

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. Ch. 151**

Re: Hale Mountain Fish and Game Club, Inc. Declaratory Ruling #435

**MEMORANDUM OF DECISION ON MOTION TO ALTER**

Adjoining landowners Kathy and Owen Beauchesne, Kenneth and Mary Kennedy, Ann Dailey, and Lorraine and Richard Mattison (Neighbors) move to alter the Findings of Fact, Conclusions of Law, and Order issued on August 4, 2005. As set forth below, the Environmental Board denies the Neighbors' motion.

**I. PROCEDURAL HISTORY**

On June 3, 2004, the District 8 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion JO#8-240 in which he determined that certain changes made to a preexisting fish and game club in Shaftsbury, Vermont (Project) require a permit or a permit amendment pursuant to 10 V.S.A. Ch. 151 (Act 250).

On June 30, 2004, Hale Mountain Fish and Game Club, Inc. (Petitioner) filed petition for Declaratory Ruling with the Environmental Board (Board), pursuant to 10 V.S.A. § 6007(c), appealing the JO. Petitioner contends that the Project does not require an Act 250 permit or permit amendment.

On July 6, 2004, Owen and Kathy Beauchesne filed a cross-appeal and a petition for party status. With the cross-appeal, the Beauchesnes filed a request to continue the prehearing conference in this matter until August 24 or 26, 2004, and Petitioner agreed to such an extension. On July 16, 2004, the Chair issued a Continuance Order granting the Beauchesnes' continuance request.

On August 23, 2004, Ann Dailey filed a petition for party status, as did Richard and Lorraine Mattison.

On August 26, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference. Richard Mattison and Mary Hall were unable to attend the prehearing conference, but notified the Board that they are interested in participating as parties.

A Prehearing Conference Report and Order was issued on August 31, 2004 (PCRO) which, among other things, identified issues and set a prehearing and hearing schedule.

On September 3, 2004, Petitioner filed its opposition to Richmond and Mary Hall's party status petition, and requested that PCRO be altered with respect to the order in which the parties were required to prefile evidence. On September 8, 2004, Ann Dailey and Lorraine Mattison filed a memorandum in opposition to Petitioner's objection to the PCRO.

On September 9, 2004, David L. Grayck, Esq. filed a notice of withdrawal, and Stephen A. Reynes, Esq. filed a notice of appearance, on behalf of the Beauchesnes. Also on September 9, 2004, the Beauchesnes filed a reply to Petitioner's request to alter the PCRO, and the Halls filed a reply to the Petitioner's opposition to their petition for party status.

The Board deliberated on preliminary issues on September 15, 2004, and on September 28, 2004, issued a Memorandum of Decision granting party status to Richmond and Mary Hall pursuant to EBR 14(A)(5) and EBR 14(A)(6) and requiring the Petitioner to prefile its direct case first.

On December 8, 2004, the Board conducted a site visit and placed observations on the record.

On February 9, 2005, the Board granted the Motion to Substitute Parties of Kenneth and Mary Kennedy, substituting them for Richmond and Mary Hall.

On March 2, 2005, the Board convened a public hearing in Rutland, Vermont, admitted exhibits, and heard testimony. The public hearing was reconvened on March 16, 2005, at the Board's offices in Montpelier, Vermont.

The Board deliberated on April 13, 2005, May 18, 2005, June 22, 2005 and July 20, 2005. Based on the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned.

## **II. DISCUSSION**

The Neighbors move to alter the Board's Findings of Fact, Conclusions of Law, and Order dated August 4, 2005 (Decision). In support of their motion, the Neighbors argue that the Petitioner failed to meet its burden of producing enough evidence on the potential for significant impact from the shooting range improvements, and that the clearing of trees in 1991 is not like routine maintenance. Based on these arguments, Neighbors request several specific alterations in the Decision.

In its opposition memo, Petitioner first argues that the Neighbors "merely restate the same arguments" made during the hearing process. (Opposition Memo at 2.) Motions to alter are governed by EBR 31(A), which states in part that:

All requested alterations must be based on a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or allegedly

improper use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to decision.

