

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

RE: Burlington Broadcasters, Inc. d/b/a WIZN;
Charlotte Volunteer Fire & Rescue;
& John Lane

Land Use Permit
Application #4C1004R-EB

MEMORANDUM OF DECISION ON MOTION TO ALTER

Burlington Broadcasters, Inc. (BBI) moves the Board to alter part of the Memorandum of Decision issued August 8, 2003 (MOD).¹ As set forth below, the Board denies this motion.

I. DISCUSSION

BBI has filed a Motion to Alter part of the MOD on Group 1 Preliminary Issues, pursuant to EBR 31(A). Specifically, BBI challenges the Board's ruling that the Board is not legally bound to apply the FCC Guidelines as part of the Board's review of the Project's compliance with Criterion 1(air).²

BBI first argues that there is no standard for review of RFR under Criterion 1(air) and that this violates principles of fundamental fairness and due process. BBI requests that the Board set a standard for review of RFR under Criterion 1(air) before the merits hearing, either by rulemaking or by bifurcating the hearing.³

The broad question of how the Board should review RFR effects under Criterion 1(air) was not presented in the Group 1 Preliminary Issues. The question before the Board was whether the Board is "bound by law to apply the FCC Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation (Guidelines) as part of the Board's review of the Project's compliance with Criterion 1(air)." In the MOD the Board ruled that it is not legally bound by the Guidelines. However, this does not mean that there is nothing to guide the Board's review of RFR effects under Criterion 1.

Criterion 1 protects against "undue air pollution." 10 V.S.A. § 6086(a)(1). In the case of noise, the Board has held that a project violates Criterion 1 only where the noise "may cause adverse health effects." *In re Barre Granite Quarries, LLC, #7C1079* (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 70-71 (Dec. 8, 2000)(citing *Re: Bull's Eye Sporting Center, #5W0743-2-EB*, Findings of Fact, Conclusions of Law, and Order at 14 (Feb. 27,

1

Terms defined in the MOD are used herein without definition. A procedural summary of this case can be found in that MOD.

2

As set forth in the MOD, the Board is bound by the FCC Guidelines with respect to personal wireless services facilities. BBI does not object to that portion of the MOD and this decision does not address it.

3

The Board is denying BBI's rulemaking request in a separate memorandum.

1997); *Talon Hill Gun Club and John Swinington*, #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order at 8 (June 7, 1995); *Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB(Altered), Findings of Fact, Conclusions of Law, and Order at 18 (Jun. 12, 1997); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 22 (Aug. 19, 1996)); *see also, In re R.E. Tucker, Inc.*, 149 Vt. 551, 556-557 (1988). The Board has not considered RFR effects under Criterion 1 before, so this is a case of first impression. However, the well-developed precedent on noise offers considerable guidance.

As the Board held in the challenged MOD, citing Criterion 1 cases on noise, the Board may be guided by federal or other regulatory standards, but need not be bound by them in determining whether undue adverse health effects may result. *Re: Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, Memorandum of Decision at 4 (Jul. 2, 2002) (EPA standard provides only guidance to Board's review of noise under Criterion 8). There is no need to choose a regulatory standard to limit what evidence the parties may present concerning whether this Project complies with Criterion 1.

In support of its position, BBI cites *In re Handy*, 171 Vt. 336 (2000). In *Handy*, the Vermont Supreme Court held that a zoning statute (24 V.S.A. § 4443(d)) was unconstitutional "because it gives town selectboards unbridled discretion to decide whether to review applications under the old or new zoning bylaws, with no standards to limit the exercise of that discretion." *Id.* at 337. In this case, the Board does not have "unbridled discretion." The Board must determine whether the Project will cause undue air pollution under Criterion 1. As discussed above, Board precedent and Vermont Supreme Court precedent on Criterion 1 indicates that the Board should approve the Project unless the RFR may cause adverse health effects.

Unlike the appellants in the *Handy* case, BBI does not challenge the statute or argue that it is unclear in any way. Instead, BBI challenges the Board's decision not to identify a regulatory standard for determining whether RFR can cause adverse health effects. In *Handy*, the Court found it problematic that no common law of selectboard review could develop to clarify the statute. *Id.* at 347. However, in the instant case there is clarifying case precedent so *Handy* does not govern. More important, the Board has opted not to restrict its review under Criterion 1 to any particular existing regulatory standard. This way, the case law can evolve with new scientific developments as the Board determines what may or may not result in adverse health effects.

As Appellants correctly point out, the Board lacks subject-matter jurisdiction to consider constitutional issues. *Re: Maple Tree Place Associates*, #4C0775-EB, Memorandum of Decision at 17 (Mar. 26, 1998)(citation omitted);

Re: *Munson Earth Moving Corp.*, #4C0986-EB, Findings of Fact, Conclusions of Law, and Order at 8 n.1 (Apr. 4, 1997), *rev'd on other grounds, In re Munson Earth Moving*, 169 Vt. 455 (1999). However, since a standard to guide the Board's review does exist, it is apparent that BBI's claim is without merit. There is no requirement, constitutional or otherwise, that the Board lock itself into a regulatory standard to determine whether RFR may cause an undue adverse health effect. This is a contested case, and the Board will decide it after hearing the evidence. See, *In re Quechee Lakes Corp.*, 154 Vt. 543, 553-554 (1990)(Act 250 does not limit evidence the Board is permitted to consider in determining whether undue adverse aesthetic effect exists); see also, *Re: Town of Stowe*, #100035-9-EB, Findings of Fact, Conclusions of Law, and Order at 27-28 (May 22, 1998)(Board should not rule as a matter of law regarding the relevancy of evidence under a criterion prior to receipt of the evidence). There is no need to promulgate a rule or bifurcate the hearing.

BBI also argues that, should the Board decline to set a standard such as the FCC Guidelines, each party should choose a regulatory standard and its case should be limited to evidence relevant to that standard. For the reasons stated above, the Board rejects this argument. The Board will apply Criterion 1 with respect to RFR to determine whether any undue adverse health effect may result, and any evidentiary rulings will be made accordingly.

Therefore, the Board declines to alter its decision.

II. ORDER

BBI's Motion to Alter is DENIED.

DATED at Montpelier, Vermont this 26th day of September, 2003.

ENVIRONMENTAL BOARD*

Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Donald Marsh
Alice Olenick
Richard C. Pembroke, Sr.
Jean Richardson

* Board Member Christopher Roy did not participate in this decision because the Motion to Recuse remains pending.