

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

Re: Conservation Designs, Inc.,
and Ritchie Crockett Lawton

Land Use Permit
#5W1418-EB [#847]

MEMORANDUM OF DECISION ON PARTY STATUS

This appeal concerns a 13-lot subdivision composed of 10 residential lots, a 15-acre common area, a 14-acre lot, and an additional 51-acre lot to be retained by the Permittees, on a 90-acre tract of land located off Hastings Road in the Town of Waitsfield, Vermont (Project). This decision addresses several petitions for party status.

I. PROCEDURAL SUMMARY

On January 13, 2004, the District 5 Environmental Commission (Commission) issued Land Use Permit #5W1418 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision) to Conservation Designs, Inc. and Ritchie Crockett Lawton (CDI), authorizing the Project.

On March 9, 2004, the Commission issued a Memorandum of Decision denying a Motion to Alter (MOD).

On April 7, 2004, Katherine and Jan-Peter Werner, Martin and Lois DeHeer, Anthony Santor, Steve and Beth Peterson, John and Susan Dillon, Michael McGrath and Stephanie Cramer, Victoria Trihy, James Mall, Bonnie and Gabor Miskolczy, Dennis Derryberry and Jenifer Tuck (Appellants) and Peter Rummel filed an appeal with the Environmental Board (Board) from the Permit, Decision and MOD, alleging that the Commission erred in its conclusions with respect to party status and Criteria 1(A)(headwaters), 1(B)(waste disposal), 1(G)(wetlands), 3(water supply), 4(soil erosion and capacity to hold water), 5(traffic), 8(A)(wildlife habitat), and 10(town plan).

On May 4, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

CDI, by Adam Lougee, Esq. with Alexander Lawton
Appellants Katherine Werner and Jan-Peter Werner, James Mall,
Dennis Derryberry, Anthony Santor, and Martin and Lois DeHeer

Peter Rummel and Appellants Victoria Trihy, Stephen and Elizabeth Peterson, Bonnie and Gabor Miskolczy, John and Susan Dillon, and Jenifer Tuck notified the Board in advance that they were unable to attend the prehearing conference. A Prehearing Conference Report and Order (PCRO) was issued on May 5, 2004. Among other things, the PCRO identified issues and set a schedule.

The Board deliberated on preliminary issues on May 19, 2004, and again on June 2, 2004.¹

II. ISSUES

The following preliminary issues are before the Board.²

EBR 14(A)(5)(interested adjoining property owner)

1. Whether Appellants Katherine and Jan-Peter Werner should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 8(A) and 10, pursuant to EBR 14(A)(5).
2. Whether Appellant James Mall should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 8(A) and 10, pursuant to EBR 14(A)(5).
3. Whether Appellants Bonnie and Gabor Miskolczy should be granted party status on Criteria 1(A), 1(B), 1(G), 4, 8(A) and 10, pursuant to EBR 14(A)(5).
4. Whether Appellants Dennis Derryberry and Jenifer Tuck should be granted party status on Criteria 1(A), 1(B), 1(G), 4, 8(A) and 10, pursuant to EBR 14(A)(5).
5. Whether Peter Rummel should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5, 8(A) and 10, pursuant to EBR 14(A)(5).

EBR 14(A)(6)(other person with direct interest)

6. Whether Appellant Victoria Trihy should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5, 8(A) and 10, pursuant to EBR 14(A)(6).
7. Whether Appellants Steve and Beth Peterson should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5, 8(A) and 10, pursuant to EBR 14(A)(6).

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Board Member Richardson did not participate in the Board's May 26, 2004 deliberations. Board Member Holland and Alternate Members Martinez and Rainville did not participate in the Board's June 2, 2004 deliberations. However, each has reviewed and joins in the Board's decision as noted herein.

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This restatement of preliminary issues corrects the inadvertent omission of Criterion 8(A) from the statement of preliminary issues in the PCRO.

