

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. §§ 6001-6092**

RE: John A. Russell Corporation  
Land Use Permit Application #1R0849-EB  
Docket #749

**MEMORANDUM OF DECISION**

This proceeding concerns Land Use Permit Application #1R0849 ("Application") pertaining to John A. Russell Corporation's ("Applicant") proposal to construct and operate an asphalt plant at property owned by the Russell Corporation on the east side of Route 7B in Clarendon, Vermont. The Application includes the addition of an asphalt plant (cold feed hoppers, dryer, and stack), three fuel and asphalt cement tanks, and various roadway, drainage and other features designed to support the asphalt plant ("the Project").

This Memorandum of Decision addresses Petitions for party status.

**I. PROCEDURAL SUMMARY**

On June 21, 1999, Anthony Stout on behalf of the Applicant filed a land use permit application for the Project with the District #1 Environmental Commission ("Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On December 7, 1999, the Commission issued its Findings of Fact, Conclusions of Law and Order of Denial of Permit ("Decision") denying the Applicant's permit application for the Project.

On January 6, 2000, the Applicant filed a Motion to Alter with the Commission.

On January 12, 2000, in reaction to the Applicant's Motion to Alter, the Commission issued its Memorandum of Decision on Motion to Alter ("MOD") which declined to alter the Commission's Decision.

On February 8, 2000, the Applicant filed a Notice of Appeal with the Board from the Commission's Decision contending that the Commission erred by finding that the Project fails to comply with 10 V.S.A. § 6086(a)(5), (8) and (9)(B) ("Criteria 5, 8 and 9(B)"). The Applicant also appealed the Commission's grant of party status to Mary and Albert Trombley, Helen Darby, Barbara Doty, Henry and Ilse Vergi, Marjorie Southard, Doris Roach, Shirley Loomis and Shelly Allen, Scott and Liza Stratton and F.Pierce and Ardis King. The Notice of Appeal was filed on behalf of the Applicant by Edward V. Schwiebert, Esq.

On February 22, 2000, Doris Roach, Ardis King, Frederick P. King, Scott C. Stratton, Lisa Stratton, Mary Trombley, Albert Trombley, Barbara Doty, Bernard Doty, Marjorie E. Southard, Helen W. Darby, Nancy Buffum, Carroll R. Buffum, Shirley W. Loomis, Shelly K. Allen and Henry Vergi (the "Neighbors") filed a Cross Appeal with the Board from the Commission's Decision contending that the Commission erred by finding that the Project complied with 10 V.S.A. § 6086(a)(1), 1(B), 1(G), (2), (3), (5), (8), (8)(A), (9)(K) and 10 ("Criteria (1), 1(B), 1(G), 2, 3, 5, 8, 8(A), 9(K) and 10"). The Neighbors also filed a Motion for Party Status on the same date. The Cross Appeal and Motion for Party Status were filed on behalf of the Neighbors by Mary C. Ashcroft, Esq.

On March 17, 2000, Board Chair Marcy Harding convened a prehearing conference with the following participants:

The Applicant by Mary Grady, Esq.  
The Neighbors by Mary C. Ashcroft, Esq.  
Doris Roach  
Marjorie White Southard

On March 20, 2000, Board Chair Harding issued a Prehearing Conference Report and Order.

On March 21, 2000, Ardis and F. Pierce King filed a Supplemental Motion for Party Status.

On March 23, 2000, the Applicant filed its Response to Cross Appellants' Motions for Party Status and Cross Appeal.

On March 28, 2000, the Neighbors filed a Response to Party Status Challenges by Applicant.

The Board deliberated on party status issues on March 29, 2000 and April 12, 2000.

## **II. PARTY STATUS BEFORE THE COMMISSION**

The Commission granted party status to the following individuals.

Adjoining landowners were granted party status under EBR 14(a)(5) including:

1. Mary and Albert Trombley, criteria 1(B), 5, 8, 8(A), and 9(K).

2. Shirley Loomis and Shelly Allen, criteria 1, 1(B), 1(G), 2 & 3, 8, 8(A), 9(B), 9(K), and 10.
3. Helen Darby, criteria 1, 1(B), 1(G), 2 & 3, 8, 8(A), 9(B), 9(K), and 10.

