

**State of Vermont
WATER RESOURCES BOARD**

**In re: Appeal of Al J. Frank (Marceau Residential Development)
Docket No. CUD-2000-02**

**MEMORANDUM OF DECISION AND ORDER:
SUFFICIENCY OF NOTICE OF APPEAL**

This decision pertains to whether certain correspondence filed with the Water Resources Board ("Board") constitutes a substantially complete notice of appeal. As explained below, the Board determines that it does and therefore the above-captioned appeal should be noticed for hearing.

I. BACKGROUND

On December 21, 1999, John Larkin of South Burlington, Vermont, filed a conditional use determination ("CUD") application with the Agency of Natural Resources ("ANR") for development in a Class Two wetland and its buffer zone related to a proposed residential project on the so-called Marceau Property in South Burlington, Vermont ("Project"). On February 29, 2000, the Director of the Water Quality Division, Department of Environmental Conservation ("DEC"), ANR, issued a CUD for the Project.

Various persons residing in the Butler Farms subdivision adjacent to the Marceau Property provided comment to the ANR during the public comment period on the Larkin CUD application. Al J. Frank of 58 Butler Drive, South Burlington, Vermont, was one of these persons. See In re matter of John Larkin, File #1999-524, Conditional Use Determination at 5, Finding 17. (Feb. 29, 2000). Once the CUD was issued, the ANR did not send a copy of this decision to Mr. Frank.

On March 16, 2000, Mr. Frank filed with the Board a letter indicating that he wished to appeal the CUD ("Notice of Appeal"). This letter was dated March 14, 2000, and was filed within the 30-day appeal period provided by 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules ("VWR").

On March 18, 2000, William A. Bartlett, the Board's Executive Officer, sent an acknowledgment letter to Mr. Frank, informing him that the Notice of Appeal was substantially incomplete. The Executive Officer's letter was issued as an advisory opinion pursuant to Board Procedural Rule 20(A).

In the March 18 letter, the Executive Officer instructed the Mr. Frank to comply with the filing requirements of Board Procedural Rule 19, a copy of which was enclosed, and he asked Mr. Frank to file an original and seven complete copies of the Notice of Appeal with the Board and also with the persons indicated on an attached service list. The Executive Officer further advised

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Mr. Frank concerning other relevant Procedural Rules and how he might obtain access to these and he established a deadline of March 31, 2000, by which Mr. Frank was to make a supplemental filing with the Board. The Executive Officer warned that, if the Notice of Appeal was not substantially completed by that deadline, the appeal might not be considered by the Board.

On March 28, 2000, Mr. Frank filed with the Board the requisite number of copies of a letter, dated March 25, 2000, which was in all essential respects the same letter as the one filed on March 16, 2000. This letter was accompanied by a certificate of service indicating that Mr. Frank had served this document on the requisite statutory parties and interested persons.

On March 31, 2000, the Executive Officer issued another advisory opinion stating that Mr. Frank's filing was still substantially incomplete. In this letter, the Executive Officer identified the following specific deficiencies:

I asked you to specifically provide the information outlined in the Board's Procedural Rule 19, which I enclosed. That rule required you to provide us with a copy of the DEC's decision from which you appealed; a citation to the statute or rule(s) at issue; and a concise statement of the reasons why you believe the act or decision appealed from was in error. Your March 28th filing did not include a copy of the decision which precipitated your appeal and you did not reference what sections of the Vermont Wetland Rules ("VWR") were at issue nor what Agency of Natural Resources' findings of fact and conclusions of law with respect to the wetland **functions** in Section 5 of the VWR were in error in DEC #1999-524. Instead, you merely reissued your letter of appeal filed on March 16, 2000.

The Executive Officer advised Mr. Frank that this matter was tentatively scheduled for oral argument before the Board on April 25, 2000, and he asked Mr. Frank to file a written request for oral argument by April 17, 2000, if he wished to avail himself of the opportunity to appear before the Board. The Executive Officer further advised Mr. Frank that if he did not file a timely request for oral argument, his appeal would be dismissed. &Board Procedural Rules 16(B) and 24. The Executive Officer noted that another appeal filed by Gregory C. Lothrop, apparently involving the same CUD, had been timely filed and determined to be substantially complete. The Executive Officer suggested to Mr. Frank that he might seek party status in that appeal as an alternative to seeking Board review of his own Notice of Appeal.

