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

RE: Windham Sports, Inc., Riverside Farm Corp., and Albert and Edith Wozniak by Jon S. Readnour, Esq. Carroll, George & Pratt P.O. Drawer 530 (J) Rutland, VT 05702-0530

Findings of Fact, Conclusions of Law and Order Land use Permit #2W0646-2-EB

I. SUMMARY OF DECISION

This decision pertains to an appeal filed with the Environmental Board on October 27, 1989 from Findings of Fact and Conclusions of Law (Corrected)- issued by the District #2 Environmental Commission on October 2, 1989. The Commission determined that Land Use Permit #2W0646 (the Permit) was abandoned and declined to issue an extension of the construction completion date specified in the Permit, as requested by Windham Sports, Inc., Riverside Farm Corp., and Albert and Edith Wozniak (the Applicants). The Permit authorized the construction of 31 vacation homes and supporting utilities and expansion of an existing golf course in the Towns of Windham and Andover.

The Board concludes that the Permit is not abandoned, for the reasons explained below.

II. BACKGROUND

On August 23, 1986, the District #2 Environmental Commission issued the Permit to the Applicants, authorizing -the construction of the first phase of a development on a tract of land totaling 385 acres in the towns of Windham and Andover. The first phase consisted of the construction of 31 vacation homes and supporting utilities and the construction of golf holes 13 through 16. The District Commission also issued findings of fact for the entire project on those criteria for which the Applicants had met their burden of proof. The Permit included a condition that all construction on the first phase of the project must be completed by December 31, 1991.

On May 4, 1989, the Applicants filed an application with the District #2 Environmental Commission to extend both the construction completion date and the date to achieve substantial construction. The District Commission determined that a ruling on whether the permit had been abandoned was necessary prior to taking evidence on the

extension request. After a hearing, the District Commission decided that the Permit had been abandoned and that the findings of fact issued for the subsequent phases of the project were void.

III. PROCEEDINGS

A prehearing conference was convened on December 15, 1989, and a prehearing conference report and order issued on December 27. With the agreement of all the parties, the hearing was delayed so that access to the site could be achieved for the Board to view the site.

On May 3, 1990, an administrative hearing panel of the Board convened a public hearing in Windham. The following parties participated in the hearing:

Applicants by Jon S. Readnour, Esq.
Andover Board of Selectmen by David Hume
Windham Board of Selectmen by Donald Coburn and Helen George
Andover Planning Commission by Joseph Fromberger
Windham Planning Commission by Edward Caron
Elva Callahan (Town Health Officer and adjoining property owner)

On May 18, the Andover Planning Commission filed proposed findings of fact and on May 23, the Andover Board of Selectmen submitted a letter to the Board. On May 24, the Applicants filed requests for findings of fact and a memorandum of law. On December 17, 1990, a proposed decision was issued and an opportunity to file responses and request oral argument was provided to the parties. No party requested oral argument. The Board deliberated on this matter on February 21, 1991. This matter is now ready for decision. To the extent any proposed findings and conclusions are incorporated below, they are granted; otherwise, they are denied.

IV. ISSUES IN THE APPEAL

1. Whether fairness dictates that Rules 38(B) not be applied to the Applicants because the permit stated that it would expire within one year if the permittees did not demonstrate an intention to proceed with the project, but did not include any reference to the requirement in Rule 38(B) that substantial construction must occur within two years from issuance of the permit.

2. Whether substantial construction occurred within two years from the date the Permit was issued.

3. Whether construction was "delayed by litigation to secure other necessary permits or approvals."

4. Whether the findings of fact issued for the future phases of the project are void.

IV. FINDINGS OF FACT

1. On August 23, 1986, the District #2 Environmental Commission issued the Permit to Windham Sports, Inc., Burtek, Inc. and Albert and Edith Wozniak. The Permit authorized the construction of Phase I of the Tater Hill Project located on a total of 385 acres in the towns of Andover and Windham. Phase I consisted of the construction of 31 vacation homes and supporting utilities and the construction of golf course holes #13 through #16, as an expansion of an existing golf course at the site. The approval was limited to 31 homes because the Applicants had *only* proved there was sufficient water and sewage disposal capacity for that number.

