

State of Vermont  
Water Resources Board

Appeal of Robert & Barbara White  
In re: Petition of Robert &  
Barbara White Revocation of  
Subdivision permits EC-3-1425  
and EC-3-1425-R1

Findings of Fact,  
Conclusions of Law and  
Order

INTRODUCTION

On February 1, 1989, Robert and Barbara White (the Whites) filed notice of appeal with the Vermont Water Resources Board (Board). This appeal was taken from the decision of the Commissioner of the Department of Environmental Conservation (Commissioner) dated January 11, 1989 regarding the Whites' petition for the revocation of Subdivision Permit EC-3-1425 and EC-3-1425-R1. The only permit at issue in this appeal is Subdivision Permit EC-3-1425 (the Permit).

The appeal is filed under the provisions of 18 V.S.A. § 1218(4) and § 2.2(F) of the Environmental Protection Rules and 3 V.S.A. § 2873(4).

On March 20, 1989, the Board conducted a prehearing conference regarding this appeal at Norwich, Vermont and on April 24, 1989 held a public hearing at Berlin, Vermont. The following parties entered appearances in this proceeding and were represented at both the March 20, 1989 prehearing conference and April 24, 1989 hearing:

1. Robert and Barbara White represented by Alfred Guarino, Esquire.
2. Kenneth Kuch, represented by Karen Miller, Esquire.
3. Calvin Knights, Peter Knights and Gail Shaw, represented by Garfield Miller, Esquire.
4. Morgan Goodrich, represented by Peter Welch, Esquire.
5. Department of Environmental Conservation, represented by Anne Whiteley.

Discussion

All parties agreed at the prehearing conference that the legal issues raised in this proceeding are:

1. Is permit revocation mandatory when a permit is issued based on incorrect information, if the information in error would have resulted in a denial?
2. If revocation is not mandatory, has the Commissioner acted within his authority in his decision on this matter?

This proceeding concerns permit revocation, which is addressed in § 2.2(F) of the Environmental Protection Rules (Rules 2.2(F)). This rule provides that "the Commissioner may revoke a permit" (emphasis added) under the following circumstances: "violation of permit conditions, false or misleading information submitted in support of the permit, violation or failure to comply with the provisions of these rules or authorizing statutes."

In this case, all parties agreed that the applicants submitted incorrect information regarding the nature of a water supply on an adjacent parcel of land now owned by the Whites. Therefore, there is no dispute that under Rule 2.2(F) revocation can be considered in this matter. The language of Rule 2.2(F) is clear on its face that the Commissioner's decision to revoke permits, even where a permit would not have been issued had accurate information been submitted in the first place, is discretionary.

With regard to the issue of whether the Commissioner acted within the limits of his discretion, the Board notes that neither the Environmental Protection Rules nor the statutory authority under which the rules are adopted, establish any specific standard to guide the Commissioner in the matter of permit revocation. Based on the record in this case, there is no evidence of impropriety in the issuance of the Permit nor of actual environmental harm as a result of its issuance. Should environmental harm occur, the Commissioner has the ability to respond through his enforcement powers. The Commissioner's January 11, 1989 decision was reasonable and within his authority in this matter.

#### Findings of Fact

1. The Department issued the Permit on July 16, 1987. The Permit affects lands owned by Calvin Knights located in Norwich, Vermont and has a book and page reference on the Notice of Permit recording as Book 32, page 178.
2. The Permit authorized Calvin Knights to subdivide his property into Lots A and B. Lot B is located uphill and adjacent to the property subsequently purchased by the Whites on August 5, 1987.

3. The application for the Permit stated that the water supply on the adjacent property now owned by the Whites was a drilled well.
4. The water supply for the Whites' property is not a drilled well, but is a spring located close to the boundary between the Whites' property and Lot B.
5. There is insufficient isolation distance, as specified by the Environmental Protection Rules, between the sewage disposal system on Lot B and the Whites' water supply. If the source of the water supply on the Whites' property had been correctly known by the Department, when it was initially reviewing the application, the Permit would not have been issued.
6. There is no place on either Lot A or Lot B where a sewage disposal system could be built to meet the isolation distance requirements, so long as the source of water for the Whites' property remains the spring that is currently servicing the house. The Whites have declined an offer to have a well drilled on their property.
7. On October 20, 1987, Kenneth and Sheila Kuch purchased Lot B. At the time of the purchase, the Kuchs had not been given notice that there had been a problem in connection with the sewage disposal system on the property that they were purchasing.
8. There is now a house on Lot B that is the Kuchs residence. Revocation of the Permit would be tantamount to eviction of the Kuchs, who are innocent third parties.
9. There is no evidence of impropriety in the issuance of the Permit.
10. There is no evidence of actual environmental harm as a result of the issuance of the Permit.

Conclusions of Law

1. In an appeal proceeding under 18 V.S.A. § 1218(4), § 2.2(F) of the Environmental Protection Rules and 3 V.S.A. § 2873(4), the Board reviews the record created by the Commissioner. As in the case, the parties may stipulate as to the content of the record.
2. Rule 2.2(F) provides that "the Commissioner may revoke a permit" under any of the following circumstances:  
"violation of permit conditions, false or misleading information submitted in support of the permit, violation or failure to comply with the provisions of these rules or authorizing statutes."

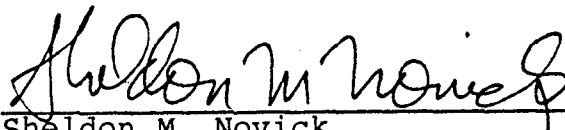
3. The application which resulted in the issuance of the Permit on July 16, 1987 incorrectly indicated that the water supply on an adjacent property (subsequently purchased by the Whites') was a drilled well when in fact the source of that water supply is a spring. Had the nature of this water supply been correctly identified in the application, the Permit would not have been issued. Accordingly under Rule 2.2(F) the Commissioner has the authority to revoke the Permit.
4. Revocation is not mandated, however, even when, as in this case, a permit is issued on the basis of "false or misleading information." Rather the Commissioner's decision as to whether or not to revoke any specific permit issued under such circumstances is discretionary as Rule 2.2(F) clearly indicates: "the Commissioner may revoke. . ." (emphasis added).
5. There is no evidence of impropriety in the issuance of the Permit.
6. There is no evidence of actual environmental harm as a result of the issuance of the Permit.

Order

The appeal of Robert and Barbara White from the decision of the Commissioner of Environmental Conservation not to revoke Subdivision Permit EC-3-1425 is denied and the Department's decision dated January 11, 1989 is hereby affirmed.

Dated at Troy, Vermont, this 14th day of June, 1989.

Vermont Water Resources Board

  
Sheldon M. Novick

  
Elaine B. Little

  
David L. Deen