On April 17, 2000, Mr. Frank filed a letter with the Board, dated April 10, 2000, and a copy of the CUD in question. In this letter, Mr. Frank noted that he had not received personal service of the CUD and consequently he had not previously filed this decision with the Board. Mr. Frank also identified specific findings of fact, conclusions of law and wetland functions at

issue. Mr. Frank indicated that he wished to address the Board concerning the completeness of his Notice of Appeal.

On April 17, 2000, a memorandum providing notice of the date, time, and location of oral argument was issued by the Executive Officer, On April **21, 2000**, a notice of change of location of oral argument was issued by Board counsel.

On April 25, 2000, the Board held an oral argument in Montpelier with the following persons participating by teleconference: Al J. Frank, pro se; and Lance Llewellyn, P.E., for John Larkin.

The Board deliberated on April 25, 2000 and made the following ruling.

II. ISSUE

Whether the Notice of Appeal filed by Al J. Frank is substantially incomplete and should therefore be dismissed.

III. DISCUSSION

Appeals from CUD decisions issued by the ANR are initiated by the filing of a notice of appeal with the Board pursuant to 10 V.S.A. § 1269 and Section 9 of the VWR. Section 1269 and the VWR do not, however, specify what information must be contained in a notice of appeal. A would-be appellant must turn to the Board Procedural Rules for such guidance. Board Procedural Rule 19(A) specifies five information items that must be contained in a notice of appeal. These are:

- (1) Identification of the act or decision appealed from, including a copy of any written decision and the Agency or Department's service list for the act or decision being appealed;
- (2) A citation of any statute or rule at issue in the appeal;
- (3) A citation and statement of the basis for Board jurisdiction;
- (4) A concise statement of issues and a statement of the reasons why the petitioner or appellant believes the act or decision appealed from was in error; [and]
- (5) A description of the relief sought.

Additionally, Board Procedural Rule 19(A)(6) provides that additional information may be

required by the Board or Executive of Officer to supplement and thereby perfect a notice of appeal.

Should a notice of appeal fail to contain sufficient information to address the five items listed in Board Procedural Rule 19(A), the Executive Officer is empowered to issue an advisory opinion that the filing is substantially incomplete and establish a deadline for the filing of additional information to perfect the appeal. Board Procedural Rules 19(A)(6) and 20(A). An Executive Officer's advisory opinion issued pursuant to Procedural Rule 20(A) may be reviewed, upon request, by the Board as a declaratory ruling pursuant to Board Procedural Rule 16(B).

It has long been the Board's policy to construe notices of appeal liberally, especially in ~~denovo~~ appeals by pro se appellants. Docket No. W Q - 9 2 - 1 3, Memorandum of Decision at 3 (May 28, 1993). Specificity in notices of appeal is desirable and indeed encouraged by the Board, but the Board does not insist upon hypertechnical pleading. Id. at 2-3. An appellant must, at a minimum, provide the Board and affected persons with reasonable notice of the matter at issue -- that is, sufficient information to determine the basis for the Board's jurisdiction, the substance and scope of the appeal, and the relief sought.

Here, Mr. Frank timely filed his Notice of Appeal with the Board. In his filing of March 16, 2000, Mr. Frank expressed a generalized concern about the adverse impact of proposed development activities on the subject wetland's capacity to store storm water run-off and prevent potential downstream erosion within the Butler Farms subdivision. Mr. Frank provided the Board with the requisite copies of the appeal and served the parties by the March 31, 2000, deadline, but he did not file a copy of the CUD decision nor did he reference the jurisdictional basis for nor errors or omissions in that decision until April 17, 2000. Therefore, when the Executive Officer issued his second advisory opinion on March 31, 2000, Mr. Frank's Notice of Appeal was substantially incomplete.

According to Mr. Frank, he was unfairly disadvantaged in preparing his appeal and responding to the Executive Officer's information requests because he never was served with a copy of the CUD decision at the time of its issuance nor did ANR provide him information on how interested persons might obtain review by the Board of the CUD decision. Once, however, the Executive Officer identified specific omissions in the advisory opinion of March 31, 2000, Mr. Frank supplemented the Notice of Appeal on April 17, 2000, by filing the CUD decision and by referencing the specific findings of fact and conclusions of law therein allegedly in error.

