

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

RE: Wesco, Inc. and Declaratory Ruling  
Jacob & Harmke Verburg by Request #304  
John R. Ponsetto, Esq.  
Gravel and Shea  
P.O. Box 369  
Burlington, VT 05402-0369

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to a motion to dismiss filed by Wesco, Inc. and Jacob & Harmke Verburg, and certain party status requests. As explained below, the Board denies the motion to dismiss, denies Judith and John Van Houten party status, and grants Barry Washburn party status.

I. BACKGROUND

On February 27, 1995, the District #4 Environmental Coordinator issued Advisory Opinion #AO-95-112 (the Opinion) to Wesco, Inc. (Wesco) and Jacob and Harmke Verburg (collectively the Respondents). The Opinion pertains to whether the proposed construction of a commercial building (a gasoline and diesel fuel station) by Wesco (the Project) is subject to 10 V.S.A. Chapter 151 (Act 250).

The Project is to be built in the Town of Richmond on land presently owned by Mr. and Mrs. Verburg. Mr. and Mrs. Verburg have a purchase and sale agreement with Wesco to (a) convey a 6.64 acre lot (Lot #2); and (b) grant a perpetual and exclusive easement for the benefit of Lot #2 for the construction of a wastewater disposal system (the System) on a portion of an adjoining 8.89 acre lot (Lot #1). The easement area for the System within Lot #1 is 1.46 acres (the Easement Area).

The Opinion concludes that the Project's involved land is less than 10 acres, based upon the sum of Lot #2 and the Easement Area. Since the Project's involved land is less than 10 acres, the Opinion concludes that the Project is not subject to Act 250 jurisdiction because the Project is not development as defined in 10 V.S.A. § 6001(3) and EBR 2(A)(2).

On March 24, 1995, Richmond Citizens for Responsible Growth, Inc. (RCRG) appealed from the Opinion and filed a petition for a declaratory ruling regarding whether the Project is subject to Act-250 jurisdiction-(the Petition).

On April 6, 1995, the Respondents filed a Motion to Dismiss the Petition (the Motion).

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On May 23, 1995, RCRG filed a Memorandum in Opposition to the Motion.

On June 1, 1995, the Agency of Natural Resources (ANR) filed a Notice of Appearance and Notation of Witnesses and Exhibits.

On June 2, 1995, the Respondents filed a response to **RCRG's** May 23, 1995 Memorandum, and a Prehearing Conference Statement.

On June 5, 1995, RCRG filed a Petition for Party Status and a Response to Notice of Hearing.

On June 5, 1995, Judith and John Van Houten filed a Petition for Party Status.

On June 5, 1995, Barry Washburn filed a Petition for Party Status.

On June 5, 1995, Chair John T. Ewing convened a prehearing conference in Montpelier, Vermont with the following persons and entities **participating**:<sup>1</sup>

Wesco, Inc. and Jacob and Harmke Verburg by John R. Ponsetto, Esq., Bill and Walter Simendinger, and Jacob and Harmke Verburg  
Richmond Citizens for Responsible Growth by William Roper, Esq., Jeff Forward, and Michael Marks.  
Town of Richmond Board of Selectmen by Selectperson Frances Thomas and Town Administrator Ronald Rodjenski.  
Town of Richmond Planning Commission by Planning Commission Member Virginia Clark  
Cote Enterprises by Rene Cote  
Barry Washburn

On June 13, 1995, the Respondents filed a Memorandum in Opposition to **RCRG's** Petition for Party Status; a Memorandum in Opposition to Judith Van **Houten's** Request for Party Status; and a Joint Statement of Stipulated Facts and Exhibits.

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<sup>1</sup>No Prehearing Conference Report and order has been issued. Attached to this Memorandum of Decision is a Scheduling Order which supplants any need for a Prehearing Conference Report and Order.

On June 13, 1995, RCRG filed a Reply Memorandum relative to the Motion.

On June 28, 1995, the Board deliberated regarding the three preliminary issues stated in Section II, below.

## II. ISSUES

The three preliminary issues decided by the Board are:

1. Whether to grant the Motion and dismiss the Petition.
2. Whether to grant party status to Judith and John Van Houten.
3. Whether to grant party status to Barry Washburn.

## III. MOTION TO DISMISS

### A. The Standard Defined

The Motion requires the Board to consider the effect of the Legislature's amendments to 10 V.S.A. § 6007(c). See 1993 Vt. Laws No. 232 (Adj. Sess.), § 25, effective March 15, 1995.

Presently, under 10 V.S.A. § 6007(c), a jurisdictional opinion of a district coordinator may be appealed to the Board by, among others, "[i]ndividuals or entities who may be affected by the outcome of the opinion."

The Respondents contend that RCRG has failed to demonstrate in its Petition that it's an entity that may be affected by the Opinion.\* Respondents rely on Town of Cavendish v. Vermont Public Power Supply Authority, 141 Vt. 144 (1982) and Sierra Club v. Morton, 405 U.S. 727 (1972) for their **contention** that on the face of the Petition, RCRG had to allege the threat of a "injury in **fact**" to some-protected interest in order to establish standing to bring the Petition. Thus, the Respondents conclude that 10 V.S.A. § 6007(c) incorporates an injury in fact standing requirement, and that RCRG has failed to meet it.

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<sup>2</sup>None of the parties have disputed that 10 V.S.A. § 6007(c) as amended March 15, 1995 is the applicable provision notwithstanding that the Opinion was issued on February 27, 1995.

