

STATE OF VERMONT

SUPERIOR COURT
Vermont Unit

ENVIRONMENTAL DIVISION
Docket No. 130-9-13 Vtec

Hovey A250 Permit

ENTRY REGARDING MOTION

Title: Motion to Disqualify Attorney Huessy (Motion 5)
Filer: Gregory Hovey
Attorney: Deborah T. Bucknam
Filed Date: August 13, 2014

Response filed on 08/20/2014 by Attorney Hans Huessy for Appellant Toni Flanigan
Opposition

Response filed on 09/09/2014 by Attorney Deborah T. Bucknam for Appellee Gregory Hovey
Reply

The motion is DENIED.

Robert and Toni Flanigan (Appellants) appeal the September 6, 2013 decision of the District Environmental Commission # 7 allowing Gregory Hovey (Applicant) to construct and operate a dog breeding facility in the Town of Victory, Vermont. Pending before the Court is Applicant's motion to disqualify Appellants' counsel, Attorney Hans Huessy.

Applicant contends that Appellants' counsel must be disqualified because he is a necessary witness in this case. Attorney Huessy spent the night at the Flanigan residence on the night of August 7, 2014. The next morning, he viewed the project site and then departed at 8:30 a.m. to attend depositions in this matter. Applicant asserts that during this time, Attorney Huessy heard the frequency and magnitude of dog barks and could additionally speak as to whether any smell of dog feces attributable to Applicant's breeding facility could be detected from the Flanigan property.

Appellants contend that Attorney Huessy is not a necessary witness and argue that granting this motion would create a chilling effect on counsel performing site visits. Appellants also request that they be awarded attorney's fees incurred in defense of this motion.

Vermont Rule of Professional Conduct 3.7(a) states in relevant part that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." This Court has previously stated that a necessary witness is one whose testimony will provide relevant and material evidence that is neither merely cumulative nor otherwise obtainable. In re Mastelli Constr. Application, No. 220-10-07 Vtec, slip op. at 14 (Vt. Env'tl. Ct. Sept. 19, 2008) (Durkin, J.)

(citation omitted). Because we find the proffered testimony is otherwise obtainable, Attorney Huessy is not a necessary witness.

This appeal relates to whether any noise or odors created by the project will have an undue adverse impact. Unlike a controversy involving a discrete event, such as a traffic accident, the effects (or lack thereof) of Applicant's use can be witnessed first-hand by anyone who visits the project site or the Flanigan property.

For example, the parties disagree as to whether the noise created by the project is an intermittent "roar" or merely isolated "woof[s]." (See Robert Flanigan Dep. at 33, filed Sept. 9, 2014; Hovey Aff. at ¶ 8, filed Sept. 9, 2014). The sense impressions of Attorney Huessy on August 7–8 are neither unique nor dispositive on this issue, and we will not require his disqualification based on sensory perceptions during a site visit when a substantially similar experience is available to anyone who visits the project site.

Further, this Court encourages counsel to be familiar with a development site when appearing in a land use appeal. Granting this motion could cause counsel to hesitate in developing familiarity with a site out of fear of disqualification. For the above reasons, Applicant's motion to have Attorney Huessy disqualified is **DENIED**.

The Flanigan's request for an award of attorney's fees is also **DENIED**.

Electronically signed on September 16, 2014 at 11:34 AM pursuant to V.R.E.F. 7(d).



Thomas G. Walsh, Judge
Superior Court, Environmental Division

Notifications:

Hans Huessy (ERN 1813), Attorney for Appellant Robert Flanigan
Hans Huessy (ERN 1813), Attorney for Appellant Toni Flanigan
Melanie Kehne (ERN 2561), Attorney for Interested Person Natural Resources Board
Deborah T. Bucknam (ERN 1391), Attorney for Appellee Gregory Hovey
Interested Person Darlene Pearson
Interested Person Doug Preston