

State of Vermont
WATER RESOURCES BOARD

RE: Vernon Squiers
(Appeal of Subdivision Permit #EC-8-0538)
Docket No. EPR-94-06

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On May 12, 1994, the Water Resources Board received a notice of appeal filed by Vernon Squiers of Dorset, Vermont, from a decision of the Wastewater Management Division, Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), denying an informal appeal requesting that the DEC find a permit was issued in error and that it be revised to allow an existing well to serve a two-lot subdivision (part of the Butternut Glen subdivision) in Dorset, Vermont, created by the appellant. This appeal was filed pursuant to 3 V.S.A. § 2873(c)(4) and Section 2-02F of the Environmental Protection Rules (EPRs).

On May 19, 1994, the appellant was informed by Board staff that his notice of appeal was substantially incomplete. On May 31, 1994, the appellant supplemented his filing. On June 2, 1994, the appellant was informed by Board staff that his notice of appeal was deemed complete and docketed. See Rule 18, Board's Rules of Procedure. On that same date, Board staff wrote to the ANR requesting that it forward a documents list and the record on appeal. See Rule 30, Board's Rules of Procedure.

A Notice of Appeal and Prehearing Conference was sent to persons required to receive notice on June 2, 1994, and published in the Bennington Banner on June 4, 1994, pursuant to Rules 18(C) and 20 of the Board's Rules of Procedure. On June 27, 1994, at 10:00 a.m., a prehearing conference was convened at the Board's Conference Room, 58 East State Street, in Montpelier, Vermont, by the Board's delegate, Kristina L. Bielenberg, Esq. See Rule 24(A), Board's Rules of Procedure. The following persons were present at the prehearing conference:

Vernon C. Squiers, appellant, pro se
Department of Environmental Conservation, ANR,
by N. Jonathan Peress
P. Howard Flanders, Engineering Manager, DEC, ANR

Not present were Joseph and Marghenita Coppola, represented by Marilyn F. Hand, Esq., who had timely entered an appearance with the Board on June 13, 1994. The Coppolas own lots 3 and 4 (now combined) of the Squiers' subdivision and have a deeded right to take water from the well on Lot #2, the subject of this appeal.

On August 30, 1994, a draft Prehearing Conference Report and Order was circulated to the above persons for comment. On September 16, 1994, the Board received comments from the appellant. On September 23, 1994, the Board received comments filed on behalf of the DEC/ANR by Anne F. Whiteley, Esq. The DEC/ANR also filed copies of ANR's complete record in the file, Vernon Squiers EC-8-0538. A final Prehearing Conference Report and Order is now ready for issuance.

II. ISSUES:

Based on the appellant's notice of appeal and his statements at the prehearing conference, the issues in this matter appear to be:

1. Whether the provision of water for more than one lot from a well located on Lot #2 of appellant's subdivision was in compliance with state law (Environmental Protection Rules and Vermont Health Regulations, Chapter 5) at the time he applied for and received a subdivision permit from the ANR in 1986;
2. Whether the subdivision permit issued by the ANR in 1986 to appellant was in error in that it did not incorporate information supplied by the appellant at the time of application concerning the use of a well on Lot #2 of his subdivision to provide water for Lot #4; and
3. Whether the ANR is estopped from denying "exemption" of Lot #1 and combined Lots #3 and 4 of appellant's subdivision if ANR employees had knowledge, based on the appellant's application and statements in 1986, that he intended to provide water for more than one lot from the well on Lot #2.

The appellant requests that the ANR's decision of April 28, 1994, be reversed and that Subdivision Permit #EC-8-0538 be revised so as to authorize the use of the well on Lot #2 to provide water to Lots #2 and #4.

II. PRELIMINARY ISSUES

The ANR has raised the following jurisdictional and standing issues:

1. Whether the Board has jurisdiction to hear this case under the authority of 3 V.S.A. § 2873(c)(4) due to the fact that this matter is an enforcement action:
 2. Whether this appeal is timely, since it was not filed within
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30 days of the issuance of the subdivision permit in 1986;

3. Whether the doctrine of **laches** bars the appellant's request for relief, since the appellant could have requested relief from the Board in 1986;

4. Whether the appellant lacks standing to bring this appeal, since he does not presently own the property that is the subject of the subdivision permit at issue in this appeal.

