State of Vermont
Water Resources Board

In re: Appeal of Larivee **Authority:**
Docket No. CUD-92-09 **10 V.S.A. § 1269**

MEMORANDUM OF DECISION ON PRELIMINARY ISSUES

This decision pertains to two preliminary issues raised by the parties in the above-captioned appeal. As is explained below, the Water Resources Board ("Board") has decided that Ms. Larivee's appeal is properly before the Board and that the Board should proceed to a hearing on the merits.

I. BACKGROUND

On May 25, 1992, the Wetlands Office of the Department of Environmental Conservation of the Agency of Natural Resources granted Conditional Use Determination ("CUD") #92-142 to Oon Teong Ko of Montreal, Canada, authorizing construction of five driveways within a Class II wetland and buffer zone for an eight (8) lot subdivision on land owned by his wife, Wye Meng Cheong Ko, on Maquam Shore Road in Swanton, Vermont. On or about June 3, 1992, Louise Larivee, a member of the Abenaki Nation, filed a written notice of appeal with the DEC. This notice was referred to the Water Resources Board ("Board") and subsequently perfected. Parties to this appeal are Ms. Larivee, the appellant and representative of the Abenaki Nation; the appellee by power of attorney, Mr. Ko; and the Agency of Natural Resources (ANR).

On April 20, 1993, in Swanton, Vermont, the Water Resources Board convened a hearing in this matter. Chairman Rocheleau presided, and Board members present included Potvin and Reynes. The appellant was represented by Arthur J. Ruben, Esq. The appellee, Mr. Ko, was represented by attorneys Carl Lisman and Douglas K. Riley of the firm Lisman and Lisman. Also present and participating was Anne Whiteley, Acting General Counsel of ANR.

In opening statements to the Board, the parties raised two preliminary issues which the Board took under advisement. Because these issues called into question the jurisdiction of the Board to hear this appeal on the merits, the Board recessed the hearing to provide the parties an opportunity to brief the issues. The Board deliberated on May 10, 1993. The Chairman subsequently recused himself. On June 1, 1993, the Board elected member Reynes to serve as Acting Chair. Board members who reviewed the record and participated in the deliberations with respect to the preliminary issues were: Reynes, DesMeules, Einstein and Potvin.

II. ISSUES

The issues before the Board are:

a. Can a person, other than the applicant for a CUD, appeal the decision of the Secretary of ANR with respect to a CUD request?

b. If the Secretary of ANR, in issuing a CUD, fails to make written findings and conclusions with respect to each wetland function, should the Board remand the matter to the Secretary for further consideration?

III. DISCUSSION

A. Appellant other than the Applicant

The appellee argues that only an applicant for a CUD may appeal the Secretary's determination with respect to the applicant's CUD request and, therefore, the Board is without jurisdiction to hear an appeal filed by a person other than the applicant.

The appellee asserts that the only statutory mechanism for regulating development in a wetland is 10 V.S.A. § 1272. That section authorizes the Secretary to issue an order establishing reasonable and proper methods and procedures for the control of an activity which reasonably can be expected to violate the Vermont Wetland Rules ("Wetland Rules"). The appellee maintains that the CUD process created by Section 8 of the Wetland Rules is the mechanism by which the Secretary may issue a 1272 order. Section 1272 provides that "[a]ny person who receives an order pursuant to this section may appeal to the board as provided in section 1269 of this title." The appellee argues that the express language of this provision limits the right of appeal from CUD #91-142 to himself, the applicant. Because Ms. Larivee is not a proper appellant, the appellee argues that the Board, as a matter of law, lacks jurisdiction to consider Ms. Larivee's appeal.

The Board does not share this narrow reading of the statutes governing the regulation of wetlands or appeals to the Board. The Board concludes that a person, other than an applicant for a CUD, may appeal the Secretary's decision with respect to a CUD request.

