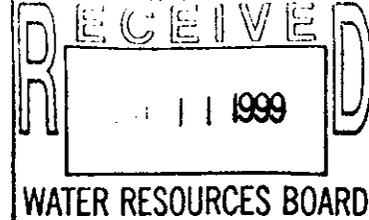


STATE OF VERMONT
WINDSOR COUNTY, SS.



In re: KILLINGTON, LTD.
(Appeal of DEC § 401 Water
Quality Certification - #WQC-97-10)

WINDSOR COUNTY
SUPERIOR COURT

In re: KILLINGTON, LTD.
(Appeal of Encroachment
Permit - #MLP-97-09)

Docket No. S343-9-98 Wrcv

DECISION AND ORDER

This is an appeal from proceedings before the Water Resources Board, pursuant to 10 V.S.A. § 1024, 29 V.S.A. § 407, and V.R.C.P. 74.

Appellee Killington, Ltd. (Killington) plans to install a water intake system in the Woodward Reservoir for snowmaking, and to construct new ski lifts and trails in areas known as Rams Head and Pico Peak (Interconnect). In order to realize these plans, Killington needs, among other things, a Management of Lakes and Ponds Permit (Encroachment Permit) and a § 401 Water Quality Certification (401 Certification). The Agency of Natural Resources (ANR) granted the Encroachment Permit and the 401 Certification; and Appellants, owners of land on or near the Woodward Reservoir, appealed to the Water Resources Board (Board). See 10 V.S.A. § 1024(a); 29 V.S.A. § 406. After the Board affirmed the ANR's grant of the Encroachment Permit and 401 Certification, Appellant landowners appealed the Board's decision to this court. See 10 V.S.A. § 1024(b); 29 V.S.A. § 407.

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Appellants contend the Board erred in three ways: (1) in limiting Appellants' appeal to those portions of the Encroachment Permit and the 401 Certification that dealt with the Woodward Reservoir Project; (2) in excluding an exhibit prepared by one of Appellants' witnesses and concluding that he was not qualified to testify as an expert on ice formation and strength; and (3) in excluding numerous documents showing lack of initial support for the project on the part of ANR employees, which allegedly would have been relevant to the credibility of their subsequent testimony in support of the project. The court has considered the arguments, but finds no error, and therefore affirms the Board's decisions.

At the outset, the court notes that this review of administrative agency action is on the record, with some deference given to the agency's determinations. Conservation Law Foundation v. Burke, 162 Vt. 115 (1994); V.R.C.P. 74. The court presumes that decisions made by an agency within its area of expertise are correct, valid, and reasonable absent a clear showing to the contrary. See Petition of New England Telephone and Telegraph Co., 159 Vt. 459, 462 (1993). The reviewing court does not defer to the agency's purely legal determinations on issues not falling within the agency's area of expertise, but it does view the record in a light favorable to supporting any findings of fact underlying those legal determinations. See Bigelow v. Dept. of Taxes, 163 Vt. 33, 35 (1994).

1. Limitations on the Scope of the Appeal

Appellants first contend that the Board erred in determining

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that Appellants could challenge the permits as they relate to the Woodward Reservoir Project only. This was essentially a decision that Appellants lacked standing to challenge the Interconnect Project, though the Board made this determination in the context of its ruling on the scope of the appeal rather than its ruling on party standing.

Under 10 V.S.A. § 1024 and 29 V.S.A. §§ 406-407, a decision of the ANR may be appealed to the Board and a decision of the Board may be appealed to the Superior Court by any person "aggrieved" by the decision. The Board interprets this to mean the person has a substantial interest which may be adversely affected by the decision. See Rule 22 of the Board's Rules of Procedure. In at least one of its prior decisions, the Board has ruled that an organization demonstrated a substantial interest by showing that its members used the affected waters for boating, fishing, and other recreational activities. See In re Blodgett Corp., No. MLP-96-01 (1996 WL 706591). Accord Sierra Club v. Morton, 405 U.S. 727, 735-740 (1972) (standing may be based on plaintiffs' use of the affected lands or waters for recreational purposes).

Appellants assert that they alleged in their petition for party status that they fish in the waters of the Interconnect Project area, and that this is a sufficient basis for standing to challenge the permits as they relate to that project. However, the petition alleges that the "appellants have enjoyed fishing in the proposed project area," without distinguishing between the Woodward Reservoir and Interconnect Projects. Moreover, Appellants came

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forward with no evidence to support this allegation, and unsupported allegations do not establish standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). The elements of standing "are not mere pleading requirements, but rather an indispensable part of the plaintiff's case" which, if disputed, must be proved like any other element. Id. at 561.

