VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Lawrence White, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation)

and

Re: Lawrence White, #1R0391-7-EB (Interlocutory)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to requests for interlocutory appeal and a petition to revoke certain land use permits. As explained below, the Board denies the requests for interlocutory appeal and grants the petition to revoke subject to an opportunity to correct the violation.

I. PROCEDURAL SUMMARY

On December 8, 1995, the District #1 Environmental Commission ("Commission") issued re: Lawrence White, #1R0391-7, Preliminary Ruling and Recess Memorandum and Order (Dec. 8, 1995) ("Commission Decision") wherein the Commission: (i) recessed its proceeding pending resolution of whether certain permits already issued to Lawrence White ("White") were valid; (ii) advised that its recess order could be appealed pursuant to Environmental Board Rule ("EBR") 43, interlocutory appeal; and (iii) advised that the validity of the permits already issued to White could be challenged pursuant to EBR 38, revocation of permits.

On December 18, 1995, Cathy J. Cushing and Stephen Maurer ("Cushing/Maurer") filed an interlocutory appeal from the Commission Decision.

On December 18, 1995, Mr. Harris Peel ("Peel") filed a petition to revoke ("Petition") Land Use Permits #1R0391 ("Original Permit"), #1R0391-3 ("Dash 3 Permit"), #1R0391-4 ("Dash 4 Permit"), #1R0391-5 ("Dash 5 Permit"), #1R0391-5A ("Amended Dash 5 Permit"), and #1R0391-6 ("Dash 6 Permit") issued to White by the Commission. White is also the permittee in Land Use Permit #1R0391-2 ("Dash 2 Permit"), but Peel does not seek revocation of this permit.

On December 20, 1995, Peel and Christel Hall ("Hall") filed an interlocutory appeal from the Commission Decision.

The interlocutory appeals and the Petition all pertain to the single issue of whether the permits already issued to White are valid.

On January 22, 1996, Board Chair John T. Ewing convened

a prehearing conference. Persons attending the prehearing conference, including Peel, were instructed to file a petition for party status and a map depicting the location of his or her property relative to White's property. The Chair also appointed himself as administrative hearing officer pursuant to 10 V.S.A. § 6027(g) and EBR 41.

On February 26, 1996, Chair Ewing issued a Prehearing Conference Report and Order ("Report and Order").

On March 11, 1996, White filed an objection ("Objection") to the Report and Order's grant of party status to Peel and Hall.

On March 21, 1996, Cushing/Maurer filed a letter regarding their party status in this Petition and, on March 22, 1996, White filed a response.

On March 27, 1996, the Board convened a deliberation relative to White's objection to the Report and Order, but made no ruling.

The parties filed prefiled testimony and exhibits, and evidentiary objections during March and April, 1996.

On April 8, 1996, the Chair granted the joint request by White and Peel for an extension of the deadline for the submission of proposed findings of fact and conclusions of law.

On April 18, 1996, Chair Ewing convened a hearing with the following parties participating:

Lawrence White by Jon Readnour, Esq.
Harris Peel and Christel Hall by
Charles R. Eichel, Esq.

After taking the evidence, Chair Ewing recessed the hearing.

On April 29, 1996, White filed proposed findings of fact and conclusions of law. On April 30, 1996, Peel filed proposed findings of fact and conclusions of law. On May 13, 1996, White filed a response to Peel's proposed findings of fact and conclusions of law, and on May 17, 1996, Peel filed an objection and counter-response.

On June 6, 1996, Chair Ewing issued a proposed decision

("Proposed Decision") to the parties. Pursuant to 10 V.S.A. § 6027(g), parties were allowed to request oral argument before the Board. In addition, parties were allowed to file written objections.

On June 21, 1996, White filed a request for oral argument and written objection to the Proposed Decision. Due to scheduling conflicts, oral argument could not be held until the Board's August deliberation day.

On August 28, 1996, the Board convened an oral argument with Peel and White participating, and, a deliberation regarding this matter. Following a review of the Proposed Decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned. This Petition is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. ISSUE

Peel seeks revocation of the Original Permit and the Dash 3 through Dash 6 Permits. The Report and Order ruled that all parties had failed to establish that they adjoined White's land when White applied for the Original Permit and, therefore, the Original Permit would not be subject to revocation. The Proposed Decision ruled likewise. No party objected to the Report and Order and the Proposed Decision with regard to this issue.

Accordingly, only the Dash 3 Permit, Dash 4 Permit, Dash 5 Permit, Amended Dash 5 Permit, and the Dash 6 Permit are at issue in the Petition, and these permits shall be collectively referred to as the "Revocation Permits."

