VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: R. Brownson Spencer II
156 Middle Road
Clarendon, VT 05759
and
Joseph H. Vargas III
Woodstock Avenue
Rutland, VT 05701
and
Harry and Martha Ryan
P.O. Box 310
Rutland, VT 05701

Findings of Fact,
Conclusions of Law
and Order
Application #1R0576-1-EB

On October 17, 1985, an appeal was filed with the Environmental Board (Board) by R. Brownson Spencer II on behalf of himself, Joseph H. Vargas III, and Harry and Martha Ryan (Applicants) in the above matter, from the September 16, 1985, decision of the District #1 Environmental Commission (Commission) issuing Amended Land Use Permit #1R0576-1 (Permit). The Permit authorizes the creation of an eight-lot subdivision served by a 1600' road adjacent to Meadow Lake Drive in Mendon, Vermont.

On October 22, 1985, the Board notified the parties that proceedings on the appeal would be deferred until such time as the Commission issued a decision regarding a then-pending Motion for Reconsideration filed by the Applicants. On December 23, the Commission issued a decision on the reconsideration request, together with a revised Land Use Permit. By letter filed with the Board on April 9, 1986, the Applicants renewed their appeal. A prehearing conference was held on April 30, by Board Chairman Darby Bradley. At this conference it was agreed that the Applicants would submit pre-filed testimony (or stipulation of facts) and a legal memorandum by June 2. After the Chairman granted various extensions, the requested information was submitted by the Applicants on August 6. The Chairman conducted a site visit on September 3. On October 8, the Chairman sent Proposed Stipulated Facts to the parties. The Findings of Fact stated below reflect the Restated Stipulated Facts submitted to the Board by Applicant Spencer on October 16 and as modified by the Applicants' submission of January 12, 1987.

On October 30, 1986, the Chairman issued Proposed Findings of Fact and Conclusions of Law. Exceptions and objections to the proposed findings of fact, conclusions of law and order were received by the Board from the Applicants on January 12, 1987. Oral argument on the proposed decision was held by the

Board on February 3, 1987 in Essex Junction, Vermont. The Board conducted its final deliberation on the legal issues on March 4, 1987. This matter is now ready for decision.

The only parties which have participated in these proceedings were:

Applicants Spencer and Vargas by R. Brownson Spencer II and A. Jay Kenlan, Esq.
Applicant Ryan by Harry Ryan.

I. ISSUES IN THE APPEAL

The Applicants have raised the following issues with this appeal:

1. Is this project subject to the jurisdiction of Act 250 in any respect; and, if so, what lands are included within the jurisdiction and therefore subject to the terms and conditions of the land use permit?

2. Did the District Environmental Commission fail to issue its original decision in this matter within the 20 day time limit as required by Section 6086(b)? If the Commission failed to meet this deadline, are the Applicants entitled to a land use permit without any conditions?

3. Should the expiration date of the permit be January 1, 2100, which the Applicants maintain is a reasonable projection of the economically useful life of the project?

4. Given the language of Environmental Board Rule 32, which allows the Board or Commission to require a permittee to file affidavits of compliance with respect to specific conditions of a permit at reasonable intervals, is it appropriate to include a condition in the land use permit which may require the permittees to periodically submit an affidavit which certifies that the project is being completed in accordance with the terms of the permit?

II. FINDINGS OF FACT

1. Prior to the mid-1950s, Annie Lasher owned a parcel of land which consisted of more than 110 acres located east of Meadow Lake Drive in Mendon, Vermont. At that time a town road extended eastward from Meadow Lake Drive past the Lasher residence and through the rest of her property to lands of other property owners.

2. In the mid-1950s, Mrs. Lasher paid for the construction of a road starting approximately 700 feet northerly of the intersection of the town road and Meadow Lake Drive and

running along her northerly property boundary and then southeasterly about 1600 feet total to intersect with the old town road. She also secured an agreement from the common users of the town road to use the relocated road in lieu of the town road. The purpose of the relocation was to move town road traffic away from her residence.

3. On July 9, 1975, Mrs. Lasher sold 110 acres to R. Brownson Spencer II and Joseph H. Vargas III. The deed for this transaction was recorded in the Town of Mendon land records in Book 23, Page 289.

