State of Vermont
Superior Court—Environmental Division

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ENTRY REGARDING MOTIONS

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In re Waitsfield Water System Final Plan Approval Application **Docket No. 67-5-12 Vtec**
(Appeal from DRB subdivision final plat approval)

Title: Motion to Dismiss, Strike, and Clarify Questions (Filing No. 5)
Filed: Nov. 19, 2012
Filed By: Appellee Town of Waitsfield
Opposition to Motion filed on 12/5/12 by Appellant Virginia Houston
Reply filed on 12/18/12 by Appellee

Title: Motion to Amend Statement of Questions (Filing No. 6)
Filed: Dec. 31, 2012
Filed By: Appellant Virginia Houston
Response filed on 1/7/13 by Appellee Town of Waitsfield

__X__ Granted (in part) __X__ Denied (in part) ___ Other

Virginia Houston ("Appellant") appealed a decision by the Town of Waitsfield Development Review Board (the "DRB") granting subdivision approval to the Town of Waitsfield (the "Town") for the subdivision of a parcel of land formerly owned by Appellant and a neighbor in connection with the Town's proposed municipal water supply project. In her Statement of Questions, Appellant posed ten questions for determination by this Court. The Town moved to dismiss Appellant's Questions 1, 6, 7, and 10; strike language from Questions 4 and 8; and clarify the remainder of Question 8. Appellant opposed the Town's motion, but subsequently moved to amend her Questions 4 and 8. We address both motions in this entry order.

I. Appellant's Question 1

Appellant's Question 1 asks,

> Whether, by this subdivision, Ms. Houston will suffer considerable lost property rights and opportunities to her own proposed water withdrawal system, access to the majority of her land by closure of her long-term 25 year access over what was once called "Reed Road" driveway as well as access to logging of her property, educational programs that she offers through Norwich University, farmland use, pasturing of horses and other farm animals, access to . . . her hunting cabins, and her personal home site as well as other home possibilities.

(Appellant's Statement of Questions at 1–2, filed May 21, 2012.) Question 1 raises two issues: whether approval of the Town's proposed subdivision will (1) impair Appellant's property

rights, including her opportunity to construct her own water withdrawal system and develop her land; and (2) impair Appellant's ability to access her land for a variety of uses.

In holding a de novo hearing on an appeal of a decision by a municipal tribunal, such as the Waitsfield DRB, this Court must apply the "substantive standards that were applicable before the tribunal appealed from." 10 V.S.A. § 8504(h). In this case, those substantive standards are contained within the Town of Waitsfield Subdivision Regulations ("Regulations"), which govern the DRB's review of proposed subdivisions. See Regulations § 1. Our jurisdiction in this case is therefore limited to issues raised under the Regulations. Moreover, the purpose of a statement of questions in an appeal such as this one is to provide notice to other parties and this Court of the "questions that the appellant desires to have determined." V.R.E.C.P. 5(f); see, e.g., In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.) (E.O. on Mot. to Strike Questions). To provide such notice, Appellant must identify those portions of the Regulations she believes the Town's proposed subdivision violates.

Appellant's Question 1 fails to cite to any provision of the Regulations. In her response to the Town's motion to dismiss, Appellant appears to suggest that we may consider the harms alleged in Question 1 in light of Regulations §§ 1.1(B) and 3.1(D). Regulations § 1.1(B) merely states that the policy of the Town is to regulate the subdivision of land and future development on such subdivided land. Regulations § 3.1(D) requires that "[w]henever a subdivider submits a proposal for development on a minor portion of a parcel, the Development Review Board may require a general indication of the intended uses of the remaining portion of land." Neither § 1.1(B) nor § 3.1(D) grants the DRB, or this Court, the authority to consider the effects of a proposed subdivision on a neighboring landowner's future plans to develop her own parcel.

Appellant contends that this Court may consider Appellant's "future development plans . . . in the context of the subdivision permit process," but she fails to identify any portion of the Regulations under which we may do so. Moreover, the portion of Question 1 alleging that the subdivision will affect Appellant's ability to access her property is redundant, as Question 8 covers that concern in its challenge under Regulations § 3.6. Accordingly, we **DISMISS** Appellant's Question 1 for failing to state a claim upon which this Court can grant relief.