The issue in this Petition is whether, pursuant to EBR 38, White failed to comply with EBR 10(F) when he applied for the Revocation Permits such that they should be revoked.

III. FINDINGS OF FACT

1. The Revocation Permits all authorize development on a 65 acre tract of land described at Book 32, Page 165, and Book 40, Page 1, of the land records of Danby, Vermont ("Site"). White owns the Site.

2. On May 31, 1983, White filed his application with the Commission for the Dash 2 Permit. White's application identified Mr. Michael Peloso ("Peloso") as an engineering consultant, and as the person to be contacted regarding the application. White signed the Dash 2 Permit application.

3. The Dash 2 Permit application included a list of adjoining property owners to the Site. Peel was one of those persons identified on the list. Peel filed as exhibit Peel 5 a copy of White's Dash 2 Permit application.

4. On January 15, 1988, White applied for the Dash 3 Permit. White's application identified C. Heins, Northeast Environmental Associates, as a planning consultant, and as the person to be contacted regarding the application. Northeast Environmental Associates did the actual filling out of the application form.

5. White signed the Dash 3 Permit application. Item 10 of White's Dash 3 Permit application states, in part, that "[b]y signing this application, the applicant assumes responsibility for the information provided."

6. The Dash 3 Permit application listed as adjoining landowners the Danby Cemetery Association, John Backus, John Lazorik, Donald and Susan Mellen, Edwin Staples, Linwood Champine, Renaldo Vasquez, and David and Celia Hayward. An effort was made to identify the adjoining landowners and then list them in the application. Northeast Environmental Associates did not intentionally omit Peel.

7. The Commission mailed a copy of the notice of hearing for the Dash 3 Permit application to all of the aforementioned adjoining landowners.

8. Commission Exhibit #6 of White's Dash 3 Permit application is a letter to the Town of Danby Board of Selectmen. The letter is on the stationery of Northeast Environmental Associates, is signed by "Michael R. Peloso, Principal Northeast Environmental Associates", and pertains to how the project being applied for would not cause an unreasonable burden on the Town of Danby to provide governmental services under 10 V.S.A. § 6086(a) (7).

9. Commission exhibits #7 through #12, and #17 of White's Dash 3 Permit application are all letters signed by Peloso, and they pertain to how the project being applied for would comply with certain Act 250 criteria.

10. Commission exhibits #19 through #21 of White's Dash 3 Permit application are all letters addressed to Peloso from various state agencies and a private company regarding how the project being applied for would comply with certain Act 250 criteria.

11. On April 12, 1988 the Commission issued the Dash 3 Permit to White authorizing the construction of a 70' x 100' maintenance building, the conversion of an existing restaurant to offices with a 24' x 30' foot addition, and the establishment of a firewood cutting area, subject to certain conditions.

12. On July 23, 1990, White applied for the Dash 4 Permit. White's application identified himself as the person to be contacted regarding the application. White's employee, Ms. Nancy A. Brown ("Brown"), did the actual filling out of the application form. Brown has worked for White since 1989. White signed the Dash 3 Permit application.

13. The Dash 4 Permit application listed as adjoining landowners the Danby Cemetery Association, John Backus, John Lazorik, Donald and Susan Mellen, Edwin Staples, Linwood Champine, Renaldo Vasquez, and David and Celia Hayward.

14. The Commission mailed a copy of the notice of application and hearing regarding the Dash 4 Permit application to the aforementioned adjoining landowners.

15. Brown did not intentionally omit Peel from the Dash 4 Permit application adjoiners list. Brown relied on the Dash 3 Permit application adjoiners list to prepare the Dash 4 permit application adjoiners list.

16. Brown did not examine the Dash 2 Permit application adjoiners list when she prepared the Dash 4 Permit application adjoiners list. It is not credible evidence that the Dash 2 Permit application adjoiners list was unavailable to Brown when she prepared the Dash 4 Permit application adjoiners list.

17. Commission exhibit #2 to the Dash 4 Permit application is a site plan prepared by Northeast Environmental Associates. The site plan indicates a "Second Amendment to Site Plan July 1990."

18. Item 12 of White's Dash 4 Permit application states, "I hereby swear that the information provided above or attached to this application is true and accurate to the best of my knowledge." White's signature as applicant follows this sentence.

19. On May 3, 1991 the Commission issued the Dash 4 Permit to White authorizing the stockpiling, processing, and storage of stone and gravel materials, subject to certain conditions.

20. On July 23, 1990, White applied for the Dash 5 Permit. White's application identified himself as the person to be contacted regarding the application. Brown did the actual filling out of the application form.

