

State of Vermont
WATER RESOURCES BOARD

RE: Lost Cove Homeowners Assoc. Inc.
Docket No. CUD-98-04 (DEC #97-185)
(Gale Driveway, near Brickyard and Red Rocks Road, Colchester, Vermont)

PREHEARING CONFERENCE REPORT AND ORDER

On October 29, 1998, Water Resources Board ("Board") Chair William Boyd Davies convened a prehearing conference in Montpelier, Vermont, in the above-captioned matter. The following persons participated:

Lost Cove Homeowners Association, Inc. ("LCHA" or "Appellant"), by William Alexander Fead, Esq., Paul, Frank & Collins, Inc.; and Barden Gale and Melanie Gale Amhowitz ("CUD applicant"), by William W. Schroeder, Esq., Downs Rachlin & Martin, PLLC, and Paul Gale, agent

I. BACKGROUND

On August 24, 1998, the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), issued Conditional Use Determination ("CUD") #97-185 to Paul Gale, agent for Barden Gale and Melanie Amhowitz. The CUD allows the construction of a driveway to serve a residential lot and the installation of a 24-inch culvert within a Class II protected wetland and buffer zone. The subject wetland and buffer zone are located on the west side of Brickyard Road in the Town of Colchester, Vermont.

On September 23, 1998, the LCHA filed an appeal of CUD #97-185 to the Board. This appeal was filed pursuant to 10 V.S.A. §1269 and Section 9 of the Vermont Wetland Rules ("VWR").

On September 23, 1998, the Executive Officer of the Board sent a letter to the Appellant advising it that the Notice of Appeal was substantially incomplete. On October 8, 1998, the Appellant perfected the appeal and this matter was docketed as CUD-98-04.

On October 9, 1998, a Notice of Appeal and Prehearing Conference was issued and subsequently published in the Burlington Free Press in accordance with Rule 20 of the Board's Procedural Rules ("Procedural Rules").

On October 29, 1998, the Board's Chair convened a prehearing conference in this matter pursuant to Procedural Rule 24.

II. PURPOSE OF PREHEARING CONFERENCE

The Chair described the purpose of a prehearing conference. See Procedural Rule 24. The Chair advised those present to obtain copies of the Procedural Rules, as well as the VWR, to prepare for the hearing in this matter. The Chair advised the parties that the Board is in the process of amending its Procedural Rules. He noted, however, that even if new rules are adopted during the pendency of this proceeding, the Procedural Rules (effective April 25, 1988) will govern practice before the Board in this case.

III. DISCLOSURES

The Chair identified for the prehearing conference participants the current Board members: members Davies, Einstein, Gossens, Osherenko, and Potvin. He distributed copies of biographical notes for these persons and asked the participants whether they were aware of any conflicts of interest or other disqualifying interests which might prevent one or more of the identified persons from serving as decision makers in this proceeding. Those participating in the preheating conference indicated that they were not aware of any conflicts of interest or other circumstances requiring disqualification of one or more of the named Board members. However, the Chair and representatives for the prehearing conference participants made the following disclosures:

- (1) Counsel for the CUD applicant disclosed that he is being called as an expert witness for some of the defendants in real estate litigation in Orleans County. The Chair disclosed that he is a nominal defendant in the case. Counsel for the CUD applicant is not being called as a witness for the Chair. Based on this disclosure, counsel for both parties indicated that they waived objection to the continued participation of the Chair in this appeal,.
 - (2) Counsel for the CUD applicant disclosed that a partner in his law firm was a former Chair of the Water Resources Board. The Chair further disclosed that Cathy Rachlin, wife of one of the partners of Downs Rachlin and Martin, also was a former Chair of the Board and that the Rachlins occasionally attend social gatherings with the Chair. The Chair further revealed that he serves on the Board of the Northeast Vermont Development Association with the librarian for Downs Rachlin and Martin. Based on these disclosures, counsel for the parties did not object to the continued participation of the Chair in this appeal.
 - (3) The Chair disclosed that in 1971 he had sought, and been offered, employment with the firm of Paul, Frank and Collins, Based on this disclosure, counsel for the parties did not
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object to the continued participation of the Chair in this appeal.

