State of Vermont
WATER RESOURCES BOARD

In re: Champlain Oil Company (Denial of Conditional Use Determination #91-351), Docket No. CUD-94-11

PRELIMINARY ORDER

Party Status and Takings Issues

This order pertains to two preliminary issues: a Petition for Intervention filed by Gerald Bovat and a request by Champlain Oil Company for a ruling on whether the Board has the power to decide a takings claim under the United States and Vermont constitutions. As explained below, the Board denies petitioner Bovat's request for intervention as a party. The Board also declares that it has no authority to decide whether the Secretary's denial of Conditional Use Determination #91-351 constitutes a regulatory taking.

I. BACKGROUND

On August 12, 1994, the Water Resources Board (Board) received a notice of appeal filed by Champlain Oil Company (Champlain) from a decision of the Secretary of the Agency of Natural Resources (the Secretary) denying Conditional Use Determination (CUD) #91-351 to Champlain for the placement of 0.9979 acres of fill in a Class Two wetland to enable the construction of a convenience store, restaurant, gasoline service islands and parking spaces, at Champlain's property on Route 78 in the Village of Swanton, Vermont. Champlain, represented by John R. Ponsetto, Esq., filed its appeal pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules.

On August 15, 1994, this appeal was deemed complete and docketed. On September 19, 1994, a Notice of Appeal and Prehearing Conference was sent to persons required to received notice and on September 22, 1994, it was published in the St. Albans Messenger. Rule 18(C) and 20 of the Board's Rules of Procedure. A prehearing conference was held on October 6, 1994, and a Prehearing Conference Report and Order was issued on November 4, 1994.

On October 28, 1994, Gerald Bovat, represented by Scott Michael Mapes, Esq., filed a timely Petition for Intervention as a party pursuant to Rule 22 of the Board's Rules of Procedure. On November 10, 1994, in accordance with the terms of the Prehearing Conference Report and Order, Champlain filed a memorandum in opposition to Mr. Bovat's intervention request. In response to Champlain's filing, Mr. Bovat requested an opportunity to present oral argument to the Board. Oral argument was noticed and held before the Board on December 7, 1994, with counsel for Mr. Bovat and Champlain presenting their respective positions. At oral argument, the Board was presented with a Memorandum in Support of Gerald Bovat's Petition for Intervention. Upon objection by

Champlain, the Board's Chair ruled that this memorandum was not timely filed and would not be considered by the Board in its consideration of Mr. Bovat's intervention request.

In its Notice of Appeal, Champlain asserted that the Secretary's denial of CUD #91-351 amounted to a taking without compensation in violation of the fifth and fourteenth amendments of the United States Constitution and chapter I, article 2 of the Vermont Constitution. At the prehearing conference, the parties expressed interest in having the Board issue a preliminary ruling on the question whether the Board has the power to decide a takings claim under the United States and Vermont Constitutions. Gerald Bovat, the Abenaki Nation, and Champlain each filed timely memoranda with respect to this question, but no party requested oral argument. Therefore, oral argument on December 7, 1994, was limited to Gerald Bovat's Petition for Intervention.

The Board deliberated with respect to Mr. Bovat's intervention request and the takings issue on December 7, 1994, and January 3, 1995.

II. DISCUSSION

A. Party Status of Gerald Bovat

In an appeal from a CUD decision of the Secretary, the Board is authorized to hold a de novo hearing "at which all persons and parties in interest as determined by Board rule may appear and be heard...." 10 V.S.A. § 1269 and Vermont Wetland Rules, Section 9. 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. In re: Appeal of Larivee, Docket No. CUD-92-09, Memorandum of Decision at 3 (July 13, 1993). For example, Section 8.2 of the Vermont Wetland Rules requires the applicant for a CUD to provide notice of its request to all persons owning property within or adjacent to the wetland or buffer zone in question. However, a person's ownership of property within or adjacent to a significant wetland or its buffer zone does not per se entitle that person to party status in a CUD appeal.

Rule 22 of the Board's Rules of Procedure sets forth the standards governing the grant of party status as of right or by permission. Party status as of right may be granted to any person entering a timely appearance and "demonstrating a substantial interest which may be adversely affected by the outcome of the proceeding where the proceeding affords the exclusive means by which that person can protect that interest and where the interest is not adequately represented by existing parties." (Emphasis added.) Rule 22(A)(7). The Board may grant permissive party

status to any person who "demonstrates a substantial interest which may be affected by the outcome of the proceeding." (Emphasis added.) Rule 22(B)(3). A comparison of the two sections of Rule 22 reveals that in order for a person to obtain intervention, either as of right or by permission, he or she must "demonstrate a substantial interest" which will in some degree be affected by the outcome of the proceeding.

