

State of Vermont
WATER RESOURCES BOARD

RF: Barden Gale and Melanie Gale Amhowitz
Docket No. CUD-99-01 (DEC #98-340)
(Application of Gary and Paula Warner, Colchester, Vermont)

RE: Lost Cove Homeowners Association, 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 March 23, 1999, Water Resources Board ("Board") Chair William Boyd Davies convened a prehearing conference in Montpelier, Vermont, in the matter, In re: Barden Gale and Melanie Gale Amhowitz, Docket No. CUD-99-01. The following persons entered timely appearances and participated:

Barden Gale and Melanie Gale Amhowitz ("Appellants"), by William W. Schroeder, Esq., Downs Rachlin & Martin, PLLC; and
Gary and Paula Warner, by William Alexander Fead, Esq.,
Paul, Frank & Collins, Inc.

I. BACKGROUND

On December 14, 1998, the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), issued Conditional Use Determination ("CUD") #98-340 to Gary and Paula Warner ("CUD Applicants") of Shelburne and Colchester, Vermont. The CUD allows the CUD Applicants to establish a lawn and garden area ("Project") in the buffer zone of a Class Two wetland in the Town of Colchester, Vermont. The subject wetland and buffer zone are located adjacent to Brickyard Road in the Town of Colchester, Vermont.

On January 13, 1999, Barden Gale and Melanie Gale Amhowitz filed a notice of appeal with the Board, seeking de novo review of CUD #98-340. This appeal was filed pursuant to 10 V.S.A. §1269 and Section 9 of the Vermont Wetland Rules ("VWR").

On January 15, 1999, the Executive Officer of the Board advised the Appellants that their Notice of Appeal was substantially complete and docketed the matter as CUD-99-O 1.

On January 20, 1999, a Notice of Appeal and Prehearing Conference was issued and subsequently published in the Burlington Free Press in accordance with Rule 22 of the Board's

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Procedural Rules (“Procedural Rules”).

On March 17, 1999, counsel for the CUD Appellants and the Lost Cove Homeowners Association, Inc., entered his appearance and tiled a letter for his clients supporting partial consolidation of this proceeding with the CUD appeal, In re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98-04.

On March 23, 1999, at 1:30 p.m., the Chair convened a prehearing conference in this matter in the Board’s Conference Room in Montpelier, Vermont, pursuant to Procedural Rule 24 (1988).

II. PURPOSE OF PREHEARING CONFERENCE

The Chair described the purpose of a preheating conference. See Procedural Rule 24.

The Chair advised the preheating conference participants that the Board had adopted new Procedural Rules, effective February 22, 1999. He offered the opinion that, given the date of the tiling of this appeal, the 1988 Procedural Rules should apply in this case. The Appellants and CUD Applicants concurred with the Chair’s Opinion.

This preheating conference was scheduled and noticed for consideration of matters only related to In re: Barden Gale and Melanie Gale Amhowitz, Docket No. CUD-99-01. Given, however, the overlap in the parties, their representatives, and subject matter of this appeal and In re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98-04, counsel for the parties agreed to waive the requirement of separate notice for a prehearing conference in Docket No. CUD-98-04 and allow the Chair to make rulings with respect to the management of both appeals in order to expedite the hearing process.

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.

The Chair reminded the participants of the disclosures made at the time of the prehearing

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conference In re: Lost Cove Homeowners Association, Inc. See In re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98-04, Prehearing Conference Report and Order at 2-3 (Nov. 2, 1998). He 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. Both the CUD Applicants and the Appellants indicated that they were aware of no facts requiring recusal of the Chair or other Board members based on actual or perceived disqualifying interests.

The Chair noted that several Board member's terms had expired in February. The Chair indicated that, depending when new appointments are made to the Board, it may be necessary to assign new appointees and/or alternate Board members to sit on this appeal. See 10 V.S.A. §905(1)(F)). If such assignments are required, the Chair indicated that 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. There were no objections to the grant of party status to the prehearing conference participants.

B. Motion to Consolidate

On February 1, 1999, the Appellants filed a Motion to Consolidate the Appeals of In re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98.04, and the present appeal. Docket No. CUD No. 99-01 ("Consolidation Motion"). The two appeals involve the same Class

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Two wetland complex and involve substantially the same parties represented by the same counsel. They address, however, two different projects -- one located in the subject wetland, and the other involving a buffer zone.

