

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

Re: Norman P. Kelley

Land Use Permit Amendment
#5W0961-3-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This proceeding concerns lot 4 of a ten acre residential development located off Upper Terrace Street in Montpelier, Vermont (Project).

I. PROCEDURAL SUMMARY

On September 2, 1998, Norman Kelley (Applicant) filed Land Use Permit Amendment Application # 5W0961-3 (Application) with the District #5 Environmental Commission (Commission) pursuant to 10 V.S.A. §§ 6001-6092 (Act 250). The Application requested that condition 13 in Land Use Permit #5W0961-1 be lifted and that lot 4 be authorized for residential development.

On August 31, 2001, the Commission issued Land Use Permit Amendment #5W0961-3 (Permit) and a Memorandum of Decision (Decision).

On September 28, 2001, David Borgendale, Yvonne Byrd, James Giffin and Robin Morgan (Appellants) filed an appeal with the Environmental Board (Board) from the Permit and Decision alleging that the Commission erred in lifting the restrictions imposed by Conditions 11, 12 and 13 of the Land Use Permit Amendment #5W0961-1. The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules (EBR) 6 and 40.

On November 6, 2001, Board Chair Marcy Harding convened a prehearing conference with the following participants:

Applicant by Glenn Howland, Esq. and Norman Kelley
Appellants by David Borgendale, Yvonne Byrd, and James Giffin
City of Montpelier (City) by Tom McArdle and Beverlee Pembroke Hill
Phil Keller
Jeffrey Francis

On December 6, 2001, the Applicant filed a motion to dismiss.

On February 20, 2002, the Board held oral arguments on the Applicant's motion to dismiss. After the oral argument the Board deliberated.

II. PRELIMINARY ISSUE

The Applicant's motion to dismiss argues that the Commission did not abuse its discretion in issuing a decision pursuant to EBR 51(D) without first holding an evidentiary hearing. During oral argument on the motion to dismiss, the Applicant acknowledged that the motion to dismiss addressed the same legal question as the ultimate merits issue. As a result, and in light of the fact that the Applicant and Appellants submitted legal memoranda and exhibits in support of their memoranda, the parties agreed to have the ultimate merits issue decided as discussed below.

During the oral argument the parties agreed to waive their right to an evidentiary hearing, stipulated to the admission of all the exhibits into evidence, and requested the Board to take official notice of the Commission's file for the Application.¹ The Board granted the parties' request and will make its determination on the ultimate merits issue based on the legal memoranda filed, the exhibits which have now been accepted into evidence, oral argument, and the Commission's file #5W0961-3.

III. ISSUE ON APPEAL

Pursuant to EBR 51 (D), did the Commission abuse its discretion in issuing the Decision without first holding an evidentiary hearing.

IV. FINDINGS OF FACT

1. On September 2, 1998, the Applicant filed the Application with the

¹ Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See *In re Handy*, 144 Vt. 610, 612 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

Commission.

2. The Application requested that condition 13 of Land Use Permit #5W0961-1 be lifted and that lot 4 be authorized for residential development.
3. On September 23, 1998, the Commission issued a Notice of Minor Application and Hearing (Notice) and prepared a proposed permit.
4. On October 1, 1998, the Appellants objected to the Notice and the proposed permit and requested a hearing. The letter included the following opening which clearly stated Appellants' position. "We are notifying the Commission that we do not feel that the proposal in the letter from Mr. Norman P. Kelly is adequate to release Condition number 13 in the land use permit. We request that the Commission maintain all conditions of the land use permit."
5. On November 10, 1998, the Commission held a prehearing conference. No Prehearing Conference Report and Order was issued.
6. Over the next two and one half years the Applicant, Appellants, and the City attempted to negotiate a settlement.
7. During the negotiation period, on at least three occasions, the District Coordinator (Coordinator) wrote memoranda to the parties in an effort to determine what course of action the Commission should take.
8. On April 11, 2000, the Coordinator issued a memoranda to the Applicant and the parties outlining several options including; a) revising the proposed permit based on recent representations by the Applicant and issuing a decision; b) the Commission issuing a Prehearing Conference Report and Order and establishing a course of action; c) the Commission scheduling an evidentiary hearing.
9. On May 8, 2000, the Coordinator issued a memorandum to the Applicant and the parties summarizing the status of the case.

10. On December 22, 2000, the City provided the Appellants with a draft letter addressed to the Commission.
11. On April 17, 2001, the Appellants wrote a letter to the City providing comments on the City's draft letter to the Commission. The Appellants' letter stated that the "proposals represent a significant step towards resolving the longstanding problems ..." However, the Appellants also expressed several concerns which were not satisfactorily resolved. The Appellants' letter concluded:

In light of the substantial number of unresolved permit issues affecting the development, the current residents believe it would be unwise to permit the construction of another home on Lot #4 before all the proposed remedies have been completed and all the conditions of the Act 250 permit as amended have be (sic) satisfied.

