

State of Vermont
WATER RESOURCES BOARD

In re: Herbert N. **Lackshin** (Denial of Conditional Use
Determination #92-386), Docket No. CUD-94-14

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On December 19, 1994, the Water Resources Board (Board) received a notice of appeal filed by Herbert N. **Lackshin** seeking review of a decision of the Agency of Natural Resources (ANR) granting Conditional Use Determination (CUD) #92-386 to George and Bonilyn Kablesh. This CUD authorizes the placement of a dwelling, driveway, septic tank and pump station in a Class II wetland and buffer zone located east of the Quechee-Hartland Road approximately one mile south of Quechee, Vermont. Mr. Lackshin, an adjoining property owner, filed his appeal pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules.

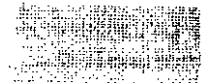
On January 10, 1995, this appeal was deemed complete and docketed. On February 1, 1995, a Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and on February 4, 1995, it was published in the Valley News. Rule 18(C) and 20 of the Board's Rules of Procedure.

Entering a timely written appearance was James A. Caffry, Esq., for the Agency of Natural Resources (ANR).

On February 24, 1995, at 10:30 a.m. (Eastern Standard Time), a prehearing conference was convened by teleconference at the Board's Conference Room, 58 East State Street, Montpelier, Vermont, by the Board's delegate, **Kristina L. Bielenberg, Esq.**, pursuant to Rule 24(A) of the Board's Rules of Procedure. This prehearing was continued to 10:30 a.m., March 10, 1995 (Eastern Standard Time) to allow the appellant an opportunity to obtain and review the Findings of Fact, Conclusions of Law and Decision issued by ANR on November 21, 1994. The following persons appeared and participated on February 24 and March 10, 1995:

Herbert N. Lackshin, Esq., appellant
John C. **Candon, Esq.**, Hughes, Miller & Candon, for George
And Bonilyn Kablesh, CUD applicants
James A. Caffry, Esq., for ANR

On March 20, 1995, a draft Prehearing Conference Report and Order was circulated to the above persons for comment. On April 6, 1995, the Board received comments from the appellant. A final **Prehearing Conference Report and Order is now ready for issuance.**



II. ISSUES

Based on the appellant's Notice of Appeal and his representations at the Prehearing Conference, the issues in this matter appear to be:

(a) Whether, pursuant to Section 8.5(a) of the Vermont Wetland Rules, the proposed placement of a dwelling, driveway, septic tank and pump station in a Class II wetland and buffer zone will have an undue adverse effect on the wetland's protected functions. The ANR in its decision granting the CUD found that the protected functions for this wetland included the following: water storage for flood water and storm runoff (function 5.1, Section 5 of Vermont Wetland Rules); surface and groundwater protection (function 5.2); wildlife and migratory bird habitat (function 5.4); and open space and aesthetics (function 5.9). CUD #92-386, Finding 12 (Nov. 21, 1994). The appellant does not contest this finding.

(b) If the adverse impacts of the project on any of the above listed functions are more than minimal, has the applicant used measures to mitigate those impacts in accordance with Section 8.5.

At the prehearing conference, the appellant indicated that he contests the following Findings of Fact contained in the decision authorizing CUD #92-386: 8, 9, 11, 14, 15, 16, 17, 19, 21, 22, 23, 27, and 28. Additionally, the appellant argues that there is no "finding" that the CUD is personal to the applicants and does not run with the land. The appellant also contests the ANR's conclusions of law and decision (conditions) to the extent that they fail to address the other lots created by the applicants, specifically lot #2; do not specify the size of the proposed house; do not limit the CUD to the applicants, personally; and contain no deed restrictions concerning future use and development of the site by subsequent owners. In his written comments in response to the draft Prehearing Conference Report and Order, the appellant noted additional alleged inconsistencies between Findings of Fact 9 and 11 and Conclusion of Law E.

III. 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. The Board shall issue an order affirming, reversing or modifying the act or decision of the Secretary of ANR within ten days of the conclu-

sion of the hearing. The applicants for the CUD under appeal have the burden of proof by a preponderance of the evidence that they are entitled the CUD, applying the standards of Sections 8 and 5 of the Vermont Wetland Rules.

