

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

RE: Kapitan Gravel Pit  
West Street  
Proctor, Vermont

**Declaratory Ruling Petition #388**

**DISMISSAL ORDER**

This matter concerns a Petition for a Declaratory Ruling by Diana Kapitan ("Petitioner") from a Jurisdictional Opinion which holds that the Kapitan Gravel Pit is statutorily exempt from Act 250 (10 V.S.A. Ch. 151) jurisdiction as a "pre-existing development." Environmental Board Rule ("EBR") 2(O).

**I. PROCEDURAL SUMMARY**

On May 19, **2000**, District 1 Environmental Commission Assistant Coordinator Carmelita Brown, in response to a May 2, 2000 letter from Len Knappmiller, issued Jurisdictional Opinion #1-322 ("JO"), finding no jurisdiction over the Kapitan Gravel Pit.

On June 14, 2000, the Petitioner filed a letter (the "Petition"), with the Environmental Board ("Board") appealing the JO.

**II. FINDINGS OF FACT**

Based on a review of the Record in this case, the Board finds the following facts:

1. The Petition included the filing fee but did not include copies of the JO; nor did the Petitioner file a Certificate of Service indicating that persons who had been sent the JO by the Assistant Coordinator had received copies of the Petition.

2. On June 16, 2000, the Board's General Counsel sent to Petitioner a notice acknowledging Petition but noting that it was incomplete, as it lacked ten copies of the JO and the said Certificate of Service. The letter noted that the Petitioner's failure to complete her filing by June 27, 2000 might result in the Petition being referred to the Board for dismissal.

3. The Petitioner did not respond to the June 16 letter.

4. On June 28, 2000, the Board's General Counsel sent a second letter to Petitioner, by Certified Mail, noting the provisions of and deadline in his June 16 letter. The June 28 letter noted that the Petition was still incomplete with respect to the filing of certain documents. It concluded, in pertinent part:

*Kapitan Gravel Pit.*  
Declaratory Ruling Petition #388  
Dismissal Order  
Page 2

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Please give this your preferred attention and supplement your filing with the required items on or before **4:30 p.m., on Friday, July 7, 2000**. Please note that if you do not complete your filing by this deadline, this case cannot proceed and, further, the Board may decide that your Petition be dismissed. See EBR 3(D).

(Emphasis in original)

5. The Return Receipt from the US Postal Service indicates that the Petitioner received the June 28 letter on July 5.

6. On July 14, 2000, Board Chair Marcy Harding issued a Chair's Preliminary Ruling ("**CPR**") which noted the Board's earlier attempts to obtain the Petitioner's compliance with EBR 3(D). The CPR ordered:

1. On or before **Thursday, July 27, 2000**, Petitioner shall comply with the requirements of Environmental Board Rule 3(D).

2. Should the Petitioner fail to comply with the requirements of Environmental Board Rule 3(D) by July 27, 2000 this matter shall be referred to the board for dismissal.

(Emphasis in original)

7. The Return Receipt from the US Postal Service for the July 14 CPR was signed by Ross Campbell, as Petitioner's agent, on July 15.

8. As of this date, Petitioner has not complied with the CPR or EBR 3(D).

### **III. DISCUSSION**

EBR 3(D) requires, in pertinent part:

(D) Declaratory rulings. Petitions for declaratory rulings as to the applicability of Act 250, these rules, or an order of the board shall be filed with the board and shall be accompanied by a \$100.00 filing fee, an original and ten copies of the petition and the jurisdictional opinion appealed from, and a certificate showing that the following persons have been served: all parties under Rule 14(A) and any other persons on whom the district coordinator served the opinion.

Although she has been advised of the provisions of Rule 3(D) on three different occasions, Petitioner has failed to comply with its requirements.

EBR 18(D) states:

- The Board may, on its own motion or at the request of a party, consider the dismissal, in whole or in part, of any matter before the board for reasons provided by these rules, by statute, or by law.

The Board therefore has the general authority to dismiss this Petition.

The Board is, and rightly so, hesitant to dismiss an appeal or a petition for a Declaratory Ruling because of a failure by the appellant or a petitioner to comply with the Board's procedural requirements. See *Constantino Antique Business*, Declaratory Ruling 262, Memorandum of Decision at 2-3 (May 12, 1992) (Board has declined to dismiss because of party's failure to timely file petition [I] or copies of decisions rendered below). Dismissal is a severe measure which should only be imposed in circumstances where it is absolutely warranted. As the Vermont Supreme Court wrote in *John v. Medical Center Hospital of Vermont, Inc.*, 136 Vt. 517, 519 (1978):

We hold that where the ultimate sanction of dismissal is invoked it is necessary that the trial court indicate by findings of fact that there has been bad faith or deliberate and willful disregard for the court's orders, and further, that the party seeking the sanction has been prejudiced thereby.