EBR 31(A)(1). Unless the Board decides to reopen the hearing, "[a]ll requested alterations must be based on a proposed reconsideration of the existing record." EBR 31(A); see also *Re: Van Sicklen Limited Partnership*, #4C1013R-EB, Memorandum of Decision, at 2 (July 26, 2001)(citing *Re: North Country Animal League*, #5L0487-4-EB, Memorandum of Decision at 1 (Apr. 20, 2000); *Re: Mill Lane Development Corp.*, #2W0942-2-EB, Memorandum of Decision at 8 (Jan. 27, 2000)(citing *Re: Charles and Barbara Bickford*, #5W1186-EB, Memorandum of Decision at 3 (September 12, 1995); *Re: Nehemiah Associates, Inc.*, #1R0672-1-EB, Memorandum of Decision at 1 (Oct. 3, 1995); *Re: Swain Development Corp.*, #3W0445-2-EB, Memorandum of Decision at 3-4 (Nov. 8, 1990); *Re: Berlin Associates*, #5W0584-9-EB, Memorandum of Decision at 7 (April 23, 1990)). "This interpretation is based on the need to maintain the integrity of the Board's appeal process by ensuring that arguments and evidence are introduced prior to final decision." *Re: Finard-Zamias Associates*, #1R0661-EB, Memorandum of Decision at 2 (Jan. 16, 1991). This also ensures that parties present their best cases to the Board, which prevents unnecessary delay. *Van Sicklen*, Memorandum of Decision at 4 (quoting *Nehemiah*, Memorandum of Decision at 2 (internal quotations omitted)). Thus, the Neighbors cannot be faulted for restating their arguments. There is no question that Neighbors' motion is proper under Rule 31(A).

Neighbors urge the Board to reconsider whether Petitioner met its burden of producing enough evidence on the potential or actual impacts from the shooting range improvements. Although this is a very close case, the Board is persuaded that there is no failure of production. As noted in the Decision, it is getting increasingly difficult to prove that any development is grandfathered under Act 250. Even with these challenges, the evidence was sufficient for the Board to determine the issue. Unlike the question of wetlands delineation, where there was no evidence, the Board had several sources of evidence on the question of potential and actual impact from the shooting range improvements. There was prefiled evidence on this question, and the Board took additional evidence at the hearing and on the site visit. The fact that some of the evidence conflicted did not mean that there was a failure to produce.

Neighbors also argue that the removal of trees in the shooting range was not routine maintenance, as held in the Decision, and that this constituted a substantial change. Petitioners counter that the clearing was done only to widen the range, and that it was done for safety reasons. The purpose of the

widening is not relevant to the jurisdictional analysis – there is no safety exemption from Act 250 jurisdiction. The question is whether it is a physical change with the potential for significant Act 250 impact. Even if the clearing was sufficient to constitute a physical change, the Board is not persuaded that it would have a potential for any significant impact. Accordingly, it cannot be a substantial change.

Because there is no basis to modify the Decision, the Board denies Neighbors' motion.

### III. ORDER

The Neighbors' Motion to Alter is DENIED.

DATED at Montpelier, Vermont this 17<sup>th</sup> day of October, 2005.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden* \_\_\_\_\_  
Patricia Moulton Powden, Chair \*  
George Holland  
W. William Martinez  
Patricia Nowak\*\*  
Alice Olenick\*  
Karen Paul\*  
Richard C. Pembroke, Sr.  
A. Gregory Rainville  
Christopher D. Roy

\* Chair Moulton Powden and Members Olenick and Paul CONCUR, as follows:

As noted in our dissent from the Decision, we would hold that the improvements to the shooting facilities did constitute a substantial change that permeates the entire project. However, we concur that there is not a failure of proof in this case and would deny the Motion to Alter.

\*\* Board Member Patricia Nowak was unable to participate in deliberations on September 28, 2005, but has reviewed and joins in this decision.