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

RE: Roger and Beverly Potwin
Land Use Permit Application #3 W0587-3-EB
Docket #736

MEMORANDUM OF DECISION

This proceeding concerns an appeal from an order authorizing the extension of a construction completion deadline in connection with a project to create a two-lot subdivision, one lot consisting of 8.1 acres (containing a farmhouse complex) and a second lot of 34.9 acres (containing eight house sites and related improvements) with an access drive and related amenities on a site off Old Town Farm Road in the Town of Quechee, Vermont ("Project").

I. PROCEDURAL SUMMARY

On September 29, 1998, Roger and Beverly Potwin filed a land use application for an extension of the Project's construction completion deadline pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On June 8, 1999, the District #3 Environmental Commission ("District Commission") issued Land Use Permit #3 W0587-3 ("Permit") and supporting "Memorandum of Decision: Extension of Construction Completion Deadline" ("Decision") to the Potwins, their assigns, and successors in interest, extending the construction completion date for the Project from October 1, 1998 to October 1, 2003.

On July 7, 1999, George Baldwin and David Olio ("Appellants") filed an appeal with the Environmental Board from the Permit and Decision alleging that the Commission erred by (i) denying Mr. Baldwin party status as to 10 V.S.A. § 6086(a)(3), (4), (8), and (9)(B) ("Criteria 3, 4, 8, and 9(B)") and (ii) extending the construction completion deadline. The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules ("EBRs") 6 and 40.

Title to the Project site transferred to Frederick Zeytoonjian ("Permittee") by warranty deed filed on June 18, 1999 in Volume 273, pages 399-402, of the Town of Hartford Land Records.

On August 6, 1999, Board Chair Marcy Harding convened a prehearing conference with the following individuals participating:

Permittee by John C. Candon, Esq. and David Courtney
Appellants by Carl H. Lisman, Esq.

On August 6, 1999, Chair Harding issued a Prehearing Conference Report and Order ("Prehearing Order") which, among other things, set forth filing deadlines for the parties to address the issue of Mr. Baldwin's party status.

On August 26, 1999, Mr. Baldwin filed a petition for party status.

On September 2, 1999, Permittee filed a response to Mr. Baldwin's petition.

On September 15, 1999, the Board deliberated concerning Mr. Baldwin's party status.

II. PRELIMINARY ISSUES

Preliminary Issue 1: Whether the District Commission erred by denying party status to Mr. Baldwin for the reasons articulated in the Decision.

Preliminary Issue 2: If the answer to Preliminary Issue 1 is in the affkrnative, whether Mr. Baldwin has now demonstrated that he has party status under Criteria 3, 4, 8, and 9(B) pursuant to EBR 14.

III. DISCUSSION

Mr. Baldwin appeals from the District Commission's denial of party status as to Criteria 3, 4, 8, and 9(B). The facts, briefly stated, are these: the Commission sent a notice of application and a notice of hearing to Mr. Baldwin at his Massachusetts address. The notices were not returned to the Commission. Mr. Baldwin has no memory of receiving them. The Commission convened a hearing on November 11, 1998. It was recessed pending the submission of additional information by the applicants. Mr. Baldwin did not attend the hearing. He filed a letter on November 13 expressing his belief that the area contained scenic beauty and wildlife that should be preserved. He did not request party status at that time. In March, 1999 he filed a petition for party status as to Criteria 3, 4, 8, and 9(B) pursuant to EBR 14(A)(5) and 14(B)(2), which the District Commission ultimately denied.

To have standing to appeal a criterion to the Board, an appellant must have obtained party status as to that criterion before the District Commission.[1] 10 V.S.A. §

[1] Although evidence regarding individual criteria is sometimes taken into the record in a case involving the extension of a construction completion deadline, it is pertinent to the