2. In the decision approving Phase I, the District Commission also issued findings of fact for the total project, consisting of a total of 150 vacation homes and supporting utilities, and the expansion of the existing nine-hole golf course to 18 holes. These findings were issued for those criteria for which the Applicants met their burden of proof.

3. The Findings of Fact indicated that they were binding upon all parties until December 31, 1991, except for the Findings for Criterion 5, which would be valid only for the first phase of the project.

4. The Permit contained the following conditions pertinent to this review:

> 29. All construction on this project must be completed by December 31, 1991.
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> 30. This Permit shall expire on December 30, 2015, unless extended by the District Environmental Commission.
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> 31. Notwithstanding, the permit shall expire on a year from date of issuance if the permittees have not demonstrated an intention to proceed with the project.

5. The Permit does not contain a requirement that construction must begin within one year. Board Rule 38(B) is not referred to in the Permit.

6. Albert J. Wozniak is a principal stockholder and President of Windham Sports, Inc. He has been personally involved in all aspects of this project.

7. In September 1986 the Applicants sought and received state approval for a stump burial area on the site. During September and October of that year, the Applicants began clearing the area for the golf course holes and the access road for the project. *During 1987* and 1988 the proposed fairways and Phase I access road were maintained through mowing and brush removal.

8. In November 1986 the Applicants complied with Condition 13 of the Permit which required them to establish an escrow account equal to the cost of the sewage disposal system for Phase I.

9. Soon after the Permit was issued, the Applicants initiated an active marketing program which resulted in seventeen preconstruction agreements with purchasers.

10. Although the Applicants had sufficient sewage disposal capacity for Phase I, in November I986 they began to attempt to obtain an additional sewage disposal area for the. rest of the project. Engineering studies done in May 1987 on adjacent land ("the Green property") indicated that that land was better suited for sewage disposal for the entire project than the area they planned to use for Phase I sewage disposal.

11. In May 1986 the Vermont *General* Assembly greatly revised the law regarding indirect sewage discharges by adopting Act 199. Final rules implementing the law were not developed and adopted for several years. The interim administrative procedures adopted on September 2, i986 were not final and were intended to be revised. Final rules were not adopted until early 1990. Uncertainty surrounding the requirement of the indirect discharge rules impeded efforts to proceed with the development of sewage disposal areas.

12. During 1988 and 1989, a hydrogeologist working on behalf of the Applicants continued to explore possible sewage disposal areas and sources for domestic water for the entire project. The potential sewage spray site was surveyed, topographic maps were prepared, and test pits were dug and soil conditions mapped. A

hydrogeologic evaluation called a fracture trace analysis was performed in the effort to find water. Since the Permit was issued, the Applicants have spent between $60,000 and $75,000 in pursuit of adequate sewage disposal: This amount includes options on land and fees for mapping, legal work, and engineering and geological investigations.

13. The Applicants have undertaken extensive efforts to obtain financing for the project. Although the Applicants have met with some success, apparently financing for the entire project has still not been obtained.

14. By the spring of 1989 Mr. Wozniak realized that the project would not be completed by the construction completion date in the Permit. On May 1, 1989, Mr. Wozniak wrote to the District Coordinator seeking an extension of the dates for construction and completion of the project.

VI. CONCLUSIONS OF LAW

10 V.S.A. § 6091(b) states:

> Nonuse of a permit for a period of one year following the date of issuance shall constitute an abandonment of the project and the permit shall be considered expired.

Board Rule 38(B), entitled "Abandonment by non-use," purports to interpret § 6091(b) and states, in pertinent part:

> Use of a permit within one year as required in 10 V.S.A. § 6091(b) shall include but not be limited to actions by the permit holder to arrange financing, obtain other permits or otherwise demonstrate an *intention to* proceed with the project. However, in any case, substantial construction must occur on a development within two years from the date on which the permit was issued unless construction has been delayed by litigation to secure other necessary permits or approvals.

The Applicants argue 1) that the reasoning of the Board's decision in Re: Vercon Associates, #5L0806-EB, Findings of Fact, Conclusions of Law and Order (July 21, 1989) controls this determination; 2) that their permit should not be deemed abandoned because their actions during the time since the Permit was issued demonstrate that they "used" the Permit within one year and completed substantial construction within two years; 3) that, even if the Board concludes that substantial construction did not occur, the delay is excused because it was due to circumstances analogous to litigation; and 4) even if the Permit is determined to be abandoned with respect to Phase I, the findings of fact applicable to the rest of the project should remain in effect because they concern construction activities that will continue after the two year period contemplated by Board Rule 38(B).

