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

Re: Bull's Eye Sporting Center
and
David and Nancy Brooks
Wendell and Janice Brooks
by
Stephen J. Craddock, Esq.
1413 Paine Turnpike – North
Berlin, Vermont 05602

Land Use Permit 5W0743-2-EB (Altered)
(Revocation)

MEMORANDUM OF DECISION

I. Introduction

On June 23, 2000, the Environmental Board ("Board") issued Findings of Fact, Conclusions of Law, and Order ("Decision") revoking Land Use Permit 5W0743-2-EB (Altered) ("Permit") for a shooting range operated by the on a tract of land (approximately 35 acres) owned by Wendell and Janice Brooks in the Town of Orange, Vermont ("Project"). The Decision, however, provided Bull's Eye Sporting Center and David and Nancy Brooks and Wendell and Janice Brooks ("Permittees") the opportunity to cure the revocation.

Pending before the Board are Motions to Alter the Decision filed by Ray Letourneau, Anita Page and George Wild (collectively, the "Neighbors") and the Town of Orange. For the reasons stated below, the Board denies the motions.

II. Discussion

Motions to reconsider or alter decisions of the Board pursuant to Environmental Board Rule ("EBR") 31(A) must be based on the existing record. *Re: Charles and Barbara Bickford*, #5W1186-EB, Memorandum of Decision at 3 (September 12, 1995). No new hearings are held, nor is new evidence taken. *Id.* One reason for these limits is to discourage parties from using such motions to convert Board decisions into "proposed" decisions to which they can later respond. *Id.*

A. The Neighbors' Motion

The Neighbors raise four arguments in support of their motion to alter.

1. that the opportunity to cure should not be granted

The Neighbors repeat their earlier argument that the Board should not allow the Permittees the opportunity to cure the revocation through a permit amendment application.

Pursuant to EBR 38(A)(3), If the Board determines that a violation exists, then it must give the permit holder 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).

In the Decision the Board found that, "the harm caused by the tree cutting, while certainly a harm to the public's general welfare and the environment, is not irreparable." Decision at 17. As to the Permittees' failure to install the shooting stops, the Board found that there had been no evidence that shot has actually left the Project tract; the Board further concluded that the Commission would be able to condition the operation of the Project to prevent the problems which the shooting stop condition was meant to address. *Id.* The Neighbors have presented no argument that the Board's decision is inconsistent with Rule 38's policy that a cure should be allowed unless there is the threat of irreparable harm, and therefore the Board declines to alter the Decision as requested.

2. *that the Board should alter the Decision to reflect that the Permittees willfully or with gross negligence submitted misleading information*

The Neighbors next ask that the Decision be altered to reflect that the Permittees willfully or with gross negligence submitted misleading information in connection with the tree cutting that occurred at the Project site before the Permit was issued in 1997. They argue that, had the Permittees provided accurate information to the Board when the Permit was originally issued, the Board might have denied the application or required additional or different conditions in the Permit.

The Board declines to speculate on whether the receipt of the information at issue would have resulted in a denial of the Permit or the imposition of additional or different conditions. Further, the Board finds that the Neighbors' arguments in this regard are unpersuasive for two reasons.

First, the Neighbors cannot use their pending motion to "appeal" or reopen the Board's issuance of the Permit. *See, In re Taft Corners Associates, Inc.*, 160 Vt. 583, 593 (1993) (once a permit is issued and the time for appeal has run, the permit becomes final). However, a permit is always subject to attack through the revocation process. If the Permittees' failure to provide accurate information to the Board rises to the level required by Board precedent, *see* cases cited in the Decision at 13 – 14, then this provides grounds for revocation, which is the proper method to review the issuance

of a final permit. The Neighbors have availed themselves of the revocation process. Revisiting the circumstances under which the Permit was issued in 1997 serves no purpose not already addressed through revocation proceedings.

Second, a finding of willful or grossly negligent submission of misleading information in connection with a permit application is grounds for revocation under EBR 38(A)(2)(a). Had the Board not determined to revoke the permit on other grounds, then the Neighbors' arguments in their motion to alter might have meaning. But the Board provided two other grounds on which to base its decision to revoke the permit, *see* Decision at 10 – 12 and 16, and it thus needs not reach the question of whether there is a third ground.

3. *that the Board should alter the Decision and expressly order that the Permittees have made a substantial change to the Project, and thus confirm to the District 5 Environmental Commission that the requirements of Rule 34(B) apply*

The Board expressly concluded that the Permittees' tree cutting constituted both a substantial and material change. Decision at 11 –12. The Board has faith that the District 5 Environmental Commission will properly apply the Board's Rules.

4. *that the Board should alter the Decision to require that no shooting stations be used in the north and west areas of the Project site until such time as the basal area is between 120 and 150 square feet*

In its Decision, while allowing the Permittees to cure their tree-cutting violation by seeking a permit amendment before the District 5 Environmental Commission, the Board held that

> any cure that is permitted by the Commission must prohibit shooting or the use of firearms in the areas along the western and northern boundaries of the Project tract until such time as the forest growth is equivalent (in terms of sound attenuation) to the growth that existed prior to any cutting which occurred in 1996 – 1998, or a period of ten years, whichever last occurs.

Decision at 18.

The Neighbors seek to quantify the Board's sound attenuation requirement in terms of basal area. The Neighbors would add language to the Decision which would require that no shooting stations be used in the north and west portions of the Project

site until the basal area of the trees in those portions is between 120 and 150 square feet.

The Board declines to incorporate the language suggested by the Neighbors. In terms of noise, the relevant question is the extent to which forest growth in the affected area must occur in order to ensure that the noise levels approved in the Permit are not exceeded. Basal area, while significant, is not necessarily controlling in terms of noise attenuation. The Board believes that its requirement that the forest growth be equivalent in terms of sound attenuation, coupled with a ten-year prohibition on shooting, is sufficient to substitute for and satisfy the Permit's requirement that there be no cutting in the buffer zone.

B. The Town of Orange's Motion

The Town of Orange appears to raise an argument in favor of its motion to alter that is similar to one raised by the Neighbors. Thus, to the extent that the Town asserts that the Board should find that the Permittees willfully submitted inaccurate or misleading information to the Board at the time the Permit was issued in 1997, this claim is unpersuasive for the same reasons as stated in Section II(A)(2), above.

To the extent that that the Town contends that "the logging was done willfully" and that this "is in direct contrast to the Environmental Board's conclusion," the Board made no conclusion as to the "willful" nature of the *logging* done by the Permittees. Further, "willfulness" is not a relevant or required element in the consideration of whether a permittee has, as in this case, violated a term or condition of its permit. EBR 38(A)(2)(b).

III. Order

1. The Motion to Alter the Decision filed by Ray Letourneau, Anita Page and George Wild is denied.

2. The Motion to Alter the Decision filed by the Town of Orange is denied.

Dated at Montpelier, Vermont, this 21st day of September 2000.

ENVIRONMENTAL BOARD

by: Marcy Harding
Marcy Harding, Chair
John Drake
George Holland
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W. William Martinez
Rebecca Nawrath
Alice Olenick
Gregory Rainville

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