

VERMONT ENVIRONMENTAL BOARD

10 V.S.A. Chapter 151

RE: Thomas W. Bryant and John P. Skinner by Julian R. Goodrich, Esq. Goodrich & Rice P.O. Box 156 Montpelier, VT 05602	Memorandum of Decision and Order Application #4C0795-EB
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This decision pertains to preliminary issues concerning the scope of this appeal and party status. As is explained below, the Board has determined that the scope of the appeal includes Criteria 1(B) (waste disposal), 5 (traffic), 8 (aesthetics, scenic or natural beauty), 9(B) (primary agricultural soils), and 9(K) (development affecting public investments) and has denied the cross-appeals with respect to Criteria 9(C) (forest and secondary agricultural soils) and 10 (conformance with local or regional plans). The Board also has granted party status as a group to several persons named below on all criteria listed above except Criterion 1(B), provided that this group provides one spokesperson only on each criterion.

I. BACKGROUND

On December 22, 1989, the District #4 Environmental Commission issued Findings of Fact, Conclusions of Law and Order #4C0795, denying an application for a 180-unit planned residential subdivision on 139 acres of land, with municipal water and sewer services, and associated roadways and utilities, located off Towers and Old Stage Road in Essex, Vermont.

On January 19, 1990, the Applicants filed an appeal of the District Commission decision with respect to the following criteria-of 10 V.S.A. § 6086(a): 1(B) (waste disposal), 8 (aesthetics, scenic or natural beauty), 9(B) (primary agricultural soils), and 9(K) (development affecting public investments). On February 8, 1990, the Board issued a notice that the appeal had been filed and a preliminary hearing had been scheduled for February 26.

On February 20, 1990, Reed von Gal filed a cross-appeal with respect to Criterion V(C) (forest and secondary agricultural soils), and a request for party status on Criteria 9(B) and 9(C). Mr. von Gal also notified the Board that he would not be able to attend the preliminary hearing. On February 23, 1990, Judy F. Carr filed a cross-appeal with respect to Criterion 10

(conformance with local or regional plans), and a request for party status on Criteria 5 (traffic), 8, and 9(K). Ms. Carr also notified the Board that she would not be able to attend the preliminary hearing.

On February 26, 1990, Environmental Board Chairman Stephen Reynes convened a preliminary hearing in Essex Junction, Vermont. Persons attending the hearing included the Applicants by Julian Goodrich, Esq., Catherine Suiter, Linda S. Halsted, Robert McEwing, and Kevin B. Albaugh.

On March 8 and 9, 1990, the Board's Assistant Executive Officer, Aaron Adler, spoke with Mr. von Gal and Ms. Carr, **respectively**, concerning items discussed at the preliminary hearing. On March 13, Mr. von Gal and Ms. Halsted filed requests for party status. On March 14, Ms. Suiter filed a request for party status. On that date, Ms. Carr filed a supplement to her initial request for party status. On March 15, Kevin and Cheryl Albaugh filed a request for party status.

On March 19, 1990, the Board issued a preliminary hearing report and order. On March 26, Ms. Suiter filed a memorandum informing the Board that the above persons seeking party status planned to present evidence as a group. On March 29, the Applicants filed a memorandum of law. On April 3, the Board issued a memorandum notifying the parties of scheduling changes and of pertinent results of a Board decision in Re: Finard-Zamias Associates, et al., #1R0661-EB, Memorandum of Decision (March 28, 1990). An opportunity was given to file further briefs by April 16, 1990. None were filed.

On April 30, 1990, the Board deliberated by conference call and was able to decide some but not all of the preliminary issues identified in this matter. At the request of Board member Rebecca Day, Mr. Adler contacted Ms. Suiter on or about May 3 and requested that those seeking party status consent to the Board's granting party status to them as a group rather than individually. The Applicants were informed of this request and stated that they had no objection to this procedure. On May 9, the Board received a memorandum signed by Mr. Albaugh, Ms. Carr, Ms. Halsted, Mr. McEwing, Ms. Suiter, and Mr. von Gal. The Board deliberated on May 10 in Chittenden, Vermont.

## II. ISSUES

1. Whether Ms. Carr's cross-appeal of Criterion 10 must be dismissed (1) because she was not granted party

status before the District Commission on that criterion or (2) because her cross-appeal was untimely in that it was not filed within 14 days of the Board's notice of appeal, as required by Board Rule 40(D).

2. Whether Mr. von **Gal's** cross-appeal of Criterion 9(C) must be dismissed because he was not granted party status before the District Commission on that criterion.

3. Whether, pursuant to Rule **40(C)**, the Board should expand the appeal to include Criterion 5, because the District Commission issued joint findings under Criteria 5 and 9(K).

4. Whether the Board should grant party status to persons on criteria concerning which they did not have party status before the District Commission (see party status discussion below).

5. Whether the Board should revoke Ms. **Carr's** party status on those criteria concerning which the District Commission granted her such status, because she no longer lives near the proposed project.

