

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

RE: John Swinington
Land Use Permit #1R0693-EB

MEMORANDUM OF DECISION

This decision, dated August 5, 1992, pertains to a Motion to Dismiss filed by John Swinington (the Permittee) in which he seeks the dismissal of the appeal filed by Andrew and Patricia Bostock (the Bostocks) from the issuance of a land use permit. The Permittee asserts that the appeal should be dismissed because the Bostocks failed to participate in the District Commission proceeding and because they do not meet the requirements for party status as adjoining landowners. For the reasons set forth below, the Motion to Dismiss and to deny party status under Criteria 5 (traffic) and 8 (aesthetics) of 10 V.S.A. § 6086(a) is denied.

I. BACKGROUND

On March 28, 1991, an appeal was filed with the Environmental Board by the Bostocks from Land Use Permit #1R0693, Findings of Fact, Conclusions of Law, and Order issued by the District #1 Environmental Commission on February 27, 1991. Land Use Permit #1R0693 authorizes the Permittee to create and use a sand and gravel extraction operation in two phases on 12 acres of a 90-acre parcel of land on the east side of Town Farm Road in Brandon and Leicester, Vermont. The Bostocks, who are adjoining landowners, believe the project does not meet the requirements of Criteria 5 and 8.

On March 29, 1991, the Agency of Natural Resources (the Agency) filed a cross-appeal under Criterion 8 (rare and irreplaceable natural areas). The Agency contends that the 'permitted project' will have an undue adverse effect on Scanlon Bog, which it contends is a rare and irreplaceable natural area.

A prehearing conference was convened on May 14, 1991. At that time, the parties indicated that the issues on appeal might be resolved without a hearing. On March 25, 1992, the parties were advised that this matter would be dismissed unless any party notified the Board prior to April 8, 1992, that the appeal should go forward. Both the Agency and the Bostocks indicated that they wished to proceed with the appeal and a second prehearing conference was held on May 14, 1992.

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II. ISSUES

1. Whether the appeal filed by the Bostocks should be dismissed because of their failure to participate in the District Commission proceeding.
2. Whether the Bostocks are entitled to party status under Criteria 5 and 8.

The Bostocks were granted party status in the District Commission proceeding as adjoining landowners who had demonstrated that the project might have a direct effect upon their property with regard to Criterion 5 and 8. With respect to Criterion 5, the Bostocks claim that the operation of the gravel pit will result in a significant increase in truck traffic on Town Farm Road and that this will create safety hazards. With regard to Criterion 8, the Bostocks claim that the project will result in increased levels of dust and noise.

On April 8, 1991, the Permittee filed an Objection to Party Status and Motion to Dismiss Appeal of the Bostocks. The Permittee contends that the Bostocks are not entitled to party status under Criteria 5 and 8 and that they have surrendered their previously granted party status by failing to participate in, or present evidence, at the District Commission proceeding. District Commission decisions concerning party status may be challenged by the filing of an appeal or cross-appeal. See Re: Finard-Zamias Associates, Land Use Permit #1R0661-EB, Memorandum of Decision at 12 (March 28, 1990). The Board has treated the Permittee's objection and motion as a cross-appeal on the issue of party status.

On June 22, 1992, the Permittee again filed a Motion to Dismiss the appeal and request for party status of the Bostocks. In that motion, the Permittee again argues that the Bostocks should be barred from participating in this appeal because of their failure to present evidence or participate in the hearing before the District Commission.

On July 9, 1992 the Permittee filed a Supplemental Memorandum in support of his motion to dismiss, alleging that the Bostocks have provided misleading information to the Board concerning the witnesses they intend to call in this matter.

III. DISCUSSION

1. Dismissal of Appeal

Board Rule 40 concerning appeals, provides as follows:

Any party aggrieved by an adverse determination by a district commission may appeal to the board and will be given a de novo hearing on findings, conclusions and permit conditions issued by the district commission.

This Rule does not require that in order to appeal a decision of the District Commission a party must have participated in the District Commission proceeding.

In another appeal the Board considered the issue of whether an appeal of a party should be dismissed because of that party's failure to participate in the District Commission proceeding with respect to the criterion which was the subject of its appeal. The Board refused to grant a motion to dismiss on this basis. See Re: Finard-Zamias Associates, #1R0661-EB Memorandum of Decision at 10 (March 28, 1990).

In this case, the Permittee alleges that Mr. Bostock attended the District Commission hearing, but failed to present testimony or cross-examine witnesses. The Board agrees with the Permittee that if, as alleged, the Bostocks failed to present evidence in the District Commission proceeding, that failure may have denied the Commission the opportunity to address the Bostocks' concerns by imposing permit conditions under Criteria 5 and 8. However, the Board cannot be sure that Mr. Bostock might not have concluded that his concerns had been adequately addressed at that hearing by the testimony presented by other parties and/or questions asked by other parties and Commission members. In the absence of any requirement in statute or Board Rule that a party have participated in a District Commission proceeding in order to appeal, the Board believes that, at least where a party has attended the District Commission proceeding, any questions concerning the right of such party to appeal must be resolved in favor of permitting the appeal. The Motion to Dismiss is therefore denied.

2. Party Status

The Board believes that, pursuant to 10 V.S.A. § 6085(c) and Board Rule 40, the Bostocks have adequately demonstrated that their property may be directly affected under Criteria 5 and 8. They are therefore entitled to party status under these criteria.

3. Witnesses

In the Supplemental Memorandum filed in support of his motion to dismiss, the Permittee contends that the Bostocks 'have provided misleading information to the Board concerning the witnesses that they will call. The Permittee has submitted signed statements by the persons listed as witnesses for the Bostocks stating that they will not testify on behalf of the Bostocks.

As indicated in the Prehearing Conference Report and Order, witnesses are "tentatively " identified in that report. The parties must file pre-filed testimony of all direct witnesses they intend to present on or before Wednesday, August 12, 1992. Prior to that date, parties are not required to finally establish who they will call as witnesses. The Board therefore finds no basis to conclude that the appeal should be dismissed on the grounds that the witnesses tentatively identified by the Bostocks may actually not appear as witnesses.

IV. ORDER

1. The Permittee's Motion to Dismiss is denied.
2. The Bostocks are entitled to party status on Criteria 5 and 8 pursuant to 10 V.S.A. § 6085(c) and Rule 14(A)(3).
3. The terms of the Prehearing Conference Report and Order remain in full force and effect.

Dated at Montpelier, Vermont, this 5th day of August, 1992.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Samuel Lloyd
Steve Wright

Dissenting Opinion:

Board Members Lixi Fortna and Arthur Gibb dissent from the majority's decision. They would grant the Motion to Dismiss the Bostocks' appeal and deny their request for party status because of the Bostocks' failure to present testimony or cross-examine witnesses in the District Commission proceeding.

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