

Whitmore v. Phillips, No. 770-10-08 Rdcv (Cohen, J., Nov. 13, 2008)

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**STATE OF VERMONT  
RUTLAND COUNTY**

<b>MELISSA WHITMORE and</b>	)	<b>Rutland Superior Court</b>
<b>DAVID WHITMORE</b>	)	<b>Docket No. 770-10-08 Rdcv</b>
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>THOMAS PHILLIPS, KIMBERLY</b>	)	
<b>PHILLIPS, TOWN OF WALLINGFORD,</b>	)	
<b>FULLER SAND AND GRAVEL, INC.,</b>	)	
<b>WILLIAM LOHSEN, JOHN DOE and/or</b>	)	
<b>JANE DOE, employees or agents of the</b>	)	
<b>Town of Wallingford whose identities</b>	)	
<b>are currently unknown,</b>	)	
	)	
<b>Defendants</b>	)	

**DECISION ON PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUCTION**

This matter is before the Court on Plaintiff’s Motion for a Temporary Restraining Order or an Emergency Preliminary Injunction, filed October 10, 2008. Plaintiffs Melissa Whitmore and David Whitmore are represented by Christopher J. Larson, Esq, and William H. Meub, Esq. Defendants Thomas Phillips and Kimberly Phillips are represented by Frank H. Langrock, Esq.

**Background**

Plaintiffs Melissa and David Whitmore filed this action on October 10, 2008, seeking a Temporary Restraining Order (TRO) or an Emergency Preliminary Injunction. Plaintiffs allege that defendants Thomas Phillips and Kimberly Phillips are operating an

illegal commercial gravel pit on defendants' property located in the Town of Wallingford.

On October 13, 2008, the Court granted the Plaintiffs' Motion for a TRO, and ordered the defendants to cease operation of the gravel pit. A hearing was held on November 4, 2008 on the Motion for a Preliminary Injunction, during which the Court sought input from the parties on the question of proper jurisdiction. The TRO was extended through November 13, 2008 so that the parties could provide memoranda on the jurisdictional issue. The Court received memoranda from the plaintiffs and defendants.

### **Discussion**

The legislature created the Environmental Court in 1989 to handle cases regarding Vermont's land use laws. 4 V.S.A. §§ 1001-1004. The plaintiffs claim the defendants are violating either Act 250 or the town zoning ordinances. As the defendants stated in their memorandum, the legislature repealed the jurisdictional authority of the superior court for those actions that are within the jurisdiction of the Environmental Court. See 2003 Adj. Sess. No. 115, § 121(b)(B).

V.R.E.C.P. 3 sets forth the original jurisdiction of the Environmental Court for civil actions:

The following actions within the original jurisdiction of the Environmental Court shall be commenced and conducted as civil actions under the Vermont Rules of Civil Procedure and the Vermont Rules of Appellate Procedure, so far as those rules are applicable and except as they may be modified by subdivisions (b)-(e) of Rule 2:

V.R.E.C.P 3(6) includes “[a]ctions by municipal administrative officers to prevent, restrain, correct, or abate violations of bylaws enacted under 24 V.S.A., chapter 117, as provided in 24 V.S.A. § 4452.”

V.R.E.C.P. 3(8) includes “[a]ctions by municipalities or interested persons to enforce decisions of appropriate municipal panels under 24 V.S.A., Chapter 117, by mandamus, injunction, process of contempt, or otherwise, as provided in 24 V.S.A. § 4470(b).”

The Environmental Court, not superior court, is the proper court for injunctive relief for this type of action.

Furthermore, even if this were the proper court in which to bring the request for a preliminary injunction, plaintiffs have not shown irreparable harm.

An injunction is an extraordinary remedy, the right to which must be clear. *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2002). V.R.C.P 65 is substantially similar to F.R.C.P. 65. Reporter’s Notes, V.R.C.P. 65. To obtain preliminary injunctive relief a party must show: (a) that it will suffer irreparable harm in the absence of an injunction and (b) either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Callahan*, 265 F.Supp.2d 440, 443 (D.Vt. 2003).

The plaintiffs have not sustained this burden of proof to show the requisite of irreparable harm in order to obtain the injunction. The request for a preliminary injunction is denied.

### **ORDER**

Plaintiffs’ Motion for a Preliminary Injunction, filed October 10, 2008 is DENIED.

Dated at Rutland, Vermont this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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Hon. William Cohen  
Superior Court Judge