

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

*Re: Vermont RSA Limited Partnership
d/b/a Verizon Wireless*

Declaratory Ruling #441

Memorandum of Decision

This proceeding involves a Petition (Petition) for a Declaratory Ruling (DR) filed with the Environmental Board (Board), by Vermont RSA Limited Partnership d/b/a Verizon Wireless (Vermont RSA) from a Jurisdictional Opinion which asserts jurisdiction pursuant to 10 V.S.A. Ch. 151 (Act 250) over the proposed construction of cellular and PCS antennas in the towers of St. Mary's Star of the Sea Church (Church) in Newport, Vermont (Project).

I. Procedural History

On June 24, 2004, in response to a January 27, 2004 request for a Jurisdictional Opinion from Vermont RSA, the District 7 Environmental Commission Assistant Coordinator issued Jurisdictional Opinion #7-219, which found Act 250 jurisdiction over the Project. Vermont RSA timely requested reconsideration of this decision.

On October 22, 2004, the District 7 Environmental Commission Coordinator issued Jurisdictional Opinion #7-219 (Reconsideration), concluding that the Project is subject to Act 250 jurisdiction.

On November 18, 2004, Vermont RSA filed the Petition. Vermont RSA requested that its Petition be held in abeyance pending action by the District Commission on an intended Act 250 permit application.

On December 16, 2004, Gerald R. Tarrant, Esq., representing a group of neighbors to the Project, filed a Memorandum with the Board, asking that proceedings on the Petition go forward. Vermont RSA replied to Mr. Tarrant's Memorandum on January 7, 2005, and on January 25, 2005, the Board issued a Memorandum of Decision in which it decided to move forward with the Petition.

On February 24, 2005, Clark Curtis, Linda Curtis, Christine Hilliker, Richard Hilliker, Elizabeth Lemieux, Romeo Lemieux, Norma Major, Stephanie Rosamilia, John Snay, Nelson Stevens, Rachel Stevens, Susan Zaffis and Thomas Zaffis (Intervenors) submitted affidavits and a memorandum in which they stated the basis in support of their petition to participate as parties in this matter under several provisions of 10 V.S.A. §§6086(a)(1)(air), (5), (8)(aesthetics and historic sites), (9)(K), and (10)(City Plan) (Criteria (1), (5), (8), (9)(K), and (10)) .

Following a March 4, 2005, Prehearing Conference Board Chair Patricia Moulton Powden issued a Prehearing Order on April 1, 2005.

In the Prehearing Order, the Chair ruled on party status petitions filed by the Intervenor. The Chair granted the Intervenor party status as to Criterion 8 (aesthetics) and Criterion 10 (City Plan). The Prehearing Order denied the Intervenor party status as to Criteria 1 (air) and 8 (historic sites), concluding that they had not made sufficient cases to support a grant under those Criteria. Lastly, the Chair determined that the Intervenor's party status under Criteria 5 and 9(K) was in dispute, and offered Vermont RSA the opportunity to file a response to the petition as to those Criteria.

The Intervenor and Vermont RSA have both filed memoranda and additional information.

II. Discussion

A. Party Status/Standing

1. Criterion 1 (air)

The Intervenor seeks party status as to Criterion 1 (air) in terms of noise. The Chair's denial of party status as to Criterion 1 was based on her ruling, consistent with Board precedent, that review under Criterion 1 (air) for noise is triggered only when its occurrence may cause adverse health effects such as hearing damage. *Prehearing Order* at 3, citing *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 68 (Dec. 8, 2000); *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, Findings of Fact, Conclusions of Law, and Order at 21 (May 22, 2000); *Re: Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, Findings of Fact, Conclusions of Law, and Order at 27 (May 16, 2000). The Chair noted that Intervenor alleged no such impacts.

The Intervenor states that they seek a review of potential impacts from noise in terms of their aesthetic claims under Criterion 8. As the Intervenor has party status under Criterion 8 (aesthetics), they will be afforded the review they seek.

The Board therefore denies the Intervenor's petition as to Criterion 1 (air).

2. *Criteria 5 and 9(K)*

Vermont RSA has filed an affidavit to the effect that, while the Project would use an area which currently allows for three of the 100 parking spaces at the Church, the Church parking lot could be reconfigured to result in no net loss in parking spaces and could result in the addition of parking spaces.

The Intervenors assert that Vermont RSA's argument is based on a new configuration that has not been approved and therefore cannot be used as a basis to deny their party status petition.

We conclude that, even if the parking lot is not reconfigured and three parking spaces are lost to the Project, a loss of 3% of available parking at the Church does not trigger party status in the Intervenors. The Intervenors have yet to provide sufficient evidence or a convincing argument that even the potential loss of such a small percentage of available parking has any possibility of resulting in relevant impacts under those values that Criteria 5 or 9(K) seek to protect.

The Intervenors' petition for party status under Criteria 5 or 9(K) is denied.

3. *Criterion 8 (historic sites)*

The Prehearing Order denied the Intervenors' petition for party status under Criterion 8 (historic sites) on the grounds that it failed to indicate that the Church met the definition of an "historic site." 10 V.S.A. §6001(9).

The Intervenors have now provided information from the Vermont Division for Historic Preservation that the Church is an "historic site." Vermont RSA does not dispute this contention.¹

The Board also finds that, as a number of the Intervenors own property adjoining the Church, view the Church from their property, and are parishioners of the Church, they demonstrate interests that are different from those which any member of the general public might assert. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, Memorandum of Decision at 7 (May 10, 2004).

The Board therefore grants the Intervenors party status as to Criterion 8 (historic sites).

¹ While Vermont RSA does dispute the Intervenors' claim that the Project will have an adverse effect on the Church as an historic site, this argument is one that should be presented within the context of a discussion of the merits of this Petition, not within the context of the Intervenors' party status petition.

III. Order

1. The Intervenors' petition for party status in this Petition is granted as to Criteria 8 (aesthetics and historic sites) and 10 (City Plan).

2. The Intervenors' petition for party status in this Petition is denied as to Criteria 1(air), 5 and 9(K).

3. Paragraph 3 of Part V of the Prehearing Order is amended. Summary decision motions (Environmental Board Rule 23) and memoranda may be filed on or before **Wednesday May 25, 2005**. Responses to summary decision motions shall be filed on or before **Wednesday June 15, 2005**.

4. Paragraph 4(a) of Part V of the Prehearing Order is amended. If no motion for summary decision is filed, Vermont RSA and the Church shall file (a) exhibits, (b) prefiled direct testimony for all witnesses they intend to present, and (c) lists of witnesses and exhibits on or before **Wednesday, May 25, 2005**.

5. The Second Prehearing Conference will be held on **Thursday, June 23, 2005 at 2:00 p.m.** at the Board's Montpelier offices.

6. A site visit will be held and this matter will be heard by the Board on **Wednesday, June 29, 2005**.

7. All other provisions of the Prehearing Order remain in force and effect.

Dated at Montpelier, Vermont this 11th day of May 2005.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Alice Olenick
A. Gregory Rainville