

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

RE: Equinox Resort Associates, L.P.
Land Use Permit Amendment #8B0209-5-EB
(Revocation Petition)

CHAIRS RULING ON PRELIMINARY ISSUES

I. BACKGROUND

On February 19, 1997, Amy and Scott Swinarton ("Petitioners") filed a Motion with the Environmental Board ("Board") seeking revocation of Land Use Permit #8B0209-5 (Amended) ("Dash 5 Permit Amendment"). The Petitioners allege that shortly after the Dash 5 Permit Amendment was issued, the Permittees, Equinox Resort Associates ("ERA") dug up the Petitioners' water line and installed a meter on the line. Petitioners have alleged, in a proceeding now pending before the Bennington Superior Court, that ERA's action constituted a violation of their property rights. The Petitioners maintain that revocation of the Dash 5 Permit is appropriate because ERA's disturbance of the water line also constitutes direct interference with Petitioners' rights, in violation of condition 4 of the Dash 5 Permit Amendment.

On February 24, 1997, ERA filed a Motion to Dismiss the revocation action requested by Petitioners. On March 7, 1997, the Petitioners responded to ERA's Motion. The motions make competing claims regarding the propriety of going forward with a revocation proceeding. These issues were scheduled to be discussed in the context of a prehearing conference on April 7, 1997. At the request of the Petitioners, the prehearing conference was postponed.

On May 12, 1997, Board Chair John T. Ewing convened a prehearing conference in the above-referenced matter in Montpelier, Vermont. At the close of the conference, ERA and the Petitioners were directed to supplement their filings regarding dismissal. Chair Ewing instructed the parties to focus their memoranda upon the legal question of whether the Board has jurisdiction over this matter and to explore further whether, as a matter of law, a ruling of the Superior Court in the ongoing civil action would have any preclusive effect upon the Board's disposition of the preliminary issues. On June 10, 1997, Chair Ewing issued a prehearing conference report and order ("Prehearing Order") that memorialized the events of the prehearing, set forth filing deadlines for the briefs on preliminary issues, and provided the parties with a detailed summary of the background to this proceeding.¹

¹There was no objection to the Prehearing Order and it therefore became a final order of the Board relative to this proceeding. There is one correction to the Prehearing Order that was brought to the attention of Board staff by Lee A. Krohn who represents the Town of Manchester (a statutory party), to wit: the date

On June 10, 1997, both ERA and the Petitioners filed memoranda relative to the issues under consideration. Petitioners supplemented their filing on June 24, 1997 in a filing entitled a "Response to Memorandum on Jurisdiction." These filings have been considered along with the lengthy history of ERA's proposed bottling facility and this matter is now ready for a decision.

II. DISCUSSION

The Board may revoke a permit in the event of violation of any conditions attached to any permit or the terms of any application, or violation of any rules of the Board. 10 V.S.A. §6090(c). This statutory language is essentially repeated in Environmental Board Rule ("EBR") 38 (A)(2) which authorizes, but does not compel the Board to revoke a permit if the applicant or successor in interest has violated the terms of the permit or any permit condition. In most instances, the Board must give the permit holder an opportunity to cure a violation prior to any revocation order becoming final. EBR 38(A)(3). In the present case, however, the activity resulting in the alleged violation has already occurred - leaving little or no opportunity to undo the harm allegedly caused thereby. Rather, the Petitioners seek revocation on the basis that the terms of the permit that govern ERA's activities with respect to the water line do not allow ERA as Permittees to "use the spring and the Swinarton line as if it were its own." In a revocation proceeding, the burden of proof is on the party petitioning the Board for revocation. See Putney Paper Co., Inc., #2W0435-6-EB, Findings of Fact, Conclusions of Law, and Order at 11 (February 2, 1995).

Petitioners rely specifically on condition 4 of the Dash 5 Permit Amendment which they believed clarified their private water right status. Condition 4 provides:

No condition of this permit shall authorize any interference with or abridgement of any private, non-commercial right to draw water **from** the spring or any right of access to the spring, including but not limited to those rights provided by deed to property of Amy and Scott Swim-ton, their heirs, successors and assigns.

ERA contends that, notwithstanding condition 4, the issue in dispute is an adjudication of competing property rights. ERA correctly points out in its Memorandum in Response to Pre-Hearing Conference that such an adjudication is an issue that calls for equitable relief and which is properly before the Bennington Superior Court. However, mindful of the

referenced on Page 2, pgph. 2, line 13 should read May 9, 1986 rather than 1996. The Board has taken official notice of the substantial record in this case.