### III. DISCUSSION

#### A. Scope of the Appeal

The Board has determined that the cross-appeals cannot be allowed. Persons may only appeal criteria on which they had party status before the District Commission unless they requested party status on other criteria and were wrongly denied it, or a substantial inequity or injustice would result if they were not allowed to appeal the criteria. **Re: Maple Tree Place Associates, Application #4C0775-EB, Memorandum of Decision at 12-13 (December 22, 1988); Re: Sherman Hollow, Inc., Application #4C0422-5-EB, Memorandum of Decision at 4 (February 3, 1988).** The District Commission decision **states** that Mr. von Gal had party status as an adjoining land owner on Criterion 9(B). The decision also states that Ms. Carr had party status on Criteria 5 and 8. The decision does not include any statements that Mr. von Gal had or requested party status on Criterion 9(C) or that Ms. Carr had or requested party status on Criterion 10. The Board is not persuaded that a substantial inequity or injustice would result if the cross-appeals are disallowed. Accordingly, the cross-appeals are dismissed.

The Board also has determined that Criterion 5 must be added to this appeal. Board Rule **40(C)** provides:

The scope of the appeal hearing shall be limited to those reasons assigned by the Appellant why the Commission was in error unless a substantial inequity or injustice would result from such limitation.

The District Commission made joint findings of fact and conclusions of law on Criteria 5 and 9(K). Criterion 9(K) has been appealed by the Applicants. Because the District Commission's decision on Criterion 9(K) is inextricably intertwined with Criterion 5, the Board concludes that review of this application on appeal only with respect to Criterion 9(K) would work a substantial inequity.

The Board's decisions with respect to the scope of the appeal mean that the Board will review this application for compliance with the following criteria: 1(B), 5, 8 (aesthetics, scenic or natural beauty), 9(B), and 9(K).

B. Party Status

The Applicants generally do not object to the retention of party status on appeal by persons who had such status before the District Commission, but object to the expansion of any person's party status beyond those criteria concerning which the District Commission granted them party status. They do not object to the Board's treating those persons who are requesting party status as a group.

The persons seeking to participate in this matter are, with respect to those criteria within the scope of the appeal as determined above:

1. Ms. Suiter, on Criteria 5, 8 (aesthetics), 9(B), and 9(K). Ms. Suiter had party status as an adjoining landowner on Criterion 8 before the District Commission, and was denied such status on 1(B), and 5. The Applicants do not object to her party status to the extent she had it before the District Commission. She has not previously sought party status on Criteria 9(B) and 9(K).
2. MS. Halsted, on Criteria 5, 8 (aesthetics), 9(B), and 9(K). Ms. Halsted had party status as an adjoining landowner on Criterion 8 before the District Commission. The Applicants do not object to her having party status on Criterion 8 (aesthetics). She has not previously sought party status on Criteria 5, 9(B), and 9(K).

3. Mr. **McEwing**, on Criteria 5, 8 (aesthetics), 9(B), and 9(K). **Mr. McEwing** had party status as an adjoining landowner before the District Commission on Criterion 8 (aesthetics). The Applicants do not object to his party status to the extent he had it before the District Commission. He has not previously sought party status on Criteria 9(B) and 9(K).
4. Ms. Carr, on Criteria 5, 8 (aesthetics), and 9(K). Ms. Carr had party status under Rule 14(B) before the District Commission on Criteria 5 and 8 (**aesthetics**). The Applicants object to her party status because they allege that she has moved since she was granted party status and is no longer affected under the Act 250 criteria. She has not previously sought party status on Criteria 9(K) and 10.
5. Mr. von Gal; on Criterion 9(B). Mr. von Gal had party status as an adjoining landowner on Criterion 9(B). The Applicants do not object to his party status to the extent he had before the District Commission.
6. Mr. Albaugh, on Criteria 8, 9(B), and 9(K). Mr. Albaugh was not a party before the District Commission but states that he is an adjoining landowner.

During its conference call of April 30, 1990, the Board decided that Ms. Carr should retain party status on appeal. Persons have party status on appeal to the extent they had it before the District Commission, subject only to challenge of their party status by appeal or cross-appeal. Re: Finard-Zamias Associates et al., #1R0661-EB, Memorandum of Decision at 12-13 (March 28, 1990). The Applicants did not appeal Ms. **Carr's** party status.

Also on April 30, the Board decided to grant **Ms. Carr** party status on **Criterion 8** pursuant to Rule 14(B)(2) (materially assisting party). Further, the Board decided to grant party status to Mr. von Gal on Criterion 8 pursuant to 10 V.S.A. § 6085(c) and Rule 14(A)(3) (adjoining landowner).

Subsequent to its April 30 conference call, the Board received a memorandum signed by Mr. Albaugh, Ms. Carr, Ms. Halsted, Mr. **McEwing**, Ms. Suiter, and Mr. von Gal stating that they can be treated as a group for purposes of party status and that they plan to have one spokesperson for the group on each criterion under appeal. On May 10, **the Board** decided that the group is granted party status pursuant to Rule 14(B)(2) (**materially** assisting party) on all criteria

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under appeal except Criterion 1(B) because it has members  
who have party status on each of these criteria except  
1(B).

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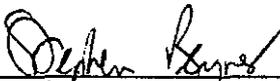
IV. ORDER

1. The scope of the appeal is limited to Criteria **1(B)**, 5, 8 (aesthetics, scenic and natural beauty), 9(B), and 9(K).

2. Pursuant to Rule 14(B)(2), party status is granted on all criteria under appeal except Criterion 1(B) to a group consisting of Mr. Albaugh, Ms. Carr, Ms. Halsted, Mr. **McEwing**, Ms. **Suiter** and Mr. von Gal, provided that the group provides one spokesperson for each criterion under appeal.

Dated at Montpelier, Vermont this 8th day of June,  
1990

ENVIRONMENTAL BOARD

  
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