

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

Re: George E. Benson, Sr. and
Janice Benson

Declaratory Ruling Request #432

MEMORANDUM OF DECISION

George E. Benson, Sr. and Janice Benson (Petitioners) filed this Declaratory Ruling petition concerning the proposed expansion of the employee parking area at the Benson Chevrolet Dealership on a .22-acre parcel on the corner of West Main Street and Pond Street in Ludlow, Vermont (Project). After the hearing in this matter, adjoining property owners Kenneth and Judith Pullinen filed a petition for party status, alleging that they had not received notice of the JO or appeal. As set forth below, the Board grants this petition and orders that the hearing be reconvened.

I. PROCEDURAL HISTORY

On December 4, 2003, the District # 2 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #2-196 (JO), which held that the Project would require an amendment to Land Use Permit #2S1035 pursuant to 10 V.S.A. Ch. 151 (Act 250). On February 20, 2004, the Coordinator issued Jurisdictional Opinion #2-196 Reconsideration (Reconsidered JO), which also held the Project would require a permit amendment.

On March 19, 2004, Petitioners filed a Petition for Declaratory Ruling with the Vermont Environmental Board (Board) appealing the Reconsidered JO, pursuant to 10 V.S.A. § 6007(c). The Petitioners contend that the Project does not require an Act 250 permit amendment.

On April 16, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference. The sole participant was Petitioners' attorney, Matthew T. Birmingham, III, Esq., who participated by telephone. No other person notified the Board that they have an interest in participating in this case.

On June 17, 2004, Petitioners filed a Motion for Summary Decision. No reply was filed. The Board deliberated on Petitioners' motion on July 21, 2004. On August 6, 2004, the Board issued a Memorandum of Decision denying Petitioners' Motion for Summary Decision for insufficient undisputed facts.

A hearing was convened on November 10, 2004, Chair Moulton Powden presiding. The Board conducted a site visit, took testimony and heard argument, and deliberated immediately afterward.

On December 13, 2004, Patrick and Judith Pullinen filed a petition for party status pursuant to EBR 14(A)(5). The Board deliberated on the petition on December 15, 2004 and February 2, 2005.

II. ISSUE

The preliminary issue is whether the Board should grant party status to Judith and Patrick Pullinen pursuant to EBR 14(A)(5).

III. DISCUSSION

Patrick and Judith Pullinen seek party status as adjoining property owners pursuant to EBR 14(A)(5). The Board discusses the timeliness concern below, then addresses the merits of the request under Board rules and precedent.

A. Timeliness

Petitioners oppose the Pullinens' request on the grounds that it is untimely under EBR 14(C). This rule provides, in relevant part, that petitions for party status pursuant to EBR 14(A)(5) or (A)(6) "must be made at or prior to an initial prehearing conference, unless the board or district commission directs otherwise." EBR 14(C). This rule also states that:

The board or district commission may grant an untimely petition if it finds that the petitioner has demonstrated good cause for failure to request party status in a timely fashion, and that the late appearance will not unfairly delay the proceedings or place an unfair burden on the parties.

Id.

The Pullinens claim that they did not receive notice of this declaratory ruling proceeding. Petitioners do not dispute that the Pullinens did not receive notice. In fact, there is no indication that any adjoining landowner was served with the JO, Reconsidered JO, Notice of Appeal, or any filing in this matter.

A jurisdictional opinion must be served as follows:

If a requestor wishes a final determination to be rendered on the question, the district coordinator, at the expense of the requestor and in accordance with the rules of the board, shall serve the opinion on individuals or entities who may be affected by the outcome of the opinion, and on parties that would be entitled to notice under section 6084 of this title, if jurisdiction were entitled to exist.

10 V.S.A. § 6007(c).

Board rules require that the JO be served “on all persons identified in writing by the requestor, or known to the coordinator, as either qualifying as parties under Rule 14(A) or who may be affected by the outcome of the opinion,” if the person requesting the opinion wants it to be a final determination. EBR 3(C)(1). Board rules also require any petitioner for declaratory ruling to serve the petition on “all parties under Rule 14(A) and any other persons on whom the district coordinator served the opinion.” EBR 3(D).

Furthermore, the following statement was included on the last page of the JO and the Reconsidered JO:

Failure to appeal within the prescribed period shall render the jurisdictional opinion the final determination with respect to jurisdiction under this chapter unless the opinion has not been properly served on parties that would normally be entitled to notice under 10 V.S.A. § 6084 and Board Rule 14(A), and on persons and entities who may be affected by the outcome of the decision, according to the Rules of the Board.

