

State of Vermont
Water Resources Board

William Blachly
d/b/a Unadilla Theatre
Calais, Vermont

3 V.S.A. §2873(4) and
§2-02(E) Environmental
Protection Regulations

Introduction

On August 6, 1985, William Blachly d/b/a Unadilla Theatre, Calais, Vermont filed an appeal with the Vermont Water Resources Board under the provisions of 3 V.S.A. §2873(4) and §2-02(E) of the Environmental Protection Regulations. This appeal was taken from the July 24, 1985 decision of the Commissioner of the Department of Water Resources and Environmental Engineering that the Unadilla Theatre is not entitled to an exemption from the requirement to install permanent toilet facilities under §4-06 of Environmental Protection Regulations.

On August 8, 1985, the Vermont Water Resources Board appointed William Bartlett, its Executive Officer as a referee to hear and determine all matters material or pertinent to this appeal. On August 20, 1985 a public hearing regarding this appeal was conducted at Montpelier, Vermont by the hearing referee. Appearances at this hearing were entered by the following parties:

- (a) William Blachly
- (b) Department of Water Resources and Environmental Engineering (Department)
- (c) Tina Bielenberg

During the course of this proceeding the hearing referee took judicial notice of Land Use Permit PB-5-0608 dated December 2, 1983 issued by the Department under the authority of the Environmental Protection Regulations, Chapter 4 "Public Buildings" and Land Use Permit #5W0781 dated September 13, 1984 issued by the District #5 Environmental Commission under the authority of 10 V.S.A., Chapter 151 ("Act 250").

On August 21, 1985, the hearing referee issued preliminary findings of fact as provided for in 10 V.S.A. §905(a). All parties were given until September 9, 1985, to respond to the preliminary findings of fact. The only response filed by September 9, 1985 was a document dated September 8, 1985 entitled "Preliminary Findings of Fact - Unadilla Theatre Appeal to the Water Resources Board" filed by William Blachly.

During the course of this proceeding the following documents were entered into the record:

Department Exhibit #1: A letter dated July 25, 1985, addressed to William Blachly from Jonathan Lash, Commissioner, Department of Water Resources and Environmental Engineering.

Department Exhibit #2: A letter dated June 28, 1985, addressed to William Blachly from Donald Robisky, Department of Water Resources and Environmental Engineering enclosing a document entitled "Informal Appeal to Chief of Engineering Services" dated June 28, 1985.

Bielenberg Exhibit #1: A copy of Act #56 adopted by the 1985 session of the Vermont Legislature adding 3 V.S.A. §801(12) and §823 a, entitled "An act relating to flexibility of administrative rules pertaining to small businesses."

Findings of Fact and Conclusions of Law

1. William Blachly is the owner and operator of a community summer theatre (Unadilla Theatre) located in Calais, Vermont. The Unadilla Theatre was established in 1983.
2. The Unadilla Theatre is located in a converted barn. A stage has been constructed at one end of the barn. The audience sits on wooden benches located in the remaining portion of the barn. The benches have a capacity of between 80-100 people. The barn is not insulated, has no doors and no plumbing facilities. The barn does have electric lights.
3. On December 2, 1983, the Department issued Land Use Permit #PB-5-0608 under the authority of the Environmental Protection Regulations, Chapter 4 "Public Buildings." This permit approved the renovation of an existing barn to house an 84 seat theatre and authorized the use of portable toilets (condition #3). The Department's decision to authorize the use of portable toilets under the provisions of §4-06 was based on its understanding that the Unadilla Theatre had only given three performances in 1983 and that it would either continue to give performances infrequently or alternatively would seek to amend its permit.
4. On July 11, 1984, the Department's Regional Engineer, after reviewing an Act 250 application for the Unadilla Theatre which requested approval of a seating capacity of 100 and as many as 30 performances per year, informed Mr. Blachly that this level of usage would require the installation of permanent toilet facilities in accordance with section 4-06 of the Environmental Protection Regulations.
5. On September 13, 1984 the District #5 Environmental Commission issued Land Use Permit #5W0781 under the authority of 10 V.S.A., Chapter 151 (Act 250). This permit authorized Mr. Blachly to operate a summer theatre with a

maximum occupancy of 100 patrons for "an annual total of 27 performances to be scheduled at a rate of three (3) performances per week running from the 4th of July to the Labor Day weekend in any given year."

