

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

RE: Puppy Acres Boarding Kennel by Timothy J. O'Connor, Jr., Esq.
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Findings of Fact,
Conclusions of Law
and Decision
Land Use Permits #2W0568,
#2W0568-1, and #2W0568-2
(revocation proceedings)

On September 23, 1985, John and Ann Dixon of Guilford, Vermont, filed a petition for permit revocation with the Environmental Board (Board). The petition involved a dog and cat boarding kennel located on Lee Road in Guilford which is owned and operated by William and Linda Nightingale and is known as the Puppy Acres Boarding Kennel. The construction and operation of the kennel was originally authorized under Title 10 V.S.A., Chapter 151 (Act 250) by Land Use Permit (LUP) #2W0568 issued on May 10, 1983. The permit was subsequently amended by LUP #2W0568-1 issued on July 20, 1983 and by LUP #2W0568-2 issued on June 10, 1985. The Petition for Revocation alleged that the Permittee had failed to implement the erosion control measures required by Condition 5 of LUP #2W0568-2 and had failed to keep the dogs confined indoors at night, as required by Condition 9 of LUP #2W0568-2.

The Board conducted a prehearing conference on the petition on June 30, 1986, in Brattleboro. At the prehearing conference, several preliminary issues were identified concerning party status, notice, jurisdiction, stay of the proceedings, and scope of the proceedings. The parties were given an opportunity to submit legal memoranda and written argument, and on August 14, the Board issued a Memorandum of Decision addressing these issues. The Board affirms its Memorandum of Decision, and fully incorporates it into this decision by reference.

The Board scheduled a hearing on the merits of the petition for September 24. Prior to that date, the parties indicated that they may be able to work out an acceptable solution to the alleged problems. Upon request of the parties, the Board postponed the hearing. On February 20, 1987, when no solution had emerged, the Board convened a second prehearing conference in South Londonderry. The parties agreed that unless a compromise could be worked out, the hearing would go forward on April 9. They also agreed that the case could be heard by an Administrative Hearing Panel under the procedures set forth in Board Rule 51. They further agreed that the erosion issues had been resolved, and that the only remaining issue was the confining of dogs indoors between the hours of 10:00 p.m. and 6:00 a.m., as required by Condition 9 of LUP #2W0568-2.

6/1/87

Doc. # 298.

On April 9, when the parties were unable to agree upon a settlement, the Administrative Hearing Panel, consisting of Board Chairman Bradley and Members Bongartz and Lloyd, convened a public hearing on the Petition for Revocation. The following parties participated in the hearing:

Permittee Puppy Acres Boarding Kennel, by Timothy O'Connor, Esq. and William and Linda Nightingale
Petitioners John and Ann Dixon, by Garvan Murtha, Esq.
Town of Guilford, by Arnold Clark
Guilford Planning Commission, by Peter Kerber

Following the public hearing, the Panel conducted a site visit to the kennel. The panel issued a proposed decision on May 1. The parties were given an opportunity to submit written objections and request oral argument before the full Board. On May 7, the Permittee filed a request for oral argument, followed by a Motion for Assurance of Discontinuance, Affidavit of Compliance, Exceptions to Proposed Findings of Fact, and Memorandum of Law on May 11. On May 14, the full Board convened a public hearing for the purpose of hearing oral argument of the parties. Following the hearing, the Board conducted a deliberative session and determined that the record was complete and adjourned the matter. The following findings of fact and conclusions of law are based upon the record developed at the hearing, the site visit, and the written and oral argument submitted to the Board.

I. ISSUES IN THE APPEAL

The two issues to be resolved in this proceeding are whether the Permittee has violated Condition 9 of LUP #2W0568-2, and, if violations have occurred, whether revocation of the permit is the appropriate remedy to correct the situation. The Petitioners allege that dogs have been allowed into the outdoor runs between the hours of 10:00 p.m. and 6:00 a.m., and that the noise caused by barking dogs has interfered with the use and enjoyment of their property which abuts the kennel property. They request that the permit and the amendments be revoked.