8. Whether Appellants John and Susan Dillon should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5, 8(A) and 10, pursuant to EBR 14(A)(6).
9. Whether Appellant Anthony Santor should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5, 8(A) and 10, pursuant to EBR 14(A)(6).
10. Whether Appellants Martin and Lois DeHeer should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5, 8(A) and 10, pursuant to EBR 14(A)(6).
11. Whether Appellants Michael McGrath and Stephanie Cramer should be granted party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5, 8(A) and 10, pursuant to EBR 14(A)(6).

CDI did not appeal the Commission's grant of party status to all Appellants on Criteria 3 and 5, but did ask at the prehearing conference that the preliminary issues be defined to include one or both of these criteria for certain persons seeking party status.

III. DISCUSSION

A. Party Status, Generally

The Board hears appeals from party status determinations *de novo*, applying the standards for party status set forth in EBR 14. *Re: Dennis Demers and NE Central Railroad*, DR# 429 (Apr. 26, 2004)(citing *Re: Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, Memorandum of Decision at 2 (Feb. 3, 1999)(citing *Re: Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB, Memorandum of Decision at 3 (Dec. 23, 1992)); *Re: Northeast Cooperatives and L & S Associates*, #2W0434-11-EB, Memorandum of Decision at 2 (Jan. 29, 1999); *Re: Pico Peak Ski Resort, Inc.*, # 1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 9 (March 2, 1995); *Re: St. Albans Group and Wal*Mart Stores, Inc.*, # 6F0471-EB, Memorandum of Decision (April 15, 1994)); *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Oct. 11, 1995)). The Board recently amended its rules on party status, effective January 2004. See, EBR 14(A)(5) and EBR 14(A)(6)(which superseded EBR 14(B)(1)).

If the Board denies party status to all appellants on a criterion, the appeal is dismissed as to that criterion. *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Oct. 11, 1995). Conversely, if the Board grants party status, it "will proceed with substantive review

on any criteria concerning which it determines that [an] appellant qualifies for party status.” *Id.* Once an issue is raised on appeal by an appellant with standing to raise that issue, however, another person may intervene as a party on that issue if they demonstrate party status under Rule 14. See, *Re: L&S Associates, #2W0434-8-EB*, Memorandum of Decision at 2 (Nov. 24, 1992). This illustrates the distinction between standing to bring an appeal and party status to participate in an appeal. See, *Re: Putney Paper, DR#335*, Findings of Fact, Conclusions of Law, and Order (Corrected) at 5-6 (Apr. 29, 1997). To establish standing to bring an appeal on a particular issue, a person must not only have party status on that issue, but must also satisfy the requirements of Rule 40, as discussed below.

Party status determinations are generally based on the parties’ filings. The Board accepts allegations in party status petitions as true, unless an opposing party requests a hearing to contest the veracity of the allegations. *Re: Bradford B. Moore, #5L1423-EB*, Memorandum of Decision at 2 (Apr. 27, 2004)(citing *McLean Enterprise Corporation, #2S1147-1-EB*, Memorandum of Decision at 6 (Sep 19, 2003)); see also, *Re: Okemo Limited Liability Company, #2S0351-24B-EB*, Memorandum of Decision at 2 (May 10, 2004). Therefore, the Board accepts the allegations in the various party status petitions as true for purposes of this decision.

