

State of Vermont  
WATER RESOURCES BOARD

In re: Robert A. Gillin (Encroachment Permit)  
Docket No. MLP-94-01

Authority:  
29 V.S.A. § 406

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal filed by Robert A. Gillin, Trustee, Gillin Living Trust (appellant), seeking reversal of a decision, dated June 8, 1993, of the Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), granting to the Department of Fish and Wildlife (DFW), ANR, an extension in the construction completion deadline, authorized in Management of Lakes and Ponds (MLP) Permit No. 90-13, for a boat launch access at Holcomb Bay on Lake Champlain, Isle La Motte, Vermont. As explained below, the Water Resources Board (Board) affirms the decision of the DEC, ANR, and modifies Conditions 2 and 7 of MLP Permit No. 90-13 to reflect an extension of the construction completion deadline to November 1, 1995.

I. PROCEDURAL HISTORY

On February 15, 1990, the DFW filed an application with the DEC, as required by 29 V.S.A. § 404(a), for a permit authorizing construction associated with two boat access ramps at Holcomb Bay in the Town of Isle LaMotte, Vermont. On September 20, 1990, the DEC issued Permit No. 90-13 with conditions for the proposed encroachment. The permit established a construction completion deadline of November 1, 1991.

This permit decision was appealed to the Board on October 1, 1990, by Robert A. Gillin, the appellant in the present appeal. The Board conducted a de novo hearing pursuant to 29 V.S.A. § 406, and issued an order upholding the issuance of the permit and extending the construction completion deadline to November 1, 1992. In re: Appeal of Robert A. Gillin, Decision, Docket No. 90-11 (September 26, 1991). Although the appellant sought reconsideration of this decision, he did not file a timely appeal with the Grand Isle Superior Court pursuant to 29 V.S.A. § 407 once his request for reconsideration was denied.

Following the issuance of the Board's decision, the appellant unsuccessfully challenged the authority of the DFW to construct the gravel boat ramp in a summary judgment action before the Grand Isle Superior Court and in an appeal to the Vermont Supreme Court. Robert A. Gillin v. Department of Fish & Wildlife, No. 93-272 (Vt. Sup. Ct. Dec. 21, 1993).

During the pendency of this litigation, the construction completion date set forth in the Board's order expired. In April 1993, the DEC received a request from DFW to extend the construction completion date. On June 8, 1993, the DEC issued a decision

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extending the deadline set forth in MLP Permit No. 90-13, to November 1, 1994.

On June 18, 1993, appellant Gillin appealed this decision to the Board. The Board's staff determined that the appellant's filing was substantially incomplete and should not be docketed until he had supplemented this filing in accordance with Rule 18(A) of the Board's Rules of Procedure. Appellant Gillin, rather than pursuing administrative review pursuant to Rules 18(B) and 16 of the Board's Rules of Procedure, filed an appeal with the Grand Isle Superior Court pursuant to 29 V.S.A. §407. The court dismissed this appeal based on the appellant's failure to exhaust his administrative remedies, and the matter was remanded for further action by the Board.

Notice of the appeal and prehearing was issued by the Board on March 4, 1994, and published in The Islander, a newspaper of general circulation in Grand Isle County, Vermont, on March 15, 1994. In addition to appellant Gillin, those entering timely appearances in this proceeding and subsequently obtaining party status were: DFW, the Town of Isle LaMotte, and Marion Dean, an owner of property adjoining the proposed boat access facility.

By staff memorandum, dated April 1, 1994, these persons were instructed concerning the procedures and deadlines for obtaining party status, for seeking Board disclosures and recusals, for obtaining a stenographic record of the proceeding, and for submitting briefs, witness lists, and exhibit lists, and other filings with the Board. These filing requirements and deadlines were incorporated in an Order on Preliminary Matters issued by the Board Chair on April 7, 1994.

On May 18, 1994, the Chair issued a Supplemental Order on Preliminary Matters. This addressed, among other things, outstanding party status issues, the process for obtaining administrative subpoenas, and the filing schedule. The Chair denied the appellant's request for Board member recusals and ruled on the appellant's objection to the schedule of filing deadlines. He also ruled that the DEC was not required to be a party to the proceeding and granted party status to Marion Dean.

On May 20, 1994, the appellant and DFW each filed legal memoranda, lists of witnesses, lists of exhibits, and exhibits. On May 31, 1994, the appellant and DFW filed reply briefs. No other party timely filed submissions with the Board.