The Board concludes that, taking into consideration his April 17 letter, Mr. Frank has provided enough information to find his Notice of Appeal substantially complete. He has satisfied the requirements of Board Procedural Rule 19(A)(1)-(S). He has provided the Board with a copy

of the decision from which the appeal was taken. Board Procedural Rule 19(A)(1). It may be inferred from his narrative in the filings of March 16, 28, and April 17, 2000, that functions 5.1 (water storage for flood water and storm runoff) and 5.10 (erosion control through binding and stabilizing the soil) are at issue. Board Procedural Rule 19(A)(2). He has, by referencing Section 8 of the VWR in the April 17 filing, addressed the jurisdictional basis for this appeal. Board Procedural Rule 19(A)(3). By identifying specific findings of fact and a conclusion of law allegedly in error, he has by his April 17 filing provided a concise statement of the issues and a statement of reasons why he believes the CUD in question was in error. Board Procedural Rule 19(A)(4). And in each of his three filings he has provided a description of the relief he seeks from the Board. Board Procedural Rule 19(A)(5).

While Mr. Frank's April 17 letter was technically filed out-of-time, the Board has accepted this filing as part of the record and found that Mr. Franks has perfected his appeal. The Board has done so by exercising its discretion to waive application of its own procedural rules "in order to prevent injustice.", Board Procedural Rule 11. The Board is persuaded that Mr. Frank was unfairly disadvantaged in preparing and perfecting his appeal due to the failure of ANR to provide him timely service of the CUD decision on which he had commented. Mr. Frank's name and address were not on the ANR's service list even though Mr. Frank had offered public comment on the application during its pendency before that agency. See In re matter of John Larkin, File #1999-524, Conditional Use Determination at 5, Finding 17. (Feb. 29, 2000); DEC/ANR service list for same. Additionally, the CUD did not contain any information that would place interested persons on notice how to seek review by the Board.

Sections 8.2 and 8.4, VWR, require the ANR to provide notice of any CUD decision to "persons owning property within or adjacent to the wetland or buffer zone in question." By his own admission at oral argument, Mr. Frank owns a lot that is not immediately adjacent to the subject wetland and buffer zone, there being one intervening residential lot between the wetland and his property. However, having participated in and offered comment in the ANR proceeding concerning the Project's alleged adverse impacts on the subject wetland's flood water storage and erosion control capacities and the potential for real property damage within the downstream Butler Farms subdivision, Mr. Frank demonstrated a sufficient interest in the outcome of the proceeding that he reasonably might have expected to have been included on the service list for the CUD decision. As the Board has previously found, persons not owning real property within or adjacent to a subject wetland may still have the requisite interest to qualify them as persons "aggrieved" within the meaning of 10 V.S.A. §1269, thereby giving them the right to appeal a CUD to the Board. See In re: Appeal of Larivee, Docket No. CUD-92-09, Preliminary Order at 4-5 (Mar. 16, 1993) (Appellant, although not adjoining property owner, nevertheless identified specific wetland functions that might be adversely affected by project, functions which supported the Appellant's cultural and educational use of the subject wetland).

The Board also believes that the public would have been better served had the CUD decision itself contained a sentence advising interested persons of the statutory basis, deadline, and process for filing an appeal with the Board. While Mr. Frank may not have benefitted from this information since he was not served a copy of the CUD decision, other "aggrieved" persons might have done so.

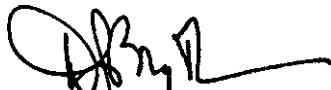
For the foregoing reasons, the Board concludes that Mr. Frank has filed a Notice of Appeal that substantially complies with the filing requirements of Board Procedural Rule 19(A) and, therefore, the above-captioned appeal should not be dismissed.

V. ORDER

1. The appeal filed by Al J. Frank is substantially complete; and
2. The above-captioned appeal shall be accepted, publicly noticed, and promptly scheduled for a prehearing conference in conjunction with the matter, In re: Gregory Lothrop (Marceau Residential Development), Docket No. CUD-2000-03.

Dated at Montpelier, Vermont, this 28th day of April, 2000.

WATER RESOURCES BOARD



David J. Blythe, Acting Chair

John Roberts