

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

Re: Pittsford Enterprises, LLP,
and Joan Kelley

Land Use Permit Application
#1R0877-EB

MEMORANDUM OF DECISION

This appeal was filed by the Friends of Pittsford Village (Friends) and Margaret Armitage (collectively, Appellants), regarding the proposed construction of a post office building, and related construction and subdivision, in Pittsford, Vermont. This Memorandum of Decision addresses issues of party status and standing, and a request to continue.

I. PROCEDURAL SUMMARY

On February 28, 2001 Pittsford Enterprises, LLP (Pittsford Enterprises) filed Land Use Permit Application #1R0877 with the District 1 Environmental Commission (Commission), seeking authorization for the removal of an existing commercial sales building and the construction of a 3,630 square-foot post office building, with parking and landscaping (the Project). The Project also includes the subdivision of the 2.7-acre parcel into two lots: 1.5 acres for the post office and 1.2 acres for an existing single family home. The Project is located in the Town of Pittsford, Vermont, at the intersection of Route 7 and Plains Road.

On December 5, 2001 the Commission issued Land Use Permit #1R0877(Permit) and corresponding Findings of Fact, Conclusions of Law, and Order (Decision).

On December 31, 2001 Appellants filed an appeal with the Environmental Board (Board) from the Permit and Decision alleging that the Commission erred in its conclusions with respect to 10 V.S.A. § 6086(a)(1)(B), (1)(E), (1)(G), (4), (5), (8)(aesthetics and historic sites), (9)(K), and (10) (Criteria 1(B), 1(E), 1(G), 4, 5, 8 (aesthetics and historic sites), 9(K), and 10, respectively). Friends also appeals the Commission's denial of party status on Criterion 9(K) and petitions for party status on that Criterion in this appeal. The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules (EBR) 6 and 40.

On February 5, 2002, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

Pittsford Enterprises, by Frank von Turkovich, Esq., with Jack Wallace
Appellants, by Stephanie J. Kaplan, Esq., with Margaret Armitage and Baird
Morgan
Vermont Agency of Natural Resources (ANR), by Elizabeth Lord, Esq., with
Greg Farkas

William J. Bloomer, Esq., entered an appearance on behalf of Margaret Rawlings, who had been granted party status by the Commission on Criteria 5 and 8. Mr. Bloomer notified the Board that he and Ms. Rawlings were unable to attend the prehearing conference, but that Ms. Rawlings wishes to participate as a party on Criterion 8 (aesthetics).

On February 6, 2002, the Chair issued a Prehearing Conference Report and Order (PCRO). Among other things, the PCRO identified issues and set deadlines for briefs on preliminary issues.

On February 12, 2002, Pittsford Enterprises filed a Motion to Dismiss and a Motion to Continue. On February 27, 2002, Friends filed its Opposition to the Motion to Dismiss and took no position on the Motion to Continue. Oral argument on the Motion to Dismiss was not requested.

The Board deliberated on March 20, 2002.

II. PRELIMINARY ISSUES

The Chair identified the following Preliminary Issues in the PCRO:

1. Whether Friends has standing to appeal the Permit and Decision.¹
2. Whether Friends should be granted party status on Criterion 9(K) pursuant to EBR 14(B)(1).
3. Whether Friends should be granted party status on Criterion 9(K) pursuant to EBR 14(B)(2).

In addition, Pittsford Enterprises has filed a Motion to Continue one of the filing deadlines in the PCRO, the deadline for filing replies to Friends' petition for party status. The Board will address standing, Issue #1, then the Motion to Continue, then the remaining issues in turn.

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The PCRO noted that Pittsford Enterprises might withdraw its objection to standing, in which case the Board would consider party status only. Rather than withdraw its objection, Pittsford Enterprises moved to dismiss for lack of standing. Therefore, the Board must address all three preliminary issues.

III. DISCUSSION

A. Standing

Pittsford Enterprises argues that Friends lacks standing because its full name, "Friends of Pittsford Village," is not the same as that of the "Friends of Historic Pittsford Village," which had party status below. This, Pittsford Enterprises, argues, indicates that a different party filed the appeal than participated below. There is no question that, if the Friends of Pittsford Village is the same group as the Friends of Historic Pittsford Village, Friends has standing to file this appeal.

