State of Vermont
WATER RESOURCES BOARD

RE: Al J. Frank
Docket No. CUD-2000-02 (DEC #1999-524)
RE: Gregory C. Lothrop
Docket No. CUD-2000-03 (DEC #1999-524) (CONSOLIDATED)

REMAND ORDER

This order voids a conditional use determination ("CUD"), DEC #1999-524, and remands this matter to the Agency of Natural Resources ("ANR") for new proceedings regarding the CUD application or such other CUD application as may be filed in its place.

I. BACKGROUND

John Larkin and Larkin Realty ("Applicants") sought and, on February 29, 2000, received from ANR a CUD, DEC #1999-524, for development in two Class Two wetlands and adjacent buffer zones related to a proposed residential subdivision on the former Marceau farm on the westerly side of VT Route 116 in South Burlington, Vermont ("Project"). The CUD was appealed to the Water Resources Board, first by neighbor Al J. Frank, on March 16, 2000, and then by neighbor Gregory Lothrop on March 28, 2000. The Frank appeal was deemed substantially incomplete, but after additional filings were made by Mr. Frank and Board review, the two appeals were jointly noticed for a prehearing conference on May 2, 2000.

In preparation for noticing the appeals, the Board's staff reviewed ANR's distribution list for CUD DEC #1999-524. Since it appeared from ANR's distribution list that ANR had not provided notice of the CUD application and CUD through the South Burlington City Clerk, the Board's Notice of Appeals and Notice of Prehearing Conference, issued on May 2, 2000, asked prospective parties to come to the Prehearing Conference prepared to address the question of whether ANR's failure to serve the South Burlington City Clerk constituted a defect in notice requiring remand to ANR for further action ("notice and remand issues").

On May 25, 2000, the Board's then Chair Gerry Gossens and Vice-Chair David J. Blythe convened the Prehearing Conference respecting the two appeals. Because ANR was not adequately prepared to address the notice and remand issues at the Prehearing Conference, a Prehearing Conference Report and Order ("Prehearing Order") was issued with a schedule for briefing preliminary issues, including the notice and remand issues. Prehearing Order at 6-7, 16 Item 9-11.

Since no objections were timely filed with respect to the Chair's preliminary party status rulings, the following persons, including persons residing in the Butler Farms subdivision adjacent to the Project, became parties to the consolidated appeals:

Appellants Al J. Frank and Gregory Lothrop, pursuant to 10 V.S.A. §1269, VWR Section 9, and Procedural Rule 25(B)(7);
Applicants, pursuant to Procedural Rule 25(B)(1);
ANR, pursuant to Procedural Rule 25(B)(5);
William S. Brakeley, pursuant to Procedural Rule 25(B)(8);
Leonard Gluck, pursuant to Procedural 25(C);
Bill and Diane Daniels, pursuant to Procedural Rule 25(C);
Terrence J. Daley, pursuant to Procedural 25(C);
Margaret Flaherty, pursuant to Procedural 25(C);
Mary Lou and Paul Newhouse, pursuant to Procedural 25(C); and
Dorset Heights Water System Association, represented by Randall Kay, pursuant to Procedural 25(C).

On June 12, 2000, the Applicants moved to have the appeals stayed to allow the parties time to negotiate a redesign of the Project to address the concerns of the two appellants and other neighbors in the Butler Farms subdivision adjacent to the Project. On June 13, 2000, Chair Blythe granted the first in a succession of orders continuing these appeals. The final such order was issued by Chair Blythe on November 29, 2000. In this order, the parties were given another short continuance to complete negotiations and a deadline of January 25, 2001, to file legal memoranda on preliminary issues set forth in the Prehearing Order, including the notice and remand issues.

Only three parties, the Applicants, ANR, and Appellant Lothrop, filed legal memoranda on the notice and remand issues. No other preliminary issues were raised or addressed by the parties. On January 25, 2001, counsel for the Applicants filed a legal memorandum and requested a limited evidentiary hearing on the notice issue. On January 25, 2001, counsel for ANR filed a legal memorandum in which it conceded that notice of the CUD application had not been provided to the South Burlington City Clerk. On February 8, 2001, counsel for Appellant Lothrop filed a responsive memorandum.