6. On May 29, 1985, Mr. Blachly filed an informal appeal of the Regional Engineer's determination that permanent toilet facilities were required with the Department's Chief of Engineering Services as provided for in §2-02(D) of the Environmental Protection Regulations. On June 28, 1985, the Chief of Engineering Services issued a decision (Department Exhibit #2) which affirmed the Regional Engineer's determination that permanent toilet facilities should now be required.
7. On July 6, 1985, Mr. Blachly appealed the Chief of Engineering Service's decision to the Commissioner of the Department as provided for in §2.03(D) of the Environmental Protection Regulations. On July 24, 1985, the Commissioner issued a decision affirming the decision of the Chief of Engineering Services. (Department Exhibit #1).
8. Section 4.06 "Toilets" of the Environmental Protection Regulations provides that:

Each public building shall have at least one functional water closet and one functional lavatory, or more fixtures where required by regulation applicable to the particular type of planned occupancy; toilet rooms shall be supplied with the capacity to provide at least 15 C.F.M. of mechanical ventilation for each toilet fixture. Where it would be unreasonable to require a water closet and lavatory because of the infrequency or briefness of occupancy, or the availability of a nearby toilet, the Division may authorize the use of privies, chemical toilets, or incinerators or determine that the requirement for toilet facilities is unwarranted. Where privies are proposed, they shall have a durable, water tight vault.

9. Section 4-06 of the Environmental Protection Regulations authorizes the Department to waive the requirement for toilet facilities where it would be unreasonable to require such facilities for one of three reasons:
 - (a) infrequency of use.
 - (b) briefness of occupancy.
 - (c) the availability of a nearby toilet.

In granting such a waiver the Department may authorize the use of privies, chemical toilets or incinerators or may determine that the requirement for any toilet facilities is unwarranted.

10. Portable toilets are a form of chemical toilet.
11. The Department has no written procedure regarding the circumstances under which it will grant waivers under the provisions of §4-06.
12. Mr. Blachly has not asked the Department to consider authorizing the use of a privy, an incinerator or a nearby toilet. The Department has been asked to authorize the use of portable toilets.
13. In deciding whether or not to grant a waiver under section 4-06 it is the Department's practice to consider the following factors:
 - (a) frequency of use
 - (b) the volume of use
 - (c) public expectations with regard to the availability of toilet facilities.
14. It has been the Department's practice not to waive the requirement for toilet facilities in those public buildings where the public regularly visits or where persons are employed.
15. It has been the Department's practice to generally discourage the use of portable toilets as a regular means of sanitary waste disposal for the following reasons:
 - (a) They neither treat nor dispose of sanitary wastes.
 - (b) They involve greater health risks than a conventional toilet.
 - (c) They present the Department with a significant management problem because the Department has no method of regulating the ultimate disposal of wastes from the portable toilets.
16. The use of portable toilets in situations not involving a "public building" is common in Vermont and often occurs in situations where they receive substantial usage including rest areas on Interstate 89, outdoor festivals and concerts. However, such circumstances are not subject to compliance with the Environmental Protection Regulations and therefore have no bearing on the issues raised in this appeal.

17. The number of performances at the Unadilla Theatre between 1983 and 1985 are as follows:
 - (a) 1983 - 3 performances
 - (b) 1984 - 23 performances
 - (c) 1985 - 12 performances

Performances typically last approximately two hours. Rehearsals are sometimes held at the Unadilla Theatre, but on other occasions are held at other locations in the Calais-Montpelier area.
18. The average attendance per performance at the Unadilla Theatre between 1983 and 1985 has been approximately 50 people. The average toilet usage during this period has been approximately six per performance.
19. In considering whether any particular public building should be exempt from the requirement that each public building have at least one functional water closet and one functional lavatory, it is appropriate for the Department to consider the particular type and frequency of occupancy which is authorized under applicable state regulations. In the case of the Unadilla Theatre, the authorized use is three performances per week with a maximum occupancy of 100 patrons plus the cast for a 9 week season. In addition there is some use of the theatre for rehearsals.
20. The Environmental Protection Regulations are adopted by the Secretary of the Agency of Environmental Conservation under various statutory authorities designated in Appendix 1A "Legal Authorities."
21. When an agency's interpretation of its own rules is involved, that interpretation shall be given "great weight" K.C. Davis, Administration Law Treatise (2nd ed.) §29.00-7 and shall be upheld unless it is "demonstrably irrational," Id. §29.00-6 at 556-558. This deference to an agency's interpretation of its own regulations is endorsed by the Vt Supreme Court. In re: Brooks, 130 Vt 83, 85-86 (1971). In accordance with this standard of review, the Water Resources Board will not reject the Department's interpretation of §4-06 unless it produces irrational results or has been inconsistently applied.
22. Although the Department has not established a written procedure for guiding the judgments which are inherent in applying section 4-06, there is no evidence that the Department has interpreted this section with respect to the Unadilla Theatre in a manner which is inconsistent with its regulation of other Public Buildings.