It is apparent from the initial filings in this proceeding, which include the JO, Reconsidered JO, and a letter from Petitioners’ engineer requesting each, that Petitioners requested the JO and Reconsidered JO without the benefit of counsel. Nevertheless, to the extent that Petitioners sought a final decision, they should have provided a list of adjoining property owners to the Coordinator.

Some time after the JO and Reconsidered JO were requested and issued, Act 250 was amended to require that applicants and persons requesting jurisdictional opinions submit a list of adjoining property owners. 10 V.S.A. § 6084 (eff. Jul. 1, 2004). In addition, the Vermont Supreme Court has construed EBR 3(C)(1) to require the person requesting a jurisdictional opinion to provide the names “of all persons the requestor knows may be affected by the outcome of the opinion” for that opinion to be final. *In re Catamount Slate*, 844 A.2d 787, 791-792 (2004).

Also, although the Pullinens’ petition was filed late, the matter is still open. *Compare, In re White*, 172 Vt. 335, 340-341 (2001)(holding that inadvertent failure to provide adjoining landowner with notice of application is not grounds for revocation, and distinguishing *In re Conway*, 152 Vt. 526 (1989) on the grounds that the permit appeal was still pending when the Board remanded to cure a lack of notice).

As discussed below, the Pullinens' petition establishes their entitlement to party status as adjoining property owners under EBR 14(A)(5). As adjoining property owners who could be directly affected, the Pullinens were entitled to notice of the JO and the declaratory ruling petition, and to participate in this proceeding. Because they only learned of this declaratory ruling proceeding after the hearing, the Pullinens were not given notice or an opportunity to be heard. The next question is how to cure this procedural defect.

The procedural defect can be cured by convening a new hearing and site visit in this declaratory ruling. There is no need to remand to the Coordinator, since there is no hearing process when a coordinator issues a JO. Holding a hearing and site visit will cause delay, since the next available hearing date is not until April 27, 2005. However, the delay is not unfair, given the Pullinens' rights to participate in this proceeding.

In preparation for the new hearing, the Petitioner may simply serve the Pullinens with a copy of the already prefiled exhibits and note this on the certificate of service, or may file new prefiled exhibits. The Board notes that Petitioners submitted only one exhibit for the original hearing, and the Board took official notice of the tax map, so another round of filings should not be unduly burdensome.

Under these circumstances, the Board finds good cause to accept the Pullinens' untimely filing, in accordance with EBR 14(C).

B. Petition for Party Status as Adjoining Property Owners

The Pullinens seek party status as adjoining property owners under EBR 14(A)(5). The rule provides party status to "[a]ny adjoining property owner who demonstrates a property interest under any of the criteria listed at 10 V.S.A. Section 6086(a) which may be directly affected by the outcome of the proceeding." EBR 14(A)(5). There is no dispute that the Pullinens own adjoining property. Their primary residence at 4 West Main Street adjoins the residential parcel that Petitioners propose to turn into a parking lot for their automobile dealership.

The question, therefore, is whether the Pullinens have an interest under any Act 250 criterion that could be affected directly by the proposed Project. *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). The Pullinens claim that the Project will have several adverse

impacts. Specifically, the Pullinens allege that the Project will remove a residential home that buffers their view of, and noise from, Route 103/Main Street. This is sufficient to demonstrate an interest under Criterion 8(aesthetics) that may be directly affected. They also allege that the Project will increase traffic and impede visibility at the intersection at the end of their street, which they claim is a dangerous intersection already. The Board accepts allegations in party status petitions as true, unless a party to the proceeding disputes the allegations and requests a hearing. *Re: McLean Enterprises Corporation, #2S1147-1-EB, Memorandum of Decision at 5-6 (Sept. 19, 2003)(citations omitted).* These allegations demonstrate an interest under Criterion 5(traffic congestion and safety), and possibly Criterion 9(K)(public investments) that could be directly affected by the Project.

Because the Pullinens have demonstrated that their interests under at least one Act 250 criterion may be directly affected, they are entitled to party status under EBR 14(A)(5).

IV. ORDER

1. Patrick and Judith Pullinen's petition for party status pursuant to EBR 14(A)(5) is GRANTED.
2. The Chair shall issue a Scheduling Order setting this matter for a new hearing.

DATED at Montpelier, Vermont this 4th day of February, 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Patricia Nowak
Alice Olenick
Jean Richardson
Christopher D. Roy
Richard C. Pembroke, Sr.