

AA

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

RE: Sherman Hollow, Inc. Application #4C0422-5-EB  
Richard A. Gadbois, Trustee, Memorandum of Decision  
Estate of Ned H. Pettengill,  
Roger Lussier and Arthur  
Elliot by  
Jonathan H. Brownell, Esq.  
**Brownell & Moeser**  
**P.O. 200**  
Norwich, VT 05055

On October 28, 1987, an appeal was filed with the Environmental Board (Board) by Sherman Hollow, Inc., Richard A. Gadbois, Trustee, Estate of Ned H. Pettengill, and Roger Lussier and Arthur Elliot through their attorney, Jonathan H. Brownell, Esq., from the District #4 Environmental Commission (Commission) decision dated October 22, 1987. The Commission denied the Applicants' proposal for an 18 hole golf course and the addition of lighting to 1.5 kilometers of existing cross-country ski trails in the Towns of Huntington, Richmond and Hinesburg, Vermont. The Applicants believe the Commission erred in finding that Phase I would result in the injection of harmful or toxic substances into the groundwater under Criterion 1(B).

On November 6, the Town of Huntington (Town) filed an appeal with the Board under Criterion 1(B). On November 13, a cross-appeal was filed by Lisa Barrett on Criteria 1 (air), 1(A), 1(B), 1(C), 1(F), 2, 3, 4, 5, 7, 8 (aesthetics), 8(a) (wildlife habitat), 9 (A), 9 (B), 9 (H), and 10.

On November 12, a cross-appeal was filed by Marlene McDonald with respect to Criteria 1(A), 1(B), 1(E), 3, 4, 5, and 9(A). On December 10, the Board received a notice of appearance from Carl Lisman, Esq. on behalf of a number of neighbors.

On December 17, 1987, a prehearing conference was convened by Acting Chair Jan S. Eastman. A Prehearing Conference Report and Order (Report) was issued on December 23, 1987. Certain preliminary legal issues were identified at the conference and in the Report, and the parties were given an opportunity to brief these issues.

These matters are now ready for review and decision by the Board.

I. Background

The procedural history of this case is as follows. On October 31, 1984, an application for an Act 250 permit was filed by Sherman Hollow, Inc. et al. for the construction of

2/3/88  
37.

an 18 hole golf course and the addition of lighting to 1.5 kilometers of existing cross-country ski trails, Phase I, and for partial findings for the development of a destination resort, Phase II. The resort will include a 70 room inn, 72 condominium units, a golf course, an indoor sports center, a 300 seat conference center, 150 seat restaurant, a theater, shops, an outdoor amphitheater, a chapel, a heating plant, a maintenance building, outdoor tennis courts and a **pool**, and the construction of 5500 feet of roads and parking for 650 cars.

On April 26, 1985, after several hearings, the Commission issued a decision in which it concluded that the Applicants had not met their burden of proof for approval of Phase I, but that the hearing would remain in recess to allow the Applicants to submit additional evidence. The Commission issued positive findings with respect to all criteria except 1(A), 1(B), 1(F), and 4. For Phase II, the Commission made positive findings on Criteria 6, 7, 8, 9, and 10 and negative findings on Criterion 5. The Commission ordered that the findings on Phase I would remain in effect unless appealed, and the findings on Phase II would expire on April 31, 1986 [sic].

On May 21, 1985, a Notice of Appeal was filed with the Board by various persons. On May 21, 1985, the Appellants were requested to supplement their notice as required by Rule 40(A). On May 22, 1985, Sherman Hollow, Inc. filed a Motion to Dismiss the appeal. On June 5, 1985, the parties were notified that the Board would stay this appeal pending further proceedings before the Commission.

