

State of Vermont
WATER RESOURCES BOARD

RE: Larry Westall
Docket No. CUD-99-02 (DEC #95-241)
RE: James & Catherine Gregory
Docket No. CUD-99-03 (DEC #95-241)
(Consolidated)

SECOND PREHEARING CONFERENCE REPORT AND ORDER

On January 18, 2000, at 10:00 a.m., Water Resources Board ("Board") Chair Gerry Gossens convened a second prehearing conference in Montpelier, Vermont, in the above-captioned matters. The Chair was assisted by Vice-Chair, David J. Blythe, Esq., who was designated by the Chair to make preliminary rulings in this matter. Also present was the Board's Associate General Counsel, Kristina L. Bielenberg, Esq. The following parties participated either in person or by teleconference in this prehearing conference:

Larry Westall by David M. Sunshine, Esq., by telephone;
Hobart Heath, pro se, by telephone;
James and Catherine Gregory ("Gregorys"), by William F. Ellis, Esq., by telephone;
Agency of Natural Resources ("ANR") by Jon Groveman, Esq., in person;
Jericho Conservation Commission ("JCC") by Thomas Baribault, in person;
Charles (Chuck) Lacy, for Jericho Center Preservation Association ("JCPA"), himself and other neighbors, by telephone.

II. PURPOSE OF PREHEARING CONFERENCE

The Chair described the purpose of a prehearing conference. He specifically noted that the purpose of this second prehearing conference was to: (1) make preliminary evidentiary rulings; (2) address any outstanding preliminary issues, procedural and substantive; and (3) set the schedule for the hearing day. See Preheating Conference Report and Order at 16, Item 19 (Aug. 4, 1999); Third Order Modifying Prefiled Schedule at 3, Item 19 (Dec. 7, 1999); and Fourth Order Regarding Prefiled Schedule (Jan. 11, 2000). He further noted that he had delegated to Vice-Chair Blythe the authority to make preliminary rulings on all legal issues, including evidentiary objections, at the second prehearing conference and at the hearing on January 25, 2000, subject to review by the full Board upon the request of a party or Board member.

III. DISCLOSURES

On January 11, 2000, the Board issued a memorandum to the parties identifying

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Barbara Farr as a new Board member, making certain disclosures, and establishing deadlines for requests for further disclosures and objections. The Chair noted that no party had requested further disclosures by the January 17, 2000, deadline. Consequently, he asked the parties participating in the prehearing conference whether any of them had an objection to Barbara Farr participating in the hearing on January 25, 2000 and sitting as a decision maker in this matter.

No party objected to Ms. Farr's participation in this proceeding. Because neither Barbara Farr nor Board member Jane Potvin had been present for the site visit in Jericho on November 16, 1999, attorney Sunshine requested that these two members make such a site visit on their own either before or after the hearing. This request was noted for the record, although the Board's counsel advised the parties that members Farr and Potvin had already been making plans to conduct such a site visit.

IV. ADDITION OF WITNESSES TO THE WITNESS LIST

A. Jeffrey Severson

The Chair noted that on January 17, 2000, the Board received a letter from attorney Sunshine indicating that he proposes to call Jeffrey Severson, the consultant who prepared the Westall CUD Application, as a witness in this proceeding. Mr. Severson had not previously been identified on a witness list or had prefiled testimony.

The Chair inquired whether Mr. Severson would be called as a hostile witness and whether his testimony would be limited to responding to questions on cross-examination only. Attorney Sunshine reported that he did not know at this time whether Mr. Severson would attend the hearing voluntarily or whether a subpoena would need to be issued to obtain his live testimony on January 25, 2000. Mr. Sunshine indicated that the reason for calling Mr. Severson was to address ANR's hearsay objections and allow Mr. Severson to respond to questions concerning the statements contained in the CUD Application.

The Chair asked the parties whether they objected to the live testimony of Mr. Severson at the hearing, based on attorney Sunshine's representations concerning the scope of the witness's testimony.

