

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

Re: Hale Mountain Fish and Game Club, Inc. Declaratory Ruling #435

MEMORANDUM OF DECISION ON PENDING MOTIONS

This Declaratory Ruling proceeding concerning the Hale Mountain Fish and Game Club in Shaftsbury, Vermont (Project) is before the Environmental Board again on remand from the Vermont Supreme Court. This decision addresses the motions that have been filed since the appeal was remanded.

I. Procedural Summary

A status conference was convened in this matter on November 6, 2007, by Environmental Board (Board) Chair Patricia Moulton Powden. Hale Mountain Fish and Game Club, Inc. (Petitioner) was represented by James P.W. Goss, Esq. Adjoining landowners Owen and Kathy Beauchesne were represented by Paul Gillies, Esq. Adjoining landowner Ann Dailey participated on behalf of herself and adjoining landowners Lorraine and Richard Mattison. The Mattisons were not available to participate.

On November 9, 2007, the Chair issued a Scheduling Order setting filing deadlines for various motions. The Board deliberated on the motions on January 10, 2008 and February 21, 2008.

II. Motions

A. Petitioner's Response to Scheduling Order

Petitioner objects to the Scheduling Order to the extent that it states that the Parties agreed on the issues requiring supplemental findings and that supplemental findings are required on wetlands and streams. It is clear from Petitioner's objection that there is not agreement. The scope of remand is addressed below, in response to Petitioner's Preliminary Motions. Petitioner is correct that, under the Vermont Supreme Court's decision, supplemental findings are not required on wetlands and streams. *In re Hale Mountain Fish & Game Club, Inc.*, 2007 VT 102 ¶11 (mem.). Accordingly, Petitioner's objections are granted.

B. Owen and Kathy Beauchesnes' Motion to Recuse

Neighbors Owen and Kathy Beauchesne move that Board members George Holland and Chris Roy recuse themselves from this matter. These Board members have recused themselves from considering these motions, but for the reasons discussed below have not recused themselves from the merits of this remand. Thus, the Board also considers this motion as a motion to disqualify.

1. Board Member George Holland

As the Chair informed the parties at the status conference, Board member George Holland joined two organizations after retiring from the Land Use Panel of the Natural Resources Board in 2007: the National Rifle Association (NRA) and Hunters, Anglers and Trappers of Vermont (HAT-VT). He is not involved in management, policymaking or advocacy activities at either organization. The Beauchesnes argue that Mr. Holland should recuse himself because both organizations are "pro gun," and because the NRA website contained comments on this appeal characterizing the Board's original decision as "favorable." The Beauchesnes also allege, "upon information and belief," that the NRA has "provided funds to [Petitioner] to support its 'defense' of the continued and unregulated operation of the new ranges at the site." (Motion to Recuse at 4.)

Impartiality of administrative decisionmakers is a constitutionally protected interest. *Secy, Agency of Nat'l Resources v. Upper Valley Reg'l Landfill Corp.*, 167 Vt. 228, 234-235 (1997) (citing *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). "There is a presumption of honesty and integrity in those serving as administrative adjudicators." *Secy, Agency of Nat'l Resources v. Upper Valley Reg'l Landfill Corp.*, 167 Vt. at 235 (citing *Withrow*, 421 U.S. at 47; *In re Crushed Rock, Inc.*, 150 Vt. 613, 623 (1988)); see also, *In re Odessa Corp.*, 2006 VT 35 ¶ 9 (mem.)(citation omitted). The burden of overcoming this presumption rests on the party asserting grounds for disqualification. *Mclsaac v. State*, 2004 VT 50 ¶ 22 (citing *State v. Putnam*, 164 Vt. 558, 563, (1996)).

A Board member "shall not act in a judicial capacity in . . . a cause or matter in which he . . . is interested in the event of such cause or matter." 12 V.S.A. § 61. An interest does not have to be financial to be disqualifying. See, *In re State Aid Highway, No. 1, Peru*, 133 Vt. 4, 9-10 (1974). In *State Aid Highway Peru*, the Vermont Supreme Court applied 12 V.S.A. § 61 to disqualify an Environmental Board member who also served on the board of an environmental group from presiding over an appeal in which that group was a party. *State Aid Highway Peru*, 133 Vt. at 9-10.