A group or individual who was granted party status by the Commission has standing to appeal the Commission's decision. See, 10 V.S.A. § 6089(a) (governing appeals to the Board); EBR 40(A) ("any party aggrieved by an adverse determination by a district commission may appeal" that decision to the Board); 10 V.S.A. § 6085(c) ("[p]arties shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule."); EBR 2(K) (defining "party"); see *Also, Re: The Stratton Corporation, #2W0519-9R3-EB*, Findings of Fact, Conclusions of Law, and Order at 3 (Jan. 15, 1998); *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); *Re: Derby Plaza Associates Limited Partnership, # 7R0886-EB*, Memorandum of Decision at 5 (Feb. 25, 1994); *accord, Re: Roger And Beverly Potwin, #3W0587-3-EB*, Memorandum of Decision (Sept. 17, 1999); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors, # 8B0444-6-EB*, Memorandum of Decision (May 29, 1995); *Re: St. Albans Group and Wal*Mart Stores, Inc., #6F0471-EB*, Memorandum of Decision (Apr. 15, 1994).

The Commission granted final party status to the Friends of Historic Pittsford Village on Criteria 1, 1(B), 1(E), 1(G), 4, 5, 8, and 10, pursuant to EBR 14(B)(1) and EBR 14(B)(2). There has been no appeal or cross-appeal filed to challenge these grants of party status. See, *Re: The Stratton Corporation, #2W0519-9R3-EB*, Findings of Fact, Conclusions of Law, and Order at 3 (Jan. 15, 1998) (citing *Re: Finard-Zamias Associates, #1R0661-EB*, Memorandum of Decision at 12-13 (March 29, 1990) (any grant of party status by the Commission to a nonstatutory party may be challenged by appeal or cross-appeal)). While failure to raise party status issues in an appeal or cross-appeal precludes a party from raising them during a Board proceeding, the instant motion to dismiss for lack of standing is timely.

Also, any person or group denied party status by the Commission has standing to appeal that denial to the Board. *Re: Springfield Hospital, # 2S0776-2-*

EB, Memorandum of Decision at 3 (Aug. 14, 1997); *Re: Gary Savoie*, Findings, Conclusions and Order at 7; *Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, Memorandum of Decision at 7 (July 18, 1995); *Re: Derby Plaza Associates Limited Partnership*, #7R0886-EB, Memorandum of Decision at 4 (Feb. 25, 1994); *Re: Swain Development Corp.*, #3W0445-2-EB, Memorandum of Decision at 4-7 (July 31, 1989). Friends has, in fact, challenged the Commission's denial of party status on Criterion 9(K). Provided Friends is the same group that participated below, it has standing to appeal on that issue.

Pittsford Enterprises argues that Friends was not a party to the Commission proceedings, because of changes in the name, size and mission of the group. The petition for party status filed with the Commission by the Friends of Historic Pittsford Village states, in relevant part, that:

Friends of Historic Pittsford Village is a group consisting of approximately 90 members who live within the Village limits as well as the surrounding town. The mission of the group is [to] preserve the historic and social center of the village; to discourage urban sprawl; and to assure that the post office is located in the safest and most approachable part of the Village for the convenience of postal patrons.

Appendix C to Memorandum in Support of Motion to Dismiss, filed by Pittsford Enterprises on Feb. 12, 2002.

The corresponding portion of the petition for party status filed with the Board, with relevant differences highlighted in bold type, provides that:

Friends of Pittsford Village is a group consisting of **more than 70 Pittsford residents** who live within the village limits as well as in the surrounding town. The mission of the group is [to] preserve the historic and social center of the village; to discourage urban sprawl; to assure that the post office is located in the safest and most approachable part of the Village for the convenience of postal patrons; **and to ensure that the natural resources of Pittsford are protected.**

Friends' Petition for Party Status, at 2 (Dec. 31, 2001). There is no Board precedent which indicates that a group party should lose its party status when there is a slight change in its name, or in its membership numbers. What a group calls itself, and the number of members it has are not determinative of status. The interests of the group, not its name or numbers, are the key to party status and identity.

Pittsford Enterprises argues that, "By claiming that [its] mission includes protecting the '*natural resources of Pittsford*,'" the organization would be in a position to argue that [the] project touches and concerns new and distinct areas of the organization's interests, far beyond that which *Friends of Historic Pittsford Village* was able to qualify under." Pittsford's Memo, at 4. Not so. As stated above, the Commission granted the Friends of Historic Pittsford Village final party status on Criteria 1, 1(B), 1(E), 1(G), 4, 5, 8, and 10, pursuant to EBR 14(B)(1) and EBR 14(B)(2), and this has not been challenged by Pittsford Enterprises. The addition of natural resource protection to the group's mission does nothing to change the scope of this group's participation before the Board.