Both the CUD applicant and the Appellant indicated that they were aware of no facts requiring the recusal of the other Board members based on actual or perceived disqualifying interests.

Should new appointments be made to the Board during the pendency of this proceeding, or should the Chair need to appoint a former Board member to sit on this case (10 V.S.A. §905(1)(F)), additional disclosures will be made to the parties so that they may have an opportunity to file any requests for Board member disqualification.

IV. EX PARTE CONTACTS

The Chair cautioned the prehearing conference participants against communicating directly with Board members concerning this matter during its pendency. He directed all persons having procedural questions to bring them to the attention of the Board's attorney Kristina Bielenberg (Phone: 828-5443).

V. PRELIMINARY ISSUES

A. Party Status

The Chair asked if there were any objections to the grant of party status to the persons represented at the prehearing conference. He noted that no other persons, including the ANR, had entered timely entries of appearance.

(1) The Chair asked counsel for the CUD applicant whether the owners of the property to be served by the proposed driveway, Barden Gale and Melanie Gale Amhowitz, were the proper parties to this proceeding, even though the ANR had issued CUD #97-185 to Paul Gale, their agent and father. Counsel for the applicant conceded that the applicants and therefore the proper recipients of the CUD should have been the landowners and not their agent. It was noted, however, that Paul Gale, his children Barden and Melanie, and another member of the Gale family own land adjoining on two sides the lot at issue. Counsel for the Appellant initially stipulated that the names of Barden Gale and Melanie Gale Amhowitz could be substituted for that of Paul Gale as the recipient of the CUD should the Board grant a decision in the applicant's favor. Counsel for the Appellant subsequently withdrew this offer once his clients' party status was challenged by counsel for the CUD applicant.

(2) Counsel for LCHA indicated that he was representing the Homeowners Association as well as certain individual lot owners within the Lost Cove subdivision. The LCHA will soon own certain common lands adjoining the subject lot and/or proposed driveway now owned by the developer and certain homeowners in the LCHA currently own property adjoining the subject lot and/or proposed driveway.

In light of this disclosure, the Chair indicated that he would require the tiling of written party status petitions clarifying exactly which entities and individuals seek party status in this proceeding. Counsel for the CUD applicant indicated that he would likely object to any party status petition filed by LCHA and individual lot owners. The Chair noted that a petition by the Appellant or memorandum in opposition would need to address both the party status standards in Procedural Rule 22 and the standard for standing in 10 V.S.A. §1269.

B. Motion to Dismiss

Counsel for the CUD applicant indicated that he might file a motion to dismiss based on the doctrines of collateral estoppel or res judicata. He argued that the ANR had issued CUDs for other driveways crossing the wetland in question and that the LCHA's predecessor(s)-in-interest had participated in those proceedings and not objected to the issuance of these approvals. The LCHA asked for an opportunity to respond to such a motion if it were filed.

The Chair inquired whether such a motion could be decided without an evidentiary hearing and the prehearing conference participants responded that in their opinion it could be based on pleadings, copies of prior CUDs, and other written submissions. However, the Chair asked that parties advise the Board promptly if they determined that an evidentiary hearing would be required to decide this matter.

VI. ISSUES

The issues to be decided in this matter are:

- (1) Whether the proposed driveway and culvert will not result in an undue adverse effect on protected functions? Section 8.5(a) of the VWR.

