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

MEMORANDUM OF DECISION

RE: Old Vermonter Wood Products and Richard Atwood
Land Use Permit #5 W 1305-EB

This Memorandum of Decision addresses the party status requests of Walter Flatow ("Appellant") and Richard and Barbara Woodard ("Woodards"). For the reasons specified below, the Board concludes that Mr. Flatow is denied party status on Criteria 1 (A), 1 (B), 1 (E), 1 (F), 1 (G) and 4. The Woodards are denied party status on Criteria l(A), l(B), l(E), l(F), l(G) and 4. Accordingly, the appeal is dismissed as to these criteria.

I. PROCEDURAL SUMMARY

On August 20, 1998, the District #5 Environmental Commission ("Commission") issued Land Use Permit #5 W 1305-EB ("Permit") and supporting Findings of Fact and Conclusions of Law and Order ("Decision") to Old Vermonter Wood Products and Richard Atwood (collectively the "Applicants"). This Permit applies to the lands located off Route 100 in Waterbury Center, Vermont and identified in Book 139 Pages 321-322 of the land records of Waterbury, Vermont, as subject of a deed to Richard Atwood, the "permit-tee as grantee" and authorizes the construction of a new 40' by 100' two story wooden building with front porch and related driveways and parking areas ("Project").

On November 6, 1998, after the Commission denied his September 17, 1998 Motion to Alter, Appellant filed an appeal with the Environmental Board ("Board") contending that the Commission erred in denying him party status on Criteria l(E) (streams), 1 (G) (wetlands), 4 (erosion) and 9(K) (public investments) and in finding that the Project will comply with those criteria and Criteria 5 (traffic) and 8 (aesthetics).

On December 11, 1998, the Board Chair, Marcy Harding, convened a prehearing conference and on December 15, 1998, Chair Harding issued a prehearing conference report and order ("Prehearing Order"), incorporated herein by reference.

On December 17, 1998, Appellant filed an Amendment to Notice of Appeal ("Amendment") and the Woodards filed a Request for Party Status ("Petition").

On January 5, 1999, the Applicants filed Response to Request for Party Status of Appellant and Other Parties ("Response").

On January 8, 1999, pursuant to EBR 16(B), the Chair issued a Preliminary Ruling ("Preliminary Ruling") as to the party status requests which is incorporated herein by reference.

On January 16, 1999, both the Woodards and Waiter Flatow filed objections to the Preliminary Ruling.

On January 28, 1999, the Board deliberated on the issue of party status. This matter is now ready for decision.

II. ISSUES

Whether the Appellant should be granted party status on Criteria l(A), l(B), l(E), l(F), l(G) and/or 4 pursuant to EBR 14 (A)(5), EBR 14 (B)(1) or 14(B)(2).

Whether the Woodards should be granted party status on Criteria 1(A), 1(B), 1(E), 1(F) 1(G) and/or 4 pursuant to EBR 14 (B)(1) or EBR 14(B)(2).

III. DISCUSSION

A. Appellant's Request for Party Status

Appellant has appealed the Commission's ruling denying him party status on Criteria 1 (E), 1 (G), and 4. After the prehearing conference, the Appellant added requests for party status on Criteria l(A), l(B) and l(F). At the Commission level, Appellant was denied party status on l(A), and he never requested party status on Criteria l(B) and l(F).

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A person may appeal a decision of a district commission on party status, and the Board reviews such appeals de novo. Re: Cabot Creamery Cooperative, Inc., #5W0870-13-EB, Memorandum of Decision at 3 (Dec. 23, 1992).

i. Criteria 1(A), l(B) and l(F)

As Criteria l(A), l(B) and l(F) were not appealed, Appellant's party status request is an attempt to expand the scope of the appeal. According to EBR 40(E), 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.

