



Roser Wetland Permit

DECISION ON MOTIONS

This is an appeal of Individual Wetland Permit No. 2023-0545 (the Permit) issued by the Vermont Agency of Natural Resources (ANR) to James and Joanne Roser (Applicants) authorizing the construction of a driveway and sewer main connection in a Class II wetland and associated buffer zone on the property located at 42 Fairbanks Turn in Hartford, Vermont (the Property). Neighboring landowners (Neighbors)¹ appealed the Permit to this Court. Applicants filed a cross-appeal.

Presently before the Court is Applicants' motion to dismiss for lack of standing, and alternatively, for failure to state a claim upon which relief can be granted. Applicants also filed a motion to withdraw their cross-appeal. Neighbors did not respond to either motion.

1. Neighbors' Standing

Applicants move to dismiss this appeal for lack of standing pursuant to Vermont Rule of Civil Procedure (V.R.C.P.) 12(b)(1) and 10 V.S.A. § 8504. A party's standing is a question of subject matter jurisdiction. Brod v. Agency of Nat. Res., 2007 VT 87, ¶ 8, 182 Vt. 234. When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to V.R.C.P. 12(b)(1), the Court accepts as true all uncontroverted factual allegations and construes them in a light most favorable to the nonmoving party. Rheume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245.

Any "person aggrieved by an act or decision by the Secretary" of ANR may appeal to this Court. 10 V.S.A. § 8504(a). A "person aggrieved" is "a person who alleges an injury to a particularized interest protected by the provisions of law listed in § 8503 of this title, attributable to an act or decision by the . . . Secretary" of ANR. 10 V.S.A. § 8501(7). As the Vermont Supreme Court has explained, statutory standing under § 8504(a) may be predicated on minimal allegations. In re Snowstone LLC

¹ Those neighbors are: Stuart Katz, Michael Kolowich, Kirstin Lynde, Alison and Matthew McCourt, and Richard and Ann Reindollar.

Stormwater Discharge Authorization, 2021 VT 36, ¶ 15, 214 Vt. 587. “[T]he statute requires only an allegation of injury, and not any measure of proof.” *Id.* at ¶ 17.

Here, Neighbors’, with the exception of the Reindollars’, have not satisfied the minimal burden of alleging an injury to a particularized interest. Because Neighbors did not respond to the pending motion to dismiss, we look to the record, including the Notice of Appeal and Statement of Questions, to determine if any allegation of an injury has been indicated in the filings.

Each Neighbor filed their own Notice of Appeal using the one-page Environmental Division form. They all claim standing pursuant to 10 V.S.A. § 8504(a), but do not provide any additional information related to standing.

With respect to the Statement of Questions, it contains significant narrative portions, which normally are improper for a Statement of Questions. See In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (explaining that “detailed factual and legal information that goes beyond identifying the Questions and crosses over into arguing the merits . . . is misplaced. . .”). For the limited purpose of assessing Neighbors’ standing, however, the Court will consider those narrative portions in the Statement of Questions.

Neighbors’ Question 2 explains, in part, that they are concerned that:

[S]hould the DEC’s statements be proven incorrect, there will be serious resultant damage to Drs. Richard and Anne Reindollar, whose property is located downhill from and directly abuts the Roser property. Water runoff created by the new build would result in foreseeable, irreparable harm in the form of property damage, undue financial hardship, and mental anguish to a retired elderly couple with preexisting health conditions.

Neighbors’ Statement of Questions at 2–3 (filed July 6, 2024).

While this commentary sufficiently alleges a particularized interest to the Reindollars’, it does not make any showing relating to the other Neighbors. Without this minimal showing, the Court lacks subject matter jurisdiction over the remaining Neighbors and their appeals. Accordingly, we **DISMISS** the following parties and their appeal: Stuart Katz, Michael Kolowich, Kristin Lynde, and Alison & Matthew McCourt.

2. Failure to State a Claim

Applicants’ motion to dismiss identifies multiple issues with Neighbors’ Statement of Questions. Specifically, Applicants argue that the Questions lack specificity, mischaracterize the

standard of review, and are impermissibly argumentative.² When reviewing a motion to dismiss for failure to state a claim under V.R.C.P. 12(b)(6), we will “consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle [Neighbors] to relief.” Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1.

In the Environmental Division, the Statement of Questions provides notice to other parties and this Court of the issues to be determined within the case and limits the scope of the appeal. In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Env'tl. Div. Aug. 30, 2012) (Durkin, J.). The Statement of Questions is subject to a motion to dismiss or clarify the Questions therein. V.R.E.C.P. 5(f). We will direct a party to clarify its Questions when necessary to ensure that “the claims have enough specificity to notify the opposing party and the court of the issues on appeal.” In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 14, 204 Vt. 301 (citation omitted); In re Couture Subdivision Permit, No. 53-4-14 Vtec, slip op. at 2–3 (Vt. Super. Ct. Env'tl. Div. July 17, 2015) (Durkin, J.) (dismissing a question that did not reference any specific provisions, just the applicable regulations generally). Lastly, as explained above, the Statement of Questions is not a mechanism to argue one’s claims. In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super Ct. Env'tl. Div. Aug. 30, 2012) (Durkin, J.). With this framework in mind, we turn to Neighbors’ Questions to determine whether they satisfy the requisite standards.

