

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

RE: L & S Associates  
#2W0434-8-EB

MEMORANDUM OF DECISION

This decision, dated October 1, 1992, pertains primarily to the question of whether the appeals of the Dummerston Planning Commission (DPC) and the Windham Citizens for Responsible Growth (WCRG) should be accepted. For the reasons explained below, the Environmental Board has decided to accept the appeal of DPC on 10 V.S.A. § 6086(a)(5) (traffic) and of WCRG concerning the District Commission's denial of party status to WCRG.

I. CHRONOLOGY

On July 17, 1992, the District Commission issued a permit amendment to L & S Associates (formerly C & S Associates) authorizing the construction of a 202,000 square foot warehouse, parking for cars and trucks, a truck repair center; and a restroom building for truck drivers. The project is an expansion of an existing warehouse facility in Brattleboro.

On August 14, an appeal dated August 13<sup>1</sup> was filed by William Tyler through his attorney, Seth Bongartz, concerning 10 V.S.A. § 6086(a)(1) (air), (5) (transportation), 8 (aesthetics), 9(K) (public investment), and 10 (local and regional plans). Mr. Tyler had party status on Criterion 5. Later that day, Mr. Tyler called the Environmental Board office and stated he would be withdrawing his appeal. On August 18, a motion to withdraw the appeal was filed with the Board.

On August 18, an appeal dated August 14 was filed by Angelo DiCicco concerning Criteria 1 (air and noise), 5, 8, 9(K), and 10. Mr. DiCicco had party status on Criteria 1 (air and noise), 5, and 8. Later in the day on August 18 a notice of appearance and withdrawal of appeal were filed on behalf of Mr. De Cicco by Richard L. Brock, Esq.

On August 19, Stephanie Kaplan, General Counsel for the Board, returned the \$50.00 filing fees paid by Mr. Tyler and Mr. De Cicco. The cover letters stated, in pertinent part: "We are returning your check ... as the appeal you

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<sup>1</sup>The date that a document is deemed to be filed with the Board is the date the document is received by the Board. See Board Rule 12(A).

filed ... was withdrawn ...."

On August 20, an appeal dated August 19 was filed by DPC concerning Criteria 1(air and noise), 5, 8, 9(K), and 10. DPC had party status on Criterion 5 as a permitted party pursuant to Board Rule 14(B).<sup>2</sup> The notice of appeal filed by DPC begins with the following statement: "With the knowledge that at least one appeal has been filed . . . we hereby appeal ...." The notice also stated: "We are concerned that we retain party status regarding this project now and in the future."

On August 20, WCRG filed two motions for party status dated August 19, one of which includes an appeal of the denial of party status by the District Commission. One motion states: "We, the WCRG, having received notices of appeal of William Tyler, Angelo DeCicco, and the Dummerston Planning Commission, are filing a request for permission for party status." The other motion states: "We appeal the District Environmental Commission ruling disallowing us party status before the ... Commission. In the alternative, the board should grant us party status under Rule 14(B) [because] we will be able to materially assist the Board ...." WCRG's motion then presents argument to support its eligibility for party status on Criteria 1(air), 5, 8, 9(K), and 10. WCRG had requested the District Commission to grant it party status on Criteria 1 (air), 5, 9(K),, and 10.

Mr. Tyler's appeal had been filed by Seth Bongartz. On August 20, Attorney Bongartz filed a motion to withdraw as counsel for Mr. Tyler, stating that "our continued representation of Mr. Tyler might give rise to a conflict of interest on the part of the firm," and that "Mr. Tyler's decision to withdraw from this litigation may place his interests at odds with those of another client of [his law firm], the Windham Citizens for Responsible Growth."

On August 25, the Chair of the Board sent a memo to interested persons providing an opportunity to file statements supporting or opposing the Board's acceptance of the appeals.

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<sup>2</sup>The Dummerston Planning Commission was not an automatic party under 10 V.S.A. §§ 6084 and 6085 because Dummerston is neither the municipality in which the project is located nor adjacent to the land on which the project is located.