To appeal a criterion to the Board, an adjoiner or EBR 14(B) party must obtain party status on that criterion before the district commission, or have been denied party status on that criterion by the district commission, appealed to the Board, and then been granted party status on that criterion by the Board. Re: Garv Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law and Order (Oct. 11,

1995). It is possible for a petitioner to 'overcome this impediment if he can persuade the Board that party status on the criterion should be granted and that a substantial injustice or inequity will occur if the appeal on the criterion is disallowed. See Re: Okemo Mountain, Inc., #2S0351-10B-EB, Memorandum of Decision at 3 (Jan. 15, 1993).

Appellant has not met the standard that a substantial injustice or inequity will occur if the appeal on the criteria is disallowed. The Board's rules, absent a showing of good cause for waiver, must be adhered to or they become a nullity. Accordingly, Appellant's request for party status and to expand the scope of the appeal to include Criteria l(A), l(B) and l(F) is denied.

ii. Appellant's request on Criteria 1(E), 1(G), and 4

Appellant has appealed the Commission's denial of party status on Criteria l(E), l(G), and 4 and now seeks party status before the Board on those criteria pursuant to EBR 14(A)(5), as an adjoining property owner. In the alternative, he seeks party status on these criteria pursuant to EBR 14(B)(l), as one whose interests may be effected, and pursuant to EBR 14(B)(2), as a person who can materially assist the Board. Appellant's EBR 14(B)(2) request is addressed first.

Appellant's EBR 14(B)(2) Request

To establish party status pursuant to EBR 14(B)(2) as a party who can materially assist the Board, the Board requires more than an assertion that such person can cross-examine witnesses and present experts. The Board also considers whether that person possesses particular expertise with respect to a proposed project, the complexity of the project, whether issues involved are novel and unfamiliar or the subject of sufficient public notice and awareness, and whether the Board has experience with the issues involved. Spring Brook Farm Foundation, Inc., #2S0985-EB (Chair's Ruling on Preliminary Issues) (6/2/95) [EB #615].

An individual may be denied party status under EBR 14(B)(2) when he cannot demonstrate that he is a person with specific expertise who could assist the Board, and the issues presented by the project are not particularly complex, novel or unfamiliar. Re: Springfield Hospital, #2S0776-2-EB, Memorandum of Decision at 6 (Aug. 14, 1997), In re Springfield Hosnital, No. 97-369 (Vt. S. Ct. Oct. 30, 1997) anneal dismissed.

The Board has considered all of Appellant's filings in regard to his request for party status on Criteria l(E), l(G), and 4 as a EBR 14(B)(2) party. Appellant has not demonstrated that he is a person with specific expertise who could assist the Board, nor has he established that the issues presented by the project are particularly complex, novel or unfamiliar. Accordingly, the Board agrees with Preliminary Ruling, adopts it as its own

and denies Appellant's request for party status on Criterion l(E), l(G) and 4 pursuant to EBR 14(B)(2).

Annellant's EBR 14(A)(5) and EBR 14(B)(1) Reauests

Appellant's requests for party status pursuant to EBR 14(A)(5) and EBR 14(B)(l) are considered for each criterion.

a. Criterion 1 (E) (Streams)

Criterion l(E) focuses on whether the development of lands "on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners." 10 V.S.A. § 6086(a)(l)(E).

Appellant fails to demonstrate how the project may have a direct effect on *his* property or interests with regard to this criterion. Accordingly, Appellant has failed to meet his burden to establish grounds for party status on this criterion pursuant to EBR 14 (A)(5) and EBR 14 (B)(l). The Board adopts the Preliminary Ruling as its own and denies Appellant party status on Criterion 1 (E).

b. 1 (G) (Wetlands)

Criterion l(G) provides that the applicant must demonstrate that the Project "will not violate the rules of the water resources board, as adopted under section 905(9) of this title, relating to significant wetlands." 10 V.S.A. § 6086(a)(l)(G).

For the same reasons as stated above in regard to Appellant's party status request on Criterion l(E), the Board agrees with the Preliminary Ruling that the Appellant has failed to establish potential effects the Project may have on his property or interests. Accordingly, his party status requests pursuant to EBR 14(A)(5) and EBR 14(B)(1) on Criterion l(G) are denied.

c. 4 (Erosion1

Under Criterion 4, the Applicants must show that the Project "[w]ill not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result." 10 V.S.A. § 6086(a)(4).