II. Appellant's Question 6

Appellant's Question 6 asks, "Whether Ms. Houston and her neighbors' potential attachment to utility lines will be compromised by the effective closure of Reed Road to her use." As with Question 1, the text of Question 6 fails to cite to a particular provision of the Regulations under which this Court may review the impact of the proposed subdivision on the future installation of utility lines. In her response to the Town's motion to dismiss, Appellant points to Regulations § 1.2(A)(9) as providing the DRB and this Court the authority to consider "the present and future status of utilities on the property to be subdivided." (Appellant's Resp. to Town's Mot. to Dismiss, Strike, and Clarify at 4, filed Dec. 5, 2012.)

Section 1.2 is the Regulations' purpose provision. Section 1.2(A)(9) states that one of the objectives of the Regulations is, in part, to "ensure the logical and coordinated extension of roads and utilities." While § 1.2(A)(9) suggests that when the DRB or this Court reviews a subdivision application, we may consider the extension of utilities, the language of the section does not provide any discernible standards. The phrase cited by Applicants in Section 1.2(A)(9) is aspirational, and "[w]ithout more specificity, such language cannot be read as restricting

specific activities." In re Rivers Dev., LLC, Nos. 7-1-05 Vtec and 68-3-07 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. Jan. 8, 2008) (Durkin, J.). Appellant does not identify any other provisions in the Regulations that implement the aspirational language concerning utility lines by providing specific enforceable standards.

Appellant has failed to identify any provision within the Regulations under which this Court may review the Town's proposed subdivision for its impact on Appellant's ability to extend utility lines onto her property. Accordingly, we **DISMISS** Appellant's Question 6 for failing to state a claim upon which this Court can grant relief.

III. Appellant's Question 7

Appellant's Question 7 asks, "[w]hether, pursuant to Section 3.4, the proposal impacts Ms. Houston's ability to log her property, because of access problems and its interference with ongoing forest management of her land after subdivision." (Appellant's Statement of Questions at 3, filed May 21, 2012.) Regulations § 3.4 establishes standards relating to stormwater and erosion control and does not address forest management or access to land. However, in her response to the Town's motion to dismiss, Appellant cites to several other provisions of the Regulations, particularly Regulations § 3.3(H), relating to the protection of forest resources. Section 3.3(H) provides discernible standards under which this Court may review the Town's proposed subdivision, and we read Appellant's Question 7 as asking the cognizable question of whether, pursuant to § 3.3(H), the proposal impacts Appellant's ability to log her property. Accordingly, we **DENY** the Town's motion to dismiss Appellant's Question 7.

We note, however, that our denial of the Town's motion to dismiss on this Question does not relieve Appellant of her duty to present evidence of actual interference from the Town's proposed subdivision upon Appellant's future logging activities. We also anticipate that the Town may claim that Appellant is barred from claiming that the Town's proposed project will impact her ability to log her property, since that issue was adjudicated in the Town's favor in this Court's de novo hearing on the Town's Act 250 permit application. See In re Waitsfield Water System Act 250 Permit Appeal, No. 33-2-10 Vtec, slip op. at 3, 5, 8 (Vt. Super. Ct. Envtl. Div. Jul. 11, 2012) (Durkin, J.). We reserve any determination on a claim based upon the issue preclusion doctrine to the de novo trial in this Docket.

IV. Appellant's Question 10

Appellant's Question 10 asks, "Whether the Waitsfield Development Review Board had jurisdiction to hear and consider a final application while the preliminary application is on appeal to this Court." (Appellant's Statement of Questions at 3, filed May 21, 2012.) In light of our July 20, 2012 order in this proceeding, in which we dismissed the appeal of the DRB's preliminary subdivision approval, this question is now moot. See In re Waitsfield Water System, Nos. 39-3-12 Vtec and 67-5-12 Vtec, slip op. at 3–4 (Vt. Super. Ct. Envtl. Div. July 20, 2012) (Durkin, J.). Accordingly, we **DISMISS** Appellant's Question 10.