4. On February 2, 1982, Spencer and Vargas sold Harry Ryan a 17 acre portion of this tract with access by way of the right-of-way and road constructed by Mrs. Lasher. The road at the time of this transaction consisted of an approximately 10 to 12 foot-wide woods road.

5. On August 13, 1982, Spencer and Vargas reconveyed the same 17 acres to Harry Ryan with a revised right-of-way. This revised right-of-way extended from a point 318± feet south of the former right-of-way intersection with Meadow Lake Drive for about 650-700 feet easterly until it intersected with the former right-of-way. The purpose of this relocated right-of-way was to provide better access to the 17 acres purchased by Ryan. The improved right-of-way also serves the remaining lands of Spencer and Vargas as well as the lands of other owners who had previously used the right-of-way.

6. In October of 1982, District Coordinator Sally Greene issued a project review sheet which indicated that an Act 250 permit was not required for the construction of the road since it was a driveway which would serve only one parcel of land.

7. From 1983 to 1986, Ryan constructed an access road to town specifications from Meadow Lake Drive along the revised right-of-way to the point where his proposed driveway entered his land. Approximately 1500 feet of improvements to the road were constructed.

8. On June 26, 1984, Spencer and Vargas conveyed 58 acres to R. Brownson Spencer II and wife and 15 acres to Joseph H. Vargas III and wife.

9. On August 2, 1985, Spencer, Vargas and Ryan filed Application #1R0576 for a permit to use the previously constructed 1600' road as an access to an additional 3 acre lot to be subdivided from the Ryan parcel and 7 lots to be subdivided from the land held jointly by Spencer and Vargas.

10. The public hearing on Application #1R0576 was held and adjourned by the Commission on August 26, 1985. Land Use Permit #1R0576 was signed by the Chairman of the Commission on September 16, 1985. The decision was mailed by the Commission staff on September 19, 1985, 24 days after the adjournment of the hearing.

11. Development on the lots owned by Ryan and by Spencer and Vargas has consisted of single-family residences.

12. Currently Spencer and Vargas are completing the construction of the remaining 230± feet of road until it joins the old town road in its pre-1950s location. Upon completion, the road will serve the 58 acre parcel owned by the Spencers, the 15 acre parcel now or formerly owned by the Vargases, and the lands beyond previously served by the right-of-way and town road.

III. CONCLUSIONS OF LAW

Jurisdiction

We conclude that the project as proposed requires a permit pursuant to Section 6081(a), because it is a "development" under Section 6001(3). Section 6001(3), in pertinent part, defines "development" as "the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within five miles of any involved land, for commercial or industrial purposes." We conclude that the construction of the road improvements by Ryan, with the subsequent extension of the road by Spencer and Vargas, was not merely to provide access to a single house, but was for the commercial purpose of selling lots. In reaching this conclusion, we have considered the following:

1. The road as constructed essentially meets town road specifications, a standard far in excess of that normally associated with a residential driveway.

2. The new road is not merely a replacement of the old road, but is a substantial upgrade to the access to the lands owned by Ryan, Spencer and Vargas.

3. Relatively little time elapsed between the start of construction for the new road and the filing of applications to sell lots. Construction of the road was completed after the Act 250 applications were filed.

Had the road been constructed only on the Ryans' property, had it provided access to only a single residence, or had it been constructed to a standard normally associated with a residential driveway, we might have concluded that the road was exempt as a residential project. However, from the facts presented by the Applicants and observed during the site visit,

the Board is persuaded that the road was built for the commercial purpose of providing access to lots which were to be sold.

Environmental Board Rule 2(A)(6) (the so-called "road rule") also confirms the jurisdiction of the Act over this project because the Applicants have constructed a road which exceeds 800 feet in length incidental to the sale or lease of land on a parcel of land more than 10 acres in size. This Board rule does not expand the jurisdiction of the Act. Rather, because it does not apply to the construction of all roads, but only to those that are more than 800 feet or serve more than five lots, it actually limits the kinds of road projects which require permits. This limitation of jurisdiction was the purpose of the rule when it was adopted in 1975.

