

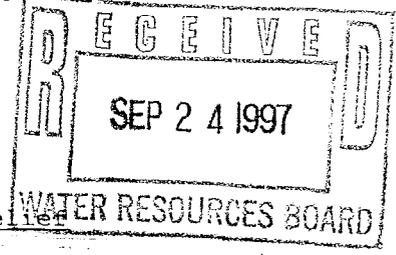
State of Vermont
Washington County, SS

FILED

JA

SEP 22 A 9:32
Washington Superior Court
Docket No. 608-11-95 Wncv &
616-11-95 Wncv
WASHINGTON COUNTY

Robert A. Gillin, Trustee,)
Plaintiff/Appellant,)
v.)
Dept. of Fish and Wildlife,)
and Dept. of Environmental)
Conservation,)
Defendants/Appellees.)



Appeal of Water Resources Board Decision
and Request for Restraining Order/Injunctive Relief
Appellant's Motion to Compel
Opinion and Order

This case is before the court on plaintiff's appeal from an August 23, 1994 Water Resources Board decision (Docket No. 616-11-95 Wncv) and plaintiff's request for injunctive relief (Docket No. 608-11-95 Wncv). These cases were consolidated by Hon. Matthew Katz in the Grand Isle Superior Court on July 28, 1995 and were transferred to Washington Superior Court on October 31, 1995. Oral argument on the merits of these cases was heard on July 22, 1997, the Honorable Alan W. Cheever presiding. Plaintiff appeared pro se; defendants were represented by Mr. John H. Hasen, Esq.

As an initial matter, the court will address plaintiff's concern regarding potentially missing documents in the court file. Plaintiff had the opportunity at the hearing to review the court's file with opposing counsel to ascertain whether certain documents were missing. Plaintiff and Defendant determined that the court did not have the entire file from the Water Resources Board. After an exchange of letters, the defendants requested the Water Resources Board to forward the entire file to the court, which the court has received. Plaintiff then filed a motion to compel the Grand Isle court and the Water Resources Board to provide all documents relating to this case. This motion is, at this point, moot as all documents have been provided. Although plaintiff has not been afforded an additional opportunity to review the file, the court has obtained all documents from the Water Resources Board file and the documents mentioned by plaintiff are included within the material received. Any material outside of the record before the Water Resources Board is not relevant to the appeal, and

therefore the court may proceed with it's decision on the merits.

Procedural Posture

At the heart of this case is the construction of a boat access ramp on Holcomb Bay in Isle La Motte. An initial permit to build the boat ramp was issued by the Dept. of Environmental Conservation in September 1990 with a construction completion deadline of November 1991. In June 1993, the Dept. of Environmental Conservation issued a second decision extending the construction completion deadline to November 1994. This decision was appealed to and affirmed by the Water Resources Board on August 23, 1994. Plaintiff moved the Board to correct manifest errors in the August 23, 1994 decision [hereinafter called the motion for reconsideration]; this motion was denied on October 4, 1994. Plaintiff now appeals the August 23, 1994 decision to this court pursuant to V.R.C.P. 74 and 29 V.S.A. §407.

Standard of Review

Title 29 V.S.A. §407 allows any person aggrieved by an order of the Water Resources Board to appeal to the Superior Court. Appeals from government agency decisions to the Superior Court are governed by V.R.C.P. 74. The standard of review on appeal affords deference to the board's decision. If the findings of fact, taken as a whole, justify the Department's ultimate conclusion, the court will uphold the order. Grievance of Murray, 8 Vt.L.W. 21 (1996). The court will not set aside findings unless they are clearly erroneous. Bigelow v. Vermont Dept. of Taxes, 163 Vt. 33 (1994). Where the findings fairly and reasonably support the agency's conclusions of law the court will uphold the agency's decision. In re N.E. Telephone & Telegraph Co., 159 Vt. 459, 461-462 (1993). Furthermore, "absent compelling indication of error, the interpretation of a statute by the administrative body responsible for its execution will be sustained on appeal." Burlington Electric Dept. v. Vermont Dept. of Taxes, 154 Vt. 332, 337 (1990) (quoting In re R.S. Audley, Inc., 151 Vt. 513, 517 (1989)). The agency's interpretation is to be accepted if it has "warrant in the record" and a reasonable basis in law. NLRB v. Hearst Publications, 322 U.S. 111 (1944).

Discussion

After review of the complete record and the memoranda filed by the parties, the court concludes that the agency's decision was supported by the record before it and has a reasonable basis in law. The court, therefore, affirms the agency's decision.

