

VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

Re: Howard and Louise Leach
Enosburg Falls, VT 05450

MEMORANDUM OF DECISION
Motion for Interlocutory
Appeal and Stay of
Proceedings
Land Use Permit
Application #6F0316-EB

On May 20, 1985, the Village of Enosburg Falls and the Village Water and Light Department ("Petitioners") filed with the Environmental Board ("the Board") a "Motion for Interlocutory Appeal and for Stay of Proceedings" in respect to Land Use Permit Application #6F0316-EB, an application by Howard and Louise Leach filed pursuant to 10 V.S.A., Chapter 151 (Act 250) seeking approval of a sanitary landfill to be located in Enosburg Falls, Vermont. On May 20, the Board notified all parties of its receipt of this motion and its intent to consider the Petitioners' requests on May 29 pursuant to Board Rule 43. On May 29 this matter was considered in deliberative session and the Board determined to deny both motions. The basis for that decision is set forth below.

I. FINDINGS OF FACT

1. Hearings on application #6F0316 were convened by the District #6 Environmental Commission ("the Commission") on March 28, April 11, and April 18 with Anita Seymour serving as Chairman and members Joseph Lockhart and Robert Fitts present. In addition to preliminary procedural matters, the Commission received evidence only in respect to Criteria 1(A) and 1(B) of 10 V.S.A. § 6086(a) at the first three hearings.

2. At those hearings, the Applicant proceeded under Board Rule 19(E) by filing a Certification of Compliance issued by the Department of Water Resources. Upon filing, the burden of going forward shifted to those choosing to challenge the presumption attaching to the Certification. During the first three days challenging parties presented evidence challenging the Certification. At the close of the third hearing, the Commission ruled that the presumption had been rebutted, returning the burden of going forward to the Applicants.

3. After the third hearing but prior to the fourth (May 3) Tim Murphy was appointed Chairman of the Commission, Mrs. Seymour's term having expired. Mrs. Seymour decided to terminate her service on the Commission and chose not to participate in the remaining Leach application proceedings. Mr. Murphy, therefore, sat as a member of the Commission on May 3 but the Commission selected Mr. Lockhart to serve as its Chairman in the proceedings.

4. Mr. Murphy did not attend the first three hearings, nor did he attend a site visit conducted on the Leach premises. The Commission taperecorded its proceedings, although non-verbal communication cannot be recorded using this method. The Commission's staff maintains hearing notes which are available to its members. On May 3, the Applicant presented its case with respect to Criteria 1(A) and 1(B) and other parties were afforded the opportunity to respond to the Applicants' direct case.

5. By Order dated May 14, the Commission denied the Petitioners' Motion for Interlocutory Appeal. In that Order the Commission stated that Mr. Lockhart (whose term has also expired) intends to continue his participation on the Leach application to completion. Mr. Fitts (whose term runs for an additional two years) also plans to continue. The Commission will allow Mr. Murphy to ask questions of the parties after he has reviewed recordings of the first three hearings, if Mr. Murphy requires clarification.

II. CONCLUSIONS OF LAW

In reviewing Petitioner's request, we bear in mind the admonition of the Vermont Supreme Court that interlocutory appeals are an exception to the customary appellate route and should be entertained only in unusual circumstances. In re Pyramid Co. of Burlington, 141 Vt. 294 (1982). The three-part test of V.R.A.P. 5(B) examined by the Court in the latter case is also contained in Board Rule 43 which provides that this Board "may permit an appeal to be taken from any interlocutory order or ruling if the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the application process."

There is no doubt that the Commission is legally authorized to review the Leach application. Board Rule 18(A) provides that a quorum of a Commission for the conduct of business consists of two members. Mr. Lockhart and Mr. Fitts have heard all evidence to date and plan to continue their participation in the Leach application. There is also little doubt that Mrs. Seymour cannot be compelled to continue as Chairman on this case against her personal wishes. While 3 V.S.A. § 259 apparently requires appointed state officers to continue their service until a successor is appointed, and 3 V.S.A. § 849 allows a retiring Commission member to continue participating on a case which has been initiated before such retirement, we find no basis for compelling Mrs. Seymour to continue.

Therefore, the only issue presented by the Motion is: "Did the Commission commit error in allowing Mr. Murphy to sit as a Commission member beginning with the fourth hearing day?" We conclude that the Motion does not meet the requisite standards of Rule 43.

We do not believe that the question presented by the Petitioners raises a "controlling question of law as to which there is substantial ground for difference of opinion." Lewandoski v. Vermont State Colleges, 142 Vt. 446 (1983), is controlling. In that case the Vermont Labor Relations Board conducted hearings over a three day period and no one member was present on all three occasions, although a quorum of two was always present. The Supreme Court held:

. . . we are satisfied that the majority of the cases hold that in order to comply with due process it is only required that members not present when testimony is taken review the testimony before participating in the decision. [Citations omitted.] We therefore follow the majority rule, and hold that on the facts presented here, where a quorum of administrative officers has been present throughout, and where the whole tribunal has carefully reviewed the record prior to the rendering a decision, grievant was not denied due process of law.

Id at 452-453. This holding is directly applicable to Leach: a quorum has been (and presumably will be) present throughout the proceedings and Mr. Murphy will review the record prior to participating in the permit decision. In fact the Leach proceedings stand in a better posture than those in Lewandoski in that two members of the Commission have been present throughout all hearings to date.

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Furthermore, there is no reason that the site visit cannot be repeated. No testimony can be taken during a site visit; the sole function of a visit is to observe the proposed project site and examine existing features. In addition, should Mr. Murphy be unable to understand portions of the tape recorded record, the Commission's May 14 decision (Finding #5) indicates that Mr. Murphy will be afforded an opportunity to ask clarifying questions of the parties before rendering a decision. Finally, because under Rule 19 proceedings were commenced anew with respect to Criteria 1(A) and 1(B) issues at the fourth hearing, all parties had a full opportunity to present live to Mr. Murphy all evidence they felt relevant to his determination of those issues. Therefore, we do not believe that "a reasonable appellate judge could vote for reversal of the challenged order." In re Pyramid Co. of Burlington, *supra*, 141 Vt. at 307.

Finally, taking into consideration both Commission hearing time and Board appellate time, we conclude that entertainment of an appeal would not advance the ultimate termination of this case. Were we to grant the appeal, a hearing would be set and at least ten days advance notice would have to be afforded all parties. The first available hearing date at this juncture would come in July and a decision would be issued thereafter. The Commission proceedings would not, under this scenario, be completed until August at the earliest. Because the impact of Mr. Murphy's participation is only speculative at this point, and in view of the availability of a de novo appeal to this Board concerning any issues identified by a party, consideration of the Petitioners' objections at this time will not expedite the proceedings.

Because we decline to permit an interlocutory appeal, we also decline to issue a stay of the Commission's proceedings on the Leach application.

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III. ORDER

Having concluded that the Petitioners have failed to fulfill the requirements of Rule 43, we deny their Motion for Interlocutory Appeal and their Motion for Stay of Proceedings.

Dated at Montpelier, Vermont, this 3rd day of June, 1985.

VERMONT-ENVIRONMENTAL BOARD

BY 
Darby Bradley, Chairman
Ferdinand Bongartz
Dwight Burnham
Jan S. Eastman
Samuel Lloyd