V. Appellant's Questions 4 & 8

Finally, the Town moves to strike portions of Appellant's Questions 4 and 8 and, in any case, for clarification of the remainder of Question 8. The Town argues that portions of Appellant's original Questions 4 and 8 contained factual assertions and legal arguments inappropriate for this appeal. While Appellant originally opposed the Town's motion to strike

language from Questions 4 and 8 and to further clarify Question 8, she subsequently moved to amend both questions.

In its response to Appellant's motion to amend, the Town does not seek to further clarify or strike language from Appellant's amended Question 4. Accordingly, we **GRANT** Appellant's motion to amend Question 4 and **DISMISS** as moot the Town's motion to strike language from Appellant's original Question 4.

However, the Town continues to challenge the propriety of Appellant's amended Question 8, which asks, "Whether, pursuant to Section 3.6, the Waitsfield subdivision plan has an impact on [Appellant's] access roads, since the Civil Division of the Superior Court has prohibited Houston from accessing the former Reed Road for water hauling." The Town argues that by failing to identify a subsection of Regulations § 3.6 with which the Town's proposed subdivision does not comply, Appellant's amended Question 8 fails to provide notice of the issue Appellant seeks to have resolved at trial. In particular, the Town claims that Question 8 does not tie the alleged impact to Appellant's access roads with a provision in the Subdivision Regulations under which that issue can be considered.

A Statement of Questions should be a "short and plain statement," V.R.C.P. 8(a), that provides notice to other parties and this Court of the "questions that the appellant desires to have determined" in the appeal. V.R.E.C.P. 5(f); see, e.g., Conlon, No. 2-1-12 Vtec, slip op. at 1. In particular, the parties "are entitled to a statement of questions that is not vague or ambiguous, but is sufficiently definite so that they are able to know what issues to prepare for trial." In re Sheffield Wind Project, No. 252-10-08 Vtec, slip op. at (Vt. Envtl. Ct. Sept. 29, 2009) (Wright, J.) (quoting In re Unified Buddhist Church, Inc., Indirect Discharge Permit, Docket No. 253-10-06 Vtec, slip op. at 5 (Vt. Envtl. Ct., May 11, 2007) (Wright, J.)).

Regulations § 3.6 encompasses approximately four and a half pages within the Regulations and provides standards for, among other things, road design, road construction, coordination with adjoining properties, intersections, drainage, stormwater, and access management. Section 3.6 arguably contains standards applicable to the proposed subdivision as it relates to Appellant's access to her property. While Appellant could be more specific in describing which sub-sections within § 3.6 she finds applicable**,** Question 8 is not so vague that it fails to notify this Court or the Town of the issues to be raised at trial. However, particularly in light of the prior and concurrent cases in which Appellant has raised similar concerns about the impact of the Town's water supply project on access routes to her property, and the determinations already made by this Division and the Civil Division of the Superior Court, we note that at trial we will only accept testimony from Appellant under Question 8 that specifically relates to standards contained in Regulations § 3.6, and we will address any questions of issue or claim preclusion at trial.

Accordingly, we **GRANT** Appellant's motion to amend her Question 8 and **DENY** the Town's motion to dismiss, strike language from, or clarify Question 8.

For the reasons discussed above, we **GRANT** the Town's motion to dismiss Appellant's Questions 1, 6, and 10. We **DENY** the Town's motion to dismiss Appellant's Question 7. Finally, we **GRANT** Appellant's motion to amend Questions 4 and 8; **DISMISS** as moot the Town's motion to strike language from Question 4; and **DENY** the Town's motion to dismiss, strike language from, or clarify Question 8.

Appellant's original Questions 2, 3, 5, 7, and 9 and Questions 4 and 8 as amended remain for review in the upcoming merits hearing.

_____ January 18, 2013

Thomas S. Durkin, Judge Date

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Date copies sent: _____ Clerk's Initials: _____

Copies sent to:

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