21. The Dash 5 Permit application listed as adjoiners the same persons listed in White's Dash 4 Permit application.

22. The Commission mailed a copy of the notice of application and hearing regarding the Dash 5 Permit application to the same persons who were mailed a notice of application and hearing for the Dash 4 Permit.

23. Commission exhibit #2 to the Dash 5 Permit application is a site plan prepared by Northeast Environmental Associates. The site plan indicates a "Second Amendment to Site Plan July 1990."

24. Item 12 of White's Dash 5 Permit application states, "I hereby swear that the information provided above or attached to this application is true and accurate to the best of my knowledge." White's signature as applicant follows this sentence.

25. On May 3, 1991 the Commission issued the Dash 5 Permit to White authorizing the construction of a 30' x 90' storage building, a 55' radio tower, and the change of the approved hours of operation of a previously approved construction business, subject to certain conditions.

26. The Dash 6 Permit application listed as adjoiners the same persons listed in White's Dash 4 Permit application. Brown did the actual filling out of the application form.

27. The Commission mailed a copy of the Act 250 notice of application and hearing regarding the Dash 6 Permit application to the same persons who were mailed a notice of application and hearing for the Dash 4 Permit.

28. On May 3, 1991 the Commission issued the Dash 6 Permit to White authorizing an extension of the construction deadline for the 24' x 30' foot addition authorized in the Dash 3 Permit, subject to certain conditions.

29. On August 27, 1991 the Commission issued the Amended Dash 5 Permit which supersedes conditions 2 through 7 of the Dash 5 Permit, and further alters the approved hours of operation of a previously approved construction business, subject to certain conditions, after receipt of a motion to reconsider by White.

30. The Commission mailed a notice of White's motion for reconsideration, and notice of hearing location, date, and time to the statutory parties, and also to Alice and George Araskiewicz, Celia Hayward, Chris Corsones, Esq., John J. Kennelly, Jay Kidwell, Rex Sheldon, Renaldo J. Vasquez, and Angie Slater.

31. There is no evidence that the Commission's coordinator waived the requirement that a list of adjoiners be included with the applications for the Revocation Permits.

32. Peel owns 32.9 acres of land in the Town of Danby on which he owns and operates an art gallery. Peel's ownership pre-dates White's applications for the Revocation Permits. Peel's land and the Site adjoin for approximately 1000 feet.

33. White did not list Peel as an adjoiner to the Site in White's application for the Revocation Permits. The Commission did not mail Peel any notices pertaining to the Revocation Permits. Peel had no knowledge of the Commission hearings conducted relative to the Revocation Permits. Peel had no knowledge of the

projects authorized by the Revocation Permits until October, 1995.

34. If Peel had received notice of White's applications for the Revocation Permits, then Peel would have opposed the applications. Peel's interests in opposing the applications would have been related to the noise of crushing rock, trucks being loaded and unloaded with rock, and the continual arrival and departure of trucks.

35. Since the issuance of the Revocation Permits, Peel has experienced trucks going by his property causing dust to be thrown up from the trucks and from the road. The Site can be seen from the vantage point of "Torrey Rock" on Peel's land.

36. Two other earth extraction projects have operated in the vicinity of Peel's land. At various times, crushing noise has emanated from all three of the operations such that when Peel heard crushing noises, he could not distinguish where the noise was coming from.

37. A closed dump is located on the Site, and it has a high potential for contaminating ground water supplies. Neither the actual boundaries of the dump nor its contents, including what toxic materials may lie hidden in it, are known.

38. The Town of Danby does not have a tax map which identifies ownership of property.

39. White has invested money to build and operate the projects authorized by the Revocation Permits. There is no evidence regarding how much profit and capital appreciation White has enjoyed due to the construction and operation of the projects authorized by the Revocation Permits.

40. On February 16, 1996, jurisdictional opinion #1-259 ("JO #1-259") was issued regarding whether Peel's art gallery required an Act 250 permit. JO #1-259 concludes that no permit is required based on a conclusion of estoppel. White received a copy of JO #1-259, could have appealed from its conclusions, but did not do so.

IV. CONCLUSIONS OF LAW

A. Preliminary Issues

A number of preliminary issues arising out of the Report and Order and the Proposed Decision require final adjudication by the Board.

