

VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Richard and Sandra Conway by Findings of Fact and
Richard Norton, Esq. Conclusions of Law
Miller, Norton & Cleary and Order
P.O. 6567 Application #1R0632-EB
Rutland, VT 05701

On December 14, 1987, an appeal was filed with the Environmental Board by Margaret and Robert Fish through their attorney, John J. Kennelly, Esq., from the District #1 Environmental Commission's decision dismissing the hearing dated October 19, 1987, and its denial of the Motion for Reconsideration dated November 24, 1987.

Upon review of the issues raised in this appeal, Chairman Leonard U. Wilson determined that the Board could decide the issues without an evidentiary hearing and on December 21 requested the Appellant to submit a statement of facts with opportunity for objection by other parties.

On December 29 the **Conways** filed a motion to dismiss the appeal; on January 4, 1988, they withdrew their second argument in their motion to dismiss. On January 15 the Fishes filed a memorandum in opposition to the motion to dismiss. On January 18 the Fishes filed a statement of facts; on February 4 the Fishes filed a reply to the **Conways'** objection. On February 27 the Executive Officer of the Board requested an affidavit from Timothy Clapp, former Assistant Coordinator for District #1 Environmental Commission, and on February 24 Mr. Clapp submitted an affidavit. On March 2 a copy of Mr. **Clapp's** affidavit was sent to all parties.

On April 15, 1988, the Chairman issued a proposed decision which was sent to all parties. The **Conways** filed Exceptions to the proposed decision on May 5 and on June 16 the Board heard oral argument from the parties. On August 18, the Board reviewed the proposed decision and the arguments of the parties. This matter is now ready for decision.

I. ISSUES IN THE APPEAL

Robert and Margaret Fish, who own property across the road from property owned by Richard and Sandra Conway, appeal from the decision of the District #1 Environmental Commission to consider the application of the **Conways** as a minor application pursuant to Board Rule 51 and not to hold a hearing on the application despite the Fishes' request for a hearing. The Fishes believe that failure of the District Commission staff to provide them with personal notice of the application was incorrect, since the usual practice of the staff is to

personally notify all adjoining property owners of the filing of an application and other adjoining property owners were notified. Their position is that because they did not discover that the **Conways** had filed an application until after the deadline had passed, the Commission should have continued the deadline for requesting a hearing. They believe that a hearing should be held on the **Conways'** application for a permit.

Richard and Sandra Conway believe that the case In re Great Waters of America, Inc., 140 Vt. 105 (1981), in which the court stated that adjoining property owners need not be personally notified of the filing of an application, is controlling. Their position is that since the Fishes failed to request a hearing within the time specified, the Commission was without jurisdiction to convene a hearing. The **Conways** also believe that the Board lacks jurisdiction to accept this appeal, because 10 V.S.A. § 6089(d) states that "no appeal shall be allowed when an application has been granted and no preliminary hearing requested."

The following facts are based upon the statements submitted by the parties and the file of the District Commission.

II. FINDINGS OF FACT

1. In June, 1987, Richard Conway met with Tim Clapp, Assistant District Coordinator, to review Mr. Conway's application for a land use permit.
2. The instructions for the District Environmental Commission application package state that a list of all adjoining landowners to the project, with their addresses, shall be submitted with the application, including "adjoiners to all lands owned or controlled by the applicant which are contiguous to the involved parcel. Include adjoiners on opposite sides of streets, highways, and railways."
3. An Environmental Board training and procedure manual is maintained in each district office, pursuant to § 835 of 3 V.S.A. Ch. 25 (Administrative Procedure Act). Section JP-10-7 of the manual, dated 11/28/83, addresses notice of applications and hearings under Board Rule 10 and includes the following:

The Coordinator must:

. . .

