

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

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)

MEMORANDUM OF DECISION

This decision pertains to a motion for a stay of Land Use Permit #5L1290 (Corrected) and its supporting Findings of Fact, Conclusions of Law, and Order (collectively the "Permit") and a motion to dissolve the Chair's Preliminary Ruling granting a preliminary stay of the Permit. As explained in more detail below, the Vermont Environmental Board ("Board") denies both the motion for stay and the motion to dissolve the preliminary stay pursuant to Environmental Board Rule ("EBR") 42.

I. PROCEDURAL SUMMARY

On November 13, 1997 and November 17, 1997, the District #5 Environmental Commission ("District Commission") issued the Permit to H.A. Manosh, Inc. ("Respondent") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The Permit authorized Respondent to construct and use a 160 foot telecommunications tower, related control equipment building, and 900 foot access road on Davis Hill in the Town of Hyde Park, Vermont ("Project").

In April 1998, Respondent filed an application with the District Commission to amend the Permit ("Amendment Application").

On June 11, 1998, Caroline Balard, Tammy Barry, Eric and Michele Beckstrom, Stephanie Bernheisel, Gene Blake, Sam and Judith Boynton, Ed and Deb Carpenter, Dennis Clancy, Helen Clark, John and Judy Clark, Jason Couturre, David Davis, Lisa Dimondstein, Shirley Fagnant, Alice and Dennis Ferland, Doris Florig, Corella Gray, Scott Griswold, Terry and Catherine Judkins, Deanna Judkins, Jack Leeds, Jim McLean Lipinski, Victoria Long, Greg and Eileen Paus, Joann and Tom Ring, John G. Ruffle, Kim and Steve Rushford, Thomas and Carolyn Stams, Gerry Smith, Richard and Jennie Ann Stone, and Arnold Willey ("Initial Petitioners") filed a petition to revoke the Permit and a motion requesting the Board to stay the Permit pursuant to EBR 42 ("Motion for Stay").

On June 24, 1998, Charles Davis, Bruce Emerson, and Pierre and Pat Couture ("Additional Petitioners") filed a petition to revoke the Permit. In addition, the Initial Petitioners and the Additional Petitioners (collectively, the "Petitioners") filed a motion requesting the Chair to issue a preliminary stay of the Permit pursuant to EBR 42 ("Motion for Preliminary Stay").

Docket #708M1

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)
Memorandum of Decision
Page 2

On June 26, 1998, Burak Anderson & Melloni, PLC entered its Notice of Appearance on behalf of Respondent.

On June 26, 1998, Board staff issued a Notice of Petition for Revocation and Prehearing Conference, scheduling the prehearing conference for July 21, 1998.

On July 1, 1998, Vermont Environmental Board ("Board") Chair Marcy Harding issued a Chair's Preliminary Ruling ("Preliminary Ruling") granting the Motion for Preliminary Stay for a period of thirty days pursuant to EBR 42. The Preliminary Ruling is incorporated herein by reference.

On July 9, 1998, Respondent filed an Agreed Motion for Enlargement of the time within which it could file a response to the Preliminary Ruling.

On July 10, 1998, Respondent filed a letter concerning its Motion for Enlargement.

On July 13, 1998, the Chair issued an Order Granting the Motion for Enlargement and extending the preliminary stay until August 24, 1998.

On July 20, 1998, Respondent filed a letter addressing the scheduling of this proceeding.

On July 20, 1998, Respondent filed a Motion to Dissolve Preliminary Stay ("Motion to Dissolve"). Respondent also filed a Memorandum of Law in Support of Motion to Dissolve Preliminary Stay and in Opposition to Motion for Permanent Stay, together with supporting affidavits and other documentation (collectively the "July 20 Filings").

On July 20, 1998, the Agency of Natural Resources ("ANR") filed its notice of appearance by and through N. Jonathan Peress, Esq., Associate General Counsel.

On July 21, 1998, the Lamoille County Planning Commission ("LCPC") filed a letter with attachments.

On July 21, 1998, the Garfield / Hyde Park Neighbors Alliance ("Alliance") filed a Petition for Party Status.

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)

Memorandum of Decision

Page 3

On July 21, 1998, Chair Harding convened a prehearing conference with the following individuals and entities participating:

Petitioners and the Alliance by Stephanie Kaplan, Esq., Michelle Beckstrom, Judy A. Clark, Scott Griswold, Esther Lehman, Jennie Ann Stone, Richard Stone, and Mary Walz

Respondent by Jon Anderson, Esq., Gloria Wing, and Gary Nolan
LCPC by Michelle Boomhower

Also present were Gary Underwood and Walter Earle of the Lamoille County Sheriffs Department.

