

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). The Permit authorizes the expansion of the 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.

I. PROCEDURAL SUMMARY

On April 23, 2002, Permittee filed Land Use Permit Application # 700002-17A with the Commission.

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 the amendment. 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, the Board Chair 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 December 6, 2002, the Board issued a Memorandum of Decision granting HVEHA party status.

On March 12, 2003, the Chair issued a Continuance Order.

On March 26, 2003, Appellants requested a stay of the Dash 17A Permit.

On April 30, 2003, the Board issued a stay on the Permit.

On May 5, 2003, Permittee requested reconsideration of the Board's Memorandum of Decision ordering the stay.

On May 28, 2003, the Board lifted the stay.

On November 7, 2003, the Chair issued a Continuance Order.

On February 5, 2004, Appellants and Permittee submitted a proposed settlement agreement.

On April 21, 2004, the Permittee and Appellants submitted a revised settlement agreement that included a map of the proposed changes.

On September 9, 2004, the Permittee submitted a letter informing the Board of their efforts to include all parties in the settlement agreement.

On September 17, 2004, the Board issued a Notice of Proposed Settlement.

On October 27, 2004 the Board deliberated on the proposed settlement.

II. DISCUSSION

The Appellants and the Permittee submitted a revised settlement agreement.¹ However, the revised settlement agreement did not include all of the

¹ The revised settlement agreement replaced the original settlement agreement which left out necessary details such as where the additional baffles would be placed and the new location of shooting station #1.

parties. As a result, the Board requested that the Appellants and Permittee attempt to include the remaining parties. After some of the parties did not respond to the Appellants and Permittee's efforts, the Board issued a Notice of Proposed Settlement which provided an opportunity for any party to object to the proposed settlement and request a hearing. No party objected to the proposed settlement.

Any settlement agreement between parties must be reviewed to determine whether findings of fact and affirmative conclusions of law can be made under all criteria on appeal. The Board is not obligated to accept a settlement agreement if the necessary findings of fact and conclusions of law cannot be made. *Faucett Builders Inc.*, #4C0763-2-EB Findings of Fact, Conclusions of Law, and Order at 6 (Aug. 6, 1996).

Depending on the nature of the changes, projects that undergo changes while before the Board may have to be remanded for review by the district commission. Settlement agreements typically change not only the project at issue but its impacts. If a settlement agreement does not create impacts to new parties or new impacts on Criteria not at issue before the Board, the Board can retain jurisdiction and decide the matter. See *Design Contempo, Inc.*, #3W0370-2-EB Findings of Fact, Conclusions of Law, and Order (Dec. 20, 2001); *Brewster River Land Co., LLC*, #5L1348-EB Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001); *Otter Creek Development, LLC* #1R0535-3-EB Findings of Fact, Conclusions of Law, and Order (Apr. 19, 2001); *Andrew and Peggy Rogstad*, #2S1011-EB Findings of Fact, Conclusions of Law, and Order (Dec. 19, 1996).

However, when a project is changed on appeal and the changes may create impacts to new parties or new impacts on Criteria not at issue before the Board, the matter should be remanded back to the district commission. *Spear Street Associates*, #4C0489-1-EB Memorandum of Decision at 4. (Apr. 4, 1984). Even if the changes to the project are a result of a settlement agreement, the district commission should review any increase in the project's impacts or impacts to new parties. When a case is remanded, the district commission can determine whether it is necessary to hold a new hearing to review the impacts of the project under the settlement agreement and provide notice to potential parties who may now be impacted by the project.

In the instant case the revised settlement agreement proposes permit conditions that require the Permittee to prohibit the use of reloaded shells, install additional sound baffles as shown on the attached exhibit, and relocate shooting station #1. It is possible that relocating shooting station #1 could impact parties

who are not participating in this proceeding and may have not previously been impacted by the Project. Therefore, in light of the changes to the Project, the Board concludes that the matter should be remanded to the Commission to consider the revised settlement agreement and whether it is necessary to schedule a new hearing.

The Board also notes that the revised settlement agreement does not contain sufficient factual support for the Board to issue findings of fact and conclusions of law. Therefore, remand is also appropriate because the Commission is more familiar with the facts since it has already conducted a site visit and a hearing and issued findings. *Angelo DeCicco #2W0612-1-EB* Memorandum of Decision at 2 (May 24, 1991).

III. ORDER

1. Land Use Permit Application #700002-17A-EB is remanded and jurisdiction is returned to the District #2 Environmental Commission to consider whether the Project under the Agreement complies with Criterion 8 and whether it impacts any new parties or Criteria not on appeal before the Board.

Dated at Montpelier, Vermont this 29th day of October, 2004.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden

Pat Moulton Powden

Samuel Lloyd

Patricia Nowak

Alice Olenick

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