Neighboring landowners were granted party status under EBR 14(b)(1) including:

1. Barbara Doty, criteria 1, 5, 8, 8(A), and 9(K).
2. Scott and Liza Stratton, criteria 1, 2, and 8.
3. Carroll and Nancy Buffum, criteria 1, 5, 9(K) and 10.
4. F. Pierce and Ardis King, criteria 1, 5, 8, 8(A), 9(K), and 10.
5. Henry Vergi, criteria 1, 5, 8, and 9(K).
6. Marjorie Southard, criteria 1, 1(B), 1(G), 2 & 3, 8, 8(A), 9(B), 9(K), and 10.
7. Doris Roach, criteria 1, 1(B), 1(G), 2, 5, 8, 9(B), 9(K), and 10.

Among the issues raised by the Applicant is whether the Commission erred in granting party status to Mary and Albert Trombley, Helen Darby, Barbara Doty, Henry Vergi<sup>1</sup>, Marjorie Southard, Doris Roach, Shirley Loomis and Shelly Allen, Scott and Liza Stratton and F.Pierce and Ardis King as set forth above.

### **III. THE LAW ON PARTY STATUS**

The parties to an appeal before the Board include adjoining property owners and other persons as the board may allow by rule. *10 V.S.A. § 6085(c)(1)*. Party status decisions by district commissions may be challenged by appeal or cross-appeal. *Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision at 12-13 (March 29, 1990)*. Adjoining property owners are accorded party status by right once they meet their burden of production. EBR 14(A)(5). The district commissions and Board also have the

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During the prehearing conference, the Applicant agreed to withdraw its appeal of the party status of Ilse Vergi as Ms. Vergi was not granted party status at the commission level and has not filed a cross-appeal.

discretion to grant party status to any individual or entity that demonstrates that its interests may be affected by the project under one or more of the ten Act 250 criteria or that it can materially assist the commission or Board as to any of those criteria. EBR 14(B)(1); 14(B)(2). *Re: Gary Savoie d/b/a/ WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 6-7 (Oct. 11, 1995) [EB #632].*

A. Adjoining Property Owners:

An adjoining property owner may participate in the hearing and present evidence only to the extent the proposed project will have a direct effect on their property under Act 250 criteria. *10 V.S.A. § 6085(c)(1)*. The Board's rules accord adjoining property owners party status by right. *EBR 14(A)(5)*. These adjoining property owners must petition the Board with:

1. a description of the location of the adjoining property in relation to the proposed project, including a map, if available, and
2. a description of the potential effects of the proposed project upon the adjoiner's property with respect to each of the criteria or subcriteria under which party status is requested. *Id.*

B. Other Neighboring Property Owners:

The Board may also grant party status to individuals not otherwise accorded party status by statute if the Board finds that the proposed project may affect the petitioner's interest under any criteria. *10 V.S.A. § 6085(c)(1); EBR 14(B)(1)*. These individuals must petition the Board with:

1. a statement of the details of petitioner's interest in the proceedings and whether petitioner is in support or opposition to the application,
2. a description of the location of the adjoining property in relation to the proposed project, including a map, if available, and
3. a description of the potential effects of the proposed project upon the petitioner's interests with respect to each of the criteria or subcriteria under which party status is requested.

*EBR 14(B)(3)(a) and EBR 14(B)(4)*.

#### IV. THE BOARD'S ANALYSIS OF PARTY STATUS

Because the Neighbors had party status below at the Commission level, they have standing to petition for party status before the Board. It is therefore appropriate to proceed with *de novo* consideration of their party status in this appeal.

The above listed adjoining and neighboring parties, which the Applicant has brought an appeal challenging the grant of party statute thereto, have filed a Motion for Party Status.<sup>2</sup> The Board will consider the motions as petitions for party status as provided by EBR 14. The Neighbors also filed a Response to Party Status Challenges by the Applicant. At the prehearing conference, Attorney Ashcroft requested an opportunity to respond to Applicant's response to the Neighbor's petition for party status. This request was denied by Chair Harding. The Board sees no reason to overrule the Chair's ruling, and accordingly, declines to accept the Neighbors Response to Party Status Challenges by the Applicant.

