

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

RE: Town of Milton  
Land Use Permit Application #4C0046-5-EB

**MEMORANDUM OF DECISION**

This proceeding concerns an application to modify an existing 275,000 gallon per day (GPD) aerated lagoon system municipal wastewater treatment facility to a 1,000,000 GPD sequential batch reactor, and the construction of a four mile expansion of an existing wastewater collection system along Route 7 that will terminate at the Catamount Industrial Park, located in the Town of Milton, Vermont ("Project").

**I. PROCEDURAL SUMMARY**

On March 5, 1999, the Town of Milton ("Applicant") filed a land use permit amendment application for the Project with the District #4 Environmental Commission ("District Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On December 20, 1999, the District Commission issued Findings of Fact, Conclusions of Law and Order ("Decision") denying Applicant's permit amendment application for the Project.

On January 19, 2000, Applicant filed an appeal with the Vermont Environmental Board ("Board") contending that the District Commission erred by finding that the Project fails to comply with 10 V.S.A. §6086(a)(1)(E), (5), (8), (9)(A), (9)(B), (9)(C), (9)(H), (9)(K), and (10) ("Criteria 1(E), 5, 8, 9(A), 9(B), 9(C), 9(H), 9(K), and 10"). Applicant also raised other preliminary issues.

On January 28, 2000, the Conservation Law Foundation ("CLF") filed a cross-appeal with the Board contending that the District Commission erred by finding the Project complies with 10 V.S.A. §6086(a) (1)(B), (9)(L), and parts of (10) ("Criteria 1(B), 9(L), and parts of 10") as well as by denying CLF party status on Criterion 10 and not requiring the Applicant to file a Master Permit Application for the Project.

On February 1, 2000, the Greater Burlington Industrial Corporation ("GBIC") filed a cross-appeal with the Board contending that the District Commission erred by finding the Project fails to comply Criteria 1(E), 5, 8, 9(A), 9(B), 9(C), 9(H), **9(K)**, and 10. GBIC also raised other preliminary issues.

Docket #746

On February 3, 2000, the Town of Colchester ("Colchester") filed a cross-appeal with the Board contending that the District Commission erred concerning 10 V.S.A. §6086(a)(1)(B), (I)(E), (I)(G), (4), and (9)(L), ("Criteria 1 (B), 1 (E), 1 (G), 4, and 9(L)"). Colchester also raised other preliminary issues.

On February 28, 2000, Board Chair Marcy Harding convened a prehearing conference.

On February 28, 2000, Applicant filed a Motion to Continue and Request for a Partial Remand.

On March 2, 2000, the Chair issued a Prehearing Conference Report and Order ("PCRO"). The PCRO requested that the parties and those seeking party status file memoranda on three preliminary issues:

- 1) Party Status
  - a) GBIC and Cynosure for Criteria 1 (E) and 10;
  - b) CLF for Criteria I(B), I(E), I(F), 5, 8, 9(A), 9(B), 9(H), 9(K), and 10;
  - c) Housing Foundation Inc., ("HFI") for Criteria 1 (A), 1 (B), I(E), 9(H), and 9(K).
- 2) Applicant's Motion for a Continuance and Partial Remand.
- 3) CLF's Request for a Master Permit Application.

During March, the parties and those seeking party status filed memoranda on preliminary issues.

On March 29, 2000, the Board deliberated on the above issues.

## II. Discussion

### 1. Party status'

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<sup>1</sup> The Board makes party status determinations in order to determine which memoranda it would consider to decide the remaining preliminary issues.

a) **GBIC and Cynosure**

No party has objected to **GBIC** and Cynosure's party status request for Criteria I(E) and 10. The Board finds that **GBIC** and Cynosure have sufficient interest in the above Criteria. **GBIC** and Cynosure are granted party status on Criterion I(E) pursuant to EBR 14(A)(5). **GBIC** and Cynosure are granted party status on Criterion IO pursuant to EBR 14(B)(2). Cynosure was inadvertently left out of the party status section of the PCRO. Cynosure has party status along with **GBIC** on Criteria I(B), 5, 8, 9(A), 9(B), 9(H) and 9(K) pursuant to EBR 14(A)(5).

b) **CLF**

CLF has a history of providing useful information that has materially assisted the Board in determining complex issues. The Board notes that CLF participated in the District Commission hearing and provided information and expertise that the District Commission found of material assistance and relied on in its Decision. The Board anticipates that it too will be materially assisted by CLF evidence, CLF is granted party status on Criteria I(B), I(E), I(F), 5, 8, 9(A), 9(B), 9(H), 9(K), and IO pursuant to EBR 14(B)(2).

c) **HFI**

No party has objected to **HFI's** request for party status. The Board finds that HFI has sufficient interest on Criteria I(A), I(B), I(E), and 9(H). HFI is granted party status on Criteria 1 (A), 1 (B), 1 (E), and 9(H) pursuant to EBR 14(B)(1).