It is not clear whether DPC sought party status on criteria in addition to Criterion 5.

On September 1, L & S filed a notice of cross-appeal and entry of appearance. L & S appeals the District Commission's decision to grant party status to Angelo De Cicco as an adjoining property owner under Criteria 1 (air), 5, and 8 and to DPC and Mr. Tyler as permitted parties on Criterion 5.

A number of interested people and entities responded to the Chair's request for statements. Parties to the District Commission proceeding who filed statements included the Town of Brattleboro, the Dummerston Board of Selectmen, the Windham Regional Commission, the DPC, and Mr. Tyler. Legal memoranda were filed on September 3 by L & S and by WCRG.

Along with its legal memorandum, L & S raised an issue concerning the participation in this matter by Board members Terry Ehrich and Ferdinand Bongartz. In a letter to the Board dated September 3, L&S stated:

As of two weeks ago, Seth Bongartz, Esq. represented Windham Citizens for Responsible Growth in this case; we understand that Seth is related to Ferdinand Bongartz, an Environmental Board member. Terry Ehrich, another Environmental Board member, has taken public positions on a number of issues peculiar to this appeal. We respectfully request that Board members Bongartz and Ehrich consider these possible conflicts of interest before they participate in any decision in this case.

The Board deliberated on September 9 in Essex Junction.

## II. LAW

Board Rule 40(A) states, in pertinent part:

An appeal shall be filed with the board within 30 days after the date of the decision of the commission. The appeal shall consist of the original and 10 copies of the appeal and of the decision of the commission, and a statement of the reasons why the appellant believes the commission was in error and the issues the appellant claims are relevant. A filing fee in the amount established in Rule 11

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of these rules payable to the State of Vermont shall accompany the appeal (Amended, effective May 4, 1990).

Board Rule 40(E) states:

Any party to the application may enter its appearance in the appeal before the board within 14 days after notice was mailed to him by the appellant or expiration of the 30 days allowed for filing appeals, whichever is latest (Amended, effective May 4, 1990).

Board Rule 40(F) states:

If any party of right or other parties of record to an application wishes to appeal findings of the district commission relating to criteria or issues other than those raised by the appellant, the party must file a cross-appeal with the board within 14 days of the date the notice of appeal was mailed to him by the appellant, or before the expiration of the 30 days allowed for filing appeals, whichever is later (Added, effective May 4, 1990). Such appeal shall comply with the requirements of paragraphs (A) and (B) of this rule, excepting, however, the filing of copies of the decision of the commission with the board is not required.

The 30-day deadline for filing appeals to the Environmental Board was August 16. This deadline was extended to August 18 because August 16 was a Sunday and August 17 was a state holiday. See Board Rule 6.

William Tyler and Angelo De Cicco both mailed their appeals on August 14. Accordingly, the 14-day deadline for other parties to enter appearances or file appeals was August 28.

### III. DECISION

#### A. Dummerston Planning Commission

Based upon the plain language of Rules 40(E) and 40(F), the Board believes that DPC's cross-appeal and notice of

appearances were filed within the time period specified in these rules. Although the appeals were later withdrawn, appeals had been filed by Mr. Tyler and Mr. DiCicco within the 30-day period specified in Rule 40(A). Copies of the appeals were mailed to DPC, and DPC's cross-appeal and notice of appearance were filed within 14 days after the appeal was mailed to DPC by the appellants, as required by Rules 40(E) and 40(F).

L & S argues that since the appeals were not entered on the Environmental Board's docket before they were withdrawn, no appeal existed on the date that the cross-appeal was filed, and therefore DPC had no right to file a cross-appeal.

The Board believes, however, that since Rules 40(E) and (F) allow for cross-appeals and notices of appearance to be filed within 14 days of the original appeal, and nothing in the statute or rules modifies this right, withdrawal of an appeal does not affect the rights of other parties to file cross-appeals and notices of appearance after the parties have received copies of the appeals.