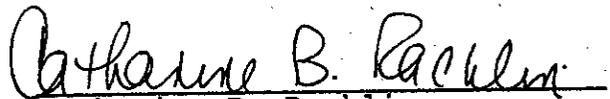
23. The use of portable toilet facilities in lieu of permanent toilet facilities involves a greater health risk and creates a greater health and environmental risk to the public at large because the manner in which the sanitary wastes collected in the portable toilets are ultimately disposed of is not regulated.
24. To the extent that they are not incorporated in the foregoing, all exceptions and additions to the Preliminary Findings of Fact proposed by the parties are hereby denied.

Order

The appellant's request for an additional hearing is denied. On the basis of the above Findings of Fact and Conclusions of Law, the Water Resources Board hereby affirms the decision of the Commissioner of the Department of Water Resources and Environmental Engineering dated July 24, 1985, and thereby denies the appeal of William Blachly.

Done this 26th day of September, 1985, at Burlington, Vermont.

For the Vermont Water
Resources Board


Catharine B. Rachlin
Chairman

Board members in favor
of this decision:

Catharine B. Rachlin
Kathleen A. Scheele
William Boyd Davies

Board member not
participating in this
decision:

William D. Countryman

State of Vermont
Water Resources Board

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Introduction

On August 6, 1985, William Blachly d/b/a Unadilla Theatre, Calais, Vermont filed an appeal with the Vermont Water Resources Board under the provisions of §2-02(E) of the Environmental Protection Regulations. This appeal was taken from the July 24, 1985 decision of the Commissioner of the Department of Water Resources and Environmental Engineering to require the Unadilla Theatre, to install permanent toilet facilities.

On August 8, 1985, the Vermont Water Resources Board appointed William Bartlett, its Executive Officer as a referee to hear and determine all matters material or pertinent to this appeal. On August 20, 1985 a public hearing regarding this appeal was conducted at Montpelier, Vermont by the hearing referee. Appearances at this hearing were entered by the following parties:

- (a) William Blachly
- (b) Department of Water Resources and Environmental Engineering (Department)
- (c) Tina Bielenberg

During the course of this proceeding the hearing referee advised the parties that he would take judicial notice of Land Use Permit PB-5-0608 dated December 2, 1983 issued by the Department of Water Resources and Environmental Engineering under the authority of the Environmental Protection Regulations, Chapter 4 "Public Buildings" and Land Use Permit #5W0781 dated September 13, 1984 issued by the District #5 Environmental Commission under the authority of 10 V.S.A., Chapter 151 ("Act 250").

During the course of this proceeding the following document were entered into the record:

Department of Water Resources (DWR) Exhibit #1: A letter dated July 25, 1985, addressed to William Blachly from Jonathan Lash, Commissioner, Department of Water Resources and Environmental Engineering.

DWR Exhibit #2: A letter June 28, 1985, addressed to William Blachly from Donald Robisky, Department of Water Resources and Environmental Engineering enclosing a document entitled "Informal Appeal to Chief of Engineering Services" dated June 28, 1985.

Bielenberg Exhibit #1: A copy of Act #57 adopted by the 1985 session of the Vermont Legislature entitled "An act relating to flexibility of administrative rules pertaining to small businesses."

Preliminary Findings of Fact

1. William Blachly is the owner and operator of a small community summer theatre (Unadilla Theatre) located in Calais, Vermont. The Unadilla Theatre was established in 1983.
2. The Unadilla Theatre is located in a converted barn. A stage has been constructed at one end of the barn. The audience sits on wooden benches located in the remaining portion of the barn. The benches have a capacity of between 80-100 people. The barn is not insulated, has no doors and no plumbing facilities. The barn does have electric lights.
3. On December 2, 1983, the Department issued Land Use Permit #PB-5-0608 under the authority of the Environmental Protection Regulations, Chapter 4 "Public Buildings." This permit approved the renovation of a existing barn to house an eighty-four seat theatre and authorized the use of portable toilets (condition #3). The Department's decision to authorize the use of portable toilets was based on its understanding that the Unadilla Theatre had only given three performances in 1983 and that it would either continue to give performances infrequently or alternatively would seek to amend its permit.
4. On July 15, 1984, the Department informed Mr. Blachly that the theatre would be required to install permanent toilet facilities based on its Regional Engineer's review of a recently filed Act 250 application for the Unadilla Theatre which indicated that the theatre had a capacity of 100 seats and would conduct approximately 30 performances per year.
5. On September 13, 1984 the District #5 Environmental Commission issued Land Use Permit #5W0781 under the authority of 10 V.S.A., Chapter 151 (Act 250). This permit authorized Mr. Blachly to operate a summer theatre with a maximum occupancy of 100 patrons for "an annual total of 27 performances to be scheduled at a rate of three (3) performances per week running from the 4th of July to the Labor Day weekend in any given year."
6. On May 12, 1985, Mr. Blachly appealed the Regional Engineer's determination that permanent toilet facilities were required. In accordance with the informal appeal process