IV. PRELIMINARY ISSUES

In his Notice of Appeal and at the prehearing conference, the appellant asserted that the primary reason cited in the applicants' request for the CUD is Mrs. **Kablesh's** health. He therefore asked the Board to make a determination that the approval of the CUD in favor of the applicants is personal to them and consequently does not run with the land.

The proceeding before the Board is de novo. Therefore, any issue concerning the relevance of Mrs. Kablesh's health to the issuance of a CUD and what conditions, if any, should properly be imposed, will be decided anew by the Board. Because determination of this issue will require reference to the factual record and because the issue of whether Mrs. Kablesh's health should be considered and with what consequences is best addressed in the context of mitigation analysis under Section 8.5(b) of the Vermont Wetland Rules, the appellant's request will not be treated as a preliminary issue. Rather, the Order which follows sets forth deadlines for written memoranda and responses, and any party wishing to address the questions raised by the appellant may do so after the filing of all prefiled testimony and evidence.

V. WITNESSES AND EXHIBITS

(a) At the prehearing conference, the appellant identified the following potential witnesses: Herbert Lackshin, himself; Cheryl Herman, real estate agent for the applicants; and several unnamed residents of the Meadowland Farms subdivision. The appellant requests from the applicants written proof of Mrs. Kablesh's disability, such a letter from her doctor, and the proposed house plan.

(b) The applicants propose to call the following witnesses: George and Bonilyn Kablesh; and John Bruno, civil engineer.

(c) The ANR does not propose to call witnesses or offer exhibits.

(d) At the prehearing conference, the participants agreed to prefile witness and exhibit lists, testimony, exhibits, and other

filings with the Board in accordance with a schedule and terms established in the Order below and any Supplemental Prehearing Order. The Board's delegate advised the parties to file prefiled testimony in question and answer format as provided by the Order below.

(e) The Board's delegate advised the parties that in order for the Board to notice any administrative decisions or documents in the possession of the ANR (such as the application and supporting exhibits), these documents must be offered as exhibits in the Board proceeding in accordance with the terms of the Order below and any Supplemental Prehearing Order.

(f) Should any party be unable to secure the cooperation of another party in obtaining documents or witnesses for this proceeding, the Board's delegated advised them of the subpoena process set forth in the Vermont Administrative Procedure Act, 3 V.S.A. §§ 809(h), 809a and 809b.

VII. STENOGRAPHIC RECORD

All hearings before the Board are recorded by electronic sound recording device. Parties are reminded that if they anticipate that this case might be appealed to superior court they should retain the services of a court reporter to create a transcript of the proceeding, consistent with the procedures set forth in Rule 28(C) of the Board's Rules of Procedure.

IX. DISCLOSURES

At the prehearing conference, the current Board members were identified by name (Chair William Boyd Davies, Stephen **Dycus**, Ruth Einstein, Gail Osherenko and Jane Potvin) and their present and past professional affiliations. Additional information about members Einstein and Osherenko were provided to the parties in the cover memorandum to the draft Prehearing Conference Report and Order, mailed on March 23, 1995.

No party sought additional disclosures with respect to the above-named Board members by the April 14, 1995, deadline set forth in the proposed Order at 2. Any party objecting to a Board member's participation in this proceeding should do so in accordance with the terms set forth in the Order below.

X. SUPPLEMENTAL PREHEARING ORDER

Any Supplemental Prehearing Order setting forth additional prehearing requirements shall be issued only after consultation with the parties.

XI. HEARING SCHEDULE

The parties indicated that a hearing in this matter would require two days for cross-examination of witnesses and a site visit. Counsel for the applicant indicated that he would be unavailable from July 1 to July 15, 1995. The appellant requested that the hearing be held some time during the last two weeks of August 1995.

XII. ORDER

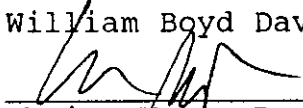
1. The following are parties as of right: the appellant, pursuant to 10 V.S.A. § 1269 and Section 9 of the Vermont Wetland Rules: George and Bonilyn Kablesch, pursuant to Rule 22(A)(6) and (7) of the Board's Rules of Procedure; and the ANR, pursuant to Rule 22(A)(4) of the Board's Rules of Procedure.
 2. On or before 4:30 p.m., Friday, May 5, 1995, any party objecting to the participation of a Board member in this proceeding shall file a written objection with the Board. This filing should state the reason(s) for the objection(s) and any facts known to the party or petitioner which might require the Board member's recusal. Failure to file a timely request may be deemed a waiver of objection to the participation of a Board member.
 3. On or before 4:30 p.m., Friday, May 5, 1995, the applicants shall file their final list of witnesses and exhibits, pre-filed testimony for all witnesses they intend to present, and exhibits. For each expert witness, a resume or other statement of qualifications shall be filed.
 4. On or before 4:30 p.m., Friday, May 26, 1995, all other parties shall each file their final lists of witnesses and exhibits, prefiled testimony for all witnesses they intend to present, and exhibits. For each expert witness, a resume or other statement of qualifications shall be filed.
-

