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

Re: *John J. Flynn Estate* Land Use Permit #4C0790-2-EB
and
Keystone Development Corp.

Memorandum of Decision

This proceeding involves an appeal to the Vermont Environmental Board (Board) from the issuance of Land Use Permit #4C0790-2 (Permit) by the District 4 Environmental Commission (Commission) to John J. Flynn Estate and Keystone Development Corp. (Keystone) authorizing the construction of a 148 unit multifamily residential condominium project on 40.8 acres in the City of Burlington, Vermont (Project).

I. History

On May 2, 2003, the Commission issued the Permit and accompanying Findings of Fact, Conclusions of Law, and Order (Decision)

On June 2, 2003, Sunset Cliff Homeowner's Association (SCHA) filed an appeal with the Board from the Permit and Decision, alleging that the Commission erred in denying SCHA party status under Environmental Board Rules (EBR) 14(A) and (B) and as to its conclusions with respect to 10 V.S.A. §6086(a)(1), (4), (5), (8), (8)(A) and (10). Also on June 2, 2003 the Starr Farm Beach Camp Owners Association (SFBCOA) also appealed the Decision, alleging that the Commission erred in denying SFBCOA party status under EBR 14(A) and (B) and as to its conclusions with respect to 10 V.S.A. §6086(a)(1), (4), (5), (8), and (10).

On June 27, 2003, SCHA filed an Emergency Motion to Stay Permit.

On June 30, 2003 Board Chair Patricia Moulton Powden convened a site visit and hearing on SCHA's Motion. SCHA was represented by Lisa B. Shelkrot, Esq. and Robert Hemley, Esq.; Keystone was represented by John O'Donnell, Esq. The City of Burlington and SFBCOA were present at the site visit and hearing through their representatives but did not participate at the hearing.

II. Findings of Fact

1. Since 1988, Keystone has held a lease on 40.8 acres owned by the John J. Flynn Estate in the "New North End" of the City of Burlington, Vermont (Project tract).

2. Keystone seeks to develop the Project tract with a 148-unit multifamily residential condominium project.

3. The Project tract is presently open land – large fields with some copses of trees – and some forested lands on its east, south and west edges. It is bordered on the north by Sunset Cliff Road and on the west by lands owned by SCHA.

4. The Project tract was historically farmland; however, it has not been farmed in many years.

5. As farmland, the field was historically cleared land; up until 1988, it had been hayed at least once a year for at least 35 years.

6. Keystone mowed the field as recently as 1999 or 2000, but it has not been hayed within the last three to four years.

7. In late June 2003, Keystone brush-hogged much of the field land on the Project tract; some birch, alder and poplar trees were cut.

8. Before the Project tract fields were brush-hogged, they were overgrown and very difficult to walk through because of the dense, chest-high vegetation on the site.

9. Because of the brush-hogging, the fields are now mostly open land, although Keystone did not cut several small copses of trees scattered within the fields.

10. Historic drainage ditches, five to six feet wide, run along the west boundary and the western half of the southern boundary of the Project tract.

11. In late June 2003, digging occurred in the drainage ditches. Some trees (up to 6" in diameter) were cut within the drainage ditches and parts of these ditches were cleared. Some of this cutting is very recent, while other cutting appears to be have been done in the more distant past.

12. The work in the drainage ditches is not intended to alter historic water flow patterns.

13. There are Class III wetlands on the Project tract, although the location, size and extent of these wetlands is in dispute.

14. The fields were not wet at the time of the site visit.

15. A petition to reclassify the wetlands on the Project tract from Class III to Class II is pending before the Water Resources Board.

16. An area on the Project tract includes red maple and skunk cabbage, but its location was not stated with any certainty and its boundary is contested.

17. The Project does not presently have zoning approval from the City of Burlington.

18. No evidence has been presented that there is "necessary wildlife habitat," as that term is defined in 10 V.S.A. §6001(12), on the Project tract.

19. No evidence has been presented that there are "rare and irreplaceable natural areas," 10 V.S.A. §6086(a)(8), on the Project tract.

20. No evidence has been presented that the brush-hogging of the fields or the clearing of the drainage ditches has or will cause water pollution.