B. Appellants’ Party Status on Criteria 3 and 5

The Commission granted Appellants party status on Criteria 3 and 5, as set forth below, and no appeal was taken from that part of the Commission’s decision. Accordingly, each Appellant who has notified the Board of intent to participate as a party retains his or her party status on Criteria 3 and 5 pursuant to Rule 14. See, *Re: Finard-Zamias Associates, #1R0661-EB*, Memorandum of Decision at 12 -13 (Mar. 28, 1990); *Re: Stratton Corporation, 2W0519-9R3-EB*, Findings of Fact, Conclusions of Law, and Order at 4 (Jan. 15, 1998); *Re: Roger Loomis d/b/a Green Mountain Archery Range, No. 1R0426-2-EB*, Order at 1 (Sept. 23, 1997)(citing *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, # 2W0991-EB*, Findings of Fact, Conclusions of Law, and Order at 7 (Oct. 11, 1995); *Re: Spring Brook Farm Foundation, Inc., # 2S0985-EB*, Memorandum of Decision at 7 (Jul. 18, 1995)). Specifically, Jan-Peter and Katherine Werner, James Mall, Gabor and Bonnie Miskolczy, and Dennis Derryberry and Jenifer Tuck retain their party status on Criteria 3 and 5 as adjoining property owners pursuant to EBR 14(A)(5), and Victoria Trihy, John and Sue Dillon, Beth and Stephen Peterson, Anthony Santor and Mary and Louis DeHeer retain their party status on Criteria 3 and 5 as interested parties pursuant to EBR 14(B)(1)(superseded by EBR 14(A)(6)). Michael McGrath and Stephanie Cramer did not petition for party status or otherwise notify the Board of any interest as participating as parties in this proceeding, as required by the Notice of Prehearing Conference, so they are not parties to this appeal.

C. Appellants’ Petitions for Party Status on Other Criteria

Several Appellants also seek party status on criteria other than 3 and 5 (specifically, 1A, 1B, 1G, 4, 8A and 10), as set forth below. CDI argues that the Appellants did not request party status at the Commission on the criteria in question, and should be denied party status on these criteria on appeal. CDI also argues that the petitions for party status are untimely under Board rules. Each argument is addressed in turn.

1. Whether Appellants Requested Party Status on Other Criteria at the Commission

Under the Board's rules as they existed before January 12, 2004, a person who sought to raise an issue for the first time on appeal bore a heavy burden:

To appeal a criterion to the Board, an . . . 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. . . . 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.

Re: Okemo Mountain, Inc., #2S0351-30-EB (2nd Revision), #2S0351-31-EB, and #2S0351-25R-EB, Memorandum of Decision at 10 (May 22, 2001)(quoting Re: Old Vermonter Wood Products and Richard Atwood, #5W1305-EB, Memorandum of Decision at 2 (Feb. 3, 1999)(citing Re: Okemo Mountain, Inc., #2S0351-10B-EB, Memorandum of Decision at 3 (Jan. 15, 1993); Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 6-7 (Oct. 11, 1995)). The "substantial injustice or inequity" standard from EBR 40(E) applies because a request for initial party status at the Board effectively seeks to expand the scope of the appeal.³

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On the other hand, if the issue already has been raised on appeal by another person who has party status, the "substantial injustice or inequity" standard would not apply. To participate as a party on a criterion already on appeal, a person need only demonstrate entitlement to party status under EBR 14. See, *Re: L&S Associates, #2W0434-8-EB, Memorandum of Decision at 2 (Nov. 24, 1992)*. Put another way, a person may have party status under Rule 14 to participate on an issue on appeal even if that person would lack standing under Rule 40 to raise that issue on appeal.

Current Board rules are similar. They provide that a person generally cannot raise a new criterion on appeal unless the district commission granted that person party status on that criterion, EBR 40(A), with certain exceptions set forth at EBR 40(B). Specifically, an aggrieved person has standing to appeal a criterion on which the commission did not grant him or her party status if:

- (1) there was a procedural defect which prevented the person from participating in the proceeding or otherwise obtaining final party status;
- (2) the decision being appealed is the grant or denial of party status; or
- (3) some other fact or circumstance exists which would result in manifest injustice if the person's right to appeal was disallowed.

EBR 40(B). As noted above, this does not apply to a person who wishes to participate as a party on a criterion already on appeal. In that case only the party status rules would apply.