The Board agrees with the Chair's Preliminary Ruling that the Appellant has failed to show that the Project may affect his property or interests under Criterion 4. Accordingly, the Board adopts the Preliminary Ruling as its own and denies Appellant

party status on this criterion pursuant to EBR 14(A)(5) and EBR 14(B)(l).

B. Woodards' Request for Party Status

The Woodards did not file an appeal or cross-appeal in this case. Their first involvement with this appeal was at the prehearing conference when they offered their petition for party status with supporting exhibits.

The Woodards request party status on Criteria I(A), l(B), l(E), l(F), l(G) and 4. They make these requests pursuant to EBR 14(B)(l) claiming their interests will be affected by the Project, and pursuant to EBR 14(B)(2) as people who can materially assist the Board in its review of the impacts of the Project. The Woodards did not have party status at the commission level and the criteria on which they seek party status are not on appeal.

EBR 40(D) provides, in part, that: "If any party of right or other parties of record to an application wishes to appeal findings of the district commission relating to criteria or issues other than those raised by the appellant, the party must file a cross-appeal with the board within 14 days of the date the notice of appeal was mailed to the party by the appellant, or before the expiration of the 30 days allowed for filing appeals, whichever is later." EBR 40(D) is not intended to be construed to allow appeal by a non-party. Re: Derby Plaza Associates Limited Partnershin, #7R0886-EB, Memorandum of Decision at 5 (Feb. 25, 1994). The rule is directed at limiting the scope of the appeal to the errors and issues properly assigned by the appellant and cross-appellant with the caveat that the scope may be expanded under certain circumstances. Id.

EBR 40(A) and (D) have been interpreted to allow parties to appeal the criteria on which they had party status before the district commission, except that the parties could appeal a criterion on which they did not have party status at the commission level if (a) they were denied party status on the criterion and can persuade the Board that party status should be granted, or (b) they can persuade the Board that party status on the criterion should be granted and that a substantial injustice or inequity will occur if the appeal on the criterion is disallowed. Re: Okemo Mountain, Inc., #2S0351-10B-EB, Memorandum of Decision at 3 (Jan. 15, 1993).

The Woodards did not seek party status in the commission proceedings. In addition, the criteria on which they seek party status are not within the scope of the appeal. Accordingly, the Woodards must demonstrate that substantial inequity or injustice would result unless the Board expands the scope of the appeal and grants them party status. Re: L & S Associates, #2W0434-8-EB, Memorandum of Decision at 2 (Nov. 24, 1992).

The Board has reviewed the Woodards' filings, exhibits and objections to the Preliminary Ruling. After consideration of these materials, the Board agrees with and adopts the conclusions in the Preliminary Ruling that the Woodards have not demonstrated the standard of substantial injustice or inequity to justify expansion of the scope of appeal and grant of party status. Accordingly, the Woodards are denied party status on Criteria l(A), l(B), l(E), l(F), l(G) and 4.

IV. ORDER

1. Mr. Flatow is **denied** party status on Criteria l(A), l(B), l(E), l(F), l(G), and 4 pursuant to EBR 14(A)(5), 14(B)(l) and (2).

2. The Woodards are **denied** party status on Criteria l(A), l(B), l(E), l(F), l(G) and 4 pursuant to EBR 14(B)(l) and (2).

3. Mr. Flatow has party status on criteria 5, 8 and 9(K) and the issues on appeal as they pertain to these criteria are as stated in the last three issues in section III of the December 15, 1998 Prehearing Conference Report and Order.

4. The appeal is **dismissed** as to Criteria l(A), l(B), l(E), l(F), l(G) and 4.

Dated at Montpelier, Vermont, this 3rd day of February, 1999.

ENVIRONMENTAL BOARD

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