On January 31, 2001, the Board issued a Notice of Oral Argument and Limited Evidentiary Hearing. This matter was initially scheduled for Board consideration on February 13, 2001, but was rescheduled and renoticed on February 16, 2001, for consideration at the Board's meeting on April 3, 2001. The Applicants waived the right to an evidentiary hearing on the notice issue by not renewing their request by the February 27, 2001, deadline set forth in the Board's Notice of Cancellation and Rescheduled Oral Argument.

On April 3, 2001, the Board held oral argument on the notice and remand issues. Those parties presenting oral argument were the Applicants, ANR, and Appellant Lothrop. The Board took official notice of the following documents pursuant to 3 V.S.A. § 810(4): Exhibits A, B, and C attached to the Applicants' January 25, 2001, Memorandum; and Exhibit D, ANR's Distribution List for CUD File #1999-524. None of the parties present and participating objected to the Board so noticing these documents, with one exception. Counsel for Appellant Lothrop objected to the Board's taking official notice of the Applicants' Exhibit C.[1]

The Board deliberated on April 3 and April 19, 2001. This matter is now ready for decision.

II. ISSUES

(1) Whether ANR's acknowledged failure to provide notice of the CUD Application to the South Burlington City Clerk as required by Sections 8.2 and 8.3 of the Vermont Wetland Rules constitutes a jurisdictional defect.

(2) If the answer to Issue 1 above is in the affirmative, whether the proper remedy is to remand the CUD Application back to ANR for re-noticing and a new proceeding.

III. DISCUSSION

The relevant sections of the Vermont Wetland Rules ("VWR") are Sections 8.2, 8.3, and 8.4.

Section 8.2, VWR, requires an applicant to file a complete copy of its CUD application with ANR, the clerk of each Vermont municipality in which the wetland or buffer zone is located and also the regional planning commission serving the area in which the wetland or buffer zone is located. In addition, the applicant is required to notify others,

[1] The documents officially noticed by the Board were: Exhibit A - Letter from the Applicants' consultant, James Howley of Llewellyn Howley, Inc., to ANR staff, Karen Bates, dated January 5, 1999, regarding filing of the CUD Application; Exhibit B - ANR's "Notice of Conditional Use Determination #1999-524," signed by Karen Bates, undated; Exhibit C - Act 250 Land Use Permit Amendment and Memorandum of Decision, Re: John A. Russell Corporation, #1R0257-1-EB (Nov. 30, 1983); and Exhibit D - ANR's "Distribution List for CUD File #99-524, John Larkin."

such as persons owning property within or adjacent to the wetland or its buffer zone, that an application has been filed and where it is available for inspection. For most members of the public, including persons owning property within or adjacent to a wetland or its buffer zone, the municipal clerk's office is the most convenient place to view a copy of a pending CUD application.

Section 8.3, VWR, states, in relevant part, that the Secretary of ANR shall initiate a CUD proceeding by providing the following public notice:

> The Secretary shall provide an opportunity for public comment by posting, for not less than 15 days, a notice of a request for a conditional use determination at the town clerk's office of all towns wherein the wetland or buffer zone is located . . . .

This requirement places the burden on the Secretary of ANR or his designee to prepare a written notice indicating receipt of a CUD application and stating how persons may comment on or otherwise participate in any review proceeding involving the application. The Secretary has an affirmative duty, at a minimum, to serve the notice on the clerk of the municipality in which the affected wetland or buffer zone is located with a request that the notice be posted.

Additionally, Section 8.4 states:

> The Secretary shall provide notice of any decision made under Section 8 of these rules to all persons entitled to receive notice under Section 8.2 above.

Among those persons required to receive notice of the CUD decision is the clerk of the municipality in which the wetland or buffer zone is located. See VWR, Section 8.2. Thus, the municipal clerk is required to receive notice of both the CUD application and any final, appealable action of the Secretary.

It is undisputed that the wetlands and buffer zones affected by the Project are located in South Burlington. It also is undisputed that the Applicants filed their CUD application with the City Clerk of South Burlington in January 1999 in conformance with VWR, Section 8.2. See Exhibit A. The only question is whether the Secretary of ANR or his designee complied with the notice requirements of the VWR.

