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

Re: Woodford Packers, Inc.
d/b/a WPI
334 ½ Pleasant Street
Bennington, Vermont 05201

Land Use Permit Application
8B0542-EB

MEMORANDUM OF DECISION

This is an appeal by the Vermont Agency of Natural Resources from Land Use Permit #8B0542 and the supporting Findings of Fact, Conclusions of Law, and Order, issued to Woodford Packers, Inc., d/b/a WPI, by the District #8 Environmental Commission.

I. PROCEDURAL SUMMARY

On October 2, 2000 the District # 8 Environmental Commission ("Commission") issued Land Use Permit #8B0542 ("Permit"), and supporting Findings of Fact, Conclusions of Law, and Order ("Decision"), to Woodford Packers, Inc., d/b/a WPI ("WPI"). On November 13, 2000 the Commission issued a Memorandum of Decision denying a Motion to Alter filed by the Vermont Agency of Natural Resources ("ANR"). The Permit authorizes the construction of a 30-unit retirement village located on 12.5 acres of land between Route 9 and the Roaring Branch River in the Town of Bennington, Vermont ("Project").

On December 13, 2000, ANR filed an appeal with the Vermont Environmental Board ("Board") from the Permit and Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A.§6086(a)(1)(D),(1)(F), (4) and (9)(K)(“Criteria 1(D), 1(F), 4 and 9(K)”). The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules ("EBR") 6 and 40.

In its appeal, ANR requested an order allowing ANR access to the Project site "to conduct the necessary investigations, tests and site evaluations needed to make findings and conclusions."

On December 29, 2000, WPI filed a Motion to Dismiss the appeal.

On January 22, 2001, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

WPI by Lawrin Crispe, Esq., with James Davis and William Jewell
ANR by Warren Coleman, Esq. and Elizabeth Lord.

On January 23, 2001, Chair Harding issued a Prehearing Conference Report and Order ("PHCRO"). Among other things, the PHCRO identified certain preliminary issues and set forth the prehearing and hearing schedule in this matter.

On February 20, 2001, the Town of Bennington filed a Notice of Appearance.

On February 21, 2001, the Board heard oral argument and commenced deliberations on the preliminary issues identified in the PHCRO.

On February 22, 2001, the Board issued a Revised Scheduling Order setting the case for hearing on March 28, 2001.

II. PRELIMINARY ISSUES

Oral argument was heard on the preliminary issues, which were set forth in the PHCRO as follows:

1. Whether the Board should grant WPI's Motion to Dismiss the appeal.

2. If the answer to Preliminary Issue #1 is in the negative, whether the Board should grant ANR's request for access to the Project site to conduct investigations and tests related to this appeal.

3. If the answer to Preliminary Issue #1 is in the negative, whether the issue presented by 10 V.S.A. §6086(a)(1)(D)(ii) (whether the Project is within a floodway fringe, and, if so, whether it will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding), should be included in this appeal.

III. DISCUSSION

A. WPI's Motion to Dismiss

WPI moves to dismiss, claiming that ANR did not act in good faith before the Commission and in bringing this appeal, that ANR failed to raise the issues presented by the criteria on appeal in a timely manner before the Commission and has caused WPI to go to "enormous expense" to obtain regulatory approval for the Project. EBR 18(D) authorizes the Board to dismiss any matter "for reasons provided by these rules, by statute, or by law." While the Board

sympathizes with WPI's concerns, they do not constitute legal grounds for dismissal.

WPI argues that the Board should dismiss this appeal based on Rule 60 of the Vermont Rules of Civil Procedure ("V.R.C.P. 60"). V.R.C.P. 60 provides for relief from judgment in cases of clerical or other mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or any other reason justifying relief. WPI argues that, absent such grounds as mistake, newly discovered evidence, or fraud, ANR should be barred from presenting evidence to the Board that it did not present to the Commission. V.R.C.P. 60 allows parties affected by a court order to seek relief from that order. It does not restrict a party's right to file an appeal, and does not apply here. As set forth below, Act 250 appeals are heard *de novo*.