21. No evidence has been presented that the brush-hogging of the fields or the clearing of the drainage ditches has or will cause erosion.

22. Keystone intends to continue to engage in normal maintenance at the Project tract, including cutting the field, and trenching and clearing the drainage ditch as necessary. The purpose of this maintenance is to maintain the quality of the property and improve the health of the land.

23. Keystone intends to clear or cut some areas in the forest that borders the northeast portion of the Project tract as a part of a forest management program; these forests have not been cut for at least the last 35 years. No tree maintenance is intended for the southeast or southwest quadrant of the Project tract.

24. While this matter is pending, Keystone will not cut any trees that would facilitate development on the Project tract.

25. Keystone will not commence development or commence construction on its Project until it has obtained all necessary state and local permits.

III. Conclusions of Law

SCHA seeks a stay from the Chair in order to prevent Keystone from engaging in any further cutting or clearing on the Project tract. SCHA fears that further clearing will be the first step toward commencing the development of the tract.

A. SCHA's standing to petition for a stay.

SCHA's standing to petition for a stay in this matter is a question that must be first determined, as without such standing, the stay cannot issue. *In re Estate of Swinington*, 169 Vt. 583, 585 (1999)(mem.) (because standing questions affect the Board's jurisdiction to hear a matter, it is a threshold question that must normally be reviewed prior to the consideration of substantive questions); *and see, Michael Jedware*, #6F0194 and #6F0259 (Revocation), Chair's Preliminary Ruling at 3 (Oct. 19, 2000) (request for preliminary stay was denied where petitioner failed to demonstrate that it was a party to the permit proceedings or otherwise had standing to request a stay); *Springfield Hospital*, #2S0776-2-EB, Memorandum Of Decision at 8 (Aug. 14, 1997), *app. dism.*, *In re Springfield Hospital*, No. 97-369 (V. S. Ct. 1997) (stay request denied when Board determined that requestor lacked standing to support appeal).

SCHA's Stay Motion alleges at ¶5 that Keystone's brush-hogging and clearing activities:

> threaten the integrity of the wetland areas, endanger wildlife habitat, and may permanently alter or damage the environmental quality of the area. If Keystone is allowed to continue with its actions, any later decision by this Board denying the Act 250 permit may come too late to protect the very features Sunset Cliff seeks to preserve.

SCHA does not have party status under 10 V.S.A. §6086(a)(8)(A) (Criterion 8(A) (necessary wildlife habitat), although it has appealed the Commission's denial of party status on this criterion to the Board. SCHA does not have and has not sought party status under 10 V.S.A. §6086(a)(1)(G) (Criterion 1(G) (wetlands).[1] SCHA argues, however, that, if it has party status under any criterion, it can seek a stay based upon concerns that arise under other criteria.

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[1] Because Criterion 1(G) protects only those that have been designated Class I and II wetlands under Vermont Wetland Rules, *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 72 (Dec. 8, 2000), and the wetlands on the Project tract are Class III, SCHA could not have obtained party status under Criterion 1(G).

EBR 42(A) states, in pertinent part:

> (A) Appropriate Filing of Stay Request: Board or District Commission. Prior to the filing of an appeal of a district commission decision, any aggrieved party may file a stay request with the district commission. Following appeal of the district commission decision, such stay request must be filed with the board. … Any stay request must be filed by written motion identifying the order or portion thereof for which a stay is sought and stating in detail the grounds for the request.

Pursuant to EBR 42(A), an "aggrieved party" may file a stay request. Certainly, a person denied party status by a commission is aggrieved by the denial and may seek review of that denial in the Board. *Springfield Hospital*, *supra*, at 3. But without present party status on a criterion, may a party seek a permit stay based on such criterion?

While numerous Vermont cases make reference to an "aggrieved party," those which have defined the term are sparse. In *State v. Central Vermont Ry. Co.,* 81 Vt. 463 (1908), the Court wrote, "The party aggrieved must be the party, and all the parties, whose right, debt or duty is attempted to be avoided." Likewise, In *Beach v. Boynton,* 26 Vt. 275 (1853), the Court noted that "the definition of 'aggrieved person' [is] one whose rights have been injuriously affected." A declaration of the general "rights" that must be at issue, however, does not appear in either decision.