Here, Mr. Holland is a member of two organizations that appear to have expressed support for guns, and one of these organizations, the NRA, has also expressed support for the Board's original decision in this appeal and may have provided some funding to Petitioner for the proceeding. However, there is no indication that Mr. Holland is a member of either group's board or otherwise involved in either group's management, policymaking or advocacy activities. Moreover, neither the NRA nor HAT-VT is a party in this appeal. The *State Aid Highway Peru* case is readily distinguished on these bases.

Moreover, the Board decided the jurisdictional issues in this appeal well before Mr. Holland joined either group, and the appeal has been remanded only for supplemental findings. The material submitted by the Beauchesnes taken from these groups' websites does not indicate that either group has taken a position on the supplemental findings required by the Court. There is no reason to believe that Mr. Holland's judgment in this remanded matter might be significantly influenced by his membership in the NRA or HAT-VT. Mr. Holland's membership in these two organizations is insufficient to constitute a disqualifying interest or even an appearance of a conflict of interest.

2. Board Member Christopher Roy.

Board member Christopher Roy is a practicing attorney who has taught continuing legal education (CLE) courses on environmental law. The Beauchesnes move that Mr. Roy should recuse himself because he made statements about this appeal at a CLE course covering recent environmental cases in Vermont. The Beauchesnes' motion alleges only that Mr. Roy provided insight "into the reasoning of the board and his particular view of the case, compromising his continuing ability to see the facts of this case in an impartial manner." (Motion to Recuse at 5.) As discussed below, this allegation does not require Mr. Roy's disqualification.

Vermont's Code of Judicial Conduct prohibits judges from making public comment on a pending case "that might reasonably be expected to affect its outcome or impair its fairness." Canon 3(B)(9). The Code of Judicial Conduct does not apply to Board members. *Mclsaac*, 2004 VT 50 ¶ 20 (citing *Crushed Rock, Inc.*, 150 Vt. at 623). But even if it did, nothing in the Beauchesnes' motion demonstrates that Mr. Roy's comments made while teaching CLE courses could affect the outcome or impact the fairness of this remand for supplemental findings. There is no allegation here that Mr. Roy's comments favored a particular party or outcome if the Board should need to issue supplemental findings, or that he had prejudged any particular issue beyond the Board's original decision. The cases cited by the Beauchesnes do not support disqualification in this case. Those decisions involve judges not administrative decisionmakers. More to the point, the judges' statements – even in cases where disqualification was not found – were far more specific and indicative of the judge's personal opinion on matters yet to be decided than the comments generally alleged by the Beauchesnes. See, *Boston's Children First v. City of Boston*, 239 F.3d 59 (1st Cir. 2001), amended on denial of reh'g, 244 F.3d 164, 2001 WL 274467 (1st Cir. 2001) (disqualifying a judge under 28 U.S.C. § 455(a) for comments made to a reporter about a pending case); *In re Barry*, 292 U.S. App. D.C. 39, 946 F.2d 913 (1991) (holding that disqualification under 28 U.S.C. § 455(a) was not warranted by judge's assertion, made after sentencing former mayor of Washington, D.C., that he had never seen a stronger government case, that some jurors had their own agendas and would not convict under any circumstances, and

that some jurors were determined to acquit regardless of the facts); *Papa v. New Haven Federation of Teachers*, 444 A.2d 196 (Conn. 1982)(disqualification not warranted by judge's criticism of illegal teachers strikes and of those strikers as 'supposedly educated individuals' who act 'without intelligence,' but disqualification required where this judge made extensive findings without hearing to deny motion seeking his recusal for other comments).

Neither the bare allegation of unspecified comments on this appeal, nor the case law cited by the Beauchesnes, supports disqualification here.

C. Petitioner's Preliminary Motions

1. Motion to Issue Supplemental Findings Without Further Hearing or Argument

Petitioner requests that the Board complete its work on remand without reopening the record. There had been discussion at the status conference about whether it would be appropriate to reopen this appeal, but as Petitioner noted in its responsive brief, no party filed a motion to reopen or reargue. The Board heard extensive evidence on the relevant questions before issuing the Board Decision. Accordingly, there is no need to hear further evidence or argument.