On May 27, 1994, the appellant filed a notice of appeal with the Grand Isle Superior Court, objecting to the Chair's preliminary ruling of May 18, 1994, that DEC was not a party to the Board pro-

ceeding. On June 16, 1994, the Board filed a Motion to Dismiss with the court.

A de novo hearing before the Board was held in Montpelier, Vermont, on July 22, 1994.<sup>1</sup> The Board hearing and deciding this matter consisted of Chair William Boyd Davies, Mark DesMeules, Ruth Einstein, and acting member Kathleen Scheele.<sup>2</sup> Parties participating in the Board hearing were the appellant, appearing pro se, and the DFW, represented by N. Jonathan Peress.

The parties were directed to file post-hearing memoranda: the appellant, by August 1, 1994, and the DFW by August 5, 1994. The appellant requested and obtained a one-day extension and filed Conclusions and Memorandum of Law on August 2, 1994. The DFW was authorized to file its responsive post-hearing memorandum on August 8, 1994, and did so accordingly. DFW's memorandum was filed on August 8 by ANR General Counsel, John B. Kassel, who entered his appearance for the DFW. On August 8, 1994, the appellant filed a Motion to Strike DFW Exhibits. On August 17, 1994, the appellant filed a Motion to Strike DFW's Memorandum and a Motion for Judicial Notice of Adjudicative Facts. On August 18, 1994, DFW filed a second post-hearing memorandum in response to appellant's filing of August 8.

The Board deliberated in this matter on August 12 and 18, 1994. On August 18, 1994, following a review of the evidence and the parties filings, the Board declared the record complete and adjourned the hearing.

This matter is now ready for decision. The following Findings of Fact and Conclusions of law are based exclusively on the record developed in this proceeding. To the extent that any party proposed findings of fact in its post-hearing filing and these are

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<sup>1</sup> A hearing in this matter was originally scheduled for June 1, 1994. However, due to difficulties in obtaining a quorum and the absence of the Chair, the hearing was rescheduled and noticed for June 22, 1994.

<sup>2</sup> Board member Jane Potvin recused herself from participation in this proceeding prior to docketing. Therefore, the Board, by its Chair, appointed former Board member Kathleen Scheele to serve in Ms. Potvin's absence. 10 V.S.A. § 905(1)(F); Order of Appointment of Acting Board Member, June 22, 1994. Member Mark DesMeules, who was unable to attend the entire hearing on the merit, reviewed the record of the proceeding. Member Stephen Dycus was absent and therefore did not participate.

included below, they are granted; otherwise, they are denied.

## II. RULINGS

### A. Matters decided at hearing

At the hearing, the Board provided the appellant an opportunity to request review of the Chair's preliminary ruling, contained in the Supplemental Order on Preliminary Matters, dated May 18, 1994, declaring that DEC is not a necessary party to this proceeding.<sup>3</sup> The Board heard argument from the parties concerning the Chair's ruling, deliberated, and informed the parties on the record of its affirmance of the Chair's ruling of May 18, 1994, concerning DEC's party status.<sup>4</sup>

The Board also provided the appellant an opportunity to present argument concerning whether the Board lacks jurisdiction to hear his appeal on the merits because the appellant had filed an appeal with the Grand Isle Superior Court. The Board heard argument from the parties concerning this issue, deliberated, and declared on the record its ruling that the appellant's filings in superior court did not divest the Board of jurisdiction or stay the Board proceeding on the merits.

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<sup>3</sup> Item 2, Supplemental Order on Preliminary Matters (May 18, 1994) states:

The Department of Environmental Conservation (DEC), Agency of Natural Resources, is not a party to this proceeding. Hearings before the Water Resources Board (Board), pursuant to 29 V.S.A. § 406(b) are de novo. Although the DEC is entitled by statute to enter an appearance in appeals brought under 29 V.S.A. § 406(c) and Board Rule 22(A), it is not required to be a party.

The DEC did not enter a timely appearance in this matter. It has indicated no intent to assert its right to participate in this proceeding. The Board has no power to compel the DEC to be a party.

<sup>4</sup> For this preliminary matter, Chair Davies recused himself, and Vice-Chair DesMeules conducted the hearing. Board members participating in the review of Chair Davies' May 18, 1994, preliminary ruling were: Mark DesMeules, Ruth Einstein, and Kathleen Scheele.

