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

Re: James L. McGovern, III — Land Use Permit Application #700002-17A-EB

MEMORANDUM OF DECISION

Michael and Mary Ann Kirby (Appellants) appeal the decision of the District #2 Environmental Commission (Commission) granting Land Use Permit #700002-17A (Permit) to James L. McGovern, III (Permittee).

I. PROCEDURAL SUMMARY

On April 23, 2002, Permittee filed Land Use Permit Application # 700002-17A with the Commission seeking authorization to expand days of operation (shooting days) of a sporting clay range with 15 stations from 5 days to 7 days a week (Project). The Project is located on 420 acres of land off Coldbrook Road in the Town of Wilmington.

On July 16, 2002, the Commission issued the Permit and Findings of Fact, Conclusions of Law, and Order (Decision).

On August 15, 2002, Appellants filed an appeal with the Environmental Board (Board) from the Permit and Decision alleging that the Commission erred in its conclusions with respect to 10 V.S.A.§ 6086(a)(8) (Criterion 8), and its reliance on a shooting demonstration that did not replicate actual conditions of operation, and in considering the application for amendment at all. The appeal was filed pursuant to 10 V.S.A.§ 6089(a) and Environmental Board Rule (EBR) 6 and 40.

On September 19, 2002, Eric Swanson filed a letter stating that he wished to participate in this matter as a party.

On September 20, 2002, Board Chair Marcy Harding convened a prehearing conference and on September 25, 2002, she issued a Prehearing Conference Report and Order (PCRO).

On September 25, 2002, Haystack Village East Homeowners Association (HVEHA) requested party status for Criterion 8 pursuant to EBR 14(A)(5).

On October 30, 2002, the Chair issued a Chair's Preliminary Ruling granting party status to HVEHA.

On November 15, 2002, Permittee filed an objection to HVEHA's party

status.

On November 20 and December 4, 2002, the Board deliberated on the preliminary issues and the objection to HVEHA's party status.

II. Discussion

1) Permittee's objection to HVEHA's party status.

On October 30, 2002, the Chair granted HVEHA party status pursuant to EBR 14(A)(5). The Chair also provided an opportunity for any party to file written memoranda objecting to HVEHA's party status. The Permittee filed an objection arguing that HVEHA's request for party status was late and that HVEHA had notice of the proceedings.

HVEHA is an organization of 36 homeowners abutting the Project. Pursuant to EBR 14(A)(5), adjoining property owners are entitled to party status if they enter an appearance on or before the first prehearing conference and demonstrate that the project may have a direct affect on their property under any of the Act 250 Criteria.

HVEHA submitted a late request for party status for Criterion 8. The Board can waive a deadline if it finds a showing of good cause for the late filing and that it will not unfairly delay the proceeding or place an unfair burden on the parties. *Paul and Dale Percy*, #5l0799-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 27, 1985).

HVEHA demonstrated good cause for its late filing because it claims that it was not provided notice of the amendment application. The Permittee asserts that HVEHA was served with a notice for a hearing. The Board has examined the certificate of service which accompanied the Commission's Notice of Application and Hearing issued April 17, 2001. HVEHA is not included on the certificate of service. Association of Haystack Property Owners (AHPO) is listed but it is not clear if this is the same entity as HVEHA. Further, the entry for AHPO does not include a post office box number so even if AHPO and HVEHA are the same entity, AHPO may not have received the notice.

Since Michael Kirby has appealed Criterion 8, adding another party on Criterion 8 will not unfairly delay the proceeding or place an unfair burden on the parties. As a result, the Board will waive the deadline and consider the request for party status.

HVEHA's members claim that they can hear the Project from their homes. Therefore, since HVEHA is an adjoining property owner and the Project may have a direct affect on its property under Criterion 8, HVEHA is granted party status for Criterion 8 pursuant to EBR 14(A)(5).

2) Whether based on the competing policy considerations of flexibility and finality established by the Board in *Re: Stowe Club Highlands*, #5L0822-12-EB (Jun. 20, 1995), *aff'd* 166 Vt. 33 (1996), the Board should consider amendment of Land Use Permit #700002 as amended, and proceed to review the Project.

The Board will reach the merits of a permit amendment application under any of the Act 250 criteria on appeal only after applying the balancing test set forth in *Re: Stowe Club Highlands,* #5L0822-12-EB*,* Findings of Fact, Conclusions of Law and Order (June 20, 1995)*, aff'd*, *In re Stowe Club Highlands*, 166 Vt. 33 (1996). *Re: Donald and Diane Weston*, #4C0635-4-EB, Findings of Fact, Conclusions of Law and Order, at 19 (Mar. 2, 2000), *see also, Re: Nehemiah Associates, Inc.*, Land Use Permit Application #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order at 4 (Apr. 11, 1997), *aff'd*, *In re Nehemiah Associates, Inc.,* 168 Vt. 288 (1998).

Under *Stowe Club Highlands*, three kinds of changes may justify the alteration of a permit condition. These are: (a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology. *Stowe Club Highlands, supra*, 166 Vt. at 38. If one or more of such changes favoring flexibility is found the Board then considers the finality element of *Stowe Club Highlands*. *Re: Richard Bouffard,* #4C0647-6-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Oct. 23, 2000).

Michael Kirby argues that the Permittee has not demonstrated any of the three changes that can justify altering a permit. He claims that there have been no factual or regulatory changes of any kind, that the additional baffles installed by the Permittee are not changes in construction or operation, and that there have also been no changes in technology since the baffles are only stockade fencing and hay bales.

