

Environmental Court of Vermont
State of Vermont

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ENTRY REGARDING MOTION

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Champlain Marina Dock Expansion

Docket No. 28-2-09 Vtec

Project: Expansion of water-borne docks, to accommodate larger boats

Applicant: Champlain Marina, Inc.

(Appeal from DEC determination on lake waters encroachment)

Title: Motion to Clarify participation of VNRC counsel (Filing No. 16)

Filed: June 11, 2010

Filed By: Cielo Marie Mendoza, Attorney for Agency of Natural Resources

Response in Opposition filed on 06/11/10 by Appellants "Save the Bay"

Response in Support filed on June 15, 2010 by Cross-Appellant CMI

Reply filed on June 15, 2010 by ANR

Sur-reply in Opposition filed on June 15, 2010 by Appellants "Save the Bay"

___ Granted

X Denied

___ Other

By its June 11, 2010 Motion to Clarify, the Vermont Agency of Natural Resources ("ANR") requests that the Court clarify its ruling of May 19, 2010, in which we granted the Vermont Natural Resources Council ("VNRC"), as amicus curiae, permission to cross examine witnesses in the upcoming merits trial. ANR contends the Court exceeded its authority in permitting VNRC to cross examine witnesses because participation by amicus curiae is necessarily limited to the submission of legal briefs. For the following reasons, we disagree.

The Vermont Rules of Appellate Procedure expressly authorize the participation of amicus curiae through the submission of legal briefs. V.R.A.P. 29. However, the rules also authorize amicus curiae to make oral argument before the Vermont Supreme Court. V.R.A.P. 34(i). In other words, amicus curiae are authorized to participate before an appellate court to the same extent as the principle parties.

The Rules of Appellate Procedure are made applicable to the Environmental Court by V.R.E.C.P. 5(a)(2). In an appeal to the Environmental Court, however, parties are not limited to submitting briefs and making oral argument. As a trial court performing an appellate function, we review de novo the issues preserved on appeal, taking evidence and testimony as if no proceeding had previously occurred. In re Killington, Ltd., 159 Vt. 206, 214 (1992). It is inconsistent to allow amicus curiae to perform the same function as the principle parties at an appellate level, but to prohibit them from participating to the same extent as the principle parties before this Court.

A court has "inherent authority to appoint or deny amicus curiae," and "it is solely within the discretion of the Court to determine the fact, extent, and manner of participation by the amicus.'" Jin v. Ministry of State Security, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (quoting Cobell v. Norton, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)). "A court can allow amici to call their own witnesses and cross examine the witnesses of other parties, but need not do so." Russell v. Board of Plumbing Examiners, 74 F. Supp. 2d 349, 351 (S.D.N.Y.

1999). We therefore conclude that we have the discretion to authorize VNRC to cross examine witnesses as amicus curiae in this appeal. In light of counsel's representation that Appellant Neighbors ("Save the Bay") and VNRC will avoid overlap in their trial participation, we conclude that VNRC's participation will not be unduly burdensome and therefore should be allowed.

This conclusion aligns with the Court's ability to allow such participation by amicus curiae in Act 250 permit appeals. Title 10 V.S.A. § 6085 allows the Court to permit amicus curiae to cross examine witness and otherwise participate in a pending appeal even though they are not a party. We see no compelling reason to allow such participation in an Act 250 appeal but not in an appeal of an ANR encroachment permit, particularly when VNRC has represented that it will undertake a limited role in these proceedings.

VNRC has represented that it will not delay the proceedings and it will not call additional witnesses. Its role will be limited to cross-examining select witnesses in the stead of Appellant Save the Bay. As a result of these representations, no duplication will occur, and honoring these requests will ensure a complete, yet also summary and expedited proceedings. Accordingly, we DENY ANR's motion to further clarify or limit VNRC's participation in this proceedings.

Thomas S. Durkin, Judge
June 16, 2010
Date

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Date copies sent to: _____ Clerk's Initials _____

Copies sent to:

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