Except for Scott and Liza Stratton, Marjorie Southard and Doris Roach, each of the neighbors have petitioned the Board for party status under the same criteria as they had before the Commission. The Strattons' had party status before the Commission under criteria 1, 2 & 8. They have petitioned, however, for party status before the Board under criteria 1, 5, 9(K), and 10. Initial consideration of all issues, including party status, must first be done by the Commission prior to an appeal to the Board. *Town of Albany and Florence Beaudry*, #7R1042-EB(Interlocutory Appeal), Memorandum of Decision at 5 (Mar. 19, 1998); *citing, In re Just Associates*, 136 Vt. 577, 581 (1978). It appears that the Strattons never asked for party status before the Commission under criteria 5, 9(K) and 10.<sup>3</sup> Accordingly, the Board declines to grant party status to the Strattons' under

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Ardis and F. Pierce King did not join in this motion, however, they subsequently filed a Supplemental Motion for Party Status.

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Preliminary party status was granted pursuant to the Commission's Hearing Recess Order and Notice of Second Hearing dated July 23, 1999, as clarified or corrected in Section III of the Commission's Hearing Recess Order #2 dated August 12, 1999. The Hearing Recess Order and Notice of Second Hearing preliminarily grants the Strattons' 14(B)(1) party status under criteria 1, 2, and 8. The Commission's Hearing Recess Order #2 states that the Strattons made a request for party status at the second hearing and that the request was untimely under the Commission's rules and was denied. The Commission's Hearing Recess Order #2 does not note under which criteria the Strattons requested and were denied party status. The Strattons do not address any of these facts

criteria 5, 9(K) and 10. The Strattons' petition for party status under criterion 1 is addressed below.

Marjorie Southard and Doris Roach do not specify in their petition the specific criteria for which they seek party status before the Board. Taking the Neighbors' petition as a whole, however, it is apparent that Marjorie Southard and Doris Roach are seeking party status under the same criteria as they had before the Commission.

The Neighbors' petitions describe the specific location of each of their properties in reference to the Project. No map is included with the petition, however, EBRs 14(A)(5) and 14(B)(4) state that a map should be included if it is available. There is no indication that such a map is available. Accordingly, the lack of a map is not fatal to the petition. The Board therefore concludes that the Neighbors satisfy EBRs 14(A)(5)(a) and 14(B)(4)(a).

The neighbors' motions for party status state that they support the decision of the Commission to deny the Act 250 permit. The motions also provide the details of the Neighbors' interest in the proceedings. The Board concludes, therefore, that EBR 14(B)(3)(a) is satisfied.

The Applicant has filed its response to the Neighbors' petition for party status. The Applicant believes that the Neighbors have not established a connection between the Project and any property or other specified interests of each Neighbor. The core argument of the Applicant is that the Neighbors do not demonstrate specific potential effects on each of their individual properties or interests with respect to each of Act 250's criteria. Otherwise stated, the Applicant argues that the Neighbors fail to satisfy EBRs 14(A)(5)(b) and 14(B)(4)(b).

The Applicant also argues that the Neighbors may participate only with respect to how the Project may affect the Neighbors specific properties and/or interests. It is the law in Vermont that a party has no interest or standing to adjudicate another person's legal right. *See Allen v. Wright*, 468 U.S. 737, 750-752 (1984), *reh. Denied* 468 U.S. 1250. *See also Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, Memorandum of Decision, at 3-6 (Apr. 21, 1999). The Neighbors had the option to petition for party status pursuant to EBR 14(B)(2) as a materially assisting party which could have broadened their status. The Neighbors have not petitioned for this status however. Accordingly, to the extent the Neighbors are granted party status as set forth

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in their petition.

below, their status is limited to each of the Neighbors specific interests. <sup>4</sup>

A. Criterion 1:

Shirley Loomis, Shelly Allen, Helen Darby petition for 14(A)(5) party status. Barbara and Bernard J. Doty, Scott and Liza Stratton, Henry Vergi, Marjorie Southard, Doris Roach, and Ardis and Pierce King petition for 14(B)(1) party status. These neighbors allege that odors, noise, dust and dangerous air emissions will disrupt their quality of life and potentially threaten their livelihood and health. The Kings additionally allege that they live within the airshed of the Project, that air contaminates will precipitate over their property, and that the Project may have a long term effect on their property and enjoyment of it.