The Chair noted that the Board presumes that a Class II wetland is significant for all ten functions listed in Section 5 of the VWRs, and therefore in a de novo proceeding the applicant for a CUD is expected to present evidence on the impacts of its project with respect to each of these functions. However, he further noted that the ANR had determined that the wetland was only minimally significant for functions 5.5 (hydrophytic vegetation), 5.6 (threatened and

endangered species habitat), 5.7 (education and research in natural science), 5.8 (recreational value and economic benefits), and 5.9 (open space and aesthetics) and further that the wetland, while it served other protected functions, might only be minimally impacted by the proposed driveway and culvert. Accordingly, the Chair indicated that he would require the Appellant to provide further written clarification concerning the protected wetland functions presumably adversely affected by the proposed driveway and culvert. Counsel for the Appellant indicated that its wetland consultant would provide it with this information within three weeks of the date of the prehearing conference.

- (2) If the proposed driveway and culvert will result in an undue adverse effect on protected functions are these impacts minimal? Section 8.5(a) of the VWR.
- (3) If the undue adverse effect on protected functions is more than minimal, has this impact been sufficiently mitigated to the extent necessary to achieve no net undue adverse effect? Section 8.5(b) of the VWR

Specifically, the Appellant stated that it challenges the ANR's conclusion that the proposed use cannot practicably be located on the upland portion of the site in question or on another site owned, controlled or available to satisfy the basic project purpose. Section 8.5(b)(1). In this regard, the Appellant noted that the lot owned by Barden Gale and Melanie Gale Amhowitz is surrounded by land owned by them, Paul Gale and another member of the Gale family. The Appellant asserts that the CUD applicant has upland available to it that can be used to create a driveway connecting the subject lot to Red Rock Road and therefore no wetland crossing is necessary.

The Appellant indicated that it only challenges the ANR's conclusion with respect to 8.5(b)(1) and does not seek review under the other mitigation standards.

VII. STANDARD OF REVIEW

The Chair reminded the prehearing conference participants that appeals filed pursuant to 10 V.S.A. §1269 are heard ~~as a~~ ~~consequence~~, parties are forewarned that any evidence that might have been submitted to the ANR in support of or in opposition to the application for CUD #97-185, including the application itself, must be resubmitted to the Board in the form of prefiled exhibits. The Chair further reminded the prehearing conference participants that the CUD applicant has the burden of proof and persuasion in proving that it is entitled to a CUD applying the standards set forth in Section 8.5 of the VWR.

VIII. WITNESSES AND EXHIBITS

The Chair explained to the prehearing conference participants that prefiled testimony and exhibits would be required in this proceeding. The Chair asked each participant to provide a preliminary list of witnesses and exhibits.

The Appellant indicated that it would be calling three or four witnesses (one wetlands expert, two LCHA members, and perhaps a person to provide land records and other municipal documents). Counsel for the Appellant indicated that if he were putting on a live case, he would need no more than a morning to present the LCHA's evidence. The Chair noted that with prefiled testimony, very little time is required for the offer and admission of exhibits, especially given that evidentiary objections are ruled on at a second prehearing conference held prior to the hearing on the merits.

The CUD Applicant indicated that it would likely call four or five witnesses (a civil engineer to address driveway access questions, a person with wetlands expertise, Paul Gale as agent for the landowners, Rick Davis who would testify in his capacity as the former developer of the Lost Cove development, possibly a person from ANR, and another person to provide land records and other municipal documents).

Neither party revealed what exhibits would be offered. However, the Chair encouraged those granted party status to work together, if possible, to prepare stipulated facts, identify exhibits to which there would be no objections, and develop a joint site visit itinerary and proposed report of site visit observations.

The Chair noted that the Prehearing Conference Order would contain specific instructions for the pre-filing of testimony and exhibits. He noted, however, that with respect to all filings, the parties are required to file original and five copies with the Board as well as a certificate of service indicating that each of the persons listed has been sent a copy of the filing in person or by first-class mail.

The Chair also noted that a second prehearing conference would be scheduled about a week before the hearing at which time he would make evidentiary rulings based on prefiled objections and review final plans for the hearing day and site visit.