The Applicants submitted additional evidence and the Commission held further hearings. On April 14, 1986, the Commission issued supplemental findings and denied the permit for Phase I based on negative findings on Criteria **1(A), 1(B), 2, 3, and 4**. The Applicants filed a Motion for Reconsideration on April 28, 1986. On June 4 the Commission issued a Memorandum of Decision in which it stated that it would reconsider Criterion 4 on erosion control, but would not reconsider other, unspecified issues. The Commission further stated that the decision was final with respect to all criteria except Criterion 4, and set a deadline for parties to file responding memoranda. Within the time allowed, the Applicants filed an objection to the Commission's findings and a request for an opportunity to submit further evidence on those criteria on which the Commission denied the permit. The Commission did not respond to the Applicants' request.

On February 20, 1987, Lisa Barrett filed a motion with the Commission requesting a declaration that the permit denial was a final decision. On May 18 the Commission

reopened the hearings and ruled that its decision was not final because the Commission's failure to respond to the Applicants' request of the previous June in effect left the proceedings open. The Commission therefore proceeded to schedule another hearing for the purpose of taking evidence under Criteria 1(A), 1(B), 2, and 3 as well as Criterion 4.

On May 20, 1987, the persons who originally appealed on May 21, 1985, requested the Board to hear the appeal. On May 22, 1987, Sherman Hollow,, Inc.. et al. filed a memorandum in opposition to the request to hear the appeal. On June 1, 1987, Lisa Barrett filed a memorandum in support of the request to hear the appeal. On July 9, 1987, the Board denied the request to hear the appeal. Proceedings continued before the Commission. The Commission issued a decision on October 22, 1987, which has been appealed to this Board for the reasons set forth above.

## II. Consolidation of Phase I and Phase II

Various neighbors, parties to the proceedings before the Commission, assert that Phases I and II are one project and should be consolidated. They ask that the Board remand this case to the Commission for final findings on Phase II prior to hearing any appeal.

The neighbors argue that Act 250 requires a comprehensive review of all applications and of all planned development by an applicant. In this case, an Act 250 application has been filed for the golf course project and the construction of condominiums, restaurant **facilities** and other related amenities.

The Board agrees with the Commission that this project can be appropriately reviewed in stages and so will proceed with a review of Phase I at this time. This procedure is not unusual. The Board is aware that such reviews must be carefully considered and that approval of one phase does not guarantee approval of later phases. The possible disapproval of a later phase is a risk the applicant takes in asking for phased approval. The Board is also aware of the possibility that impacts may appear less significant when phased. Recent Board decisions relative to amendment proceedings point out, however, that the Board and Commission must look at total impacts when considering amendments or later phases to previously approved projects. See Re: David and Linda Walker, Land Use Permit #5W0816-1-EB (January 14, 1987).

## III. Scope of the Appeal

On October 28 and November 6, 1987, appeals were filed with the Board under Criterion 1(B). On November 13 a cross-appeal was filed under Criteria 1 (air), 1(A), 1(B),

1(C), 1(F), 2, 3, 4, 5, 7, 8 (aesthetics), 8(a) (wildlife habitat), 9(A), 9(B), 9(H), and 10. Another cross-appeal was filed November 12, 1987, but no new issues were raised.

At the prehearing conference, various neighbors argued that all ten criteria must be reviewed by the Board because 10 V.S.A. § 6086(a) requires that the Board or Commission shall find a project in conformance with Act 250.

10 V.S.A. § 6089 states in pertinent part that "[t]he board shall hold a de novo hearing on all findings requested by any party." The Board has interpreted this statement to mean that it must hold a de novo hearing with respect to specific criteria raised on appeal by parties but not on all ten criteria. The Board is not convinced by arguments in this case that this practice is wrong. Consequently, the Board will limit the scope of this appeal to those criteria raised in any notice of appeal or cross-appeal.

The cross-appeals in this case were filed by persons granted status below on some but not all criteria. The Board understands that 10 V.S.A. § 6085(c) and Rule 14(B) allows Commissions and the Board to limit party status to specific criteria for certain individuals or entities. Consequently, 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 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), "substantial inequity or injustice would result from such limitation."

