

State of Vermont
WATER RESOURCES BOARD

RF,: **Barden Gale and Melanie Gale Amhowitz**
Docket No. CUD-99-08 (DEC #98-340.01)
(Application of Gary and Paula Warner, Colechester, Vermont)

MEMORANDUM OF DECISION AND ORDER ON PRELIMINARY ISSUES

This decision pertains to certain preliminary issues identified in the course of the prehearing conference in the above-captioned proceeding. For reasons explained in more detail below, the Board determines that (1) Barden Gale and Melanie Gale Amhowitz have standing to bring this appeal; (2) Summit Engineering is not a party to this proceeding; (3) the issues on appeal are those stated in the Prehearing Conference Report and Order (Feb. 22, 2000) ("Prehearing Order"); in other words, the scope of this appeal is limited to consideration of the impacts of the Warners' septic system curtain drain on the protected functions of the subject Class Two wetland and any necessary mitigation related thereto; and (4), as a consequence, evidence shall be limited to that which is relevant to the issues in the Prehearing Order.

I. BACKGROUND

On December 10, 1999, Barden Gale and Melanie Gale Amhowitz ("Appellants") filed a notice of appeal with the Board, pursuant to 10 V.S.A. § 1269, from an ANR decision granting a conditional use determination ("CUD") to the Gary and Paula Warner ("Applicants") for construction of a septic system curtain drain in the buffer zone of a Class Two wetland on the Applicants' property in the Lost Cove Subdivision in Colchester, Vermont ("Project").

On February 15, 2000, the Board's Chair held a prehearing conference in this matter pursuant to Procedural Rule 28. Those persons entering timely appearances and participating in the prehearing conference were the Appellants and Summit Engineering, the successor to Pinkham Engineering, the firm that had provided the engineering services for the Project.

At the prehearing conference, the Chair determined that there were certain preliminary issues, including the scope of the Project under review, which would require briefing by those participating in this proceeding and a decision by the Board. On February 22, 2000, the Chair issued the Prehearing Order referred to above, which, among other things, identified the issues in dispute and set forth deadlines for filing standing and party status petitions and objections to the issues as framed.

On February 23, 2000, the Applicants entered their appearance in this proceeding. March 2, 2000, the Agency of Natural Resources ("ANR") entered its appearance in this proceeding.

On March 6, 2000, the Appellant filed two documents: Supplemental Notice of Appeal Clarifying Appellants' Standing ("Appellants' Standing Memorandum") and Appellants' Objection to the Statement of Issues and Motion to Expand the Scope of Review ("Appellants' Motion to Expand Scope of Review").

On March 14, 2000, the Applicants tiled: Applicants' Reply to Appellants' Objection to the Statement of Issues and Motion to Expand the Scope of Review ("Applicants' Reply Memorandum") and Applicants' Motion to Limit the Scope of Evidence ("Applicants' Motion to Limit Evidence").

Neither the ANR nor Summit Engineering made filings with respect to the above matters. Summit Engineering did not file a party status petition in accordance with the Prehearing Order

On March 14, 2000, the Water Resources Board deliberated with respect to the various preliminary issues set forth in the Prehearing Order. The Board made the following rulings.

II. DISCUSSION

A. Standing

The Appellants have timely supplemented their notice of appeal to provide additional information and argument clarifying the basis for their standing. The Board concludes that, as persons owning property adjacent to the subject wetland and Project, the Appellants have met the threshold qualification for "persons aggrieved" by the ANR's CUD decision, pursuant to 10 V.S.A. §1269. Neither the Applicants nor other participants to this proceeding have raised facts or argument challenging the standing of the Appellants. Accordingly, the Board concludes that the Appellants have standing to bring this appeal pursuant to 10 V.S.A. § 1269.

B. Party Status

The Board concludes that the following persons have party status in this proceeding:

Appellants, pursuant to Procedural Rule 25(B)(8);
The Applicants, pursuant to Procedural Rule 25(B)(1); and
ANR, pursuant to Procedural Rule 25(B)(5).

The Board denies party status to Summit Engineering. Summit Engineering did not file a

party status petition pursuant to Procedural Rule 25 and the Prehearing Order at 9, Item 3.’

