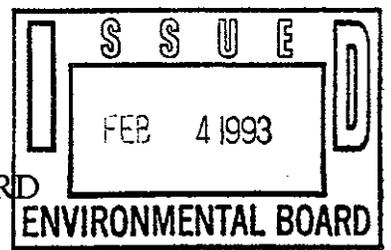


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: Robert and Barbara Barlow
Application #8B0473-EB

MEMORANDUM OF DECISION AND ORDER

This decision pertains to a party status request filed by Nancy Lubeck (the Appellant) in an appeal of a permit issued for a gravel pit owned and operated by Robert and Barbara Barlow (the Applicants) located in Pownal. As is explained below, the Environmental Board denies Ms. Lubeck's request for party status, and therefore appeal rights, with respect to all criteria at 10 V.S.A. § 6086(a) except Criterion 5 (traffic).

I. BACKGROUND

On September 20, 1991, the Environmental Board issued Declaratory Ruling #234, concluding that an Act 250 permit was and is required for the operation of a gravel pit by the Applicants located off Dean Road in Pownal. The Appellant participated in that proceeding as the representative of an adjoining landowner. The Applicants filed an appeal with the Vermont Supreme Court which is still pending. Subsequently, the Applicants filed an application for an Act 2.50 permit.

On April 14, 1992, the District #8 Commission issued Land Use Permit #8B0473, authorizing the continued operation of the gravel pit. The District Commission's decision states that the Appellant was granted party status on 10 V.S.A. § 6086(a)(5) (traffic) and revokes an earlier grant of party status on other unspecified criteria.

On May 14, 1992, the Appellant filed an appeal of the permit with the Board. The appeal seeks to have the Board review the project's compliance with the following criteria of 10 V.S.A. § 6086(a): 5 (traffic), 7 (municipal services), 9(D) (earth resources), 9(E) (extraction of earth resources), 9(H) (costs of scattered development), 9(K) (public investments and facilities), and 10 (conformance with local and regional plan). On June 16, the Appellant filed a request for party status on all criteria under appeal.

Relevant additional background information is discussed in the following documents which have been previously issued concerning this matter and which are incorporated by reference:

- a. A prehearing conference report and order issued June 30, 1992 by Assistant Executive Officer Aaron Adler.

547M3

- b. Memoranda of decision issued by the Board on August 6, 1992, October 23, 1992, and December 21, 1992, pertaining to a stay request filed by the Appellant.

Documents considered by the Board in evaluating the Appellant's party status request include:

- a. Her first party status request of June 16, 1992.
- b. Her second party status request and accompanying transcript of the hearing by the District #8 Commission in this matter, filed July 1, 1992.
- c. The Applicants' response to the Appellant's party status requests, filed July 15, 1992.
- d. The Appellant's response to the Board's decision of December 21, 1992, filed January 5, 1993.
- e. The Appellant's additional response to the December 21 decision, filed January 11, 1993.

The Board deliberated concerning the Appellant's party status on January 13, 1993.

DECISION

Interpreting 10 V.S.A. § 6089(a) and Rules 40(A) and (D), we have previously stated that a party may only appeal the criteria on which he or she has party status before the District Commission, except that a party may appeal a criterion on which he or she did not have party status before the District Commission if: (a) the party was denied party status on the criterion and can persuade us that such status should be granted, or (b) the party can persuade us that party status on the criterion should be granted and that a substantial injustice or inequity will occur if appeal on the criterion is disallowed. Re: Sherman Hollow, Inc., #4C0422-5-EB, Memorandum of Decision at 4 (Feb. 3, 1988); Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision at 5-7 (July 31, 1989). We have also stated that party status decisions by a district commission may be challenged following the district commission's final decision on an application by appeal or cross-appeal. Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision at 12-13 (March 28, 1990).

The history of the Appellant's party status and party status requests is somewhat complicated. Based on pages 36 and 65 of the transcript the Appellant supplied, the District Commission appears initially to have granted her party status pursuant to Rule 14(B)(1)(b) (materially assisting party) on Criteria 1 (air pollution), 1(B) (waste disposal - stormwater runoff), 1(C) (water conservation), 1(F) (shorelines), 4 (soil erosion), 5 and 10. However, in the District Commission's final decision, it revoked her party status on all criteria except 5 on the basis that she had materially assisted only on Criterion 5.

The Appellant's notice of appeal and initial party status requests before this Board pertain to Criteria 5, 9(D), 9(E), 9(K), and 10. The Applicants do not challenge her party status on Criterion 5 but do challenge her party status on the other four criteria.

In the Appellant's January 1993 filings, she states that she wants to revise her party status requests to include all criteria which concern air pollution, reclamation, and the use of Town Bridge #41, which serves the gravel pit. Because this revision to the party status request does not state specifically which criteria are meant, we will treat this as a request to add all criteria on which the District Commission initially gave the Appellant party status to the other criteria mentioned in her appeal and initial party status requests.

Given that the Applicants did not file a cross-appeal challenging the Appellant's party status on Criterion 5, we evaluate whether the Appellant qualifies for party status under the other requested criteria.

The Appellant does not state on what basis she seeks party status. To our knowledge, the Appellant is not an adjoining landowner. The Appellant has not stated that her interests are affected under any of the criteria nor has she given any basis for concluding that her interests are affected. We therefore conclude that she seeks party status as a materially assisting party. See 10 V.S.A. § 6085(c), Board Rule 14(A)(3), (B)(1).

We turn first to Criteria 1, 1(B), 1(C), 1(F), 4, and 10, on which the Appellant did seek party status before the District Commission. The Appellant has offered no statement of how she would materially assist on these criteria and party status is denied.

With regard to Criteria 9(D), 9(E), and 9(K), we examine whether a substantial injustice or inequity will occur if appeal on these criteria is disallowed, since the Appellant did not request party status on these criteria before the District Commission. In this regard, the Appellant alleges that the District Commission acted in an intimidating manner during the hearing. In support of this allegation,

she points to several places in the transcript which show, she alleges, that the District Commission kept her from asking relevant questions. While we do not wish to appear to condone such hearing conduct, we do not believe that, even if true, such intimidation kept the Appellant from asking for party status on Criteria 9(D), 9(E), and 9(K). Our reasons for this statement are that the Appellant previously has represented another person before us and was able to articulate a request during the District Commission's hearing for party status on Criteria 1, 1(B), 1(C), 1(F), 4, 5, and 10. Accordingly, we are not persuaded that a substantial injustice or inequity will occur if party status on Criteria 9(D), 9(E), and 9(K) is disallowed, and the Appellant's request for party status on those criteria is denied.

ORDER

The Appellant's request for party status on criteria other than Criterion 5 is denied. The scope of this appeal shall be limited to Criterion 5.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair

Terry Ehrich

Arthur Gibb

Samuel Lloyd

Steve E. Wright