On July 21, 1998, Chair Harding issued a Prehearing Conference Report and Order.

On July 30, 1998, Petitioners filed an Objection to [Respondent's] Opposition to Permanent Stay, a Memorandum in Opposition to Dissolution of Preliminary Stay and in Support of Permanent Stay, and supporting affidavits and other documentation.

On August 14, 1998, Respondent filed a Motion for Leave to File Reply Memorandum ("Motion to File Reply"). Respondent also filed a Reply Memorandum and supporting- documentation (collectively the "August 14 Filings").

On August 18, 1998, Petitioners filed a letter in opposition to the Motion to File Reply and the, August 14 Filings.

On August 19, 1998, the Board deliberated concerning (i) whether to accept the August 14 Filings, (ii) the Motion to Dissolve the Preliminary Stay, (iii) whether to consider the July 20 Filings in connection with the Motion for Stay, and (iv) the Motion for Stay.

II. DISCUSSION AND ANALYSIS

A. Introduction

The Permit authorizes Respondent to construct and operate a 160' telecommunications tower, related 8' x 12' control equipment building, and 900 access road "on Davis Hill" in Hyde Park, Vermont. In April 1998, Respondent filed the Amendment Application seeking authorization to "add 30' to permitted 160' tower[,] increase permitted building from 8' x 12' to 14' x 26'[, and] add Bell Atlantic building, 12'

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)
Memorandum of Decision
Page 4

x 30'." The District Commission has granted Petitioners party status in the proceeding concerning the Amendment Application. A hearing on the Amendment Application has been stayed pending determinations in the instant revocation proceeding.

The Initial Petitioners argue that the Permit is void due to an alleged defect in the Notice. They claim that this defect, the alleged mis-identification of the Project site as "Davis Hill," denied them the opportunity to participate as parties to the Permit application proceeding. The Initial Petitioners urge the Board to stay the Permit "until the Board has determined whether the [Initial] Petitioners will be able to participate in the review of a project that has direct effects on them." Motion for Stay at 2. The Board interprets this as a request to stay the Permit until the Board determines whether the Permit is void for failure to provide proper notice.'

B. The August 14 Filings

On July 1, 1998, the Chair issued the Preliminary Ruling granting Petitioner's Motion for Preliminary Stay for a period of thirty days. Pursuant to EBR 42, the Preliminary Ruling provided that Respondent could file a motion to dissolve the preliminary stay within ten days after its issuance. The Preliminary Ruling also authorized Petitioners to respond to any such motion to dissolve by a date certain.

On July 9 and 10, 1998, Respondent requested an extension of time within which to file a motion to dissolve the preliminary stay. In connection with the request, Respondent suggested an extended deadline within which Petitioners could file a response to the motion to dissolve. Motion for Enlargement at 2. In accordance with the Chair's Order Granting the Motion for Enlargement, Respondent filed its Motion to Dissolve the Preliminary Stay on July 20, 1998 and Petitioners filed a Memorandum in Opposition to Dissolution of Preliminary Stay on July 30, 1998.

On Friday afternoon, August 14, 1998, Respondent filed the August 14 Filings, which responded to Petitioners' Memorandum in Opposition to Dissolution of Preliminary Stay. Respondent also filed the Motion to File Reply. The Motion to File Reply requested the Board to consider the August 14 Filings at the Board's August 19, **1998** deliberations. This Motion must be denied and the August 14 Filings excluded from consideration for at least two independent reasons.

¹ See Preliminary Ruling at 3. Only the Initial Petitioners can be considered "parties" for purposes of a request for stay pursuant to EBR 42.

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)
Memorandum of Decision
Pane 5

First, pursuant to EBR 12, Petitioners are entitled to fifteen days within which to file a response to the Motion to File Reply. In order to ensure that the Board would have such a response prior to its scheduled deliberations on August 19, however, Petitioners would have had to file a response before the close of business on Tuesday, August 18, 1998 -- four days after the Motion's filing. Because the August 14 Filings were filed on the Friday afternoon prior to a three-day holiday weekend, there was inadequate opportunity for Petitioners to request, and for the Chair to consider and potentially grant, an extension of time for Petitioners' response and a postponement of the Board's deliberation.

