

State of Vermont
WATER RESOURCES BOARD

In re: Gordon Whitman (Appeal of Conditional Use
Determination #94-099), Docket No. CUD-94-12

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On July 25, 1994, the Water Resources Board (Board) received a notice of appeal filed by Gordon Whitman of Bennington, Vermont, seeking review of a decision of the Agency of Natural Resources (ANR) granting Conditional Use Determination (CUD) #94-099 to Robert L. Tatro, Sr., (the applicant) for the relocation and culvertization of a small stream in the fifty foot buffer zone of a Class Two wetland near Park Street, Bennington, Vermont. The appellant specifically objected to the ANR's findings, conclusions and conditions respecting the project's impact on flood and storm water runoff control and the protection of private property and sources of potable water in accordance with Function 5.1 of the Vermont Wetland Rules. This appeal was filed pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules.

On August 23, 1994, this appeal was deemed complete and docketed. On September 23, 1994, a Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and on September 26, 1994, it was published in the Bennington Banner. Rules 18(C) and 20 of the Board's Rules of Procedure.

On October 12, 1994, at 1:30 p.m. a prehearing conference was convened at the Wills Insurance Room, Bennington Free Library, 101 Silver Street, Bennington, Vermont, by the Board's delegate, **Kristina L. Bielenberg, Esq.**, pursuant to Rule 24(A) of the Board's Rules of Procedure. The following persons entered timely appearances and participated.

Gordon R. Whitman, appellant
Rhys Evans, Esq., for the appellant
Robert L. Tatro, applicant
Francis E. Morrissey, Esq., for the applicant
James R. **Secor**, P.E., for the applicant
Stephen F. **Juszczyk**, Zoning Administrator, for the Town of
Bennington
Cynthia W. Tatro

Entering a timely appearance on October 7, 1994, but not attending the prehearing conference, was Kurt. R. **Janson**, Esq., for the Agency of Natural Resources. The Board also received correspondence from Mr. and Mrs. Elmer S. Greene, dated August 16, 1994, and **received** at the Board office on September 26, 1994, objecting



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to the culvertization of the Park Street stream, but not specifically notifying the Board of its appearance in the above-captioned appeal.

On October 14, 1994, a draft Prehearing Conference Report and Order was circulated to those persons entering timely appearances or participating in the prehearing conference. No comments concerning the content of the prehearing conference report were filed by the October 24, 1994, deadline. However, on October 17, 1994, the appellant filed with the Board a notice of withdrawal and a signed stipulation of settlement as provided in Item 4 of the draft order. A final Prehearing Conference Report and Order is now ready for issuance.

II. ISSUES

Based on the appellant's notice of appeal and his supplemental filings, the issue in this matter appears to be:

Whether the relocation and culvertization of a small stream within the buffer zone of a Class II wetland near Park Street, Bennington, would result in an undue adverse effect on protected function 5.1 (water storage for flood water and storm runoff) and therefore should not be authorized as a conditional use pursuant to Section 8 of the Vermont Wetland Rules.

III. INTERVENTION

The applicant indicated that it would object to the grant of party status of Mr. and Mrs. Elmer Greene, based on their filing of September 26, 1994. No party objected to the party status of the ANR.

The Town of Bennington indicated that it was present at the prehearing conference to observe the proceeding, but did not indicate whether it would seek intervention.

IV. STANDARD OF REVIEW

Any hearing on the merits in this appeal shall be conducted as a de novo proceeding, pursuant to 10 V.S.A. § 1269 and the Vermont Wetland Rules. The Board shall issue an order affirming, reversing or modifying the act or decision of the ANR within 10 days following the conclusion of any hearing on the merits.

V. SETTLEMENT NEGOTIATIONS

At **the** prehearing conference, the applicant indicated that he had installed the culvert authorized by CUD #94-099, but that he was willing to remove this and restore the stream bank in exchange for the appellant's withdrawal of its notice of appeal in the above-captioned matter. The applicant and appellant prepared a settlement agreement which they agreed to send to the ANR, Mr. and Mrs. Elmer Greene, Mr. **Juszczyk**, and the Board following its final execution.

The Board's designee indicated that the ANR would be provided an opportunity to review the settlement agreement and indicate any objection to its terms by a date certain.

The appellant represented that it would either notify the Board of its withdrawal or request voluntary dismissal of its appeal based on the terms of the settlement agreement.

The Board's designee informed the appellant and the applicant that the Board may require as a condition of its final order that removal of the culvert within the wetland buffer zone occur under, the supervision of a wetland biologist or staff of the Vermont Wetlands Office.

The appellant filed a signed stipulation of agreement and, notice of withdrawal on October 17, 1994.

VI. ORDER

1. The following are parties as of right to this proceeding:
 - a. The appellant, Gordon R. Whitman, is a party to this proceeding pursuant to 10 V.S.A. § 1269, and the Vermont Wetland Rules;
 - b. The applicant, Robert L. Tatro, pursuant to Rule 22(A) (7) of the Board's Rules of Procedure; and
 - c. The ANR, pursuant to Rule 22(A)(4) of the Board's Rules of Procedure.
 2. Having failed to file timely petitions for party status by October 24, 1994, the Town of Bennington and Mr. and Mrs. Elmer Greene are denied party status in this appeal.
 3. On October 17, 1994, the appellant filed a notice of withdrawal and a stipulation of agreement between himself and the applicant. No later than **4:30** p.m., Monday, November 7, 1994, any party may file a written objection to the notice of with-
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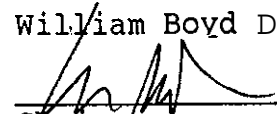
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drawal and settlement agreement or offer other comments concerning the final disposition of this appeal. Oral argument shall be granted upon specific request: failure to make such a request shall be deemed waiver of oral argument.

4. Any motions, memoranda, petitions or other filings with the Board shall be filed as an original and five (5) copies. With respect to any settlement agreement, six (6) copies may be sent to the Board in lieu of an original and five (5) copies. One copy of each filing shall also be mailed to each of the persons listed on the attached Certificate of Service until otherwise notified by the Board. A certificate of service indicating delivery to all listed persons by hand or by first class mail shall also be filed with the Board and listed persons. The Board does not accept filings by FAX.
5. Pursuant to Rule 24(B) of the Board's Rules of Procedure, this order shall be binding on all persons who have received notice of the prehearing conference, unless there is a timely **objection** to the Order, or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Dated at Montpelier, Vermont, this 26th day of October, 1994.

William Boyd Davies


Chair,

Water Resources Board