Moreover, Friends has filed the affidavits of Pittsford residents Roberta Scarcello, Ruth P. Earman, Charles S. Davies, Jean S. Davies, Elinor W. Pike, Lois C. Blittersdorf, Murry A. Snyder, Elizabeth C. Morgan, Jean O. Harvie, Fred A. Harvie, Ernest J. Brod, Mary Lou Brod, Diana Merritt, James McRae, Elizabeth McRae, Ruth L. Hennessey, Ruth S. Wimett, Jocelyn Chutter Frost, Emerson Frost, Colleen Conway Maxham, Lawrence W. Smith, Baird Morgan, Emily Rose Miner, George Lesznik, James Merritt, LaVerne Kendrick, and Margaret Armitage, which state, in part, that: "The group that I joined that received party status at the District Commission called itself Friends of Historic Pittsford Village and now calls itself Friends of Pittsford Village. I am still a member of the group, and my concerns are the same as they were before."

Because Friends is the same party as the Friends of Historic Pittsford Village, the Board will not address Pittsford Enterprises' arguments that the party that participated before the Commission did not petition for party status in this proceeding; that the name change was purposeful; and that the party that participated below is time-barred from entering an appearance in this appeal.

The Board concludes that Friends has standing. Friends' appeal, therefore, will proceed on the merits issues identified in the PCRO.

B. Pittsford Enterprises' Motion to Continue

The PCRO required that reply briefs to Friends' petition for party status on Criterion 9(K) be filed by February 12, 2002. Pittsford Enterprises moves to extend this deadline until after the Board rules on standing.

In its motion, Pittsford Enterprises contends that it is "unable to effectively address" the party status issues because, until standing is decided, it will not know whether to argue against admission of the "Friends of Pittsford Village" or the "Friends of Historic Pittsford Village" as parties under Criterion 9(K). This

argument is based on the flawed assumption that the name change somehow jeopardizes Friends' standing. As set forth above, it does not. Moreover, the Board conducts a *de novo* review of any district commission's party status determinations when such determinations are appealed. The question before the Board is whether the current petition for party status on Criterion 9(K) filed by Friends, satisfies the requirements of EBR 14(B)(1) or EBR 14(B)(2), or both – not whether the Commission erred in denying party status. The fact that Friends called itself by a slightly different name below has no bearing on this question. This is no reason to extend the filing deadline for party status briefs.

Pittsford Enterprises also argues that, due to its "pending Motion to Dismiss, the necessity for a ruling under Criterion 9(K) at all may now be . . . moot." It is correct that a challenge to standing may render all other issues in that party's appeal moot. However, the possibility that a motion to dismiss may be granted does not, in itself, require that the rest of the case be stayed. To hold otherwise would provide unnecessary incentive and opportunity to delay Act 250 proceedings. Also, as a basic principle, a party who files a request to extend a deadline assumes the risk that his or her motion will not be granted.

The Board notes that Pittsford Enterprises filed its Motion to Continue on the date set in the PCRO for reply briefs on party status, and that this date also served as the deadline for filing objections to the PCRO. To the extent that the Motion to Continue could be construed as an objection to the PCRO, the Board would overrule that objection.

The Motion to Continue is denied.

C. Party Status on Criterion 9(K)

Friends appeals the Commission's denial of EBR 14(B)(1) and EBR 14(B)(2) party status on Criterion 9(K). As set forth below, the Board grants Friends' petition for party status on Criterion 9(K) pursuant to EBR 14(B)(1), and denies the petition for party status on Criterion 9(K) pursuant to EBR 14(B)(2).

The Board hears appeals from party status determinations *de novo*, applying the standards for party status enunciated in EBR 14. *Re: Old Vermonter Wood Products and Richard Atwood, #5W1305-EB, Memorandum of Decision at 2 (Feb. 3, 1999)(citing Re: Cabot Creamery Cooperative, Inc., #5W0870-13-EB, Memorandum of Decision at 3 (Dec. 23, 1992)); see Also, Re: Northeast Cooperatives And L & S Associates, #2W0434-11-EB, Memorandum of Decision at 2 (Jan. 29, 1999)(citing Re: Pico Peak Ski Resort, Inc., # 1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 9 (March 2, 1995); Re: St. Albans Group and Wal*Mart Stores, Inc., # 6F0471-EB, Memorandum of Decision (April 15,*

1994)); *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Oct. 11, 1995).*

1. EBR 14(B)(1)

To demonstrate party status under EBR 14(B)(1), the petitioner must:

- A. establish a connection between the proposed project and a specified interest;
- B. show that, due to this connection, its specified interests may be affected; and
- C. articulate how its interests differ from those of the general public.