For party status purposes, it is not necessary for a petitioner to prove potential effects on an individuals' property or other interests. At the party status stage of proceedings it is only necessary for the Board to consider whether impacts *may* exist. *Town of Albany and Florence Beaudry*, #7R1042-EB(Interlocutory Appeal), Memorandum of Decision at 4 (Mar. 19, 1998). The Board concludes that the Neighbors' allegations set forth potential effects relating to property and other interests. The Neighbors' petitions therefore satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 1.

B. Criterion 1B.

Mary and Albert Trombley, Shirley Loomis, Shelly Allen, and Helen Darby petition for 14(A)(5) party status. Marjorie Southard and Doris Roach petition for 14(B)(1) party status. These neighbors allege that used wastewater may contaminate groundwater and endanger the water supplies of their residents. They also allege that all of the neighbors have their own wells or springs because there is no municipal water supply serving the residents of the area. The Board concludes that the Neighbors' allegations satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 1B.

C. Criterion 1G

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One example of this party status issue relates to Criterion 3. The Neighbors allege that the Project has the potential to affect, among other interests, the watershed protection area for a mobile home park. There is no allegation, however, that any of the Neighbors have property or other interests in the mobile home park. Accordingly, the neighbors do not satisfy either EBRs 14(A)(5) or 14(B)(1) with respect to the mobile home park.

Shirley Loomis, Shelly Allen, Helen Darby petition for 14(A)(5) party status. Marjorie Southard and Doris Roach petition for 14(B)(1) party status. These neighbors allege that runoff in the form of siltation or contaminants, or precipitating air emissions from the project could endanger nearby wetlands. The petitions do not state where the wetlands are located. Nor do the petitions state whether or not the wetland are Class One or Two wetland which are protected under Criterion 1(G) or Class Three wetlands which are protected by other criteria. Furthermore, there is no explanation of potential effects to the Neighbors' properties or other interests of the Neighbors'. The Board concludes that the Neighbors' allegations do not satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to criterion 1(G).

D. Criterion 2

Shirley Loomis, Shelly Allen, Helen Darby petition for 14(A)(5) party status. Scott and Liza Stratton, Marjorie Southard and Doris Roach petition for 14(B)(1) party status. These neighbors allege a lack of adequate water for the Project. Whether or not there is adequate water supply for the Project can in no way be interpreted to have any potential effects upon the joiners' properties. Nor can it be interpreted to have any effect on other neighboring property owners' interests. The Board therefore concludes that the Neighbors' allegations do not satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 2.

E. Criterion 3

Shirley Loomis, Shelly Allen, Helen Darby petition for 14(A)(5) party status. Marjorie Southard petitions for 14(B)(1) party status. These neighbors allege that used wastewater may (contaminate groundwater and) endanger the water supplies of the neighbors. They also allege that there is no municipal water supply serving residents of the area, and therefore, all neighbors have their own wells or springs. The Board concludes that the Neighbors' allegations satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 3.

F. Criterion 5

Mary and Albert Trombley petition for 14(A)(5) party status. Barbara and Bernard J. Doty, Ardis and Pierce King, Henry Vergi, and Doris Roach petition for 14(B)(1) party status. These neighbors allege that heavy truck traffic added to the rural road will create conflicts with pedestrians and other users, and will break down the road not meant to carry the weights of the aggregate trucks. Ardis and Pierce King allege that they could be adversely effected by the large increase in heavy truck traffic near their



home. The Board concludes that the Neighbors' allegations satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 5.

G. Criterion 8

Mary and Albert Trombley, Shirley Loomis, Shelly Allen, and Helen Darby petition for 14(A)(5) party status. Barbara and Bernard J. Doty, Scott and Liza Stratton, Marjorie Southard, Ardis and Pierce King, Henry Vergi, and Doris Roach petition for 14(B)(1) party status. These neighbors allege that the Route 7B area is a quiet, relatively undeveloped neighborhood consisting primarily of homes, agricultural lands in production and a few small businesses such as Mr. Vergi's driving range. They allege that it is the quintessential rural neighborhood. The neighbors also allege unique historical features of Route 7B, including wider than usual stone walls, an old tavern and sites of Revolutionary importance. The Board concludes that the Neighbors' allegations satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 8.