The plaintiff raises eleven claims of error in his papers; the court has grouped several claims together where the same legal theory is at issue. First, plaintiff argues that his procedural due process rights were violated in several ways. The following are his contentions: that the Water Resources Board refused to accept his appeal on two occasions, that the Board "changed the intent" of his appeal, that the Board addressed two matters not specifically included in the notice¹, that the Dept. of Environmental Conservation was a necessary party to the appeal and should not have been dismissed, and that the Board failed to allow proper examination and cross-examination of the witnesses. Second, plaintiff contends that the Board should not have proceeded with his appeal, after he had filed a temporary restraining order and appealed earlier decisions. Third, plaintiff objects that the Board's order did not address the procedural due process claims he raised in his appeal. Fourth, the plaintiff raises the issue that the construction of the boat ramp began prior to the final decision being entered by the Board and that the final order did not address this violation. Fifth, plaintiff claims that the trial court in Grand Isle county did not address his petition in a timely fashion. Sixth, at the hearing, the plaintiff claimed that the Chair of the Board was biased. Lastly, the plaintiff argues in both his papers and at the hearing that the agency did not address the issue that the boat ramp was on a private road.

The court addresses the last point first. This appeal is from a decision extending the construction deadline. The issue in front of this court is whether there were procedural or substantive errors in the hearing on this issue. The

¹ The first matter was whether the Dept. of Conservation was properly removed by . This issue was raised by appellant on April 11, 1994. The second matter was whether the board had jurisdiction once DEC was removed as a party. The appellant raised this issue prior to the hearing.

court will not reconsider the earlier permit applications, hearings or decisions. Framed in this context, the court must consider whether the status of the road as private was relevant to the extension of the construction deadline. Under title 29 V.S.A. §401 et seq, a permit is needed prior to the construction of any boat ramps. The statute grants the Dept. of Environmental Conservation the authority to issue these permits. Section 401 notes, however, that "[n]o provision of this chapter shall be construed to permit trespass on private lands without the permission of the owner." 29 V.S.A. §401. When issuing a permit, the Dept. must determine whether the permit adversely affects the public good. 29 V.S.A. §403(a).

With these provisions in mind the court determines that the issue of the road was not relevant to the decision presently appealed. Although the issue of potential trespass on a private road may have been relevant to the initial determination of whether the public good was adversely affected, it is not relevant when the modification of an existing permit was sought solely for the period of construction. The sole issue at the hearing was whether the construction period, which had lapsed, should be extended to allow the construction. The permit, in fact, included a provision for extension of the construction period "for cause." The Board need not completely reconsider the validity of the permit when a narrow application of this sort is made and the permit includes the authority for the extension of the construction time period.

The court will address each of plaintiff's other argument in turn. First, the court addresses the due process issues raised by the plaintiff. Due process requires that certain procedural protections be afforded to litigants. U.S. Constitution, Amendments V and XIV. These protections as applied to administrative agencies are, for the most part, codified in the Administrative Procedure Act, 3 V.S.A. §801 et. seq.

Plaintiff's first contention, that the Board improperly refused his appeal, is moot. The court cannot review this issue as the plaintiff was afforded an appeal and, at this time, the court cannot effectively review the denial of appeal when an appeal has been taken. In re Moriarity, 156 Vt. 160 (1991).

Plaintiff also argues that the Board violated his due process rights by changing the intent of his appeal. Although plaintiff has made this assertion, he does not clearly articulate how he was denied a full hearing as a result of this action. Due process and the Administrative Procedure Act entitle a litigant to notice and an opportunity to be heard. 3 V.S.A. §809, In re Vt. Health Service Corp., 155 Vt. 457, 460 (1990). Title 29 V.S.A. §406(b) requires the Board to hold a de novo hearing. Plaintiff was present at and afforded an opportunity to participate in this hearing. From reviewing the record, it appears as though plaintiff objects to the phrasing of the Notice as it was published in the Islander newspaper. See Plaintiff's 3/12/97 letter to Water Resources Board. Plaintiff expressed the issues as follows:

The primary issue is DEC's [the Department of Environmental Conservation's] capricious extension of a long expired DEF [Department of Fish and Wildlife] encroachment permit and other pertinent statutory violations by DEC and DFW.

The published notice indicates that plaintiff appealed from the DEC's extension of the construction completion date for the boat ramp. Upon receiving plaintiff's objection to the Notice, the DEC mailed copies of plaintiff's appeal letter to the service list of interested parties.

Although the parties framed this issue in different words, the act in issue is the agency's decision to extend the construction date pursuant to a letter filed by the DFW. This act was the matter taken up at the hearing. The plaintiff's due process rights were not violated by the publication of the notice. Although plaintiff may have preferred his statement of the appeal, it is not a due process violation to reframe the language. The notice was substantially similar, although differently worded, to plaintiff's appeal letter. In addition, when plaintiff's objection was expressed, the agency took steps to alert other interested parties to his objection and his preferred statement of the appeal.

