STATE OF VERMONT
ENVIRONMENTAL BOARD

Marked as Ruling #59 for Reference Only.

RE: GEORGE F. ADAMS & CO., INC.

APPLICATION NO. 5L0289

DECISION ON MOTION OF APPLICANT TO DISMISS THE APPEAL OR OTHERWISE LIMIT SCOPE OF APPEAL

The above matter on the appeal from the issuance of a permit by District Environmental Commission #5 comes before the Chairman of the Environmental Board for decision in accordance with the stipulation of counsel as set forth in the pre-hearing order dated January 13, 1975 as amended by agreement of counsel and after argument on January 13, 1975.

The applicant proposes to develop and subdivide land within the Town of Stowe. The appellants, Mr. & Mrs. Philip Stehle, are property owners within the Town and were admitted to the proceedings on the application by the District Commission under Rule 12(C) of the Rules of the Environmental Board on their representations concerning the impact the project may have on Town Road 21.

The issues raised by the applicant's motion are:

(1) were the appellants improperly admitted as parties to the proceedings by the District Environmental Commission under Chapter 151 of Title 10 (Act 250) and the Rules of the Board and therefor lack standing to appeal?;

(2) if the appellants were properly admitted by the District Environmental Commission, can they appeal the decision of the Commission to the Environmental Board under 10 VSA, §6085(c)?;

(3) if the appellants have standing to appeal the decision of the District Commission:

(a) may they raise issues on the appeal other than

those they raised before the Commission as grounds for admission as parties under Rule 12(C)?; and,

(b) may they raise issues regarding municipal services provided by the Town of Stowe?; and

(4) does the Environmental Board have the authority to consider the potential impact of the proposed development on the aesthetics and natural beauty of a town road by reason of improvements to the road to be undertaken by the town?

The parties to the motion agree that the appellants sought and received party status from the District Environmental Commission under Rule 12(C) on their representations that they were concerned about the impact of the proposed project on Town Road 21. The appellants' petition to the District Environmental Commission, their representations in support of the petition as stipulated to by the parties, and the admission of the appellants as parties by the Commission constitute the record before the Board on the issue of whether the appellants were properly admitted.

Prior to October 9, 1973 the Environmental Board had no rules for the admission of persons, not parties as a matter of statute, as parties to 250 proceedings under 10 VSA, §6085(c).

The Chair notes that the cases acted upon by the Vermont Supreme Court which dealt with party status and rights under this provision arose prior to the effective date of Rule 12(C). Great Eastern Building Supply Company, Inc., 132 Vt. 610 (1974); State Aid Highway No. 1, Peru, Sup. Ct. Docket No. 237-73 (1974); In re Preseault, 130 Vt. 343 (1972).

Rule 12(C) of the Board Rules leaves the admission of a person, not otherwise a party as a matter of right under 10 VSA §6085(c), to the discretion of the District Environmental Commission upon finding that the petitioner has adequately demonstrated that the project proposed may adversely affect his interest under one or more of the criterion of Act 250.

The applicant offers nothing to provide any basis for the Chair to find that the District Commission abused its discretion in admitting the appellants as parties under Rule 12(C). The fact that the applicant may believe that after admission the appellants failed to prove substantively the adverse impact on their interests by the proposed development does not render the Commission's action improper.

On the basis of argument and the record before it, the Chair finds that no error was committed by the Commission in admitting the appellants as parties.

The appellants have appealed to the Environmental Board from the issuance of a permit to the applicant by the District Environmental Commission. The applicant seeks to have the appeal dismissed on the grounds that pursuant to 10 VSA §6085(c) only the applicant, a State agency, the regional and municipal planning commissions and the municipalities required to receive notice have standing to appeal a decision of a Commission to the Board.

The applicant asserts that this section, read in conjunction with In re Preseault, Supra, and State Aid Highway No. 1, Supra, forecloses to the appellants an appeal to the Environmental Board and suggests that if there is a remedy available

to the appellants it would be an appeal to the Supreme Court under 3 VSA §815(a).

By implication applicant's position is that if the appellants do not have the right to appeal under the Administrative Procedures Act they have no right of appeal at all, administrative or judicial.

The Supreme Court in the Preseault decision made clear that in determining the rights of parties aggrieved by a decision of a District Commission liberal interpretation of the statutes was necessary to avoid an unjust or unreasonable result. It also made clear that statutes should be read liberally to preserve rights to judicial review. The Court stated in Preseault:

> Clearly, a literal enforcement of the language of 10 V.S.A. §6085(c), as interpreted by the Environmental Board, would result in an unjust and unreasonable departure from the intent of the legislature when it recognized the interest adjoining property owners have in an application for an environmental permit on lands adjacent to theirs. The unreasonableness of this interpretation becomes more manifest when the fact finding significance of a de novo proceeding before the Environmental Board is considered. Therefore, we hold the intent of the legislature as expressed in the broad purposes of the Act, and in the Act itself, is to accord to adjoining property owners the right to appear as parties at hearings before the Environmental Board. (at page 348)

The narrow and literal reading of 10 VSA §6085(c) by the applicant would recognize the right of the appellants to participate in hearings on the application before the Commission assuming proper admission under Rule 12(C), but would then deny them the remedy, namely an appeal to the Board, afforded the other parties specified in §6085(c). Why a person admitted for cause should not have the same remedy if aggrieved by a Commission

decision is not apparent. Additionally if the appellants' remedy is limited to an appeal under 3 VSA §815(a), then the applicant would be deprived of its option to remove the appeal to Superior Court under 10 VSA §6089(a).

