

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

Re: Town of Albany and Florence **Beaudry**,
Application #7R1042-EB (Interlocutory)

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to a Motion for Interlocutory Appeal filed by Edward Mateo, requesting party status under criteria 1, 3, 4, 8 and 9(E). As explained below, the Environmental Board ("Board") grants the motion in part, and denies the motion in part. The Board grants party status to the Movant with respect to criteria 1 and 3 only, and remands back to the District #7 Environmental Commission for further consideration whether Mr. Mateo should be granted party status under Criteria 4, 8, and 9(E).

I. BACKGROUND

The Town of Albany and Florence **Beaudry** (collectively, "Applicants") have applied for an Act 250 permit to allow operation of a six-acre gravel pit on a 20-acre tract of land in the Town of Albany, Vermont, owned by Florence **Beaudry**. The pit has been operating without a permit for a least eight years. The Applicants request permission to annually extract approximately 6,500 yards of material consisting of 4,000 yards of gravel and 2,500 yards of sand ("Project").

Edward Mateo and his family own a 26.8 acre parcel of land adjoining the tract of land on which the gravel pit is located. Although the Mateos' primary residence is in Warwick, New York, they bought their Albany property twelve years ago as a vacation property and for potential future use as a full-time residence. There is an old cabin on the Mateos' property that they stay in when they spend time in Albany.

On September 9, 1997, the District #7 Commission ("Commission") conducted a hearing and site visit of the Project tract. Edward Mateo was not represented by counsel at the time of the Commission's proceeding and he was not present when the Commission considered party status requests, due to an injury he suffered in an accident en route to the site visit. Therefore, because of Mr. Mateo's unavailability and to allow time for the Applicants to file additional requested submissions, the Commission recessed the hearing indefinitely.

On January 16, 1998, the Commission reconvened a hearing in this matter at which time Edward Mateo was present but was not represented by counsel. Mr. Mateo advised the Commission concerning potential impacts of the Project and their effects on his property, specifically with respect to potential impacts on his water supply and dust and noise. He sought party status before the Commission under criteria 1 (dust and noise), 2 (sufficient water available), and 3 (burden on existing water supply).



At the January 16, 1998, hearing, the Commission deliberated with respect to Edward Mateo's party status request and considered other matters. It again recessed the proceeding. In a Recess Memorandum issued January 20, 1998, and memorializing the Commission's rulings, the Assistant Coordinator reported that the Commission had denied party status to Edward Mateo on the basis that it could not determine any impacts to Mr. Mateo's property from the Project. The Recess Memorandum was not served on the parties until January 27, 1998.

On February 6, 1998, Edward Mateo filed a Motion for Interlocutory Appeal ("Motion"), through counsel Stephanie J. Kaplan, Esq., pursuant to Environmental Board Rule ("EBR") 43(B). In the Motion, he asks the Board to grant him party status pursuant to EBR 14(B)(5). In addition to requesting party status under criteria 1 and 3, two of the criteria for which he was denied party status by the Commission, Mr. Mateo asks the Board to grant him party status under criteria 4, 8 and 9(E).

On February 12, 1998, the Town of Albany ("Town") filed a memorandum in Opposition to Motion for Interlocutory Appeal ("Town's Opposition Memorandum"), through counsel Angela M. Ross, Esq.

On February 23, 1998, Edward Mateo filed a memorandum in Response to the Town ("Mateo's Responsive Memorandum").

On February 25, 1998, the Town filed a further memorandum in Response to Edward Mateo's Responsive Memorandum ("Town's Responsive Memorandum").

On February 25 and March 18, 1998 the Board deliberated with respect to the Motion and various pleadings filed by Edward Mateo and the Town.

II. ISSUES

- A. Whether to grant interlocutory review.
- B. Whether Edward Mateo should be granted party status pursuant to EBR 14(A)(5) with respect to criteria 1, 3, 4, 8 and 9(E).

III. DISCUSSION

- A. Interlocutory Review

Under EBR 43(B), the Board in its sole discretion may review an appeal from any party status ruling of a commission if it determines that such review may “materially advance the application process.” Re: Maple Tree Place Associates, Application #4C0775-EB (Interlocutory Appeal), Memorandum of Decision and Order at 2 (Oct. 11, 1996). Thus, with respect to the Motion, the first consideration the Board must take into account is whether deciding Edward Mateo’s party status request will materially advance the application process before the Board before deciding de novo the merits of whether party status should be granted. The Board concludes, based on the pleadings filed by the parties, that granting interlocutory appeal in this instance will “materially advance the application process.”

It is evident from review of the parties’ pleadings that there are sufficient uncontested facts for the Board to reach a conclusion with respect to the criteria 1 and 3, both considered by the Commission and now under appeal. It is also apparent from the Recess Memorandum that the Commission applied the wrong legal standard in considering Edward Mateo’s party status request with respect to the facts that it did consider in reaching its conclusion. Furthermore, this proceeding is still at the evidentiary stage. Therefore, the Board believes that by making a party status ruling based on the correct legal standard, by providing the Commission with additional guidance, and by promptly remanding this matter back to the Commission, the application process will be materially advanced while preserving the prerogative of the Commission to make an original merits determination with respect to the application for the Project. Accordingly, this is not a situation analogous to that in Re: Manchester Commons Associates, #8B0500-EB- (Reconsideration) (Interlocutory Appeal), Memorandum of Decision at 2 (May 14, 1996).