ANR concedes that it provided notice of the CUD application on January 11, 2000, to the *Burlington* City Clerk rather than to the City Clerk of South Burlington. ANR's

Response on Preliminary Issues at 1 (Jan. 25, 2001). Moreover, the distribution list used by ANR in DEC #1999-524 reveals that notice of the CUD application was sent to the City Clerk of Burlington rather than to the City Clerk of South Burlington. See Exhibits B and D. Thus, the Secretary of ANR failed to comply with the notice requirements of VWR, Sections 8.3.[2]

Neither the VWR nor Board Procedural Rules state what the consequences of such failure of notice should be. Rather, the Board has relied on a long line of precedent from the Vermont Supreme Court to address the question of what remedy is appropriate.

The Applicants argue that "the effect of the Secretary's apparent error in sending the posting notice to the City of Burlington rather than [to] the City of South Burlington depends entirely upon a factual determination: Whether the City of South Burlington had actual knowledge of the Applicants' request for conditional use determination." Applicants' Memorandum at 2-3 (Jan. 25, 2001). The Applicants assert that the failure of notice would be harmless error if the City Clerk had actual notice of the application. They cite an Environmental Board decision, Re: John A. Russell Corporation, Land Use Permit Amendment #1R0257-1-EB, Memorandum of Decision (Nov. 30, 1983) for the proposition that a party who has actual knowledge of a permit application cannot use the failure of the administrative agency to provide public notice as the basis for challenging the agency's action with respect to that application. See Exhibit C. Additionally, the Applicants cite various Vermont Supreme Court opinions for the proposition that only "substantial compliance" with notice requirements is required. See, e.g., Putney School, Inc. v. Schaff, 157 Vt. 396, 404-405 (1991); Rutz v. Essex Junction Prudential Comm., 142 Vt. 400, 412 (1983). Thus, the Applicants argue that as long as the City Clerk knew that the CUD Application had been filed, this was substantial compliance with the Board's notice requirements.

The Applicants' statement of the law would be correct if the notice provision of the VWR only contemplated that the South Burlington City Clerk receive personal notice of a CUD application. However, this is not the intent of Section 8.3 of the rules. Rather, the intent is to provide both the municipality as well as the *public* within the municipality where the affected wetland and/or buffer zone is located with, at a minimum, *posted* notice of the ANR proceeding with respect to the CUD application and instruction on how to participate in that proceeding. Without such notice, the public may be deprived of any meaningful

[2] It also is evident that ANR sent a copy of the CUD to the City Clerk of Burlington, in non-compliance with VWR, Section 8.4.

opportunity to comment on the merits of the pending CUD application.[3]

The Vermont Supreme Court has emphasized in an appeal of a zoning permit issued without proper notice that:

> [I]t is not for the parties, the boards, or the courts to dispense with the public notice mandated by [] statute. The general view is that notice and hearing requirements on application to a zoning board are mandatory and *jurisdictional*, and failure to adhere to these requirements renders the action taken null and void.

In re Torres, 154 Vt. 233, 236 (1990) (emphasis added). Additionally, the Vermont Supreme Court has determined that failure to comply with the notice requirements set forth in Environmental Board rules and procedures, even when more rigorous than required by statute, was a basis for voiding a permit and remanding it to the District Commission. In re Conway, 153 Vt. 526 (1989).

The Secretary of ANR's failure to post notice of the application for CUD DEC #1999-524 at the South Burlington City Clerk's office is a jurisdictional defect requiring that the Board remand this matter back to ANR so that it may properly re-notice and, if requested by a member of the public, re-open the permit application review process with respect to application DEC #1999-524. In fashioning a remedy for the defect in notice, the Board believes that something short of requiring the Applicants to refile their application is appropriate.

It is significant, and deserving of particular emphasis, that the fatal error in this case is ANR's and not that of the Applicants. There is no indication that the Applicants failed to comply with either the letter or the spirit of the law in applying for the CUD or in cooperating with ANR in the approval process. The failure to provide the required notice to the South Burlington City Clerk was ANR's alone. Despite that error, ANR did little to try to remedy the problem. After the Board raised the defect of notice issue in its public notice of May 2, 2000, ANR took no initiative to correct the situation by asking the Board

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[3] Counsel for the Applicants also argued at oral argument that the posting requirement of VWR, Section 8.3, is not an effective means of providing public notice. He suggested that publication of notice by ANR in a newspaper of general circulation within the area of the subject wetland or buffer zone would better advise the public of a pending CUD application. The Board takes seriously the suggestion made by the Applicants and will consider it when next the Board proposes revisions to the VWR. However, until this provision of the VWR is changed, it must be applied.

to remand the matter. Indeed, ANR's representative came to the Prehearing Conference totally unprepared to discuss the defect and how it should be remedied. See Prehearing Order at 6-7. Only after the Applicants had briefed the notice and remand issues in January 2001 did ANR's representative concede that the agency had failed to provide proper notice of the CUD application and suggest that remand would be an appropriate remedy.

