did not proffer an alternative definition for "terminates" but rather argues that it does not apply to the appeal period, but merely the running of time.

> rule. The full time for appeal shall commence to run and is to be computed from issuance of a decision on said motion."

Act 250, Rule 31(A)(3), History, Amendments – 2013. Thus, prior to the 2013 amendments, the rule expressly "reset" the appeal clock for appellants following disposition of a timely motion to alter. Id.

During the rulemaking process for the 2013 amendments, a Decision and Responsiveness Survey by the Natural Resources Board explained the deletion of the sentence as follows:

> The existing language in Rule 31(A)(3) provides that a motion to alter tolls the running of time in which to file an appeal from the decision denying a permit application. The amendment to Rule 31(A)(3) concerning the staying of the time for filing an appeal from a motion to alter is *not a substantive change* to that provision but merely makes the language in the rule concerning the tolling of time *consistent with VRAP 4*.

Natural Resources Board, Decision and Responsive Summary re: Act 250 Rules (2013 Amendments), VT Proposed Rule 13-P004, at 16 (Aug. 13, 2013). As such, the administrative history reveals an intent to clarify the rule as consistent with V.R.A.P. 4, and eliminate surplus language, rather than substantively alter the rule. Vermont Rule of Appellate Procedure Rule 4, in 2013 and continuing today, provides, in relevant part: "(b) Tolling. If a party timely files in the superior court any of the motions referenced below, the full time for appeal begins to run for all parties from the entry of an order disposing of the last remaining motion . . . ." V.R.A.P. 4(b). A motion to alter is one of the referenced motions. See V.R.A.P. 4(b)(5).[5] Based on the 2013 amendment history, the Court concludes that the appeal period is terminated by a motion to alter, and consistent with V.R.A.P. 4, the full 30-day appeal period runs anew following a decision on motion to alter.

Blackrock suggests that the Court should defer to the NRB's interpretation of Rule 31(A)(3). Where a statute is silent or ambiguous and an agency charged with enforcing the statute has interpreted it, this Court will defer to the agency interpretation of the statute within its area of expertise. See In re Smith, 169 Vt. 162, 169 (1999); C & S Wholesale Grocers, Inc. v. Dep't of Taxes, 2016 VT 77A, ¶ 13 ("We defer to agency interpretations of statutes the Legislature has entrusted to their administration . . . ."). The Court accords deference to the Environmental Board's interpretation of Act

[5] Blackrock offers that the Application of Act 250 Rule 31(A)(3) and the resulting calculation of the appeal period would differ depending on whether the motion to alter resulted in a substantive change. This approach differs from V.R.A.P. 4(b)(5) and would add an additional level of complexity to the Act 250 procedure and appeals process. The Court disfavors adding complexity to the already complex land use process.

250 rules, and to the Board's specialized knowledge in the environmental field. Absent compelling indications of error, we will sustain the Board's interpretation on appeal. In re Nehemiah Assocs., Inc., 168 Vt. 288, 292 (1998)) (citations omitted); see also In re S-S Corp./Rooney Housing Developments, 2006 VT 8, ¶ 5, 179 Vt. 302 (same); In re Village Assocs. Act 250 Land Use Permit, 2010 VT 42A, ¶ 7 n.2, 188 Vt. 113 (confirming that this rule of deference applies with equal strength to the NRB as part of its Act 250-related rulemaking authority as it did the former Environmental Board). Courts afford less or no deference, however, if its interpretation is contrary to the rule's plain language, if the agency changes its interpretation, or if the agency's rule merely "parrots" the language of the statute or court rule. See, e.g., Christensen v. Harris County, 529 U.S. 576, 588 (2000) ("[D]eference is warranted only when the language of the regulation is ambiguous."); INS v. Cardoza–Fonseca, 480 U.S. 421, 446 n. 30 (1987) (according less deference to due to Agency's inconsistent interpretations over the years); Gonzales v. Oregon, 546 U.S. 243, 257 (2006) ("[T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute.")

At the time that Blackrock was contemplating the motion before the Court, it received opinions from NRB staff and counsel supporting its offered calculation of the appeal period. In response to the motion before the Court, however, the NRB filed a response concluding that the Appellants' appeal was timely. The Court concludes that any prior interpretation by the NRB staff and the program that align with Blackrock's calculation are clearly in error, inconsistent with the NRB's representations in the present filing, and as such, not entitled to deference. Similarly, the language included at the end of the decision denying the motion to alter at issue in this appeal states:

> Any appeal of the Commission's decision must be filed with the Superior Court, Environmental Division within 30 days of the date the original decision was issued, pursuant to 10 V.S.A. Chapter 220, not including the time between the date any motion to alter was filed and the date the Commission issued this decision. The issuance of this decision does not restart the deadline for appealing the Commission's original decision.