In his Petition for Intervention, Gerald Bovat requested permission to intervene as a party pursuant to Rule 22 of the Board's Rules of Procedure.1 In his petition, Mr. Bovat alleged that he owns land and a commercial enterprise adjacent to the wetland complex and land owned by Champlain that are the subject of this appeal and that he supports the Secretary's denial of CUD #91-351. Although Mr. Bovat asserted that Champlain's proposed project would have an undue adverse impact on several specified protected wetland functions and also represented that he has "significant property rights meriting protection which rights may not be fully represented by any other party to this proceeding," Mr. Bovat's petition failed to describe what those "property rights" might be and how they would be affected by Champlain's proposed activity within the significant wetland. He did not allege that he actually uses or benefits in some specific way from the subject wetland nor did he state with specificity how Champlain's project might adversely affect "his property rights" through alleged impacts on the wetland's protected functions. In short, Mr. Bovat did not offer "a detailed statement" of his interest in this proceeding, thereby enabling the Board to determine whether that interest is "substantial" and whether it might be affected by the outcome of this proceeding. See Rule 22(B)(1)(a) and (3).

At oral argument, counsel for Mr. Bovat sought to supplement the original petition with a Memorandum in Support of Gerald Bovat's Petition for Intervention. The Board finds that the Chair properly ruled that this memorandum was untimely and should not be considered in deciding Mr. Bovat's party status request. Contrary to the assertion of counsel for Mr. Bovat, this situation is not analogous to the Board's decision in another appeal to ask a pro se petitioner to supplement his party status request with evidence to substantiate the assertion that his property adjoined that of the applicant for the CUD or the wetland in question. See In re: Appeal of Larivee, Docket No. 92-09, Preliminary Order at 4 (March 16, 1993); WRB Minutes of September 16, 1992

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1 Gerald Bovat's Petition for Intervention did not indicate whether Mr. Bovat seeks intervention pursuant to Rule 22(A) (intervention as of right) or Rule 22(B) (permissive intervention). However, for purposes of this decision, the distinction is not relevant.

Counsel for Mr. Bovat had participated in the Prehearing Conference at which the process for seeking intervention was fully discussed and had been directed by the Prehearing Conference Report and Order to file a petition "addressing the standards for intervention in Rule 22" by October 31, 1994. See Prehearing Conference Report and Order at 3 (Section V.) and 5 (Section XI., 2). His failure to provide a facially adequate petition supporting his client's request within the time frame established for all would-be intervenors cannot in fairness to the parties be remedied by a filing offered at the time of oral argument.**2**

The Board, therefore, denies Gerald Bovat's Petition for Intervention. It does so because Mr. Bovat has failed to timely demonstrate that he has a substantial interest which may be affected by the outcome of this proceeding. The Board, in making this ruling, specifically rejects the arguments of counsel for Champlain that Mr. Bovat should be denied party status because he might be motivated by a competitive business interest, given that he owns a gas station on property adjoining Champlain's parcel,**3** or because he allegedly has "unclean hands", having built his gas station on filled land within the significant wetland that is the subject of this proceeding.

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2 Pursuant to Rule 22(B)(3), the Board, in exercising its discretion whether to grant permissive intervention, is directed to consider: (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant can protect his interest; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

Although Mr. Bovat indicated in his petition that he supports the Secretary's denial of CUD #91-351, his Petition for Intervention fails to adequately explain why other parties to this proceeding also supporting denial of the CUD application (for example, ANR) can not adequately protect his interest. Moreover, Mr. Bovat has neglected to address standards (2) and (3).

3 The Board is mindful that alleged injury to a business interest, alone, does not support a grant of party status. See Chittenden Solid Waste District v. Casella Waste Management, Inc., Vt. No. 93-419, slip op. (May 27, 1994). However, the Board is not prepared to conclude that a business competitor should be denied party status where he or she has demonstrated a "substantial interest" which may be directly affected by alleged adverse impacts on protected wetland functions.

B. The Takings Issue

In its Notice of Appeal, Champlain asserted that the Secretary's denial of CUD No. 91-351 was in error in that it amounted to "a taking, for which compensation is required but has not been made, a violation of the Fifth and Fourteenth Amendment[s] of the United States Constitution and Chapter I, Article 2 of the Vermont Constitution." As a result of the prehearing conference and the comments of the parties, the question was reframed to state:

> Whether Champlain has been denied all economically beneficial and productive use of its land, a taking for which compensation is required pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and Chapter I, Article 2 of the Vermont Constitution.

