

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Ch. 151

Re: *Mark and Pauline Kisiel and  
Thomas and Cheryl Kaminski*

Land Use Permit Application  
#5W1 151-1 -EB

**Memorandum of Decision**

This matter involves an appeal to the Environmental Board (Board) from a Memorandum of Decision (Decision), issued by the District 5 Environmental Commission (Commission) to Mark and Pauline Kisiel and Thomas and Cheryl Kaminski (Kisiels and Kaminskis) concerning Land Use Permit Application #4C1 11 0-EB (Application) which seeks authorization to construct a waste disposal system on land owned by the Kaminskis in order to serve certain lots on land owned by the Kisiels (Project). The Project is on a 43.5 acre tract located off Eurich Farm Road in the Town of Waitsfield, Vermont.

On March 22, 2004, the Commission issued the Decision.

On April 19, 2004, Town of Waitsfield filed an appeal with the Board from the Decision alleging error in the Commission's decision with respect to the Project's secondary impacts under 10 V.S.A. 6086(a)(1), (1)(A), (1)(E), (4) and (8)(A), collateral estoppel, the Waitsfield Town Plan, and a failure to afford the Town a hearing.

On May 28, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

Kisiels by Paul Gilles, Esq.

The Town of Waitsfield (Town) by Joseph McLean, Esq..

As the parties stated their intention to determine filing dates and report these dates to the Board for inclusion into a Prehearing Order, no Prehearing Order was issued immediately following the Prehearing Conference.

On September 17, 2004 the Town filed a motion for summary decision and supporting documents pursuant to Environmental Board Rule (EBR) 23. On October 26, 2004, the Kisiels filed a memorandum in response to the Town's motion and supporting documents.

On December 20, 2004, while the motion for summary decision was pending before the Board, the Town filed a motion to deny the application. The Kisiels filed a response to the Town's December motion on January 7, 2005, and on January 12,

2005, the Kaminskis, through their attorney, filed information relative to the Town's December motion.

The Board deliberated on the Town's motion to deny the application on February 2, 2005.

## **II. Findings of Fact**

No hearing has been held on this matter, nor have the parties filed affidavits or other evidence pertinent to the motion before the Board. Nevertheless, from a review of the Record before the Commission, of which the Board takes official notice pursuant to 3 V.S.A. §810(4), and other documents filed by the parties thus far to which there appear to be no dispute, the Board makes the following findings.

1. On September 12, 2003, Mark and Pauline Kisiel, as applicants, filed an application (Application #5W1 151-1) with the District 5 Environmental Commission, seeking to amend Land Use Permit #5W1151.

2. Application #5W1 151-1 states:

This project involves the allowance of a septic easement onto the lands of Thomas and Cheryl Kaminski from the adjoining land owned by the Kisiels. Said easement will serve lots 1, 2, and 3 of the five lot subdivision created by the Kisiels in 1996.

3. Application #5W1 151-1 lists Thomas and Cheryl Kaminski as the landowners of the lands on which the septic system would be constructed.

4. On March 22, 2004, the Commission issued a Memorandum of Decision and proposed Land Use Permit Application #5W1 151-1, which the Town of Waitsfield appealed to the Board on April 19, 2004.

5. In its Notice of Appeal, the Town contends that the Commission erred in its refusal to consider certain secondary impacts of the Project, in its failure or refusal to apply the doctrine of collateral estoppel, in its failure to address the Project's compliance with the Waitsfield Town Plan, and in its failure to allow the Town to adequately present its case.

1 Because a decision on the Town's motion to deny the application may prove dispositive to this matter, the Board will not decide the Town's motion for summary decision at this time.

6. Some time between July and December 2004, the Town became aware of a July 12, 2004 letter written by Mark Sperry, Esq., the attorney for the Kaminskis, to Paul Gilles, Esq., the attorney for the Kisiels. In this letter, Mr. Sperry indicates that the agreement between the Kisiels and Kaminskis which allows the Kisiels to use the Kaminskis' lands for the Project has lapsed, and that, therefore, the Kisiels no longer hold an easement to use the Kaminskis' land as a septic area for the Kisiels' lots.