1. Interlocutory Appeals

Cushing/Maurer and Peel/Hall filed interlocutory appeals from the Commission Decision. The Peel/Hall interlocutory appeal is untimely since it was filed after the expiration of the ten day period provided for in EBR 43(A). The Cushing/Maurer interlocutory appeal, while timely, seeks adjudication of the same issue addressed by the Petition and, as stated in the Report and Order, this issue is properly addressed in a EBR 38 revocation proceeding. The Proposed Decision ordered the dismissal of Re: Lawrence White, #1R0391-7-EB (Interlocutory). No party objected to this part of the Proposed Decision. Therefore, the Peel/Hall and Cushing/Maurer interlocutory appeals are dismissed.

ii. Official Notice

The Report and Order took official notice of the Original Permit and the Revocation Permits and supporting findings of fact and conclusions of law, including the respective applications, plans, and exhibits on file with the Commission relative to these permits. No party objected. Accordingly, official notice has been taken of the aforementioned permits.

iii. Peel's Standing and Hall's Party Status

White's March 11 Objection pertains to the Chair's grant of party status to Peel and Hall in the Report and Order. The Objection did not request that the Board rule prior to the Chair's convening of a hearing on the Petition's merits, nor did White object to the Chair's appointment as hearing officer, or the schedule for the submission of prefiled evidence. Accordingly, while the Objection has been pending, the Chair convened a hearing pursuant to the Report and Order.

White renewed his objection to the Report and Order at the hearing, and again objected after the issuance of the

Proposed Decision. The Proposed Decision, in part, incorporates the Report and Order's decision relative to Hall and Peel's party status.

Under 10 V.S.A. § 6027(g) and EBR 41, the Proposed Decision is subject to review by the full Board, and the Board's final findings and conclusions shall be based on the record. Therefore, the Board now rules on the Objection.

The Objection contends that the Petition should be dismissed because Peel and Hall failed to file party status petitions which satisfy the requirements of EBR 14(A)(5).

The Board concludes that, with regard to Peel, the controlling rule is not EBR 14, but rather, EBR 38 since the latter provides a specific standard with regard to who has standing to initiate a revocation petition and on what grounds. With regard to Hall, the Board concludes that the controlling rule is EBR 14 since Hall seeks to participate as a party in a revocation petition brought by a person who has standing to do so under EBR 38. Applying-these two rules, the Board concludes that Peel has standing to bring the Petition, but that Hall does not have party status to participate in the Petition.

a. Peel

Peel filed the Petition pursuant to 10 V.S.A. § 6090(c) and EBR 38(A). EBR 38(A) provides, in part, that a petition for revocation may be made "by any adjoining property owner whose property interests are directly affected by an alleged violation." EBR 38(A) states a specific standing requirement which Peel must satisfy to invoke the Board's jurisdiction. Once invoked, the Board adjudicates the Petition without considering whether Peel has party status under EBR 14 since EBR 38(A) does not require Peel to also satisfy the party status requirements set forth in EBR 14.

For example, in Re: NJM Realty Limited Partnership, #2W0312-EB (Revocation), Memorandum of Decision and Order at 2 (June 29, 1990), the Board dismissed a revocation petition where the petitioner was not a party to the original permit proceeding, was not an adjoining landowner, and did not fit any other category of persons able to file petitions for revocation pursuant to EBR 38(A). See also Sierra Club v. Morton, 405 U.S. 727, 732 (1972) (inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff);

Re: Wesco, Inc. and Jacob & Harmke Verburg Declaratory Ruling Request #304, Memorandum of Decision at 4 (June 30, 1995) (10 V.S.A. § 6007(c) controls who has standing to bring a declaratory ruling proceeding as the specific standard over the standard stated in the Administrative Procedure Act); #2W0521-EB, North, Inc., Findings of Fact and Conclusions of Law and Order at 6 (April 24, 1989) (a revocation petition will be entertained provided the petition alleges a reason for revocation that is grounded in [EBR] 38).

The Board concludes that, with regard to an adjoining property owner not a party to the original application, the specific standing requirement in a revocation petition is stated in EBR 38(A) and not EBR 14, and the former is controlling to the exclusion of the latter. To the extent that Peel was instructed to file a party status petition under EBR 14(A)(5), such requirement is not mandated by, and conflicts with, EBR 38(A). Peel cannot be denied standing to bring the Petition under EBR 38 for failing to file a party status petition under EBR 14. Rather, the Board will decide whether Peel satisfies the standing requirement in EBR 38(A), that is, whether Peel's property interests are directly affected by the alleged violation.

Peel owns 32.9 acres on which he owns and operates an art gallery. Peel's land and the Site adjoin for approximately 1000 feet. Peel can see the Site from the vantage point of "Torrey Rock" on his land. If Peel had received notice of White's applications for the Revocation Permits, Peel would have opposed the applications. Peel's interest in opposing the applications would have been related to the noise of crushing rock, of trucks being loaded and unloaded with rock, and the continual arrival and departure of trucks.