C. Scope of the Project and Issues on Appeal

The issues framed by the Chair in the Prehearing Order at 6, Section IX., are:

- (1) Whether the septic system curtain drain in the buffer zone of a Class Two wetland will result in an undue adverse effect on protected functions? Section 8.5(a) of the VWR.
- (2) If the septic system curtain drain will result in an undue adverse effect 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 Chair provided the parties with an opportunity to object to the issues as framed, including the scope of the project under review, and to submit responsive filings. Prehearing Order at 9-10, Items 5 and 7.

A

The Appellants argue that the issues as framed are too narrowly drawn. In their Notice of Appeal, they asked the Board to consider the wetland impacts of the Warners’ house, based on the premise that all or a portion of the house is allegedly located in the subject wetland’s buffer zone. They assert that the ANR erroneously failed to consider the impacts of the Applicants’ house on the subject wetland and its buffer zone and that the CUD issued by the ANR failed to consider the cumulative impacts of other associated projects affecting the wetland. The Appellants’ Motion to Expand Scope of Review at 1; see also Prehearing Order at 5-6, Section VIII.(B).

The Appellants argue that, consistent with Procedural Rule 19(C), the issues on appeal should be those raised in the Notice of Appeal rather than those framed in the Prehearing Order. They further argue that the Board’s prior CUD decision with respect to the Warners’ lawn and garden project did not settle the issue of the location of the Warners’ house with respect to the wetland buffer zone. See Re: Barden Gale and Melanie Gale Amhowitz, Docket No. CUD-99-01, Findings of Fact, Conclusions of Law, and Order at 6, Finding 8 (July 16, 1999)

¹ On the afternoon of March 14, 2000, after the Board had deliberated, the Applicants’ attorney filed a letter with the Board which stated: “This will confirm that I have been advised by Mr. Ekman that Summit Engineering will not be seeking party status.” Mr. Ekman appeared at the prehearing conference on February 15, 2000, as counsel for Summit Engineering.

The Board has consider these arguments and the responses of the Applicants and concludes that the scope of this proceeding should be narrowly drawn to not include consideration of the location and possible impacts of the Warners' house.

First, the scope of the CUD application filed by the Warners in September 1999 was narrow in scope. It specifically addressed only the as-built septic system curtain drain which the Applicants and the ANR had determined was within the 50-foot buffer zone of the subject wetland. Second, the CUD decision issued by the ANR in response to that application, and which is now the subject of this appeal, was also narrowly focused on the impacts of the septic system curtain drain. See Applicants' Reply Memorandum at 3. Thus, even though the Appellants, in their Notice of Appeal, asked the Board to consider the Warners' house and its impacts in the Board's de novo review, this does not mean that the Board has jurisdiction to do so, since the Warners' house was not the subject matter of the application and the decision from which the present appeal was taken. See Applicants' Reply Memorandum at 4. This reasoning is consistent with prior rulings on the scope of review involving the same parties to this proceeding. See Re: Lost Cove Homeowners Assoc., Inc., Docket No. CUD-98-04 and Barden Gale and Melanie Gale Amhowitz, Docket No. CUD-99-08, Second Prehearing Conference Report and Order at 2 (June 1, 1999).

The Appellants rely on the language of Procedural Rule 19(C)² to support their claim that an expansive scope of review is justified. That rule, however, was *not* created as a vehicle to allow appellants to expand the scope of project review to include matters not considered by the ANR in the first instance. Rather, it was designed to put all persons on notice that they must raise in their initial pleading all bonafide issues they would like the Board to consider. Granted, the Board deplores the piecemeal review of development projects. Re: Lost Cove Homeowners Assoc., Inc., Docket No. CUD-98-04, Findings of Fact, Conclusions of Law, and Order at 21 (July 16, 1999). Nevertheless, the Board is estopped from reviewing develop-ment which the ANR, the body with original jurisdiction over CUD applications, has not first determined is subject to its jurisdiction, and then reviewed and addressed in a written determination under VWR, Section 8.

