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

Re: L & S Associates
Application #2W0434-8-EB

MEMORANDUM OF DECISION

This decision pertains to preliminary issues raised by parties to this appeal and by persons seeking party status. Memoranda and responses were filed by various parties and persons. The Board deliberated on November 18, 1992, in Montpelier.

A. Introduction - Party Status

Some persons are designated as parties to Act 250 proceedings by statute, and others are identified by Board Rule. The circumstances for seeking and obtaining party status for non-statutory party or, "intervenor," is governed by Board Rule 14(B). Party status may be granted to interested parties on two bases: under Rule 14(B)(1)(a), if the petitioner has demonstrated that a proposed development or subdivision may affect its interest with respect to any of the Act 250 criteria; and under Board Rule 14(B)(1)(b), if the petitioner's participation "will materially assist the board or commission by providing testimony, cross examining witnesses, or offering argument or other evidence relative to" the ten criteria.

The Board has interpreted Rule 14(B) in a number of decisions.¹ The general standards for granting party status to intervenors are summarized as follows:*

1. An intervenor that has party status on a criterion in the district commission proceedings automatically has party status on that criterion if it is within the scope of the appeal.
2. If a cross-appeal is filed challenging the district commission's grant of party status to the intervenor, the intervenor must make a new showing of eligibility of party status to the Board.
3. An intervenor whose request for party status on a

¹These decisions include Re: Steven and Stanley Tanger, #3W0125-3-EW, Memorandum of Decision (May 22, 1990); Re: Finard-Zamais Assoc., #1R0661-EB, Memorandum of Decision (March 28, 1990); Re: Dr. Shimon & Malka Shalit, #8B0334-3-EB, Memorandum of Decision (Sept. 5, 1989) and Memorandum of Decision (July 25, 1989); Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision (July 31, 1989); Re: Maple Tree Place Assoc., #4C0775-EB, Memorandum of Decision (Dec. 22, 1988); Re: Sherman Hollow, Inc., #4C0422-5-EB (Feb. 3, 1988).

² William Schroeder, L & S's attorney, should be given credit for concisely and clearly summarizing the Board's rulings concerning party status in his November 4 Memorandum on Preliminary Issues.

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criterion was denied by the district commission may appeal the denial after the district commission has concluded hearings and issued a final decision on the application.³ In some cases, the Board will first review the reason for the district commission's denial to determine whether the district commission abused its discretion by denying party status. The Board will then conduct a de novo review to determine whether the intervenor should be granted party status in the Board proceedings.

4. An intervenor that did not have party status in the district commission proceedings may petition for party status in the Board appeal on any criterion that is at issue by virtue of another party's valid appeal and need only demonstrate its eligibility under Rule 14(B).

5. An intervenor that seeks to appeal a criterion on which the intervenor did not seek party status at the district commission proceedings, and which is not within the scope of the appeal as brought by another party, must demonstrate that substantial inequity or injustice would result unless the Board expands the scope of the appeal. Rule 40(D). This may require a showing that the intervenor had good cause for not seeking party status at the district commission proceedings.

The issues for the Board's decision are addressed in turn below, as delineated in the Prehearing Conference Report and Order dated November 10, 1992.⁴

1. Whether to grant L & S's motion for reconsideration or clarification of the Board's October 1 decision concerning the scope of the appeal.

In the Board's Memorandum of Decision dated October 1, the Board stated that Criteria 1, 5, and 8 are at issue in this appeal because Angelo DiCicco had party status on Criteria 1, 5, and 8 and appealed these criteria. L & S disagrees with the Board's delineation of the issues, arguing that appeals that are subsequently withdrawn should not delineate the scope of the issues in the appeal.

The Board agrees with L & S that the scope of the appeal should be based upon the Board's decision concerning

³A person denied party status by the district commission may seek to take an appeal to the Board prior to a final decision by the district commission. This is called an interlocutory appeal and is addressed by Board Rule 43. The Board, in most cases, has not accepted interlocutory appeals concerning party status.

⁴One issue was omitted from the list in the Prehearing Conference Report; it is numbered 7A in this decision.

the appeal and party status rights of the Dummerston Planning Commission (DPC) and Windham Citizens for Responsible Growth (WCRG), not on appeals that was withdrawn.

2. Whether L & S's cross-appeal should be accepted **as** timely filed.

The district commission issued its decision on July 17, 1992. Mr. Tyler filed an appeal dated August 13 on August 14. Mr. DiCicco filed an appeal dated August 14 on August 18. DPC and WCRG filed their cross-appeals on August 20. Both were dated August 19. L & S filed a cross-appeal on September 1. Rule 40 requires that appeals to the Board be filed within 30 days of the Commission's decision, and that cross-appeals be filed within 14 days of the date the notice of appeal was mailed to him by the appellant, or before the expiration of 30 days from the Commission's decision, whichever is later.