The Permittee admitted at the outset of the April 9 hearing that on occasion the dogs have been allowed outside in the runs between the hours of 10:00 p.m. and 6:00 a.m., but that this was done for health or medical reasons. The Permittee stated that it had taken a number of steps to reduce the noise from the dogs, and that an acoustical consultant had developed a plan which would reduce nighttime

noise to 45 decibels at the property border by November 1, 1987. The Permittee stated that under Board Rule 38, it should be given an opportunity to correct the violation by implementing these remedial measures.

The Town and Town Planning Commission also urged that the Permittee be given an opportunity to correct the violation. The Town of Guilford uses the kennel as a dog pound.

II. FINDINGS OF FACT

1. The Puppy Acres Boarding Kennel first received Act 250 approval in LUP #2W0568 issued on May 10, 1983. That permit authorized the conversion of a horse exercise building into a 16 dog kennel with cat pens, the construction of a 32' x 40' addition for 20 dog kennels and a cat room, and the construction of a 24' x 104' building with 25 dog kennels. All of the buildings are located on the northerly side of Lee Road in Guilford, Vermont. Under Permit Condition 7 of the original permit, the District #2 Environmental Commission (Commission) retained the right to impose additional conditions to reduce noise from barking dogs for the duration of the permit. However, the Commission imposed no prohibition against dogs in the outside runs at nighttime at that time.
2. The two main kennel buildings for dogs (Kennels #1 and #2) are located perpendicular from Lee Road and parallel to each other and to the west property line. Kennel #1 is located approximately 50' from the property line. Kennel #2 is approximately 150' from the property line. The dogs are kept in inside pens, each measuring approximately 4' x 5'. A separate door in each pen leads to an outside run which measures approximately 4' x 12'. The dogs are free to move inside or outside, unless the doorways are shut. The outside runs face each other, and are separated by a grassy strip approximately 20' in width. The runs are covered on the top, but are open at the end. This design means that noise from the runs in Kennel #1 tends to be projected eastward, while noise from the runs in Kennel #2 tends to be projected westward.
3. On July 20, 1983, the Commission issued LUP #2W0568-1 that removed Condition 6 of the original permit and allowed the use of the kennel driveway as the primary kennel access.

4. In 1985, the Permittee filed an application to build another dog kennel building (Kennel #3) to be located on the southerly side of and running parallel to Lee Road. On June 10, 1985, the Commission issued LUP #2W0568-2 authorizing the construction of Kennel #3. This building is 14' x 110' and contains 25 dog kennels. The design of the inside pens and outside runs is similar to that of Kennels #1 and #2, except that the open end of the runs face in a southerly direction toward a small ravine and wooded hillside.
5. In LUP #2W0568-2, the Commission added Condition 9 to the permit:
 9. All dogs in the entire kennel operation shall be confined to the kennels (not allowed out in the runs) between 10:00 p.m. and 6:00 a.m. on a year-round basis.

The condition was based on the Commission's finding that current level of noise from the existing kennel was having an undue adverse impact on neighboring property owners, and that the addition of 25 additional dog runs would add to the existing problem if remedial action was not taken. (Commission Finding of Fact No. I(2) - Board Exhibit #3)

6. The Permittee filed a motion for reconsideration of this condition; following a hearing, the Commission affirmed its decision. The Permittee subsequently appealed the decision to the Environmental Board, and the appeal was dismissed for lack of jurisdiction. See Rey Pures Boarding Kennel, Board decision dated October 11, 1985 and In re: Puppy Acres Boarding Kennel, No. 85-490 (affirming Board's dismissal).
7. Lee Road is located in a rural part of Guilford. Land uses in the area are characterized by fields and woodlands with a scattering of residences and home businesses. Aside from the Nightingales' home, only three to four homes are located within one-quarter mile of the kennel.
8. The closest house is owned by the Petitioners John and Ann Dixon, and is located approximately 100' from the Permittee's west property line and 150' from Kennel #1. The house is occupied by the Dixons' son. Kennel #1 is partially shielded from the house by another building used by the Nightingales to raise rabbits, but the

noise of the dogs was still audible in the second-story bedroom in the house. The Dixons own another house some 300' away from the western boundary of the kennel property, which is occupied by Mrs. Dixon's mother. Their own house is one-quarter mile west of the Nightingales' property.