Second, the question of whether the Warners' house is located within or outside the buffer zone of the subject wetland was decided in the Board's prior decision, Re: Barden Gale and Melanie Gale Amhowitz, Docket No. CUD-99-01, Findings of Fact, Conclusions of Law, and Order (July 16, 1999). While the subject matter of that proceeding was the Warners' lawn and garden project and its impacts on the subject wetland and buffer zone, the Board conducted a site

² Procedural Rule 19(C) states: "The scope of any proceeding under this rule shall be limited to those issues specified in the notice of appeal unless the Board determines that substantial inequity or injustice would result from such limitation."

visit and made certain observations concerning the relationship of the Warners' house to the adjacent lawn and garden project and subject wetland buffer zone to determine the actual physical area of project impact. In that context, the Board made the following Finding 8, which preceded other findings concerning the adjacent project:

The CUD Applicants' [Warners'] house is located on a terrace of land overlooking the Upper Pond. The house, itself, is several feet outside the wetland buffer zone. However, a portion of the terrace and the steep embankment which descends to the Upper Pond are located within the buffer zone.

Re: Barden Gale and Melanie Gale Amhowitz, supra at 6.

The Appellants to the present proceeding were the appellants to that prior proceeding. They had an opportunity to seek correction or alteration of this finding or take an appeal of the decision to Superior Court pursuant to 10 V.S.A. §1270. They did neither. Therefore, Finding 8, like the other findings and conclusions of the Board became final and binding upon the parties to that proceeding. As a matter of sound public policy and fairness, the Board and the parties to the present proceeding should not be required to expend valuable resources to relitigate an issue of material fact that was decided in 1999. See Applicants' Reply Memorandum at 5-8. Accordingly, the Board concludes that, whether one relies on estoppel or waiver as the theory by which the Appellants are now barred from challenging Finding 8 of the Board's prior decision, the outcome is the same: The scope of the Board's present proceeding will not take into consideration the location and alleged impacts of the Warners' house since it has already been determined that the house is outside the subject wetland's buffer zone and therefore outside the Board's jurisdiction to review.

Accordingly, the Board affirms the Chair's determination that the issues on appeal are those stated in the Prehearing Order at 6, Section IX.

D. Scope of the Evidence

As a consequence of the Board's ruling with respect to Section II.(C) above, the Board further rules that the scope of the evidence to be admitted in this appeal shall be limited to the impacts of the septic system curtain drain on protected wetland functions and any necessary mitigation.

The Applicants have asked the Board to further limit the scope of evidence at the hearing by asking the Board to adopt certain findings of fact from the Board's prior decision in Re: Barden Gale and Melanie Gale Amhowitz, Docket No. CUD-99-01, Findings of Fact, Conclusions of Law, and Order (July 16, 1999). See Applicants' Motion to Limit Evidence. The Board

may take official notice of its prior decisions and is inclined to "adopt" prior findings of fact which are relevant to the subject wetland and project in question and which the parties agree are not subject to dispute. The Appellants, however, are entitled to an opportunity to contest the material so noticed. 3 V.S.A. §810(4). They have not had that opportunity yet. Accordingly, the Board accepts the Applicants' Motion to Limit Evidence as an early tiling under Section XIII., Item 13 of the Prehearing Order, and invites the Appellants to tile a response in accordance with Item 14 of the Prehearing Order. Alternatively, the parties may jointly file a stipulation of uncontested facts in accordance with Item 18 of Section XIII. of the Prehearing Order. The Chair or Vice-Chair shall rule on any disputed matters at the second preheating conference provided for in Section XIII., Item 20 of the Prehearing Order.

III. ORDER

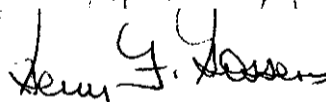
It is hereby ordered:

1. Barden Gale and Melanie Gale Amhowitz have standing to bring this appeal;
2. The parties to this proceeding are: the Appellants, pursuant to Procedural Rule 25(B)(8); the Applicants, pursuant to Procedural Rule 25(B)(1); and the ANR, pursuant to Procedural Rule 25(B)(5). Summit Engineering is not a party to this proceeding;
3. The issues on appeal are those stated in the Prehearing Order at 6, Section IX.; and
4. The scope of the evidence to be admitted in this appeal shall be limited to the impacts of the septic system curtain drain on protected wetland functions and any necessary mitigation, consistent with the issues set forth in the Preheating Order at 6, Section IX.

Dated at Montpelier, Vermont, this 21st day of March, 2000.

* Members Barbara S. Farr and John D.E. Roberts did not participate in the Board deliberations on March 14, 2000.

WATER RESOURCES BOARD*



Gerry F. Gossens
Chair

David J. Blythe
Jane Potvin