

State of Vermont
WATER RESOURCES BOARD

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

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

SECOND PREHEARING CONFERENCE REPORT AND ORDER

On May 25, 1999, Water Resources Board ("Board") Chair William Boyd Davies convened a prehearing conference in Montpelier, Vermont, in the above-two captioned matters. his prehearing conference was conducted pursuant to Board Procedural Rule ("Rule") 24 (A) (1988). The following persons received notice of and participated in the second prehearing conference:

Lost Cove Homeowners Association, Inc. ("LCHA"), the Dr. and Mrs. Edward Terrien, Dr. and Mrs. Burton Sobel, and Gary and Paula Warner (collectively, "LCHA Appellants" in CUD-98-04) and Gary and Paula Warner ("CUD Applicants" in CUD-99-01), by William Alexander Fead, Esq., and Mark G. Hall, Esq., Paul, Frank & Collins, Inc.; and
Barden Gale and Melanie Gale Amhowitz ("CUD Applicants" in CUD-98-04, and "Appellants" in CUD-99-01), by William W. Schroeder, Esq., and Philip van Aelstyn, Esq., Downs Rachlin & Martin, PLLC, and Paul Gale, agent.

I. PURPOSE OF PREHEARING CONFERENCE

The Chair reviewed the purpose of the second prehearing conference. The parties had previously been advised that the purpose of the conference was 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. See Prehearing Conference Report and Order at 8, X., Item 14 (March 30, 1999). The Chair reiterated this purpose.

II. MOTION IN LIMINE/ MOTION TO DISMISS

On May 18, 1999, Paula and Gary Warner, the CUD Applicants, filed a Motion In
i Limine/ Motion to Dismiss ("Motion") in Docket No. CUD-99-01 (DEC#98-340). The Warners

argued that (1) the Gales had exceeded the scope of the appeal in offering testimony and exhibits related to the Warners' house, curtain drains and septic system; (2) the Board's Rules of Procedure and scheduling orders should not be waived to allow inclusion of such evidence; and (3) the Gales had offered no evidence of any undue adverse impact associated with the Warners' lawn and perennial bed project. On May 24, 1999, the Gales, Appellants in this proceeding, filed a response to the Motion.

The Chair provided the Gales, and then the Warners, with an opportunity to present oral argument on the Motion at the prehearing conference.

After considering the written and oral argument of the parties, the Chair denied that portion of the Motion calling for dismissal of the appeal. The Warners could point to no express authority allowing the Board to make summary judgment-type rulings. Moreover, the Warners have the burden of proof and persuasion in this de novo appeal. The Chair noted that the Gales could have elected to file no prefiled evidence, but based their case solely on cross-examination of the Warner's witnesses. Therefore, the Chair determined that this matter should proceed to a hearing on the merits.

The Chair also denied that portion of the Motion that requested an extension of time to file additional rebuttal testimony. However, the Chair construed that portion of the Motion calling for in limine relief as a request by the Warners to strike all testimony and exhibits related to the house, curtain drains and septic system. On that basis, the Chair granted the Warners' request and instructed the parties that he would strike all evidence that addressed the house, curtain drains, and septic system because such evidence was not within the scope of Docket No. CUD-99-01. The Chair noted that DEC #98-340, the CUD under appeal, was limited in its scope to consideration of the lawn and garden project. He further noted that the issues had been framed in the notice of appeal and clarified in the Prehearing Conference Report and Order of March 30, 1999, to address only the lawn and garden project. Since no party timely objected to the issues contained in this prehearing order, the scope of the appeal was established in that order. Moreover, the Gales failed to demonstrate why the Board's Rules of Procedure and prior orders should be waived to allow inclusion of such evidence.

Accordingly, whether the ANR should have considered the impacts of the house, curtain drains, and septic system in its initial review is a matter not within the Board's jurisdiction to decide in this appeal. In this de novo proceeding, the Board may receive new evidence on issues within the scope of the appeal but the specific project under review is that described in DEC #98-340 -- namely, the lawn and garden project. The Chair ruled that Ms. McIntyre's testimony and

those exhibits addressing the impact of the Warners' house, curtain drains, and septic system on the wetland or its buffer zone should be excluded. Moreover, the Chair concluded that any and all testimony and exhibits, offered by the Warners in response to Ms. McIntyre's testimony and exhibits, should also be excluded.

In light of this ruling, the parties offered, and the Chair directed, that the parties FAX to the Board's counsel no later than Friday, May 28, 1999, an agreed upon set of amendments (strike-outs) to Ms. McIntyre's direct prefiled testimony and exhibits as well as amended prefiled rebuttal testimony and exhibits for Errol Briggs, the Warners' wetland consultant.

The parties complied with this directive, and their filings of May 28, 1999, are incorporated herein by reference.

III. STIPULATION OF FACTS

On May 18, 1999, the parties filed a set of Stipulated Facts. This filing listed six facts upon which the parties agreed and for which proof is not required.

