

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

RE: William Kalanges

Land Use Permit #4C0593-4-EB  
(Revocation)

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This proceeding concerns a petition to revoke Land Use Permit #4C0593-4 (Dash 4 Permit) issued by the District #4 Environmental Commission (Commission). The Dash 4 Permit authorized William C. Kalanges (Permittee) to construct one single-family dwelling with attached garage and outbuilding to be served by a private driveway and municipal water and sewer, located on a 13.8 acre tract off Hubbell's Falls Drive in the Village of Essex Junction, Vermont (Dash 4 Project).

**I. Procedural History**

On October 10, 2000, the Commission issued the Dash 4 Permit to the Permittee.

On July 14, 2003, Denise Noble, Christopher Wasser, Gail and Steven Connors, Melinda and Douglas Cobb, George and Martha Trendle, Ken and Dianna Mitchell, William and Suzanne Braunegg, Deanna Dahlgren and Sean and Lauren Jordan (Petitioners) filed a petition to revoke the Dash 4 Permit with the Environmental Board (Board), pursuant to 10 V.S.A. §6090(c) and Environmental Board Rule (EBR) 38(A).

On August 25, 2003, Board Chair Patricia Moulton Powden convened a Prehearing Conference, and on August 28, 2003, she issued a Prehearing Conference Report and Order (PCRO).

On September 26, 2003, Permittee filed a motion to dismiss the petition to revoke.

On October 23, 2003, the Board issued an Order taking the motion to dismiss under advisement.

On October 29, 2003, the Board held a hearing.

On November 29, 2003, the Petitioners filed a motion to amend the petition to revoke.

On December 18, 2003, the Board deliberated on the Petitioners' motion to revoke, motion to amend the petition to revoke, and the Permittee's motion to

dismiss. The record on this matter is now complete and this matter is now ready for decision.

## **II. ISSUES ON APPEAL**

1. Whether the Permit should be revoked pursuant to EBR 38(A)(2)(b) because of Permit violations.

2. If issue 1 is decided in the affirmative, whether an opportunity to cure the violation(s) should be provided pursuant to EBR 38(A)(3).

## **III. Official Notice**

At the hearing in this matter, the parties requested that the Board take official notice of the Dash 4 Permit and the Commission's Findings of Fact, Conclusions of Law, and Order. The parties also requested that the Board take official notice of the Site Plan dated May 1, 2000 which was used as an exhibit before the Commission. These requests were granted at the hearing. The Board specifically did not take official notice of any other Commission exhibits. See *In Re White* 172 Vt 335, 346 (2001).

The Vermont Administrative Procedures Act authorizes the Board to take official notice of judicially cognizable facts in contested cases such as Act 250 appeals. 3 V.S.A. § 810(4); see also, 3 V.S.A. § 801(b)(2)(contested cases). According 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 also, 3 V.S.A. § 810(1) (rules of evidence apply in contested cases); *In re Handy*, 144 Vt. 610, 612 (1984). Official notice may be taken whether requested or not and may be taken at any stage of the proceeding, 3 V.S.A. § 810(4); *In re Nelson Lyford*, Declaratory Ruling #341, Findings of Fact, Conclusions of Law, and Order at 3-4 (Dec. 24, 1997)(citing V.R.E. 201(c) and (f)). In this case, the contents of the documents in question are not subject to dispute, so this material is appropriate for official notice.

## **IV. Findings of Fact**

To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village*

*of Hardwick Electric Department*, 143 Vt. 437, 445 (1983). Topic headings are for organizational purposes only. Facts stated and terms defined in the procedural summary are incorporated herein.

#### *Dash 4 Permit*

1. On October 10, 2000, the Commission issued the Dash 4 Permit to William Kalanges as Permittee.
2. The Dash 4 Permit authorized the Permittee to construct the Dash 4 Project.
3. The Dash 4 Permit and accompanying Findings of Fact, Conclusions of Law and Order contain the following findings of fact and conditions relevant to this proceeding:

#### Finding of Fact 42

The applicant has stated that there are no changes proposed to the informal arrangement regarding the neighborhood use of the existing footpaths located on the project parcel.

#### Permit Condition 7

No changes shall be made in the design or use of this project without the written approval of the District Coordinator or the Commission, whichever is appropriate under the Environmental Board Rules.