The words "aggrieved party" in EBR 42(A) must be given some meaning. The rule does not speak of "any person" or "any party." *Compare,* EBR 3(C), 3(C)(3), 3(D), 12(G), 12(J), 15, 16(A)(2), 17(D), 18(E)(3), 19(F), 19(G), 21(D), 31(A), 31(B)(2), 34(D), 37, 38(A), 38(B)(1), 40(D), 40(F), 43(A), 43(B). Rather, because it requires that the party be somehow "aggrieved," a higher threshold than simple party status on *any* criterion at issue in an appeal must be met.

Within the Act 250 permit appeals context, a person's participatory "rights" are defined with reference to those criteria on which he holds party status. *Re: Berlin Corners Associates*, Declaratory Ruling #62, Order at 2 (Sept. 12, 1974) (persons may participate as parties only with regard to those issues upon which they are admitted as parties); *Re: Okemo Mountain, Inc*., #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, Memorandum of Decision at 6 (May 22, 2001) (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"), citing *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis,* #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Oct. 11, 1995); *and see, In re Green Peak Estates*, 154 Vt. 363, 372-73 (1990) (once an appeal has been filed with the Board, there is no need for other parties who had party status at Commission level to file a cross-appeal in order to have party status before the Board; such parties are entitled to participate on those issues in which they have party status, regardless of whether they filed a cross-appeal); *In re Wildlife*

Wonderland, Inc., 133 Vt. 507, 518 (1975); *In re Preseault*, 130 Vt. 343, 348 (1972) (parties who had an interest in the original proceeding may participate as proper parties at the second set of hearings).

The focus of SCHA's petition is on the protection of "wetland areas," "wildlife habitat," and "the environmental quality of the area." But it has no present party status in any protected "wetland areas" or "habitat" on the Project tract; Act 250 protects only "significant wetlands," and these do not presently exist on the site. Act 250 protects only "necessary wildlife habitat," not merely "wildlife habitat;" and no "necessary wildlife habitat" has been identified on the Project tract. And, lastly, if the phrase "the environmental quality of the area" were to be narrowed to include only "rare and irreplaceable natural areas" under Criterion 8, none have been identified on the Project tract. [2]

Thus, SCHA has not made a sufficient showing that it is an "aggrieved party" within the definition of EBR 42(A) for purposes of the issuance of a stay under Criterion 1(G), 8 (rare and irreplaceable natural areas) or 8(A) (necessary wildlife habitat).

B. Stay under Criteria 1, 4 and 8 (aesthetics)

It is possible that SCHA intends the phrase "the environmental quality of the area" to include the environmental values as embodied by Criteria 1(water pollution), 4 and 8 (aesthetics), the criteria under which SCHA has party status. We will therefore evaluate SCHA's stay request within the context of those criteria.

EBR 42(C) states:

> (C) Merit Review and Terms of Interim or Permanent Stay as Determined by the District Commission or the Board. In deciding whether to grant or deny a stay, the board or district commission may consider the hardship to parties, the impact, if any, on the values sought to be protected by Act 250, and any effect upon public health, safety or general welfare. The board or district commission may issue a permanent stay containing such terms and conditions, including the filing of a bond or other security, as it deems just. The chair of the board or district commission may issue a preliminary stay which shall be effective for a period not to exceed 30 days. Any preliminary stay shall be reviewed by

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[2] SCHA did not present evidence that the area that contains the skunk cabbage and red maples rises to the level of a site that may be considered to be a "rare and irreplaceable natural area" under existing Board precedent. *See, e.g., Barre Granite Quarries, LLC and William and Margaret Dyott*, *supra*, at 84; *Leo and Theresa Gauthier and Robert Miller*, #4C0842-EB, Findings of Fact, Conclusions of Law, and Order at 11 - 14 (Jun. 26, 1991).

the board or district commission, as appropriate, within that 30 day period. A party may file a motion to dissolve a preliminary stay within 10 days of its issuance.