Re: Mount Anthony Union High School District #14, #8B0552-EB(Interlocutory), Memorandum of Decision, at 6 (Jan. 31, 2002)(citing Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision and Order at 6 (Oct. 11, 1996); Re: Springfield Hospital, #2S0776-2-EB, Memorandum of Decision at 5-6 (Aug. 14, 1997), appeal dismissed, In re Springfield Hospital, No. 97-369 (October 30, 1997); Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 4 (Oct. 3, 2000).

In its petition for party status, Friends claims that the Project will increase traffic at Route 7 and Plains Road in Pittsford, which would "materially jeopardize and interfere with the public's use of and access to the area's roads," and "substantially increase traffic at an already dangerous intersection." (Friends' Petition, at 4.) Friends further asserts that its members, and other Pittsford residents "will have to either drive through the intersection or, if they choose to walk to the post office despite the lack of safe sidewalks, to cross Route 7 at Plains Road." (Friends' Petition, at 4-5.)

Friends also claims that its members have an interest in keeping the post office in the historic village center, "the center of commercial and social activity in Pittsford, and specifically for the members of this group." (Friends' Petition, at 6.) Friends argues that relocating the post office to the proposed Project site would "unreasonably and unnecessarily endanger the public investments made in the village center," and would "materially jeopardize and interfere with the function and efficiency and the public's use and enjoyment of the public investments in the historic village center." (Friends' Petition, at 5.)

In its petition Friends correctly notes that because "the threshold inquiry on the merits of an application is higher under Criterion 9(K) than it is under Criterion 5, it is logical to impose a higher showing of an interest for a person who seeks party status under Criterion 9(K) as well." *Re: Van Sicklen Limited Partnership,*

#4C1013R-EB, Memorandum of Decision at 8 (Jun. 8, 2001). More specifically, "the inquiry into traffic safety under Criterion 9(K) involves a higher threshold of material jeopardy or material interference, which is absent from the language of Criterion 5." *Id.* at 8-9 (quoting *Re: Swain Development Corp. and Philip Mans*, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 34 (Aug. 10, 1990); and citing *Upper Valley Regional Landfill*, #3R0609-EB, Findings of Fact, Conclusions of Law, and Order at 46 (Nov. 12, 1991)). Thus, Friends must make a higher showing of an interest in its petition for party status under Criterion 9(K), than would be necessary to warrant party status under Criterion 5. The Board concludes that Friends' petition sufficiently alleges such a heightened interest under Criterion 9(K).

However, this does not end the inquiry. The Board must also consider whether Friends has alleged specific interests which differ from those of the general public. *Re: Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), Memorandum of Decision, at 6-7 (Jan. 31, 2002)(citing *Re: Springfield Hospital*, #2S0776-2-EB, Memorandum of Decision at 5-6 (Aug. 14, 1997), *appeal dismissed, In re Springfield Hospital*, No. 97-369 (October 30, 1997)). In *Mt. Anthony* the Board denied party status where a group alleged that it had "over 5,000 members, including over 500 members in Vermont, and about 30 members in Bennington County, and over 80% of these members reside in the towns that will be served by the new Middle School," and also alleged general public interests such as protecting viable farmland and opposing sprawl development. *Mt. Anthony*, Memorandum of Decision, at 6-7.

In *Springfield Hospital*, the Board denied EBR 14(B)(1) party status to an individual on Criterion 5:

The Appellant asserts that he seeks party status as "a concerned citizen" advocating for himself, his neighbors, and even "passersby." . . . However, the Appellant has not articulated how his interest is distinguishable from those of the general public in desiring safe roads and neighborhoods. The Appellant's property does not adjoin the Project. While his home is located on a side street accessing Park Street not far from the Project, the Appellant has not alleged facts explaining specifically how his interest in that property or any other cognizable interest may be adversely affected by the Project itself.

Springfield Hospital, Memorandum of Decision, at 6-7.