WPI also cites EBR 13(A) and EBR 18(F) in support of its claim for dismissal. EBR 13(A) provides the district commission and the Board with authority to continue hearings "until all testimony and evidence relating to the criteria set forth in the Act have been presented and all parties have had an adequate opportunity in the judgment of the Board or district to be heard." EBR 18(F) provides that: "A hearing shall not be closed until a district commission or the board has provided an opportunity for all parties under the relevant criteria to respond to the last permit or evidence submitted." WPI argues that these rules effectively bar a party from presenting evidence to the Board that was not presented to the district commission. This would be inconsistent with the requirement that Act 250 appeals be heard *de novo.* 10 V.S.A. § 6089(a)(3); EBR 40(A). EBR 13(A) and EBR 18(F) serve to ensure that the record is complete, whether before the district commission or the Board. These rules do not alter the *de novo* nature of Act 250 appeals.

Nor does the Board's decision in *Re: Sherman Hollow,* #4C0422-EB (revised decision)(Feb. 17, 1989), support WPI's motion. The issue in *Sherman Hollow* was whether the Board could reopen its own proceedings to take additional evidence. It does not stand for the proposition that a party cannot submit evidence to the Board unless it has been submitted to the district commission. Again, this would contravene the *de novo* nature of Act 250 appeals. Moreover, *Sherman Hollow* was decided at a time when neither Act 250 nor the Board's rules allowed the Board to reopen proceedings to take new evidence. The rules currently provide far greater flexibility. *See, e.g.*, EBR 31(A)(1). *Sherman Hollow* does not apply here.

Appeals from district commission decisions are heard *de novo*. 10 V.S.A. § 6089(a)(3); EBR 40(A). "In a de novo proceeding, the Board is required to hear the matter as if there had been no prior proceedings in the district

commission." *In re Killington, Ltd.*, 159 Vt. 206, 214 (1992)(citing *In re Green Peak Estates,* 154 Vt. 363, 372 (1990)). There is no requirement that parties present the same issues and evidence to the district commission before they can raise them on appeal. ANR's conduct and timeliness in the Commission proceeding have no bearing on the merits of this *de novo* appeal, and cannot justify its dismissal under EBR 18(D).

B. ANR's Request for Site Access

ANR requests that the Board allow ANR "to conduct the necessary investigations, test and site evaluations needed to make findings and conclusions." (Notice of Appeal, at 2.) ANR seeks to perform in-depth studies of the Project site to supplement the basic, "Level I" site assessment it performed during the Commission proceeding.[1]

The Level I assessment provides:

> a basic characterization of stream type, management history and the fluvial process in effect both presently and in the past. From Level I analysis, one can describe plan form changes (width, sinuosity and location) over time, anthropogenic influences and river channel response to those influences.

(Memorandum of Law in Support of ANR's Request for Site Access, at 6-7 (Jan. 31, 2001).)

ANR seeks to conduct Level II and Level III assessments, and states that the Level II assessments would provide "the field data verification of the

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[1] ANR contends that it originally chose only to submit data from a Level I analysis to the Commission, but that:

> When the ANR's concerns about the Site's susceptibility to flooding were not recognized by the District Commission's Act 250 permit decision, the ANR requested the opportunity for additional investigation for purposes of conducting Level II and Level III assessments. The ANR's request for such access was formally denied in a Notice Against Trespass from the Permittee dated November 7, 2000.

(Memorandum of Law in Support of ANR's Request for Site Access, at 7-8 n.3 (Jan. 31, 2001).)

conclusions made under a Level I assessment and support quantitative analysis of river channel stability . . . [and would help] to confirm the potential for further changes in plan form, channel dimension and slope." *Id.* at 7. ANR states that the Level III assessments would provide "an assessment of relative channel stability, the conditions that are necessary to achieve or maintain stability, and what a stable river channel/riparian corridor condition would look like." *Id.*

According to ANR, these studies should not be conducted before late spring, after the spring run-off is over. Under ANR's proposal, a significant portion of the 2001 building season would likely pass before the Board could issue a final decision in this case.

In reviewing requests for orders compelling site access made pursuant to the Federal Rules of Civil Procedure,[2] courts must weigh "the degree to which the proposed inspection will aid in the search for truth against the burdens and dangers created by the inspection." *McKesson Corporation v. Islamic Republic of Iran*, 185 F.R.D. 70, 76 (D.C. Cir. 1999)(citations omitted). While this federal rule does not govern Act 250 proceedings, these considerations are appropriate here. The reasons ANR cites for requesting the Level II and Level III assessments certainly are legitimate and relevant to this appeal. On the other hand, allowing the assessments to delay the decision in this matter could impose a significant burden on WPI. Whether such a burden would be undue, however, cannot be determined until the Board has the opportunity to hear the evidence.