Plaintiff next contends that the Board did not give him sufficient notice that the preliminary issues he raised would be considered at the July 1994

hearing.² Although the published hearing notice did not detail that these preliminary matters would be addressed, the plaintiff had actual notice that the claims would be considered via a June 2, 1994 letter by the Board's attorney. This letter indicated that objections to the preliminary decision would be taken up at the hearing. In addition, the Board could not have held the hearing without addressing the issues raised by the plaintiff as one was jurisdictional and the other involved a potentially necessary party. The court determines that there was actual notice that the issues would be addressed at the hearing. In addition, the plaintiff did not object at the hearing nor did he ask for a continuance. See generally State v. Emmi, 160 Vt. 377 (1993) (preservation of issues for appeal). He was afforded an opportunity to present his arguments on these matters and, in fact, affirmatively indicated that he wished to raise the issues. Transcript, Hearing 7/22/97 page 8, line 11-12. Therefore, his due process rights were not violated.

The next argument presented by the plaintiff is that the Board improperly dismissed the Dept. of Environmental Conservation as a party. This was not error. The right of appeal under the statute grants the plaintiff a de novo hearing. A de novo hearing is a new hearing on the merits, which requires the initiating party, in this case the Dept. of Fish and Wildlife, to present sufficient evidence to prove its case. Given this procedural posture, it was not error to exclude the Dept. of Environmental Conservation from the hearing.

The last due process issue is whether the Board failed to allow proper examination and cross examination of the witnesses during the hearing. The scope of examination and cross examination is within the agency's discretion. State v. Miller, 146 Vt. 164 (1985), State v. Smith, 145 Vt. 121 (1984). The court has reviewed the transcript of the proceeding in order to determine whether there is an abuse of discretion in this case. Although the Board did interrupt the plaintiff's cross-examination, the court determines that it did not abuse its

² The two issues were the Board's preliminary decision dated May 18, 1994 that the Dept. of Conservation need not participate in the hearing and that the Board had jurisdiction over the proceeding notwithstanding the Dept. of Conservation's absence.

discretion. The Board has the discretion to control the flow and scope of the hearing. Id. It validly limited the scope of the appeal to the merits of the permit in issue and did not allow irrelevant evidence regarding the initial permit to be introduced. This is a valid exercise in discretion, and was not in error.

The second legal issue is whether the Board should have proceeded with plaintiff's appeal when plaintiff had filed actions in the Superior Court. There is no evidence that plaintiff moved to stay the proceedings until the conclusion of the Superior Court's determination. A stay upon appeal is not automatic. 3 V.S.A. §815(a), 29 V.S.A. §407. As no motion to stay was filed, the Board did not err in proceeding with the de novo hearing.

The plaintiff's next argument is that the Board did not address the procedural due process claims he raised in his post-hearing memoranda. Although the Board did not address these arguments, plaintiff's due process claims are more properly considered by this court than by the Board. Plaintiff has not been prejudiced by the Board's failure to address these issues as this court has thoroughly reviewed plaintiff's claims.

Fourth, plaintiff makes several claims of error due to the construction of the boat ramp in September 1994. The Board issued the initial permit on 9/20/90, authorizing construction of the boat ramp. The permit was issued for a thirty (30) year period and provided a construction deadline of November 1, 1991³, which could be extended "for cause." The DFW applied by letter for an extension some time later. On August 23, 1994, the Board issued a decision extending the construction deadline to November 1, 1995. The plaintiff moved for reconsideration of this decision. The motion to reconsider was not decided until October 1994.

The issue, then, is whether the construction of the boat ramp was done with a valid permit where the motion for reconsideration was not decided at the time of construction. Again, no motion for a stay was filed after the August 23, 1994

³ This decision was appealed and affirmed. At the time of affirming the decision, the Board extended the construction deadline for one year.

decision. As stated above, the stay is not automatic. The court concludes that the permit was valid and the construction was, therefore, not in violation of the law.

The plaintiff also asks this court to review the timeliness of the previous courts ruling on his petition for a temporary restraining order. That is not the function of this court. This issue is more properly raised in an appeal to the Vermont Supreme Court. Accordingly, this court will not address the issue.

Last, there is a claimed bias on the part of the Chair of the Board. This issue was not briefed by the parties. Bias will be found only where it is clearly established by the record. ANR v. Earth Construction, Inc., 7 Vt.L.W. 36, 38 (1996), In re: Sherman Hollow, Inc., 160 Vt. 627, 629 (1993). After a review of the record, the court has not found the bias claimed by the plaintiff.

In conclusion, the court holds that the agency's decision is affirmed based on the above. The plaintiff has not shown that the agency erred nor that his procedural due process rights were violated by the proceedings as held below. As the Board's decision is valid, the plaintiff's petition for a restraining order does not have merit.

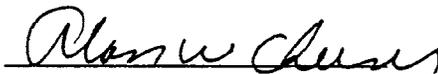
ORDER

The agency's decision is affirmed.

The plaintiff's petition for a restraining order is denied.

The plaintiff's motion to compel is moot.

Dated this 18th day of September, 1997 at Woodstock, Vt.



Hon. Alan W. Cheever
Superior Court Judge