Thus, under current Board rules, a person seeking to appeal a criterion to the Board who did not request party status on that criterion at the district commission must satisfy the requirements of EBR 40(B) by showing a procedural defect or manifest injustice. Under the former Board rules, such a person must show that "a substantial injustice or inequity will occur if the appeal on the criterion is disallowed."

The materials from the Commission proceedings, filed by CDI indicate that the Appellants in question did, at least originally, request party status from the Commission on criteria other than 3 and 5. In a letter filed with the Commission on November 1, 2002, Bonnie and Gabor Miskolczy requested party status on Criteria 1(B), 2, 3, 4, 5, 6 and 8(aesthetics). (Commission Exhibit 1.) In a letter filed with the Commission on November 7, 2002, Sheila Getzinger, Esq. requested party status on Criteria 1(B), 1(G), 2, 3 and 5 on behalf of "Peter and Kitty Werner, James P. Mall, Gabor and Bonnie Mischolsky [sic], Dennis Derryberry and Jenifer Tuck as adjoining property owners, and Vicky Trihy, Justin and Shannon Lewis (withdrawn), Beth and Steve Peterson, John and Sue Dillon, Anthony Santor, Lisa Loomis [not joining in this appeal], Marty and Lois DeHeer, and Michael McGrath and Stephanie Cramer," as persons whose properties abut Hastings Road, the public road and/or private right-of-way involved in the proposed Project. (Commission Exhibit 2.)

CDI argues that Appellants limited their requests for party status to Criteria 3 and 5 at the Commission's prehearing conference. The partial transcript of the November 2002 prehearing conference supplied by CDI certainly shows that counsel for the various neighbors, most of whom are now Appellants, informed the Commission that these neighbors sought party status only on Criteria 3 and 5. Citing the Board's decision in *Re: Bradford B. Moore*, #5L1423-EB, Memorandum

of Decision (Apr. 27, 2004), CDI argues that the Appellants have failed to make the requisite showing to warrant a second chance at party status before the Board.

In the *Moore* case, the Board denied party status to two *pro se* appellants who had failed to request party status on Criterion 10 at the district commission based upon information that the town would participate as a party on Criterion 10. *Moore*, Memorandum of Decision at 3-4.

Regardless of precisely what the Commission said or did not say before the hearing began, Scott Meyer and Kim Dunkley were provided an opportunity to request party status on any Criteria once the hearing formally began. They did not request party status on Criterion 10 even though there was no guarantee that the representatives of the town would share their same exact interests. The fact that Scott Meyer and Kim Dunkley were representing themselves before the Commission *pro se* and may not have understood the legal ramifications of requesting party status was a result of their own choosing. It may be unfortunate but it does not rise to the level of substantial injustice or inequity.

Id. at 3. CDI argues that the Appellants in this case were represented by counsel at the Commission, so had an advantage over those in *Moore*. The fact that these Appellants had a lawyer at the Commission is beside the point (as is Appellants' claim that they were following their lawyer's advice in limiting their party status request to two criteria). As the Board noted in *Moore*, litigants must abide by Board rules whether or not they have a lawyer. *Id.* But the present case is different from *Moore* in several significant respects.

At the Commission's prehearing conference, the attorney for the neighbors who are now Appellants requested party status on Criteria 3 and 5, and told the Commission that "[t]here are some other criteria that I would like to offer some brief comment about, but not (inaudible) present any evidence" (Transcript Excerpt at 17-18.) The Commission asked whether the neighbors were still concerned with Criteria 1, 2, 4, 6 and 8, and the neighbors' lawyer told the Commission that the neighbors had "whittled it down" to Criteria 3 and 5, provided that they were allowed to offer "comments" on other criteria. (Transcript Excerpt at 22.) The Commission then granted preliminary party status on Criteria 3 and 5 and also allowed neighbors the opportunity to "comment" on other criteria.⁴ The Commission did not, for

