

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

RE: Edward E. Buttolph Revocable Trust
Land Use Permit Application #5L1339

CHAIR'S PRELIMINARY RULING PROPOSING REMAND

This proceeding concerns Edward E. Buttolph Revocable Trust's ("Applicant") Land Use Permit Application #5L1339 seeking authorization to create a 12 lot residential subdivision and construct 3,400 feet of roadways located off Town Highway 44 in the Town of Johnson, Vermont ("Project").

This Chair's Preliminary Ruling proposes to remand Land Use Permit Application #5L1339 to the District 5 Environmental Commission ("Commission").

I. PROCEDURAL HISTORY

On May 6, 1999, Applicant filed Land Use Permit Application # 5L1339 with the Commission pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The Applicant seeks authorization to create the Project on a tract of land consisting of approximately 104 acres.

On February 24, 2000 the Commission issued Findings of Fact, Conclusions of Law, and Order ("Decision") denying the application for the Project.

On March 14, 2000, Applicant filed an appeal with the Vermont Environmental Board ("Board") alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(1)(F), (5) and (9)(H) ("Criteria (1)(F), (5), and (9)(H)").

On May 2, 2000, Board Chair Marcy Harding convened a prehearing conference with the following participants:

The Applicant by Donald R. Powers, Esq., Edward E. Buttolph, and David Ring,
Vermont Agency of Transportation ("VTRANS") by Richard C. Bowen and Del Thompson,
Vermont Agency of Natural Resources ("ANR") by Elizabeth Lord, Joseph and Marion Lendway, and Kevin Lendway.

On May 4, 2000, Attorney Gerald R. Tarrant filed a notice of appearance on behalf of Joseph, Marion, and Kevin Lendway ("Lendways").

On May 23, 2000, Applicant, the Lendways, and ANR filed prefiled testimony, exhibits, and exhibit lists.

On June 5, 2000, Applicant prefiled rebuttal testimony of David M. Ring.

On June 6, 2000, the Lendways prefiled rebuttal testimony, exhibits, witness and revised exhibit lists.

On June 27, 2000, Applicant and the Lendways filed Proposed Findings of Fact and Conclusions of Law.

On July 6, 2000, Applicant filed a letter correcting David M. Ring's prefiled testimony.

The Second Prehearing Conference in this matter is scheduled for Monday, July 24, 2000, and the Panel Hearing is scheduled for Wednesday, July 26, 2000.

II. PRELIMINARY RULING

Pursuant to Environmental Board Rule ("EBR") 16(B), the Chair may make preliminary rulings as to party status and other procedural matters as are necessary to expedite and facilitate the hearing process. Any such ruling may be objected to by any interested party and the matter then resolved by the Board.

III. DISCUSSION

A remand to the District Commission is warranted where alterations in a project design are changes to a project that were not reviewed by the District Commission and where the project changes introduce new impacts on criteria not at issue before the Board. See *Re: Windsor Improvement Corporation, #2S0455-EB*, Findings of Fact, Conclusions of Law, and Order (March 27, 1980). In the Board decision to remand the Windsor Improvement Corporation matter, the Board stated that a remand was necessary because:

... If the Board were to permit **partial review on appeal of a substantially different project from that reviewed by the District**

Commission, the purposes of the Act [250] could well be undercut. This could occur where an alteration is proposed in order to avoid a negative finding on a particular criterion that is before the Board, if that alteration has a negative impact under one or more criteria that are not before the Board on appeal. Unless the amended application is returned to the District Commission, neither the Board nor the Commission would have the opportunity to review the project under all of the criteria of the act.

Id. at 3.

The Commission denied Land Use Application #5L1339 based on the Project's failure to satisfy Criteria (1)(F), (5), and (9)(H). The Applicant appealed the Commission's decision to the Board only on Criteria (1)(F), (5), and (9)(H). The Applicant, however, appears to have changed the Project on appeal. Presently before the Board, the Applicant proposes to raise the elevation of Town Highway 44 by 9 inches and install guard posts. Specifically, Applicant's witness, David M. Ring ("Ring"), recommends the addition of 9 inches of new base material on Town Highway 44 in two flood-prone areas and the installation of guard posts in flood-prone areas as well as in areas where guard posts are necessary for general safety purposes. *See Prefiled Testimony of David M. Ring at p. 10-11.* In rebuttal testimony, Ring states that the Applicant is prepared to raise the height of Town Highway 44 by 9 inches in the two flood-prone areas where it flooded on May 11, 2000, and install guard posts to protect the buffer and delineate the sideline of the road for travel. *See Prefiled Rebuttal Testimony of David M. Ring at pp. 1, 6.* According to the Applicant's Proposed Findings of Fact and Conclusions of Law, Applicant "proposes as part of the project to further improve T.H. 44" by raising the level of Town Highway 44 by approximately 9 inches and by installing guard posts where necessary to protect the buffer and to protect motorists from driving over the riverbank edge. *See Applicant's Proposed Findings of Fact and Conclusions of Law at p. 6.*

The Applicant's proposed changes to the Project, adding 9 inches of new base material and guard posts to Town Highway 44, are changes to the Project which may potentially effect criteria other than the criteria on appeal before the Board. For instance, adding 9 inches of fill to Town Highway 44 may result in erosion issues which were not previously considered by the Commission. Erosion under 10 V.S.A. § 6086(a)(4), Criterion 4, is not on appeal to the Board, and therefore, cannot be reviewed unless the changed Project is remanded to the Commission. Accordingly, remanding the changed Project to the Commission is warranted because the changes to the Project on appeal

potentially introduce new impacts on criteria not at issue before the Board.

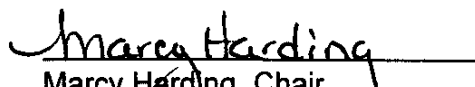
It is not necessary for the Applicant to submit an entirely new application to the Commission to obtain Commission review. The Applicant may apply for reconsideration of the Commission's decision pursuant to 10 V.S.A. § 6087(C). The Commission could expedite its review of this changed Project by declining to hear testimony that is already in the Commission's record.

IV. ORDER

1. The Chair proposes that Land Use Application #5L1339 be **REMANDED** to the District 5 Environmental Commission for review of the changed Project under all of the Act 250 criteria.
2. The Second Prehearing Conference scheduled for Monday, July 24, 2000, will be held to further address this issue.
3. The Panel Hearing scheduled for Wednesday, July 26, 2000, is hereby continued to a future date until final resolution of the remand issue.
4. This Chair's Preliminary Ruling is issued pursuant to EBR 16(B) and is binding on all parties unless a written objection to it, in whole or in part, is filed on or before Monday, August 7, 2000.
5. Should any party object to this Chair's Preliminary Ruling, the Board will deliberate on this Ruling and consider the parties' objections on Wednesday, August 23, 2000. If the remand of this matter becomes final, the appeal will be dismissed.

Dated at Montpelier, Vermont this 20th day of July, 2000.

ENVIRONMENTAL BOARD


Marcy Harding, Chair