DPC and WCRG's cross-appeals were both filed within 14 days from the dates that Mr. Tyler and Mr. DiCicco mailed their notices of appeal. L & S asserts that it should be given additional time to file a cross-appeal concerning the party status of DPC because it had no reason to file one previously because, based upon the withdrawals of Mr. DiCicco and Mr. Tyler's appeals, that there was no appeal.

Given the unusual facts of this case, the Board believes it is fair to accept L & S's cross-appeal as timely filed. Ordinarily, once an appeal is filed, an additional fourteen days is provided for any other party who wishes to raise issues not raised in the appeal. However, in this case L & S believed that all appeals had been withdrawn. The Board believes it is reasonable to allow additional time for L & S to file a cross-appeal based upon the cross-appeals that were filed by DPC and WCRG. The Board therefore accepts L & S's cross-appeal dated September 1, 1992.

3. Whether the District Commission erred in granting party status to DPC on Criterion 5.

In its cross-appeal L & S argues that DPC should not have been granted party status because 1) a planning commission cannot have affected interests because it is the selectboard, not the planning commission, that represents the interests of a town, and 2) DPC did not demonstrate to the district commission that it could materially assist the Commission.

The Board believes that the district commission did not err in granting party status to DPC on Criterion 5. Act 250

confers party status on municipal planning commissions separate and distinct from the party status of selectboards. 10 V.S.A. §§ 6084, 6085. See In re Wildlife Wonderland, Inc., 133 Vt. 507, 517-18 (1975). It is unlikely that the legislature would identify municipal planning commissions as parties separate from boards of selectmen if planning commissions could not represent the interests of the town. The Board therefore concludes that a planning commission has interests that may be affected by a proposed Act 250 project.

The Board is persuaded that DPC's interests are affected by the traffic generated by L & S's project. Evidence was submitted to the district commission that the project will generate an average of 310 truck trips per day, with as many as 600 truck trips on some days, and an average of 784 car trips per day; all trucks will be routed to the intersection of U.S. Route 5 with Vermont Route 9 and the ramps for Exit 3 of Interstate 91; and traffic along the relevant section of U. S. Route 5 is currently congested.

Re: L & S Associates, #2W0434-8, Findings of Fact and Conclusions of Law at 24-27 (District #2 Environmental Commission, July 17, 1992). The Dummerston town border is only 1.5 miles from the proposed project and Dummerston townspeople frequently use the Putney Road for shopping and other services and to reach their jobs. They are also affected when traffic from Putney Road backs up on the Interstate at Exit 3. We believe that the district commission correctly granted party status to DPC on Criterion 5, and we therefore deny L & S's cross-appeal.

4. Whether the District Commission erred in denying party status to DPC on Criterion 1(a).

The Board has been unable to reach a decision relative to this issue. This decision will be issued during the first week of December.

5. Whether DPC should be permitted to appeal on Criteria 8, 9(A), 9(K), and 10.

DPC did not seek party status from the district commission on these criteria. DPC needs to persuade the Board that there is good cause for its failure to seek party status on these criteria in the district commission proceedings, and that substantial inequity or injustice would result if the Board does not grant party status now. In addition, DPC needs to establish its eligibility for party status under Criteria 8, 9(A), 9(K), and 10.

The Board declines to grant the appeal of DPC on criteria 8, 9(A), and 10. The Board believes that DPC should have sought party status from the district commission

on these criteria, and that DPC has not demonstrated that substantial inequity or injustice would result if the Board does not expand the scope of the appeal to include these criteria.

The Board has decided to allow DPC to appeal Criterion 9(K) and it grants party status to DPC on this criterion, as it relates to traffic from the project. The issue of the impact of traffic on the highways is properly addressed under Criterion 9(K) as well as Criterion 5. Because, as discussed above, DPC's interests are clearly affected, substantial inequity or injustice would result if the scope of the appeal were not expanded to include Criterion 9(K).

6. Whether the District Commission erred in denying party **status** to WCRG on Criteria 1, 5, 9(K), and 10.

WCRG did not seek party status in the district commission proceedings until after the fifth or sixth hearings. WCRG contends it had good cause for its delay in seeking party status because 1) it only learned during the hearings that certain issues were not being properly developed during the hearings, 2) it did not agree with the approach being taken by the statutory parties, and 3) it did not become organized until June 1992. WCRG argues that its participation as a party would not have delayed the proceedings because it was not asking for any issues to be relitigated but only to be able to be a party for whatever issues remained to be addressed in the last hearing.

At the sixth and last hearing, the district commission denied party status to WCRG, but allowed WCRG to ask questions and submit proposed findings. L & S argues that WCRG waived its right to appeal because it agreed to the Commission's offer to WCRG to participate in the last hearing without being granted party status.

The Board does not agree that WCRG waived its right to appeal by accepting the district commission's ruling and being agreeable to participate to the extent allowed.