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The Commission Decision also notes that these Appellants were granted preliminary and final party status on Criteria 3 and 5. (Commission Decision at 3-4.) Whether the Commission erred in allowing these Appellants to participate as parties on other criteria without making preliminary party status determinations is beyond the scope of this *de novo* appeal.

instance, grant materially assisting party status under EBR 14(B)(2),⁵ or state that it wished to call one or more neighbors as witnesses. See, e.g., *Re: Charles Zachary, # 2S0699-EB*, Memorandum of Decision on Party Status at 1 (Feb. 24, 1987)(noting that Board denied party status but called individual as a witness to allow him to express his interests and concerns). To the contrary, counsel for the neighbors clearly requested from the Commission the opportunity to offer comments, not evidence, on criteria other than 3 and 5. The Commission granted this request.

There is no distinction in Board rules or precedent between a person who offers evidence and a person who offers only “comments.” A party is a party. See, *Re: John Flynn Estate and Keystone Development Corp., #4C0790-2-EB*, Memorandum of Decision at 5 (Oct. 8, 2003)(a person’s participatory rights are defined with reference to those criteria on which he holds party status)(citing *Re: Berlin Corners Associates, Declaratory Ruling #62, Order at 2* (Sept. 12, 1974); *Re: Okemo Mountain, Inc., #2S0351-30-EB*(2nd Revision), #2S0351-31-EB, #2S0351-25R-EB, Memorandum of Decision at 6 (May 22, 2001)). These Appellants were in effect allowed to participate as parties at the Commission on Criteria 1, 2, 4, 6 and 8, in addition to Criteria 3 and 5. This differs from *Moore*, in which the appellants voluntarily gave up all rights to participate as parties on Criterion 10. Because the Commission allowed these Appellants to participate as parties, the restrictions of Rule 40 do not apply.

Moreover, the Appellants contend that they did not obtain party status on criteria other than 3 and 5 at the Commission because the Project changed and they could not reasonably have foreseen these new impacts at the time they requested party status on Criteria 3 and 5. Appellants contend that the original project description was very different from the Project that ultimately received a permit: “a small cluster of affordable housing having very little impact on the surrounding properties.” (Petition of Werners, DeHeers, Santor, Derryberry and Tuck, and Mall, at 1; Supplement to Petition of Miskolczyns, at 1.) The Board notes that the application cover sheet describes the project as:

. . . a clustered development of 10 building lots, one common lot and one retained lot on a +/- 39 acre lot accessed via an existing 50 foot ROW from Hastings Road, a Class III Town Highway in Waitsfield, Vermont. Each lot shall house one three-four bedroom single-family

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Since the Commission proceeding, Board rules have been amended to eliminate the “materially assisting party” category, and add instead a new “non-party participant” category. See, EBR 14(E). Under the new rule, a person may participate in Commission proceedings without obtaining party status. This option was not available at the time of the Commission proceeding.

residence. The lots shall be clustered at the edge of an existing meadow, screened from view and serviced by the existing gravel road and an interior gravel road to be constructed on the common area. The interior gravel road shall follow the contours and complete a loop approximately 1,000 feet long.

The permit authorizes:

. . . a 13 lot subdivision consisting of 10 residential lots, a 15-acre common area, a 14-acre lot and an additional 51 acre lot to be retained by the Permittees. The 90 acre tract is located off Hastings Road in the Town of Waitsfield, Vermont.

The Permit also authorizes construction of single-family homes, two-family homes, and multi-family homes three stories or less, pursuant to 21 V.S.A. Section 266, et seq. (Permit, Condition 10.)

CDI counters that the Project did not change in any significant manner. Where there has been no request for a hearing on the veracity of a party status petition, the Board accepts allegations in a petition for party status as true. See, *Bradford Moore*, Memorandum of Decision at 2 (Apr. 27, 2004)(citations omitted). Thus, even if Rule 40 did apply, Appellants' claim that they would have petitioned for party status on criteria other than 3 and 5 had they known the full scope of the project at the outset of the Commission proceeding, weighs heavily in their favor. On the criteria on which they have interests (see discussion below), this would tip the balance in favor of allowing them to bring this appeal under Rule 40.