#### Permit Condition 10

This permit hereby incorporates all of the conditions of the Agency of Natural Resources Conditional Use Determination #2000-214, issued on August 24, 2000 by the Water Quality Division. Any subsequent non-material changes to this permit shall be automatically incorporated herein upon issuance by the Agency of Natural Resources. Subsequent amendments involving material changes to the Act 250 permit shall not be constructed prior to review and approval of the District Coordinator of the District Commission under applicable Environmental Board Rules.

#### Permit Condition 11

The limit of disturbance shall not exceed the area noted as "proposed tree line" and "silt fence" as shown on Sheet 1 (Exhibit #24).

Permit Condition 21

All exterior lights shall be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view beyond the perimeter of the area to be illuminated. Additionally, all exterior lighting shall conform with the Outdoor Lighting Manual for Vermont Municipalities published by the Chittenden County Regional Planning Commission (1996).

Permit Condition 24

No further subdivision, alteration, and/or development of any parcel of land approved herein shall be permitted without the written approval of the District Commission.

*Conditional Use Determination*

4. The Dash 4 Permit incorporated the conditions of the Conditional Use Determination #2000-214 (CUD) issued by the Agency of Natural Resources on August 24, 2000.

CUD Finding of Fact 13

The wetland complex is significant for the wildlife and migratory bird habitat function because three or more wetland vegetation classes (1/2 acre or greater in size) are present including: open water contiguous to (but not necessarily part of) marsh, scrub-shrub wetland, and wet meadow wetland; the wetland is located contiguous to a stream; and eighty-five percent of the surrounding habitat type is forest. The proposed impact will be minimal, and will be to an area with prior disturbance and little wildlife value (the existing walking path). Based on the factors described above, the proposed project will not result in undue adverse impact to this function.

CUD Finding of Fact 14

The wetland complex is significant for the recreational value and economic benefits function because the wetland is used for, and contributes to, recreational activities. The project will not alter the recreational paths in use at this time, nor does the landowner plan to prohibit access to the paths on his property...

CUD Finding of Fact 15

The wetland complex is significant for the open space and aesthetics function because the wetland can be readily observed by the public from Hubbells Falls Road; possesses special aesthetic qualities as open space; and has prominence as a distinct feature in the surrounding landscape. The area of the proposed project is in the woods and is not readily visible from Hubbells Falls Road. Based on the factors described above, the proposed project will not result in undue adverse impact to this function.

#### CUD Finding of Fact 18

If the project is constructed according to the specifications of the application and accompanying site plans, and the conditions of this Conditional Use Determination, the resulting wetland filling alteration is not expected to result in any violations of the Vermont Water Quality Standards.

#### *Fence*

5. In the fall of 2002, the Permittee constructed a 6 foot high, approximately 900-foot long wood fence along the eastern boundary and a portion of the northeastern boundary of the Project tract. The finished side of the fence faces towards the Permittee's house.
6. The Permittee installed the fence because of concerns about keeping the Petitioners' yard debris from the Project tract and to separate his dogs from the Petitioners' dogs.
7. The Petitioners live on Beech Street or Hubbell's Falls Drive. The Permittee's fence generally follows the boundary between the Permittee's property and the Petitioners' back yards.
8. Many of the Petitioners also have fences in their back yards. These fences are 4 foot high chain link or picket fences.

#### *Lighting*

9. The Permittee has a few lighting sconces located on the exterior wall of his garage and house. The fixtures contain 60 watt bulbs. Although the light produced from the sconces do not appear bright as observed during daylight, the lighting source and reflector surfaces of the lighting sconces are clearly visible well beyond the perimeter of the area to be illuminated. Some of the Petitioners can observe the lighting sconces from the second story of their homes which are several hundred feet away.

10. The Permittee also has a lamp post that lights the front steps to the house. The lighting source from the lamp post is neither shielded nor concealed and is visible beyond the perimeter of the area to be illuminated.

#### *Trails*

11. A significant trail circumnavigates the Project tract. The trail is well worn and is marked with white trail blazes on the trees (White Blaze Trail). The white blaze markings were painted on the trees by the Permittee's nephew. The White Blaze Trail has a few corduroy style bridges in areas that are often wet.

12. The White Blaze Trail has a "Private Property No Trespassing" sign at the entrance to the trail off Hubbell's Falls Drive.

13. In addition to the White Blaze Trail, there are several other trails that branch off the White Blaze Trail and traverse the Project tract. These other trails are not marked and showed less signs of use. In several locations the minor trails have "No Trespassing" signs or are blocked by wood nailed between two trees.

