

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

RE: Michael Jedware  
Land Use Permit #6F0194 and #6F0259

**CHAIR'S RULING ON PRELIMINARY STAY**

This matter comes before the Environmental Board on a Petition for Revocation which includes a request for immediate stay filed by the Abenaki Self-Help Association, Inc. ("ASHAI") relating to Land Use Permits #6F0194 and #6F0259. As discussed in detail below, Environmental Board Chair Marcy Harding ("Chair Harding") denies ASHAI's request for an immediate stay.

**I. PROCEDURAL SUMMARY**

On July 20, 1979, District 6 Environmental Commission ("Commission") issued Michael Jedware ("Permittee") Land Use Permit ("LUP") #6F0194. This permit allowed Permittee to conduct preliminary site work for the construction of dewatering or draining ditches on a 37+ acre parcel.

LUP #6F0194 was appealed to the Environmental Board ("Board") and on October 29, 1979, the Board affirmed the permit without amendment.

On April 21, 1983, the Commission issued Permittee LUP #6F0259. This permit authorizes the construction of a 20 lot subdivision for single family residences including on-site wastewater disposal, water supply, an underground drainage system and roadways all to be located on the northern side of Monument Road in the Town of Highgate, Vermont.

On October 9, 2000, ASHAI filed a Petition for Revocation pertaining to LUPs #6F0194 and #6F0259. Among the relief sought by ASHAI is an immediate stay.

**II. PRELIMINARY RULING**

Pursuant to Environmental Board Rule ("EBR") 42, the Chair may issue a preliminary stay which shall be effective for a period not to exceed 30 days. Any preliminary stay shall be reviewed by the board within that 30 day period. A party may file a motion to dissolve a preliminary stay within 10 days of issuance.

### III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases before administrative bodies. *Id.* § 810(1). Pursuant 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 *In re Handy*, 144 Vt. 610, 612 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

Pursuant to 3 V.S.A. § 810(4), the Chair Harding takes official notice of the following items:

1. The Commission's files relative to LUPs #6F0194 and #6F0259.

### IV. DISCUSSION

On October 9, 2000, ASHAI filed a Petition for Revocation pertaining to LUPs #6F0194 and #6F0259. Among the relief sought by ASHAI is "an immediate stay of the permit," presumably permit #6F0259. As of the issuance of this ruling, Permittee has not yet filed in response to ASHAI's Petition.

ASHAI requests "[t]hat the Board grant an immediate stay of the permit and enjoin, through judicial intervention if necessary, any construction, excavation, land-fill or other ground moving or breaking activities as well as any removal or disturbance of any tree, shrubbery or other vegetation on the properties described in the permit." Chair Harding interprets this as a request for the Chair to grant a preliminary stay of permit #6F0259 pursuant to EBR 42.

EBR 42 states the circumstances under which a stay of a commission decision may be requested:

No decision of the board or district commission is automatically stayed by the filing of an appeal. Any party aggrieved by a final order of the board or a district commission may request a stay by written motion filed with the board identifying the order or portion thereof for which a stay is sought and stating in detail the grounds for the request.

EBR 42 then states the factors which the Chair must weigh when determining whether to grant a stay. First, the Chair must consider the hardship to the parties. Second, the impact, if any, on the values sought to be protected by Act 250 must be evaluated. Third, the effect on the public health, safety or general welfare is considered. See, *Winhall/Stratton Fire District #1 and The Stratton Corporation, #2W0519-6A-EB*, Memorandum of Decision (July 28, 1999); *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB*, Memorandum of Decisions (Sep. 8, 1999 and Apr. 13 2000).

A threshold issue presented by the circumstances of ASHAI's request is whether or not ASHAI has standing to bring the Petition and request for stay. EBR 42 states that any aggrieved PARTY may request a stay. ASHAI was not a party before the Commission during the proceedings of LUP #6F0259. ASHAI alleges in their Petition and request for stay that they received no notice of the application for LUP #6F0259, and that consequently, ASHAI did not seek party status or otherwise participate in the permit proceedings. ASHAI alleges several reasons why they were entitled to notice.

Based on a review of the Commission files relating to LUP #6F0259, it appears that ASHAI did have notice of the application and the Commission's proceedings relating to the permit. Consequently, it appears likely that ASHAI may not have standing to bring the Petition for Revocation nor request a stay of the permit. ASHAI has merely alleged that they did not receive notice and they argue why they were entitled to notice. ASHAI has not produced any facts, by affidavit or otherwise, relating to this issue. While Chair Harding acknowledges ASHAI's interest in protecting burial grounds and artifacts, Chair Harding declines to issue a stay where ASHAI has not met its burden of demonstrating that ASHAI was a party to or otherwise has standing to request a stay of LUP #6F0259.

Even if ASHAI allegations are taken as true and it is assumed that ASHAI has standing to request a stay, ASHAI's Petition and request for stay fails to show

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that a stay is necessary. This is because ASHAI has the additional burden in this case to prove that a stay is necessary, *Re: Stokes Communication Corp., #3R0703-EB*, Supplemental Memorandum of Decision at 1 (Feb. 26, 1993); See also, *Winhall/Stratton Fire District #1 and The Stratton Corporation*, Supra and *Barre Granite Quarries, LLC and William and Margaref Dyott*, Supra. Consequently, ASHAI must prove that the above three factors weigh in favor of granting a stay.

Considering ASHAI's Petition as a whole, the hardship to ASHAI relates to ASHAI's failure to appear in the proceedings relating to Permit #6F0259 alleged to be a result of the alleged lack of notice of the permit application and proceedings. Again, Chair Harding is concerned about the reality of ASHAI's lack of notice.' Furthermore, as is true with issuing a stay of any permit, the delay to a permittee caused by a stay can itself be a hardship. In this case, development under the permit is limited by the seasons and any delay during the construction season can cause hardship to Permittee.

Based on these circumstances, Chair Harding concludes that balancing the hardships tips in favor of denying the request for stay, primarily due to the questionable standing of ASHAI.

ASHAI alleges impacts on the values sought to be protected by Act 250 including conformance and compliance with permit conditions. ASHAI cites to condition number 18 of LUP #6F0259 which states:

The Division of Historic Preservation shall be contacted if any pre-historic artifacts are discovered during construction and sufficient time shall be allowed to mitigate any potential adverse impact on historic sites within the project area.

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For the purpose of this substantive review of the merits of ASHAI's request for a stay, Chair Harding assumed that ASHAI did not receive notice. ASHAI's hardship relates directly to notice, however, and consequently, the question of whether or not ASHAI received notice can not be overlooked under this prong of the stay analysis.

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Dated at Montpelier, Vermont this 1 9<sup>th</sup> day of October 2000.

ENVIRONMENTAL BOARD

  
Marcy Harding, Chair

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