**VERMONT ENVIRONMENTAL BOARD**
**10 V.S.A. ch. 151**

**Re: Lawrence White, Land Use Permit Amendment #1R0391-8-EB (Remand)**

# MEMORANDUM OF DECISION

This decision pertains to the disposition of a case which was remanded by the Vermont Supreme Court to the Environmental Board (Board). The Board had issued to Lawrence White (Permittee) Land Use Permit Amendment #1R0391-8-EB (Board Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Board Decision), which authorized, among other things, the stockpiling of sand and gravel at his property in Danby, Vermont, subject to certain conditions, but expressly prohibited the use of a rock crusher/screen at the Permittee's tract. The Supreme Court reversed the Board Decision, in part, remanding for a new hearing on the auditory impact of the Permittee's operations under 10 V.S.A. § 6086(a)(8)(aesthetics) (Criterion 8).

As explained below, the Permittee has failed to avail himself of the opportunity of a hearing before the Board. The Board, therefore, concludes that Board Permit should remain in full force and effect and that jurisdiction should be returned to the District #1 Environmental Commission (Commission).

## I. Procedural Background

On September 23, 1997, the Commission issued Land Use Permit #1R0391-8 (Corrective -8 Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Commission Decision), superceding various revoked Act 250 permits and authorizing the Permittee to operate an office, a maintenance building, a firewood processing area, and a radio tower, as well as stockpile sand and gravel, at his Danby property (Project). On October 7, 1997, the Permittee appealed the Corrective -8 Permit and Commission Decision to the Board, objecting to certain conditions regulating hours of operations, noise, dust and other impacts primarily associated with the earth resources aspects of his Project operations.

On April 16, 1998, the Board issued the Board Permit and Board Decision. The Board Decision in large part affirmed the Commission Decision; however, to address noise, dust, and negative impacts to scenic beauty from the Permittee's sand and gravel operations, the Board imposed more restrictive conditions on the Permittee than those ordered by the Commission.

The Permittee, through counsel, filed a Motion for Rehearing and Motion to

Alter, both of which were denied by the Board in a Memorandum of Decision on July 24, 1998.

The Permittee appealed the Board Permit and Board Decision and a companion revocation decision to the Vermont Supreme Court on August 24, 1998. See *Re: Lawrence White*, Land Use Permits #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation), Findings of Fact, Conclusions of Law and Order (Apr. 16, 1998; revised: Apr. 24, 1998). On June 1, 2001, the Supreme Court issued an opinion affirming the Board's revocation decision and reversed, in part, the Board Decision. The Supreme Court's order stated in relevant part: "The decision of the Environmental Board issuing permit number 1R0391-8 is reversed and remanded for a new hearing on the auditory impact of permit applicant White's operations under criterion 8 of 10 V.S.A. § 6086." *In re Lawrence White*, 12 Vt. L.W. 121 (Jun. 1, 2001) (Remand Order).

On June 26, 2001, the Permittee filed with the Court a Motion for Reargument. On July 24, 2001, the Court denied his Motion. The Court returned the record in this matter to the Board on August 3, 2001.

On October 5, 2001, the Chair notified the parties by memorandum that a status conference would be convened on October 23, 2001. This was later rescheduled to November 6, 2001. As stated in the Chair's October 5, 2001 and subsequent memoranda, the purpose of the status conference was to allow the parties an opportunity to discuss what further proceedings, if any, were necessary to comply with the Remand Order.

On October 18, 2001, the Board received a letter from John D. Hansen, Esq., who had represented the Permittee in the final stage of proceedings before the Board in 1998 and on appeal to the Vermont Supreme Court, indicating that he was withdrawing his appearance as counsel.

On October 19, 2001, the Permittee filed a letter with the Board in which he indicated that he was "unable to under go another hearing at this time" based on financial circumstances, business demands, and present health status. No certificate of service was filed with this letter and there was no other indicia that it had been served on the parties.

On November 6, 2001, Chair Harding, convened a status conference in the above-captioned matter at the Board's Conference Room in Montpelier, Vermont. Those present and participating were: Stephanie J. Kaplan, Esq., counsel for Danby Protective Association (DPA), and George and Alice Araskiewicz, Harris Peel, Kenneth

and Christine Rush, and William Buckman, all persons owning real property adjacent to or in the neighborhood of the Permittee's operations in Danby, and all previously granted party status by the Board (Neighbors). The Permittee was not present, either in person or by representative.

At the status conference, the Chair provided the other parties with a copy of the Permittee's letter of October 19, 2001. The Chair observed that in light of this filing and the Permittee's failure to appear at the status conference, she was inclined to issue a Chair's Preliminary Ruling dismissing the pending matter with the result that the Board Permit would stand as issued on April 16, 1998. However, in fairness to the Permittee and other parties, she issued a Status Conference Report and Order on November 15, 2001 (Status Conference Order), identifying several preliminary issues related to the interpretation and implementation of the Remand Order and establishing a scheduling order for the filing of briefs and other documents. Specifically, the Chair set a deadline of November 28, 2001, for the Permittee to file a letter with the Board indicating whether he intended to prosecute the remaining issues on appeal, including through participation in any hearing that the Board might convene to comply with the Remand Order. Status Conference Order at 3-4, Section IV., Item 1. The Chair also provided all parties, including the Permittee, with an opportunity to brief the preliminary issues set forth in Section III. of the Status Conference Order by December 12, 2001, to file reply briefs by December 26, 2001, and to request oral argument before the full Board. Status Conference Order at 4, Items 2-4.