Since the issuance of the Revocation Permits, Peel has experienced trucks going by his property causing dust to be thrown up from the trucks and from the road. Two other earth extraction projects have operated in the vicinity of Peel's land. At various times, crushing noise has emanated from all three of the operations such that when Peel heard crushing noises, he could not distinguish where the noise was coming from. Finally, a closed dump is located on the Site, and it has a high potential for contaminating ground water supplies. Neither the actual boundaries of the dump nor its contents, including what toxic materials may lie hidden in it, are known.

The Board concludes that Peel has demonstrated that his property interests are directly affected by the alleged violation. These property interests are directly relevant to Criteria 1, 1(B), 5, and 8. Accordingly, the Board overrules the Objection with regard to Peel, and concludes that Peel has standing to bring the Petition relative to the Revocation Permits.[1]

b. Hall

Hall seeks to participate in the Petition filed by Peel.[2] A person who is not the petitioner may participate as a party in a revocation petition if granted party status by the Board pursuant to EBR 14. See Re: Re Charles and Barbara Bickford, #5W1093-EB (Revocation), Memorandum of Decision at 1 (Jan. 22, 1993); Re: Crushed Rock, Inc., #1R0498-EB, Findings of Fact, Conclusions of Law, and Permit Revocation Order at 3 (Oct. 17, 1986), rev'd on other grounds, In re Crushed Rock, Inc., 150 Vt. 613 (1988). With regard to Hall, the applicable rule is EBR 14(A)(5) since she is an adjoiner that seeks to participate in--but not initiate--the Petition.

Hall failed to file a party status petition in compliance with EBR 14(A)(5) which demonstrates how the project's authorized by the Revocation Permits may have a direct effect on her property under any the of the 10 Act 250 criteria. Accordingly, the Board sustains the Objection with regard to Hall, and she is denied party status to participate in the Petition.

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[1] White's Objection also states, as an alternative to denying Peel party status under EBR 14, that Peel be instructed to identify the potential effect of the projects authorized by the Revocation Permits upon the Peel property with respect to specific criteria or sub-criteria. Peel has, without being instructed to do so, identified the potential effect of the projects authorized by the Revocation Permits on his property, and these effects are clearly relevant under Criteria 1, 1(B), 5, and 8.

[2] While Hall/Peel filed a joint interlocutory appeal from the Commission Decision, Hall did not jointly file the Petition with Peel.

iv. Cushing/Maurer's Failure to Participate

The Report and Order grants party status to Cushing/Maurer. After the Report and Order's grant of party status, Cushing/Maurer filed a request that "their names be withdrawn as parties" in this proceeding "without prejudice to the merits of the Peel/Hall" Petition. White contends that the withdrawal should be with prejudice. White renewed this objection in response to the Proposed Decision.

The Board's rules do not require that a party "withdraw" from a proceeding after having been granted party status, nor is there any provision for withdrawal with or without "prejudice.' A person granted party status that does not participate has waived his or her right to participate. Kanaaran v. Kanaan 6 Vt. Law Week 93, 96 (1995) (waiver is a voluntary and intentional relinquishment of a known and enforceable right). The Board concludes that Cushing/Maurer waived their party status rights in this Petition, and that their waiver has no bearing on the Petition's merits, nor is there any basis or necessity for the Board to decide whether their lack of participation was done with or without "prejudice."[3]

v. White's Response to Peel's Proposed Findings of Fact

White filed a response to Peel's proposed findings of fact and conclusions of law. Peel objects and requests the Board to not consider the response. The Proposed Decision concludes that filings not allowed for by the Board's rules or an order of the Board are not allowed since they impair the Board's ability to manage its own proceedings. Re: Northern Develooment Enterprises, #5W0901-R-5-EB, Memorandum of Decision (Aug. 21, 1995). White did not object to this portion of the Proposed Decision. Therefore, the Board will not consider White's response in ruling on the Petition's merits.

B. Revocation

Pursuant to EBR 38, the Board may revoke a permit if it

[3]The Board notes, however, that Cushing/Maurer's waiver may be res judicata if they were to seek revocation of the Revocation Permits due to White's failure to list them as an adjoiner.

finds that: (i) the applicant or its representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission to deny the application or to require additional or different conditions, on the permit; (ii) the applicant or his successor in interest has violated the terms of the permit or any permit condition, the approved terms of the application; or (iii) the rules of the board.