Therefore, the Board will grant interlocutory review of Edward Mateo’s party status appeal.

B. Party Status

Pursuant to EBR 14(A)(5) an adjoining property owner shall be granted party status if he timely requests the right to be heard. However, party status is granted only “to the extent that the adjoining property owner demonstrates that the proposed development . . . *may* have a direct effect on the adjoiner’s property under any of the 10 criteria listed at 10 V.S.A. § 6086(a).

There is no dispute that Edward Mateo and his family own real property adjoining the Project tract. The record also reveals that Edward Mateo timely requested that the Commission consider potential dust and noise impacts, as well as potential adverse impacts to his springs, arising from proposed Project operations. The Commission construed Mr. Mateo’s request as a request for party status under criteria 1, 2 and 3. The Commission did not apparently consider whether Mr. Mateo, who was a pro se litigant, might also qualify for party status under Criterion 8 or other Act 250 criteria. Therefore, in considering the merits of the Motion, the Board will

evaluate separately Edward Mateo's request for party status under criteria 1 and 3 from his request for party status under other criteria.

In reaching its conclusion to deny party status with respect to criteria 1 and 3, the Commission appears to have focused on whether the Project *would or would not* have a direct adverse impact on Edward Mateo's property based on a narrow construction of what constitutes Mr. Mateo's use and enjoyment of his property. This is evident from the Commission's own findings contained in the Recess Memorandum. There the Commission found no noise or dust impacts because the Mateo acreage is wooded, the Mateo cabin is some 2,000 feet from the Project site, and Mr. Mateo presence in Albany is limited to approximately thirty days per year. Furthermore, the Commission determined that "it is unlikely that the project impacted the adjoiner's springs" given testimony by the Applicants' engineer that "the over-burden is three feet above ground water."

The Town in its Opposition Memorandum and Responsive Memorandum focuses on these same findings, with the addition that it asserts Mr. Mateo's well is 2,000 feet from the gravel pit and therefore couldn't possibly be affected.

However, impacts on a person's property interests are not to be evaluated by how far a person's residence is from the proposed development nor how much time that person is in residence at his or her property. While mere ownership of an adjoining property is not sufficient to confer party status upon a party status petitioner, a demonstration that a proposed project *may* have an impact under any of the Act 250 criteria upon his property interests will give rise to standing as of right pursuant to EBR 14(A)(5).

With respect to noise impacts, the Board frequently relies at a hearing on the merits on sound tests taken at the shared boundary between the Project tract and adjoining properties. See Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order (March 27, 1997). The Board also takes into consideration the topography and density of vegetation of a Project tract and surrounding properties in assessing noise and other impacts. See Re: Charles and Barbara Bickford, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order (May 22, 1995). Moreover, while it may be true that after a full evidentiary hearing, the fact finder may conclude that there are sufficient facts to reach a positive finding on a given criteria, at the party status stage of the proceedings it is only necessary for the Commission or Board to consider whether impacts *may* exist.

Based on the pleadings of the parties record, it is evident that the Mateo property, while wooded, is topographically situated in relation to the Project site such that the natural grade has the potential of amplifying noise and dust impacts arising from proposed extraction and other operational activities at the Project tract. Moreover, Edward Mateo has asserted that

the potential of amplifying noise and dust impacts arising from proposed extraction and other operational activities at the Project tract. Moreover, Edward Mateo has asserted that stripping of vegetation, top soil, and overburden at the Project site may affect springs on his property, not the well referred to in the Town's pleadings. It is irrelevant, for the purposes of determining party status, that the Mateo family may not reside full time at their Albany cabin or use the springs as their primary source of water. The issue is whether they have demonstrated that Project impacts may have impacts on their property interests, and the Board has concluded that with respect to criteria 1 and 3 they have made such a demonstration. Therefore, the Board rules that Edward Mateo has party status with respect to these two criteria.

However, with respect to criteria 4, 8, and 9(E), the Board declines to grant party status at this time. This is because the record does not clearly reveal that the Commission was asked by Edward Mateo to consider impacts under these criteria. Initial consideration of all issues, including party status, must first be done by the Commission prior to an appeal to the Board. See In re Juster Associates, 136 Vt. 577,581 (1978). Nevertheless, the Board observes that, especially where an adjoining property owner is a pro se litigant and appears to raise concerns such as noise and dust, that the decision maker may be under a duty to at least explore with the petitioner whether criteria 8 is implicated.

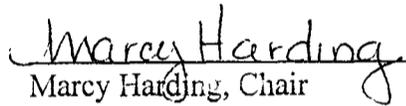
Accordingly, the Board denies the Motion with respect to Edward Mateo's request for party status under criteria 4, 8, and 9(E), but remands this matter back to the Commission for further consideration whether Mr. Mateo is entitled to party status under any of these criteria.

IV. ORDER

1. The Board grants interlocutory review.
2. The Board grants party status to Edward Mateo pursuant to EBR 14(A)(5) with respect to criteria 1 and 3.
3. The Board denies Edward Mateo's request for party status pursuant to EBR 14(A)(5) with respect to criteria 4, 8, and 9(E) at this time.
4. This matter is remanded to the District #7 Environmental Commission for further consideration of Edward Mateo's party status request with respect to criteria 4, 8, and 9(E).

Dated at Montpelier, Vermont, this 19th day of March, 1998.

VERMONT ENVIRONMENTAL BOARD



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