

VERMONT SUPERIOR COURT  
Environmental Division  
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Docket No. 24-ENV-00079

Higher Ground Natural Burial Cemetery, Revised Site Plan DRB Decision Appeal

**ENTRY REGARDING MOTION**

Title: Motion to Dismiss  
Filer: Samuel H. Angell, attorney for Applicant-Appellees Higher Ground Conservation Cemetery Association, Inc. and Michael Mayer  
Filed Date: October 9, 2024  
Reply to Motion, filed on October 25, 2024, by Appellants Gordon Bristol and John Walker

**The motion is DENIED. Appellants shall file their Statement of Questions within seven (7) days of the date of this Entry Regarding Motion.**

This is an appeal from an August 11, 2024 decision by the Town of Newfane Development Review Board approving Applicants' revised site plan, dated November 16, 2023.<sup>1</sup> On September 10, 2024, neighbors to the project—Gordon and Jean Bristol and John and Linda Walker—filed a timely notice of appeal of the DRB's decision to this Court. No Appellant has filed a Statement of Questions within the time required by V.R.E.C.P. 5(f).<sup>2</sup> Applicants have moved to dismiss this appeal based on Appellants' failure to file a Statement of Questions, pursuant to both V.R.E.C.P. 5(f) and V.R.C.P. 41(b)(2). Among other things, Applicants assert that Appellants failure to file a Statement of Questions is evidence of bad faith and an attempt by Appellants to delay their project.

In their response, Appellants Gordon Bristol and John Walker, who are self-represented, appear to contest whether they are required to file a new Statement of Questions in this appeal.<sup>3</sup> While it is somewhat difficult to follow their argument, Mr. Bristol and Mr. Walker also appear to claim that no

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<sup>1</sup> While it involves a new appeal, this matter appears to be directly related to prior litigation between these same parties, as addressed by this Court in Docket No. 21-ENV-00060. In the earlier case, this Court granted conditional use approval to Applicants by Order dated May 31, 2023.

<sup>2</sup> Rule 5(f) provides: **(f) Statement of Questions.** Within 21 days after the filing of the notice of appeal, the appellant shall file with the clerk of the Environmental Court a statement of the questions that the appellant desires to have determined. The statement shall be served in accordance with Rule 5 of the Vermont Rules of Civil Procedure and the 2010 Vermont Rules for Electronic Filing. 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. The statement is subject to a motion to clarify or dismiss some or all of the questions. V.R.E.C.P. 5(f).

<sup>3</sup> No response was filed by Jean Bristol or Linda Walker.

Statement of Question was required in their prior appeal and they challenge whether Applicants may require one now.

Under our rules, “Failure of an appellant to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal but is ground only for such action as the court deems appropriate, which *may* include dismissal of the appeal.” V.R.E.C.P. 5(b) (emphasis added). In other words, failure to timely file a Statement of Questions is not jurisdictional and the Court has discretion to determine how best to address such a failure.

Generally, under the Vermont Rules of Civil Procedure, the Court may extend the time for an action: “with or without motion or notice if the court acts, or if a request is made before the original time or its extension expires; or...on motion made after the time has expired if the party failed to act because of excusable neglect.” V.R.C.P. 6(b). When determining whether excusable neglect exists, we consider “the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” Capitol Plaza Act 250, No. 59-5-19, 2019 WL 4136863, at 2 (Vt. Super. Ct. Envtl. Div. Aug. 1, 2019) (Walsh, J.) (quoting In re Laberge Shooting Range, 2018 VT 84, ¶ 14).

“[I]gnorance of the law or inattention to detail would rarely constitute excusable neglect.” In re Lund, 2004 VT 55, ¶ 5, 177 Vt. 465 (mem.) (citing In re Town of Killington, 2003 VT 87A, ¶¶ 17–18). However, the Vermont Supreme Court has expressed a preference for courts to “resolv[e] litigation on the merits, to the end that fairness and justice are served.” Desjarlais v. Gilman, 143 Vt. 154, 158–59 (1983); see also Shahi v. Ascend Fin. Servs., Inc., 2006 VT 29, ¶ 3 n.\*, 179 Vt. 434 (“Because due process favors decisions on the merits, we are reluctant to overturn a trial court’s decision to allow a late filing.”); Capitol Plaza Act 250, No. 59-5-19, slip op. at 3–4 (Vt. Super. Ct. Envtl. Div. Aug. 01, 2019) (granting a motion for extension of time to file a motion for party status given “the short length of the delay and its limited impact on the present proceedings, the lack of an allegation of bad faith, and the lack of an allegation of prejudice”).

Appellants are required to file a Statement of Questions in this appeal. To the extent that they assert no Statement of Questions was required in Docket No. 21-ENV-00060, they are mistaken. Indeed, the Walkers failed to timely file a Statement of Questions in Docket No. 21-ENV-00060 and this Court denied a Motion to Dismiss their appeal in that case. Thus, Mr. Walker, at least, was on notice regarding the requirements of V.R.E.C.P. 5(f).

Applicants here have not cited any substantial prejudice from a relatively short delay in Appellants’ filing of their Statement of Questions “other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal.” In re Mahar Conditional Use Permit, 2018 VT 20, ¶ 22, 206 Vt. 559 (quoting 16A C. Wright et al., Federal Practice & Procedure § 3950.6 (4th ed.)). Failure to timely file a Statement of Questions, by itself, is also insufficient evidence of bad faith. Therefore, we **DENY** the motion to dismiss at this time. **However, Appellants shall file a Statement of Questions within seven (7) days of the date of this Entry Regarding Motion or they risk dismissal by renewed motion of the Applicants or by action of this Court.**

Electronically signed on October 28, 2024, pursuant to V.R.E.F. 9(d).

A handwritten signature in blue ink, appearing to read "Joseph S. McLean". The signature is fluid and cursive, with the first name "Joseph" being the most prominent part.

Joseph S. McLean  
Superior Court Judge  
Environmental Division