The person seeking revocation has the burden of proof. Re: Putney Paper Co., Inc., #2W0436-6-EB (Revocation), Findings of Fact, Conclusions of Law, and Dismissal Order at 11 (Feb. 2, 1995).

1. willful or **gross** negligence

An act or omission is done willfullv "if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done." Black's Law Dictionary, West Publishing Co., Fifth Edition. See Re: Synergy Gas Cornoration, Findings of Fact, Conclusions of Law, and Order at 15 (June 8, 1995); Re: Talon Hill Gun Club. Inc. and John Swininuton #9A0192-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 11 (Oct. 8, 1993).

With regard to gross negligence, the Vermont Supreme Court has described gross negligence **as** being "equivalent to the failure to exercise even a slight degree of care. ... It is heedless and palpable violation **of** legal duty respecting the rights of others." Shaw v. Moore, 104 Vt. 529, 531-532 (1932).

Northeast Environmental Associates prepared the Dash 3 Permit application. White's employee, Brown, prepared the Dash 4 through Dash 6 Permit application adjoiners list by relying on the Dash 3 Permit application adjoiners list. In each instance, an effort was made to identify the adjoining landowners and then list them as part of the applications. This effort was complicated by the Town of **Danby** not having a tax map which identifies ownership of property. While these efforts were faulty, the omission of Peel was not intentional nor was it so flagrant as to constitute the failure to exercise even a slight degree of care.

The Board concludes that White did not act willfully or with gross negligence in the submission of the applications for the Revocation Permits.

ii. Permit conditions and application terms

Under EBR 38(A)(2)(b), the Board may revoke a permit if it finds that a permittee violated the terms of the permit *or* any permit condition or the approved terms of the application. Since the only issue is whether White failed to comply with EBR 10(F)'s provision regarding adjoiners, this part of EBR 38(A)(2)(b) is not applicable.

The Board concludes that White has not violated the terms or conditions of the Revocation Permits, nor the approved terms of the applications for the Revocation Permits.

iii. Board rules

Under EBR 38(A)(2)(b), the Board may also revoke a permit if it finds that a permittee violated the Board's rules. When White applied for the Permits, EBR 10(F) provided:

> The applicant shall file with the application a list of adjoining property owners to the tract or tracts of land proposed to be developed or subdivided, unless this requirement is waived by the district coordinator. Provision of personal notice to adjoining property owners and other persons not listed in section (E) of this Rule shall be solely within the discretion and responsibility of the district commission.'

In 1985 the Legislature ratified the Board's rules, including EBR 10(F), such that they have "effectively become part of the Act 250 legislative scheme codified at chapter 151 of Title 10." In re Barlow, 160 Vt. 513, 521 (1993); In re Spencer, 152 Vt. 330, 336 (1989).

'The Board amended EBR 10(F) effective January 2, 1996. However, the Legislature amended 10.V.S.A. § 6084(a) and EBR 10(E) and (F) with the passage of Senate bill S.272, effective May 22, 1996.

In Re: Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort, #5L0646-3-EB (Revocation), Memorandum of Decision at 4 (April 26, 1994), the Board ruled that EBR 10(F) "is not simply a technicality but is an important rule."

> Under 10 V.S.A. § 6085(c), adjoining landowners have a right to participate in Act 250 proceedings to the extent that their property is directly affected under one or more of the Act 250 criteria at 10 V.S.A. § 6086(a). If the District Commission is not given the names of adjoining landowners, then the District Commission cannot notify them, and the landowners are deprived of the opportunity to be heard concerning potential adverse effects on their interests.

Id.

Peel is an adjoiner to the Site. His ownership predates White's application for the Revocation Permits. White did not list Peel in his applications for the Revocation Permits. As noted above, had Peel received notice of White's applications for the Revocation Permits, he would have opposed the applications to protect interests which are relevant to Criteria 1, 1(B), 5, and 8.

There is no evidence that the Commission's coordinator waived the requirement that a list of adjoiners be included with the applications for the Permits. Rather, just the opposite is the case. White provided a list of adjoiners, and the Commission provided personal notice to the adjoiners listed by White. Because Peel was not listed, the Commission did not provide him with personal notice.

In In re Conway, 152 Vt. 526 (1989), the Vermont Supreme Court upheld a remand order by the Board where EBR 10(F) was not complied with. The Board has consistently applied Conway and required permittees to correct the failure to comply with EBR 10(F).

For example, in Re: Charles and Barbara Bickford, #5W1093-EB (Revocation), Memorandum of Decision at 5 (April 12, 1993), a decision subsequent to Conway pertaining to EBR 10(F), the Board stated:

> When agency procedures and regulations require personal notice to adjoiners, such notice must be given. "'Where the

> rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous then otherwise would be required'." In re Conway, 152 Vt. 526, 529, citing Morton v. Ruiz, 415 U.S. 199, 235 (1974).

