

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: Richard Madowitz and Douglas Kohl
d/b/a The Woods Partnership and Amherst Realty LLC
Land Use Permit #1R0522-10-EB (Revocation)
Land Use Permits #1R0522-9-EB and #1R0522-10-EB (Abandonment)

MEMORANDUM OF DECISION

This proceeding concerns petitions for abandonment and revocation concerning certain elements of phase IV of a 144 unit condominium project known as The Woods at Killington ("Project"). The Project is located off the Killington Road in the Town of Killington, Vermont.

I. PROCEDURAL SUMMARY

On July 26, 1988, the District #1 Environmental Commission ("Commission") issued Land Use Permit #1R0522-9 ("Dash 9 Permit") and its supporting Findings of Fact, Conclusions of Law, and Order. The Dash 9 Permit authorized Killington 43 Associates, Inc. to construct the Project.

On June 14, 1995, the Commission granted Land Use Permit #1R0522-10 ("Dash 10 Permit") to Messrs. Richard Madowitz and Jack F. Phelan, Jr. d/b/a The Woods Partnership ("Permittee"). The Dash 10 Permit extended the construction completion date to January 1, 2000.

On March 5, 2001, The Woods at Killington Owners' Association ("Petitioner") filed a petition for revocation with the Vermont Environmental Board ("Board"), requesting the Board to revoke the Dash 10 Permit. The revocation petition was filed pursuant to 10 V.S.A. § 6090(c) and Environmental Board Rule ("EBR") 38(A). The Petitioner contends that the Permittee failed to provide it with the requisite notice of the application for permit extension as required by Rule 10 (F), and failed to include the Petitioner as a co-applicant as required by law and Board precedent.

On March 5, 2001, the Petitioner also filed a petition for abandonment to declare the Dash 9 and Dash 10 Permits abandoned and void due to non-use.

On April 13, 2001, Permittee filed a motion to dismiss the petitions for revocation and abandonment.

On April 16, 2001, Board Chair Marcy Harding convened a prehearing conference and on April 18, 2001 she issued a Prehearing Conference Report

and Order ("PCRO"). Pursuant to the PCRO, the parties were provided an opportunity to file written memoranda on the following preliminary issues.

1. Whether Petitioner has standing to petition for revocation of the Dash 10 Permit.

2. If issue 1 is decided in the affirmative, whether Petitioner's petition for revocation is moot in light of the Permittee's pending request before the Commission to extend the construction completion deadline.

3. Whether the Board has jurisdiction to consider the petition for abandonment.

4. If issue 3 is decided in the affirmative, whether Petitioner has standing to petition for abandonment of the Dash 9 and 10 Permits.
ISSUES 1 and 2.1. Whether Petitioner has standing to petition for revocation of the Dash 10 Permit.

On May 16, 2001 the Board heard oral argument on the preliminary issues. During oral argument, the parties discussed the possibility of settling the matter without a hearing. The parties were unable to reach settlement.

On June 13, 2001, the Board deliberated.

II. DISCUSSION

1. Whether Petitioner has standing to petition for revocation of the Dash 10 Permit.

Preliminary issues 1 and 2 will be considered by the Board, if necessary after additional briefings are filed as detailed below.

2. If issue 1 is decided in the affirmative, whether Petitioner's petition for revocation is moot in light of the Permittee's pending request before the Commission to extend the construction completion deadline.

After the preliminary issues were framed and the parties provided briefing,

the Vermont Supreme Court issued *In re Lawrence White* Docket Nos. 1998-390 & 1998-391 (June 1, 2001) which provided significant additional guidance to the Board concerning petitions for revocation based on violations of the EBR. As a result of the *In re Lawrence White* decision, the Board requests the parties brief merits issue 1 in the PCRO as a preliminary issue. In particular, the parties should address the implications of the *In re Lawrence White* decision on the petition for revocation. This issue may be able to be resolved without the benefit of an evidentiary hearing.

Therefore, the Board will defer consideration of preliminary issues 1 and 2 until after the Board considers the parties' briefs on the implications of *In re Lawrence White* on merits issue 1. In addition, the Board renews its request that the parties attempt to settle this matter in light of the *In re Lawrence White* decision.

3. Whether the Board has jurisdiction to consider the petition for abandonment.

Pursuant to EBR 38(B)(2), "determinations of use or abandonment will be made by the Board or district commission retaining jurisdiction over the permit. The Dash 9 permit specifically states that the district commission shall retain jurisdiction over the permit. Condition 22 states that "the District Environmental Commission maintains continuing jurisdiction during the lifetime of the permit and may periodically require that the permit holder file an affidavit certifying that the project is being completed in accordance with the terms of the permit."

Condition 1 of the Dash 10 permit incorporates conditions of the original permit as amended. Since the Dash 10 permit incorporates Condition 22 of the Dash 9 permit, the Commission maintains jurisdiction over the Dash 10 permit as well.

Therefore, the petition for abandonment of the Dash 9 and Dash 10 permits should have been filed with the Commission. The Board will dismiss the petition for abandonment and allow the Petitioner to file it with the Commission. As a result, merits issue 3 will not be considered by the Board.

4. If issue 3 is decided in the affirmative, whether Petitioner has standing to petition for abandonment of the Dash 9 and 10 Permits.

Since preliminary issue 3 was decided in the negative, the Board does not need to reach preliminary issue 4.

III. ORDER

1. The petition for abandonment of the Dash 9 and Dash 10 permits is dismissed.
2. Parties may submit written memoranda on the implications of the *In re White* decision on the petition for revocation of the Dash 10 permit by **Thursday, July 3, 2001**.

Dated at Montpelier, Vermont this 14th day of June, 2001.

ENVIRONMENTAL BOARD

Marcy Harding, Chair
John Drake
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