

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)

DISMISSAL ORDER

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). As discussed in detail in the Board's June 10, 1997 Prehearing Conference Report and Order, the Amended Permit authorized Equinox Resort Associates, L.P. ("ERA") to construct a pipeline and bottling facility which was designed to draw water from a spring known as the Bower, or Blower Spring. The Petitioners sought revocation of the Amended Permit on the basis that although the terms set forth therein authorized use of a water line connected to the Bower Spring, the Amended Permit did not allow ERA as Permittees to interfere with the Swinarton's deeded rights to the spring. In a separate proceeding filed in the Bennington Superior Court (Docket No. SO3 1 O-95 BcC), Petitioners claimed that ERA's action constituted a violation of Petitioners' property rights.

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 made competing claims regarding the propriety of going forward with a revocation proceeding. The Board's former Chair, John T. Ewing, convened a May 12, 1997 prehearing conference at which these issues were discussed in detail. 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, 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." On August 18, 1997, then Chair Ewing issued a Ruling on Preliminary Matters ("Chair's Ruling"). In summary, the Chair's Ruling ordered that the Petitioner's Revocation Petition be allowed to go forward. On August 20, 1997, ERA filed an objection to the Chair's Ruling and requested oral argument. On September 3, 1997, the Board convened oral argument in Middlebury. On September 24, 1997, the Board issued its Memorandum of Decision and Continuance

Order concluding that inextricably linked to the Board's determination of whether a condition of the Amended Permit had been violated, and whether the permit should be revoked, was a legal issue beyond the ambit of the Board's authority, namely, an adjudication of which rights have been granted to the respective parties, and whether those rights have been violated. Recognizing that the adjudication of competing property rights is a matter beyond the Board's jurisdiction, the Board deferred to the Bennington Superior Court to make those determinations. Accordingly, and to promote administrative efficiency, the Board refrained from add-essing the revocation petition until after the Superior Court issued its decision.

II. DISCUSSION

The Board's Order granting a continuance in this matter set forth instructions through which parties were directed to apprise the Board of the progress of the Superior Court action, The Order stated as follows:

The matter is continued pending a determination by the Bennington Superior Court in Docket Number SO3 1 O-95 BcC as to the parties respective property rights to the Bower Spring. The parties shall inform the Board on an ongoing basis of any court action relative to this case or any informal resolution among the parties concerning the issues in dispute. In any event, the parties shall file a status report with the Board during the first week of February, 1998 indicating the status of the superior court action.

Re: Equinox Resort Associates, L.P., #8B0209-5-EB (Amended) (Revocation Petition), Memorandum of Decision and Continuance Order, (September 24, 1997) at p.4. No status report or other update as to any informal resolution was provided.

During early February, 1998, Board staff contacted counsel for the parties seeking an update as to the status of the superior court action. Counsel for each of the parties confirmed that during the pendency of the Superior Court action, the parties in the above-referenced matter reached a settlement agreement to resolve the issues before the Bennington Superior Court. A component of that settlement agreement, as described by the parties' attorneys to Board staff, included Appellants' commitment to withdraw their pending request before this Board to revoke the Amended Permit. Board staff subsequently contacted counsel for the parties to request that a voluntary withdrawal of the revocation request, or alternatively, a stipulated dismissal request be filed so that this matter could be cleared from the Board's docket. No such request or stipulation has been filed.

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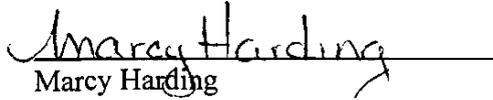
Notwithstanding, the Board, concludes that dismissal of this action would not be contrary to the values sought to be protected by 10 V.S.A. §6001-6092. Accordingly, dismissal of the matter is warranted.

III. ORDER

Unless any party raises an objection to this Order on or before June 16, 1998, this matter shall be dismissed with prejudice.

Dated at Montpelier, Vermont this 1st day of June, 1998

ENVIRONMENTAL BOARD
by its Chair


Marcy Harding

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