9. Noise levels within a dog kennel can reach as high as 105 decibels (**dBA**) when dogs are barking and no special measures are taken to reduce the sound. This is well above the level at which a person will begin to suffer hearing loss, assuming a sustained level of sound. Most people in a rural area will complain about noise from a new source when the level reaches 60-65 **dBA**. Noise levels above 40 **dBA** in a person's sleeping quarters may interfere with that person's falling asleep, while noises above 50 **dBA** will cause a sleeping person to wake up. Noise levels generally abate 6 **dBA** as the distance from the noise source doubles. They will also be abated by structures, topographical barriers and, to a lesser extent, vegetation. In general, intermittent noise is considered more annoying than a steady noise.
10. Many dogs will bark when they are startled by an unexpected sound or confronted by something new (including members of the Board's Administrative Hearing Panel). When one dog begins to bark, others will do so as well. Then, as the noise or person becomes more familiar, the dogs will tend to quiet down.
11. Over the years, the Permittee has undertaken a number of steps to try to quiet the dogs and reduce noise from the kennels. These steps include playing a radio in Kennel #2, using a sound conditioner (which produces a sound like raindrops on a roof) in Kennels #1 and #3, building a fence on the northerly end of the rabbit building near the Dixons' property line, and covering the ends of the outside runs on Kennel #2 so that the dogs in Kennels #1 and #2 cannot see each other. The Permittee had also investigated the possibility of building overhead doors which would allow the outside runs in Kennels #1 and #2 to be closed at night, but found that this solution was too expensive.
12. The Board finds that the mitigative steps which the Permittee has taken in the past have not been sufficient to abate noise from the kennel when the dogs are allowed in the outside runs at night. The noise is

sufficiently loud to disturb the sleep patterns of people residing at the neighboring house, especially during the warmer months. Under certain weather conditions, the noise can cause disturbance in homes up to one-half mile away.

13. At the time of the May 14 hearing before the full Board, the Permittees stated that the Administrative Hearing Panel's proposed decision had come as a "bolt of lightning," and that it had taken steps to fully comply with the requirements of the land use permits. The Permittee was no longer accepting dogs that needed to be outside at night for medical or health reasons. All persons boarding dogs at the kennels were being advised that their dog must be confined indoors at night. In addition to shutting off the outside runs between the hours of 10:00 p.m. to 6:00 a.m., the Permittee stated that it would install acoustical material on the insides of Kennels #1 and #2, that radios or sound conditioners would be played to quiet the dogs, that shades would be pulled over the windows of the kennels at night, and that a fence would be constructed between Kennels #1 and #2.

III. CONCLUSIONS OF LAW

The principal issues which the Board must decide are whether the Permittee has violated the terms of its land use permit and, if so, whether the appropriate remedy is revocation of the permit. The authority for revocation of a permit is set forth in 10 V.S.A. § 6090(c):

(c) A permit may be revoked by the board in the event of violation of any conditions attached to any permit or the terms of any application, or violation of any rules of the board.

Board Rule 38(A)(2) further specifies the grounds for permit revocation:

(2) Grounds for revocation. The board may after hearing revoke a permit if it finds that: (a) The applicant or his 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 or board to deny the application or to require additional or different conditions on the permit; or (b) 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 the Rules of the board; or (c) the applicant or his successor in interest has failed to file an affidavit of compliance with respect to specific conditions of a permit, contrary to a request by the board or district commission.

Because the Permittee admitted at the outset of the April 9 public hearing that the dogs had been allowed into the outside runs between the hours of 10 p.m. and 6 a.m., there is no doubt that the Permittee has violated Condition 9 of LUP #2W0568-2. The question becomes, then, what is the appropriate action for the Board to take, given all the circumstances of this case.

