

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

Re: New Haven Savings Bank  
Land Use permit #2W0769-1-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated November 23, 1992, pertains to a land use permit authorizing the development of a 34-lot subdivision, known as Wilson's Woods, on a 20-acre tract off Fairground Road in the Town of Brattleboro. This project was originally approved by the District #2 Environmental Commission on September 29, 1989. The Permittee subsequently applied for and obtained a permit amendment to extend the construction completion deadline. On December 26, 1991, an adjoining landowner filed an appeal of the permit amendment with the Environmental Board and requested that either the permit be revoked or declared void.

As is explained below, the Board concludes that the Permittee neither violated nor abandoned its land use permit. Therefore, revocation or a declaration that the permit is void are unwarranted. The Board has determined that the construction completion deadline should be extended to December 15, 1994, and that substantial construction must occur by September 13, 1993.

I. SUMMARY OF PROCEEDINGS

On December 6, 1991, The District #2 Environmental Commission granted Land Use Permit Amendment #2W0769-1 to New Haven Savings Bank (the Permittee). This permit amendment authorized an extension in the construction completion deadline for the Wilson's Woods subdivision, from October 15, 1991 to October 15, 1993.

On December 26, Philip L. Feidelseit (the Appellant) filed an appeal seeking revocation of Land Use Permit #2W0769 (Revised) or a declaration that the permit is void. The Appellant contends that the District Commission erred in granting the permit extension because the Permittee failed to supply sufficient evidence in support of its request. The Appellant further contends that the permit should be revoked or declared void because of the Permittee's failure to proceed with construction consistent with the terms of the permit and Board Rule 38.

By memorandum, dated February 3, 1992, the parties were informed that the Board would dismiss the appeal in light of a recent amendment to 10 V.S.A. § 6091(b), unless a written objection was filed on or before February 18. On February 12, the Permittee filed a letter with the Board urging that the appeal and the Appellant's requests be denied. On February 18, the Appellant filed a written

533

objection to dismissal.

This matter was scheduled for **hearing** before an administrative hearing officer of the Board pursuant to Board Rule 41. The Permittee filed written statements of interest and disputed facts on May 13. The Appellant filed his statement of interest on May 15. A public hearing was convened on May 28, 1992, in Brattleboro, Vermont, before Board Chair, Elizabeth Courtney, acting as administrative hearing officer. The following parties participated:

Philip L. Feidelseit (the Appellant) by Michael J. Hertz, Esq.  
New Haven Savings Bank (the Permittee) by Raymond P. Perra, Esq.

The hearing officer recessed the hearing on May 28, pending the submission of proposed findings and conclusions of law. These were filed on June 18, 1992, by both the Appellant and the Permittee.

A proposed decision was sent to the parties on October 2, 1992. The parties were provided an opportunity to submit written objections to the proposed decision and to present oral argument before the full Board. Written comments were filed with the Board by the Appellant on October 28, 1992, and by the Permittee on October 30, 1992. The Board deliberated on November 4 and November 18, 1992. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise they are denied.

## II. ISSUES

1. Whether the Permittee abandoned its land use permit, and, if so, whether the permit should be declared void, pursuant to Board Rule 38(B);
2. Whether the Permittee violated its land use permit and, if so, whether the permit should be revoked, pursuant to Board Rule 38(A); and
3. If the Permittee neither abandoned nor violated its permit, whether an extension to the construction **completion** date in the land use permit should be granted.

## III. FINDINGS OF FACT

1. Land Use Permit #2W0769 was issued by the District #2 Environmental Commission on September 29, 1989, to Stephen Green and Michael **Kantrow** for a 34-lot **subdivi-**

sion, two deferral lots, and the construction of necessary utilities on a 20-acre tract off Fairground Road in the Town of Brattleboro. This project, known as Wilson's Woods, was approved for 17 two-bedroom houses and 17 three-bedroom houses.