14. The Permittee installed the "No Trespassing" signs because of liability concerns and because of prior break-ins and acts of vandalism during construction of the house.

15. There is no evidence in the record establishing the terms of any "informal arrangement regarding the neighborhood use of the existing footpaths located on the project parcel." The White Blaze Trail and the other trails do not appear on any official map that has been entered into evidence.

16. Although the Permittee posted the "No Trespassing" signs, the Permittee has allowed the Petitioners to use the trails. He has never told any of the Petitioners that they could not walk on the trails. Nor is there any gate, fence or other obstacle that someone could not walk around.

17. The Petitioners have continued to use the trails even with the "No Trespassing" signs, the fence, and other barriers.

18. There is no evidence in the record that any of the Petitioners have ever asked for permission to walk on the trails and have been refused access.

#### **V. Conclusions of Law**

*Petitioners' Motion to Amend the Petition to Revoke the Dash 4 Permit*

At the hearing, the Petitioners alleged that the Permittee willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application. The Board held that the testimony was inadmissible because although it could be relevant under EBR 38(A)(2)(a), the Petitioners petition to revoke only referenced EBR 38(A)(2)(b).

After the hearing, the Petitioners attempted to add a claim under EBR 38(A)(2)(a) by submitting a motion to amend the petition to revoke. The Permittee objected because, among other reasons, the petition to amend was submitted late.

The Board agrees with the Permittee that the petition to amend was submitted too late and there are not sufficient grounds to accept it. The Board had already held a hearing in this matter and had begun deliberations when the Petitioners filed their motion. Therefore, the Board denies the Petitioners' motion to amend but without prejudice should the Petitioners choose to file another petition to revoke that includes EBR 38(A)(2)(a).<sup>1</sup>

*Permittee's Motion to Dismiss*

The Permittee filed a motion to dismiss on September 26, 2003. The Permittee's motion to dismiss was similar to a motion for a directed verdict and the

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<sup>1</sup> The Petitioners should note that the Board did not rule that the testimony concerning the deed restriction would necessarily be relevant under EBR 38(A)(2)(a). The Board does not have jurisdiction over competing property interests. *Re: Equinox Resort Associates, #8B0209-5-EB (Revocation), Memorandum of Decision at 3 (Sep. 24, 1997)*. Any issues concerning the implications of deed restrictions need to be resolved in Superior Court. The parties have informed the Board that such a case has been filed in Superior Court.

In addition, the Board cannot determine if there are grounds to revoke pursuant to EBR 38(A)(2)(a) until the Superior Court has ruled on the implications of the deed restriction. Should the Petitioners file a new petition to revoke concerning the deed restriction, the Board will defer any decision on the petition to revoke until after the Superior Court has ruled on the matter. *Re: Buttolph, 147 Vt. 641, 643 (1987)*.

Board took the Permittee's motion under advisement. In light of the decision below, the Board denies the Permittee's motion to dismiss.

*Petitioners' Motion to Revoke the Dash 4 Permit*

Under EBR 38(A)(2), the Board may, after hearing, revoke a permit if it finds that:

(a) the applicant or 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 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.

In 1985, the Legislature ratified the Board's rules, including EBR 38, such that they have "effectively become part of the Act 250 legislative scheme codified at chapter 151 of Title 10." *In re Barlow*, 160 Vt. 513, 521 (1993); *In re Spencer*, 152 Vt. 330, 336 (1989).

The Board has historically been reluctant to revoke a permit when it is doubtful or uncertain about the grounds for revocation. *Re: Stokes Communications Corp.*, #3R0703-EB (Amendment Application Revocation), Memorandum of Decision at 9 (Mar. 20, 1996); *Re: Bull's Eye Sporting Center and David and Nancy Brooks, Wendell and Janice Brooks*, 5W0743-2-EB (Revocation) Findings of Fact, Conclusions of Law, and Order at 15 (Jun. 23, 2000). The Petitioners have the burden of proof on the petition to revoke. *In re White*, 172 Vt. 335 (2001).

Under the PCRO and in light of the Board's denial of the Petitioners' request to amend the petition to revoke, the issue before the Board is limited to EBR 38(A)(2)(b). Thus, the Board will consider whether the Permittee violated the terms of the Dash 4 Permit or the rules of the Board.

1. *Violation of permit terms or condition*

a. *Fencing*

The Petitioners allege that the 6 foot high fence that the Permittee constructed violates the Dash 4 Permit. The Permittee responds that the Dash 4 Permit does not

prohibit the construction of fences and adds that many of the Petitioners have fences in their own back yards.