Another inconsistency would be that a person made a party under 12 (C) would satisfy the requirement of 3 VSA §815(a) that all administrative remedies be exhausted before an appeal to the Supreme Court after final action of a District Commission, whereas all other parties under 10 VSA §6085(c) are required to appeal through the Environmental Board before being entitled to judicial review. These inconsistencies and others which could be noted would be neither reasonable nor just.

The dictum found in State Aid Highway No. 1 (pp 2 and 4 of the advance sheet), concerning who may be an appropriate party for the purposes of an appeal under 10 VSA §6085(c), does not overcome the clear thrust of the court's reasoning in the Preseault decision that a person being a party by virtue of having an interest in an application should not be foreclosed from a de novo proceeding before the Board.

The reading of 10 VSA §6085(c) and 3 VSA §815(a) in pari materia and the decision of the Supreme Court in Preseault leads to the conclusion that a person once properly admitted under Rule 12(C), who is aggrieved by the final decision of the District Commission, has standing to appeal to the Environmental Board and Rule 16(A) of the Environmental Board so provides.

The Chair concludes that the appellants' appeal is properly before the Board.

The appellants contend that once admitted as parties under Rule 12(C) they have the right to participate in the proceedings on all issues under the 10 criteria of Act 250; applicant asserts to the contrary that the appellants are limited to those issues raised by the appellants in their petition to the District Commission for admission as parties to the proceedings.

Rule 12(C) was promulgated by the Board pursuant to the authority conferred upon it under 10 VSA §6085(c) to make rules to allow persons other than specified in that section to be admitted as parties. In exercising this authority, the rule is clear that the Board did not intend that persons not otherwise designated as parties be admitted casually but rather that the reasons for seeking party status be adequately and specifically stated.

The additional purpose of Rule 12(C) is to alert in a timely manner the Commission and other parties to the application, including the applicant itself, what precisely the position of the petitioner is and the substance of his objections. To find otherwise would put a premium on surprise and limited disclosure by a person requesting party status under the Rule.

The Chairman concludes, absent a motion, and the granting thereof, by the petitioners on good and sufficient grounds to expand the scope of their appeal under Rule 12(C) that the appellants are limited on their appeal to the issues regarding

Town Road 21 raised by themselves under Rule 12(C) before the District Commission as grounds for admission as parties to the proceedings (pre-hearing order January 13, 1975, section 3). See: Berlin Corners Associates, application #5W0298, Declaratory Ruling No. 62, Environmental Board, September 12, 1974.

The applicant further contends that appellants are foreclosed from raising issues relating to the impact of the proposed development on municipal services including highway safety and congestion under Criterion (5) (10 VSA §6086(a)(5)). This contention is based on applicant's reading of the decision of the Supreme Court in Great Eastern Building Supply Company, Inc., Supra. This case arose before the promulgation of Rule 12(C).

In view of the limitation in the scope of the appeal, the right of the appellants to raise issues other than under Criterion (5) is not considered here.

If the applicant believed that the appellants' interests regarding highway safety and congestion attributable to the proposed development were adequately represented by the municipality, the time to raise such objection was in opposition to appellants' petition to be admitted as parties under Rule 12(C). This the applicant did not do.

Rule 12(C) provides the opportunity to a person other than those designated by statute to become a party to an Act 250 application upon adequately demonstrating to the Commission that his interest may be adversely affected. Once

admitted as a party he clearly must have the right to offer evidence to prove his contention. The applicant's remedy in this instance was to appeal the admission of the appellants as parties on the ground that the appellants had not adequately demonstrated that their interests may be affected and admission as parties by the Commission was in error. To preclude the appellants from making an offer of proof under the criteria once admitted as parties would be inconsistent with the intent of 10 VSA §6085(c) and Rule 12(C) promulgated thereunder.

Lastly, the applicant claims that the issue of the impact of improvements to Town Road 21 on the aesthetics and scenic beauty (10 VSA §6086(a)(8)) is beyond the scope of review of the Environmental Board on this appeal.

It is found that it is the intention of the town to make improvements to Town Road 21 which will alter its quality and character in order to accommodate, in part, the anticipated traffic to be generated by the proposed development. The applicant has agreed to pay to the town one-half of the costs of these improvements not to exceed $10,000. On these facts it is clear that there is a direct and immediate relationship between the proposed development and proposed road improvements and that a partnership to accomplish these improvements exists or will exist between the applicant and the town.

Even assuming that the road improvements, if undertaken by the town independently of the applicant, would not be subject to review under Act 250, the Board does have authority, when properly raised, to review what impact under specified

criteria a proposed development may have and to impose reasonable conditions appropriate under the criteria. The appellants aver that an immediate and direct impact will be the consummation of an arrangement between the applicant and the town in the improvement of Town Road 21 to accommodate the development which will constitute an undue adverse effect on the aesthetics and scenic and natural beauty of the area under Criterion (8). These improvements the appellants claim will not be undertaken if the development does not occur or is amended. Whether the appellants can in fact and law satisfy their burden of proof under this criterion remains to be seen after hearing on the merits.

It is hereby ordered:

Applicant's motion to dismiss the appeal is denied.

Applicant's motion to limit the scope of appeal to the impact of the proposed development on Town Road 21 is granted.

Applicant's motion to limit appellants' right to raise issues on the appeal under either Criterion (5) or Criterion (8), or both, is denied.

These rulings on applicant's motion shall be final, subject to objection of any party on or before January 20, 1975, in which event the issues preserved by the objections will be heard by a quorum of the Board on January 22, 1975 at 10:00 a.m.

Dated at Montpelier, Vermont this 16th day of January, 1975.

ENVIRONMENTAL BOARD

By _____
Schuyler Jackson, Chairman