Neighbors’ Question 1 asks, in relevant part: “was the wetland properly identified and classified appropriately under Vermont’s wetland regulations?” The Question then proceeds to quote from a memo prepared by Otter Creek Engineering which appears to argue that the wetland should properly be classified as a Class III wetland. It is unclear to the Court why Neighbors would cite language purporting that the wetland is Class III, which would render it non-jurisdictional under the Vermont Wetland Rules. Nevertheless, the relevant portion of this Question lacks specificity, and the remainder of the Question is impermissible narrative. Accordingly, we order the Reindollars, should they so choose, to **AMEND** and **CLARIFY** Question 1 by citing to specific provisions in the Vermont Wetland Rules upon which they believe the subject wetland was mischaracterized. We further **STRIKE** the remainder of Question 1. If the Reindollars do not amend or clarify Question 1 it will be dismissed.

Question 2 asks, in relevant part: “[w]as a detailed evaluation and environmental impact study of the proposed flooding mitigation strategies and their consequences conducted before issuing the

² Because a copy of the Vermont Wetland Rules has not been filed with the Court, we are unable to fully evaluate whether the Questions have a legitimate basis in the Rules. Accordingly, we direct the Reindollar’s, if they so choose, to amend and clarify any Questions which lack a citation to the Vermont Wetland Rules.

permit based upon review of the landowner's plans and subsequent one-time site visit." The remainder of the Question cites to various statements made by DEC, as well as Neighbors' concerns regarding the Reindollar property. Again, this Question does not cite to any applicable provision in the Vermont Wetland Rules which would require a detailed evaluation and environmental impact study of proposed flooding mitigation strategies. Accordingly, we order the Reindollars to **AMEND** and **CLARIFY** Question 2 by citing to the specific provision in the Wetland Rules upon which this Question is based. We further **STRIKE** the remainder of Question 2. If the Reindollars do not amend or clarify Question 2 it will be dismissed.

Next, Question 3 asks, in relevant part, whether DEC should have required "stipulations of special conditions, monitoring, and reporting requirements" as part of the application process or conditions of the Permit. First, this Question seems to misunderstand the Court's standard of review in this appeal. We review decisions from ANR de novo, meaning we hear the case as though no action has occurred prior. 10 V.S.A. § 8504(h). Accordingly, we are not concerned with what DEC did or should have done with the application. Secondly, this Question again fails to cite to any applicable provision in the Wetland Rules. As such, we order the Reindollars, should they choose, to **AMEND** and **CLARIFY** Question 3 to reflect this Court's de novo review and to cite to specific provisions in the Wetland Rules which would require any special conditions or monitoring and reporting requirements. We further **STRIKE** the remainder of Question 3 because it is impermissible narrative. If the Reindollars do not amend or clarify Question 3 it will be dismissed.

Neighbors' Question 4 asks, in relevant part, "why didn't the DEC consider the economic impact of its decision on the agricultural activities of a local multi-generational farmer during its inquiry process to identify alternative project sites?" Again, this Question misstates the standard of review. It also clearly lacks a basis in law which would allow the Court to grant relief. The narrative portion of this Question explains that Neighbors take issue with Applicants' posting of a no trespassing sign, which Neighbors believe is located beyond Applicants' property line. This Court lacks jurisdiction to determine private property rights absent a specific statutory assignment. In re Ranney Dairy Farm, LLC, 2024 VT 66, ¶ 12 n. 3. In the context of this wetlands permit application, this Court has no statutory authority to consider Neighbors' Question. Accordingly, Question 4 is **DISMISSED**.

Question 5 asks, in relevant part: "[w]hy did the DEC improperly decide in favor of the approval of the Roser's wetland permit prior to the closure of the public comment period for said permit?" The narrative portion of this Question explains that during a Hartford Zoning Board of Adjustment meeting, Applicants shared an email from a DEC staff person explaining that there are no alternative locations for the proposed project which would have less of an impact on the wetland

and buffer zone. According to Neighbors, this email predated the close of DEC's public comment period for the pending application, and therefore, amounted to a pre-approval of the application. Question 5, as stated, misstates facts or is incomplete. Accordingly, we order the Reindollars, should they choose, to **AMEND** and **CLARIFY** Question 5 to expressly state the facts upon which their issue is based and to cite to any legal authority on which Question 5 is based. If the Reindollars do not amend or clarify Question 5 it will be dismissed.

Lastly, Question 6 asks, in relevant part: “[d]id the DEC properly consider the impact to down-gradient wetlands that are only wet because water drains across the meadow?” As stated, this Question misstates the standard of review and fails to cite to a provision in the Wetland Rules. Accordingly, we order the Reindollars, should they so choose, to **AMEND** and **CLARIFY** Question 6 to reflect this de novo proceeding and to cite to a specific provision in the Vermont Wetland Rules. If the Reindollars do not amend or clarify Question 6 it will be dismissed.

Conclusion

For the foregoing reasons, we conclude that Neighbors, except for the Reindollars, have failed to establish their standing to maintain their appeals. Accordingly, we **DISMISS** Stuart Katz, Michael Kolowich, Kristin Lynde, and Alison & Matthew McCourt and each of their separate appeals. Additionally, we conclude that Neighbors' Statement of Questions fails to cite to specific provisions in the Vermont Wetland Rules which would provide a legal basis for their claims. To the extent that Questions 1, 2, 3, 5 and 6 can be amended with specific citations, we direct the Reindollars to **AMEND** and **CLARIFY** those Questions ON or BEFORE November 22, 2024 should they choose to maintain this appeal. Because it is beyond a doubt that Question 4 fails to state a claim upon which relief can be granted in the Environmental Division, that Question is **DISMISSED**.

Lastly, Applicants motion to withdraw their cross-appeal is **GRANTED**.

Electronically signed November 7, 2024, pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is stylized and cursive.

Thomas G. Walsh, Judge
Superior Court, Environmental Division