Second, and more significantly, Respondent had no authority to submit the Reply Memorandum. Although Board procedure provides an opportunity for parties to file a response to an opponent's motion, Board rules and the Act 250 Statute do not authorize or even contemplate that the moving party will have an opportunity to respond to that response. Neither the Chair's Preliminary Ruling which granted the preliminary stay nor the Order Granting the Motion for Enlargement provided Respondent with an opportunity to respond to Petitioners' response to the Motion to Dissolve the Preliminary Stay. Furthermore, in its July 9 and 10, 1998 filings requesting an extension of time within which to file a motion to dissolve, Respondent did not request that it be provided an opportunity to respond to Petitioners' response. Because Respondent had no express or implied authority to file an additional response, it was necessary for Respondent to file a motion requesting permission to do so. It was unreasonable, however, for Respondent to file the Motion to File Reply on August 14, 1998. It was incumbent upon Respondent to file the Motion early enough in the process for Petitioners to have adequate time to respond and for the Board to have the opportunity to adjust filing and deliberation dates if it chose to grant the motion.

Accordingly, the Board denies the Motion to File Reply. The Board will not consider the August 14 Filings in its analysis of the Motion to Dissolve the Preliminary Stay or the Motion for Stay.

C. Motion to Dissolve the Preliminary Stay

On July 1, 1998, the Chair issued the Preliminary Ruling granting Petitioner's Motion for Preliminary Stay for a period of thirty days. Pursuant to EBR 42, the Preliminary Ruling provided that Respondent could file a motion to dissolve the preliminary stay within ten days after its issuance. On July 9 and 10, 1998, Respondent requested an enlargement of time within which to file a motion to dissolve the **preliminary stay. The Chair's Order Granting the Motion for Enlargement stated:**

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)
Memorandum of Decision
Page 6

In connection with [its] request [for an enlargement], Respondent **acknowledge[d]** that the Board will not deliberate concerning the preliminary stay until its August deliberative session. Respondent thereby **waive[d]** the EBR 42 requirement that the Board deliberate concerning the preliminary stay within thirty days of the [Preliminary Ruling's] issuance. Respondent also **accede[d]** to the extension of the preliminary stay until August when the Board [would] deliberate on both the Motion for Stay and the grant of the preliminary stay.

Order Granting the Motion for Enlargement at 2. Accordingly, the Order extended the preliminary stay until Monday, August 24, 1998. Respondent did not file an objection to the extension of the preliminary stay. In light of Respondent's acquiescence to the extension of the preliminary stay and for the reasons set forth in the Preliminary Ruling, the Board concludes that the preliminary stay does not cause an undue hardship to Respondent or negatively affects the public health, safety, or general welfare. EBR 42.

Accordingly, the Board affirms the **Preliminary Ruling**, as amended by the Order Granting the Motion for Enlargement, and denies Respondent's Motion to Dissolve the Preliminary Stay.

D. The July 20 Filings

Respondent timely filed the Motion to Dissolve and the July 20 Filings, to the extent that the July 20 Filings address the preliminary stay. Respondent asserted, however, that it submitted the July 20 Filings not only as support for the Motion to Dissolve the preliminary stay, but in opposition to the pending Motion for Stay. Petitioners object to the Board's consideration of the July 20 Filings in connection with the Motion for Stay on the basis that they were not timely filed for that purpose.

Initial Petitioners filed the Petition for Revocation and the Motion for Stay on June 11, 1998. EBR 12(F) provides in pertinent part that "all memoranda in reply to a motion shall be filed within fifteen days of service of the motion." Thus, Petitioners argue that a response to the Motion for Stay was due to the Board on or before June 26, 1998 (which was, incidentally, the day on which the law firm of Burak Anderson & Melloni, PLC entered its appearance on behalf of Respondent). Petitioners' argument is technically correct. The Board concludes, however, that EBR 12 is not the only appropriate consideration in this proceeding.

EBR 42 provides that the Chair of the Board may issue a preliminary stay of not more than thirty days. A party may move to dissolve the preliminary stay within ten days after the issuance of the Chair's order. The full Board must review the preliminary stay

RE: H.A. Manosh, Inc. ~~XXXXXXXXXXXXXXXXXXXX~~
Land Use Permit #5L1290-EB (Revocation Petition)

Memorandum of Decision

Page 7

within the thirty-day period of the stay. EBR 42. As a practical matter, a preliminary stay will almost always expire by its own terms within a few days after the Board meets to review it because the Board must have an opportunity to read and consider the motion to dissolve prior to its review of the preliminary stay and the Board convenes deliberations on a limited number of days per month. Implicit in the requirement that the Board review the preliminary stay within the stay's thirty-day **pendency** is the assumption that the Board will also consider any motion for a long term stay at the same time. Such an interpretation of EBR 42 assures that there is no lapse in time between the conclusion of a preliminary stay and the commencement of one of longer duration. As a result, it is reasonable to assume that EBR 42 contemplates that the motion to dissolve the preliminary stay would, in most circumstances, address the motion for permanent stay as well. This assumption is further supported by the fact that, again in most circumstances, the arguments in opposition to a preliminary stay and those opposing a motion for permanent stay would be similar, if not identical?