H. Criterion 8A

Mary and Albert Trombley, Shirley Loomis, Shelly Allen, and Helen Darby petition for 14(A)(5) party status. Barbara and Bernard J. Doty, Marjorie Southard, and Ardis and Pierce King petition for 14(B)(1) party status. These neighbors allege that adjoining pastures and open lands are home for a wealth of wildlife including deer, moose, small mammals, and varieties of birds. The Kings also allege that they enjoy resident wildlife which include a nearby deer wintering yard. These alleged impacts on wildlife are valid concerns under Criterion 8 - Aesthetics, however, the Neighbors petition is void of any allegations of necessary wildlife habitat and endangered species which is at issue under Criteria 8(A). The Board therefore concludes that the Neighbors' allegations do not satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 8(A).

I. Criterion 9B

Shirley Loomis, Shelly Allen, Helen Darby petition for 14(A)(5) party status. Marjorie Southard and Doris Roach petition for 14(B)(1) party status. These neighbors allege that much of the land surrounding the Russell project land is currently in agriculture use, that hay is cut on a regular basis on Trombley, Darby and White lands, and that Marjorie Southard raises and sells vegetables at her local booth. These neighbors also allege that the Project will take prime agricultural lands out of production and endanger area farming operations. The Board therefore concludes that the Neighbors' allegations satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 9(B).

J. Criterion 9K

Mary and Albert Trombley, Shirley Loomis, Shelly Allen, and Helen Darby petition for 14(A)(5) party status. Barbara and Bernard J. Doty, Marjorie Southard, Ardis and Pierce King, Henry Vergi, and Doris Roach petition for 14(B)(1) party status. These neighbors allege that heavy truck traffic added to the rural road will create conflicts with pedestrians and other users, and will break down the road not meant to carry the weights of the aggregate trucks. The Board therefore concludes that the Neighbors' allegations satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 9(K).

K. Criterion 10.

Shirley Loomis, Shelly Allen, Helen Darby petition for 14(A)(5) party status. Marjorie Southard, Ardis and Pierce King, and Doris Roach petition for 14(B)(1) party status. These neighbors allege that sections of the Town and Regional Plans discourage the siting of industrial plants in neighborhoods and areas with inadequate roads and that the proposed site is located in an area of residences. The Board therefore concludes that the Neighbors' allegations satisfy EBRs 14(A)(5)(b) or 14(B)(4)(b) with respect to Criterion 10.

**VI. ORDER**

A. The Board declines to accept into the record the Neighbors' March 28, 2000, Response to Party Status Challenges by Applicant.

B. Party status is **GRANTED** to the following:

Adjoining landowners are **GRANTED** party status under EBR 14(A)(5) including:

1. Mary and Albert Trombley, criteria 1(B), 5, 8, and 9(K).
2. Shirley Loomis and Shelly Allen, criteria 1, 1(B), 3, 8, 9(B), 9(K), and 10.
3. Helen Darby, criteria 1, 1(B), 3, 8, 9(B), 9(K), and 10.

Neighboring landowners are **GRANTED** party status under EBR 14(B)(1) including:

1. Barbara Doty, criteria 1, 5, 8, and 9(K).

2. Scott and Liza Stratton, criterion 1.
3. F. Pierce and Ardis King, criteria 1, 5, 8, 9(K), and 10.
4. Henry Vergi, criteria 1, 5, 8, and 9(K).
5. Marjorie Southard, criteria 1, 1(B), 3, 8, 9(B), 9(K), and 10.
6. Doris Roach, criteria 1, 1(B), 5, 8, 9(B), 9(K), and 10.

C. All Neighbors are **DENIED** party status under Criteria 1(G), 2 and 8A.

D. The Board amends the issues set out in Section III. ISSUES ON APPEAL of the Prehearing Conference Report and Order by deleting issues numbered 3 (Criterion 1(G)), 4 (Criterion 2) and 7 (Criterion 8(A)). The remaining issues set out in Section III. ISSUES ON APPEAL of the Prehearing Conference Report and Order will remain at issue before the Board.

Dated at Montpelier, Vermont this 13th day of April, 2000.

ENVIRONMENTAL BOARD

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Marcy Harding, Chair  
John Drake  
George Holland  
Samuel Lloyd  
Rebecca M. Nawrath  
Alice Olenick  
Nancy Waples\*  
Donald Sargent\*

\* Members Waples and Sargent did not participate in the April 11, 2000 deliberation but concur with this decision.