EBR 10(F) required White to list Peel as an adjoiner. White failed to do so and, consequently, the Commission failed to notify Peel of the pending applications for the Revocation Permits. White violated EBR 10 (F). Accordingly, the Revocation Permits shall be revoked subject to White's opportunity to correct the violation.

C. Equitable Estoppel and Laches

White contends that, notwithstanding any violation of EBR 10(F), the Petition is barred by the doctrine of equitable estoppel or laches.

1. Equitable Estoppel

The doctrine of equitable estoppel is comprised of four elements and "is based *upon* the grounds of public policy, fair dealing, good faith, and justice." Dutch Hill Inn, Inc. v. Patten, 131 Vt. 187, 193 (1973).

a. Elements

The party asserting estoppel has the burden of establishing: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted upon, or the conduct must be such that the party asserting estoppel has a right to believe it is intended to be acted upon; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. Fisher v. Ole, 142 Vt. 162, 168 (1982).

Based on the preceding findings of fact, the Board concludes that the Petition is not barred by equitable estoppel. Peel was not aware of the Revocation Permit applications at the time of their consideration by the Commission precisely because White failed to list him as an adjoiner. Without knowledge of these applications, Peel

could not have intended that his silence in the face of these applications be acted upon, nor does White have the right to so believe.

Moreover, White's Dash 2 Permit application identified Peloso to the Commission as an engineering consultant who was to be contacted regarding the application, and White's Dash 3 Permit application relied, in part, on exhibits prepared by Peloso or Northeast Environmental Associates of which Peloso was a principal. As such, Peloso was acting as White's agent for the purpose of obtaining approval for the Dash 2 Permit and the Dash 3 Permit applications. Fancher v. Benson, 154 Vt. 583, 587 (1990) (veterinarian that conducted pre-purchase physical examination of horse on behalf of buyer was buyer's agent for purposes of determining the animal's health, and any information disclosed to her on that subject was functionally the same as disclosure to the buyer); Feet v. Silver Street Partnership 148 Vt. 99, 105 (1987) (agent's apparent authority derives from conduct of the principal, communicated or manifested to a third party, which reasonably leads the third party to rely on the agent's authority).

Even if White did not actually know that Peel was an adjoiner notwithstanding his signature on the Dash 2 Permit application, Peel was accurately listed in the Dash 2 Permit adjoiners list. Since White's agent knew that Peel was an adjoiner, White cannot be said to have been ignorant of the true facts subsequent to the Dash 2 Permit application. Estate of Thomas C. Sawyer v. Cit well, 151 Vt. 287 291 (1989) (the knowledge of an agent acting within the scope of his or her authority is chargeable to the principal, regardless of whether that knowledge is actually communicated).

Finally, the Board is not persuaded that White has detrimentally relied on Peel's conduct, notwithstanding whatever investment he has made in the various commercial operations authorized by the Revocation Permits. There is no evidence regarding how much profit White has derived from his operations, and, in the mean time, White has operated these projects without having complied with EBR 10(F) in the first instance. Conway, 152 Vt. at 531.

b. Good faith

In addition to its elements, and consistent with the

requirement of good faith, estoppel will not be invoked in favor of a party "whose own omissions or inadvertence contributed to the problem." Town of Bennington v. Hanson-Walbridge Funeral Home, Inc., 139 Vt. 288 (1981).

White cannot disclaim responsibility for Peel's omission from the Revocation Permit adjoiners lists, especially where the Dash 2 Permit application correctly listed Peel as an adjoiner. White did not merely contribute to the omissions; rather, he caused them by not verifying the accuracy of the Revocation Permit applications. As the applicant, White should have retained possession of a copy of the Dash 2 Permit application.

Even if White lacked a copy of the Dash 2 Permit application, he could have (and should have) obtained a copy of it from Peloso when Peloso assisted with the Dash 3 Permit application, or at any time from the Commission. White easily could have obtained a copy of the Dash 2 Permit application and referred back it before embarking upon the Revocation Permit applications.[5] Had White done so, he could have ensured that these applications included an accurate adjoiners list, but he did *not so act.* Accordingly, White failed to act in good faith, and estoppel, an equitable remedy, is inappropriate in'such circumstances. See Agency of Natural Resources State of Vermont v. Godnick, 162 Vt. 588, 593 (1994); Conway, 152 Vt. at 531.[6]

ii. Laches

White also contends that the Petition is barred by the doctrine of laches. "Laches is the failure to-assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right." Stamato v.

