

State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Old Vermonter Wood Products and Richard Atwood
Land Use Permit #5W1305-EB
Docket # 721

MEMORANDUM OF DECISION

I. INTRODUCTION

This decision pertains to a Motion to Deny the Application and a Motion to Alter Decision filed by Appellant Walter Flatow ("Appellant") on April 21, 1999.

Appellant objects to the decision by the Panel, following a hearing held in this matter on April 7, 1999, to permit Old Vermonter Wood Products and Richard Atwood ("Permittees") to submit further information concerning the Project relative to Criteria 5 and 8. 10 V.S.A. §§ 6086(a)(5) and (8). See **Recess Memorandum and Order**, April 12, 1999. Appellant also argues that Board Chair Marcy Harding erred on April 6, 1999 when she ruled that Appellant's grant of party status as to Criterion 9(K), 10 V.S.A. § 6086(a)(9)(K), was limited to questions concerning the impact of the construction by the Permittees of a new 40' by 100' two story wooden building with front porch and related driveways and parking areas ("Project") on Route 100 in Waterbury Center. The Permittees have opposed both motions.

II. DISCUSSION

A. ***Supplementary Information***

As to the first claim raised by Appellant, the Board believes that the Panel was within its authority, given the conflicting testimony of the parties, to recess the hearing and request further information and evidence from the parties on an issue or issues which the Panel has determined that require supplementation. Environmental Board Rule ("EBR") 20 specifically authorizes the Panel's actions in this matter:

(A) Supplementary information. The board or district commission may require any applicant to submit relevant supplementary data for use in resolving issues raised in a proceeding, and in determining whether or not to issue a permit. When necessary to an adequate evaluation of an application under the criteria set forth in 10 V.S.A. § 6086(a)(1) through (a)(10), the district commission or board may require supplementary data concerning the current or projected use of property owned by the applicant or others adjoining the project site.

[DOCKET #721M3]

5/20/99

(B) Investigation.

- (1) The board or district commission may conduct such investigations, examinations, tests and site evaluations as it deems necessary to verify information contained in the application or otherwise presented in a proceeding.
- (2) The board or district commission may make reasonable inquiry as it finds necessary to make findings and conclusions as required; in this event the board or district commission may recess the proceedings or require such investigations, tests, certifications, witnesses, or other assistance as it deems necessary to evaluate the effects of the project under the criteria in question or any other issues before it.

(Amended, effective January 2, 1996.) See also EBR 13(B) and 1 O(B).

1. Supplementary Information concerning Criterion 5.

Before issuing a permit, the Board must find that the Project “[w]ill not cause unreasonable congestion or unsafe conditions with respect to the use of highways.”¹⁰ V.S.A. § 6086(a)(5) (traffic). A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created. Id. § 6087(b). While the burden of proof is on the Appellant under Criterion 5, id. § 6088(b), the Permittees must provide sufficient information for the Board to make affirmative findings.

In this case, due to the insufficient evidence under Criterion 5, the Panel found itself unable to evaluate the impact of the additional traffic generated by the Project and to determine what, if any, mitigation measures would be reasonable. Accordingly, the Panel invited the parties to submit additional evidence on current traffic counts related to the Project Tract, 1 relevant Agency of Transportation Route 100 traffic counts, and accident information specifically related to the mileage markers within the immediate vicinity of the Project. *Recess Memorandum and Order* (April 12, 1999).

¹ The Panel is particularly interested in evidence on the number of vehicle trip ends that are currently made in relation to the Project Tract and the additional number of vehicle trip ends that the proposed Project is expected to generate.

2. ***Supplementary Information concerning Criterion 8.***

Before issuing a permit, the Board must find that a proposed project “[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.” 10 V.S.A. § 6086(a)(S) (aesthetics). Although the burden of proof is on the Appellant under Criterion 8, id. § 6088(b), the Permittees must provide sufficient information for the Board to make affirmative findings. See, e.g. Re: Black River Valley Rod & Gun Club, Inc., #2S 10 19-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 19 (June 12, 1997) [EB #651R] and cases cited therein.

As with Criterion 5, the Panel required additional evidence to determine the actual detail and specifications of the Project in relation to Aesthetics under Criterion 8. Project characteristics testified to at the hearing, but not accurately reflected on the site plan created sufficient ambiguity which merits clarification. Accordingly, the Panel requested that the Permittees submit a newly revised site plan which, with sufficient detail, accurately depicts the appearance of the proposed Project Tract. ***Recess Memorandum and Order*** (April 12, 1999).

The information sought by the Panel in its Recess Memorandum and Order is within the scope of that sanctioned by Rule 20. The Board finds no error in the Panel’s decision to seek supplemental information from the parties in this case.

B. The scope of Appellant’s party status under Criteria 9(K)

The Board finds that the Appellant’s argument that the Chair unduly restricted his participation under Criterion 9(K) to be without merit.

At the Commission level, the Appellant did not have party status on Criterion 9(K). In his November 5, 1998 Notice of Appeal (“Notice”), the Appellant sought party status on numerous criteria, including Criterion 9(K). In the 9(K) section of his Notice’s summary of the evidence, the Appellant listed only information related to traffic and the access to the traveled way (Route 100). The Appellant wrote:

With respect to Criteria 5 and 9(K), the Appellant will show how it is impossible to see south at 15’ from the traveled way. The Appellant will show that an increase in traffic directly across from the Cider Mill will exacerbate the already dangerous entrance to the **project that does not meet minimum standard requirement of width.**

While the Waterbury Reservoir was mentioned in the Appellant's summary of evidence section, it was specifically linked to consideration of Criteria 1(E), 1(G) and 4.