The Board also believes that the district commission did not err in denying party status to WCRG. Rule 14'(B)(2)(c) states that an **intervenor's** petition for party status

must be made to the board or district commission on or before the first hearing day if a prehearing conference is not held and to the board or district commission or or before the day of the prehearing conference, if one is held, unless the board or district commission finds that the petitioner has demonstrated good cause for failure

to appear on time, and that its late appearance will not unfairly delay the proceedings or place an unfair burden on the applicant or other parties.

The District Commission was not persuaded that good cause existed to justify WCRG's very late request for party status. The Board is similarly not persuaded. The application was filed on January 14, 1992, and hearings began on February 11. WCRG's request for party status was not made until approximately five months had elapsed since the filing of the application and four months since the first hearing. Residents of the area had ample opportunity to determine that the project may affect their interests and seek party status well before June.

Since the Board is denying WCRG's appeal of the district commission's denial of its petition for party status, WCRG may only participate in the appeal if it can establish its eligibility for party status under the criteria which the Board has determined are at issue because of DPC's valid appeal. These consist only of Criteria 5 and 9(K).

7. Whether WCRG should be permitted to appeal Criterion 8.

WCRG seeks to appeal Criterion 8. WCRG did not request party status on this criterion from the district commission. The Board denies the appeal for two reasons. One, WCRG had no standing as a party before the district commission, and therefore has no standing to appeal. Two, even if WCRG had been granted party status on the criteria it requested, the Board would deny WCRG's appeal on Criterion 8 because WCRG did not justify its failure to seek party status on this criterion from the district commission or demonstrate that substantial inequity or injustice would result from a failure of the Board to include Criterion 8 in the appeal.

7A. Whether WCRG should be granted party status on any of the criteria that are now at issue in this appeal by virtue of DPC's appeal (Criteria 5 and 9(K)).⁵

The standard is whether WCRG is eligible under Criteria 5 and 9(K). The Board believes that WCRG has demonstrated its eligibility for party status under these criteria. WCRG is composed of a group of citizens who live in the area of the proposed project whose interests are likely to be affected by the traffic. WCRG also can materially assist the Board by presenting expert witnesses to provide the

⁵This issue was inadvertently omitted from the list of issues in the Prehearing Conference Report.

Board information it may not otherwise receive. In light of the potential complexity of the issues concerning traffic generated by the project, the Board believes that the information provided by WCRG's witnesses will add to the Board's knowledge of the matters under appeal and, accordingly, will assist the Board in making an informed decision. See Re: Okemo Mountain, Inc., #2S0351-12A-EB, Memorandum-of Decision (July 18, 1991). WCRG is granted party status pursuant to both Rule 14(B)(1)(a) and 14(B)(1)(b).

8. Whether the Coalition of C & S Employees should be granted party status on the Criteria at issue in this appeal.

The Coalition consists of employees of C & S Wholesale Grocers, Inc. who will work in close proximity to the new proposed facility, which is an expansion of the existing C & S warehouse. The interests of the Coalition will be affected by the traffic generated by the project, and the Board therefore grants party status to the Coalition on Criteria 5 and 9(K) under Rule 14(B)(1)(a)⁶.

B. Board Witnessses

9. Whether the Board should request Alec Portalupi and Brian Fitzgerald to testify.

ANR does not want to have state employees used as witnesses for parties when parties can make their cases with their own experts. If, after receiving the prefiled testimony the Board believes it needs testimony from the state's experts, it will call them at that time.

10. Whether the Board will request Michael Oman, a land use and traffic planning consultant, who testified at the request of the District Commission, to testify in these proceedings.

The Board does not usually call its own witnesses unless it needs information not otherwise provided by the parties. Again, if questions arise that cannot be answered by the parties' witnesses, the Board will consider calling its own expert witness.

⁶The Board reminds parties that individual economic interests are not cognizable under either Criterion 5 or 9(K).

C. Participation of Ferdinand Bongartz

At the time it filed its cross-appeal, L & S requested that Board member Ferdinand Bongartz consider potential conflicts of interest before participating in this case. Although L & S did not identify potential conflicts, we assume that the reference is to the fact that Mr. Bongartz's son Seth represented WCRG at the district commission proceedings and filed the appeal by on behalf of Mr. Tyler that was subsequently withdrawn. On August 20, 1992, Seth Bongartz withdrew from representing Mr. Tyler.

Mr. Bongartz has carefully considered whether he has a conflict of interest in this case or whether, by virtue of his son's previous participation, he will not be able to judge this matter fairly. Mr. Bongartz has concluded that because his son has not participated in this appeal, there is no conflict of interest. Mr. Bongartz also believes that he can fairly and impartially participate in this appeal. He therefore participated in the preliminary matters that are the subject of this decision, and he will continue to participate.

Dated at Montpelier, Vermont this 24th day of November, 1992.

ENVIRONMENTAL BOARD



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

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