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[5]The Board notes that Peel obtained a copy of the Dash 2 Permit application and filed it as exhibit Peel 5.

[6]White also argues that, because Peel was not required to obtain an Act 250 permit pursuant to JO #1-259, the Revocation Permits should not be revoked. This argument is without merit. The Board also notes that, without passing on the correctness of JO #1-259, White *received* a *copy of the jurisdictional opinion* and could have appealed from its conclusions, but did not do so.

Quazzo, 139 Vt. 155, 157 (1980). "What constitutes unreasonable and inexcusable delay depends largely upon the circumstances of the particular case and is ordinarily a question of fact upon which the party asserting it has the burden of proof." Turner v. Turner, 131 Vt. 253, 257 (1973). The party asserting laches also has the burden to demonstrate how he or she was prejudiced by the other party's delay. Kanaan, 6 Vt. Law Week at 96 (1995). "Circumstances which constitute laches involve questions of fact with the ultimate conclusion to be based thereon being a question of law." Laird Properties v. Mad River Corp., 131 Vt. 268, 282 (1973).

Based on the preceding findings of fact, the Board concludes that White has failed to persuade the Board that the Petition is barred by laches.

a. Unreasonable and unexplained period of time

Peel had no knowledge of the projects authorized by the Revocation Permits until October, 1995. His lack of knowledge is attributable to White's failure to comply with EBR 10(F). Upon learning of the omissions, Peel promptly filed the Petition to protect his rights under the Board's rules. The Board concludes that Peel has not failed to assert his rights for an unreasonable and unexplained period of time.

b. Prejudice due to delay

For the same reasons stated above regarding detrimental reliance, the Board concludes White has not been prejudiced by Peel's delay in filing the Petition regardless of whether that day is measured from when the Revocation Permits were issued or from October, 1995.

Finally, the Board believes that White's reliance on Petition of Vermont Electric Cooperative, Inc., No. 93-525 (Vt.Sct. April 29, 1994) is misplaced for two reasons.

First, a timely motion for reargument under V.R.A.P. 40 has been filed regarding this decision, and the Court has not yet decided this motion. Consequently, this decision is

not a final decision and is entitled to little, if any, precedential value.[7]

Second, even if affirmed after reargument, Vermont Electric is distinguishable based on the facts. In Vermont Electric, the party barred by the Court's holding of laches knew of the procedural defect which it sought to take advantage of when the defect was committed by the municipality in question. Instead of immediately acting, the party waited six years before trying to void the municipality's action. In contrast, Peel did not become aware of White's failure to comply with EBR 10(F) until October, 1995, whereupon he acted promptly to protect his rights. Consequently, laches does not bar the Petition.

D. Opportunity to Correct

Under EBR 38(A)(3), unless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, the Board must give the permit holder a reasonable opportunity to correct any violation prior to any order of revocation becoming final.

While Peel was not listed as he should have been, White has always been obligated to operate pursuant to the Revocation Permits' respective terms and conditions. The Revocation Permits contain numerous conditions which alleviate the impacts caused by the authorized activities.

The Board is not persuaded that the activity authorized by the Revocation Permits presents any threat of irreparable harm to public health, safety, or general welfare or to the environment.

The Board will allow White ninety days from the date of this decision to submit a complete application for the activities authorized by the Revocation Permits. This decision in no way precludes the Commission from processing White's application pursuant to EBR 51. EBR 10(E) and (F) as amended by the Legislature shall apply to any such application. If the Commission issues a permit, then such permit shall supersede the Revocation Permits.

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[7] On September 6, 1996, White filed a letter apprising the Board of the status of this case before the Court.

Provided White complies with the terms and conditions of the Revocation Permits, White may continue to operate under the Revocation Permits until such time as the Commission either denies White's application or issues a permit. If there is an appeal to the Board, provided White continues to comply with the Revocation Permits' terms and conditions, White may operate under the Revocation Permits until the Board issues its decision.

V. ORDER

1. Re: Lawrence White, #1R0391-7-EB (Interlocutory) is dismissed.

2. Peel has standing to bring the Petition relative to the Revocation Permits. Hall is denied party status to participate in the Petition.

3. Cushing/Maurer have waived their party status rights in this Petition.

4. The Dash 3 Permit, Dash 4 Permit, Dash 5 Permit, Amended Dash 5 Permit, and Dash 6 Permit are revoked subject to White's opportunity to correct as provided for in Section IV, above.

Dated at Montpelier, Vermont, this 17th day of September, 1996.

ENVIRONMENTAL BOARD

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