X. HEARING DAY SCHEDULE

The Chair outlined for the prehearing conference participants the typical hearing day schedule and answered their procedural questions. Since prefiled testimony is required in this

proceeding, the Chair noted that the better part of the hearing day would be devoted to the site visit and the cross-examination of witnesses.

The Chair also noted that the hearing in this matter would be scheduled at a public facility in close proximity to the subject wetland. The parties recommended either the new municipal building in Milton approximately four or five miles away from the subject wetland and lot or the Hampton Inn in Colchester.

The proposed hearing day schedule is as follows:

- 9:00 a.m. Parties arrive at hearing site and review last minute details with Board's counsel,
 - 9:30 a.m. Hearing convened and Chair offers introductory comments.
 - 9:40 a.m. Five-minute opening statements by the CUD applicant and the Appellant.
 - 9:50 a.m. Board departs for a site visit of the subject wetland and project site.
 - 10:45 a.m. Board returns to hearing site, reconvenes hearing, and places site visit observations on the record.
 - 11:00 a.m. CUD applicant offers all prefiled direct and rebuttal evidence; appellant conducts cross-examination of appellants' witnesses, followed by redirect, recross and Board questions.
 - 12:00 noon Board breaks for Lunch.
 - 12:45 p.m. Hearing reconvenes.
 - 2:00 p.m. Appellant offers all prefiled direct and rebuttal evidence; CUD applicant conducts cross-examination of appellant's witnesses, followed by redirect, recross and Board questions.
 - 4:00 p.m. Time permitting, five-minute closing statements by CUD applicant and Appellant.
 - 4:15 p.m. Closing instructions by the Chair.
 - 4:20 p.m. Recess Hearing and Board holds Preliminary Deliberation.
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The Chair asks the parties to plan their cases in accordance with the above time allotments and, if additional time is required, to file requests for additional time in accordance with the Prehearing Order. He encourages parties to coordinate their testimony and argument so as to eliminate redundancy and achieve efficiency in the presentation of their respective cases.

XI. SCHEDULE

The Chair discussed with the prehearing conference participants the logistics for scheduling this matter for a hearing. A case such as this would normally be scheduled for mid-winter in order to meet the 6-month performance deadline established by the Board. The Chair asked the prehearing conference participants whether they foresaw any obstacles to the scheduling of a hearing accordingly.

The CUD applicant requested that a hearing not be held in this matter until June since Paul Gale, the agent for the CUD applicants, would be in Florida until that month. The Appellant agreed to the deferral of a hearing in this matter until June 1999.

Counsel for those present at the prehearing conference identified the following dates as presenting scheduling conflicts due to vacation plans: the week between Christmas and New Years Day, February 18 through March 1, and the last two weeks of April.

XII. SERVICE LIST

Counsel for the CUD applicant and the Appellant reviewed the certificate of service prepared for the Notice of Appeal and Prehearing Conference and identified those persons which could be eliminated due to their representation by counsel. Counsel for the CUD applicant specifically requested that Paul Gale be kept on the service list during the pendency of the proceeding.

Mr. Gale is instructed to provide the Board with a forwarding address for the winter months during which he will be in Florida.

XIII. STAYS

The Appellant asked whether the CUD would be stayed pending the outcome of the Board's proceeding. The Chair noted that this question, like others, could be answered by

referral to the Board's past decisions in CUD appeals. He specifically referred the prehearing conference participants to the case, In re: Appeal of Larivee, Docket No. CUD-92-09.

