

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

RE: Josiah E. Lupton, Quiet River Campground
Land Use Permit #3W0819 (Revised)-EB
Docket #765

MEMORANDUM OF DECISION and SCHEDULING ORDER

This appeal concerns the creation of two lots, with a single-family residence on Lot 1-B and a commercial campground on Lot 1-A, both lots being located off of Route 14 in Sharon, Vermont ("Project").

This Memorandum of Decision addresses Josiah E. Lupton's ("Permittee's") Motion to Withdraw Appeal. As described in more detail below, the Vermont Environmental Board ("Board") denies Permittee's motion and establishes a schedule for the remainder of this proceeding.

I. PROCEDURAL SUMMARY

On June 29, 1999, Permittee filed Land Use Permit Application # 3W0819 with the District #3 Environmental Commission ("Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The Applicant seeks authorization to create the Project. The tract of land containing the Project consists of approximately 9.22 acres. The Applicant originally sought a campground with 28 campsites and then later revised the application to contain 22 campsites.

On March 28, 2000, the Commission issued Findings of Fact, Conclusions of Law, and Order ("Decision") and issued Land Use Permit #3W0819 to the Permittee for the Project.

On April 26, 2000, Permittee filed a Motion to Alter.

On July 13, 2000, the Commission issued its Revised Findings of Fact, Conclusions of Law, and Order ("Revised Decision") and Land Use Permit #3W0819 (Revised) ("Revised Permit") for a campground containing 14 campsites.

On August 10, 2000, Permittee filed an appeal with the Board alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(1)(F), (8) and (9)(B) ("Criteria 1(F), 8, and 9(B)").

On September 18, 2000, Board Chair Marcy Harding ("Chair Harding") convened a prehearing conference with the following participants:

The Permittee by Lawrence G. Slason, Esq. and Josiah E. Lupton, The Town of Sharon and Sharon Planning Commission ("Town") by Gerald Tarrant, Esq., and Concerned Citizens of Sharon ("Citizens") by Deborah Wroth.

On September 20, 2000, Chair Harding issued a Prehearing Conference Report and Order ("PHCRO").

On September 25, 2000, the Citizens petitioned for party status.

On September 28, 2000, Board members Marcy Harding, John Drake, George Holland, Samuel Lloyd, W. William Martinez performed a preliminary site visit to the Project, at the Permittee's request, so that the Board could see the area with foliage intact. The above parties were also present.

On October 2, 2000, Permittee filed a memorandum in opposition to Citizens' petition for party status.

In an October 3, 2000 Chair's Preliminary Ruling, Citizens was granted party status pursuant to Environmental Board Rule ("EBR") 14(B)(1) under Criteria 1(F) and 8.

On November 28 and 30, 2000, Permittee filed his Motion to Withdraw Appeal and his Supplement to Motion to Withdraw Appeal, respectively.

Between December 1 and December 20, 2000, Permittee filed letters and memoranda in support of his Motion to Withdraw Appeal, while during this same period Citizens and the Town filed letters and memoranda in opposition to Permittee's motion.

The Board deliberated on Permittee's Motion to Withdraw Appeal on December 20, 2000.

II. DISCUSSION

The Permittee moves to voluntarily withdraw his appeal. The Town and Citizens oppose the motion to withdraw. More specifically, Citizens states that it would support Permittee's Motion to Withdraw Appeal, only if the Board granted the withdrawal while at the same time issuing an order vacating all prior orders, including all permits, issued by the Commission. Permittee, however, has stated his intent to proceed with the Revised Permit issued by the Commission.

In Re Green Peak Estates, #8B0314-2-EB, the Board stated:

Once an appeal has been filed with the Board, there is no requirement that other parties file a cross-appeal in order to have party status. Any people who were given full or partial party status in the District Commission proceedings will automatically retain that status before the Board unless the decision to grant party status to them was also appealed. *See In re George F. Adams & Co.*, 134 Vt. 172 (1976). These people are entitled to participate in the appeal on those issues in which they have party status whether or not they have filed a cross-appeal.

In this case, [Green Peak Estates] appealed the District Commission's findings under Criteria 1(A), 1(B), 1(C), 2, 3, 4, 5, 8(a), and 10. Another party may have appealed one or more of these criteria had [Green Peak Estates] not done so. *While [Green Peak Estates] has the right to waive its objections to the District Commission's decision as to these criteria, the Board cannot dismiss the appeal without first allowing the other parties an opportunity to object to and be heard on the Commission's findings on these criteria.* The Board therefore denies [Green Peak Estate's] motion to dismiss its appeal of the Commission's findings under Criteria 1(A), 1(B), 1(C), 2, 3, 4, 5, and 8(a).

Re Green Peak Estates, #8B0314-2-EB, Memorandum of Decision at 2-3 (Sept. 24, 1986) (emphasis added; footnote omitted).