We also conclude that the land use permit applies to all of the lands owned by Ryan, Spencer and Vargas which are served by this rebuilt roadway. "Involved land" is defined by Environmental Board Rule 2(F)(1) as the entire tract or tracts of land upon which the construction of improvements occurs. In this case, the construction of improvements occurred on lands owned by Ryan, by Spencer and Vargas jointly, by Spencer and wife, and by Vargas and wife. Because the road served all of these properties at the time of its construction, all of these lands must be included as involved lands which are subject to the land use permit.

At the time construction of the road was commenced by Ryan, the District Coordinator issued an advisory opinion in the form of a Project Review Sheet which held that the road construction was exempt from Act 250 as a residential driveway serving only one residence. It is clear from reading this advisory opinion that it was highly qualified and granted an exemption only to the use of the road as a driveway to the Ryan lot. No such exemption was stated or implied regarding the use of this road to serve the remaining properties of Spencer and Ryan or others.

From the facts now available to the Board, we must conclude that the advisory opinion was incorrect and a permit should have been required at that time for the construction of this road. Clearly the construction of this road was incidental to the sale of land to Ryan by Spencer and Vargas. Clearly, too, it was a "road" and not just a "driveway" because of its width and because it provided access to all of the remaining lands of Spencer and Vargas as well as the Ryan parcel. Consequently, because a permit should have been required at that time, all of the lands owned by Spencer and Vargas which were served by the road should have been considered to be "involved lands" for the purposes of Act 250 jurisdiction. Although no permit was required for the

construction of the road as a driveway, this staff error was not sufficient to remove jurisdiction from these lands served by the road. These lands are therefore subject to the terms and conditions of any land use permit subsequently issued for the development of any portion of the involved lands. The later division of the land between the two partners cannot remove this involvement since both newly-created parcels have continued to be served by the road.

2. Twenty Day Time Limit

The Applicants allege that the land use permit should have been issued without any conditions because the District Environmental Commission failed to issue its decision within 20 days of the adjournment of the hearing. From the facts available to the Board, it is clear that the decision on this application was completed by the District Commission within the 20-day time period./1/ It is also clear, however, that the decision was not actually "issued"--i.e., placed in the mail--within twenty days as required. The question to be resolved here, then, is what is the remedy for failure to issue the decision within the period prescribed by Section 6086(b)?

The Board recently had an opportunity to address the issue of the time limits set forth in Act 250 and the remedy available to the parties in the event the time limit is missed. In In re: Killington, Ltd., Application #1R0584-EB, Memorandum of Decision dated August 8, 1986, the question was whether a permit must be issued because the District #1 Environmental Commission had failed to convene a hearing within 40 days of receipt of the application, as required by 10 V.S.A., Section 6085(b). The Applicant, Killington, Ltd., argued that it was entitled to a permit as a matter of right.

The Board rejected that argument. It noted that there were three different time limits set forth in Section 6085: (1) a 25-day limit for setting a hearing after receipt of the application; (2) a 40-day limit for holding the first hearing after receipt of the application; and (3) a 60-day limit for granting or denying a permit after receipt of the application, in the event no hearing has been requested or ordered within the prescribed period. Only in the latter instance--violation of the 60-day limit--is a remedy specified in the statute, namely, that the application is deemed approved

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/1/ The 20th day after August 26 (the date the hearing was adjourned) was September 15. However, because September 15, 1985, fell on a Sunday, the 20-day period expires on the next business day.

and a permit shall be issued. No remedy is specified in the statute for violation of the 25-day or 40-day limits. The Board concluded that the District #1 Commission should have convened the hearing within 40 days, and that the proper remedy was for the Board to order a hearing on the merits, rather than automatic approval of the project. It therefore remanded the case to the Commission for a hearing on the merits.

Although the time limit at issue in this case is found in Section 6086(b) rather than in Section 6085(b), the Board's rationale in Killington, Ltd. is equally applicable. The purpose of the 20-day rule is to ensure that a District Commission does not delay a decision on an application unduly, thus denying an applicant the opportunity to begin construction on the project in the event the decision is favorable or an opportunity to appeal to the Environmental Board in the event the decision is unfavorable. Board Rule 13(B) allows District Commissions to recess the proceedings for a reasonable period after a hearing in order to review the evidence, deliberate, await submittal of additional evidence, or similar reasons.