B. Post-hearing motions

1. Appellant's Conclusions and Memorandum of Law

In his post-hearing filing, Conclusions and Memorandum of Law, filed August 2, 1994, the appellant raises several objections to the procedures used by the Board in the conduct of its hearing. First and foremost, the appellant suggests that the Board Chair should have removed himself from the proceeding due to "bias, prejudice and personal conflict shown toward the appellant." To support his argument that the Chair had acted unfairly and with bias, the appellant cites statements by member Davies from the transcript in the hearing before the Board in the previous encroachment appeal, In re: Appeal of Robert A. Gillin, Docket No. 90-11.

The Board Chair addressed the appellant's disclosure and recusal requests in the Supplemental Order on Preliminary Matters, dated May 18, 1994, at Item 4. The appellant did not request review of the Chair's preliminary ruling prior to hearing, pursuant to Rule 21 of the Board's Rules of Procedure. Nevertheless, the Board feels compelled to respond to the appellant's suggestion that a member's statements in a previous proceeding, designed to keep the proceeding within the bounds of the Board's jurisdiction and the issues on appeal, indicate personal bias and prejudice against the appellant.

The Vermont Supreme Court has stated that "[t]he presumption of honesty and integrity which attaches to administrative tribunals is not rebutted by bare allegations of bias." In re: Judy Ann's Inc., 143 Vt. 228, 233 (1983). Moreover, mere participation of a Board member in a previous proceeding involving the same parties and resulting in an adverse decision to the appellant, does not provide evidence of bias. Id. at 235. The fact that a member of the Board (now Chair of the Board) made statements in both the previous and present proceedings to control the scope of examination, without a showing of clear abuse of discretion, does not amount to reversible error or a denial of due process. See State v. Miller, 146 Vt. 164 (1985); State v. Smith, 145 Vt. 121 (1984); accord State v. Baldwin, 140 Vt. 619 (1982); State v. Young, 139 Vt. 535 (1981).

Therefore, to the extent that appellant's Conclusions and Memorandum of Law request that the Board conduct new or additional hearings under the supervision of a new Chair to permit further

cross-examination of ANR employees, his request is denied.<sup>5</sup>

2. Gillin's Motion to Strike DFW Exhibits

On August 8, 1994, the appellant filed a Motion to Strike Department of Fish and Wildlife Exhibits. The Board finds that none of the reasons identified by the appellant in this motion support his request to strike.

DFW is a proper party to this proceeding and the exhibits are relevant. The standard for determining admissibility in contested case proceedings is found in the Vermont Rules of Evidence, as modified by 3 V.S.A. § 810. The Rules of Evidence cited by the appellant do not stand for the propositions he has offered.

The appellant was provided ample opportunity to cross-examine ANR witnesses within the scope of the proceeding. To the extent that the appellant's examination of ANR employees concerning the "truth" of the DFW's exhibits were for the purpose of supporting his common law fraud complaint,<sup>6</sup> his questions were beyond the jurisdiction of the Board and the scope of this proceeding.

The appellant's inference that writings offered by the DFW were incomplete and that he was entitled to other parts of those writings was not raised as an objection either at the time the DFW prefiled its exhibits or at hearing. Indeed, the appellant stipulated to the admission of DFW Exhibits 1, 2, 4, 5, 6 and 7 at hearing, and the Board's decision in In re: Appeal of Robert A. Gillin, Docket No. 90-11 (DFW Exhibit 3) was judicially noticed. Even if his motion to strike were timely (which it is not), the appellant has failed to identify which exhibits specifically lack foundation, are incomplete, or inaccurate, and failed to indicate how he has been prejudiced by the admission of these exhibits.

For the foregoing reasons, the appellant's motion to strike DFW's exhibits is denied.

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<sup>5</sup> Chair Davies did not participate in the review and decision of this issue. Participating Board members were: Mark DesMeules, Ruth Einstein, and Kathleen Scheele.

<sup>6</sup> See Appellant's Brief in Rebuttal to Department of Fish and Wildlife Defensive Argument of Appeal at 2-5, filed May 31, 1994.

3. Appellant's Motion to Strike DFW Memorandum

On August 17, 1994, the appellant filed a Motion to Strike Department of Fish and Wildlife Memorandum. The reason offered by the appellant in support of this motion was that ANR General Counsel John B. Kassel had filed the DFW's post-hearing memorandum on August 8, 1994, not N. Jonathan Peress who had previously appeared as representative for the DFW. Because Mr. Peress had not filed a request for leave to withdraw his appearance as representative for DFW, the appellant sought to strike Mr. Kassel's filing.

