

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

RE: Northeast Cooperatives and L & S Associates  
Land Use Permit #2W0434-11-EB

MEMORANDUM OF DECISION

This decision pertains to a Petition for Party Status filed by Craig Stead ("Appellant") and a Motion to Dismiss Appeal filed by Northeast Cooperatives, Inc. ("Permittee"). For the reasons explained below, the Environmental Board {"Board"} dismisses the appeal because Appellant is denied party status.

I. BACKGROUND AND PROCEDURAL SUMMARY

On December 7, 1998, the District #2 Environmental Commission ("Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") issued Land Use Permit #2W0434-11 ("Dash 11 Permit") and supporting Findings of Fact and Conclusions of Law and Order ("Decision"). The Dash 11 Permit authorizes Northeast Cooperatives, Inc. and L & S Associates to construct in three phases a grocery distribution warehouse and general offices ("Project"). The Project is located on Technology Drive in Brattleboro, Vermont.

On January 5, 1999, the Appellant, pursuant to 10 V.S.A. § 6089 and Environmental Board Rule ("EBR") 40, filed a Notice of Appeal with the Board under Criterion 1.

On January 11, 1999, the Permittee, by their attorney Raymond A. Perra and pursuant to EBR 1 S(D), filed a Motion to Dismiss the above-captioned appeal ("Motion"). The Motion pertains to matters addressed in Land Use Permits #2W0434-8-EB (revised) ("Dash 8 Permit") and #2W0434-10-EB ("Dash 10 Permit").

On January 13, 1999, the Permittee filed a cross-appeal contending that the Commission erred with respect to: (i) Criterion 5, Condition 14 at page 3 of the Dash 11 Permit and (ii) the grant of party status to the Appellant.

On January 14, 1999, the Appellant requested oral argument on the Motion and the Town of Brattleboro filed a Motion to Dismiss the Appeal

On January 26, 1999, Craig Stead filed his petition for party status, and on January 27, 1999, John Kessler, General Counsel to the Agency of Commerce and Community Development ("Commerce"), filed a Notice of Appearance and a Memorandum in Support of Dismissal of Craig, Stead's Appeal.

On January 27, 1999, the Board heard oral argument on the Motion and the Appellant's party status with the following persons participating:

Permittee, by its attorney Richard Perra;  
Town of Brattleboro by its attorney, Robert Fisher; and  
Appellant.

The Board deliberated on this matter on January 27 and 29, 1999. This matter is now ready for decision.

## II. PRELIMINARY ISSUES

- A. Whether the Appellant, Craig Stead, should be granted party status on Criterion 1 (air pollution) as a materially assisting party pursuant to EBR 14(B)(2).
- B. Whether the Appellant's appeal, based on Criterion 1 (air pollution) as it relates to the Commission's consideration and determination regarding the Permittee's use of diesel trucks and refrigerated trailers, shall be dismissed because it fails to present a **justiciable** issue and is barred by the doctrine of collateral estoppel.

## III. DISCUSSION

### A. Craig Stead's Party Status

Party status decisions by district commissions may be challenged by appeal or cross-appeal. Re: St. Albans Group and Wal\*Mart Stores, Inc., #6F0471-EB, Memorandum of Decision (April 15, 1994). The Board considers issues of party status de novo. 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., supra.

The Permittee has **filed** a timely challenge to Appellant's party status. Appellant seeks party status pursuant to EBR 14 (B)(2) as a party who can **materially** assist the Board. EBR 14(B)(2) provides:

Parties by permission. The board or a district commission may allow as parties to a proceeding individuals or groups, including adjoining property owners, not otherwise accorded party status by statute upon **petition** if it finds that the petitioner has adequately demonstrated:

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(2) That the petitioner's participation will materially assist the board or commission by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant to the provisions of § 6086(a).

The decision whether or not to grant party status under EBR 14(B)(2) is solely within the Board's discretion. Re: Pico Peak Ski Resort, Inc., supra at 9 citing Re: Sherman Hollow, #4C0422-5-EB, Memorandum of Decision at 5 (Feb. 3, 1988). Party status pursuant to EBR 14 (B)(2) is sparingly granted, usually when the party can assist the Board in addressing "a particularly complex, novel, or unfamiliar project." Re: Springfield Hospital, #2S0776-2-EB, Memorandum of Decision at 7 (August 14, 1997) citing Re: Spring Brook Farm Foundation, Inc., #2S0985-EB, Memorandum of Decision at 3 (Oct. 3, 1995).

The Board considers several factors in determining whether party status should be granted pursuant to EBR 14(B)(2). These factors include: the petitioner's expertise regarding the matters at issue; the public's general understanding of the matters at issue; relevancy of the proffered testimony, if any; and the Board's familiarity with the subject matters at issue. Re: Maple Tree Place Associates, #4C0775-EB (Interlocutory Appeal), Memorandum of Decision at 7 (Oct. 11, 1996); Re: Putnev Paper Co. Inc., Declaratory Ruling #305 at 6; Re: Pico Peak Ski Resort, Inc., supra at 10.

After consideration of the materials presented and oral argument, the Board concludes that Appellant has not demonstrated that his participation will materially assist the Board, despite his clearly established expertise. This is because the Project in the Dash 11 Permit now before the Board is the expansion in the size of a warehouse, and not the previously authorized number of truck trips. See Decision, Findings of Fact #5 and #6 and In re Taft Corners Assocs., 160 Yt. 583, 593 (1993) (permits that are not appealed are final and not subject to attack by subsequent application proceedings, regardless of whether or not they were properly granted in the first instance).

In addition, although questioned several times during the Board's oral argument, the Appellant was unable to demonstrate how his offer is relevant to the expansion of the warehouse. Because the Project does not present issues which are particularly complex, novel, or unfamiliar to the Board, the Board does not need the assistance of Appellant as a

Rule 14 (B)(2) party. Since Mr. Stead is denied party status his appeal is dismissed.'

B. Permittee's Motion to Dismiss

In light of the Board's dismissal due to the determination on the party status issue, the Permittee's Motion to Dismiss, as well as similar Motions filed by the Town of Brattleboro and the Agency of Commerce and Community Development, are all moot.

C. Permittee's Cross-Appeal

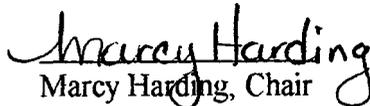
Consistent with Permittee's January 22 filing and in light of the Board's denial of Appellant's party status and dismissal of the appeal, the Permittee's cross-appeal regarding Criterion 5 and Condition 14 of the Dash 11 Permit is also dismissed with prejudice.

IV. ORDER

1. Appellant does not have party status pursuant to EBR 14(B)(2) to pursue this appeal. Accordingly, this appeal is dismissed with prejudice.
2. Permittee's Cross-appeal is dismissed with prejudice.

Dated at Montpelier, Vermont this <sup>29<sup>th</sup></sup> 29 day of January, 1999.

ENVIRONMENTAL BOARD

  
Marcy Harding, Chair

John Ewing

George Holland

Arthur Gibb

Samuel Lloyd

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The Board is cognizant of the ongoing concerns regarding pollution from diesel exhaust in the Brattleboro area. However, the Board is satisfied that the Commission's retention of jurisdiction over Criterion 1 (air pollution) as indicated in its Decision and other available mechanisms, such as EBR 34 revocation proceedings and the Board's enforcement function, will provide ongoing oversight and possible remedies should changing conditions, new information or testing indicate a need.

Rebecca M. Nawrath  
Alice Olenick