HFI is denied party status on Criterion 9(K). **HFI's** stated justification for Criterion 9(K) party status is that since HFI receives government funding to create and maintain affordable housing, the affordable housing units are public investments within the meaning of 9(K). HFI next argues that the Project would enhance the public investment in affordable housing.

HFI does not argue that the Project at issue will endanger any public investment. The purpose of Criterion 9(K) is to protect public investment in facilities endangered by a development project. Criterion 9(K) only pertains to developments that "unnecessarily or unreasonably endanger the public or quasi-public investment in the facility..." 10 V.S.A. §6086(a)(9)(K). Moreover, individual economic interests are not cognizable under 9(K). L & S Associates, #2W0434-

8-EB Memorandum of Decision at 7, November 24, 1992. Therefore, HFI's request for party status under Criterion 9(K) pursuant to EBR 14(B) (1) and (2) is denied. In reaching its conclusion, the Board does not reach the issue of whether publicly funded housing is the type of public investment protected by Criterion 9(K).

2) Motion for a Continuance and Partial Remand

At the Prehearing Conference, the Applicant filed a motion to continue and request for partial remand. The motion to continue requested that the hearing be stayed until the Applicant can complete initiatives concerning the town core master plan and a growth management study. The request for a partial remand requests that the Board partially remand the matter to the District Commission to consider an amendment extending municipal sewer service to the Birchwood Manor Mobile Home Park.

The Vermont Supreme Court has held that once an appeal is filed, the lower court is divested of all jurisdiction as to all matters within the scope of appeal. Kotz v. Kotz 134 Vt. 36,38 (1975). Accordingly, jurisdiction lies either with the lower court or the appellate court, but not both. Under the teachings of Kotz, if the Board wants to remand this case, it must remand the entire case back to the District Commission.

Although the Applicant only requested a partial remand, ultimately it is a distinction without a difference. As GBIC and Cynosure point out, the real issue is not whether the Board grants a full versus partial remand, but whether the Applicant loses its right to appeal the matter back to the Board. Therefore, the Board will grant a full remand without prejudice to appeal a subsequent District Commission decision in this matter to the Board.

Granting a remand as opposed to a continuance will also allow the District Commission to review a new town plan, should the Applicant amend the existing one after it completes its growth initiatives.

The District Commission needs to review an amended town plan first before it can be reviewed on appeal by the Board. In Mill Lane Development Co. Inc., 2W0942-2-EB Chair's Preliminary Ruling, (March 30, 1999), the Board refused to consider a town plan adopted during the District Commission proceedings that had not been considered by the District Commission. The

Board relied on In re Taft Corners Associates, 160 Vt 583, 591, (1993) which held that the Board has no jurisdiction to decide issues regarding criteria that were not before the District Commission and not ruled upon by it.

In the instant case, the District Commission has only ruled upon the existing town plan. Should the Applicant amend its town plan and want the new town plan considered, the District Commission must review and rule upon the new town plan before it can be appealed to the Board.

Since the Board is remanding the case to the District Commission, the Applicant's motion for a continuance is moot.

3) Request for a Master Permit-Application

Since the Board is remanding the matter back to the District Commission, it would not be appropriate to rule on any **additional** substantive matters. Therefore, the Board will withhold ruling on **CLF's** request for a Master Permit application.

**III. ORDER**

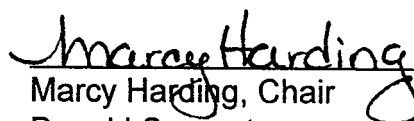
1. The requests for party status are granted or denied as set forth in Section II.
2. The Applicant's motion for a remand is granted without prejudice to appeal.
3. The Applicant's motion for a continuance is moot.
4. Jurisdiction is remanded to the District **#4** Commission.

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Dated at Montpelier, Vermont this 14th day of April, 2000.

ENVIRONMENTAL BOARD



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