*Accord, C.C. Miller Corp. v. AG Asset, Inc.*, 151 Vt. 604, 606-07 (1989); *Goshy v. Morey*, 149 Vt. 93, 97 (1987).

The *John* case, therefore, establishes two prerequisites for dismissal of an action: (1) "bad faith or deliberate and willful disregard for the [tribunal's] orders;" and (2) prejudice to the party seeking the dismissal.

As to the first prerequisite, the Petitioner's failure to comply with the Chair's Preliminary Order and two requests from the Board's General Counsel, while perhaps not bad faith, is considered to be deliberate and willful.

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Under prior Board precedent the term “willfully” has been defined as “done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done.” *Re: H.A. Manosh, #5L1290-EB* (Revocation), Findings of Fact, Conclusions of Law, and Order (Feb. 3, 1999); *Re: Vermont RSA Limited Partnership d/b/a Bell At/antic Mobile, #3W0738-4-EB* (Revocation), Findings of Fact, Conclusions of Law, & Order (Aug. 21, 1998); *Re: Lawrence White, #1 R0391 -EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1 R0391 -5A-EB, #1R0391-6-EB* (Revocation), Findings of Fact, Conclusions of Law, and Order at 14 and case cited therein (Sept. 17, 1996), appeal docketed, No. 98-391 (Vt. Sup. Ct).

The above cases all addressed the term “willful” within the context of revocation actions, where the continued viability of a permit was at stake; it is not surprising, therefore, that the Board would have applied a heightened level of scrutiny to such proceedings. By contrast, within the present context, such a definition would appear to be too restrictive.

The circumstances of this case lead to the conclusion that the Petitioner’s failure to comply with Rule 3(D) is willful and deliberate. While the letters from the General Counsel could not be considered to be “orders,, issued by the Board, the Chair did issue an order to the Petitioner requiring compliance with EBR 3(D) by a date certain. The Board concludes that the Petitioner’s failure to comply with such order establishes the “order,, element of the first prerequisite of the *John* decision.

As to the second prerequisite of the *John* decision, here, there is no party who seeks dismissal and, therefore, there is no party to be prejudiced. There are reasons, however, as to why this requirement may not be wholly applicable to the instant matter.

This element is born from litigation in the courts where there is a plaintiff and a defendant, and the litigation cannot proceed without service of the complaint on the defendant. See *Vermont Rules of Civil Procedure 3* (action is commenced by service or by filing of complaint with court, but service must be completed within 60 days of filing or action may be dismissed). Thus, in civil litigation, service is required, and a party exists who may thereafter seek dismissal on whatever grounds the law allows. Here, no “party” exists who seeks dismissal who could be prejudiced by the Petitioner’s failure to comply with EBR 3(D) because *the Petitioner has not informed any other party that she has filed her Petition*. The matter of prejudice, therefore, has less to do with the lack *of prejudice* than with the fact that there is no party who is presently *aware* that he could be prejudiced. Thus, to allow the Petitioner to escape dismissal on the ground that no party has asserted prejudice --

where Petitioner is the very cause of the reason that there is not such party -- would stand logic on it head.

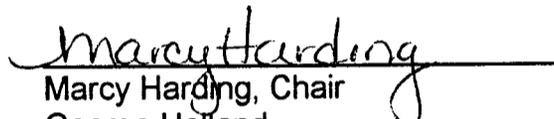
Certainly, were the Board to proceed with this Declaratory Ruling without requiring the Petitioner to inform other parties that it has been filed, such other parties could well be harmed, even early on in the process. There is thus a sound **basis** for the notice requirement in EBR 3(D). In this case, prejudice, arising from the lack of notice, is inherent in such lack of notice; it can be assumed from the very failure of the Petitioner to comply with the notice requirements of the Rule.

IV. ORDER

1. Declaratory Ruling Petition #388 is dismissed.
2. Jurisdictional Opinion #1-322 is a final decision.

Dated at Montpelier, Vermont, this 8th day of September 2000.

ENVIRONMENTAL BOARD

  
Marcy Harding, Chair  
George Holland  
W. William Martinez  
Rebecca M. Nawrath  
Alice Olenick  
Gregory Rainville  
Donald Sargent

ENDNOTE

**1** While in the past the Board may have had some discretion to accept untimely filed Declaratory Ruling petitions, the 30 day time limit to appeal Jurisdictional Opinions imposed by the legislature in 10 V.S.A. §6007(c) in 1991 removes this discretion. *Constantino* itself notes (at p. 3) that the amendments to §6007(c) may mean that the Board's prior, lenient approach to filing deadlines is therefore no longer good law.

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