The Board agrees with the Permittee that the Dash 4 Permit does not specifically prohibit the construction of the fence. In addition, the Permittee did not violate the CUD because according to the Vermont Wetlands Rules, the placement of fences in Class Two Wetlands and buffer areas is an allowed use:

The following uses shall be allowed in a Class One or Class Two wetland and in its buffer zone without any review under Section 8, provided that the configuration of the wetland's outlet or the flow of water into or out of the wetland is not altered and that no draining, dredging, filling, or grading occurs except as may be provided for in subsections a, b, c, d, g, h, l, m, n, and t below....

o. The placement, maintenance or removal of duck blinds, ice fishing shanties, fences, catwalks, footbridges, observation decks, docks exempt under 29 V.S.A. Section 403(b) and similar structures.

Section 6.2 of the Vermont Wetlands Rules.

Therefore, fences are an allowed use in the wetlands complex and the Permittee did not violate the CUD or the Dash 4 Permit in constructing the fence.

*b. Trails*

The Petitioners claim that they have been using the trails on the Project tract for years and that Finding of Fact 42 of the Dash 4 Permit and Finding of Fact 14 of the CUD guarantee their continued access to the trails. The Permittee responds that the trails are located on private property and that Petitioners have no legal right to use the trails.

CUD Finding of Fact 14 references "the recreational paths in use at this time" and Finding of Fact 42 of the Dash 4 Permit references an "informal arrangement regarding the neighborhood use of the existing footpaths." However, there was no evidence introduced into the record that documented the nature of the informal arrangement concerning the use of the trails.<sup>2</sup>

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<sup>2</sup> The Board notes that even if the Petitioners produced an official map or document delineating trails and purporting to provide them legal access, the enforcement of such rights would be a matter for the Superior Court.

More importantly, Act 250 cannot create property rights. The Petitioners either have pre-existing property rights to the Project tract or they do not. As discussed above, the Superior Court is currently determining the matter of the community use of the trails. The Commission's reference to the informal arrangement concerning access to the trails in the Dash 4 Permit does not create such a right if no prior right existed.<sup>3</sup>

The Board also notes that although the Permittee posted the land, the Petitioners have continued to use the trails. At no time has the Permittee attempted to deny access to the Petitioners nor have the Petitioners ever requested permission and been denied. In light of the above, the Board holds that the Petitioners have failed to meet their burden to demonstrate a violation.

*c. Lighting*

The Petitioners argue that the Permittee's exterior lighting violates Permit Condition 21 of the Dash 4 Permit. Permit Condition 21 requires the shielding of outdoor light sources and requires that the lights conform to the Outdoor Lighting Manual for Vermont Municipalities published by the Chittenden County Regional Planning Commission (1996) (Lighting Manual). The Permittee responds that the Lighting Manual was not introduced into evidence and is not part of the record. The Permittee is correct and the Board will not consider any possible violations of the Lighting Manual.

However, Permit Condition 21 clearly requires that all exterior lights be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view beyond the perimeter of the area to be illuminated. The lighting sconces on the exterior of the house and the lamp post are not installed or shielded to conceal the lighting source and the lighting sources are visible from a considerable distance. Although it may appear to be a minor violation, nevertheless, it is a violation of the Dash 4 Permit. Therefore, the Permittee is in violation of the Dash 4

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*Re: Equinox Id at 3.*

<sup>3</sup> In *Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB*, Findings of Fact, Conclusions of Law, and Order at 18 (May 18, 2001), in circumstances concerning access to a river, the Board held that if no public access currently exists on the Project, then none should be created or required by the Act 250 permitting process.

Permit and the Dash 4 Permit will be revoked unless the Permittee cures the violation as set forth below.

2. *Violation of board rules*

If the Board finds that the changes to the Project are either a material or substantial change, the Permittee should have obtained a permit amendment. Undertaking construction that is a material or substantial change without a permit amendment is a violation of Board rules and is grounds for revocation. *Lawrence White, supra*, at 17.

a. *Substantial change*

EBR 2(G) defines “substantial change” as “any change in a development or subdivision which may result in significant impact with respect to any of the 10 Act 250 criteria.”