Counsel for the ANR stated that he would not object to Mr. Severson's live testimony, provided that Mr. Severson was being offered for the limited purpose of

responding to questions on cross-examination and from the Board concerning the Westall CUD Application. Attorney Groveman indicated, however, that he would object if attorney Sunshine intended to use this opportunity to introduce live direct or rebuttal testimony.

Attorney Ellis stated that he would object to Mr. Severson's testimony to the extent that it addressed the Gregory parcel.

Hobart Heath and representatives for the JCC and JCPA did not object to the participation of Jeffrey Severson as a live witness at the hearing on January 25, 2000.

Vice-Chair Blythe **ruled** that Larry Westall could offer Jeffrey Severson's live testimony at the hearing on January 25, 2000, provided that his testimony was limited to responses to questions on cross-examination and by the Board. He noted that testimony concerning the Gregory home and property would not likely be elicited unless a party or the Board specifically pursued a line of questioning addressing this aspect of the CUD Application.

B. Charles Siegchrist

Hobart Heath indicated at the second prehearing conference that he intends to call Charles Siegchrist as a witness and that Mr. Siegchrist will be available for cross-examination at the hearing on January 25, 2000. Mr. Heath further indicated that it was his belief that the letter from Mr. Siegchrist, which he filed with the Board as Exhibit H-3, constituted "prefiled testimony" within the meaning of the Prehearing Conference Report and Order (Aug.4, 1999).

Taking into consideration the above representations by Mr. Heath, the ANR and other parties did not object to the addition of Charles Siegchrist to the witness list for the hearing on January 25, 2000.

V. ANR's FILING OF JANUARY 6, 2000

On January 6, 2000, the ANR alerted the Board and the parties that (1) it would likely file a Motion to Dismiss in this matter and therefore it asked the Board to postpone the filing deadline for proposed findings of fact, conclusions of law and order **until after** evidentiary rulings were made and (2) it requested that the Board postpone the hearing on the merits, scheduled for January 25, 2000, and hear instead its Motion to Dismiss. On January 11, 2000, the Chair issued a Fourth Order Regarding Prefiled Schedule in which he

denied the ANR's two requests, but indicated that any requests for modification of the filing schedule could be discussed at the second prehearing conference.

Based on the Vice-Chair's preliminary ruling concerning the testimony of Jeffrey Severson, counsel for the ANR indicated that he would not be filing a Motion to Dismiss in this matter since Mr. Severson would be available for cross-examination.

VI. PRELIMINARY RULINGS ON SPECIFIC PREFILED EVIDENTIARY OBJECTIONS

Vice-Chair Blythe made preliminary rulings on the evidentiary objections filed by the parties on January 6, 2000. He noted that only the ANR and Hobart Heath had prefiled objections.

Vice-Chair Blythe reminded the parties that the evidentiary standard applicable in contested cases is found in 3 V.S.A. § 810, which provides for a relaxed standard for the admission of evidence that ordinarily would be excluded in civil court as hearsay. He noted, however, that the Board may exclude evidence that is "[i]rrelevant, immaterial, or unduly repetitious." Additionally, Vice-Chair Blythe reminded the parties that because this is a de novo proceeding, it is irrelevant what the ANR did or didn't do or decide in the proceeding below and evidence addressing the ANR's prior actions would be excluded.

A. ANR's Objections to Hobart Heath's prefiled direct testimony and exhibits

Vice-Chair Blythe first made preliminary evidentiary rulings with respect to ANR's objections to Hobart Heath's exhibits, and then made preliminary evidentiary rulings with respect to Mr. Heath's prefiled testimony.

