

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

Re: City of Burlington / Burlington International Airport
#4C0331-9-EB and #4C0331-13-EB

CHAIR'S PRELIMINARY RULING

As requested by the parties and as explained more fully below, the Chair of the Environmental Board ("Board") issues this Preliminary Ruling dismissing the above-reference appeal filed by the City of Burlington / Burlington International Airport ("Appellant").

I. PROCEDURAL SUMMARY

On March 20, 1996, Appellant filed an application with the District #4 Environmental Commission ("District Commission") seeking approval under 10 V.S.A. §§ 6001-6092 ("Act 250") to clear approximately 20 acres of land adjacent to Runway 33 at the Burlington International Airport off Williston Road in South Burlington, Vermont ("Project").

On June 12, 1996, the District Commission issued Land Use Permit #4C0331-9 together with supporting Findings of Fact, Conclusions of Law, and Order (collectively the "Permit"). On July 11, 1996, ANR filed a Motion to Alter the Permit.

On February 13, 1997, Appellant filed an application with the District Commission seeking Act 250 approval to fill and regrade much of the area involved in the Project.

On June 26, 1997, in response to the Motion to Alter, the District Commission issued Land Use Permit #4C0331-9(Revised) together with supporting Findings of Fact, Conclusions of Law, and Order (collectively the "Revised Permit").

Also on June 26, 1997, the District Commission issued Land Use Permit #4C0331-13 together with supporting Findings of Fact, Conclusions of Law, and Order (collectively the "Dash 13 Permit").

On July 25, 1997, Appellants filed an appeal with the Board contending that the Revised Permit errs as to permit conditions, findings of fact, and conclusions of law concerning 10 V.S.A. § 6086(a)(S)(A). In addition, Appellant contends that the District Commission erred in its analysis concerning whether federal regulations concerning the safety and operation of airports preempts Act 250. Finally, Appellant also appeals from portions of the Dash 13 Permit to the extent it relates to the Revised Permit. (collectively, the "Appeal").



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On August 25, 1997, then Board Chair John T. Ewing convened a prehearing conference with the following organizations and individuals participating:

Appellant by Joseph A. Farnham, Esq.
Agency of Natural Resources ("ANR") by Andrew Raubvogel, Esq.

At the August 25, 1997 prehearing conference, Appellant and ANR jointly requested that the Appeal be continued for a period of at least 60 days in order to continue ongoing negotiations.

On August 27, 1997, Chair Ewing issued a Prehearing Conference Report and Order which, at the parties' request, continued the Appeal until October 24, 1997 in order to continue ongoing negotiations.

On October 24, 1997, Appellant and ANR filed a Joint Motion for an additional 30 days continuance in order to complete negotiations.

On November 4, 1997, Chair Ewing issued an Order which, at the parties' request, continued the Appeal until December 3, 1997 in order to continue ongoing negotiations.

On December 4, 1997, Appellant and ANR filed a Joint Motion for an additional fifteen (15) days continuance in order to finalize negotiations.

On December 8, Chair Ewing issued an Order which, at the parties' request, continued the Appeal until December 23, 1997 in order to finalize negotiations.

On December 23, 1997, Appellant and ANR filed a Joint Motion requesting that the Appeal be dismissed ("Motion to Dismiss"). On December 31, 1997, ANR filed a letter confirming that it joined in the Motion to Dismiss.

On January 1, 1998, Marcy Harding assumed the office of Chair of the Board.

On January 14, 1998, Appellant filed a copy of a letter from District Coordinator Faith Ingulsrud dated December 4, 1997 ("December 4, 1997 Letter").

II. DISCUSSION

The Revised Permit authorizes the clearing of land adjacent to Runway 33 of the Burlington International Airport. An affirmative finding under Criterion 8(A) was conditioned on the requirement, set forth in Condition #12 of the Revised Permit, that

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Appellant compensate for habitat lost by the clearing. Appellant appealed Criterion 8(A) to the Board, including relevant findings, conclusions, and permit conditions. At the prehearing conference, the Appellant and ANR jointly requested a continuance in order to continue negotiations regarding Criterion S(A) and, in particular, Condition #12.

During the period of continuance, Appellant submitted a proposal to the District Commission regarding the method by which it intended to satisfy Condition #12. Also during the continuance, Appellant and ANR discussed with the Coordinator for the District Commission their understanding of Condition #12 and Appellant's proposal to satisfy it. The understanding eventually reached between Appellant, ANR, and the District Commission / Coordinator is set forth in the December 4, 1997 Letter, which was filed with the Board in support of the parties' joint request to dismiss the Appeal.

When Appellant appealed Criterion 8(A) to the Board, jurisdiction over that criterion and all applicable findings, conclusions, and permit conditions transferred from the District Commission to the Board. E.g., Re: Leo and Theresa Gauthier, #4C0842-EB, Memorandum of Decision at 1 (Dec. 10, 1990)[EB #495M] (citing Kotz v. Kotz, 134 Vt. 35, 38 (1975)). By requesting that the Board dismiss the Appeal, the parties are agreeing that the terms of the Revised Permit and the Dash 13 Permit, *as they were issued, are final*. The understanding reached by Appellant, ANR, and the District Commission / Coordinator is not legally binding, because the District Commission / Coordinator were without jurisdiction to make determinations concerning a criterion on appeal. Such an informal agreement will not estop the Board or the District Commission from interpreting or enforcing either of those permits, *as issued*, in the future.

Accordingly, the Chair will issue a Preliminary Ruling dismissing the Appeal pursuant to the joint request of Appellant and ANR.

If the parties choose not to have the Appeal dismissed at this time, then during the period of time provided to object to this Preliminary Ruling, they may request that the Board review and approve of their understanding and incorporate its terms by permit amendment. For the Board to make such a determination, however, the parties must submit information that sets forth the complete terms of their understanding.

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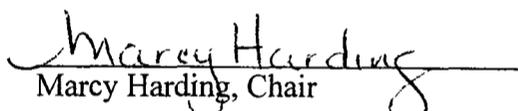
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III. ORDER

1. The Appeal is **dismissed with prejudice**. Jurisdiction is returned to the District Commission.
2. Pursuant to EBR 16, this Preliminary Ruling is binding on all interested parties unless a written objection to the Preliminary Ruling, in whole or in part, is filed on or before **Tuesday, February 24, 1998** ("Objection"). The Objection may be accompanied by or incorporate a memorandum of law addressing the issues to which the party is objecting.
3. Parties shall file an original and ten collated copies of legal memoranda and any other documents filed with the Board and mail one copy to each of the parties listed on the attached certificate of service. Pursuant to EBR 12(D), memoranda shall be no more than twenty-five pages.

Dated at Montpelier, Vermont this 30th day of January, 1998.

ENVIRONMENTAL BOARD


Marcy Harding, Chair