

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

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

Land Use Permit Application
#5W1151-1-EB

Dismissal Order

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 #5W1151-1-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.

I. Findings of Fact¹

1. On March 22, 2004, the Commission issued the Decision.
2. 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.
3. 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.
4. 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.
5. 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

¹ These findings are based on a review of the record and knowledge obtained by the Environmental Board through discussions with the Board's General Counsel. There has been no hearing on the issues raised in this Order.

and supporting documents.

6. On December 3, 2004, the Kaminskis, through their attorney, Mark Sperry, Esq., filed a letter with the Board. In that letter, the Kaminskis noted that the septic area for the Kisiels' Project was to be located on the Kaminskis land, but that the agreement (Septic Agreement) for such location had lapsed on July 1, 2004, and that the Kaminskis had notified the Kisiels that they considered that their obligations under the agreement had expired. Given this, the Kaminskis stated that they did not wish to proceed with the application for Act 250 approval, and they withdrew as parties to the appeal.

7. On December 20, 2004, based on the Kaminski's December 3 letter and while the motion for summary decision was pending before the Board, the Town filed a motion to deny the application.

8. The Kisiels filed a response to the Town's December 20 motion on January 7, 2005, arguing that their agreement with the Kaminskis was still in existence and that therefore denial would be premature. The Kisiels suggested that the Board should allow the Kisiels and Kaminskis the time to resolve their dispute and asked for a temporary suspension of review of "the Kaminski portion" of the application.

9. On January 12, 2005, the Kaminskis, through their attorney, filed information relative to the Town's December motion.

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

11. On February 3, 2005, the Board issued a Memorandum of Decision, noting the above information. The Board found that, "The Kisiels' right to an easement to use the Kaminskis' land as a septic area for the Kisiels' lots is in dispute," and the Board concluded that the Kaminskis are "necessary co-applicants to Application #5W1151-1 and there exists no cause to waive EBR 10(A)." The Board further noted that the Kaminskis had informed the Board that they "do not wish to move forward with the application." While the refusal of a necessary co-applicant to proceed with an application would ordinarily be grounds for its denial, the Board recognized:

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 #5W1151-1 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.

12. The Board's February 2005 Decision therefore continued 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 #5W1151-1." The Board ordered the Kisiels to give regular updates on the progress of any court litigation.

13. There have been sporadic updates from the Kisiels; the last written report was received in September 2006. Oral reports to the Board's General Counsel indicate that, rather than litigate the issue of whether the Septic Agreement remained in force, the Kisiels had decided to alter the design of their project and submit it to the Town zoning and planning authorities for review and approval. Such review has taken a long time. As of this date, no final decision has been rendered by the Town, but the Kisiels believe that such decision will be forthcoming by the end of the year.

14. On November 19, 2007, the Chair issued a Proposed Dismissal Order, setting a deadline of December 12, 2007 for any objections to the Proposed Order.

15. No objections to the Proposed Order were filed by December 12, 2007.

16. On December 10, 2007, the Kisiels, through their attorney, filed a letter with the Board's General Counsel, which reads, "This is the letter you've been waiting for. We are ready to have the appeal dismissed, finally. Thank you for your patience."

II. Decision

The District Commission issued a permit in this matter, but the validity of the permit, is in serious question as a result of the Kaminskis' decision to withdraw as co-applicants. As found by the Board's February 2005 Memorandum of Decision, the Kaminskis participation as co-applicants in the present Project is necessary; the Project cannot proceed without their consent.

This matter was continued to allow Kisiels to resolve in court the question of the Kisiels' and Kaminskis' property rights and obligations concerning the Kaminskis' land over which the Kisiels claim an easement for the septic system. There is no

indication that this matter has been presented to a court for its review. Rather, the Kisiels have determined to proceed with a revised project, one which, the Chair assumes, will not require the Kaminiskis' participation. This project, however, has been under review for an inordinate amount of time. As a result, the present matter has languished in the Environmental Board's Docket for several years. It is now the only matter on the Board's docket not to have been decided by the Board.

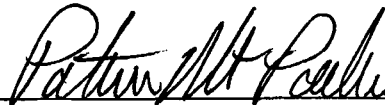
The time has come for this matter to be concluded, and the Kisiels are in agreement with this sentiment.

III. Order

This appeal is dismissed.

Dated at Montpelier, Vermont this 12 day of December, 2007.

ENVIRONMENTAL BOARD



Patricia Moulton Powden, Chair
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