

From: MacLean, Alex
Sent: Monday, April 16, 2012 9:02 AM
To: Shems, Ron; Recchia, Chris
Subject: FW: S.28 - Proposed Party Status Revisions
Attachments: Party Status - S.28 (MZ Revised) (04 13 12).doc

Where are we at with this?

Alexandra MacLean
Secretary of Civil and Military Affairs
1-802-272-0443

From: Michael Zahner [mzahner@vtchamber.com]
Sent: Friday, April 13, 2012 9:45 AM
To: MacLean, Alex
Subject: FW: S.28 - Proposed Party Status Revisions

Sorry Alex. I messed up your email address.

Michael Zahner

From: Michael Zahner
Sent: Friday, April 13, 2012 9:40 AM
To: Ron Shems; bshupe@vnrc.org; Chris.recchia@state.vt.us; alex.mcclean@state.vt.us; kkillian@clf.org; jfiedel@vnrc.org; jbrown@vnrc.org
Cc: Dawn Francis; Warren Coleman; Parker Riehle; Will Dodge; epomerleau@vermontrealestate.com
Subject: S.28 - Proposed Party Status Revisions

I'd like to take this opportunity to send our party status revisions to all interested parties for review and discussion. I have talked to Dawn, consulted with Will Dodge, Warren Coleman and Parker Riehle. We believe the attached revisions effectively deal with the concerns raised in the Pion case while preserving the federal standard for standing. I have revised what I provided to the HNRC yesterday in order to clarify what I believe we are all trying to achieve.

Best regards,

Michael

Michael Zahner
Vermont Chamber of Commerce
802-272-5945

S.28
PROPOSED REVISIONS

* * * PARTY STATUS; STANDING TO APPEAL * * *

Sec. 5. PARTY STATUS AMENDMENTS; PURPOSE

The purpose of Secs. 6 (party status) and 7 (person aggrieved) of this act is to correct the overly rigorous application of existing standards for party status and standing to appeal exemplified by the decision of *In re Pion Sand and Gravel*, No. 245-12-09 Vtec (July 2, 2010), and to assure that future decisions properly apply these standards. To determine standing, the Vermont supreme court has applied an analysis used by the federal courts under Article III of the United States Constitution. *Parker v. Milton*, 169 Vt. 74 (1998). In addition, Vermont statutes establish who may be a party. For the purpose of 10 V.S.A. §§ 6085(c)(1)(E) (party status; adjoining property owner; other persons) and 8502(7) (person aggrieved), establishing status as a party or “person aggrieved” is distinct from a merits determination. **In a petition for party status, A a person need not prove the merits of a claim in order to participate or appeal, but rather need only is required to demonstrate a reasonable possibility of injury potential impact to a particularized interest. This demonstration must include factual information necessary to support the petition.¹ The information supporting the petition can be challenged and the petition may be challenged on legal grounds. However, a person need not successfully prove the merits of a claim under the specific criteria of 10 V.S.A. § 6086(a) in order to achieve party status, participate in an Act 250 proceeding, or appeal provided that the person retains party status at the end to the district commission proceeding.** The subdivisions amended in Secs. 6 and 7 of this act shall be applied consistently with this purpose.

Sections 6 and 7 of S.28 are subject to strike all and replacement with the following language:

Sec. 6. 10 V.S.A. § 6085(c) is amended to read:

(c)(1) Party status. In proceedings before the district commissions, the following persons shall be entitled to party status:

* * *

¹ *Laidlaw v Defenders of Wildlife (January 12, 2000)*: For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw’s facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw’s discharges. Record, Doc. No. 71 (Exhs. 41, 42). *Curtis reaffirmed these statements in extensive deposition testimony*. For example, he testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw’s discharges. *Ibid.* (Exh. 43, at 52–53; Exh. 44, at 33). **MZ Notes: It is my understanding that facts supporting the petition for standing in the deposition testimony can be challenged for veracity, etc. For instance, it might be proven that Kenneth Lee Curtis did not grow up in the area, or he no longer lived there. In Pion, it was proven that the Murphy’s grandparents did not have a legal interest in the adjoining property and therefore did not qualify for standing.**

(E) Any adjoining property owner or other person who has **alleges** an injury to a particularized interest protected by this chapter ~~that may be affected by an act or decision by a district commission~~ **attributable to a proposed development or subdivision. The alleged injury must be factual and concrete, not conjectural or hypothetical, it must be actual or imminent, it must directly relate to the specific criteria of 10 V.S.A. § 6086(a), and it must be likely that the alleged injury will be redressed by a favorable decision of the district commission. The factual information supporting the allegation shall be presumed to be correct unless challenged by a party or the district commission on its own motion. However, in seeking party status, the adjoining property owner or other person shall not be required to successfully prove a claim on the merits of the issue identified under the specific criteria of 10 V.S.A. § 6086(a).**

Sec. 7. 10 V.S.A. § 8502(7) is amended to read:

(7) “Person aggrieved” means a person who alleges an injury to a particularized interest protected by the provisions of law listed in section 8503 of this title, attributable to an act or decision by a district coordinator, district commission, the secretary, or the environmental division that can be redressed by the environmental division or the supreme court. **The alleged injury must be factual and concrete, not conjectural or hypothetical, it must be actual or imminent, it must directly relate to the specific criteria of 10 V.S.A. § 6086(a), and it must be likely that the alleged injury will be redressed by a favorable decision of the district commission. The factual information supporting the allegation shall be presumed to be correct unless challenged by a party or the court on its own motion. However, the adjoining property owner or other person shall not be required to successfully prove a claim on the merits of the issue identified under the provisions of law listed in section 8503 of this title.**

Prepared by Michael Zahner, Vermont Chamber of Commerce