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

RE: Richard Madowitz and Douglas Kohl
d/b/a The Woods Partnership Amherst Reality, LLC
Land Use Permit Application # 1R0522-10-EB (Revocation)
Docket #783

MEMORANDUM OF DECISION AND DISMISSAL ORDER

This proceeding concerns the 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 HISTORY

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 ("Permittees"). The Dash 10 Permit extended the construction completion date for the Project to January 1, 2000.

On March 5, 2001, The Woods at Killington Owner's 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 Permittees 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, the Permittees 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 ("PHCRO"). Pursuant to the PHCRO, the parties were provided an opportunity to file written memoranda on the preliminary issues as framed in the PHCRO.

On May 16, 2001, the Board heard oral argument on the preliminary issues, and on June 13, 2001, the Board deliberated.

On June 14, 2001, the Board issued a Memorandum of Decision dismissing the petition for abandonment of the Dash 9 and Dash 10 permits. The Memorandum of Decision also gave the parties until July 3, 2001 to file written memoranda on the implications of the Vermont Supreme Court's *In re Lawrence White,* Docket Nos. 1998-390 & 1998-391 (June 1, 2001) on the petition for revocation of the Dash 10 permit.

On July 18, 2001, and August 15, 2001, the Board deliberated on the preliminary issues relating to the revocation of the Dash 10 permit.

II. ISSUES

As described in the PHCRO, the two preliminary issues remaining before the Board are:

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

2. Whether Petitioner's petition for revocation is moot in light of the Permittees' pending request before the Commission to extend the construction completion deadline?

III. DISCUSSION

1. Does the Petitioner have standing to petition for revocation?

Under EBR 38(A), a petition for revocation may be filed by "any person who was a party to the application, by any adjoining property owner whose property interests are directly affected by an alleged violation, by a municipal or regional planning commission, or any municipal or state agency having an interest which is affected by the development or subdivision."

The Petitioner is a homeowner's association which claims that it owns the land where the Project will be built. The Permittees do not dispute that the Petitioner owns the land in question, but argue that the Permittees own the development rights. The Board doubts that the Petitioner is an adjoining landowner since the parties seem to agree that the Petitioner owns the land in question, not adjoining land. Petitioner has a reasonable argument that if it was entitled to notice, the only reason it was not a party to the application was that it was not sent notice. However, these determinations would require an evidentiary hearing. In light of the Board's conclusion below regarding Issue 2, the Board does not need to resolve Issue 1.

2. Is the Petition for Revocation Moot?

The Petitioner argues that it should have been provided notice of the application under EBR 10(E) as a landowner or 10(F) as an adjoining property owner. EBR 10(E) states that notice should be given to the "owner of the land if the applicant is not the owner." EBR 10(F) requires that notice be given to "adjoining property owners."

Absent an evidentiary hearing, the Board can not address Petitioner's argument that it should have received notice as either an adjoining landowner or an owner of land if the applicant is not the owner.

However, whether or not notice was required, apart from Petitioner's co-applicancy claim, the remainder of its case is moot. Petitioner's revocation petition requests that the Board revoke Permittees's Dash 10 Permit. However, the construction completion deadline for the Dash 10 Permit has already expired. If the deadline has expired, Permittees are deriving no benefit form the Dash 10 Permit and there is nothing left for the Board to revoke. Regardless whether the Board determined that the Dash 10 Permit is void or not, Permittees would still need to pursue an amendment application to extend the construction completion deadline. Such amendment application is currently pending before the Commission as the The Dash 11 Permit application ("Dash 11 Permit application"). Therefore, this portion of the Petitioner's case is moot.

Even if Petitioner's revocation argument was not moot, Petitioner's notice claims under EBR 10(E) and 10(F) fail because the Dash 10 Permit was considered a minor permit amendment for which no notice was required at the

time.

In 1995, when the Dash 10 Permit was issued, EBR 34(C)(2) read:

> [Minor amendment] Applications processed under this section shall be exempt from the distribution and publication requirements of 10 V.S.A. § 6084 and sections (E) through (G) of Rule 10. Such applications shall be processed in the same manner as minor applications under Rule 51(B).[1]

In *Re: Roger V. and Beverly Potwin,* #3W0587-1-EB (Revocation), Findings of Fact, Conclusions of Law, and Order (July 15, 1997), the petitioner raised similar issues in a revocation petition regarding the notice requirements of EBR 10(F). Recognizing that the EBR at the time provided an exception to EBR 10(F), the Board noted that:

> The review procedure under the then EBR 34(C)(2) provided that applications processed as minor amendment applications were exempt from the distribution, posting and publication requirements of 10 V.S.A. § 6084 and sections (E)-(G) of EBR 10... the personal notice requirements of EBR 10(F) were made inapplicable through the exemption in EBR 34(C)(2). Therefore, in the Board's opinion, neither the Respondents nor the District Commission was under a duty to provide personal notice to the Petitioner [because the application was minor.]

Id. at 15.