The Permittee argues that he installed 10 additional baffles in 7 shooting stands, added hay bales, and changed the angles of some stands to reduce noise. Permittee claims that these additional features constitute changes in the construction or operation of the Permittee's Project not reasonably foreseeable at

the time the permit was issued.

Therefore, since the Permittee only makes an argument under (b), the only question before the Board is whether the additional baffles, hay bales, and changed angles in the shooting stations are a change in construction or operation that was not reasonably foreseeable at the time the original permit was issued.

The Board has held that even cosmetic changes may qualify as changes in construction or operation. *Town and Country Honda and Robert M. Aughey, Jr.* #5W0773-2-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Feb. 15, 2001). Therefore, the additional baffles, hay bales, and the reconfiguration of the shooting stations also constitute a change in construction or operation.

The Board also concludes that the changes in construction or operation were not reasonably foreseeable at the time the prior permit was issued. At the time the permit was first issued for the shooting range, the effectiveness of the mitigation measures in the permit, as well as the amount of noise the shooting range would generate were unknown.[1] After the Permittee began operating the shooting range, he made the above changes to attempt to further mitigate the noise. These changes were not foreseeable at the time the permit was issued and favor a finding of flexibility.

While the Board recognizes Michael Kirby's interest in the finality of the permit conditions limiting the days of operation of the shooting range, the Board concludes that the interests of flexibility outweigh those of finality. The Board has only ruled today that the Permittee has met the Stowe Club Highlands test and that the Board will consider the Permittee's amendment request. As a result, the Permittee will have an opportunity to demonstrate that the additional mitigation measures sufficiently control the noise and that he should be allowed to operate seven days a week.

3) Whether the Permittee is estopped from seeking this proposed amendment to the Permit.

Michael Kirby argues that the doctrine of collateral estoppel should preclude the Permittee from seeking an amendment to the Permit. Collateral

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[1] Thus, the actual noise generated could constitute a change in factual circumstances. This may have made the change a candidate for consideration under subsection (a) of the *Stowe Club Highlands* test.

estoppel applies when a party is attempting to relitigate a factual or legal issue previously decided in a judicial or administrative proceeding.

The Vermont Supreme Court has held that collateral estoppel is appropriate where:(1) [i]t is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair. *Cold Springs Farm Development, Inc. v. Ball*, 163 Vt. 466, 469 (1995), quoting *Trepanier v. Getting Organized, Inc.,* 155 Vt. 259, 265 (1990).

The purposes of the doctrine of collateral estoppel are (1) to conserve the resources of the courts and the litigants by protecting them against piecemeal or repetitive litigation; (2) to prevent vexatious litigation; (3) to promote the finality of judgments and encourage reliance on judicial decisions; and (4) to decrease the chances of inconsistent adjudications. *In re Tariff Filing of Central Vermont Public Service Corp.,* 98-214 at 5-6 (1999).

In *The Van Sicklen Limited Partnership*, #4C1013R-EB, Memorandum of Decision (June 8, 2001) the Board relied on the Supreme Court's decision in *In re Carrier*, 155 Vt. 152, 157-58 (1990), and applied the doctrine of collateral estoppel in an Act 250 proceeding.[2] In *Carrier*, the Court stated that "the principles of *res judicata* and collateral estoppel generally apply in zoning cases as in other areas of the law...[A]s a general rule, a zoning board or commission 'may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions had occurred or other considerations materially affecting the merits' of the request have intervened between the first and second applications." *In re Carrier*, 155 Vt. 152, 157-58 (1990).

While the concerns of finality and integrity are generally applicable in the context of the Act 250 process, permit amendment cases by their nature are distinguishable because of the underlying notion that permits can be reopened.

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[2] In *The Van Sicklen Limited Partnership*, a proposed subdivision had fewer environmental impacts on some Criteria than a prior application for a subdivision by the same applicant for the same land. The Board considered applying collateral estoppel to preclude relitigation of Criteria in the scaled down project for the Criteria where the applicant had already received positive findings of fact and conclusions of law.

The Vermont Supreme Court specifically rejected the application of collateral estoppel in permit amendment proceedings because permits are not final unalterable judgments. The Court stated:

> We are not persuaded that collateral estoppel provides the correct framework in which to evaluate applications for permit amendments... The doctrine of collateral estoppel is based on the premise that issues previously litigated and resolved on the merits should not be reopened. The Board, however, has explicitly acknowledged in Rule 34 that previously litigated permit conditions in some cases may be relitigated.
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> *Stowe Club Highlands* at 37-8.

Thus, the Court made it clear that the doctrine of collateral estoppel is not appropriate for permit amendment cases and the Permitee is not estopped from seeking to amend the Permit.

III. ORDER

1. HVEHA is granted party status for Criterion 8 pursuant to EBR 14(A)(5).

2. The Permittee has satisfied the test established by the Board in *Re: Stowe Club Highlands*, #5L0822-12-EB (Jun. 20, 1995), *aff'd* 166 Vt. 33 (1996), and the Board will consider amendment of Land Use Permit #700002 as amended, and proceed to review the Project.

3. The Permittee is not estopped from seeking this proposed amendment to the Permit.

Dated at Montpelier, Vermont this 6th day of December, 2002.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
Marcy Harding, Chair
John Drake
Bernie Henault
George Holland

Samuel Lloyd*
Alice Olenick
Donald Sargent

Samuel Lloyd did not participate in the November 20, 2002, deliberation.