Original CUD Application (Exhibit H-1): In response to a question from Vice-Chair Blythe, counsel for ANR represented that Exhibit H-1 was the CUD Application, prepared by Jeffrey Severson for Larry Westall, and submitted to and reviewed by the ANR in the proceeding below, DEC #95-241. ANR indicated that it would withdraw its objections to this exhibit if the author, Jeffrey Severson were available at hearing for cross-examination. Vice-Chair Blythe ruled that whether or not Mr. Severson is available at the hearing for cross-examination, Exhibit H-1 will be admitted. He overruled the ANR's objections on the basis that Exhibit H-1 is the document which gave rise to this proceeding and it is central to the Board's understanding of the project for which Larry Westall sought a CUD. Had no party prefiled this document, the Board would have asked for its filing and would have admitted it as a Board exhibit. Exhibit H-1 will be admitted by the Board.

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Draft 2 of CUD Denial (H-2): Vice-Chair Blythe *sustained* the ANR's objections. He determined that this exhibit is irrelevant, because this is a ~~de novo~~ appeal. In a proceeding, what matters is not what individual ANR staff may have thought as they reviewed and considered the CUD Application, but whether the CUD Applicant can demonstrate to the Board anew that its project will not have an undue adverse impact on the four wetland functions within the scope of this appeal. Accordingly, Exhibit H-2 will not be admitted. of CUD Application and therefore shall be excluded.

Report by Charlie Siechrist (Exhibit H-3) & Proposed Plantings by Charlie Siechrist exhibit H-4: ANR *withdrew* its objections to the admission of these exhibits, based on Hobart Heath's representation that Charlie Siechrist would be available for cross-examination. See Section IV.B.

Letter (and accompanying documents) from Jack Smolinski (Exhibit H-SA-J): Vice-Chair Blythe *sustained* the ANR's objections to these documents, both because they are irrelevant and Mr. Smolinski will not be present and available for cross-examination at the hearing on January 25, 2000. Exhibits H-SA-J will not be admitted by the Board.

Testimony of Hobart Heath, Lines 13-15, Page 1: Vice-Chair Blythe overruled ANR's objections to this testimony. While technically hearsay, Hobart Heath's statement merely directs the Board to text in the CUD Application (H1-M) prepared by Jeffrey Severson. The CUD Application will be admitted by the Board and Mr. Severson will be called as a witness by Larry Westall so that he may be cross-examined about this document.

Testimony of Hobart Heath, Lines 15-19, Page 1: Vice-Chair Blythe sustained the ANR's objections to this testimony, on the basis that Draft 2 of the ANR's Conditional Use Determination (H-2A) is irrelevant in this de novo proceeding. These lines of testimony will be struck from the record.

Testimony of Hobart Heath, Lines 21-25, Page 2: Vice-Chair Blythe *sustained* ANR's objections to this testimony on the basis that this testimony is irrelevant. In a de novo proceeding, the Board is not interested in what ANR staff did or did not say in the past, Mr. Heath, however, may cross-examine witness Austin at the hearing on January 25, 2000, about what measures, if any, might be appropriate and acceptable to ANR to mitigate any undue adverse impacts on the wildlife and migratory bird function.

Testimony of Hobart Heath, Lines 26-31, Page 2: Vice-Chair Blythe *overruled* the ANR's objections with respect to Lines 26-28 related to Mr. Severson's statements in the CUD Application (H-10), for reasons stated above. Mr. Severson's statements are a part of the CUD Application that he prepared for Larry Westall and which was submitted to and

reviewed by the Board. Hobart Heath is merely paraphrasing Jeffrey Severson's conclusion and such testimony will be given such weight as it is due. In light of Hobart Heath's disclosure that Charles Siegchrist would be available for cross-examination at the hearing on January 25, 2000 and Hobart Heath is merely directing the Board to Mr. Siegchrist's report (Exhibit H-3), Vice-Chair Blythe *overruled* the ANR's objections to Hobart Heath's testimony at Lines 28-31 and noted that such testimony would be given such weight as it is due.