X. ORDER

1. On or before **4:30 p.m., Tuesday, November 17, 1998**, those persons seeking party status, including the Appellant, shall file with the Board petitions for party status addressing the standards in Procedural Rule 22. The Appellant shall also address in its petition the standard in 10 V.S.A. §1269 ("any person or party in interest aggrieved by an act or decision of the secretary"). Counsel for the CUD applicant shall clarify which of his clients have the requisite property interest to apply for and receive a CUD for the proposed driveway and culvert project.
2. On or before **4:30 p.m., Tuesday, November 17, 1998**, the Appellant shall clarify in writing the issues on appeal with reference to Section 8.5 and Section 5 of the VWR. The Appellant shall identify which protected functions are more than minimally impacted by the proposed driveway and culvert.
3. On or before **4:30 p.m., Tuesday, December 1, 1998**, parties may file written objections supported by legal memoranda to petitions for party status filed with the Board in accordance with Item 1 above.
4. On or before **4:30 p.m., Tuesday, December 1, 1998**, parties may file motions supported by legal memoranda on any preliminary issues identified in Section V.
5. On or before **4:30 p.m., Tuesday, December 1, 1998**, parties objecting to the issues as framed in Section VI. above, as modified by the Appellant's filing in accordance with Item 2 above, may file written objections supported by legal memoranda.
6. On or before **4:30 p.m., Tuesday, December 15, 1998**, parties may file any responsive legal memoranda with respect to the preliminary issues and the issues as framed in Sections V. and VI. above.
7. On or before **4:30 p.m., Tuesday, March 9, 1999**, the Appellant shall file lists of prefiled testimony and exhibits and prefiled direct testimony and exhibits for all witnesses it intends to present.

Prefiled direct exhibits which are larger than 8% by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the**

Board, and will be available for inspection and copying at the Boards office by any party prior to the hearing.

8. On or before **4:30 p.m., Tuesday, March 23, 1999**, LCHA shall file lists of prefiled testimony and exhibits and prefiled direct testimony and exhibits for all witnesses it intends to present.

Prefiled direct exhibits which are larger than 8% by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the Board**, and will be available for inspection and copying at the Board's off-ice by any party prior to the hearing.

9. On or before **4:30 p.m., Tuesday, April 13, 1999**, parties shall tile lists of prefiled testimony and exhibits and prefiled rebuttal testimony and exhibits.

Prefiled rebuttal exhibits which are larger than 8% by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the Board**, and will be available for inspection and copying at the Boards office by any party prior to the hearing.

10. On or before **4:30 p.m., Tuesday, May 11, 1999**, parties shall submit a single, combined list of all prefiled testimony and exhibits.
 11. On or before **4:30 p.m., Tuesday, May 11, 1999**, parties shall file in writing all evidentiary objections to all prefiled testimony and exhibits previously filed, except exhibits larger than 8% by 11 inches, or such objections shall be deemed waived.
 12. On or before **4:30 p.m., Tuesday, May 11, 1999**, parties shall tile in writing requests for time beyond the time allotments given in Section VII. above. The Chair may allow more time if good cause is shown.
 13. On or before **4:30 p.m., Tuesday, May 11, 1999**, parties shall tile a joint proposed itinerary for the site visit to be held on June 8, 1999. To the extent that the parties cannot agree concerning the relevancy of any proposed site visit itinerary item, they should communicate their disagreement in writing so that the Board's Chair may rule on the scope of the site visit.
 14. The Board Chair will conduct a second prehearing conference by telephone on **Tuesday, May 25, 1999 at 1:00 p.m.** to address any pending evidentiary objections, site visit, other preliminary rulings, etc. Any party wishing to participate in this conference should
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so advise the Board's Secretary, Karen Dupont (802-828-3354) on or before 12:00 noon on **Tuesday, May 11, 1999**. The Board's staff will arrange the conference call.