The ANR asserts that the Vermont Health Regulations, Chapter 5, had no legal applicability at the time the appellant applied for and received Subdivision Permit #EC-8-0538. The ANR asserts that the regulation applicable in this proceeding are the Environmental Protection Rules (effective September 10, 1982) and that the term "exemption," as it is applied in the administration of the state Subdivision Permit program, does not have the meaning that the appellant argues is required by state law.

The ANR may file its motion to dismiss and other parties may file written responses in accordance with the terms set forth in the Order below.

III. STANDARD OF REVIEW AND SUPPLEMENTATION OF THE RECORD

Pursuant to 3 V.S.A. § 2873(c)(4), the standard of review in this proceeding is appellate. Therefore, this appeal is governed by the procedural requirements set forth in Rule 30 of the Board's Rules of Procedure. The Board may affirm, reverse with directions to the ANR, remand to the ANR for reconsideration or further proceedings, or modify the decision of the ANR, as the case may warrant.

The record on appeal consists of all documents and materials reviewed or considered by the ANR in making its decision. This record is on file at the Board's office and available for inspection and copying. Pursuant to Rule 30(A), any party may supplement this record, with the Board's approval, with any materials which were before the ANR but omitted from the agency's document list (see enclosure) or any material offered to the ANR prior to and in respect to its decision but not considered by that agency in accordance with the terms set forth in the Order below.

Either prior to or **at** the prehearing conference, the appellant submitted to the Board for its consideration and supplementation of the record copies of: a blank form, "Application for Single Lot Subdivision" (Form PD 1, Effective 3/14/90); the "Vermont Health Regulations, Chapter 5, Sanitary Engineering," n.d. but last amended 4/28/79; the Environmental Protection Rules (effective

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September 10, 1982); a Warranty Deed (Dorset Book 64, page 312-314), dated May 8, 1995, from Schoterman to Getty; a Warranty Deed (Dorset Book 60, page 357-359), dated November 4, 1983, from Squiers to Schoterman; a letter, dated May 7, 1986, from David R. Swift, Regional Engineer, to Edgar T. Campbell, Esq., re: Vernon C. Squires, [sic] property in East Dorset; 8/4/92 notations concerning well for Lot #2, Butternut Glen subdivision, East Dorset, on Frost, Inc., stationery and purportedly signed by Jack Frost; sketch map and notations related to well serving Lots #2 and 4 in Butternut Glen subdivision, dated 10/14/92, and purportedly signed by John P. Stannard, Stannard Co., Inc.; and septic system design, drawing # CE-1065, prepared for Vern Squires [sic], by Erickson, Dern, Lattuga Associates, Inc., dated 4/10/86, with notations and signatures purportedly added by David R. Swift, Vernon Squiers, and Raymond Dean.

Other parties may file objections to the above described documents offered by the appellant for supplementation of the record and/or submit their own requests for supplementation in accordance with the terms set forth in the Order below.

IV. BRIEFING AND ORAL ARGUMENT

The parties may submit written memoranda and argument to the Board with reference to the record, statutes, rules and other legal authorities relevant to this matter. The parties may request oral argument before the Board, although the scheduling and conduct of such argument shall be within the discretion of the Board. Terms governing the filing of memoranda and requests for oral argument are set forth in the Order below and may be augmented by a Supplemental Order.

V. STENOGRAPHIC RECORD

Any oral argument scheduled in this matter, including argument on preliminary matters, shall be recorded by electronic sound recording device. Upon the written request of any party filed in accordance with the terms of the Order below, oral argument will be recorded by a qualified stenographer in addition to electronic sound recording. The party requesting a stenographic recording shall be responsible for arranging the appearance of, and payment to, the stenographer. A transcript shall be prepared by the stenographer on the request of any party and a copy shall be provided to the Board without cost. The stenographic and transcription expenses shall be borne by the party requesting the stenographic recording; however, that party shall be reimbursed on a pro-rata basis by any other party requesting a copy of the hearing transcript. See Rule 28(C) of the Board's Rules of Procedure.