The Board's counsel noted for the benefit of the parties that Exhibit H-3 has an exhibit sticker which identifies it as H-6; the correct number for the record is Exhibit H-3 and all copies of this exhibit should note this correction.

Testimony of Hobart Heath. Lines 35-36. Page 2 and Lines 50-51. Page 3: Vice-Chair Blythe *overruled* the ANR's objections to this testimony, since Mr. Heath is merely summarizing statements made in the CUD Application.

B. Hobart Heath's Objections to ANR's prefiled direct testimony

Testimony of Karen Bates. Lines 13-15. Page 3: Vice-Chair Blythe *overruled* Hobart Heath's objection as he provided no evidentiary basis for the exclusion of this testimony. Mr. Heath, however, may cross-examine Ms. Bates at the hearing on January 25, 2000, concerning the basis of her statement.

Testimony of John Austin. Line 17-19. Page 14: Vice-Chair Blythe *overruled* Hobart Heath's objection as he provided no evidentiary basis for the exclusion of this testimony. Mr. Heath, however, may cross-examine Mr. Austin at the hearing on January 25, 2000, concerning the basis of his statement.

C. Preservation of Objections

ANR indicated that it would renew its objections to the admission of certain of Hobart Heath's prefiled testimony and exhibits should either Jeffrey Severson or Charlie Siegchrist or both not appear and be available for cross-examination at the hearing on January 25, 2000. See Prehearing Conference Report and Order at 15, Item 11 (Aug. 4, 1999).

VII. OTHER PRELIMINARY ISSUES

In response to a question posed by counsel for ANR, Hobart Heath clarified that his statements about mitigation contained in the letter of January 13, 2000, constituted a

'proposed CUD condition.' See Prehearing Conference Report and Order at 16, Item 18 (Aug. 4, 1999); Third Order Modifying Prefiled Schedule at 3, Item 18 (Dec. 7, 1999).

In response to a question posed by counsel for ANR, attorney Sunshine represented that his client, Larry Westall, concurs with and is relying upon Hobart Heath's evidence, including prefiled testimony and exhibits, to meet his burden of proof in this de novo proceeding on CUD Application DEC #95-241.

VIII. STIPULATION BETWEEN ANR AND THE GREGORYS

ANR and the Gregorys prefiled a stipulation on January 13, 2000, which if the Board were to adopt would amicably dispose of the issues addressed in the Gregorys' appeal, Docket No. CUD-99-03. The stipulation is in the form of proposed findings of fact.

Vice-Chair Blythe inquired of the parties: (1) whether there were any objections to the Board's adoption of this document; and (2) if not, whether the parties would waive cross-examination of the Gregory? expert witness Errol Briggs and allow the admittance of his prefiled testimony with supporting affidavit.

All parties with the exception Larry Westall had received and reviewed this Stipulation. Representatives for the ANR, Gregorys, JCC, and JCPA all indicated that they agreed with the content of the Stipulation and supported its adoption by the Board; they also agreed to waive cross-examination of witness Briggs and the admittance of his prefiled testimony. Hobart Heath indicated that he had received and reviewed the Stipulation, but that he would not agree to the Board's adoption of this Stipulation nor waive cross-examination of Mr. Briggs unless Larry Westall, through counsel, agreed to do so. Attorney Sunshine indicated that until he had an opportunity to review the Stipulation, he could not indicate whether he had an objection to its contents and he declined to waive cross-examination of witness Briggs. Attorney Sunshine represented that he would obtain a copy of the Stipulation from attorney Ellis if he did not receive ANR's filing within the day, and he would promptly notify the Board by letter, with copies to the parties, concerning his position on the Stipulation and waiver of cross-examination of Mr. Briggs.

Accordingly, the Vice-Chair **ruled** that on or before 12:00 noon, Friday, January 20, 2000, attorney Sunshine will file a letter with the Board and the parties indicating whether his client and Hobart Heath have any objections to the Board's adoption of the Stipulation between the ANR and the Gregorys and whether they waive cross-examination of Errol Briggs and agree to the admission of Mr. Briggs' prefiled testimony and exhibits.