In construing the purpose of the 20-day limits in Section 6086, the Board must also consider the overall legislative intent behind the adoption of Act 250, which was to protect the public health, safety and welfare. Automatic approval of an application without conditions simply because a decision was mailed by the District Commission a few days after the required deadline would not be justified when the possible harm to the applicant for such a delay is balanced against the overall protection of the public's health, safety and welfare. This decision is consistent with the Vermont Supreme Court's decision in City of Rutland v. McDonald's Corporation, 146 Vt. 324 (1985)./2/

/2/ In City of Rutland v. McDonald's Corporation, 146 Vt. 324 (1985), the Vermont Supreme Court recently stated that McDonald's was not entitled to an automatic variance under 24 V.S.A., Section 4470(a), even though the zoning board of adjustment failed to act on an application for a variance within 45 days after the hearing is completed as required by the statute. The court stated that while "the purpose of the 45-day rule is to encourage prompt consideration of the application within a time certain . . . this interest in prompt action must be balanced against the state's 'paramount obligation to promote and protect the health, safety, morals, comfort and general welfare of the people.'" Id. at 330.

3. Permit Expiration

The Applicant alleges that the October 1, 2015, expiration date of the permit as issued by the District Commission does not reflect a reasonable projection of the economically useful life of the permitted project as required in Section 6090(b) and Rule 32(B)(2). Upon review of this expiration date, we agree that the duration of the land uses approved by this application should be longer than 30 years. We cannot, however, agree that the 114± years requested by the Applicant is appropriate given the uncertainties of the future. While the homes built within the subdivision may last that long, the expected life of a septic system and leach field is much shorter, perhaps as little as 10-25 years. A much more realistic date for permit expiration would be October 1, 2030, which provides sufficient time for the permittees and all assigns and successors to fully amortize their investments. In any event, if the land uses are still appropriate at the time of permit expiration and if application is made prior to permit revocation, Section 6091(C) allows for permit renewal without the necessity of a hearing.

4. Affidavits of Compliance

The Applicants ask the Board to delete Condition #12 of the land use permit. They allege that the condition does not conform to Environmental Board Rule 32 because it does not specify those conditions of the permit for which affidavits of compliance must be submitted.

Based upon our interpretation of Board Rule 32, we reject this argument. Board Rule 32 is very clear that Commissions have the right to request affidavits of compliance with respect to specific conditions at any time even if no conditions in this regard are included in the permit. Condition #12 of the District Commission's permit is a reasonable implementation of the Board's policy as provided in this Rule because it allows the Commission to periodically review the permittee's overall conformance with the permit as issued. Such a review was the clear intent of the Board when the Rule was adopted. Consequently, we will not order the deletion of this condition.

5. Estoppel

In response to the Proposed Findings of Fact, Conclusions of Law and Order issued by Administrative Hearing Officer Darby Bradley on October 30, 1986, the Applicants raised the issue of equitable estoppel because of the prior determination made by the District Coordinator that the construction of the driveway by Ryan did not require an Act 250 permit. The Applicants contend that they should not now be required to obtain a permit for this project because they reasonably relied on the Coordinator's determination that no permit was required for the construction of the road.

The Board rejects this argument and concludes that equitable estoppel does not apply to this project because of the very limited effect of the Coordinator's opinion. The Project Review Sheet which outlined the opinion in question clearly applied only to the construction of a driveway to serve the Ryan residence. As soon as the Applicants proposed to use this driveway to serve its other lands, the driveway became a road for the purposes of Act 250 jurisdiction. Since the Coordinator's opinion did not address the use of this driveway as a road, the doctrine of estoppel is not applicable.

IV. ORDER

Land Use Permit #1R0567-1-EB shall be issued with the following conditions:

1. Condition #13 of Land Use Permit #1R0567-1 is hereby amended to read: This permit shall expire on October 1, 2030, unless extended by the District Environmental Commission.

2. Except as amended herein, all conditions of Land Use Permit #1R0567-1 remain in full force and effect. Jurisdiction over this matter is returned to the District Environmental Commission.

Dated at Montpelier, Vermont, this 10th day of March, 1987.

ENVIRONMENTAL BOARD

Darby Bradley, Chairman
Lawrence H. Bruce, Jr.
Samuel Lloyd III
Roger N. Miller
Donald B. Sargent