

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

Re: GHL Construction, Inc. and Land Use Permit Application #2S1124-EB,
 PAK Construction, Inc. Declaratory Ruling Request #396

MEMORANDUM OF DECISION

This decision addresses preliminary issues of party status in this consolidated appeal and declaratory ruling request involving a stone quarry located off of Todd Whitten Road in Chester, Vermont ("Project").

I. PROCEDURAL SUMMARY

On November 9, 2000, GHL Construction, Inc. and PAK Construction, Inc. ("Applicants") filed Land Use Permit Application # 2S1124 with the District # 2 Environmental Commission ("Commission") seeking a permit for the Project.

On March 23, 2001, the District #2 Environmental Commission Coordinator ("Coordinator") issued Jurisdictional Opinion #2-142 ("JO"), in which she determined that construction for quarrying operations commenced in 1996 when the quarry was part of a 125± acre tract. The 125-acre tract included 39.89 acres now owned by John and Mary Skawinski, as well as the 85 acres owned by the Applicants.

On March 26, 2001 the Commission issued Findings of Fact, Conclusions of Law, and Order ("Decision") denying the land use permit application.

On April 23, 2001, Applicants filed an appeal with the Vermont Environmental Board ("Board") from the Decision alleging that the Commission erred in concluding that the 39.89-acre parcel conveyed to the Skawinskis was subject to Act 250 jurisdiction.¹ The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules ("EBR") 6 and 40.

Also on April 23, 2001, Applicants filed a Petition for Declaratory Ruling with the Board, appealing the JO. Specifically, Applicants challenge the Coordinator's determination that the 39.89-acre tract of land now owned by John and Mary Skawinski is subject to Act 250 jurisdiction.

On May 25, 2001, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

Applicants, by Patrick Ankuda, Esq.
The Vermont Agency of Natural Resources ("ANR"), by Warren Coleman, Esq.

¹

This appeal does not challenge the merits of the Commission's Decision, except to the extent that the Commission relied on the Coordinator's jurisdictional determination regarding the Skawinski parcel.

Tomasso Brothers, Inc., ("Tomasso") by James Tomasso and Lawrence T. Alberti.

Mr. Tomasso stated that another adjoining landowner, Philip Halton, also wished to participate in this case.

On May 29, 2001, the Chair issued a Prehearing Conference Report and Order ("PHCRO"). Among other things, the PHCRO identified party status of Mr. Halton and Tomasso as preliminary issues, and set deadlines for filing petitions for party status and reply briefs. The PHCRO provided that Tomasso and Mr. Halton each had until June 5, 2001 to file petitions for party status. On June 5, 2001, Tomasso filed a timely petition for party status. Mr. Halton did not file a petition for party status, and did not seek to extend the filing deadline.

On June 28, 2001, the Board deliberated on the party status of Tomasso.

II. DISCUSSION

The preliminary issues are whether Tomasso and Philip Halton should be granted party status pursuant to EBR 14.

A. Party Status of Tomasso

Tomasso requests "Act 250 Statutory Party Status . . . as an adjoining property owner." The Board construes this as a request for party status under EBR 14(A)(5).

To obtain party status under EBR 14(A)(5), Tomasso must show that it: 1) owns property adjacent to the Project; and 2) that the Project "may have a direct effect" on its property "under any of the 10 criteria listed at 10 V.S.A. § 6086(a)," (the "Act 250 criteria"). EBR 14(A)(5); *see also, Re: Stone Cutter's Way*, Declaratory Ruling Request #391, Memorandum of Decision at 2 (Jun. 1, 2001)(petitioner must show ownership of adjacent property and that project may affect interest in this property), *appeal docketed*, No. 2001-__ (Vt. 2001).

There is no dispute that Tomasso is an adjoining property owner. The tax map indicates that Tomasso owns property directly adjoining both the Skawinski parcel and the Applicants' property. Therefore, the remaining question under EBR 14(A)(5) is whether the Project may directly affect Tomasso's property.