2. On October 13, 1989, Mr. Green and Mr. Kantrow filed a Reconsideration Motion with the District #2 Environmental Commission. Some time in early 1990, while this motion was pending, New Haven Savings Bank of New Haven, Connecticut, acquired title to the property as a result of mortgage foreclosure litigation.
3. On September 13, 1990, Land Use Permit #2W0769 (Revised) was issued to New Haven Savings Bank (the Permittee). No appeal was filed.
4. Condition 28 of the revised permit states:

All construction for infrastructure for this project must be completed by October 15, 1991.
5. Condition 29 of the revised permit states:

This permit shall expire on October 15, 2020, unless extended by the District Commission. Notwithstanding the latter date, this permit shall expire one year from the date of issuance if the permittee has not demonstrated an intention to proceed with the project. Substantial construction must occur within two years of the permit issuance date, unless construction has been delayed by litigation to secure other necessary permits or approvals, in accordance with Environmental Board Rule 38.
6. No construction has taken place on the Wilson's Woods project, including construction of infrastructure.
7. The Permittee is a lending institution. It does not plan to sell lots or construct the necessary infrastructure. It plans to sell the subdivision to a developer. Toward this end, it has investigated financing and attempted to locate interested parties to develop affordable housing at the Wilson's Woods property.
8. In early 1990, the Permittee retained Wayne Mills, a

Brattleboro real estate broker, to find a developer to purchase and complete the project. Mr. Mills **advertised** the property extensively and responded to numerous inquiries about the property.

9. The Permittee retained the services of William Jewell, an environmental consultant, to work on the project infrastructure plans.
10. The Permittee hired Jonathan Gottlieb, President of ACI, Inc., as a consultant in order to help it both in marketing the property and in locating financing for prospective buyers. Mr. Gottlieb, on the instruction of the Permittee, attempted to develop a financing structure involving subsidies, grants, below market rate construction financing, and favorable rate on end load in order to produce affordable housing on the Wilson's Woods site. Mr. Gottlieb had extensive discussions with various public financing agencies prior to July or August 1991. He also met with a number of prospective buyers, including Nutmeg Housing Development Corporation of New Haven, Connecticut.
11. Nutmeg Housing Development Corporation, a Connecticut non-profit corporation, has executed a Purchase and Sale Agreement for the Wilson's Woods property. The Permittee has agreed to provide most of the financing for the project. However, a sale cannot be completed until after resolution of this appeal.
12. Recognizing that it would not be able to meet the deadline for construction of infrastructure, the Permittee filed a permit amendment application with the District #2 Environmental Commission on September 4, 1991, seeking extension of the construction completion date to October 15, 1994.
13. On December 6, 1991, the District #2 Environmental Commission issued Land Use Permit Amendment #2W0769-1. **Condition 2** extends the construction completion date to October 15, 1993. Condition 3 states, in relevant part:

Notwithstanding [the October 15, 2020] expiration date, substantial construction must occur by September 13, 1992, unless construction has been delayed by litigation to secure other necessary permits and approvals, in accordance with Environmental Board Rule 38.

14. Philip L. Feidelseit owns property abutting the Wilson's Woods project and was a party to the application proceedings with respect to this permit.

IV. CONCLUSIONS OF LAW

A. Abandonment of the Permit

The Permittee requests that Land Use Permit #2W0769 (Revised) be declared void for non-use, pursuant to Board Rule 38(B). The Appellant contends that the Permittee abandoned its permit because it failed to construct infrastructure or otherwise perform site work within one year of the issuance of its permit.

The determination of whether the Permittee abandoned its permit requires an interpretation of the term "nonuse" as it was used in 10 V.S.A. §6091(b) and Board Rule 38(B) in September 1990 when the Permittee was issued a revised permit for the Wilson's Woods subdivision.

At that time, 10 V.S.A. § 6091(b) stated:

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.<sup>1</sup>

Board Rule 38(B) interpreted the statute to make clear that use of a permit within one year included, but was not limited to, "actions by the permit holder to arrange

---

<sup>1</sup>10 V.S.A. § 6091(b) was amended in 1991 to make clear that nonuse of a permit for a period of two years following the date of issuance shall constitute an abandonment of a project. For a permit to be considered "used," substantial construction on a project must have commenced within two years of permit issuance, unless construction is delayed by litigation to secure other permits or unless, at the time the permit is issued, the district commission or board provides that construction may commence more than two years from the date of permit issuance. The effective date of this amendment was June 28, 1991, subsequent to the issuance of Land Use Permit Amendment #2W0769 (Revised). Therefore, the amendment does not alter any obligations incurred by the Permittee prior to the present permit amendment request, #2W0769-1. See 1 V.S.A. § 214(b)(2).

financing, obtain other permits or otherwise demonstrate an intention to proceed with the project." Rule 38(B) further stated that "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."