The Board has broad authority to protect Vermont's significant wetlands. 10 V.S.A. § 905(7)-(9). This includes the power to adopt rules designed to protect the values and functions which make a particular wetland significant. 10 V.S.A. § 905(9). The CUD

process, enacted by Board rule, is the means by which an applicant may voluntarily obtain a determination from the Secretary that the development of a project may proceed in a significant wetland or its buffer zone in compliance with the Vermont Wetland Rules. Vermont Wetland Rules, Section 8. The authority for the Secretary's determination is 10 V.S.A. §§ 905b(18) and 1272. This is distinguishable from a § 1272 order issued by the Secretary on his own initiative to assure compliance with the Wetland Rules. 1

The CUD process is not a new permitting process. Rather, the issuance of a CUD is akin to the issuance of an advisory opinion subject to appeal to the Board. Although 10 V.S.A. § 1272 assures that the applicant for a CUD has an automatic right of appeal, 10 V.S.A. § 1269 authorizes a right of appeal to "[a]ny person or party in interest aggrieved by an act or decision of the secretary." The Board reads this statute to permit other persons than an applicant to appeal the Secretary's determination. The Board looks to the Vermont Wetland Rules and its own Rules of Procedure to determine whether a person appealing a CUD satisfies the standing requirements of 10 V.S.A. § 1269.

The Vermont Wetland Rules clearly contemplate that persons living in the vicinity of a significant wetland may have an interest in the protection of that wetland. The Wetland Rules expressly provide for public notice of an application and an opportunity for public comment. Section 8.2 and 8.3, Vermont Wetland Rules. Further, Section 9 of the Wetland Rules states that any act or decision of the Secretary under the Wetland Rules may be appealed to the Board pursuant to 10 V.S.A. § 1269. The Board has previously determined that Ms. Larivee, as representative of the Abenaki Nation, is a person or party in interest entitled to a de novo hearing with respect to the Secretary's CUD decision. In re: Appeal of Larivee, Docket No. 92-09, Preliminary Order on Party Status at 2-3, 4-5, (March 16, 1993). Therefore, the Board implicitly determined that Ms. Larivee was and is a proper appellant under § 1269.

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1 Although the ANR did not file a brief on this issue, counsel for the agency observed at hearing that the ANR distinguishes between § 1272 orders and CUDs. She noted that the ANR had not found the appellee in violation of the Wetland Rules. Rather, the appellee had applied for a CUD. The authority to create and implement the CUD process is found in the Board's rulemaking authority, 10 V.S.A. § 905(9), and the ANR's general authority to protect wetlands and prevent water pollution. See, for examples, 10 V.S.A. § 905b(18) and 10 V.S.A. ch. 47. The Secretary has complementary enforcement powers under 10 V.S.A. § 1274.

Both Rule 22(A) and 22(B) of the Board's Rules of Procedure require that a person seeking review of the ANR's decision demonstrate "a substantial interest which may be adversely affected by the outcome of the proceeding." Ms. Larivee's notice of appeal as supplemented identifies herself as a member and representative of the Abenaki Nation and describes both the historical and present utilization of the subject wetland by members of the Nation residing in the vicinity. These include the use of the wetland and its plant and animal resources for food, medicine, recreation and instruction. Ms. Larivee asserts that the applicant's activities within this significant wetland may adversely affect the wetland's capacity to store stormwater runoff, to maintain water quality, and to provide significant vegetative and wildlife habitat, thereby threatening the wetland's continued use and significant value for Abenaki education in the natural sciences, hunting and gathering, and enjoyment of open space.

The interest which Ms. Larivee and the Abenaki Nation have in the subject wetland is clearly a specific interest in the subject wetland rather than a general concern for the natural resources of the state. In re: Appeal of VNRC, Docket Nos. 92-02 and 92-05, Preliminary Order at 4-5 (August 18, 1992). The Board has previously determined that this interest may be adversely affected by the outcome of this proceeding and that there exists no other alternative means to protect this interest. In re: Appeal of Larivee, Docket No. 92-09, Preliminary Order at 4-5 (March 16, 1993).