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RCRG contends that injury in fact is not the applicable standard in Board declaratory ruling proceedings. RCRG relies on Committee To Save the Bishop's House v. Medical Center Hospital of Vermont, Inc., 136 Vt. 213 (1978) and Sierra Club for its contention that the applicable standing requirement before the Board is governed by the specific terms of Act 250 and EBR 14(B)(1)(a). Thus, RCRG concludes that 10 V.S.A. § 6007(c) incorporates the standing requirement that a petitioner for a declaratory ruling demonstrate that a proposed development or subdivision may affect its interest under any of the ten Act 250 criteria. Alternatively, RCRG contends that its Petition satisfies the injury in fact requirement.

The Board's declaratory ruling proceedings are governed by both Act 250 and Vermont's Administrative Procedure Act (the **APA**), codified at 3 V.S.A. Chapter 25. Generally, under the **APA** alone, the applicable standing requirement is the injury in fact standard. Cavendish, 141 Vt. at 148. However, where the Legislature has authorized the Board to perform certain functions according to law, and has provided by statute who, and under what circumstances, such functions may be initiated, then "the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." Sierra Club, 405 U.S. at 732.

10 V.S.A. § 6007(c) specifically grants to those persons **orentitieswho** may be affected by the **outcome of the** jurisdictional opinion the right to file a petition for a declaratory ruling before the Board. 10 V.S.A. § 6007(c) establishes a specific standard relative to standing. The more specific standard is the applicable standard. See In re Kelscot, Ltd., d/b/a R. C. Fisher, Inc., 152 Vt. 579, 582 (1989). The applicability of the **APA** to the Board's declaratory ruling proceedings establishes additional--and not **substitute--requirements**. See Bishop's House, 136 Vt. at 215.

In relevant part, the language used in 10 V.S.A. § 6007(c) and EBR 14(B)(1)(a) are virtually the same. Under 10 V.S.A. § 6007(c), the standard is whether an individual or entity "may be affected by the outcome of the **opinion**." Under EBR 14(B)(1)(a), the standard is whether a person has demonstrated that "a proposed development or subdivision may affect his **interest**" under any of the Act 250 criteria.

After careful review of the competing standards, the Board concludes that the standing requirement imposed by 10 V.S.A. § 6007(c) for those individuals or entities who may be

affected by the outcome of a jurisdictional opinion is identical to the standard established by EBR 14(B)(1)(a). There is substantial judicial economy in using a single substantive standard to determine both standing and party status.

Therefore, the Board concludes that the standard by which it will evaluate whether a petitioner has standing to bring a declaratory ruling under 10 V.S.A. § 6007(c), when not otherwise authorized therein, is whether such person or entity may be affected by the outcome of a jurisdictional opinion, and that such standard is identical to the standard established by EBR 14(B)(1)(a) that a person seeking party status demonstrate that a proposed development or subdivision may affect his or her interest under any of the ten Act 250 criteria.

B. The Standard Applied

The Board next considers whether RCRG has demonstrated in its Petition whether it may be affected by the outcome of the jurisdictional opinion.

In determining whether RCRG has demonstrated that it may be affected by the outcome of the Opinion, the Board has considered a number of factors which, in total, persuade it that RCRG has standing as set forth in its March 24, 1995 Petition.

RCRG is a non-profit corporation consisting of members who own property in the Town of Richmond. RCRG's purposes are to promote sound and responsible land use planning and to participate in matters concerning proposed land use development. RCRG participated in the Respondents' request for the Opinion before the district coordinator. The Project's proposed location is in the middle of one of the visual gateways for the Town of Richmond. Persons traveling south through the valley on Interstate 89 or exiting from Interstate 89 toward the Town of Richmond are presented with a view of undeveloped, floodplain farm land, foothills and Camel's Hump.

Based on these factors, the Board concludes that RCRG's interests may be affected by the outcome of the Opinion under Criteria 8 and 10. Therefore, RCRG has standing to bring the Petition pursuant to 10 V.S.A. § 6007(c) and the Respondents' Motion is denied.

IV. PARTY STATUS

A. Judith and John Van Houten

Judith and John Van Houten filed a letter which the Board will consider as a request for party status. The Respondents object to Mr. and Mrs. Van Houten's party status request.

Mr. and Mrs. Van Houten's letter does not satisfy the requirement that a request for party status under EBR 14(A)(3) include a description of the potential effect of the Project upon their property, or the requirement that a request for party status under EBR 14(B)(1)(a) include a demonstration that the Project may affect their interests under any of the Act 250 criteria. Therefore, the Board denies Mr. and Mrs. Van Houten party status.

B. Barry Washburn

Barry Washburn filed a petition for party status pursuant which the Board considers under EBR 14(B)(1)(a). The Respondents do not object to Mr. Washburn's party status request.

Mr. Washburn's party status petition provides all the information required by EBR 14(B)(1)(a). The Board is persuaded, based on his petition, that the Project may affect his interest under Criteria 5, 8, and 10. Accordingly, Mr. Washburn is granted party status.

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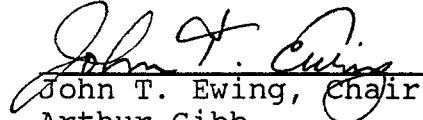
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V. ORDER

1. RCRG has standing to bring the Petition pursuant to 10 V.S.A. § 6007(c).
2. The Respondents' Motion is denied.
3. Mr. and Mrs. Van Houten are denied party status.
4. Mr. Washburn is granted party status.
5. Attached hereto and incorporated herein is a Scheduling Order.

Dated at Montpelier, Vermont, this 30th day of June, 1995.

ENVIRONMENTAL BOARD

  
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John T. Ewing, Chair  
Arthur Gibb  
Dr. Robert Page  
Rebecca Nawrath  
John M. Farmer  
Samuel Lloyd  
William Martinez  
Steve Wright

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