15. On **Tuesday, June 8, 1999**, the Board will convene a hearing in this matter. The specific time and location of this hearing shall be announced later.
16. The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter, provided such request is made on or before **4:30 p.m., Tuesday, May 11, 1999**. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must make his or her own arrangements with a reporter. One copy of any transcript made of the proceedings must be filed with the Board at no cost to the Board. See Procedural Rule 28(C).
17. On or before **4:30 p.m., Tuesday, June 15, 1999**, parties shall file proposed findings of fact, conclusions of law, and orders.
18. No individual may be called as a witness in this matter if he or she has not tiled pretiled testimony or exhibits in compliance with this Prehearing Order. All reports and other documents that constitute substantive testimony must be filed with the pretiled testimony. If prefiled testimony has not been submitted by the date specified, the witness may not be permitted to testify. Instructions for tiling pretiled testimony are enclosed.
19. The Board may waive the tiling requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
20. Parties shall tile an original and five **collated copies** of pretiled testimony, legal memoranda, all exhibits which are 8 1/2 by 11 inches or smaller, and any other documents tiled with the Board, and mail one copy to each of the **persons** listed on the enclosed sample Certificate of Service. The Certificate of Service will be revised once party status determinations have been made and a revised sample Certificate of Service will be sent to you at that time for your use in serving parties only.

Legal memoranda shall be no more than twenty-five pages and proposed findings of fact and conclusions of law shall be no more than fifty pages.

21. Each party shall label their pretiled testimony and exhibits with their name. The labels on the exhibits must contain the words WATER RESOURCES BOARD, Re: Lost Cove Homeowners Assoc., Inc., Docket No. CUD-98-04, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. **The completed labels must be affixed to all prefiled testimony and**
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exhibits prior to submission to the Board. Label stickers are available from the Board on request.

With respect to labeling, each party is assigned a letter as follows: "A" for CUD Applicant and "LCHA" for the Appellant. Exhibits shall be assigned consecutive numbers. For example, the CUD Applicant would number its exhibits A-1, A-2, A-3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. A-2A, A-2B, etc. However, each page of a multi-page exhibit need not be labeled.

Concerning preparation of the combined list of all **prefiled** testimony and exhibits, the list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and **prefiled** testimony. An **example** is as follows:

CUD APPLICANT'S
LIST OF EXHIBITS
RE: LOST COVE HOMEOWNERS ASSOCIATION, CUD-98-04

<u>Number</u>	<u>Description</u>	<u>Status</u>
A-1	Prefiled Direct Testimony of Paul Gale	
A-2	CUD Application filed with ANR on _____	
A-3A-D	Survey dated _____, sheets 3A through 3D	

The Board will use the status column to mark whether or not the exhibit has been admitted.

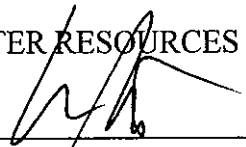
Exhibits offered to the DEC, ANR, for its consideration in evaluating the CUD request, if they are to be considered by the Board **de novo**, must be introduced into the evidentiary record for this proceeding.

22. Pursuant to Procedural Rule 24(B), this Order is binding on all parties who have received notice of the prehearing conference, unless a written objection to the Order, in whole or in
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part, is filed on or before **4:30 p.m., Tuesday, November 10, 1998**, or a showing of cause for, or fairness requires, waiver of a requirement of this Order. The filing of an objection shall not automatically toll that portion of the order to which an objection is made.

Dated at Montpelier, Vermont this 2nd day of November, 1998.

WATER RESOURCES BOARD



William Boyd Davies, Chair

proceeding, the Chair noted that the better part of the hearing day would be devoted to the site visit and the cross-examination of witnesses.

The Chair also noted that the hearing in this matter would be scheduled at a public facility in close proximity to the subject wetland. The parties recommended either the new municipal building in Milton approximately four or five miles away from the subject wetland and lot or the Hampton Inn in Colchester.

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6. On or before **4:30 p.m., Tuesday, December 15, 1998**, parties may file any responsive legal memoranda with respect to the preliminary issues and the issues as framed in Sections V. and VI. above.
7. On or before **4:30 p.m., Tuesday, March 9, 1999**, the CUD applicant shall file lists of prefiled testimony and exhibits and prefiled direct testimony and exhibits for all witnesses it intends to present.

Prefiled direct exhibits which are larger than 8½ by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the**