Therefore, at the time the Permittee was issued its revised permit, neither 10 V.S.A. § 6091(b) nor Board Rule 38(B) required that the Permittee begin or complete construction within one year but only to demonstrate its intention to proceed with the Wilson's Woods project.'

The Board concludes that the Permittee demonstrated an intention to proceed with the project within one year of issuance of the revised permit, by engaging in a series of actions designed to obtain financing and secure a buyer who would proceed with development of the project. When it became apparent to the Permittee that it would not be able to meet the infrastructure completion deadline, it filed an application for a permit amendment to extend that deadline, prior to expiration of the deadline. Under both its revised and amended permits,' consistent with the statute and Board Rule 38(B), the Permittee had until September 13, 1992, to commence substantial construction of its project. The application for extension was filed on September 4, 1991, well before the deadline for substantial construction.

The Board therefore concludes that the Permittee did not abandon its permit within the meaning of 10 V.S.A. § 6091(b) and Board Rule 38(B). Accordingly, the Board declines to declare Land Use Permit #2W0769 (Revised) void for non-use.

---

\*Both the Appellant and Permittee cited Re: Vercon Associates, Findings of Fact, Conclusions of Law and Order #5L0806-EB (July 21, 1989) in their Memoranda of Law, filed June 18, 1992. The issue in Vercon was whether the Board should declare a permit abandoned pursuant to Board Rule 38(B) where substantial construction had not begun within two years of the issuance of the permit and the permit had been silent concerning the "substantial construction" requirement. Vercon is relevant only to the extent that it identifies some activities the Board thought indicative of a permittee's intention to proceed with a project. See also Re: Windham Sports, et al., Findings of Fact, Conclusions of Law and Order #2W0646-2-EB (March 4, 1991).

B. Violation of the Permit

The Appellant requests that Land Use Permit #2W0769 (Revised) be revoked, pursuant to Board Rule 38(A), because the Permittee violated the conditions of its permit by not constructing infrastructure or otherwise performing site work within the time frames established in Conditions 28 and 29.

Board Rule 38(A)(2) states, in relevant part, that the Board may revoke a permit after hearing if it finds that:

(b) the applicant or his successor in interest has violated the terms of the permit or any permit condition, the approved terms of the application, or the rules of the board.

Based on the evidence provided by the parties, the District #2 Environmental Commission determined that there was good cause to extend the construction completion deadline to October 15, 1993. The Commission had recently reviewed the merits of the project in hearings related to Land Use Permits #2W0769 and #2W0769 (Revised), and it was within its discretion to grant an extension of the construction deadline. Accordingly, the Permittee did not violate the terms of its permit or permit conditions, as amended, because prior to seeking an extension the Permittee was in full compliance with those terms and conditions.

Because there is no evidence before the Board concerning any permit violations, pursuant to Board Rule 38(A), the Appellant's request for revocation is denied.

C. Extension of Deadlines

The Board is required to establish specific dates for project completion and for expiration of each land use permit in accordance with rules adopted under 10 V.S.A. chapter 151. 10 V.S.A. §6090(b); Board Rule 32(B). In determining the date for the completion of construction or subdivision, Rule 32(B)(1) states:

[T]he board or district commission shall consider the impacts of project development under the criteria of the Act, and shall give due regard to the economic considerations attending the proposed development or subdivision (such as the type and terms of financing, and the cost of development or subdivision) and the period of time over which the development or subdivision will take place.

All permits run with the land, and a purchasing landowner assumes the rights and obligations of a recorded permit without the necessity of an amendment transferring the permit. Board Rule 33(B)(1) and (3). However, a purchasing landowner may apply for an amendment for "any material or substantial change in a permitted project, or any administrative change in the terms and conditions of a land use permit." Board Rule 34(A).