Accordingly, the Board will consider the July 20 Filings in its analysis of the Motion for Stay.

E. Motion: for Stay

Initial Petitioners did not automatically stay the Permit by filing their petition for revocation. EBR 38(A). Cf. EBR 42 (appeal does not automatically stay a decision of the Board or District Commission). Rather, EBR 42 sets forth certain parameters under which a stay may be requested and under which it may issue. "In deciding whether to grant a stay, the [B]oard may consider the hardship to parties, the impact, if any, on the values sought to be protected by Act 250, and any effect upon public health, safety or general welfare." EBR 42.³ The Petitioners bear the burden regarding the Motion for

² The Board notes that the somewhat confusing sequence of deadlines was caused in part by Petitioners' decision to file the Motion for Preliminary Stay thirteen days **after they** filed the Motion for Stay, rather than request both a preliminary and long-term stay by the same motion.

³ The parties rely upon a four-part, common-law test enunciated by the Waste Facility in Re: Bristol Waste Management, Inc., #AD070-WFP, Memorandum of Decision and Order at 4 (Sept. 12, 1991) and Re: C.V. Landfill, Inc., #FR221-WFP, Memorandum of Decision at 2 (Mar. 23, 1992) to analyze whether a stay should issue under EBR 42. Although some of the factors listed in Bristol Waste and C.V. Landfill may be pertinent in a discussion of EBR 42, the Waste Facility Panel explicitly overruled

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)
Memorandum of Decision
Page 8

Stay. Re: Stokes Communication Corp., #3R0703-EB, Supplemental Memorandum of Decision at 1 (Feb. 26, 1993) [EB #562M2].

1. Hardship to Parties and Impact on Act 250 Values

The Project includes the dismantling of the two towers currently used for emergency services and the relocation of existing antennas to the Project site. Initial Petitioners⁴ argue that if the Permit for the new tower is revoked after the existing towers are dismantled, there will be no tower devoted to emergency services in their area. The Board, however, is not persuaded that the new tower will be operational and the old towers will be dismantled prior to the issuance of the decision in this revocation proceeding. First, the deadlines set forth in the Permit for both the construction of the new tower and the dismantling of the old Davis Hill tower have *expired*. See Permit Conditions 12 and 9, respectively. The extension of the construction completion deadline is an issue in the Amendment Application that is currently subject to a continuance before the District Commission. Thus, unless and until the construction completion deadline is extended, Respondent commences construction on the tower at its own peril. Second, it is questionable whether it is even possible to construct the new tower and dismantle the old towers during the remainder of this construction season. Third, there does not appear to be any urgency compelling the dismantling of the old tower on Davis Hill. Not only has the Permit deadline for dismantling the old tower expired, but the owner of the property on which the old tower is sited is willing to allow the “tower to stay where it is, *for as long as needed*, at the current rental payment.” Jones Affidavit (emphasis added). Based upon the evidence currently before it, the Board cannot conclude that the Initial Petitioners will be without emergency services if a stay is not granted and the Permit is ultimately revoked.

The Initial Petitioners additionally allege that if construction proceeds, they will be forced to live with an “unsightly and potentially harmful tower in their neighborhood” without having had the opportunity to participate in the Act 250 permit proceedings. They also state that they will be irreparably harmed by losing confidence in the Act 250 process if Respondent is permitted to proceed with construction despite “defective notice and the clear violations of the Permit.” These alleged injuries to Initial Petitioners or impact on Act 250 values are not irreparable. The Board cannot emphasize too strongly

the use of the four-part, common-law test in Re: Putney Paper Company, Inc., #WH600-WFP, Memorandum of Decision at 5, n.3 (Jan. 10, 1996).

⁴ See footnote 1, supra.

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)

Memorandum of Decision

Page 9

that *if Respondent proceeds with construction during the pendency of the revocation proceeding, it does so at its own peril.*⁵ If the Board ultimately decides to revoke the Permit or to give Respondent the opportunity to cure violations, Respondent may be required to dismantle the “unsightly and potentially harmful tower,” to correct notice violations by re-applying for a permit to construct the 160’ tower, or to take other actions.