Accordingly, the Board accepts the appeal of DPC with respect to Criterion 5.

Concerning the other criteria which DPC appealed on which it does not have party status, DPC may maintain its appeal if it meets the standards enunciated by the Board in Re: Sherman Hollow, #43C0422-5-EB, Memorandum of Decision (Feb. 4, 1988). In that decision, the Board stated:

[A] party's right to request a de novo appeal by the Board is limited to those criteria upon which the person was granted party status in the District Commission proceedings.

The right to appeal other criteria can be granted only if a successful argument is made that either a person requested party status on a criterion and was wrongly denied such status or, as provided by Rule 40(C),<sup>3</sup> "substantial inequity or injustice would result. ..."

DPC may also seek to demonstrate eligibility for party

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<sup>3</sup>Rule 40(C) has since been renumbered as 40(D).

status under criteria 1 and 8. Once criteria are validly raised in an appeal, other individuals may seek party status based upon their conformance with the standards of Rule 14.<sup>4</sup> Had the original appellants not withdrawn their appeals, the criteria at issue in the appeal would have included at least Criteria 1, 5, and 8.<sup>5</sup>

Since none of the appellants had party status on Criteria 9(K) and 10, these criteria are not at issue in this appeal unless DPC persuades the Board not only that it is eligible for party status on these criteria, but also that substantial inequity or injustice would result if Criteria 9(K) and 10 are not reviewed, or unless WCRG successfully persuades the Board that the District Commission incorrectly denied WCRG party status on these criteria (see the discussion that follows).

Accordingly, an opportunity for DPC to file legal memoranda concerning its appeal of and request for party status on Criteria 9(K) and 10 will be provided.

B. Windham Citizens for Responsible Growth

WCRG appeals the District Commission's denial of party status on Criteria 1, 5, 9(K), and 10, and seeks party status in this appeal on Criteria 1, 5, 8, 9(K), and 10.

A person who seeks party status at the District Commission proceeding and is denied on any or all criteria may appeal that denial to the Board at the time an appeal of the district commission's final decision approving or denying the

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<sup>4</sup>The standard of proving that "substantial inequity or injustice would result" only applies in the context of bringing an appeal on a criterion or issue on which the appellant did not have party status. See Rule 40(D). Once a criterion or an issue is brought to the Board by a party who does have party status, any individual may seek party status by demonstrating eligibility under the standards of Rule 14.

<sup>5</sup>Mr. Tyler had party status only on Criterion 5, and Mr. DiCicco had party status on Criteria 1, 5, and 8. Since both appellants appealed the District Commission's decision on Criteria 1, 5, 8, 9(K), and 10, the Board would have had to rule on whether to allow the appeal on Criteria 9(K) and 10. However, since Mr. DiCicco had party status on Criteria 1, 5, and 8, the appeal would have included those criteria and other parties and persons could have sought to participate under those criteria.

application is brought. See Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 12-13 (Dec. 22, 1988).

The Board believes that WCRG may appeal the Commission's decision to deny party status to WCRG. In Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision at 5-7 (July 31, 1989), the Board allowed the Town of Woodstock,<sup>6</sup> which was denied party status by the District Commission, to appeal that denial to the Board notwithstanding the language of Rule 40(A) that "[a]ny party aggrieved by an adverse determination by a district commission may appeal to the board and will be given a de novo hearing ...." (Emphasis added.) The Board stated:

The Board interprets the word "decision" in Rule 40(A) to refer to the final decision of the district commission approving or denying the application.

. . .

[T]he Board believes that the term "party" for purposes of Rule 40 includes persons who have requested and been denied party status by a district commission.

Id. at 5.

Consistent with the Swain decision, although WCRG was not a "party" in the sense that it had party status, it was a "party" for purposes of appeal provided in Rule 40. The Board believes that the right to file a cross appeal, provided to "parties" by Rule 40(F), extends to an appeal of a denial of party status by a district commission.