Appellants further argue that they were deprived of the opportunity to provide evidence that Appellants fished the waters of the Interconnect, because they had no notice that the Board might treat the two projects as separate for purposes of standing or limiting the scope of appeal. See Appellants' Reply Brief (April 14, 1999) at 3. However, the record reveals that Killington raised this exact issue in its arguments against Appellants' petition for standing, filed almost two months before the Board's March 31, 1998 ruling on the scope of the appeal. See Killington's Memorandum in Response to Appellants' Petition for Party Standing (filed February 3, 1998). Moreover, when the Board issued its Rulings on Party Standing on February 23, 1998, the Board indicated its inclination to treat the projects separately as suggested by Killington, but stated that it would wait to address Killington's argument in a subsequent ruling on the scope of the issues on appeal. See Chair's Rulings on Party Standing, at 4-5.¹

Accordingly, the court concludes that Appellants had an opportunity to present evidence to show that they had standing with

¹ The court notes that Appellants acknowledged at the hearing that the waters of the Interconnect are only fishable in the sense that they provide breeding grounds for nearby fishable areas.

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respect to the Interconnect Project, but that they failed to do so. The Board's decision that Appellants could only challenge those aspects of the permit and certification relating to the Woodward Reservoir Project is therefore affirmed.

2. Exclusion of Exhibit, and Limited Recognition of Michael Girard's Expertise

Appellants next argue that the Board erred in excluding an exhibit prepared by Michael Girard which they say presented an alternative plan for providing the necessary water for snowmaking. According to Appellants, it was excluded only because it had not been properly labelled. When Appellants objected to this ruling, however, the Board explained that it was excluded not only for failure to comply with labelling requirements, but also due to lack of identification and foundation. After examining the document, the court agrees with the Board that its evidentiary value is compromised by the total lack of background information regarding the exhibit. The absence of explanation and foundation for the exhibit undermined the Board's ability to determine its relevance. Exclusion of the exhibit was appropriate under V.R.E. 901 and V.R.E. 402.

As a corollary argument, Appellants contend that the Board erred in ruling that Michael Girard was not qualified to testify as an expert on ice formation and strength. The determination of whether a witness is qualified as an expert on a particular subject is a matter of discretion and will not be reversed unless that discretion is abused. See Northern Terminals, Inc. v. Smith

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Grocery & Variety, Inc., 138 Vt. 389, 392 (1980). Michael Girard's resume shows that he is a civil and structural engineer, with specialized experience in building structures and highways, but it does not show any particular experience with ice. Under these circumstances, the Board acted within its discretion in ruling that Mr. Girard was not qualified to testify as an expert about ice formation and strength.

3. Exclusion of Documents

Appellants also argue that the Board erred in its pre-hearing decision to exclude a stack of approximately 120 documents from the State ANR's files. According to appellants, these internal messages and memoranda would have shown that despite their eventual approval of the Killington project, various ANR officials initially expressed concerns about it; and thus, according to appellants, these documents would have cast doubt on the credibility and good faith of the eventual ANR approval.

This argument fails for several reasons. First, the pre-hearing ruling explicitly left open the possibility that the documents could be used for impeachment, which is what appellants say they wanted to use them for. Indeed, appellants were able to use two documents for this purpose, and were thus able to get before the Board their theory (i.e., that the ANR approval of the proposal was improperly motivated by considerations other than the merits of the proposal). Because many of the documents pre-date Killington's proposal (one of the documents which was allowed for impeachment dated back to 1971) or don't relate to the current

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proposal or both, it is hard to imagine how they would have been relevant to anything other than credibility, and appellants do not explain how they would have been relevant to anything else.

Second, appellants waived this argument with respect to most of the documents. Although the pre-hearing ruling explicitly left open the possible use of the documents for impeachment "or other appropriate purposes," appellants only attempted to introduce about four, of which two were admitted. (See Tr. pp. 435-39, 441, 518). It is true that after an objection to one of the documents was sustained, the Board Chairman gave a "weather forecast": "basically if the letter is offered in conjunction with something that does not constitute the permit that is under appeal, then it's not going to be admitted." (Tr. p. 444). Such a "weather forecast" was obviously intended as guidance, but it did not relieve appellants of the obligation to offer documents they wanted to present or waive any subsequent argument that they should have been admitted.

And third, the documents which were offered and excluded were properly excluded. The memoranda in question indicate that years ago, before Killington had even made this proposal, ANR officials expressed opinions arguably inconsistent with the later grant of permits relating to the current proposal. These documents have some probative value on the issue of ANR's credibility, and it was therefore proper for the Board to allow appellants to present a couple of the documents. Given that the memoranda did not relate to the current Killington proposal, however, their probative value even on the issue of credibility was minimal; and it was certainly

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within the Board's discretion to conclude that going through numerous documents to make the same point was a waste of time which outweighed that probative value. See V.R.C.P. 403.

ORDER

The Decisions of the Water Resources Board are therefore
AFFIRMED.

Dated at Woodstock, Vermont, this 7th day of
Oct, 1999.


Hon. Alan W. Cheever,
Presiding Superior Court Judge

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