On November 26, 2001, the Permittee filed a letter in response to the Status Conference Order. The Permittee indicated that he did not intend to proceed with the prosecution of the appeal in accordance with that order. He did not send copies of his letter to the other parties.

On November 30, 2001, Chair Harding sent a memorandum to the parties, forwarding copies of the Permittee's letter.

On December 12, 2001, DPA and the Neighbors filed a Memorandum on behalf of DPA and the Neighbors. The Permittee did not file a memorandum on preliminary issues.

No party filed responsive memoranda by the December 26, 2001 deadline.

Accordingly, on January 7, 2002, the Chair advised the parties by memorandum that the Board would deliberate with respect to the pending matters on January 16, 2002, and determine the disposition of this case.

On January 16, 2002, the Board deliberated regarding this appeal. This matter is now ready for decision.

## II. Preliminary Issues

The Status Conference Order set forth two issues and briefing instructions for the parties. These issues are:

1. If permittee Lawrence White will not participate in the prosecution of this appeal now that it has been remanded to the Board, should the Board vacate Land Use Permit 1R0391-8 or issue an order reinstating Land Use Permit Amendment #1R0391-8-EB as issued by the Board on April 16, 1998?

2. If permittee Lawrence White affirmatively indicates by a letter timely filed with the Board that he will prosecute the remaining issues in this appeal, what should be the scope of the new hearing convened by the Board?

Status Conference Order at 3, Section III.

## III. Discussion

A. Permittee's Role in this Proceeding

The present proceeding, as indicated by the recitation of procedural facts above, was initiated by the Permittee by the filing of an application for a corrective permit with the Commission in 1997. Not satisfied with the conditions imposed by the Commission, the Permittee appealed to the Board, where he received a *de novo* hearing. When the Board imposed additional and more restrictive conditions upon his Project, he appealed to the Vermont Supreme Court. Although the Court remanded this matter for further proceedings regarding the auditory impacts of the Permittee's earth resources operations, the Court did not expressly reverse the Board Decision in its entirety nor did it vacate the Board Permit. Indeed, the Court identified only two Board errors: the failure to consider as a noticed exhibit Permittee's Exhibit A-7 (a 1990 report from Audiology Associates) and the exclusion on the basis of irrelevance Permittee's Exhibit A-12 (a partial transcript of testimony from Harris Peel in a prior proceeding regarding auditory readings).

Under the usual course of events, a party in the Permittee's shoes would take the opportunity provided by the Court for a new, albeit limited, hearing to ask the Board to consider evidence excluded or not previously considered in support of his claim that his operations would not have undue adverse auditory impacts upon values protected by Criterion 8 and request, therefore, that the Board should impose no conditions or conditions different from the ones it did so in the Board Permit. In fairness to all of the parties involved, such a hearing would be held promptly following remand of the appeal to the Board.

In this instance, the Permittee has indicated by his letters to the Chair and in his non-appearance at the status conference that he does not intend to prosecute the present appeal. He has not requested a continuance for a specified period of time nor otherwise indicated when he might proceed with prosecution of this appeal. Indeed, the Permittee was placed on notice by the Status Conference Order that DPA and the Neighbors took the position that in the event that he was not prepared to carry his burden of proof in a new hearing before the Board, that the -8 Corrective Permit and/or Board Permit should be vacated thereby affecting *all* of his operations within the ambit of that permit. Status Conference Order at 2-3. Nevertheless, the Permittee did not file any comment regarding the preliminary issues in this matter, including any response to the memorandum filed by DPA and the Neighbors on December 12, 2001, in which they altered their position by recommending that the Board dismiss this matter for lack of prosecution and let the Board Permit stand.

Accordingly, the Board concludes that the Permittee does not intend to prosecute his appeal and therefore the second preliminary issue need not be answered by the Board.

B. Proper Disposition of this Case

The Vermont Supreme Court did not vacate the Board Permit so there was no reversion of this matter to the Commission for further proceedings. Rather, the Supreme Court remanded the case to the Board for a hearing only with respect to the auditory impacts of the Permittee's operations.

In reconciling the Supreme Court's command with the circumstances now presented, the Board concludes that the proper disposition of this case is to dismiss it for lack of prosecution, thereby allowing the Board Decision and Board Permit, as issued on April 16, 1998, to stand. See, e.g., V.R.C.P. Rule 41(b)(1)-(3); *In re Putney Paper Company, Inc.*, 168 Vt. 608 (1998), *Hayes v. Harwood*, 141 Vt. 308 (1982). The

Permittee cannot take advantage of what he won in the Supreme Court if he is unwilling to participate in the Board proceedings. Therefore, the status of his permitted operations should be as if he had never taken an appeal to the Supreme Court -- he does not lose what he would have had, had the case ended with the issuance of the Board Permit on April 16, 1998, nor does he gain any relief from the conditions of that permit.

In making this decision, the Board is mindful of its duty to protect and conserve the lands and environment of the State of Vermont. *Re: John Larkin, Inc.,* LUP Application #4C0626-6C-EB, Dismissal Order at 2 (May 1, 2001); 1996 Vt. Laws, No. 250 § 1 (Adj. Sess.). The values sought to be protected under Criterion 8, in the Board's opinion, can only be safeguarded by retaining the permit conditions imposed by the Board Permit.

## IV. Order

1. This matter is **DISMISSED**.

2. LUP Amendment #1R0391-8-EB and supporting Findings of Fact, Conclusions of Law, and Order, as issued on April 16, 1998, remain in full force and effect.

3. Jurisdiction is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont, this 17th day of January, 2002.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
Marcy Harding, Chair
George Holland
John Drake
William Martinez
Rebecca Nawrath
Alice Olenick
Jean Richardson
Nancy Waples