Prehearing Conference Report and Order at 2 (Section II.) (November 4, 1994).

At the prehearing conference, the parties expressed concern that the Board might not have the authority to decide a regulatory takings claim. It was therefore agreed that they should have an opportunity to brief the issue of the Board's power in the context of a request for a preliminary ruling. The question, as it appears in the Prehearing Conference Report and Order at 3 (Section IV.) is:

> Whether the Board has the power to decide a takings claim under the United States and Vermont Constitutions.

The Board received timely memoranda on this question from Champlain, the Abenaki Nation, and Mr. Bovat. Each argued that the Board has no authority to decide a takings claim: (1) because the Board has no explicit statutory authority to consider such claims, and (2) because the power to decide constitutional questions is vested in the courts.

The Board agrees with the parties' conclusion that it has no power to determine whether the Secretary's act or decision amounted to a taking. However, it reaches this conclusion for reasons slightly different than those argued by the parties.

Clearly, the Board may not adjudicate the constitutionality of statutes. That power is vested in the courts. See Westover v. Village of Barton Electric Dept., 149 Vt. 356 (1988). Moreover, while a court is arguably a better forum than an administrative agency for resolving constitutional claims, it cannot be said that an administrative agency necessarily lacks the power to decide constitutional questions. Swan v. Stoneman, 635 F.2d 97, 104 (2d Cir. 1980). An administrative agency may determine the "constitutional

applicability" of law to particular facts where relevant and necessary to resolve questions concededly within its jurisdiction. Thus, the Vermont Supreme Court has ruled that the State Board of Appraisers can adjudicate constitutional questions in determining the validity of town appraisals where the Legislature has clearly so provided. Alexander v. Town of Barton, 151 Vt. 148, 151 (1989).

The statutory basis for the Board's power to hear the present matter is 10 V.S.A. § 1269. Section 1269 states in relevant part: "The board shall hold a de novo hearing... and shall issue an order affirming, reversing or modifying the act or decision of the secretary...." Section § 1269 requires the Board to conduct a contested case hearing in which the matter under appeal is heard as though no action whatever had been taken by the Secretary. All evidence is heard anew and the probative effect of that evidence is determined as though no decision had been previously rendered. See In re: Poole, 136 Vt. 242 (1978) (meaning of de novo hearing explained).

The Board only has such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly or necessarily implied as are necessary to the full exercise of those granted. Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1 (1941). Neither 10 V.S.A. § 1269 nor the statutes granting the Board authority to designate and protect wetlands expressly authorize the Board to determine whether an act or decision of the Secretary amounts to a regulatory taking. Moreover, the Board can find no implied authority. First, courts have historically decided takings claims, and the Vermont Supreme Court has recognized a cause of action for takings claims generally. Southview Assocs. v. Bongartz, 980 F.2d 84, 100 (2d Cir. 1992). Secondly, the de novo nature of § 1269 appeals means that the Secretary's act or decision is not final unless affirmed by the Board. Therefore, the question of whether the Secretary's act or decision amounts to a regulatory taking is neither ripe nor within the Board's jurisdiction to decide, since the Board must make its own findings and conclusions of law and issue its own order governing the disposition of a CUD appeal before a state court may properly determine whether a taking has occurred.**4**

Although the Board determines today that it does not have the power to decide whether the act or decision of the Secretary constitutes a regulatory taking, it believes that the parties are prudent in raising and preserving all questions before the Board, even those beyond the power of the Board to decide. In re Burlington Housing Auth., 143 Vt. 80, 81-82 (1983); In re Denio, 158 Vt. 230, 234-235 (1992).

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4 Of course, the Board is mindful that its own acts and decisions must comport with constitutional norms.

III. ORDER

For the forgoing reasons, it is hereby order that Gerald Bovat's Petition for Intervention is denied.

The Board also declares that it has no authority to decide whether the Secretary's denial of Conditional Use Determination #91-351 constitutes a regulatory taking.

Dated at Montpelier, Vermont, this 3rd day of January, 1995.

Vermont Water Resources Board
by its Chair

William Boyd Davies

Concurring:

William Boyd Davies, Chair
Stephen Dycus
Ruth Einstein
Gail Osherenko
Jane Potvin