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Court's admonition in Trybulski v. B.F. Hydro-Electric Corp., 112 Vt. 1 (1941) defining the scope of an administrative agency's review, the condition under consideration was made a part of the Dash 5 Permit Amendment specifically to allow issuance of the permit. Stated another way, were condition 4 not made a part of the Dash 5 Permit Amendment, the Dash 5 Permit Amendment would not have issued. See Re: Charles and Barbara Bickford, #5 W 1186-EB, Findings of Fact, Conclusions of Law, and Order (May 22, 1995) (Permit conditions alleviate adverse effects that would otherwise be caused by a project, and those adverse effects would require a conclusion that a project does not comply with the criterion at issue unless the conditions are followed).

In this case, not only was condition 4 not appealed, but the condition was arrived at through a stipulation between Petitioners and ERA. Thus, the Board concludes that there is an Act 250 component to this dispute that will not be adequately addressed by the pending action in Bennington Superior Court. Although condition 4 does not proscribe specific conduct with respect to the Swinarton's water line, it does impose restrictions upon ERA's actions in order to temper the authority granted ERA to complete its project. The Board's analysis to ascertain compliance with this condition may closely track that which will be undertaken by the Superior Court. However, that does not mean that the Board is adjudicating competing private property rights, nor does the Board's determination to conduct this analysis require the Board to provide general equitable relief - a remedy beyond its jurisdiction. In re Buttolnh. 147 Vt. 641,643 (1987). Instead, the Board is concerned only with determining whether ERA has complied with the condition that it had agreed to in order to secure a permit.

The Superior Court has ruled that the question concerning the propriety of ERA's actions vis-a-vis the Swinarton's line, is one that is not ripe for summary judgment because there are material facts in dispute. Likewise, it would be premature to grant ERA's Motion to Dismiss in this instance where the Board has jurisdiction to consider compliance with condition 4 of the Dash 5 Permit Amendment and where it has not had an opportunity to fully consider all of the relevant facts. As stated by the parties at the prehearing, this is *primarily* a legal issue. It is not entirely a legal issue. The Board is reluctant to revoke a permit when it is doubtful or uncertain about the grounds for revocation. Stokes Communication Corp., #3R0703-EB (Amendment Application Revocation) Memorandum of Decision at 9 (March 20, 1996). Accordingly, the Board must carefully consider the facts attendant to the alleged violation and make findings as to their relevance to this proceeding. Revocation of a permit is strong medicine; however, dismissal of the revocation request based on the limited information before the Chairman would be a result equally potent to the Petitioners.

III. WITNESSES AND EXHIBITS

The parties have made no tentative identification of witnesses nor have the parties suggested the introduction of exhibits. Insofar as this is a revocation proceeding, I have presupposed the existence of a valid permit. Accordingly, parties were apprised in the Prehearing Order that the Board would officially notice all applicable permits, their findings of fact, and the approved plans and exhibits as relevant evidence. The Board must now consider this evidence in relation to the actions that Petitioners have alleged with respect to their water line. In order to do so, the Board will convene a public hearing and hear live testimony as to the actions that led up to the Petitioners' revocation request.

IV. SCHEDULING

Chair Ewing will conduct a teleconference with the parties to determine whether a site visit would be appropriate in this proceeding. The date and time of such teleconference will be arranged by the Board's staff with consideration of the parties' late-summer schedules. Notice of that teleconference will be issued independently. The teleconference will also address the issues of whether any party objects to proceeding with a hearing officer as opposed to a full Board hearing, and whether the submission of **prefiled** testimony would be preferable to presentation of live testimony. A hearing date will also be determined.

This is a Preliminary Ruling made pursuant to EBR 16(B). Any interested party may file an objection to this ruling not later than **Thursday, August 21, 1997. Should any party file a timely objection, the full Board shall review this ruling at its next regularly scheduled Board hearing which will be held on Wednesday, August 27, 1997.** Any party who objects to this Ruling, and who wishes to present oral argument may petition the Board for the opportunity to do so. Such petition shall accompany the objection.

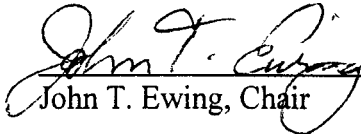
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V. ORDER

- (1) The Board has jurisdiction to hear Petitioners' revocation request;
- (2) ERA's Motion to Dismiss is hereby denied.

Dated at Waterbury, Vermont this 13th day of August, 1997.

ENVIRONMENTAL BOARD



John T. Ewing, Chair