The Chair reviewed the Stipulated Facts with the parties at the prehearing conference and, with their consent, modified them slightly to reflect the scope of the appeals and the Board's format for decision writing. The stipulated facts are:

- (1) The subject wetland complex is a Class II wetland.
 - (2) With respect to this wetland complex, the following wetland functions are either not present or are present at such a minimal level as to not be protected functions: hydrophytic vegetation habitat (§5.5); threatened and endangered species habitat (§5.6); education and research in the natural sciences (§5.7).
 - (3) Barden Gale and Melanie Gale Amhowitz are the owners of the 10.13 acre lot at issue in Re: Lost Cove Homeowners Assoc., Inc., Docket No. CUD-98-04.
 - (4) **Gary** and Paula Warner are the owners of property on which the proposed lawn and garden project at issue in Re: Barden Gale and Melanie Gale Amhowitz, Docket No. CUD-99-01, are located.
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- (5) The proper delineation of the boundary of a wetland's buffer zone is made by measuring horizontally outward from the border of the wetland.
- (6) For the purposes of authentication in this set of appeals, a copy of a document kept as a public record need not be certified.

IV. CHAIR'S EVIDENTIARY RULINGS

The Chair noted that the Board had received two sets of evidentiary objections on May 18, 1999. These were both filed by the Gales, and they are objections specific to particular testimony or exhibits offered in Docket No. CUD-98-04 and in Docket No. CUD-99-01.

At the prehearing conference, after providing the parties with an opportunity to orally expand upon their arguments concerning the above evidentiary objections, the Chair made certain preliminary rulings with respect to certain categories of objections. He then permitted the parties to decide which evidence should be voluntarily withdrawn or amended to address his rulings. He directed the parties to FAX to the Board's counsel by Friday, May 28, 1999, their proposed written responses to his preliminary rulings and to indicate any objections which they wished to have preserved for full Board review. The Chair advised the parties that he would note the rulings and any objections preserved for full Board review in the Second Prehearing Conference Report and Order.

The parties complied with the Chair's directive by filing on May 28, 1999, several Joint Proposed Prehearing Orders with respect to the Gales' various evidentiary objections. The parties also filed on that date a letter identifying two objections to the Chair's preliminary evidentiary rulings: (1) related to the use of CUD Findings; and (2) related to the stockpiling of soil. These filings are incorporated herein by reference. However, with respect to Exhibits LCHA-6 (Briggs' Development Map), the Chair specifically overrules the Gales' objections of May 18, 1999. See Joint Proposed Prehearing Order as to the Gales' Evidentiary Objections to Lost Cove's Pre-filed Testimony and Exhibits at 2, III. (May 28, 1999).

The Chair notes that objections preserved for review would be referred to the Board for consideration on June 8, 1999. The parties would have an opportunity for brief oral argument, followed by Board deliberations and oral rulings. The Chair recommended that any party seeking full Board review should be prepared to provide a brief written memorandum on the law

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at issue prior to the opening of the hearing and list all exhibits and lines of testimony that could be affected by the outcome of the Board's rulings.

V. SITE VISIT ITINERARY

On May 18, 1999, the parties filed a Joint Proposed Site Visit Itinerary. The itinerary listed six stations at which the Board is expected to make observations of the subject wetland complex and the projects authorized by the CUDs under appeal. The Chair sought clarification from the parties concerning the amount of time that would be required to drive to and from the site visit location and the amount of time needed to view each station on the itinerary.

The parties estimated that the total time required for the site visit would be one half hour to forty minutes. The travel time to and from the site visit location was estimated to be 20 minutes each way.

VI. HEARING DAY SCHEDULE

The Chair reviewed with the parties their Joint Proposed Hearing Day Schedule, filed on May 18, 1999. The Chair asked for and offered comments regarding the amount of time required for each parties' witnesses, cross-examination, and redirect. Based on these comments, the parties filed on Friday, May 28, 1999, a revised hearing day schedule, which is incorporated herein by reference.

VII. POST-HEARING FILINGS

The Chair reminded the hearing participants that final written comment, including any proposed findings of fact, conclusions of law, orders, and legal memoranda, should be filed on or before **4:30 p.m. Tuesday, June 15, 1999**. See Consolidated Prehearing Order at 10, Item 15.

VIII. ORDER

1. The Warners' Motion In Limine/ Motion to Dismiss is denied in part and granted in part. The request to dismiss Docket No. CUD-99-01 is hereby denied. The request for an
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extension of time in which to file additional rebuttal testimony is also denied. The request for in limine relief is granted, consistent with the discussion and directives in Section II. above.

2. The evidentiary rulings in Section IV. are final rulings of the Board, with the exception of those rulings that are the subject of the two objections filed by the parties on May 28, 1999. The parties shall file on or before 9:00 a.m., June 8, 1999, any legal memorandum in support of their objections and a list of all exhibits and lines of testimony that could be affected by the outcome of the Board's rulings.
3. The parties shall comply with the Site Visit Itinerary and Hearing Day Schedule set for in Sections V. and VI., unless a showing of cause for, or fairness requires, waiver of a requirement of the provisions of this Order.
4. Any proposed findings of fact, conclusions of law, orders and supporting legal memoranda shall be filed on or before **4:30 p.m., Tuesday, June 15, 1999.**

Dated at Montpelier, Vermont, this 1st day of June, 1999.

WATER RESOURCES BOARD



William Boyd Davies, Chair