2. Motion to Empanel Original Board Members

Petitioner argues that the remand must be to "the same panel" that decided the original appeal. (Preliminary Motions, at 6.) As set forth herein, Board members Christopher Roy and George Holland are not recused or disqualified from participating in the issuance of supplemental findings. This part of Petitioner's motion, therefore, is granted.

However, not all of the original nine members are able to participate. Former Board member A. Gregory Rainville has become a trial judge since leaving the Board and is not available to participate. See, Canon 4 of the Vermont Code of Judicial Conduct and Vermont Judicial Ethics Committee Opinion #2727-12 (Nov. 30, 2004) (stating that a judge may only participate in extra-judicial government commission if it deals with "issues of fact or policy directly related to the improvement of the law, the legal system or the administration of justice.") With regard to former Board member A. Gregory Rainville, Petitioner's motion must be denied. The Board recognizes the value of a fully constituted Board. Because Judge Rainville is unavailable, it is appropriate to add an alternate member, John Merrill, to participate on this remanded appeal.

3. Motion to Limit Scope of Supplemental Findings to Issues of Intensity of Noise and Use

Petitioner argues that the Board should limit the scope of supplemental findings to those “necessary to support the Board’s conclusion that no intensification of noise and use over pre-1970 levels has resulted from the discreet cognizable physical changes found by the Board.” (Preliminary Motions at 1.) Specifically, Petitioner claims that the Court limited the Board’s duties on remand to issuance of supplemental findings on intensity of use and noise, and to ensuring that proposed findings were considered and ruled upon. (*Id.* at 16.)

Petitioner is correct that the Court’s decision requires supplemental findings on noise and intensity of use. *Hale Mountain*, 2007 VT 102 ¶¶ 8 – 10. However, the Court also indicates that the Board failed to make findings on other issues, including the impact of improvements on streams and wetlands, and notes that the Board must rule on proposed findings on such issues, particularly when the parties have provided extensive evidence and argument on those issues. *Id.* ¶11. This we read to authorize findings on other issues where appropriate.

Accordingly, the Board declines to grant Petitioner’s preliminary motion to limit the supplemental findings to issues of intensity of use and noise at the Project.

D. Other Motions

1. Owen and Kathy Beauchesnes’ Motion to Alter Service List.

The Beauchesnes noted an error in the Board’s service list, which has since been corrected, and filed a motion to correct this error. The service list has been altered to reflect the fact that Attorney Paul Gillies does not represent Kenneth and Mary Kennedy. Because the error was previously corrected, this motion is dismissed as moot. The relief sought has already been granted to the Beauchesnes.

2. Petition for Party Status by Richard and Lorraine Mattison.

Richard and Lorraine Mattison filed a petition for party status. There is no dispute that the Mattisons retain their party status from the original appeal. Therefore, this motion is dismissed as moot because Richard and Lorraine Mattison remain parties in this appeal.

III. Order

A. Petitioner’s Objections to the Scheduling Order are GRANTED.

B. Owen and Kathy Beauchesnes’ Motion to Recuse is DENIED.

- C. Petitioner's Motion to Issue Supplemental Findings without Hearing further Evidence or Argument is GRANTED.
- D. Petitioner's Motion to Empanel Original Board Members is GRANTED in part and DENIED in part.
- E. Petitioner's Motion to Limit Scope of Supplemental Findings to Issues of Intensity of Noise and Use is DENIED.
- F. Owen and Kathy Beauchesnes' Motion to Alter Service List is DISMISSED as moot.
- G. Richard and Lorraine Mattison's Petition for Party Status is DISMISSED as moot.

DATED at Montpelier, Vermont this 26th day of February, 2008.

ENVIRONMENTAL BOARD



Patricia Moulton Powden, Chair
George Holland*
W. William Martinez
John Merrill
Patricia Nowak
Alice Olenick
Karen Paul ‡
Richard C. Pembroke, Sr.
Christopher D. Roy*

* Members Holland and Roy recused themselves from deciding the Beauchesnes' motion to recuse, but join in the rest of this decision.

‡ Board member Karen Paul was unable to attend the February 21, 2008 deliberations, but has reviewed and joins in decision as stated herein.