Appellant Lothrop argues that absent the required notice to the public in South Burlington, we cannot know with certainty whether some other member or members of the public might have come forward -- either in support of or in opposition to the Project. In that regard, Appellant Lothrop is correct. He also is correct (as represented by his legal counsel at oral argument) that the appeal before the Board -- which by its nature is a more formal and complex proceeding -- does not offer the public the same informal, meaningful opportunity to review the Project application as would be the case during the initial CUD review process before the Secretary of ANR or his designee. Remand to the ANR for re-noticing of the original CUD application is, therefore, an appropriate remedy.

With all of the above in mind, the Board is particularly troubled by ANR's unapologetic position in blithely "agreeing" that a remand is the appropriate remedy while, in the same breath, acknowledging that, upon remand, the scope of ANR's CUD application review may now be significantly expanded. This type of inconsistent project review smacks of changing the rules of the game after play has commenced. A project applicant which had put itself in such a position by a failure to discharge some responsibility would necessarily bear these consequences. In stark contrast, an applicant thus placed by the failure of ANR to discharge its obligations is, in the Board's opinion, the victim of gross injustice.

Therefore, fairness dictates that the ANR proceed with renoticing CUD application DEC #1999-524 as promptly as possible in accordance with the Board's instructions. It is appropriate that the Applicants not be required to prove the merits of CUD application DEC #1999-524 under law applicable *after* the filing of that application. Therefore, ANR shall consider the application for CUD DEC #1999-524 under the law applicable on December 21, 1999 -- that is, as of the date of the initial filing of that CUD application. In providing notice of the re-opened proceeding, the Secretary or his designee shall send copies of the notice of the re-opened proceeding to those persons required to receive notice under VWR, Section 8.3, including, but not limited to, those persons granted party status in the consolidated appeals before the Board. See supra at p. 2. In the event that either no public comment is received with respect to CUD application DEC #1999-524 or the Secretary or his designee determines that such comment is not substantively different from comment received previously with respect to application DEC #1999-524, the Secre-

tary shall reissue CUD DEC #1999-524 under a new date. On the other hand, if the Secretary or his designee receives substantively different public comment, the Secretary or his designee may, in his discretion, take such comment into consideration in determining whether or not to reissue CUD DEC #1999-524 and, if so, with what additional findings and conditions.

The Board is cognizant that the parties have been in negotiations regarding the redesign of the Project. Without knowing the merits of any proposal(s) presented by the Applicants to the other parties, it is not possible for the Board to assess whether such redesign will either eliminate the need to do construction or other activities within the subject wetlands or their buffer zones or result in other impacts suggesting the need for a new CUD application. Accordingly, in remanding this matter to ANR, the Board advises the Secretary or his designee to consult with the Applicants. If the Applicants request review of a new or revised application, the Applicants shall file that application in accordance with VWR, Section 8.2, the Secretary or his designee shall provide public notice as required by VWR, Section 8.3, and the Secretary or his designee shall conduct a new review of project impacts upon the wetland(s) and their buffer(s).

Regardless of whether the Applicants seek review of their application for DEC #1999-524 or of a new or revised application, the Secretary or his designee shall strictly comply with the posting of notice requirements of VWR, Section 8.3. See In re: Proctor Gas, Inc., Docket No. CUD-93-02, Dismissal Order at 2 (Oct. 1993) ("[T]he issuance of a new or revised CUD [application] requires public notice, whether or not all purported wetland impacts were identified in the original CUD application.")

IV. ORDER

The Board hereby orders:

1. This matter is remanded to the Secretary of ANR consistent with the instructions set forth in Section III above.

2. Jurisdiction over this matter is returned to ANR.

Dated at Montpelier, Vermont, this 24th day of April, 2001.

Vermont Water Resources Board

/s/ David J. Blythe
David J. Blythe, Chair
Lawrence H. Bruce
Jane Potvin
John D.E. Roberts
Mardee Sánchez