The Board closely scrutinizes a request to stay a project that is authorized by a permit from which no timely appeal was filed. Under certain circumstances, the mandated *delay* of such a project can in itself be a hardship to a permittee. The Board recognizes that Initial Petitioners argue, in part, that had they received proper notice of the application proceeding, they would have participated in the permit process and, if necessary, appealed the Permit to the Board. Nevertheless, some of the Petitioners in this **revocation action** are adjoiners of the Project. They do not allege a violation of notice provisions, they did not participate in the application proceedings, and they did not appeal the issuance of the-Permit: Although Respondent is again cautioned that it proceeds with construction at its own peril, the Board finds that a mandated delay of construction has the potential, under, the circumstances, of causing a hardship to Respondent.

A mandated *delay* has an even greater potential to cause hardship to a permittee where it is not clear if petitioners will succeed on the merits of their revocation petition. Initial Petitioners allege that the published notice for the original application incorrectly identified the location of the tower as “Davis Hill.” These Petitioners, who are not adjoiners, cannot see Davis Hill from their property but can see Carpenter Hill, which they allege is the true location of the project. The Initial Petitioners allege that they would have requested party status in the original proceeding if the location had been correctly identified. In support of revocation, Petitioners cite to cases involving failure to notify *adjoining* property owners. The Board acknowledges that the cited cases and the

⁵ In addition, Respondent has indicated its intention, if the Motion for Stay is denied, to proceed with the construction of a wider tower than that approved in the Permit. Letter dated and filed on July 20, 1998 at 4. Jurisdiction does not currently rest with **the** Board to determine whether an increase in tower width is a material or substantial change requiring an amendment to the Permit. Therefore, Respondent should not interpret the Board’s silence on this issue as concurrence with Respondent’s independent assessment that no permit amendment is required. Respondent is advised **that** if it proceeds with its stated intention to construct a tower that differs from that approved in the Permit without first having obtained a valid jurisdictional determination, it does so at its own peril. Moreover, the Board is in no way prevented from pursuing any and all available remedies under 10 V.S.A., Chapter 201, Civil Enforcement.

alleged facts of this proceeding are in some ways comparable. Nevertheless, given the novelty of the legal argument, the Board cannot at this time predict the likelihood that Initial Petitioners will ultimately succeed on the merits of their revocation petition.

Therefore, the Board concludes that Initial Petitioners have not met their burden to prove that the denial of a stay will cause them hardship or have a negative impact on the values sought to be protected by Act 250. In contrast, the Board concludes that the issuance of a stay has the potential to cause hardship to Respondent.

2. Effect Upon Public Health, Safety or General Welfare

Respondent argues that a stay is contrary to the public good. It states that its lease on the property on which the old Davis Hill tower is sited expires at the end of the year and that it is unlikely that it will be able to get an extension. **Manosh** Affidavit at 2. It argues that unless it is able to proceed immediately with the construction of the tower, the new tower will not be completed this year, thereby threatening the provision of emergency services in Lamoille County. The lessor of the property, however, has filed an affidavit indicating his willingness to extend the lease to **Manosh** "for as long as needed." Jones Affidavit. Therefore, this argument does not demonstrate that the public interest is served by the denial of a stay.

For the reasons discussed previously, however, it is not clear that the public interest is served by the *grant* of a stay. See, e.g., Section II.E. 1., supra. The moving party carries the burden in a request to stay a permit. The Board concludes that Petitioners have not met their burden of demonstrating that it is in the best interest of the public health, safety, or general welfare to stay the Permit.

III. ORDER

1. The Motion to File Reply is **denied**. The August 14 Filings shall not be considered in connection with the Board's analysis of the Motion for Stay or the Motion to Dissolve the Preliminary Stay.

2. The Motion to Dissolve the Preliminary Stay is **denied** and the Preliminary Ruling, as amended by the July 13, 1998 Order, that imposed a preliminary stay through and including August 24, 1998 is **affirmed**.

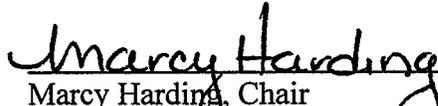
3. The July 20 Filings shall be considered in connection with the Board's analysis of the Motion for Stay.

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation Petition)
Memorandum of Decision
Page 11

4. The Motion for Stay **denied**.

Dated at Montpelier, Vermont this 27th day of August, 1998.

ENVIRONMENTAL BOARD*



Marcy Harding, Chair

Arthur Gibb

George Holland

Rebecca M. Nawrath

A. Gregory Rainville

* Board member Samuel Lloyd **dissents** from the foregoing decision.

* Board members John T. Ewing, William Martinez, and Robert H. Opel were not present at and did not participate in the August 19, 1998 deliberations in this matter.

F:\USERS\DONNAR\DECISION\MANOSH.MOD