2. Provide written notice to adjoining landowners. Although there is no statutory requirement to provide notice to adjoiners, coordinators should make all reasonable efforts to provide such notice, and should consult with the Executive Officer before waiving the normal requirement to provide the list of adjoiners with the application. ...
4. The District #1 Commission normally follows the procedures established in the procedural manual and personally notifies all adjoining property owners of the filing of an application.
5. The application submitted by Richard and Sandra Conway on August 25, 1987, omitted Robert and Margaret Fish and Gary and Patricia Carter, all of whom live across the road from the Conway parcel, but included the names of the following adjoining landowners: Richard and Shirley Conway, Sr. and Matthew and Eleanor Condon.
6. The District Commission staff provided the **Conways** and the **Condons** with personal notice of the filing of the **Conways'** application and did not provide personal notice to the Fishes or the Carters.
7. On August 28 a notice of the application was published in the newspaper pursuant to Board Rule 51(B)(2). The notice specified that a request for a hearing must be made by September 10.
8. On September 18 the Fishes discovered that the **Conways** had filed an application and requested a hearing.
9. On September 22 Mr. Clapp sent a notice to all parties that a hearing was scheduled on the application with regard to Criteria 5, 8, 9, and 10 for October 13. The Fishes subsequently added Criteria 1 and 3 to their request.
10. At the hearing on October 13, counsel for the **Conways** moved to dismiss the hearing, pursuant to Board Rule 18(D), citing the Supreme Court ruling in In re Great Waters of America, Inc., 140 Vt. 105 (1981), that **adjoining** property owners need not be personally notified of the filing of an Act 250 application. The Commission granted the **Conways'** motion and concluded the hearing.

11. On October 19 the Commission issued a written decision confirming its decision to dismiss the hearing, stating that it was compelled to do so by In re Great Waters of America, Inc.
12. On November 3 the Fishes filed for reconsideration of the Commission's decision. On November 24 the Commission denied their request.
13. On December 3, 1987, the Commission issued Land Use Permit #1R0632 to Richard and Sandra Conway, authorizing the construction of a 54' x 60' building for automobile service and sales located on Route 3 in Pittsford, Vermont.
14. On December 14, 1987, the Fishes filed this appeal.

II. CONCLUSIONS OF LAW

10 V.S.A. § 6084(a) provides that the applicant must send notice and a copy of its application to:

a municipality, and municipal and regional planning commissions wherein the land is located, and any adjacent Vermont municipality, municipal or regional planning commission if the land is located on a boundary. The applicant shall furnish to the district commission the names of those furnished notice by affidavit, and shall post a copy of the notice in the town clerk's office of the town or towns wherein the land lies.

Subsection (b) of § 6084 provides that:

[T]he district commission shall forward notice and a copy of the application to the board and any state agency directly affected, and any other municipality or state agency, or person the district commission or board deems appropriate. Notice shall also be published in a local newspaper generally circulating in the area where the land is located not more than 7 days after receipt of the application.

Board Rule 10 (F) provides:

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 In re Great Waters of America, Inc., 140 Vt. 105 (1981), the Vermont Supreme Court held that personal notice to adjoining property owners of the filing of an application for an Act 250 permit is not a constitutional requirement. Since the time of the court's decision, the Board adopted a procedure that requires the Coordinators to "make all reasonable efforts" to provide notice to all adjoining property owners and that allows the coordinator to waive the requirement for applicants to provide a list of adjoiners only after consulting with the Executive Officer. While failure of the applicant to provide a list of all adjoining property owners and of the Coordinator to notify the Fishes personally of the application did not violate the United States Constitution, it did violate the normal practice of the Commission, as well as its procedures.

Although the Commission is not required by law to provide personal notice to adjoining property owners, it is required to follow its own practices and procedures. In this instance, the Fishes should have been notified since the District Coordinator required to provide written notice to adjoiners, adjoining property owners routinely receive personal notice, and personal notice to other adjoiners was provided. is

Once the Fishes requested a hearing, the Commission could have corrected its mistake and held a hearing on the application. The Commission was acting within its authority when it convened the hearing on October 13 because it was obliged to rectify the Coordinator's error. At the time the Fishes requested a hearing, the Commission had not yet issued a permit.

The Board believes the Fishes are entitled to a hearing on the criteria for which they requested a hearing. The Board will therefore remand this appeal to the Commission for a hearing in accordance with this decision.

III. ORDER

1. Land Use Permit #1R0632 is void.
2. The District #1 Environmental Commission shall hold a hearing on Land Use Application #1R0632 with respect to criteria requested by the Fishes, pursuant to Rule 51(B) (5).

Dated at Montpelier, Vermont this 1st day of September, 1988.

ENVIRONMENTAL BOARD



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