5. On or before **4:30 p.m.**, Friday, June 16, 1995, the applicants shall file lists of rebuttal witnesses and exhibits, and prefiled rebuttal testimony and exhibits. For each expert witness, a resume or other statement of qualifications shall be filed.
 6. On or before **4:30 p.m.**, Friday, July 7, 1995, all other parties shall each file lists of prefiled rebuttal witnesses and exhibits, and prefiled rebuttal testimony and exhibits. revised lists showing rebuttal witnesses and exhibits. For each expert witness, a resume or other statement of qualifications shall be filed.
 7. On or before **4:30 p.m.**, Friday, July 28, 1995, the parties shall file in writing all objections to the prefiled testimony and exhibits previously identified, or such objections. shall be deemed waived.
 8. On or before **4:30 p.m.**, Friday, July 28, 1995, the parties shall file any memoranda on the legal issues presented by this appeal, including the issue identified by the appellant in Part IV. above.
 9. On or before **4:30 p.m.**, Friday, July 28, 1995, the parties shall jointly file a written statement and map indicating what they would like the Board to see on any site visit of the involved wetland and buffer zone. The map should indicate the location of parking convenient to the site. The parties should each identify one site visit guide and jointly indicate how much time will be required for the site visit.
 10. On or before **4:30 p.m.**, Friday, August 11, 1995, parties shall file in writing any responses to the objections to prefiled testimony and exhibits filed on July 28, 1995.
 11. On or before **4:30 p.m.**, Friday, August 11, 1995, parties shall file any reply memoranda on the legal issues presented by this appeal, including the issue identified by the appellant in Part IV. above.
 12. On or before **4:30 p.m.**, Friday, August 11, 1995, the parties shall file any stipulated facts.
 13. On or before **4:30 p.m.**, Friday, August 11, 1995, the parties shall jointly file a list of any exhibits for which there is no objection to admission.
-

14. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify.
15. Prefiled testimony shall be filed in question and answer form. Each page and each line of testimony shall be numbered. If prefiled testimony exceeds ten pages, a table of contents should be created.
16. Parties shall file an original and five (5) copies of prefiled testimony, legal memoranda, and all exhibits which are 8 1/2 by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.
Parties are required to file only lists identifying exhibits which are larger than 8 1/2 by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspections and copying by the parties prior to hearing.
17. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. (See attached instruction sheet.)
18. Any hearing scheduled in this matter shall be recorded by electronic sound recording device. Upon the written request of any party, in accordance with Rule 28(C) of the Board's Rules of Procedure, the hearing may be recorded by a qualified stenographer in addition to the Board's electronic sound recording.
19. 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 this Order, or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Dated at Montpelier, Vermont, this 18th day of April, 1995.

William Boyd Davies


Chair, Water Resources Board

State of Vermont
Water Resources Board

In re: **Herbert N. Lackshin**
Docket No. CUD-94-14

PREFILE INSTRUCTIONS SHEET

To **save** time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which can be used to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: A for the Appellant; ANR for the Agency of Natural Resources; KAB for George and Bonilyn Kablesch.

Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Appellant will number its exhibits A-1, A-2, A-3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e.: **A-2A, A-2B**, etc. The labels on the exhibits must contain the words WATER RESOURCES BOARD, In re: Herbert N. Lackshin, Docket No. CUD-94-14, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board upon request; parties must complete the information sought on the stickers prior to the hearing.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case name and number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

Appellant **Herbert N. Lackshin**
LIST OF EXHIBITS

In re: **Herbert N. Lackshin**
Docket No. CUD-94-14

<u>Number</u>	<u>Description</u>	<u>Status</u>
A-1	Prefiled testimony of [Name]	

The Board's staff will use the status column to mark whether the exhibit has been admitted.