The transcript of the hearing reveals that Mr. Peress placed the Board and the appellant on notice that he would no longer be with the DFW after July 31, 1994, and that the DFW's reply memorandum would need to be filed by someone other than himself. Transcript of hearing (July 22, 1994) at 111-113. Mr. Kassel entered his appearance for the DFW on August 8, 1994, the day he filed the DFW's post-hearing memorandum. Even if Mr. Peress's statements on the record did not amount to a formal withdrawal, the DFW was entitled to representation by counsel of its choosing.

The Board determines that Mr. Kassel is a proper representative of the DFW in accordance with Rule 23(B) of the Board's Rules of Procedure. Therefore, the appellant's motion to strike the DFW's post-hearing memorandum of August 8, 1994, is denied.

4. Appellant's Motion for Judicial Notice of Adjudicative Facts

On August 17, 1994, the appellant filed a Motion for Judicial Notice of Adjudicative Facts. The appellant stated four propositions of law based on a reading of 29 V.S.A. §§ 405 and 406 and offered his legal conclusion concerning the meaning of these provisions as they relate to the party status of DEC.

The Board may reference and construe applicable provisions of law, whether or not requested by a party, and at any stage of the proceeding. Since the gravamen of this appeal is the DEC's application of 29 V.S.A. ch. 11, the Board has already "noticed" the specific statutory provisions identified by the appellant in his motion. Nevertheless, the Board declines to reach the legal conclusion stated by the appellant in the final paragraph of his motion -- that the "DEC is a party appealed from and cannot be removed by this Board" from the present cause of action. Appellant's Motion for Judicial Notice of Adjudicative Facts at 2. Therefore, appellant's motion for judicial notice of adjudicative

facts is denied.<sup>7</sup>

### III. ISSUES

Whether or not the DEC had authority to grant an extension of the construction completion deadline of the boat launch project at Holcomb Bay?

Whether the issuance of an extension is appropriate?

### IV. FINDINGS OF FACT

1. The Department of Environmental Conservation (DEC) and Department of Fish and Wildlife (DFW) are departments of the Vermont Agency of Natural Resources (ANR).
2. The DEC issues permits for encroachments in Vermont's public waters.
3. On September 20, 1990, the DEC issued MLP Permit No. 90-13, authorizing construction by the applicant, DFW, associated with two boat access ramps at Holcomb Bay, Lake Champlain, in the Town of Isle LaMotte, Vermont.
4. Permit No. 90-13 was issued for a period of 30 years.
5. The construction completion deadline established by the permit is November 1, 1991.
6. The permit provides that an extension of the time for completion of construction may be granted for cause.
7. On September 26, 1991, the Water Resources Board extended the construction completion deadline of MLP Permit No. 90-13 to November 1, 1992, as part of its order in In re: Appeal of Robert A. Gillin, Decision, Docket No. 90-11.

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<sup>7</sup> The Board notes that an administrative body may take notice of judicially cognizable facts in accordance with 3 V.S.A. §810(4). This provision requires that parties (in this instance, parties other than the appellant) must be provided an opportunity to contest any material so noticed. Since the Board summarily denies the appellant's motion, it need not provide additional time for the filing of objections.



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8. Litigation initiated by the appellant and involving the Holcomb Bay access project did not terminate until December 1993. Robert A. Gillin v. Department of Fish & Wildlife, Docket No. 93-272 (Vt. Sup. Ct. Dec. 21, 1993).
9. The DFW did not begin or complete construction on the access ramps at Holcomb Bay by the November 1, 1992, construction completion deadline.
10. The DFW did not begin construction by the November 1, 1992, construction completion deadline due to funding problems and delays in the encroachment permit review process due to litigation involving the appellant.
11. On April 16, 1993, John Guilmette, Facilities Engineer, Agency of Natural Resources, filed with the DEC a letter on behalf of the DFW, requesting a new construction completion deadline of November 1, 1996.
12. The DEC provided written notice of DFW's request for extension of the construction completion deadline to the appellant and other persons interested in MLP Permit No. 90-13. The DEC provided these persons with an opportunity to submit written comment on the request.
13. The appellant received notice of DFW's construction deadline extension request and filed written comment with the DEC.
14. On June 8, 1993, the DEC issued a decision extending the construction completion deadline set forth in MLP Permit No. 90-13, to November 1, 1994.