Pursuant to EBR 42, the Chair and the Board must consider three factors in determining whether to grant a request for a stay: 1) the hardship to the parties, 2) the impact on the values sought to be protected by Act 250, and 3) the effect on the public health, safety or general welfare. *Re: Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A, Memorandum of Decision at 2 (Jul. 28, 1999)

1. Hardship to the parties

SCHA argues that there is no hardship to Keystone because Keystone cannot commence development until it obtains its local zoning permit. No evidence was presented, however, as to how long the local process will last, and, therefore, the Chair is not able to determine that the level of hardship that might be endured by Keystone should a stay issue will be minimal or non-existent.

Further, Keystone has stated that it wishes to engage in normal maintenance of its property, including cutting and clearing as necessary, but not in furtherance of any planned development until all permits have been obtained. SCHA requests that Keystone be stayed form doing *any* work on its lands, or, at the least, that Keystone should be required to give notice to SCHA before any further cutting or clearing occurs. The Chair believes that this is not required and that, should such a stay be issued, this would represent an unreasonable hardship to Keystone's interests as a prudent property owner.

2. Values sought to be protected by Act 250

If the phrase "the environmental quality of the area" references Criteria 1(water pollution), 4 and 8 (aesthetics), SCHA has presented no evidence that the activities in which Keystone is engaged, or the activities in which it intends to engage before it obtains all of its state and local permits, adversely impact the environmental values which those criteria protect. No evidence was presented as to water pollution or erosion. To the extent that aesthetic considerations might be implicated, the work on the drainage ditch visible only when one is near it and thus invisible from Sunset Cliff Road and the SCHA lands. And as to the clearing that occurred in the fields, the Chair concludes that no adverse effect on aesthetics has resulted, as these lands were formerly open and cleared farm lands, and that is what they resemble today.

3. Effect on public health, safety or general welfare

No evidence of actual harm to Act 250's values has been presented. Rather, SCHA argues that, should it succeed in its petition before the Water Resources Board

to reclassify the wetlands and should it obtain party status under Criterion 1(G), and should the wetlands on the site extend to the areas which it urges, Keystone may take actions on the site that might result in harm. For a stay to issue, harm must be imminent or certain, not merely speculative. *Re: Winhall/Stratton Fire District #1 and The Stratton Corporation*, *supra,* at 2. Further, no specific harm has been shown, and the Board is unwilling "base a stay (of a permit) on a general allegation of detrimental impact to the public health, safety and welfare." *Id.* at 3, quoting *Re: Brian Nichols d/b/a Speedwell, Inc.,* #7C0568-2-EB, Memorandum of Decision at 3 (Dec. 22, 1995).

Further, Keystone's assurances that it is only engaged in normal maintenance activities and will not begin construction on the Project until all permits are obtained make this case similar to *Re: Central Vermont Public Service Corporation and New England Telephone and Telegraph d/b/a Bell Atlantic Telephone Company*, #2W1074-EB, Chair's Preliminary Ruling at 3 (Apr. 26, 2000), in which a request for preliminary stay was denied where the permittee made assurances not to undertake activities which could result in irreparable harm.

4. Conclusion

SCHA's case amounts to a claim that, should SCHA prevail in its appeal, any actions taken by Keystone at the Project tract may be irreversible. This is true of any case and causes an appeal to be the equivalent of an automatic stay that runs during the pendency of the appeal, something which is not contemplated by Board rules or Act 250 itself. *Compare* 10 V.S.A. §6086(f) (allowing for temporary, seven-day automatic stay of construction, but only while a permanent stay is being sought).

SCHA, as the party requesting a stay of the Permit, bears the burden of proving that its request is justified. *Re: Winhall/Stratton Fire District #1, supra,* at 2. This burden has not been met, and, given that the issuance of a stay is a discretionary act, *Re: Wildcat Construction Co., Inc.*, #6F0283-1-EB, Memorandum of Decision at 2 (Aug. 3, 1992), the Chair declines to exercise such discretion in SCHA's favor.

IV. Order

SCHA's Emergency Motion to Stay Permit is denied.

Dated at Montpelier, Vermont this 10th day of July 2003.

ENVIRONMENTAL BOARD

***/s/Patricia Moulton Powden*_____**
Patricia Moulton Powden, Chair