provided for in §2-02(D) of the Environmental Protection Rules, Donald Robisky, Chief of Engineering Services for the Department reviewed the Regional Engineer's determination that permanent toilet facilities would be required. On June 28, 1985, Mr. Robisky issued his decision (Department Exhibit #2) which confirmed the Regional Engineer's determination that permanent toilet facilities be required.

7. On July 6, 1985, Mr. Blachly appealed the Chief of Engineering Service's ruling to the Commissioner of the Department. On July 24, 1985, the Commissioner issued a decision confirming the decision of the Regional Engineer and the Chief of Engineering Services. (Department Exhibit #1).
8. The provision of the Environmental Protection Rules at issue in this appeal is whether or not permanent toilet facilities are required at the Unadilla Theatre under §4-06 "Toilets" which provides that:

Each public building shall have at least one functional water closet and one functional lavatory, or more fixtures where required by regulation applicable to the particular type of planned occupancy; toilet rooms shall be supplied with the capacity to provide at least 15 C.F.M. of mechanical ventilation for each toilet fixture. Where it would be unreasonable to require a water closet and lavatory because of the infrequency or briefness of occupancy, or the availability of a nearby toilet, the Division may authorize the use of privies, chemical toilets, or incinerators or determine that the requirement for toilet facilities is unwarranted. Where privies are proposed, they shall have a durable, water tight vault.

9. Section 406 provides that where toilet facilities are required, the number of required facilities is determined by appendix 9A.
10. Section 4-06 of the Environmental Protection Regulations authorizes the Department to waive the requirement for toilet facilities where it would be unreasonable to require such facilities for one of three reasons:
 - (a) infrequency of use
 - (b) briefness of occupancy
 - (c) the availability of a nearby toilet.

In granting such a waiver the Department may authorize the use of privies, chemical toilets or incinerators or may determine that the requirement for toilet facilities is unwarranted.

11. Portable toilets are a form of chemical toilet.
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14. In deciding whether or not to grant a waiver under section 4-06 it is the Department's practice to consider the following factors:
 - (a) frequency of use
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15. It has been the Department's practice not to waive the requirement for toilet facilities in those public buildings where the public regularly visits or where persons are employed.
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17. The use of portable toilets in situations not involving a "public building" is common in Vermont and often occurs in situations where they receive substantial usage including rest areas on Interstate 89 and outdoor festivals and concerts.

18. The number of performances which have been conducted at the Unadilla Theatre between 1983 and 1985 are as follows:

- (a) 1983 - 3 performances
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- (c) 1985 - 12 performances

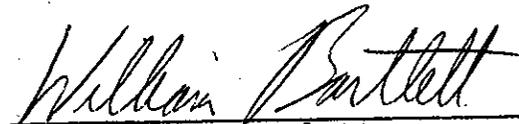
Rehearsals are sometimes held at the Unadilla Theatre, but on other occasions are held at other locations in the Calais Montpelier area.

19. The average attendance per performance at the Unadilla Theatre between 1983 and 1985 has been approximately 50 people. The average toilet usage during this period has been approximately six per performance. On a request basis patrons of the theatre have been allowed to use the toilet facilities at the Blachly residence located approximately 150 feet from the Unadilla Theatre.

The above preliminary findings of fact are issued in accordance with 10 V.S.A. §905(a) by the referee appointed by the Vermont Water Resources Board. All parties in interest to this proceeding as identified above have the opportunity to file exceptions to these findings, to request additional findings, or request that a further hearing be held by the Water Resources Board. In order to be considered by the Water Resources Board, any such exceptions or requests must be received at this office on or before September 9, 1985. All correspondence regarding this matter should be addressed to the Vermont Water Resources Board, State Office Building, Montpelier, Vermont 05602 (telephone 828-2871).

Done this 21st day of August, 1985, at Montpelier, Vermont.

For the Vermont Water Resources Board



William A. Bartlett
Hearing Referee

WAB/kgr