2. Timeliness of Petitions

CDI also argues that the petitions for party status on Criteria other than 3 and 5 are untimely under EBR 14(C). Board rules require that such petitions be made "at or prior to an initial prehearing conference . . . or at the commencement of the hearing," whichever occurs first. EBR 14(C). The Board conducts a *de novo* review of party status issues, as discussed above, and in such instances EBR 14(C) contemplates filing of party status petitions at or before the first appellate prehearing conference or hearing. The petitions in this matter were filed on or before the date of the appellate prehearing conference on May 4, 2004, so were timely filed.

Certain Appellants retain their party status on Criteria 3 and 5, as set forth above. With respect to the other criteria on which party status is sought, each petition is considered in turn.

D. Individual Petitions

The Miskolczys have petitioned for EBR 14(A)(5)(adjoining property owner) party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5 and 8(A). The Werners, DeHeers, Anthony Santor, James Mall, and Dennis Derryberry and Jenifer Tuck filed a single petition requesting party status on Criteria 1(A), 1(B), 1(G), 3, 4, 5, 8[sic] and 10. The Werners, Dennis Derryberry and Jenifer Tuck, and James Mall seek party status as adjoining property owners pursuant to EBR 14(A)(5), and Anthony Santor seeks party status as an interested person pursuant to EBR 14(A)(6), which superseded EBR 14(B)(1). Peter Rummel has petitioned for EBR(A)(5)(adjoining property owner) party status on Criteria 1(G), 4 and 8[sic]. Victoria Trihy has petitioned for party status on Criteria 1(B), 3, 4 and 5, as an interested person pursuant to EBR 14(A)(6), which superseded EBR 14(B)(1).⁶

1. The Miskolczys (Adjoiners) - Criteria 1(A), 1(B), 1(G), 4 and 8(A).

The Miskolczys claim that their property directly adjoins approximately 1100 feet of the Project tract, and that their property is at a lower elevation. They submitted a map with their petition, in accordance with Board rules, which indicates that their property does adjoin the Project tract.

The Miskolczys claim that they stand to be impacted by erosion and runoff from the Project, clear cutting of trees, pollution from Project septic systems, and that they have a small wetland that will be impacted. This makes a case for party status under current and former Board rule 14(A)(5) on Criteria 1(B), 1(G), and 4. The Miskolczys' petition does not state a claim for party status on Criterion 1(A)(headwaters) under either the current or former EBR 14(A)(5). For instance, the petition does not provide specific facts to support a claim that a headwaters area, as defined at 10 V.S.A. § 6086(a)(1)(A), in which the petitioners have a direct interest, may be affected by the Project.

The Miskolczys also claim that CDI has taken certain actions with respect to property that is owned by the Miskolczys, with out their permission. "[T]he Board's jurisdiction is limited to construction and application of Act 250 and Environmental Board rules. Adjudication of property rights arising from contract or secured by trademark or corporate law is not within the purview of the Board." *Re: Anthony*

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The preliminary party status issues defined in the Prehearing Conference Report and Order classified the Appellants who own property that adjoins Hastings Road but not the tract being subdivided, as petitioners for interested person status, not adjoining property owner status. No person objected to this classification, so the Board does not reach the issue of whether these Appellants should also be considered adjoining property owners.

Lapinsky and Colleen Smith, #5L1018-4/#5L0426-9-EB, Findings of Fact, Conclusions of Law, and Order at 9-10 (Oct. 3, 2003)(quoting *In re Estate of Swinington*, 169 Vt. 583, 586 (1999)(mem.)). The Board lacks subject-matter jurisdiction to resolve property disputes.