It is the delay contemplated by ANR's proposal, and not the access to the Project site or the additional testing, that is of concern here. Whether ANR had conducted Level II or Level III assessments for purposes of the Commission proceedings is not relevant in this de novo appeal. Moreover, site access already has been granted in the Permit. Condition 1 of the Permit states that:

> By acceptance of this permit, the Permittee agrees to allow representatives of the State of Vermont access to the property covered by the permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.

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The federal rule of civil procedure permitting parties to conduct site inspections, F.R.C.P. 34(a)(2), generally requires that parties grant each other site access for inspections. Any party who is denied site access may petition the court for an order compelling such access. It is in ruling on such a motion that the court would apply the balancing test described herein.

Because of the potential impact on WPI from any unnecessary delay in this case, the Board has issued a Revised Scheduling Order setting this matter for hearing on March 28, 2001, with a possible continuation to June 6, 2001.[3]

The Board declines to exercise its authority to order the requested site access at this time. *See Re: Finard-Zamias Associates*, #1R0661-EB, Memorandum of Decision at 15-16 (Mar. 28, 1990)("It is clear that the entire structure of Act 250 implicitly grants the board and district commissions the power to compel an applicant to grant site access to parties."). If, after the hearing in this matter, the Board concludes that additional information is necessary for it to make findings and conclusions, it may grant ANR's motion and reconvene the hearing at a later date.[4]

C. Scope of Appeal

In its Notice of Appeal, ANR listed "Criterion 1(D)" among the issues on appeal. However, ANR's narrative description of this issue included only the text of Criterion 1(D)(i). At the prehearing conference ANR contended that its appeal was intended to include all of Criterion 1(D), but WPI objected. The parties were given the opportunity to brief the issue raised by this discrepancy, but WPI declined to do so.

EBR 40 requires that the appellant state the issues on appeal. "Its purpose is to prompt appellants to focus their appeals and state the issues with reasonable specificity. The policy of the Board has always been to construe notices of appeal liberally." *Finard-Zamias, supra*, at 5; see also, *Re: Michael Caldwell and Estate of Gilbert H. Meyer, Jr.*, #5L1199-EB, Findings, Conclusions and Order at 3 (Mar. 13, 1995).

> The Board's usual procedure is to review all issues within the criteria raised on appeal without requiring separate cross-appeals on each sub-issue. . . However, if an appellant only objects to . . . [particular] sub-issues within the criteria . . . and no other parties

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3 The Board will consider any requests for more time in the schedule for the hearing day, and any evidentiary objections, at the hearing. Any rebuttal testimony may be presented live. Parties will be given an opportunity to submit proposed Findings of Fact and Conclusions of Law after the hearing.

4 The Board has reserved the June 6, 2001 in case the hearing in this matter needs to be reconvened.

> object or request broader review, the Board limits its review on appeal to those reasons assigned by the appellant why the commission was in error.

Realty Resources Chartered and Bradford Housing Associates, #3R0678-EB, Memorandum of Decision at 5 (Feb. 17, 1994)(internal quotation marks omitted)(citing *In re Killington Ltd.*, 159 Vt. 206, 214 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990)).

Accordingly, the scope of this appeal shall include all of Criterion 1(D).

IV. ORDER

1. WPI's Motion to Dismiss is DENIED, and Preliminary Issue #1 is answered in the negative.

2. Decision on ANR's Motion for Site Access, Preliminary Issue #2, is deferred until the Board has had an opportunity to consider the evidence.

3. The scope of appeal shall include all of Criterion 1(D), and Preliminary Issue #3 is answered in the affirmative. Issue #1 in section III(B) of the PHCRO is amended to read as follows:

> Whether, pursuant to 10 V.S.A. §6086(a)(1)(D)(i), the Project is within a floodway, and if so, whether it will not restrict or divert the flow of flood waters, and endanger the health, safety and welfare of the public or of riparian owners during flooding, and whether, pursuant to 10 V.S.A. §6086(a)(1)(D)(ii), the Project is within a floodway fringe, and if so, whether it will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding.

Dated at Montpelier, Vermont this 27th day of February 2001.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
Marcy Harding, Chair
George Holland
Samuel Lloyd
W. William Martinez
Alice Olenick
Donald Sargent