Accordingly, on February 5, 1999, the Chair issued a memorandum to interested persons listed on the service lists for both CUD-98-04 and CUD-99-01 advising them that he would likely rule on the Consolidation Motion at the Prehearing Conference on CUD-99-01. The Chair further asked counsel for the Appellants in CUD-98-04 and the CUD Applicants in CUD-99-01 to respond with written objections or comments with respect to the Consolidation Motion no later than March 17, 1999.

On March 17, 1999, the CUD Applicants filed a letter with the Board consenting to the consolidation of the two proceedings, but only in part, because while there is a significant overlap in issues the Board would need to make separate findings with respect to the impacts of each project.

Accordingly, after much discussion with the participants at the prehearing conference, the Chair ruled that the two appeals would be consolidated for the following purposes: (1) to conduct a joint site visit; (2) to eliminate redundancy in **prefiled evidence**; (3) to reduce duplicative **testimony** at hearing; and (4) to encourage the filing of stipulated facts supported by evidence. The Chair, however, determined that some evidence specific to each project, and therefore some proposed findings specific to **each** project, would be necessary. Accordingly, the Chair ruled that separate **decisions** would be issued for the two appeals. However, he encouraged the parties to work together to identify exhibits not in dispute which might be stipulated to before the hearing and to develop stipulated findings of facts based on that evidence which might be adopted by the Board in both appeals. He further instructed the parties to work together to develop a joint site visit itinerary and hearing days schedule for June 8, 1999. See Section IX. below.

VI. ISSUES

The issues to be decided in this matter are:

- (1) Whether the proposed establishment of a lawn and garden in the buffer zone of a Class Two wetland will not result in an undue adverse effect on protected functions? Section 8.5(a) of the VWR.
- (2) If the proposed establishment of a lawn and garden will result in an undue adverse effect

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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? The Appellants specifically asked the Board to consider mitigation under Sections 8.5(b)(2), (4), and (5) 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 VWR, 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.

Of the ten functions included in Section 5 of the VWR, the Appellants asked the Board to determine whether the Project would have more than a minimal undue adverse impact on the following functions: 5.1 (water storage for flood and storm water); 5.2 (surface and ground water protection); 5.3 (fisheries habitat); 5.4 (wildlife and migratory bird habitat); 5.8 recreational and economic benefits; 5.9 (open space and aesthetics); and 5.10 erosion control. The ANR, in issuing CUD 98-340 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).

VII. STANDARD OF REVIEW

The Chair reminded the prehearing conference participants that appeals filed pursuant to 10 V.S.A. §1269 are heard de novo. 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 #98-340, 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, EXHIBITS, AND PREFILING SCHEDULE

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

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preliminary list of witnesses and exhibits.

The Appellants indicated that they would be calling Sheila McIntyre, a wetlands consultant; Padraic Monks, District Wetlands Ecologist, ANR; and Rick Davis, the contractor who did the work on the Warner site; and possibly a witness to address delineation of the wetland and its buffer zone.

The CUD Applicants indicated that they would likely call the Sobels and Terriens, as well as their wetland biologist, Errol Briggs of William D. Countryman.

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 prefiled testimony and 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 instruction, for the pre-filing of testimony and exhibits. He noted, however, that with respect to all filings, the parties are required to file an 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.

After much discussion, the prehearing conference participants agreed to a filing schedule that would efficiently combine the pre-filing of testimony in the present case and that in In re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98-04. Consistent with the participants' proposal, the Chair authorized the withdrawal of prefiled testimony made to date in the Docket No. CUD-98-04 appeal. He indicated that he would allow the re-filing and supplementation of this prefiled testimony so that it could be offered in both the CUD-98-04 and CUD-99-01 appeals. Accordingly, the prehearing conference participants proposed a filing schedule as follows:

April 13, 1999 - Barden Gale and Melanie Gale Amhowitz would file direct prefiled testimony and exhibits in the matter, In re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98-04, and also direct testimony as Appellants in Docket No. CUD-99-01; the Lost Cove Homeowners Association, Inc., and the Warners, Sobels, and Terriens would file their direct

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prefiled testimony and exhibits in Docket No. CUD-98-04; and the Warners would file their direct prefiled testimony and exhibits in Docket No. CUD-99-01.

April 27, 1999 - Barden Gale and Melanie Gale Amhowitz would supplement their direct prefiled testimony and exhibits in Docket No. CUD-99-01; the Lost Cove Homeowners Association, Inc., and the Warners, Sobels, and Terriens would supplement their direct prefiled testimony and exhibits in Docket No. CUD-98-04; and Barden Gale and Melanie Gale Amhowitz would file rebuttal prefiled testimony, and exhibits in both proceedings.