**V. CONCLUSIONS OF LAW**

The Board has given careful consideration to the various concerns raised by the appellant in this proceeding, to the extent that they are relevant to the scope of the Board's review under applicable Vermont law, most notably 29 V.S.A. ch. 11. However, after a careful review of the testimony, exhibits, and filings in this de novo proceeding, the Board concludes that: (1) the DEC had authority to grant the requested construction completion deadline extension; (2) the extension of that deadline was appropriate; and (3) the decision of the DEC to grant the deadline extension should be affirmed and a new construction completion deadline of November 1, 1995, should be granted.

The DEC has authority to grant encroachment permits, after investigation and a determination of the public good. 29 V.S.A.

§ 402(2) Supp. 1993; 29 V.S.A. § 405. On appeal, the Board has authority to conduct a de novo hearing and affirm, modify, or reverse the permit decision of the DEC. 29 V.S.A. § 406. An encroachment permit may be granted, containing "any conditions that the department or board considers necessary to protect the public good." 29 V.S.A. § 408(a). Although the DEC does not have express authority to amend permit conditions under 29 V.S.A. ch. 11, such authority is an implied and necessary power to the administration of a permitting program in furtherance of responsible management of Vermont's lakes and ponds. See 29 V.S.A. § 401 (Policy), et seq.

Since the beginning of this appeal, the appellant has asserted that the DFW's permit "expired" several months prior to the request for and issuance of the construction completion deadline amendment. However, an examination of Condition 9 of MLP Permit No. 90-13 reveals that the permit was issued for a period to expire 30 years from the date of issuance. In other words, the expiration date of the permit is September 20, 2020.

Conditions 2 and 7 of MLP Permit No. 90-13, as previously amended by the Board, provided for a construction completion deadline of November 1, 1992.<sup>8</sup> This deadline had expired by the time the DFW sought an extension. Nevertheless, because the permit

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<sup>8</sup> MLP Permit No. 90-13, as originally issued by the DEC, contained the following relevant conditions:

2. No work shall take place prior to Labor Day nor after November 1 of 1990 or 1991. Once work commences, it will be accomplished as quickly as possible to avoid prolonged disturbance of the surrounding area.
7. The permittee shall complete the approved construction by November 1, 1991. An extension of time may be granted for cause. Request for an extension should be submitted at least one month prior to the above date.
9. This permit shall expire 30 years from the date of this permit. ...

The deadlines in Condition 2 and 7 were subsequently amended by the Board in its order of September 26, 1991. Interestingly, the appellant did not challenge the Board's authority to grant an extension of the construction completion deadline in 1991.

itself had not expired, the DEC had the power to grant a permit amendment. Under the express terms of Condition 7, an extension the construction completion deadline could be granted "for cause." After notice and opportunity for public comment, the DEC determined that an extension of the construction completion deadline was warranted given the reasons presented by DFW.

The Board is empowered to affirm or modify a permitting decision of the DEC. 29 V.S.A. § 406(c). Having reviewed the record of its own proceeding in this matter, the Board determines that DFW has demonstrated "cause" in support of the requested extension. As the witnesses, exhibits, and decisions of the Board and courts indicate, the Holcomb Bay access project was the subject of lengthy litigation, initiated by the appellant. While this litigation was pending, the permit construction deadline established by the Board expired and funding for the project was lost. The letter written by Mr. Guilmette requesting the deadline extension and Mr. Guilmette's testimony at hearing address the problem of delays and the loss of funding necessitating the requested extension. The Board, in reviewing this record, determines that there is sufficient evidence to support a finding of "cause" and concludes that an extension of the construction completion deadline, as requested by the DFW at hearing,<sup>9</sup> is appropriate.

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<sup>9</sup> See Transcript of hearing (July 22, 1994) at 110.

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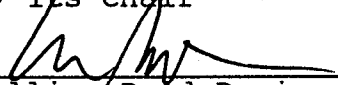
VI. ORDER

1. The decision of the DEC granting an extension to the construction completion deadline of MLP Permit No. 90-13 is hereby affirmed.

2. Conditions 2 and 7 of MLP Permit. No. 90-13 are modified to reflect an extension of the construction completion deadline to November 1, 1995.

Dated a Montpelier, Vermont, this 23 day of August, 1994.

Vermont Water Resources Board  
by its Chair

  
\_\_\_\_\_  
William Boyd Davies

Concurring:

William Boyd Davies  
Mark DesMeules  
Ruth Einstein  
Kathleen Scheele