Therefore, the Board concludes that Ms. Larivee, as representative of the Abenaki Nation, is a person in interest aggrieved by the Secretary's CUD determination and, therefore, a proper appellant. The Board has jurisdiction to hear this appeal.

B. Remand vs hearing the matter de novo

As noted above, appeals from the Secretary's conditional use determinations are appealable to the Board pursuant to 10 V.S.A. § 1269. Section 1269 requires the Board to hold a de novo hearing with the result that the Board shall issue an order "affirming, reversing or modifying the act or decision of the secretary." The Vermont Supreme Court has stated:

> A de novo hearing is one where the case is heard as though no action whatever had been held prior thereto. All of the evidence is heard anew, and the probative effect determined by the appellate tribunal ... as though no decision had been previously rendered.

In re Poole, 136 Vt. 242, 245 (1978). It is error for the Board merely to affirm or reverse the decision of the administrative body from which the appeal has been taken. Id. at 246. In fact, no deference need be paid to the decision below. Chioffi v. Winooski Zoning Board, 151 Vt. 9, 11 (1989). The Board has recognized these principles in its own proceedings, most recently in its Prehearing Conference Order and Preliminary Order in the case, In re: Appeal of VNRC, Docket No. DAM-92-02, at 5-6 (Apr. 10, 1992).

Nonetheless, there are instances where remand to the administrative agency below is appropriate. Jurisdictional defects, such as a failure to provide adequate notice, require an appellate body with de novo power to remand. In re Conway, 152 Vt. 526 (1990); In re Torres, 154 Vt. 233 (1990). Also, courts of general jurisdiction charged with de novo review of administrative decisions have the discretion to remand a matter where the court is presented with new issues never presented to the agency below and justice so requires. In re Maple Tree Place, 156 Vt. 494, 498-500 (1991). Although this Board has no express authority to remand, it has used its implied or inherent power to remand under similar circumstances. See In re Appeal of Angney, Docket No. MLP-89-14 (Feb. 12, 1991.)

Both the appellee and ANR cite ample authority in support of the conclusion that deficiencies in the Secretary's findings in this case do not create a jurisdictional defect requiring remand. In particular, counsel for ANR refers the Board to a recent Waste Facility Panel decision for the proposition that where a board has been granted de novo authority by the Legislature, it must hear the matter anew and that allegations regarding deficiencies in the lower agency's findings are not relevant, except perhaps in determining the scope of the appeal. In re: Dorr Septic System Co., #I9220-WFP, Memorandum of Decision (Jan. 7, 1993). The Dorr decision follows the general line of cases that inadequate findings of fact are not equivalent to a failure to render a decision. City of Rutland v. McDonald's Corp., 146 Vt. 324, 330 (1985).

The Board agrees with the appellee and ANR that this matter should not be remanded to the Secretary. The appellant seeks a fresh review of the appellee's CUD application in order to obtain a determination whether it complies with the requirements of the Vermont Wetland Rules. A de novo hearing before the Board, with the right to present evidence and cross-examine witnesses, is appropriate and warranted.

In reaching this decision, the Board cautions that in other appeals from ANR determinations, defects in notice or other circumstances may result in remands to the agency.

IV. ORDER

1. Ms. Larivee, as representative of the Abenaki Tribe, is a proper appellant in this CUD proceeding, pursuant to 10 V.S.A. § 1269 and the Vermont Wetland Rules.

2. The Board shall hold a de novo hearing on the merits of Ms. Larivee's appeal.

Dated at Montpelier, Vermont, this 13th day of July, 1993.

Vermont Water Resources Board
by its Acting Chair

Stephen Reynes

Concurring: Mark DesMeules
Ruth Einstein
Jane Potvin

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