The Board does not believe that the scope of the appeal needs to be expanded. Consequently, this appeal is limited to Criteria 1 (air), 1(B) (pesticides), 1(E), 3, 4, 5, 8 (aesthetics), and 9(A).

#### IV. Party Status

Various neighbors have requested to participate as parties in this proceeding. The Board must also determine the party status of Ms. Barrett and Ms. McDonald, notwithstanding their cross-appeals.

Various types of parties are designated within the Act 250 process. 10 V.S.A. § 6084 identifies certain entities that are automatically entitled to party status on all criteria. 10 V.S.A. § 6085(c) provides that an adjoining property owner is entitled to participate "only to the

extent that the proposed development or subdivision will have a direct effect on his property" under any of the ten criteria. If a person can establish that he or she is an adjoining property owner, and is directly affected by the project, he or she is entitled to party status only with regard to those criteria for which a direct effect on his or her property, from the environmental impacts addressed in those criteria, is shown.

Rule 14(B) status may be granted by the Board if a person shows that he or she might be affected by the development or can materially assist the Board. Again, these decisions are made based on a consideration of each criterion. Furthermore, Rule 14(B) party status is solely within the discretion of the Board or Commission and need not be granted.

With this procedure in mind, the Board decides as follows:

1. Lisa Barrett: Ms. Barrett, an attorney, lives and owns property across the Sherman Hollow Road from the project site. Because she adjoins the road which provides access to the property, the Board will consider her an **adjoiner** with regard to road-related issues. Ms. Barrett states that increased traffic and the use of the road by golf carts will cause unsafe conditions and unreasonable conditions on the road. The Board does not find that this is a direct effect on her property and thus Ms. Barrett is not entitled to party status as an adjoiner.

The Board finds, however, that Ms. Barrett may be affected by road impacts as well as by other aspects of the project and will allow her to participate pursuant to Rule 14(B)(1) with respect to Criteria 1 (air), 5 and 8 (aesthetics). Furthermore, the Board finds that Ms. Barrett can materially assist it and will allow her to participate pursuant to Rule 14(B)(2) with respect to Criteria 1(B) (pesticides), 1(E), 3, 4, and 9(A).

2. Marlene McDonald: Ms. McDonald owns property which adjoins the project site. Based upon her representations, the Board finds that she is entitled to status as an **adjoiner** on Criteria 1(B) (pesticides), 1(E), 3 and 4. The Board further finds that Ms. McDonald may be affected by the project and will allow her to participate on Criteria 1 (air), 5 and 8 (aesthetics).
3. Phyllis Austin: Ms. Austin's land adjoins the project and Sherman Hollow Road. In addition her property is bisected by a stream that runs through the development.

The Board cannot find that Ms. Austin has shown a direct impact on her property. The Board does find, however, that Ms. Austin may be affected by the project and will allow her to participate pursuant to Rule 14(B) (1) with respect to Criteria 1 (air), 1(B) (pesticides), 1(E), 5, and 8 (aesthetics).

