

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

Re: Brian Nichols d/b/a Speedwell, Inc.  
Land Use Permit Application #7C0568-2-EB

MEMORANDUM OF DECISION

For the reasons stated herein, the Cross Appellant's November 22, 1995 Motion to Stay the Permit is **denied**.

I. BACKGROUND

On November 22, 1995, Cross Appellant **Vince** Cartularo ("Cross Appellant") filed a Motion to Stay Land Use Permit #7C0568-2 ("Permit") in the above referenced case. The Permit authorizes the Permittee, Brian Nichols d/b/a Speedwell Inc. ("Permittee") to install a self-serve diesel pump on a six foot cement island ("Project") at his bulk plant location on 'Route 5 in Lyndonville ("Project Tract"). The pump will be operated on a card-lock system and have eleven hour accessibility for delivery trucks and commercial diesel accounts.

On November 28, 1995, John Ewing, the Chair ("Chair") of the Vermont Environmental Board ("Board") issued a Prehearing Conference Report and Order which stated, in part,

"On or before **Wednesday, December 6, 1995**, the parties shall submit any responses to the Cross Appellant's Motion for Stay filed on November 22, 1995. The full Board may consider the Motion during its deliberative session on **Wednesday, December 20, 1995**".

On December 5, 1995, the Permittee filed an Objection to the Motion to Stay the Permit.

On December 20, 1995, the Board deliberated on the Motion to Stay.

II. DISCUSSION

Environmental Board Rule (EBR) 42 states:

"No decision of the board or a 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.

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In deciding whether to grant or deny a stay, the board 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. The board may issue a stay containing such terms and conditions, including the filing of a bond or other security, as it deems just”.

Balancing the factors listed in EBR 42, the Board is not convinced that issuing a Stay of the Permit is justified.

1. Hardship on the Parties

The Cross Appellant claims that allowing the Permittee to operate under the Permit, pending this appeal, would create a hardship on the Cross Appellant’s adjacent motel (“**Motel**”), because large trucks will be using the Project disturbing Motel customers. The Cross Appellant further claims that the Permittee will not suffer hardship, because the Permittee’s customers could use the Permittee’s nearby facility to obtain comparable service. The Cross Appellant did not offer to post a bond to insure reimbursement of the Permittee’s lost revenues in the event that the Cross Appeal is unsuccessful.

The Permittee claims that he has already acted in reliance on the Permit and that shifting operations to its other facility would create traffic problems. The Permittee argues that operation of the Project would not create a hardship on the Cross Appellant, because, in sum, 1) only 20 - 25 trucks will use the Project daily during permitted hours, 2) the noise will not exceed that of surrounding commercial uses, and 3) the Motel’s closed windows in winter will prevent disturbance of its customers.

The Board is not convinced that Motel customers will be disturbed by the Project alone when the community contains other commercial activities. Even were a loss of customers reasonably anticipated, it is not evident that the loss would exceed the loss of revenue to the Permittee. Likewise, it is not apparent that any irreparable damage would be suffered by the Motel.

In addition, pending this appeal, the Permittee still must abide by the conditions of the Permit, which the District #7 Environmental Commission imposed, in part, to protect the interests of the community.

The Board concludes that it would be unjust to prevent the Permittee from benefitting from Permit related investments pending this appeal, without a more conclusive demonstration of hardship to the adverse party. However, as the Cross

Appeal in this case requests that the Permit be denied, the Permittee is cautioned that any investment in reliance on the Permit prior to the issuance of a final decision in this case is taken at a risk to that investment.

Therefore, in weighing the hardships, the Board, at this time, cannot conclude that the potential hardship to the Motel under the Permit is greater than the actual hardship that will be suffered by the Permittee through a stay.

### 2. Values of Act 250

The Cross Appellant claims that the Permittee does not respect the integrity of the Act 250 process and has violated the conditions of the Permit. However, as the alleged violations of the Permit have not been adjudicated by the Board or a Court, the Board concludes that these allegations are too speculative a basis for a Permit stay. More importantly, the Cross Appellant does not address any adverse environmental impacts under the Act 250 criteria (10 V.S.A. § 6086(a)) caused by the Permittee's actions.

Therefore, the Board cannot conclude that the values of Act 250 would be protected by granting a stay of the Permit.

### 3. Public Health, Safety and Welfare

The Cross Appellant claims that the noise generated by the Project will have a significant detrimental impact on the Motel's customers. However, the Cross Appellant does not specifically state how the noise would effect customers' health or safety or welfare or what detrimental health or safety or welfare impact is anticipated. Therefore, the Board cannot base a stay of the Permit on a general allegation of detrimental impact to the public health, safety and welfare.

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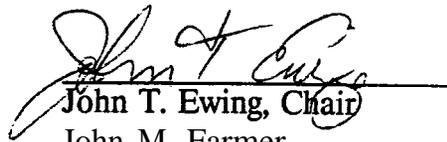
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**III. ORDER**

The Cross Appellant's Motion for a Stay of the Permit is denied.

Dated at Montpelier, Vermont this 22nd day of December, 1995.

VERMONT ENVIRONMENTAL BOARD



John T. Ewing, Chair

John M. Farmer  
Arthur Gibb  
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