The Permittee acquired title to the Wilson's Woods subdivision as a result of mortgage foreclosure proceedings involving the original applicants. After it obtained the Wilson's Woods property, it attempted to put together a financing package and secure a buyer to develop the subdivision. It engaged the services of a real estate broker to find a developer to complete the project and an environmental consultant to address infrastructure plans. It also engaged a marketing consultant, who approached various agencies about public financing and engaged in other activities to secure a developer buyer. The Permittee solicited various proposals from developers, including Nutmeg Housing Development Corporation. Within the bounds of its authority, the Permittee used its permit. Nevertheless, the Permittee was unable to arrange a sale in time to meet the infrastructure construction completion deadline set forth in its revised permit. Therefore, the Permittee filed an amendment application to obtain an extension prior to expiration of the completion deadline.

Under Board Rule 32(B)(1), the Board is required to give due regard to the economic considerations attending a proposed subdivision or development, including the type and terms of financing. The same considerations should be applied when determining whether an extension of time should be granted to a previously permitted project. The Board concludes that an extension in the construction completion deadline for the Wilson's Woods project is warranted. The Permittee has demonstrated an intention to proceed with its project, but it has been unable to complete a sale that would enable the project to be constructed within the timeframes originally established in its revised permit.

The Permittee has requested that the Board extend two of the dates set forth in its permit, as amended. First, it requests that the construction-completion date be extended to a date in 1994 computed by adding to the October 15, 1993, date set by the District #2 Environmental Commission an amount of time equal to that which has elapsed between the filing of the Appellant's notice of appeal and the expiration of the 30-day appeal period following the Board's

decision. Second, it requests that the "substantial construction" date of September 13, 1992, be extended to September 13, 1993, to make up for the loss of the 1992 construction season caused by this appeal.

The Permittee contends that it should not be disadvantaged by the passage of time resulting from the appeal. The Board agrees. The Vermont Supreme Court has recognized the need to accommodate the passage of time in land use permit proceedings in In re P.F. Partnership, No. 97-276 (Vt. March 21, 1991). The Board complied with the Court's directive by extending permit deadlines. Re: P.F. Partnership, Findings of Fact, Conclusions of Law and Order #9A0169-EB at 1-2 (June 7, 1991).

The Board agrees to extend the permit deadlines as requested by the Permittee. First, the requested extensions are reasonable in light of the nature of the project. Second, progress on this project has been delayed by an appeal by a party whose actions are beyond the Permittee's control.

Due to the time involved in hearing this appeal, deadlines referred to in the amended land use permit have passed or are now unrealistic. Therefore, the Board agrees that extensions are warranted which take into consideration not only the factors identified in Board Rule 32, but the delay incurred as a result of this proceeding.

The Board agrees to extend the construction completion deadline to December 15, 1994. In recognition that much of the construction season during 1992 has ended, the Board also agrees to extend the deadline for substantial construction to September 13, 1993. The Board notes that, consistent with 10 V.S.A. § 6091(b), as amended, Land Use Permit #2W0769 (Revised) may be deemed abandoned if substantial construction has not begun by September 13, 1993.

#### IV. ORDER

1. The Appellant's request that Land Use Permit #2W0769 be declared void for non-use is hereby denied. Land Use Permit #2W0769 (Revised) remains in full force and effect except as hereby amended.

2. The Appellant's request that Land Use Permit #2W0769 be revoked is hereby denied.

3. Land Use Permit Amendment #2W0769-1-EB is hereby issued.

4. Jurisdiction over this matter is returned to the  
District #2 Environmental Commission.

Dated at Montpelier, Vermont this 23rd day of November,  
1992.

ENVIRONMENTAL BOARD

*Elizabeth Courtney*<sup>A</sup>

Elizabeth Courtney, Chair  
Ferdinand Bongartz  
Terry Ehrich  
Lixi Fortna  
Samuel Lloyd  
William Martinez  
Steve Wright

::\wptext\2W0769-1.mem (V1)