4. Bernd Heinrich: Mr. Heinrich owns property near or adjacent to the Sherman Hollow Road. The Board will allow him to participate pursuant to Rule 14(B) (1) with respect to Criteria 1 (air) (road dust and noise) and 5.
5. Peter and Lucinda Bailey: The Baileys own land which adjoins Sherman Hollow Road. In addition, their property is bisected by a stream that runs through the development. The Board cannot find that the Baileys have shown a direct effect from the project on their property but can find that the Baileys may be affected by the project and will allow them to participate pursuant to Rule 14(B) (1) with respect to Criteria 1 (air) (road dust and noise), 1(B) (pesticides), 1(E), 3 and 5.
6. John and Carol Pendris: The Pendrises own land which adjoins Sherman Hollow Road. The Board cannot find that the Pendrises have shown a direct effect from the project on their property but can find that they may be affected by the project and will allow them to participate pursuant to Rule 14(B) (1) with respect to Criteria 1 (air) (road dust and noise) and 5.
7. Paula Kelley: Ms. Kelley owns property on the Sherman Hollow Road across from the project site. The Board cannot find that Ms. Kelley has shown a direct effect from the project on her property but can find that Ms. Kelley may be affected by the project and will allow her to participate pursuant to Rule 14(B) (1) under Criteria 1 (air), 5 and 8 (aesthetics).
8. Janet Labelle: Ms. Labelle owns property on the Sherman Hollow Road across from the project site. The Board cannot find that Ms. Labelle has shown a direct effect from the project on her property but can find that Ms. Labelle may be affected by the project and will allow her to participate pursuant to Rule 14(B) (1) with respect to Criteria 1 (air), 5 and 8 (aesthetics).
9. Wendall Sargent and Kristin Juergens: Ms. Sargent and Ms. Juergens own property on the Sherman Hollow Road across from the project site. The Board cannot find

that they have shown a direct effect from the project on their property but can find that they may be affected by it and will allow them to participate pursuant to Rule **14(B)(1)** with respect to Criteria 1 (air), 5 and 8 (aesthetics).

Some people demonstrated a possible effect from all the air issues raised in this appeal. Others justified their participation with regard only to road-related air impacts (dust and noise from use of the road). The distinction is denoted herein by the limitation on Criterion 1 (air) to road dust and noise.

The Board's party status decisions with regard to Phyllis Austin, Bernd Heinrich, Peter and Lucinda Bailey, John and Carol Pendris, Paula **Kelley**, Janet Labelle and **Wendall** Sargent and Kristin Juergens are made on the assumption that they are all represented by one counsel and that they will participate through this representative.

v. Request for Modification of Prehearing Order

The Board has previously specified the date for identification of witnesses and exhibits with regard to their direct presentations. The Board will not change this date as part of this decision. If, after a review of the prefiled testimony, parties believe they must revise their lists, they should make a request at that time.

---

**VI. ORDER**

1. Phase I, the golf course, and Phase II, the condominium and destination resort development, will not be consolidated. The Board will now hear the appeal of Phase I issues only.
2. The appeal of Phase I is limited to Criteria 1 (air), 1(B) (pesticides), 1(E), 3, 4, 5, 8 (aesthetics), and 9(A).
3. Ms. McDonald is entitled to party status as an **adjoiner** on Criteria 1(B) (pesticides), 1(E), 3 and 4.
4. The following persons may participate in this appeal pursuant to Rule 14(B)(1):
  - Lisa Barrett on Criteria 1 (air), 5 and 8 (aesthetics).
  - Marlene McDonald on Criteria 1 (air), 5 and 8 (aesthetics).
  - Phyllis Austin on Criteria 1 (air), 1(B) (pesticides), 1(E), and 8 (aesthetics).
  - Bernd Heinrich on Criteria 1 (air) (road dust and noise) and 5.
  - Peter and Lucinda Bailey on Criteria 1 (air) (road dust and noise), 1(B) (pesticides), 1(E), 3 and 5.
  - John and Carol Pendris on Criteria 1 (air) (road dust and noise) and 5.
  - Paula **Kelley** on Criteria 1 (air), 5 and 8 (aesthetics).
  - Janet Labelle on Criteria 1 (air), 5 and 8 (aesthetics).
  - Wendall** Sargent and Kristin Juergens on Criteria 1 (air), 5 and 8 (aesthetics).
5. Lisa Barrett may participate in Criteria 1(B) (pesticides), 1(E), 3, 4 and 9(A) pursuant to Rule 14(B) (2) .

Dated at Montpelier, Vermont this 3rd day of February,  
1988.

ENVIRONMENTAL BOARD

*Jan S. Eastman*  
Jan S. Eastman, Acting Chair

MD 4C0422-5-EB (16)