12. On June 6, 2001, the Appellants wrote another letter to the City generally agreeing with the City's approach to resolving the outstanding issues but also raising remaining unresolved issues. The letter also requested the City not represent in their communications with the Commission that the Appellants were in agreement with the position of the City.
13. On June 20, 2001, the City sent a letter to the Commission in an effort to resolve the remaining issues. The City did not represent that the Appellants were in full agreement with its position. Instead, the City attached the April 17, 2001 and June 6, 2001 letters from the Appellants to represent their position.
14. On June 25, 2001, the Coordinator issued a memorandum acknowledging the letter from the City and the "numerous enclosures." The memorandum concluded with the following paragraph.

Usual practice is for an applicant to provide a focused summary position in matters such as this case which has been pending for an exceptionally long period of time. I encourage Mr. Kelley to consider filing such a position. Similarly, I encourage the parties to file positions so that the

District Commission may have the benefit of comprehensive perspectives prior to determining a course of action in this matter. Please file any positions by July 6, 2001 and don't forget to exchange copies of all such filings with each other. Do not hesitate to call with any questions.

15. On July 5, 2001, the Applicant sent a position paper to the Commission. The position paper was not originally served on all parties but the Applicant corrected this error.
16. On July 5, 2001, Appellant Borgendale sent in a position paper to the Commission but did not serve the other parties. This letter is not part of the Commission's file. The filing is not referenced in the Decision or the list of exhibits. There is no indication that the Commission rejected the filing or requested Appellant Borgendale to serve the other parties.² Appellant Borgendale's letter contained the following opening sentence which makes Appellants' opposition to the Project clear.

We continue to oppose the lifting of any of the restrictions imposed by Condition 13 of the Amendment to the Act 250 Permit for the Ledgewood Terrace development until all the remedial work promised by the City of Montpelier has been completed.

17. On September 28, 2001 the Commission issued the Permit and Decision as a minor application pursuant to EBR 51 (D). The Commission based its decision to treat this matter as a minor application on its determination that "no substantive issues remain for consideration at a hearing."

V. CONCLUSIONS OF LAW

This matter has an unusual procedural history before the Commission that requires close scrutiny. Although the issue is framed as whether pursuant to

² In a July 10, 2001 memorandum the Coordinator forwarded the Applicant's and the parties' responses to his June 25, 2001 memorandum to the Commission. The reference in the memorandum to the parties' response appears to be to Appellant Borgendale's July 5, 2001 letter.

EBR 51 (D) the Commission abused its discretion in issuing a decision without first holding an evidentiary hearing, the issue by necessity incorporates the question of whether the Commission properly followed the requirements of EBR 51 (A)-(C) before it reached EBR 51 (D).

EBR 51 governs minor application procedures. Pursuant to EBR 51 (A), a project can be reviewed as a minor application “if the district commission finds that there is a demonstrable likelihood that the project will not present significant adverse impacts under any of the 10 criteria of 10 V.S.A. 6086 (a).” Pursuant to EBR 51 (B), if the district commission determines that a project qualifies for treatment as a minor application, the district commission shall:

- (1) prepare a proposed permit including appropriate conditions; and
- (2) provide written notice and a copy of the proposed permit to those entitled to written notice under 10 V.S.A. § 6084; and
- (3) provide published notice as required by 10 V.S.A. § 6084; the notice shall state that:
 - (a) the district commission intends to issue a permit without convening a public hearing unless a request for hearing is received by a date specified in the notice which is not less than seven days from the date of publication; and
 - (b) the preparation of findings of fact and conclusions of law by the district commission may be waived; and
 - (c) statutory parties, adjoiners, potential parties under Rule 14(B) and the district commission, on its own motion, may request a hearing;
 - (d) any hearing request shall state the criteria or subcriteria at issue, why a hearing is required and what evidence will be presented at the hearing; and
 - (e) any hearing request by a non-statutory party must include a petition for party status under the rules of the board.

EBR 51 (C) governs the procedures that should be followed if there is no request for a hearing in response to the district commission’s actions pursuant to EBR 51 (B). Pursuant to EBR 51 (D), if there is a request for a hearing the district commission should determine whether it raises any substantive issues. If so, the district commission shall convene a hearing.