In the event that Larry Westall and Hobart Heath have no objections to the Stipulation and they waive cross-examination of Errol Briggs, attorney Ellis is instructed to bring to the hearing a sworn affidavit from Mr. Briggs affirming that his prefiled testimony and exhibits are true and accurate to the best of his knowledge.

IX. SCHEDULE OF HEARING DAY

Chair Gossens reviewed a proposed schedule for the hearing day on January 25, 2000. In order to accommodate the addition of Jeffrey Severson and Charlie Siechrist to the witness list, the Chair advised the parties that this schedule would be modified slightly and sent to the parties along with the second prehearing conference report and order. See attachment.

Chair Gossens emphasized that the parties representatives should plan to be the Richmond Town Center promptly at 8:00 a.m. to discuss with Board counsel any last minute details. He further indicated that while each party has an opportunity to present five-minute opening and closing statements, any party could elect to waive this opportunity and rest on the argument of another party. Finally, the Chair indicated that he and Vice-Chair Blythe would be vigilant in controlling the hearing in the interest of eliminating repetitive argument and repetitive and irrelevant testimony elicited on cross-examination.

In response to a question from the representative of JCPA, the Vice-Chair indicated that he could not guarantee when JCPA's witnesses would be specifically called. If the CUD proponents completed their case early, this might result in an adjustment of the schedule. He indicated, however, that JCPA's witnesses would not be called any earlier than 1:00 p.m.

The parties were asked if any of the witnesses listed on their prefiled witness lists would not be appearing at the hearing on January 25, 2000. The parties indicated that all witnesses would be present and available for cross-examination.

The Board's counsel noted that JCPA had prefiled testimony related to mitigation that was jointly sponsored by three witnesses. She asked JCPA to designate one of these persons to be the lead witness available for cross-examination so as to avoid redundancy.

X. REMINDERS

The Board's counsel reminded the parties of the filing requirements contained in the Board's Rules of Procedure and Prehearing Conference Report and Order (Aug. 4, 1999).

Parties are responsible for filing an original and seven copies of each filing with the Board, with copies served on the parties listed on the Board's certificate of service. Rules of Procedure, Rule 9.

XI. ORDER

1. Jeffrey Severson and Charlie Siechrist will be added to the witness list for the hearing on January 25, 2000. Their testimony shall be limited to responses to questions on cross-examination and by the Board,
2. The preliminary evidentiary rulings on prefiled testimony and exhibits contained in Section VI. are binding in this proceeding. In the event, however, that either Jeffrey Severson or Charles Siechrist or both witnesses do not appear at the hearing on January 25, 2000, the Board will allow ANR to renew its objections to the admission of certain prefiled testimony and exhibits filed by Hobart Heath.
3. Counsel for Larry Westall shall file on or before 12:00 noon, Friday, **January 21, 2000** a letter responding to the issues set forth in Section VIII. In the event that Larry Westall and Hobart Heath elect not to waive cross-examination of witness Errol Briggs, Mr. Briggs shall appear at the hearing on January 25, 2000. If Larry Westall and Hobart Heath do not object to the Stipulation and agree to waive cross-examination of Mr. Briggs, attorney Ellis shall provide the Board and parties no later than the hearing on **January 25, 2000**, a sworn affidavit from Mr. Briggs affirming that his prefiled testimony and exhibits are true and accurate to the best of his knowledge.
4. This Order supplements previous Prehearing Conference and Scheduling Orders issued by the Chair, Pursuant to Procedural Rules 28(B), this Order is binding on all parties, unless a written objection to the Order, in whole or part, is filed on or before **9:00 a.m., Tuesday, January 25, 2000**, 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 20th day of January, 2000

WATER RESOURCES BOARD
By Gerry Gossens, Chair