Accordingly, the Board will allow the cross-appeal of WCRG of the decision of the District Commission to deny party status to WCRG on Criteria 1 (air), 5, 9(K), and 10. If the Board determines that WCRG should have been granted party status on any of these criteria, the appeal will include review of those criteria.

WCRG also seeks party status on Criterion 8. Since WCRG

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<sup>6</sup>The Town of Woodstock was not an automatic party under 10 V.S.A. §§ 6084 and 6085 because it was neither the municipality in which the project was located nor adjacent to the land on which the project was located.

did not seek party status on this Criterion, it may only participate if Criterion 8 becomes an issue by virtue of another proper appeal and if WCRG demonstrates its eligibility for party status and the Board exercises its discretion in favor of the request. Thus, WCRG also may seek party status under whatever criteria ultimately are-determined to be at issue in this appeal by virtue of the appeals filed by other parties.

C. Cross-Appeal of L & S

On September 1, L & S filed a cross-appeal. Since the deadline for filing cross-appeals was August 28, it appears that L & S's cross appeal was filed too late. Before dismissing L & S's cross appeal, the Board will provide an opportunity for argument to be filed on the timeliness of that cross-appeal.

D. Participation of Ferdinand Bongartz and Terry Ehrich

L & S has requested that Board members Bongartz and Ehrich consider potential conflicts of interest before participating in any decision in this case. Mr. Ehrich does not believe he has a conflict of interest. Mr. Bongartz has not yet made that determination. Accordingly, Mr. Bongartz did not participate in this decision.

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IV. ORDER

1. The Board accepts the appeal of DPC concerning Criterion 5 (traffic).
2. The Board accepts the appeal of WCRG concerning the District Commission's denial of party status to WCRG on Criteria 1, 5, 9(K), and 10.
3. A prehearing conference will be held to discuss party status, the filing of additional documents, and the hearing. The time, date, and location of the prehearing conference will be announced by subsequent notice;

Dated at Montpelier, Vermont this 1st day of October,  
1992.

ENVIRONMENTAL BOARD

*Elizabeth Courtney*

Elizabeth Courtney, Chair  
Terry Ehrich  
Lixi Fortna  
Arthur Gibb  
Samuel Lloyd  
William Martinez  
Steve E. Wright

a:C&S.dec (S2)

CERTIFICATE OF SERVICE

I hereby certify that I, Stephanie J. Kaplan, General Counsel, Environmental Board, sent a copy of the foregoing Memorandum of Decision to Parties regarding L & S Associates, #2W0434-8-EB, by U.S. Mail, postage prepaid, on this 1st day of October, 1992, to the following:

L & S Associates by  
William Schroeder, Esq.  
Downs, Rachlin & Martin  
Courthouse Plaza  
P.O. Box 190  
Burlington, VT. 05402

Agency of Natural Resources  
c/o Kurt Janson, Esq.  
Rep.; State Agencies  
103 S. Main, 2 Center  
Waterbury, VT 05676

FOR INFORMATION ONLY

C & S Wholesale Grocers,  
Inc.  
c/o Joel R. Cherington  
P.O. Box 821  
Brattleboro, VT 05302

Windham Citizens for  
Responsible Growth by  
Gerald R. Tarrant, Esq.  
Tarrant and Marks  
P.O. Box 1440  
Montpelier, VT 05601-1440

Brattleboro Board of  
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Commission  
c/o Town Clerk  
230 Main Street  
Brattleboro, VT 05301

Alex Portalupi  
Agency of Transportation  
133 State Street  
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Windham Regional Commission: Craig F. Stead  
c/o Colonel Lew Sorenson,  
Exec. Dir.,  
139 Main St. Suite 505  
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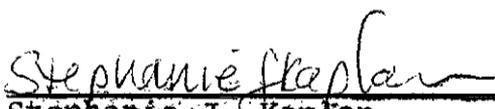
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c/o Town Clerk  
RR 2, Box 995  
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Guilford Town Planning  
c/o Eric Morse  
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Dummerston Planning  
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c/o David B. Ryan  
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