EBR 40(E) states: "The scope of the appeal hearing shall be limited to the errors and issues assigned by the appellant and any cross-appellant unless substantial inequity or injustice would result from such limitation." In his motion, the Appellant has indicated no such inequity or injustice and the Board is unable to discern any on its own. A plain reading of Rule 40, in and of itself, therefore, mandates a denial of the Appellant's motion. See *also The Stratton Corporation, Application #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order*, at 4-5 (January 15, 1998) (appeal limited to issues raised in appellant's notice of appeal).

At the December 11, 1998 Prehearing Conference, Chair Harding stated the issues on appeal; the Criteria 9(K) issue was framed as: "Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K), (Criterion 9(K)), the Project will materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to Route 100." Chair Harding advised that the consideration of this issue was contingent on Appellant being granted party status on that criterion. No party objected to or requested expansion of the Criterion 9(K) issue as framed.

On December 15, 1998, Chair Harding issued the Prehearing Conference Report and Order ("Prehearing Order"). In pertinent part, Section III framed the Issue as to Criterion 9(K) as stated by Chair Harding at the December 11, 1998 Prehearing Conference. Section VI(7) of the Order stated that it would be binding on all who received it unless a written objection were to be filed on or before December 30, 1998. No objections were filed.

On January 8, 1999, Chair Harding issued a Chair's Preliminary Ruling ("Preliminary Ruling") granting Appellant party status under Criterion 9(K). As documented on pages 7-8 of the Preliminary Ruling, the grant of party status on Criterion 9(K) was based solely on the effect on Appellant's property interests as related to the Project and its impacts on Route 100. Section IV(4) of the Preliminary Ruling states that the Criterion 9(K) issue on appeal is as framed in section III of the Prehearing Order, and section IV(6) allowed the parties to file objections to the ruling; absent objections, the ruling would become final.

On January 19, 1999, the Appellant filed an objection to the ruling, *but not with regard to the Criterion 9(K) party status determination or the framing of the related issue*. On February 3, 1999, the Board issued a Memorandum of Decision which reiterated that the Criterion 9(K) issue on appeal was to be again as stated in section III of the December 15, 1998 Prehearing Order.

In his **prefiled** testimony and subsequent memoranda, the Appellant filed evidence and proffered arguments relative to Criterion 9(K) that were not relevant to the issue on appeal. The Permittees objected to the Appellant's attempts to widen the focus of Criterion 9(K), and in its April 1, 1999 Memorandum of Decision at 8, the Board wrote:

The issue under Criterion 9(K) is limited to whether the Project will materially jeopardize or interfere with the function, efficiency, safety of, or the public's use or enjoyment of or access to Route 100. This is the issue as presented at the Prehearing Conference and recorded in the Prehearing Order. There were no objections to the framing of the Criterion 9(K) issue. As consideration of the effects of the Project on the Waterbury Reservoir are not before the Board on this appeal, the Permittees' objection is granted.

Appellant's latest motion represents yet merely another attempt to argue that his rights to participate with respect to Criterion 9(K) have been improperly restricted. The Board has addressed this issue in its previous rulings in this matter. The Appellant had ample opportunity to raise this claim in a timely manner, or to timely object to those rulings, but he failed to do so. It has therefore been waived. See *State v. Fisher*, __ Vt. __, 702 A.2d 41, 46 (1997) ("Defendant's failure to offer timely, specific objections when the issues were raised waives his right to appeal those issues"); *Clement v. Woodstock Resort Corp.*, 165 Vt. 627, 628 (1996); *In re D.B.*, 155 Vt. 580, 587 (1991).

The Board finds Appellant's citation to its decision in ***Finard-Zamias Associates***, #1R0661-EB, Memorandum Of Decision at 8 (March 28, 1990), to be unavailing. In that matter, the Board held that a party which was granted party status on a criterion before the District Environmental Commission could appeal the criterion to the Board; the basis for the Commission's grant of party status under the criterion was immaterial. It was within that context that the Board wrote: "Persons granted party status have it on the entire criterion or subcriterion and not just a part."

Further, to accept Appellant's reading of ***Finard-Zamias*** would extend its holding into areas never contemplated. Appellant's claim is not that he has been denied party status on all or part of Criterion 9(K); rather, he is arguing that he has been denied party status on any conceivable public investment that he can imagine. Under Appellant's reading of the law, once he has party status under Criterion 9(K), he can present evidence or argument that the Project will endanger or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of, any public facility, services or lands in Vermont. This defies both the law and common sense, and it further reinforces the need for and legitimacy of the

Old Vermonter Wood Products and Richard Atwood
Land Use Permit #5 W 1305-EB
Docket #72 1
Memorandum of Decision
Page 6

earlier rulings in this case which specifically limited and defined which public investment (Route 100) is at stake in this appeal.

III., ORDER

The Appellant's April 21, 1999 Motion to Deny the Application and April 21, 1999 Motion to Alter Decision are denied.

Dated at Montpelier, Vermont this 20th day of May, 1999.

ENVIRONMENTAL BOARD

Marcy Harding
Marcy Harding, Chair
George Holland
Samuel Lloyd
W. William Martinez
Rebecca M. Nawrath
Alice Olenick, Esq.
Robert H. Opel, Esq.

Board Members John Drake and John T. Ewing were not present for deliberations on this matter.