

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

RE: Forestdale Heights, Inc.  
164 North Willard Street  
Burlington, Vermont

Revocation Petition #4C0329-EB

CHAIR'S PROPOSED DISMISSAL ORDER

This matter concerns a Petition for Revocation of Land Use Permit #4C0329, held by Forestdale Heights, Inc. For the reasons stated below, this Petition for Revocation shall be dismissed pursuant to EBR 18(D) if not completed on or before January 2, 2001.

I. OFFICIAL NOTICE

Pursuant to 3 V.S.A. §801(4), the Chair of the Vermont Environmental Board ("Board") takes official notice of the information in the official files maintained by the Board in this matter from issuance of the original permit to date ("Record"). Under 3 V.S.A. §810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, and with limited exceptions, "[t]he rules of evidence as applied in civil cases shall be followed" in contested cases before administrative bodies. Id. §810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); see *In re Handy*, 144 Vt. 610, 612 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. §810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of Fact may be based upon officially noticed matters. 3 V.S.A. §809(g).

II. FINDINGS OF FACT

Based upon a review of the Record in this case, the Chair finds the following facts:

1. On July 6, 1978, the District #4 Environmental Commission issued Land Use Permit #4C0329 ("Permit") to Forestdale Heights, Inc. ("Permittee") for the development of five industrial lots and the construction of a 200+ foot road for access to said lots, on a 740-acre site in the old Village of Essex Forest on Sand Hill Road in the Town of Essex, Vermont (the "Project"). The Permit has been through

several amendment proceedings, the latest being #4C0329-17-EB, issued by the Board to Hector LeClair d/b/a Forestdale Heights, Inc. on February 25, 1999.

2. Gavin D. Wright ("Petitioner") filed a Petition for Revocation ("Petition") with the Board on October 19, 2000. The Petition included an original plus ten copies of a statement of reasons why the Petitioner believes that grounds for revocation exist. The Petition did not include a certificate of service, or an original plus ten copies of a preliminary list of witnesses or an original plus ten copies of the Permit.

3. It is not entirely clear whether the Petitioner intended to seek revocation of any or all of the amended permits in addition to the original Permit. While materials from amendment proceedings are included in the Petition, Petitioner expressly requests revocation of the original Permit only.

4. On October 20, 2000, the Board's General Counsel sent a notice to Petitioner acknowledging receipt of the Petition but noting that it was incomplete. The letter notified Petitioner that failure to complete his filing by October 31, 2000 could result in the Petition being referred to the Board for dismissal.

5. The Petitioner did not respond to the October 20, 2000 letter.

6. On November 16, 2000, the Board's General Counsel sent a second letter to Petitioner, by Certified Mail, return receipt requested, noting the provisions of and deadline in his October 20 letter. The November 16 letter noted that the Petition was still incomplete, and notified Petitioner that failure to complete his filing by November 22, 2000 could result in the Petition being referred to the Board for dismissal.

7. The November 16, 2000 letter was returned to the Board with the Return Receipt unsigned.

8. The Petition remains incomplete to date.

### III. PRELIMINARY RULING

The Chair is authorized by EBR 16(B) to make preliminary rulings on procedural matters as are necessary to expedite and facilitate the hearing process. Any such ruling may be objected to by any interested party. EBR 16(B). Should any party object to the ruling, it "shall be reviewed and the matter resolved by the board." *Id.*; see also, *Ret Eaglewood XI, Ltd.*, #9A0151-EB, Notice of Dismissal, at 1 (Feb. 18, 1986)(the Board will approve or reject a preliminary decision without hearing where no party makes a timely request for a hearing).

### IV. CONCLUSIONS OF LAW

The Chair proposes to dismiss this Petition because it is incomplete. Petitions for revocation are governed by EBR 38(A), which provides, in relevant part, that:

The petition shall consist of an original and 10 copies of the petition which shall include a statement of reasons why the petitioner believes that grounds for revocation exist, a preliminary list of witnesses and the land use permit to which it applies.