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Applicants argue that Tomasso should not be entitled to party status because it "offered nothing at the District Commission level regarding jurisdiction," and that the Act 250 criteria are not relevant to the jurisdictional issue. It is true that the sole merits issue in this case is jurisdictional, and that the Board will not be reviewing a proposed development for compliance with Act 250 criteria. However, the plain language of EBR 14(A)(5) requires that the Board look for possible impacts of the "proposed development" under one or more Act 250 criteria in determining party status. *See, Re: Catamount Slate, Inc., d/b/a Reed Family Slate Products, and Fred and Suellen Reed, Declaratory Ruling #389, Memorandum of Decision at 11-12 (Jun. 29, 2001)*(Board looks to whether party may be affected under Act 250 criteria, rather than under jurisdictional determination, to decide party status in declaratory ruling proceeding).

Moreover, a party's nonparticipation on a jurisdictional issue at the district level has no bearing on party status before the Board. Only in an appeal on one or more Act 250 criteria is participation below relevant. *See Re: Old Vermonter Wood Products and Richard Atwood, #5W1305-EB, Memorandum of Decision at 2 (Feb. 3, 1999)*(appellant who did not request party status before the district commission, and seeks party status for the first time before the Board must show that substantial injustice or inequity will occur if the appeal on the criterion is disallowed)(citations omitted).

This consolidated appeal and declaratory ruling proceeding concerns only a jurisdictional issue, so the scope of Tomasso's participation will not be limited by failure to obtain party status on a particular criterion. If Tomasso or its property stands to be affected by the proposed development under any criterion, Tomasso is entitled to party status before the Board.

Tomasso claims that the Project may have a direct effect on its property under several Act 250 criteria. Specifically, Tomasso contends that the Project will cause noise which will impact the enjoyment of one of the homes on the Tomasso property less than 1/4 mile from the quarry (Criteria 1, air pollution, and 8, aesthetics); increase stormwater runoff and result in silt deposition in the Whitmore Brook which runs through the Project site and borders Tomasso's land, (Criteria 1A, headwaters, 1E, streams, and 4, erosion); make traffic on Vermont Route 103 less safe (Criterion 5, traffic safety); have a "negative and detrimental impact on Tomasso property values" due to the visual impact of the quarry, which it contends is directly visible from the Tomasso property (Criterion 8, aesthetics); and destroy or significantly impair wildlife habitat for bear, turkey, deer and bobcat on Tomasso's property and trout in the Whitmore Brook (Criterion 8A, wildlife). It is not clear from the petition and tax map how the alleged runoff, siltation and traffic effects might impact Tomasso's property. However, the Board is persuaded that Tomasso's property may be affected by the Project under

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several Act 250 criteria: at a minimum, Criteria 1, 8, and 8A. Tomasso has demonstrated that it is entitled to party status under EBR 14(A)(5).

B. Party Status of Philip Halton

At the prehearing conference, Mr. Tomasso indicated that another neighbor, Philip Halton, was interested in participating as a party. Mr. Tomasso stated that Mr. Halton was residing out of state and had not received the notice that was sent to his Chester, Vermont address until the day before the prehearing conference. Mr. Tomasso also stated that Mr. Halton is legally blind. Chair Harding provided Mr. Halton with the same opportunity to petition for party status as was given Tomasso, and ensured that a copy of the PHCRO was sent to Mr. Halton at both addresses. Mr. Halton neither filed a petition for party status, nor sought to extend the filing deadline. Therefore, the Board does not reach the issue of whether Mr. Halton should be granted party status pursuant to EBR 14.

IV. ORDER

1. Tomasso is granted party status pursuant to EBR 14(A)(5).
2. The Chair shall issue a scheduling order setting this matter for hearing.

Dated at Montpelier, Vermont this 5th day of July, 2001.

ENVIRONMENTAL BOARD

/s/ Marcy Harding
Marcy Harding, Chair
Jill Broderick
George Holland
Rebecca Nawrath
Alice Olenick
A. Gregory Rainville
Donald Sargent