The Board's substantial change test involves a two-step analysis. First, there must be a cognizable change (i.e. physical change) to the project. *Developer's Diversified Realty Corp.*, Declaratory Rulings ##364, 371 and 375, Findings of Fact, Conclusions of Law, and Order at 16 (March 25, 1999); *Re: Village of Ludlow*, Declaratory Ruling #212, Findings of Fact, Conclusions of Law and Order (Dec. 29, 1989). Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. *Id.* The Vermont Supreme Court has upheld the Board's test. *In re Barlow*, 160 Vt. 513, 521-22 (1993); *In re Manosh Corp.*, 147 Vt. 367, 369 (1986); *In re Orzel*, 145 Vt. 355, 360-361 (1985).

In considering the issue of substantial change, the Board has stated:

In deciding whether Act 250 jurisdiction applies . . . , the appropriate consideration is whether the potential for significant impact is raised. This consideration does not require an in-depth review of possible impacts, but simply a determination that significant impacts may occur.

*Village of Ludlow, supra*, at 9 (quoting *Re: City of Montpelier*, Declaratory Ruling #190, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 6, 1988)).

b. *Material change*

EBR 2(P) defines “material change” as an “alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act.”

As with the substantial change analysis, finding a material change involves a two step process. First, the Board must decide whether a physical change or a change in use has occurred or will occur. *Developer’s Diversified, supra*, at 18. Second, if there is a change, the Board must determine whether the alteration has a significant impact on any finding, conclusion, term, or condition of the Dash 4 Permit and whether the alteration affects one or more of the values protected by Act 250. *Id.*

In sum, if the Board finds that a physical change to the Project occurred that may have a significant impact to any Act 250 Criteria or has a significant impact on any finding, conclusion, or permit condition, then the Permittee should have obtained an amendment and is in violation of Board rules.

*i) Fence*

In the instant case, the Board concludes that although the fencing is a physical change, it may not result in a significant impact with respect to any of the 10 Criteria of Act 250. While the fence may arguably have some minor impact on the aesthetics of the area, the Board concludes that it is not out of context with the area given the fact that many of the Petitioners also have fences.<sup>4</sup> Therefore, the fence does not have the potential to significantly impact a Criterion and is not a substantial change. Likewise, the fence is not a material change because it does not have a significant impact on any finding, conclusion, term, or condition of the Dash 4 Permit or affect one or more of the values protected by Act 250.

*ii) Trails*

The Board has concluded that any limitation on access to the trails is not a material or substantial change because it does not have a significant impact on any finding, conclusion, term, or condition of the Dash 4 Permit, the 10 Criteria, or affect one or more of the values protected by Act 250.

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<sup>4</sup> The Board notes that although it may be polite and customary to build a fence with the finished side facing out, the fact that the Permittee’s finished side faces in towards the Permittee’s house does not make the fence out of context.

iii) *Lighting*

The Board has already concluded that the sconce lighting on the exterior of the house and the lamp post violate Permit Condition 21 of the Dash 4 Permit. Therefore, these lights have a significant impact on a permit condition and are a material change that requires a permit amendment. The Board does not need to consider whether the lights are also a substantial change.

3) *Opportunity to Cure*

Since the Board determined that a violation exists, it must give the Permittee a reasonable opportunity to correct the violation prior to any order of revocation becoming final, unless there is "a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation." EBR 38(A)(3). Further, "In the case where a permit holder is responsible for repeated violations, the board may revoke a permit without offering the opportunity to correct a violation." *Id.* Even where repeated violations have occurred, however, the Board has the discretion to allow the opportunity to cure. *H.A. Manosh, Inc., supra*, at 30.

There is no indication in the record of a threat of irreparable public harm or repeated violations. Therefore, the Board will offer the Permittee an opportunity to cure the violation. In light of the relative ease of the cure, the Permittee must cure the violation within 30 days of the issuance of this order.

**VI. Order**

1. Permittee's motion to dismiss is denied.
2. Petitioners' motion to amend the petition to revoke is denied without prejudice.
3. Permittee has violated Permit Condition 21 of the Dash 4 Permit. The Dash 4 Permit is revoked subject to Permittee's opportunity to correct the violation, on or before 30 days from this decision, (a) by filing a statement with the Board detailing the manner in which they have corrected the violation and /or (b) by filing an amendment application with the Commission seeking authorization for the activities constituting the violation.

Dated at Montpelier, Vermont this 15<sup>th</sup> day of January, 2004.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden

Pat Moulton Powden

Samuel Lloyd\*

William Martinez

Alice Olenick\*

A. Gregory Rainville

Jean Richardson

Christopher Roy

\*Board members Olenick and Lloyd did not attend the December 18, 2003 deliberation but have read and concur with the decision.