In re Act 250 Application 4C0923-5A, 4C0694-7A, Memorandum of Decision and Order on Motion to Alter, at 4 (District 4 Environmental Commission Aug. 25, 2022). This language is also clearly in error. The legislature unambiguously provided parties 30 days to appeal a decision of the District Commission. 10 V.S.A. § 8504(a); see V.R.E.C.P. 5(a)(2) (applying V.R.A.P. and V.R.C.P. to Environmental Court proceedings); see also V.R.A.P. 4(b)(5) (providing "the full time for appeal begins to run for all parties from the entry of an order disposing of the last remaining motion . . . granting or denying a V.R.C.P. 59 motion to alter"). A district commission, as well has the NRB, has no authority to abridge an appellant's

rights provided by duly enacted statutes and judiciary rules. See Smith, 169 Vt. at 169 ("[T]he Court as well as the administrative agency must adhere to legislative intent as unambiguously expressed by the plain language of a statute . . . ."). The Court need not provide deference to an agency interpretation contrary to the legislature's clear intent, or its regulation's own plain language. Levine v. Wyeth, 2006 VT 107, ¶ 31, 183 Vt. 76; Christensen, 529 U.S. at 588.

Finally, the rationale supporting such deference is inapplicable here. The Court presumes agencies are better situated to interpret statutes governing the subject matter in which they possess a particular expertise. In re Vermont Ry., 171 Vt. 496, 500 (2000). This rationale, however, does not support the argument that an agency's interpretation of a statutory provision implicating procedural requirements merits deference, as agencies are in no better position to interpret these procedural questions than the courts.

As the evidence before the Court shows inconsistent interpretations by the Act 250 program of a statute and court rule outside the Agency's area of expertise, the Court does not defer to any of the program's interpretations. The Court concludes that the plain language of Act 250 Rule 31(A)(3), 10 V.S.A. § 8504(a), and V.R.A.P. 4(b)(5) all provide appellants with 30-days to file an appeal following the issuance of the decision on their Motion to Alter. As such, the appeal here was timely and Applicant's Motion to Dismiss is **DENIED**.

Motion for Extension of Time

As the Court concludes that Appellants' notice of appeal was timely filed, Appellants' Motion for Extension of Time for Filing Notice of Appeal is moot. Blackrock was very clear during the hearing on its motion to dismiss that a denial of its motion would be a harsh result, given its reliance on prior agency interpretation. The Court notes, however, that an untimely appeal may be permitted due to good cause or excusable neglect. V.R.A.P. 4(d)(1); Laberge Shooting Range JO, No. 96-8-16 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Oct. 20, 2016). In their motion for extra time, and during the Court's November 3 hearing on this motion, Appellants offered that because they are a group composed of several homeowners' associations, they needed the time they took to file the appeal as each association needed to decide whether to appeal and then to agree as a group. Further, Appellants purport to have relied on the language of Act 250 Rule 31, rather than the District Commission's interpretation of the rule at the end of the reconsideration decision. This situation cannot be said to be "bad faith or deliberate and willful disregard for the [tribunal's] orders" if the tribunal's orders were not a correct reflection of the rules and law. See In re Lamoille Valley Rail Trail, No. 208-10-09VTEC, slip op. at 16 (Vt. Super. Ct. Envtl.

Div. July 30, 2010) (declining to sanction appellants with dismissal for a procedural defect). While the Court does not analyze or deliberate over the motion for extension, there is a likelihood of finding good cause or excusable neglect which would lead to the same result as our above conclusion—i.e., Appellants' appeal moving forward without dismissal.

CONCLUSION

Act 250 Rule 31(A)(3) provides the full 30-day appeal period for filing a notice of appeal from the date of a decision on a timely motion to alter, regardless of whether the decision on the motion grants or denies the motion. As such, Appellants notice of appeal in this matter was timely, and Permittee's motion to dismiss is **DENIED**. Appellants motion for extension of time is **MOOT**. Both the Permit Decision and the MA Decision are before the Court. The Court is unsure of Applicants' use of the phrase "and all prior decisions of the District Commission in this matter." We simply note that prior final decisions my not be collaterally attacked. Pursuant to the Court's October 12, 2022 EO, Appellants have 21 days from today to file their Statement of Questions.[6]

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

Thomas G. Walsh, Judge
Superior Court, Environmental Division

[6] The Court acknowledges Blackrock's request for leave seek reimbursement for its expenses in filing and pursuing this motion to dismiss. The Court does not take such a request lightly. If Blackrock's continues to be interested in such relief, it may file a motion. As stated on the record of the November 3 hearing, the Court hopes that the parties will work through their differences without adding additional layers of litigation. The Court is also not readily aware of whether the Environmental Division's limited and specific jurisdiction has authority for considering such relief.