The Permittee claims that it should be given an opportunity to correct the violation by being allowed to put into place the new mitigative measures proposed by the Permittee's acoustical consultant. Board Rule 38(A)(3) provides for an opportunity to correct a violation, but allows the Board to limit that opportunity (1) where there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, or (2) where a permit holder is responsible for repeated violations.

Although the Board finds no clear threat of irreparable harm, there is evidence of repeated violations of Condition 9. The Permittee did not state how frequently the dogs had been allowed in the outside runs at night. However, the Board can infer from the evidence that violations of this permit condition occurred on a regular basis in 1985 and 1986, at least during the warmer months. There is also evidence that the violations have disrupted the neighbors' use and enjoyment of their properties, especially during the hours of sleep. The prevention of such nuisance was the specific reason that the District Commission included Condition 9 in the permit. The Board also believes that had the Board not taken action by commencing these proceedings, **the** violations probably would have continued.

The Board believes, therefore, that there is ample legal authority, both under the statute and the Board rules, to revoke the permit without providing a further opportunity to correct or abate the violation. A person cannot accept the benefits of an Act 250 permit without also

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accepting its burdens. A permit holder who repeatedly violates the terms of his or her permit should expect that when the violations are discovered, the permit may be revoked. See Re: Crushed Rock, Inc., #1R0489 and 1R0489-1, Board decision dated October 17, 1986, revoking a permit for a rock quarry upon finding repeated, serious violations.

At the same time, the Board believes that immediate revocation of the permit in this case, without giving the Permittee a final opportunity for compliance, would be unduly harsh. The Permittee has assured the Board that the dogs would no longer be allowed into the outside runs between the hours of 10:00 p.m. to 6:00 a.m. In addition, the Permittee has agreed to take several additional steps not previously required by the permit to abate the noise from the kennels. In view of these assurances, the Board will accept the Permittee's offer to enter into an Assurance of Discontinuance to ensure that violations will no longer occur in the future. The Permittee is aware that violation of the Assurance is not only grounds for revocation of the permit, but may subject the Permittee to civil penalties of up to **\$10,000** per day.

The Board therefore will exercise its discretion to allow the Permittee to correct past violations under Board Rule 38(A) (3). At the same time, in view of the facts that the past violations occurred from time to time over nearly two years, that the Permittee had ample opportunity to resolve the matter earlier in the manner now proposed, and that the Petitioner and this Board were required to exert substantial effort before the bolt of lightning finally struck, the Board feels that inclusion of a payment of \$2000 as part of the Assurance of Discontinuance is justified. In the event the Permittee feels otherwise, the Board will exclude that provision in the Assurance and request the Attorney General to commence a proceeding in Superior Court under 10 V.S.A. § 6004 and § 6006 for the sole purpose of determining an appropriate civil penalty.

II. ORDER

1. Land Use Permits #2W0568, #2W0568-1 and #2W0568-2 shall remain in effect until amended or upon further order of this Board.

2. The Permittee shall notify the Board by no later than June 15 whether it will accept the Board's proposal of a \$2000 payment. If this proposal is not accepted, the

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Board will prepare an Assurance of Discontinuance without any reference to a payment, and will refer that issue to the Attorney General's office for resolution by the Court.

3. The Board shall prepare and forward to the Permittee and other parties an Assurance of Discontinuance including at least the following provisions:

- a. The Permittee shall fully comply with the requirements of LUP #2W0568, as amended by #2W0568-1 and #2W0568-2.
- b. Material shall be installed in the interior of Kennels #1 and #2 and a fence built between the two kennels within 15 days of the signing of the Assurance.
- c. Music or sound conditioners must be played in the kennels to quiet the dogs and shades must be pulled over all windows at night.
- d. The sum of \$2,000 (if applicable) shall be paid upon the execution of the Assurance of Discontinuance by the Permittee.
- e. The Permittee's failure to strictly adhere to the terms and conditions of the Assurance may subject the Permittee to revocation of LUP #2W0568, as amended, and/or proceedings in the Superior Court for civil penalties and injunctive relief.

Dated at Montpelier, Vermont this 1st day of June, 1987.

ENVIRONMENTAL BOARD


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