May 11, 1999 - The Warners would file rebuttal prefiled testimony and exhibits in both proceedings; and Lost Cove Homeowners Association, Inc., the Sobels, and Terriens would file prefiled rebuttal testimony in CUD-98-04.

May 18, 1999 - All parties would file in writing any evidentiary objections to all prefiled testimony and exhibits previously filed. This also would be the deadline for identifying all stipulated findings of facts and supporting exhibits and a joint site visit itinerary. To the extent that any party objected to a portion of the site visit itinerary, he or she would need to file a written objection by this deadline.

May 25, 1999, at 1:00 p.m. - A joint second prehearing conference in Docket Nos. 98-04 and 99-01 will be held to address the parties' respective evidentiary objections, site visit itinerary disputes, and other preliminary matters requiring rulings.

The Chair indicated that he would take this schedule under advisement and modify as necessary to address the interests of fairness and efficiency.

IX. HEARING DAY SCHEDULE

The Chair distributed to the prehearing conference participants a rough draft of a hearing day schedule. Because this schedule had been prepared with the idea that the site visit would be consolidated but that the two appeals would be heard separately but consecutively, the Chair urged the prehearing conference participants to work together to come up with a joint hearing day schedule that would realistically reflect the amount of time needed to conduct the site visit and cross-examine witnesses with respect to both appeals. The Chair advised the parties that they would need to file this schedule at the same time that they filed their evidentiary objections, so that if there were any disputes concerning the order of witnesses or amount(s) of time dedicated to each case, these could be decided at the second prehearing conference. The Chair

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encouraged the preheating conference participants to coordinate their testimony and argument so as to eliminate redundancy and achieve efficiency in the presentation of their respective cases.

The Chair noted that this matter would be heard by the Board on Tuesday, June 8, 1999, at a time and location to be announced in a subsequent notice. Because of his consolidation ruling, the Chair indicated that the hearing could run late into the evening and the parties and their witnesses should be prepared for this possibility.

X. ORDER

1. The applicable Procedural Rules in this proceeding are those adopted in 1988.
2. In re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98-04, and the present appeal, Docket No. CUD No. 99-01, are consolidated for the following purposes: (1) to conduct a joint site visit; (2) to eliminate redundancy in prefiled evidence; (3) to reduce duplicative testimony at hearing; and (4) to encourage the filing of stipulated facts supported by evidence. Toward this end, the filing deadlines set forth in Items 7-13 and 16-17 of Section X. Order, Preheating Conference Report and Order (Nov. 2, 1998) in Docket No. CUD-98-04 are hereby amended to accommodate the consolidated filing of prefiled evidence, stipulations, **evidentiary** objections, and site visit itineraries.
3. The issues in Docket No. CUD-99-01 are those set forth in Section VI. above.
4. The parties in Docket No. CUD-99-01 'are:
(A) Barden Gale and Melanie Gale Amhowitz, pursuant to Board Procedural Rule 22(A)(7); and
Gary and Paula Warner, pursuant to Procedural Rule 22(A)(7).
5. On or before **4:30 p.m., Tuesday, April 13, 1999**, Barden Gale and Melanie Gale Amhowitz, as CUD Applicants, shall file direct prefiled testimony and exhibits in the matter, In re: Lost Cove Homeowners Association, Inc., Docket No. CUD-98-04.
6. On or before **4:30 p.m., Tuesday, April 20, 1999**, the Warners, as CUD Applicants, shall file direct prefiled testimony and exhibits in Docket No. CUD-99-01;
7. On or before **4:30 p.m., Tuesday, May 4, 1999**, the Lost Cove Homeowners Association, Inc., and the Warners, Sobels, and Terriens, as Appellants, shall file their direct prefiled testimony and exhibits in Docket No. CUD-98-04; and Barden Gale and

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Melanie Gale Amhowitz, as Appellants, shall file direct prefiled testimony in CUD-99-01.

Prefiled direct exhibits which are larger than 8 1/2 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 office by any party prior to the hearing.

8. On or before **4:30 p.m., Tuesday, May 11, 1999**, Barden Gale and Melanie Gale Amhowitz shall file rebuttal prefiled testimony and exhibits in Docket Nos. CUD-98-04 and CUD-99-01; the Warners shall file rebuttal prefiled testimony exhibits in CUD-98-04 and CUD-99-01; and the Lost Cove Homeowners Association, Inc., the Sobels, and the Terriens shall file prefiled rebuttal testimony in CUD-98-04.

