

State of Vermont

Water Resources Board

Re: Appeal of Village of Waterbury  
Authority: 10 V.S.A. §1629

Docket No. 90-14

ORDER

BACKGROUND

On November 15, 1989 the Village of Waterbury submitted an application to the Agency of Natural Resources ("ANR") for approval of a state assistance grant for the construction of a new treatment facility, source and transmission improvements for the Village's water supply system. This application was made pursuant to 10 V.S.A. §1624.

The Public Facilities Division approved the project for funding and an allotment was made subject to certain conditions. The Village subsequently outlined some concerns related to the garage and conference room components of the proposed new facility. ANR determined that these components were not eligible for assistance.

ANR also deemed certain "soft costs" (permits, insurance, etc.) ineligible for funding under the grant. Finally, ANR determined that the project was subject to Act 250 review and made this a condition of receiving the grant.

A properly filed appeal was completed on March 6, 1991 and a pre-hearing conference was held on April 15, 1991. A Motion to Dismiss was filed by ANR on May 31, 1991 and the parties submitted legal memoranda on the issue. A pre-hearing order was issued on September 3, 1991. The preliminary issue outlined in the Motion to Dismiss and the pre-hearing order is whether the Board has authority under 10 V.S.A. §1629 to review the Department of Environmental Conservation's ("DEC") decisions regarding project costs and conditions established for award of the grant.

DISCUSSION

A quasi-judicial body such as the Board has only those powers expressly conferred by statute, 3 V.S.A. §203, Miner v. Chater, 137 Vt. 330,333 (1979), or prescribed in terms definite enough to serve as a guide. State v. Auclair, 110 Vt. 147 (1939). An agency must operate for the purposes and within the bounds authorized by enabling legislation. In re Agency of Administration, 141 Vt. 68, 75 (1982). The courts are especially vigilant where an agency exercises its adjudicative functions. Id.

When construing a statute, a court must ascertain and give effect to the intention of the legislature. Paquette v. Paquette, 146 Vt. 83, 86 (1985). If the meaning of a statute is plain on its face, it must be enforced according to its terms, and there is no need for construction. Id.

Title 10 V.S.A. §1629 provides the appeal procedure for appeals of DEC decisions on water supply grant applications. Prior to its amendment in the 1981 legislative session, 10 V.S.A. §1629 read:

"Any municipality aggrieved by an act or decision of the department pursuant to this subchapter may appeal such act or decision to the water resources board within 30 days after the date thereof. The board shall hold a hearing at which all persons and parties in interest may appear and be heard and shall issue an order affirming, reversing or modifying the act or decision of the department. Such order shall be binding upon the department..."

In 1981, 10 V.S.A. §1629 was amended to read

"Any municipality aggrieved by an act or decision of the department in establishing the priority system and the priority of awards to projects under this chapter may appeal to the board within 30 days. The parties in interest may appear and be heard to determine whether the decision of the department complies with the priority system adopted pursuant to section 1628 of this title..."

The plain language of the amended statute indicates that the legislature sought to provide applicants with a review of the prioritization process under §1628 of Title 10.\* It is

\*Under §205(g) of the federal Clean Water Act the state is required to provide an appeals procedure for applicants on all issues regarding a construction grant for pollution control projects, so that appeals can be easily processed to the regional office of the Environmental Protection Agency. 40 CFR 535.3030. In February, 1986, DEC (then the Department of Water Resources and Environmental Engineering) formulated a "Policy for Appeal Resolution Under 205(g) Delegation, Water Pollution Control Program." DEC included a provision in this policy permitting decisions affecting any grant program other than those affecting pollution control to be appealed to the Board. Waterbury has not raised the policy as a grounds for appeal, but it should be noted that the policy was adopted without statutory authority. Absent such statutory authority, the Board has no appeal authority beyond that expressly stated in 10 V.S.A. §1629.

also clear that the amended statute **sought** to end Board review of the actual granting of awards. No due process rights attach to the award of the grant, but the legislature did wish to address the issue of fairness in prioritization.

The Village argues that, since there are no established and promulgated rules and regulations which relate to the priority system, a proper decision could not be made by DEC. The Board disagrees with this argument. Regardless of whether DEC has developed and promulgated rules and regulations relating to a priority system\*\*, once Waterbury was found eligible for grant assistance and was actually awarded a grant, the Board's appellate jurisdiction ceased.

The Board holds **that** the extent of its jurisdiction under 10 V.S.A. §1629 extends to appeals of decisions of DEC in establishing the priority system for grant awards and in the prioritization of those awards.

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\*\*Then Acting Commissioner Reginald **LaRosa** admitted in his letter of October 31, 1990 to counsel for the Village that his staff had previously indicated to the Village and its consultant that it had not adopted rules for eligibility determination. The eligibility determination referred to by the DEC staff, however, is the reimbursement eligibility of certain components of a proposed project. DEC does have **APA** adopted rules for project priority listing and project rating criteria.

Vermont Water Resources Board  
by its Chair



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Dale A. Rocheleau, Chair

Date: 1/3/92

Concurring: Elaine Little  
Stephen Reynes

State of Vermont  
Water Resources Board

Re: Village of Waterbury  
Docket No: 90-14

Authority: 10 V.S.A. § 1269

Pm-Hearing Order

Pursuant to Board Rule 24 B, this order shall control the subsequent course of the proceedings, unless modified at the hearing to prevent manifest injustice.

1. Party Status

The following have party status with respect to **this** appeal:

Village of Waterbury, by J. p r e  
Esq. i.

b. Agency of Natural Resources, Department of Environmental Conservation, represented by Mark Sinclair, Esq.

2. Preliminary Matters at Issue

a. Whether 10 V.S.A. §1629 specifically limits the scope of the Board's appeal authority under Chapter 55 to review under §1628 of the Department of Environmental Conservation's priority system in making project awards and of Department decisions on the priority of awards, thereby depriving the Board of jurisdiction to review the Department's determination of what project costs are eligible and how the award is conditioned under 51624 of Chapter 55.

3. Secondary Matters at Issue

b. In light of 24 V.S.A. 1751(3), whether "construction interest" is a component of a "facility" under 1622(1) so that the municipality can receive state aid funds for construction interest.,

c. Whether the garage and conference room space are eligible for state assistance under 10 V.S.A. § 1624 (a) given existing health regulations.

4. Legal Briefs

The parties agreed that they would file legal briefs on the issues of jurisdiction with the Board by 4:30 p.m. on May 13, 1991. (File means receipt in the Water Resources Board Office, located at 58 East State Street).

5. Scheduling

The parties have agreed that the Board shall decide the preliminary matter of jurisdiction prior to the filing of a witness list or prefiled testimony. Should the Board find that it does have jurisdiction in this matter the filing schedule shall be as

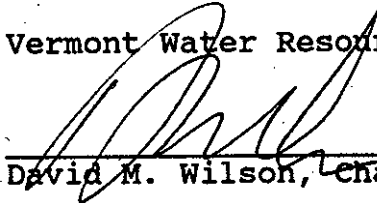
follows:

a. Witness lists shall be filed with the Board no later than three weeks prior to hearing;

b. Prefiled testimony shall be filed with the Board no later than two weeks prior to hearing;

Dated at Montpelier, Vermont this <sup>3</sup> day of September, 1991.

Vermont Water Resources Board

  
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David M. Wilson, Chair