In response to the Board's decision, Green Peak Estates appealed to the Vermont Supreme Court. The Court upheld the Board's decision and stated:

Where an appeal of a ruling by the Commission is taken to the Board, the Board must "hold a de novo hearing on all findings requested by any party." 10 V.S.A. § 6089(a). In a de novo hearing, the tribunal hears the matter as if no prior proceedings had taken place. *In re Poole*, 136 Vt. 242, 245, 388 A.2d 422, 424 (1978). Because all of the evidence must be heard anew, *id.*, it follows that each of the original parties has the right to be heard. Although Board Rule 40(d) [sic] provides that "[i]f timely notice of appeal is filed by a party,

any other party entitled to take an appeal ... may file a notice of appeal," this rule is permissive, at least where the other party does not wish to address criteria other than those already noticed. *We hold that the Board correctly denied the motion to dismiss. To hold otherwise would encourage the filing of duplicitous appeals by parties seeking to avoid situations like that presented here.*

In re Green Peak Estates, 154 Vt. 363, 372 (1990) (emphasis added).

Since the issuance of the Vermont Supreme Court decision in *Green Peak*, the Board has amended EBR 40(D) to provide that 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. *EBR 40(D)*.

The amendment to EBR 40(D) clarified that if a party seeks to appeal criteria not noticed by an appeal, then the party must file a cross-appeal. This modification, however, does not change the Board's holding in *Green Peak* that a party need not file a cross-appeal on criteria which have already been noticed for appeal. *City of Montpelier and Ellery E. & Jennifer D. Packard*, #F9711-WFP, Memorandum of Decision on Preliminary Issues, at 5 (Jan. 20, 2000).

EBR 40 and Board and Vermont Supreme Court precedent all dictate that a unilateral request to voluntarily withdraw an appeal is improper where other parties that have appeared in the proceedings before the Board oppose the withdrawal.

While Permittee wishes to withdraw his appeal, both the Town and Citizens, both parties appearing before the Board in this matter, oppose the withdrawal and want to pursue the appeal before the Board. Accordingly, the Board denies Permittee's Motion to Withdraw Appeal and establishes new filing deadlines and hearing dates as set forth below in Section III. Order. In the December 5, 2000 Chair's Preliminary Ruling, Chair Harding advised all parties of these filing deadlines and hearing dates to avoid any claims of insufficient preparation times.

III. ORDER

1. Permittee's Motion to Withdraw Appeal is **DENIED**.

2. Section VI of the Prehearing Conference Report and Order, as amended by the October 26, 2000 Chair's Preliminary Ruling, is revised as follows:

6. On or before **Wednesday, January 10, 2001**, parties shall file (a) exhibits, (b) prefiled direct testimony for all witnesses they intend to present, and (c) lists of witnesses and exhibits. **Prefiled testimony must be clearly organized and contain a table of contents identifying the criteria and issues addressed.**

7. On or before **Wednesday, January 24, 2001**, parties shall file (a) rebuttal exhibits, (b) prefiled rebuttal testimony, and (c) a final list of witnesses and exhibits reflecting the addition of rebuttal witnesses and exhibits. As indicated above, **prefiled testimony must be clearly organized and contain a table of contents identifying the criteria and issues addressed.**

8. On or before **Tuesday, January 30, 2001**, parties shall file written requests for time beyond the time allotments outlined in Section V, SCHEDULING. The Chair may allow more time if good cause is shown.

9. On or before **Tuesday, January 30, 2001**, parties shall file evidentiary objections to the pre-filed evidence or such objections shall be deemed waived.

10. On or before **Tuesday, January 30, 2001**, parties shall file proposed findings of fact and conclusions of law.

11. The Chair or Acting Chair will conduct a second prehearing conference on **Monday, February 5, 2001 at 2:00 p.m., at the Environmental Board's Conference Room, National Life Records Center Building, National Life Drive, Montpelier, Vermont.** (Take Exit 8 off I-89 onto Memorial Drive, then right at the first set of lights onto National Life Drive. The Records Center Building is at the extreme easterly end of the parking lot, separate from the main National Life buildings.) The second prehearing conference will address any pending evidentiary objections, the site visit, other preliminary rulings, etc. Any party wishing to participate in this conference by telephone should advise Board Secretary Barbara Blanchard (telephone 802-828-5445) accordingly on or before **12:00 noon on Thursday, February 1, 2001.** Ms.

Blanchard will arrange the conference call.

12. The Board will convene **a hearing** in this matter on **Wednesday, February 7, 2001 at 9:30 a.m.** The specific location of this hearing shall be announced later.

Dated at Montpelier, Vermont this 27th day of December, 2000.

ENVIRONMENTAL BOARD

/s/Marcy Harding

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

* Board member Nancy Waples did not participate in the Board's December 20, 2000 deliberations. Member Waples has, however, reviewed this decision and she concurs.