In another case, EBR 14(B)(1) party status was granted to a citizens group, where the group's petition stated: "that it has 220 members who, as residents of Sharon, are primarily concerned with maintaining the existing rural nature of the

town, preventing inappropriate development, and protecting outstanding natural resources. Citizens specifically allege its interest in the White River which is the town's preeminent and most fragile natural resource having scenic, recreational and economic attraction." *Re: Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 4 (Oct. 3, 2000)*. The petition in the *Lupton* case adequately alleged specific interests that would be affected by the proposed project, which was to have been located on the banks of the White River, and in its floodplain. Specifically, "Citizens allege that its interest may be negatively impacted by alteration of flood waters, erosion of [stream] banks, destruction of plant life, pollution of water through human carelessness or failure of a wastewater system, and obscuring views from and of the White River." *Id.*

As stated above, Friends alleges that its members walk and drive in areas affected by the proposed relocation of the Pittsford post office, namely, Route 7, Plains Road, and the historic village center. The map submitted with the petition indicates that many of the group's members live in and around the affected area, and at least one of its members is an adjoining landowner to the Project site. Friends represents a subset of the general public whose members stand to be directly affected by the proposed Project. Friends' petition is more like that of the citizen group in *Lupton*, than that of the group in *Mt. Anthony* or the petitioner in *Springfield Hospital*. The Board concludes that Friends' petition satisfies the requirements of EBR 14(B)(1), and grants Friends' petition for EBR 14(B)(1) party status on Criterion 9(K).

2. EBR 14(B)(2)

Friends also petitions for party status as a materially assisting party pursuant to EBR 14(B)(2) on Criterion 9(K). In its petition, Friends states that the group will:

present an expert witness who will testify about the hazardous conditions at the intersection of US Route 7 and Plains Road that will be exacerbated by the traffic from the post office if it moves to the proposed new location. [Friends] will also present an expert witness who will testify about the effect on the public investments in the village center from the proposed relocation of the post office. In addition, [Friends'] attorney will cross-examine the applicant's witnesses and provide legal argument on the issues involving Criterion 9(K).

(Friends' Petition, at 6.)

Board precedent is clear, "party status under EBR 14(B)(2) is sparingly granted, usually to a person with specific expertise who can assist the District Commission or Board in addressing particularly complex, novel, or unfamiliar project." *Re: Spring Brook Farm Foundation, Inc., #2S0985-EB*, Memorandum of Decision at 3 (Oct. 3, 1995) (internal quotation marks omitted)(quoted in *Re: Van Sicklen Limited Partnership, #4C1013R-EB*, Memorandum of Decision at 8 (Jun. 8, 2001); *Stonybrook Condominium Owners Association, Declaratory Ruling #385*, Memorandum of Decision at 3 (May 19, 2000)).

A determination that a party can materially assist the Board requires more than an assertion that the party can cross-examine witnesses and present experts. Such a party must demonstrate that they possess particular expertise with respect to the Project, that the Project is complex and that the issues presented by the Project are novel and unfamiliar, and that the Board is inexperienced with the issues presented by the Project.

Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 7 (Oct. 11, 1996).

Friends alleges no particular expertise that would assist the Board in this appeal. Moreover, the issues are not particularly complex, novel, or unfamiliar. Accordingly, the Board denies Friends' petition for EBR 14(B)(2) party status on Criterion 9(K).

IV. ORDER

1. Friends has standing to appeal, and Preliminary Issue #1 is answered in the affirmative.
2. Pittsford Enterprises' Motion to Continue is DENIED.
3. The Board grants Friends' petition for party status pursuant to EBR 14(B)(1) to appeal Criterion 9(K), and Preliminary Issue #2 is answered in the affirmative.
4. The Board denies Friends' petition for party status pursuant to EBR 14(B)(2) to appeal Criterion 9(K), and Preliminary Issue #3 is answered in the negative.
5. The Chair shall issue a Scheduling Order setting this matter for hearing.

DATED at Montpelier, Vermont this 21st day of March, 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding

Marcy Harding, Chair

Rebecca Day

Samuel Lloyd

W. William Martinez*

Alice Olenick

A. Gregory Rainville

Jean Richardson

Donald Sargent

*DISSENT: Board member W. William Martinez would deny Friends' petition for party status under EBR 14(B)(1) to appeal Criterion 9(K), but joins in the rest of the Board's decision.