7. On December 3, 2004, the Kaminskis, through Mr. Sperry, filed a letter with the Board which reasserts the Kaminskis' position that the agreement concerning the easement has expired. The letter concludes with the statement that the Kaminskis

do not wish to move forward with the application for Act 250 approval as to sewage disposal facilities on their property servicing the Kisiel project (which is under appeal), as they have no present intention to allow development of the property in question for that purpose. Therefore, they withdraw as parties from the pending appeal.

8. Based on these letters, the Town filed its December 20, 2004 motion.

9. On January 7, 2005, the Kisiels responded to the Town's December 20 motion.

10. The Kisiels' right to an easement to use the Kaminskis' land as a septic area for the Kisiels' lots is in dispute.

### **III. Discussion**

#### **A. EBRIO('A)**

EBR 10(A) reads, in pertinent part:

(A) An application shall be signed by the applicant and any coapplicant, or an officer or duly-appointed agent thereof. The record owner(s) of the tract(s) of involved land shall be the applicant(s) or coapplicant(s) unless good cause is shown to support waiver of this requirement. The district commission or board may, upon its own motion or upon the motion of a party, find that the property interest of any such person is of such significance that the application

cannot be accepted or the review cannot be completed without their participation as co-applicants.

*B. The parties' arguments*

The Town contends that because the Kaminskis will not allow the septic system on their land and no longer wish to participate as parties to the appeal, and as they are necessary co-applicants to the application, the Application #5W1 151-1 must be dismissed.

The Kisiels contest the Kaminskis' ability to deny them the easement to their land. They ask that the Board not dismiss the application pending resolution of their claims with the Kaminskis and assert that the substantive issues raised in the Town's Notice of Appeal remain viable.

*C. Analysis*

The Kaminskis, as the owners of the land on which the septic system would be constructed, would appear to be necessary co-applicants to Application #SWI 151-1. As the Board wrote in *Pilgrim Partnership*, #5W0894-1-EB, Findings of Fact, Conclusions of Law, and Order at 4 .5 (Oct. 4, 1988):

- The justification for requiring the record owner(s) of any involved land to be co-applicants under Rule 10(A) includes 1) the need to ensure that any permit conditions imposed by a commission or the Board will be enforceable, 2) the need to ensure that the owners of lands involved in subdivision or development have consented to the activity under review, and 3) the need to ensure that persons with a substantial interest in the
- involved lands have an opportunity to participate in the permit proceedings.

And see, *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1 01 8-4//#5L0426-9-EB, Findings of Fact, Conclusions of Law, and Order at .11 (Oct. 3, 2003); *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 3 (Oct. 26, 2000); *Re: Roger Loomis d/b/a Green Mountain Archery Range*, #1 R0426-2-EB, Findings of Fact, Conclusions of Law, and Order at 25 .30 (Dec. 18, 1997)?

<sup>2</sup>A January 11, 2005 letter to the Board from Mr. Sperry reasserts the Kaminski's position as stated in Mr. Sperry's July 12, 2004 and December 3, 2004 letters and further takes issue with the Kisiels' claim that the Kisiel-Kaminski agreement is "still alive."

In *Re: Flanders Building Supply, Inc.*, #4C0634-EB, Findings of Fact, Conclusions of Law and Order at 5 n.3 (Oct. 18, 1985), noted that a landowner's consent for an activity on his land was necessary "since, without such consent, substantial resources could be wasted in the review process."

The Board has waived the co-applicancy requirement in certain instances, as allowed by the rule, upon a showing of good cause. See, e.g., *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith, supra*. In *Re: Larry and Diane Brown, #5W1 175-1 -EB*, Findings of Fact, Conclusions of Law, and Order at 12-14 (Jun. 19, 1995), the Board noted two earlier Board decisions in which Rule 10's co-applicancy requirement was waived in circumstances which, on first review, would appear to be 'similar to those presented in the instant matter.