With respect to Criterion 8(A) the Miskolczys claim that the Project's impacts may displace wildlife onto their land "with results we cannot predict." This does not establish that the petitioners have an interest in necessary wildlife habitat that may be affected by the Project and is insufficient to support party status on this Criterion under the current and former EBR 14(A)(5).

The Miskolczys' petition for EBR 14(A)(5) party status is granted on Criteria 1(B), 1(G), and 4, and denied on Criteria 1(A) and 8(A).

**2. Werners, DeHeers, Santor, Mall, and Derryberry & Tuck -
Criteria 1, 4, 8[sic] and 10**

The Werners, DeHeers, Anthony Santor, James Mall, and Dennis Derryberry and Jenifer Tuck filed a single petition in which they claim that the Project will affect all of their wells and water supplies, that there are problems with high water testing for the Project, and that it will cause erosion on Hastings Road, affecting all of them. They also claim that "[t]he stream described by [CDI] as 'intermittent' is indeed a year-round stream," but do not put this claim in any meaningful context in terms of any interest that might be impacted by the Project. (Petition of Werner, et al., at 1.) Although the petition is not very detailed, it is sufficient to claim that these Appellants have direct interests under Criteria 1(B) and 4 that stand to be affected by the Project. It does not allege any interest, however, under Criteria 1(A)(headwaters) or 1(G)(wetlands).

Appellants also claim that the Project will significantly change the "classic country road" that is Hastings Road, and will change the nature of their quiet, close-knit neighborhood by allowing greater access to the Project tract and the Appellants' property by the public and their pets, under Criterion 8(aesthetics) and 8(A)(wildlife). Criterion 8 (aesthetics) is not an issue on appeal, see, Prehearing Conference Report and Order at 4-5, so that portion of the petition is denied as beyond the scope of this proceeding. With respect to Criterion 8(A), these Appellants have not alleged sufficient facts to demonstrate an interest that may be affected by the Project.

Nor have these Appellants given the Board enough information on which to grant their petition on Criterion 10(town plan) – there is no claim that any provision of the town plan could be violated by the Project.

Thus, with respect to Appellants Werner, DeHeer, Mall, and Derryberry and Tuck, they have standing to bring this appeal and their petition for EBR 14(A)(5) party status is granted on Criteria 1(B) and 4, and denied on Criteria 1(A), 1(G) and 10.

3. Victoria Trihy (Interested Person) - 1(B) and 4

Victoria Trihy requests party status on Criteria 1(B) and 4. She claims that CDI did not perform certain water tests and so submitted incorrect engineering information, and that this will affect her directly as an owner of property on Hastings Road. She also claims that runoff from the road will directly affect her property, and that the plan to lower the summit of the road will cause more runoff to affect her property. Ms. Trihy has established party status, and therefore standing to bring this appeal, on Criteria 1(B) and 4.

4. Peter Rummel (Adjoiner) - Criteria 1(G), 4 and 8[sic]

Peter Rummel requests party status as an adjoining property owner on Criteria 1(G), 4 and 8. It is undisputed that Peter Rummel did not request party status or otherwise participate at the Commission. He claims to have several springs and a Class III wetland on his property that will be directly impacted by Project runoff and erosion. The Board concludes that Mr. Rummel has demonstrated interests under Criteria 1(G) and 4 that could be affected by the Project, and is entitled to party status as an adjoining landowner on those criteria because they are already on appeal. See, *Re: L&S Associates, #2W0434-8-EB*, Memorandum of Decision at 2 (Nov. 24, 1992)(if an issue is raised on appeal by an appellant with standing to raise that issue, another person may intervene as a party on that issue if they demonstrate party status under Rule 14).

With respect to Criterion 8, Mr. Rummel raises issues concerning access over his land to one of three trailheads on the conservation parcel. However, this in itself does not raise any claim of an interest affected under Act 250. As stated above, the Board does not decide property rights, just compliance with the Act 250 criteria. In addition, Criterion 8 is beyond the scope of this appeal. Mr. Rummel cannot obtain party status on Criterion 8.

