

State of Vermont

In re: Appeal of Larivee
Docket No. CUD-92-09

Authority:
10 V.S.A. § 1269

MEMORANDUM OF DECISION ON
APPELLANT'S MOTION TO COMPEL ACCESS TO SITE

This decision pertains to a Motion to Compel Access to Site for Investigative Purposes filed by Louise Larivee, on behalf of the Sovereign Abenaki Nation ("appellant"). As is explained below, the Water Resources Board ("Board") has decided to grant in part and deny in part the appellant's request. The Board specifically denies appellant's request to obtain access to the Ko property on Saturdays, August 7, 14, and 21, 1993.

I. BACKGROUND

This proceeding involves an appeal from Conditional Use Determination #92-142, issued by the Department of Environmental Conservation, Agency of Natural Resources, to Oon Teong Ko, as power of attorney for Wye Meng Cheong Ko ("the applicant"). The Conditional Use Determination ("CUD") authorizes the construction of five driveways within a Class II wetland and buffer zone for an eight (8) lot subdivision on land owned by Wye Meng Cheong Ko, located in Swanton, Vermont. The Board's appellate review of the Ko CUD application is de novo. 10 V.S.A. § 1269; Vermont Wetland Rules, Section 9.

On April 29, 1993, the appellant filed with the Board a Motion to Allow Access to Site for Investigative Purposes. The appellant sought access to the Ko property to enable her expert witnesses to gather information in preparation for a hearing on the merits. The Board decided that it would not issue an order then, given the appellant's failure to demonstrate that the request for permission to enter the site had been refused and that the information sought was unavailable from another source. The parties were encouraged to reach an agreement on the terms of a site inspection, and if an agreement could not be reached, the appellant was permitted to petition the Board no later than July 28, 1993. Memorandum to Parties from the Board's Legal Counsel, July 13, 1993.

On July 28, 1993, the Board received a second Motion to Compel Access to Site for Investigation from the appellant. This motion described the appellant's attempts to secure dates for site inspection of the Ko property. The appellant asked the Board to compel access to the site from 9:30 a.m. until sunset on three successive Saturdays: August 7, 14, and 21, 1993.

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On August 2, 1993, the applicant timely filed with the Board a Response to Appellant's Motion to Compel Access. The applicant asserted that it had not denied reasonable access to the subject site and referred the Board to various provisions of the Vermont Rules of Civil Procedure in support of its position.

The Board deliberated with respect to this matter on August 4, 1993.

II. DISCUSSION

The Board has determined that it has the inherent authority to issue a motion to compel access to a property subject to its jurisdiction. The Board's enabling legislation grants it the express authority to "require the production of evidence and enter upon lands for the purposes of inspecting and investigating conditions related to the conduct of its duties" as set forth in 10 V.S.A. ch. 37, subch. 2. 10 V.S.A. § 905(1)(B). The Board's authority to protect significant wetlands is found in 10 V.S.A. ch. 37, subch. 2. 10 V.S.A. § 905(7)-(9). The Board believes that in an appeal from a CUD determination, it has authority to issue an order requiring the applicant to admit another party access to its property for purpose of site evaluation in preparation for a de novo hearing on the merits of the CUD application. Other agencies have found such inherent authority. See, for example, In re: Finard-Zamias Associates, Docket No. 1R0661-EB, Memorandum of Decision (March 28, 1990) (Environmental Board has power to issue order requiring applicant to admit party access to land for purposes of evaluation).

Where its own Rules of Procedure are silent on procedural practice, the Board has turned in the past to the Vermont Rules of Civil Procedure for guidance. Rule 26(b), V.R.C.P., sets forth the scope and limits of discovery. It states, in relevant part, that the frequency or extent of use of various discovery methods, including requests for permission to enter upon land, shall be limited by a Superior Court judge

if it is determined that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation.

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While all of the above considerations limiting discovery are not presented by appellants' present request, clearly criteria (iii) is implicated. Rule 34(b), V.R.C.P., requires a person seeking inspection of property to specify in his request "a reasonable time, place, and manner of making the inspection and performing the related acts." The reasonableness of that request is to be determined in light of the scope of Rule 26(b). V.R.C.P. Rule 34(a). Additionally, where a party from whom discovery is sought objects to a motion to compel on the basis that it is unduly burdensome or expensive, the decisionmaker must consider whether discovery should be granted and, if so, under what specified terms or conditions in order to protect that person from undue burden of expense. Rule 37(a)(2) and Rule 26(c), V.R.C.P.

The Board has determined that it is unreasonable and unduly burdensome to require the applicant to make his property available for inspection on the requested three Saturdays. Although the Board recognizes that the appellant is relying on the volunteer services of experts in developing her case, the Board is unwilling to compel the applicant to admit the appellant's experts access to the site on days outside the regular work week, at times when the applicant's identified expert, Mr. Spear, is unavailable to observe the inspection process. The Board believes that evaluation of the site can be performed during weekdays, during hours mutually agreed upon by the parties, including early morning and late afternoon hours. The applicant has previously proposed numerous weekdays when site inspections could be accommodated. Therefore, the Board denies the appellant's motion to the extent that she requests access to the Ko property on Saturdays, August 7, 14, and 21, 1993.

Therefore, the Board, having considered appellant's motion and the applicant's response hereby issues the following order.

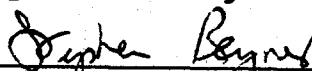
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III. ORDER

1. The appellant's Motion to Compel Access to Site for Investigative Purposes is denied to the extent that it seeks access to the Ko property on Saturdays, August 7, 14, and 21, 1993.
2. The applicant is ordered to make the Ko property available for inspection by the appellant and her experts on a minimum of three weekdays prior to August 25, 1993. Site inspections shall be conducted within daylight hours on dates and at times mutually agreed upon by the parties.

Dated at Montpelier, Vermont, this 12th day of August, 1993

Vermont Water Resources Board
by its Acting Chair



Stephen Reynes

Concurring: Ruth Einstein
Jane Potvin

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