In *Re: Flanders Building Supply, Inc., supra*, the Board waived the requirement that an entity claiming an interest in a right-of-way be made a co applicant pursuant to EBR 10(A). The Board, however, had at least preliminarily found that "it appears that the Applicant has a right-of-way interest in [the road owned by the homeowner's association]" and the homeowner's association "asks us to look beyond the deed and conduct proceedings in the nature of a quiet title action to determine the precise scope of the easement interest of the Applicant." *Id.* at 6. The Board declined to do so, noting that "[s]uch an inquiry is far beyond the bounds of this Board's jurisdiction, and should be left to the courts." *Id.* The Board also found, *Inter alia*, that, "[s]ubstantially all of the construction activities would take place on lands owned [by the Applicant]."

Here, the Board has not made a finding as to the property interest of the Kisiels in the Kaminskis' lands. And it is evident that *all* of the construction in this case will occur on lands which are *not* owned by the Kisiels. *Flanders* is therefore distinguishable from the present case.

*Re: Eastern Landshares, Inc., #4C0790-EB*, Memorandum of Decision at 1-2 (Aug. 13, 1991), can also be distinguished from the present case. There, the applicant contended that it "is the record owner of the subject property by virtue of its 98-year lease" and that "no other parties are the record owners of the land on which it proposes to construct this subdivision." As in *Flanders*, the board declined "to adjudicate disputes over ownership of property" and accepted, at least for the purposes of EBR 10(A), the "applicant's assertion of ownership... Here, the Kisiels do not claim to be the record owners of the land on which the septic system will be sited, nor do they assert that the Kaminskis do not own the land.

The Board therefore concludes that the Kaminskis are necessary co-applicants to Application #5W1 151-1 and there exists no cause to waive EBR 10(A). At present, the Kaminskis have informed the Board that they



"do not wish to move forward with the application." Ordinarily, the refusal of a necessary co-applicant to proceed with an application would be grounds for its denial.

The Board recognizes, however, that the property rights of the parties under the easement agreement at issue in this matter and thus whether the Kaminskis are

obliged to participate as co-applicants to Application #5W1 151-1 are in dispute. Such rights and obligations, of course, must be resolved by the courts, not the Board. *In re Estate of Swinington*, 169 Vt. 583, 586 (1999)(mem.); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith, supra*, at 9; *Flanders, supra*. A decision by the Board to deny the application before such a resolution is concluded would therefore be premature.

*D. Conclusion*

The Board agrees with the Kisiels that it should not deny or dismiss Application #5W1 151-1 at this time. Rather, the Board will continue this matter pending a court's determination of the Kisiels' and Kaminskis' property rights and obligations concerning the lands owned by the Kaminskis, over which the Kisiels claim an easement for the septic system at issue in Application #5W1 151-1.

**IV. Order**

1. This matter is continued pending resolution in the courts of the Kisiels and Kaminskis property dispute as noted above.
2. On the first day of each following July and January, the Kisiels shall file with the Board a status report concerning any pending court action relevant to this matter.

Dated at Montpelier, Vermont this 3rd day of February, 2005.

ENVIRONMENTAL BOARD

*/s/ Patricia Moulton Powden*  
Patricia Moulton Powden, Chair  
George Holland  
Samuel Lloyd  
Patricia A. Nowak  
Karen Paul  
Richard C. Pembroke, Sr.  
A. Gregory Rainville  
Jean Richardson

Christopher D. Roy

The Kisiels apparently believe that the Board can and should address the merits of the Town's appeal while the courts resolve their property claims. The Board finds that this would be, at the present time, an inefficient use of its resources, as, should the courts determine that the Kisiels have no rights in the Kaminskis' lands at issue here, any action on this matter taken by the Board would prove to be wasted.