6089(a); EBR 40(A). See also. e.g., Re: Garv Savoie d/b/a/ WLPL and Eleanor Bemis, #2 W099 1 -EB, Findings of Fact, Conclusions of Law, and Order at 6-7 (Oct. 11, 1995)[EB #632]; Re: Derby Plaza Associates Limited Partnership, #7R0886-EB, Memorandum of Decision at 5 (Feb. 25, 1994)[EB #597M1]. An exception to this rule is that an individual or entity denied party status at the district commission level may raise the denial before the Board by way of appeal or cross-appeal, as Mr. Baldwin has done. E.g., Springfield Hosnital, #2S0776-2-EB, Memorandum of Decision at 3 (Aug. 14, 1997)[EB #669]; Gary Savoie, supra at 7; Re: Spring Brook Farm Foundation. Inc., #2S0985-EB, Memorandum of Decision at 7 (July 18, 1995)[EB #615]. Such person is deemed to be a party for the limited purpose of deciding whether it has party status. Id. The Board considers the issue of party status de novo. Id. If the Board denies party status on a criterion, the appeal or cross-appeal is dismissed as to that criterion because the party does not have standing to file an appeal under that criterion. Id. Conversely, if the Board grants party status, it "will proceed with substantive review on any criteria concerning which it determines that the appellant qualifies for party status." Garv Savoie, supra at 7.

Act 250 confers party status to participate in an appeal upon adjoining property owners, as a matter of right, ***provided that*** the adjoiner demonstrates that the proposed project "may have a direct effect on the adjoiner's property" under one or more of the ten criteria set forth at 10 V.S.A. $6086(a). 10 V.S.A. § 6085(c); EBR 14(A). See also Gary Savoie, supra at 6. An adjoiner seeking party status must (i) request a hearing or request the right to be heard by entering an appearance (ii) on or before the first prehearing conference or the first day of hearing if no first prehearing conference is held. EBR 14(A)(5).

In addition, the district commissions and Board have the 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) and 14(B)(2), respectively. Garv Savoie. supra at 6-7. EBR 14(B)(3)(c) requires that the petition for party status be made on or before the first prehearing conference or the first day of hearing if no first prehearing conference is held unless it is demonstrated that (i) there was good cause for failure to appear on time and (ii) that the late appearance will not unfairly delay the proceedings or place an unfair burden on other parties

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Board's decision only in certain limited circumstances -- for example, when the project for which an extension is requested is a material or substantial change to the one originally approved. Neither Mr. Baldwin nor Mr. Olio have alleged that the Project or significant external factors have changed.

The District Commission denied party status to Mr. Baldwin in part because he did not attend the first hearing on the application to extend the construction completion deadline and did not file a request for party status until four months after that hearing. EBR 14(A)(5) and 14(B)(3)(c). Mr. Baldwin failed to demonstrate "good cause" for his failure to request party status in a timely manner. Furthermore, the District Commission noted that Mr. Baldwin failed to describe the nature of the evidence he intended to present as a EBR 14(B)(2) party. The District Commission denied party status under both EBR 14(A)(5) and 14(B)(2).

The Board concludes that the District Commission did not err by denying party status to Mr. Baldwin for the reasons articulated in the Decision. Because the Board cannot answer Preliminary Issue 1 in the affirmative, it need not consider Preliminary Issue 2. Nevertheless, even if the Board does consider Preliminary Issue 2, it must conclude that Mr. Baldwin's August 26, 1999 petition for party status does not sufficiently demonstrate his party status in this matter. He has provided no map and has not adequately explained the potential effect that the Project will have upon his property. Therefore, the Board concludes that even if it was able to reach Preliminary Issue 2, Mr. Baldwin does not have party status in this proceeding.*

Accordingly, the Board determines that George Baldwin does not have party status to participate in the instant declaratory ruling proceeding. This matter will proceed to hearing pursuant to a scheduling order to be issued by the Chair.

IV. ORDER

1. The sole issue on appeal is as stated in the Prehearing Order, Section III., ISSUE ON APPEAL and to which no timely objection has been made: Whether Permittee's application for an extension of the Project's construction completion deadline to October 1, 2003 should be granted..

2. The District Commission did not err by denying George Baldwin party status under Criteria 3, 4, 8, and 9(B). The Board need not consider Preliminary Issue 2.

3. Even if the Board considers Preliminary Issue 2, George Baldwin has failed to demonstrate that he has party status under Criteria 3, 4, 8, and 9(B).

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[2] The Board notes that nothing in this decision would preclude Mr. Baldwin from appearing as a witness for a party to this proceeding.

4. Mr. Baldwin has no standing to appeal from the District Commission's Decision and he has no party status to participate in this declaratory ruling proceeding.

Dated at Montpelier, Vermont this 17th day of September, 1999.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
W. William Martinez
Rebecca M. Nawrath
Alice Olenick

Board Member Robert H. Opel was not present at the September 15, 1999 deliberative session and did not participate in the consideration of the preliminary issue of party status.