Mr. Rummel may intervene as an EBR 14(A)(5) party on Criteria 1(G) and 4.

IV. ORDER

1. The Miskolczys have standing to bring this appeal and their petition for EBR 14(A)(5) party status is GRANTED on Criteria 1(B), 1(G), and 4, and DENIED on Criteria 1(A) and 8(A).

2. Appellants Werner, DeHeer, Mall, and Derryberry and Tuck have standing to bring this appeal and their petition for EBR 14(A)(5) party status is GRANTED on Criteria 1(B) and 4, and DENIED on Criteria 1(A), 1(G) and 10.
3. Anthony Santor has standing to bring this appeal and his petition for party status under EBR 14(A)(6)(which superseded EBR 14(B)(1)) is GRANTED on Criteria 1(B) and 4, and DENIED on Criteria 1(A), 1(G) and 10.
4. Victoria Trihy has standing to bring this appeal, and her petition for party status is GRANTED, on Criteria 1(B) and 4.
5. Jan-Peter and Katherine Werner, James Mall, Gabor and Bonnie Miskolczy, and Dennis Derryberry and Jenifer Tuck retain their party status on Criteria 3 and 5 as adjoining property owners pursuant to EBR 14(A)(5), and Victoria Trihy, John and Sue Dillon, Beth and Stephen Peterson, Anthony Santor and Mary and Louis DeHeer retain their party status on Criteria 3 and 5 as interested parties pursuant to EBR 14(B)(1)(superseded by EBR 14(A)(6)).
6. The portion of this appeal brought by Michael McGrath and Stephanie Cramer is DISMISSED in accordance with this decision.
7. Peter Rummel may intervene as an EBR 14(A)(5) party on Criteria 1(G) and 4, and his petition for party status on Criterion 8 is DENIED.
8. The merits issues on appeal are narrowed to whether the Project complies with Criteria 1(B), 1(G), 3, 4 and 5. The issues defined in Section III as merits issues 1 (Criterion 1A), 7(Criterion 8A) and 8 (Criterion 10) are DISMISSED.

DATED at Montpelier, Vermont this 3rd day of June, 2004.

ENVIRONMENTAL BOARD

Patricia Moulton Powden
Patricia Moulton Powden, Chair*
George Holland
Samuel Lloyd
Donald Marsh**
William Martinez**
Patricia Nowak**
Richard C. Pembroke, Sr.
A. Gregory Rainville
Jean Richardson

* CONCURRING AND DISSENTING OPINION of Chair Moulton Powden:

I would apply Rule 40 because the record simply is not clear that the Appellants had party status at the Commission on Criteria 1A, 1B, 1G, 4, 8A and 10. However, I would also hold that the Commission's having allowed these Appellants to offer comments on these criteria without either making them Commission witnesses or requiring that they demonstrate party status constitutes a procedural defect, and that these Appellants therefore meet the requirements of Rule 40. Otherwise, I concur in the majority decision.

** DISSENTING OPINION of Member Nowak and Alternate Members Marsh and Martinez:

We would hold that the Appellants retain their party status on Criteria 3 and 5, but would not grant them party status on any additional criteria and would not allow Mr. Rummel to participate as a party. The Appellants had the opportunity to request party status at the Commission on other criteria – even if they only wanted to offer comments and no evidence on those other criteria. Despite this opportunity, they failed to request party status on any criterion other than 3 and 5 at the Commission's prehearing conference. We would apply Rule 40 despite the fact that the Commission allowed these Appellants to offer comments on other criteria, and would not allow Mr. Rummel to intervene at the Board level for the first time. In our opinion, Appellants and Mr. Rummel failed to exercise their right to request party status at the Commission and neither Appellants nor Mr. Rummel has demonstrated a substantial or manifest injustice or procedural defect that would justify party status requested for the first time on appeal.