In the instant case, the Appellants contend that they raised substantive issues pursuant to EBR 51 (D) and were entitled to a hearing. On September 23,

1998, the Commission issued a Notice of Minor Application and Hearing and prepared a proposed permit. On October 1, 1998, the Appellants objected to the proposed permit and Notice. On November 10, 1998, the Commission held a prehearing conference, but it never issued a Prehearing Conference Report and Order.

After the prehearing conference the Applicant, Appellant and the City entered a prolonged period of settlement discussions that lasted through the spring of 2001. During this period, the City took an active role in resolving differences between the other parties.

The Coordinator issued memoranda to the Applicant and the parties on April 11, 2000 and May 8, 2000 providing the Applicant and the parties with the current status of the matter and attempting to determine a course of action.

The City attempted to find consensus between the parties by circulating a draft letter to the Coordinator for comment. The letter detailed the actions the Applicant and the City were planning to take to accommodate the Appellants' concerns. On April 17, 2001 and June 6, 2001 the Appellants provided comments to the City concerning the draft letter to the Coordinator. The Appellants' letters thanked the City for their efforts and highlighted the areas of agreement and few remaining unresolved issues.

On June 20, 2001, the City filed a comprehensive position paper in response to the Coordinator's May 8, 2000 memorandum. The City included the letters from the Appellants which provided Appellants' representation of the remaining areas of disagreement.

On June 25, 2001, the Coordinator issued memoranda to the parties informing them of the Commission's "usual practice" of requesting position papers from the parties to gain a comprehensive perspective prior to determining a course of action. The memorandum informally requested the Applicant and the parties to file position papers by July 6, 2001 and reminded them "to exchange copies of all such filings with each other."

The Applicant filed a position paper on July 5, 2001. Appellant David Borgendale also sent a position paper on July 5, 2001 repeating the Appellants' longstanding objection to the removal of permit condition 13. This position paper was not served on the other parties, is not in the Commission file, and is not referenced in the Commission's Decision or list of exhibits. However, there is no

indication that Appellant Borgendale's letter was rejected by the Commission nor was there evidence that the Commission requested that Appellant Borgendale serve the position paper on the other parties. A July 10, 2001 memorandum from the Coordinator to the Commission appears to forward Appellant Borgendale's letter as well as the Applicant's response to the Commission.

Based on the above series of events, the Commission concluded that pursuant to EBR 51 (D), "no substantive issues remain for consideration at a hearing." In issuing the Decision as a minor, the Commission erred.

First, by convening a prehearing conference, the Appellants reasonably inferred that a hearing would be held. There were no subsequent orders from the Commission suggesting that if Appellants did not object a second time, the matter would be handled as a minor. Although the Coordinator's informal memorandum to the Applicant and the parties dated June 25, 2001 requested position papers, it only sought such position papers so the "Commission may have the benefit of comprehensive perspectives prior to determining a course of action in this matter." It was not an order from the Commission. More importantly, it did not comply with EBR 51 (B) because it did not state that the Commission "intends" to issue a permit without convening a hearing unless a request for a hearing is received by a certain date.

Second, the Commission issued only one proposed permit on September 23, 1998. The Permit the Commission ultimately issued on August 31, 2001 differed slightly in substance from the proposed permit. In addition, it incorporated plans and exhibits filed with the Commission up to three years subsequent to the original proposed permit that the Commission issued pursuant to EBR 51 (B). Thus, Appellants were not provided an opportunity to review the actual permit and exhibits pursuant to EBR 51 (B), nor were they afforded a fair opportunity to raise substantive issues pursuant to EBR 51(D).

Third, given the Appellants' years of vocal opposition to removing permit condition 13, it is difficult to understand how the Commission concluded that no substantive issues had been raised. Assuming the Commission received Appellant David Borgendale's July 5, 2001 position paper, the Commission could have refused to accept it until he provided a certificate of service certifying that the other parties were served. Regardless of the July 5, 2001 letter from Appellant Borgendale, the Appellants' written correspondence to the Commission and the letters to the City which were forwarded to the Commission demonstrate Appellants' continued objections. These letters raise substantive

issues concerning the lifting of permit condition 13 that, at a minimum, should have been addressed in the Commission's Decision.

For all the above reasons, the Board concludes that the Commission should not have issued the Permit pursuant to EBR 51 as a minor application.

VI. ORDER

1. The Board takes official notice of the Commission files for Land Use Permit Amendment #5W0961-3.
2. Land Use Permit Application #5W0961-3 is vacated.
3. Jurisdiction is remanded back to the Commission.

Dated at Montpelier, Vermont this 12th day of March, 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding
Marcy Harding, Chair
John Drake
Sam Lloyd
William Martinez
Greg Rainville
Jean Richardson
Don Sargent