Prefiled rebuttal exhibits which are larger than 8 1/2 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 office by any party prior to the hearing.

9. On or before **4:30 p.m., Tuesday, May 11, 1999**, each party shall submit a single, combined list of its prefiled testimony and exhibits in Docket Nos. CUD-98-04 and CUD-99-01.
 10. On or before **4:30 p.m., Tuesday, May 18, 1999**, parties shall file in writing all evidentiary objections to all prefiled testimony and exhibits previously filed in Docket Nos. CUD-98-04 and CUD-99-01, or such objections shall be deemed waived.
 11. On or before **4:30 p.m., Tuesday, May 18, 1999**, parties shall file in writing all stipulated facts in Docket Nos. CUD-98-04 and CUD-99-01. Such facts shall reference specific prefiled testimony and exhibits offered for the hearing record.
 12. On or before **4:30 p.m., Tuesday, May 18, 1999**, parties shall file a joint proposed hearing day schedule for Docket Nos. CUD-98-04 and CUD-99-01. To the extent that there is a dispute concerning the order of witnesses or allocation of time for cross-examination, this should be identified in writing and filed by this deadline so that the Chair may address this matter at the second prehearing conference.
 13. On or before **4:30 p.m., Tuesday, May 18, 1999**, parties shall file a joint proposed
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itinerary in Docket Nos. CUD-98-04 and CUD-99-01 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 shall conduct a second preheating conference on Tuesday, May **25, 1999** at 1:00 **p.m.** to address any pending evidentiary objections, disputes concerning the site visit itinerary and hearing day schedule, or other matters requiring preliminary rulings in Docket **Nos.** CUD-98-04 and CUD-99-01. Any party wishing to participate in this conference by telephone should so advise the Board's Secretary, Karen Dupont (802-828-2870) on or before 12:00 noon on Tuesday, **May 11, 1999**. The Board's staff will arrange any conference call.
15. On **Tuesday, June 8, 1999**, the Board will convene a hearing with respect to Docket Nos. CUD-98-04 and CUD-99-01. 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 in Docket Nos. CUD-98-04 and CUD-99-01 shall file proposed findings of fact, conclusions of law, and orders.
18. No individual may be called as a witness in Docket Nos. CUD-98-04 and CUD-99-01 if he or she has not filed prefiled testimony or exhibits in compliance with this Prehearing Order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. For each expert witness, a professional resume must be filed as an exhibit. If prefiled testimony has not been submitted by the date specified in this Order, the witness may not be permitted to testify. Instructions for filing prefiled testimony are enclosed.
19. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

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20. Parties shall file an original and five **collated copies** of prefiled testimony, legal memoranda, all exhibits which are 8 1/2 by 11 inches or smaller, and any other documents filed with the Board, and mail one copy to each of the **persons** listed on the enclosed Certificate of Service as a party (the first persons listed; not those under the section "For Your Information").

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 prefiled testimony and exhibits with their name. The labels on the exhibits must contain the words WATER RESOURCES BOARD, Re: Barden Gale and Melanie Amhowitz, Docket No. CUD-99-01, or Re: Lost Cove Homeowners Assoc., Inc., Docket No. CUD-98-04, or both, 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 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-Gale" or "A-Warner" for the respective CUD Applicants; "LCHA" or "Gale" for the Appellants. Exhibits shall be assigned consecutive numbers. For example, the Warners, as CUD Applicants, would number their exhibits A-Warner-1, A-Warner-2, A-Warner-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-Warner-2A, A-Warner-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:

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CUD APPLICANTS - WARNERS'
LIST OF EXHIBITS
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<u>Number</u>	<u>Description</u>	<u>Status</u>
A-Warner-1	Prefiled Direct Testimony of Errol Briggs specific to Warner Application	
A-Warner-2	Resume of Errol Briggs	
A-Warner-3	CUD Application tiled by Warners with ANR on _____.	
A-Warner-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 part, is tiled on or before **4:30 p.m., Thursday, April 6, 1999**, or a showing of cause for, or fairness requires, waiver of a requirement of this Order., The tiling of an objection shall not automatically toll that portion of the order to which an objection is made.

Dated at Montpelier, Vermont this 30th day of March, 1999.

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William Boyd Davies, Chair