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VI. CONTINUANCE

At the prehearing conference, the appellant and the representative from the ANR discussed the possibility of engaging in discussions to resolve this dispute without further litigation. If the parties to this proceeding agree that additional time is required to determine whether settlement is feasible prior to the Board's consideration of the ANR's motion to dismiss, then they should file a joint request for continuance with the Board in accordance with the terms set forth below.

VII. DISCLOSURES

At the prehearing conference, the current Board members were identified by name (Chair William Boyd Davies, Mark **DesMeules**, Stephen Dycus, Ruth Einstein, and Jane Potvin) and present professional affiliations. No party sought additional disclosures or **recusals** by the September 23, 1994, deadline set forth in the draft prehearing conference report and order.

VIII. SUPPLEMENTAL ORDER

If a continuance is requested and granted, a Supplemental Order reflecting a new schedule for filing deadlines shall be issued. If no continuance is requested and the Board denies the ANR's motion to dismiss, a Supplemental Order reflecting additional filing deadlines shall be issued.

IX. ORDER

1. The appellant is a party to this proceeding until such time, if any, as the Board determines that he lacks standing or this matter should be dismissed for lack of jurisdiction.

The ANR is a party of right pursuant to Rule 22(A)(4) of the Board's Rules of Procedure.

Joseph and Marghenita Coppola are **intervenors** as of right, pursuant to Rule 22(A)(7) of the Board's Rules of Procedure.

2. The deadline for filing additional requests for disclosures was **4:30** p.m., September 23, 1994. Since no party sought additional disclosures from any Board member concerning any actual or potential conflicts of interest, it is presumed that they have waived objection to the participation of the Board's members in this proceeding.
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3. On or **before 4:30** p.m., September 30, 1994, the parties may file a joint request for continuance with the Board if they believe that a settlement in this matter might be facilitated by the grant of such a continuance. Such filing shall state the reason(s) for the requested continuance and identify a proposed date of continuance expiration.
4. On or before **4:30** p.m., October 14, 1994, any party wanting to supplement the record in this matter shall file a written request with the Board. This request should specifically identify the supplemental material and explain whether this material was before the ANR but omitted from the agency's document list or whether it was offered to the ANR prior to and in respect to its decision but not considered by that agency. A copy of the supplemental material shall be attached to the party's request.

The appellant, who has already supplied the Board with copies of certain documents he would like to have supplement the record (see III. above), should also provide a written explanation as to whether this material was before the ANR but omitted from the agency's document list or whether it was offered to the ANR prior to and in respect to its decision but not consider by that agency.

5. On or before **4:30** p.m., October 21, 1994, any party objecting to the supplementation of the record, shall file a written response stating clearly his or her objection and the reason(s) thereof.
 6. On or before **4:30** p.m., October **28**, 1994, the ANR shall file with the Board its motion to dismiss, supported by legal memorandum. If such a motion is received, the Board may schedule oral argument, if requested by a party.
 7. On or before **4:30** p.m., November **14**, 1994, any party wishing to respond to the ANR's motion to dismiss shall file with the Board a written response, supported by legal memorandum, and any request for oral argument.
 8. Parties in this proceeding shall file an original and five (5) copies of any motions, memoranda, or other filings with the Board, and mail one copy to each of the persons listed as parties (not under "For Your Information") on the attached Certificate of Service. 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 parties. The Board does not accept filings by FAX.
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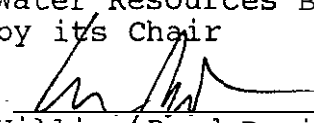
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9. Pursuant to Rule 24(B) of the Board's Rules of Procedure, this order shall be binding on all persons who have received notice of the prehearing conference, unless there is a timely objection to the Order, or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Dated at Montpelier, Vermont, this & day of September, 1994.

Water Resources Board
by its Chair



William Boyd Davies