In Re: Vercon Associates, the Board determined that a permit was not abandoned even though substantial construction had not occurred within two years of the permit's issuance. The Board's decision was based upon its belief that it would be unfair to apply Rule 38(B) because the permittee relied *upon* the conditions in the permit which stated that the permit would expire if the permittee has not demonstrated an intention to proceed with the project within one year, but did not contain either a reference to Rule 38(B) or a requirement that construction must begin within two years. The Board stated:

> While people are required to comply with the laws that apply to them and are not excused from complying simply because they were not aware of them, in this instance the Permittee was provided notice in its permit of specific provisions of the law regarding construction, and the Board believes it was reasonable for Mr. Field to rely on those provisions that were made explicit in the permit. Had the permit not included the restatement of the law that the permit will expire within one year unless the Permittee demonstrates an intention to proceed with the project within one year, the Board might have come to a different conclusion. Because of the inclusion of that statement, however, the Board believes that Mr. Field justifiably assumed that he was complying with the law by attempting to work out the various matters that needed to be resolved before construction could begin. The Board therefore concludes that Vercon

"used" the permit within one year as required by 10 V.S.A. § 6091(b).

Re: Vercon Associates at 5.

The facts of this case and the situation in the Vercon case are strikingly similar. After the permit was issued, Vercon Associates' representative actively pursued financing, negotiated for rights to develop an off-site water well, and contributed money for a study preliminary to the Town of Stowe's plans to develop a new sewer line which Vercon would use for its project. In this case, Windham Sports demonstrated its intention to proceed with the project, in addition to pursuing financing and additional sewage disposal capacity, by obtaining state approval for a stump burial area on the site, clearing the area for the golf course holes and fairways and the access road for the project, and complying with the permit condition that required them to establish an escrow account equal to the cost of the sewage disposal system for Phase I. In this case, in pursuit of adequate sewage disposal the Applicants hired a hydrogeologist who performed site testing and spent between $60,000 and $75,000 for options on land, mapping, legal work, and engineering and geological investigations.

The Board concludes that the Applicants' representatives justifiably believed they were complying with the requirements of the Permit when they undertook the above-described activities and that Rule 38(B) should not be applied. As we stated in Vercon, we do not believe that application of a rule should be waived lightly. However, as in Vercon, the Applicants here were given notice by the terms of their permit that they were required 1) to complete construction of Phase I by December 31, '1991, and 2) to demonstrate an intention to proceed with the project within one year from issuance of the Permit, but not that substantial construction must occur within one year. Because, as in Vercon, the Applicants were provided notice in the Permit of one part of Rule 38(B) but not of the part that requires substantial construction within two years, the Board believes it was reasonable for the Applicants' representatives to rely on the explicit provisions in the Permit.

Accordingly, the Board concludes that by pursuing financing, marketing, and clearing of the site, regardless of whether these activities are considered "substantial construction," the Applicants "used" the Permit within one year and the Permit is not abandoned. Because of this decision, the Board also concludes that the findings of fact for the entire project are not voided.

Because the Board has concluded that fairness dictates that the Permit not be deemed abandoned, it does not need to reach the other issues raised by the Applicants.

Although the Board concludes that the Permit has not been abandoned, if the District Commission believes that changes have occurred since issuance of the Permit that affect the findings upon which the Permit was issued, it may require the Applicants to submit an amendment application that addresses those changes which have occurred in the circumstances surrounding the project which may be affected by the project under the ten Act 250 criteria. See Re: Homestead Design, Inc., #4C0468-1-EB, Findings of Fact, Conclusions of Law and Order (Sept. 6, 1990).

VII. ORDER

1. Land Use Permit #2W0646-2 is not abandoned.

2. Findings of Fact #2W0646-2 that address the remaining phases of the project are not void.

3. This matter is remanded to the District #2 Environmental Commission for a hearing on the application for extensions of the construction completion date and the date for achieving substantial compliance.

Dated at Montpelier, Vermont this 4th day of March, 1991.

ENVIRONMENTAL BOARD

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