Petitioner included a statement of reasons why he believed grounds for revocation exist. However, Petitioner did not include an original plus ten copies of a preliminary list of witnesses, or an original plus ten copies of the Permit. Petitioner also failed to include additional documents required by other applicable rules.

EBR 40, which applies to revocation petitions by operation of EBR 38(A)(I), requires submission of a certificate of service certifying that the Petition was sent to all parties in the original permit proceeding. See a/so, EBR 38(A)(1)("petition shall be served on all parties to the original permit proceeding"). Petitioner did not include a certificate of service indicating that the Petition was served on the Permittee, or on any other party to the original permit proceeding. Accordingly, the Petition is incomplete.

The Board has the general authority to dismiss a matter in which a party has failed to comply with the Board's rules :

The Board may, on its own motion or at the request of a party, consider the dismissal, in whole or in part, of any matter before the board for reasons provided by these rules, by statute, or by law.

EBR 18(D). The rule also provides an opportunity for oral argument, upon request of a party, prior to consideration of dismissal. *Id.*

It "is within the authority of the Chairman and the Board to impose reasonable requirements on the parties in order to ensure that the proceedings will be conducted in a judicious, fair and expeditious manner." Re: *Bernard and Suzanne Carrier*, #7R0639-EB, Memorandum of Decision and Order at 2 (Jun. 22, 1987)(dismissing appeal for failure to file prefiled testimony, pursuant to EBR18(D)).

While the Board is reluctant to dismiss a petition for failure to comply with procedural requirements, see, *Re: Kapitan Gravel Pit*, Declaratory Ruling #388, Dismissal Order, at 3 (Sept. 8, 2000)(citing *Constantino Antique Business*, Declaratory Ruling #262, Memorandum of Decision at 2-3 (May 12, 1992); *John v. Medical Center Hospital of Vermont, Inc.*, 136 Vt. 517, 519 (1978)); *Re: Ruby Iantosca*, #2S1085-EB, Chairs Proposed Dismissal Order, at 2-3 (Sept. 1, 2000), the Chair notes that Petitioner has failed to complete the Petition despite having been reminded to do so by Board General Counsel. This Order gives Petitioner one last chance to complete the Petition in accordance with applicable rules.

#### IV. ORDER

1. The Chair takes official notice of the official files kept by the Board in this matter as stated above in Section I, Official Notice.

2. This Petition shall be dismissed unless completed, or an objection to this Order or request for oral argument is filed, by **Tuesday, January 2, 2001**.

3. This Order is issued pursuant to Environmental Board Rule 16(B) and EBR 18(D) and is binding on all parties unless a written objection to it, in whole or in part, is filed in accordance with this paragraph. Any party who objects to this Order shall file a written objection and supporting memorandum with the Board on or before **Tuesday, January 2, 2001**. Any request for oral argument, pursuant to EBR 18(D), shall be filed on or before **Tuesday, January 2, 2001**, or the right to request oral argument shall be deemed to have been waived.

4. Any reply to an objection to this Order may be filed on or before **Tuesday, January 16, 2001**.

5. Should any objection or request for oral argument be filed, the Board will deliberate on this matter on Wednesday, January 17, 2001. The Board will also

hear oral argument if any is timely requested, on Wednesday, January 17, 2001, at 3:00 p.m., at the Environmental Board's Conference **Room, National Life Records Center Building, National Life Drive, Montpelier, Vermont.** (Take Exit 8 off I-89 onto Memorial Drive, then right at the first set of lights onto National Life Drive. The Records Center Building is at the east end of the parking lot, separate from the main National Life buildings.) If you have a disability for which you need an accommodation, please notify the Board in advance.

Dated at Montpelier, Vermont this 20th day of December 2000.

ENVIRONMENTAL BOARD

  
Marcy Harding, Chair