In sum, the Dash 10 Permit application was characterized as a minor amendment application, and under the previous EBR 34(C)(2) exception noted above, Permittees were not required to provide notice to the Petitioner. Thus, there is no violation of the EBR to support the revocation petition.

Co-applicancy

[1] In an amendment to this rule that became effective on January 2, 1996, the phrase "exempt from" was replaced with the phrase "subject to".

The Petitioner also argues that the case is not moot because of its co-applicancy claim. The Petitioner argues that pursuant to EBR 10(A), it is the landowner of the site where the Project will be constructed and therefore, should have been a co-applicant.

EBR 10(A) provides in part:

> An application shall be signed by the applicant and any co-applicant, or an officer or duly-appointed agent thereof. The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement.

The Petitioner claims that its members own the common elements or common property of The Woods in joint tenancy with all of the other owners. The Petitioner asserts that included among these common elements is the real estate upon which the Permittees plan to construct the proposed units and the infrastructure upon which the proposed units rely.

If the Board were to conclude that the Petitioner owns the involved lands, then under EBR 10(A), the Petitioner must be a co-applicant for the permit unless "good cause is shown to waive this requirement."

In *Re: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon,* #1R0426-2-EB, Findings of Fact, Conclusions of Law and Order (Dec. 18, 1997), the Board examined the rationale behind EBR 10(A) and co-applicancy. The Board wrote:

> One of the reasons that EBR 10(A) requires record owners of involved land to be co-applicants is so that any permit conditions imposed by a district commission or the Board will be enforceable...Co-Permittees, however, do not always share equal responsibility for permit violations... Other purposes of EBR 10(A) include the need to ensure that the owners of lands involved in a subdivision or development have consented to the activity under review, and the need to ensure that persons with a substantial interest in the involved lands have an opportunity to participate in the permit proceedings.

> For each of these reasons, EBR 10(A) states that the record owner of the involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement. There can be no 'good cause' waiver where a hearing on the merits reveals that construction will in fact occur on [the] tract or that permit conditions must be issued which require [the record owner] to be a co-applicant.

Id. at 26-27 (citations omitted). *See also Re: David Enman (St. George Property),* Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 19 (Dec. 23, 1996).

In *Loomis,* the Board considered a project where the record owner, Omya, Inc., had leased the involved lands to Loomis to develop an indoor/outdoor archery range. The Board concluded that Omya should be joined as a co-applicant "on two independent bases: first, construction will occur on the Omya [property] and, second, permit conditions must be issued that require Omya to be a co-applicant." *Id.* at 27.

The Board was particularly concerned with the future enforcement of the permit, and the effect of the lease between Omya and Loomis given that Act 250 permits run with the land. The Board noted that the lease between Omya and Loomis was for just one year, and that "Omya's property interests are so significant that the Board can not waive the requirement that it be a co-applicant." *Id.* at 29.

However, when the landowner's interest is less significant, the Board has held that there can be "good cause" to not join the landowner as a co-applicant, even if there is construction on the property. *See Re: Central Vermont Public Services Corporation,* #7C0734-EB, Memorandum of Decision (Aug. 6, 1991). In *Central Vermont* the Board addressed the possible co-applicancy of a landowner who owned the involved land subject to a utility easement. The applicant was constructing a telephone line on the utility easement that crossed the landowner's property. The Board found good cause to waive the co-applicancy of the landowner because "although [the landowner] still owns the land subject to the utility easement, effective control has been transferred to CVPS by the easement." *Id.* at 2.

In the instant case, the Board has heard no evidence to determine whether the Petitioner is the record owner of the involved lands, if construction will actually occur on the Petitioner's land, or whether any other parties have a significant interest in the land to give it effective control under the holding in *Central Vermont*. As a result, the Board cannot make the above determination at this time. More importantly, such determinations should first be made at the district commission level. *South Burlington Realty Co*. #4C0154-5-EB Memorandum of Decision (May 4, 1989).

The Board has held that "EBR 10(A)...does not state when in the process the filing of co-applicancy must occur. The issue of co-applicancy may be raised at any time and need not be addressed prior to a hearing on the merits of an application." *Loomis* at 30.

As part of the Dash 11 Permit application proceedings, the Commission should determine whether the Petitioner should be a co-applicant pursuant to EBR 10(A). The determination should be based on whether the Petitioner is the record owner of the tract of land, and if so whether there is good cause to support a waiver of this requirement, or whether the Petitioner's property interest is so significant that the application cannot be accepted without its participation as co-applicants. The Board notes that any dispute over which party retains certain property rights pertaining to the tract may be outside the jurisdiction of the Act 250 process.

IV. ORDER

1. The petition for revocation of the Dash 10 permit is dismissed.

Dated at Montpelier, Vermont this 15th day of August, 2001.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
Marcy Harding, Chair
George Holland
Samuel Lloyd
Rebecca Nawrath
Alice Olenick
W. William Martinez *
Jean Richardson
Donald Sargent, Alternate Member

* Board Members Olenick and Martinez were not present at the Board deliberations on July 18, 2001, but have reviewed the decision and concur.