

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

Re: Mill Lane Development Co., Inc.
Application #2W0942-2-EB

MEMORANDUM OF DECISION

This Memorandum of Decision addresses a Motion to Alter ("Motion") filed pursuant to Environmental Board Rule ("EBR") 3 1(A) by Mill Lane Development Company, Inc. ("Permittee") in regard to the Land Use Permit Amendment #2W0942-2-EB ("Board Permit") issued on December 17, 1999, along with Re: Mill Lane Development Co., Inc., #2W0942-2-EB, Findings of Fact, Conclusions of Law and Order ("Board Decision"). As explained below, the Environmental Board ("Board") grants the Motion in part and denies the Motion in part.

I. PROCEDURAL SUMMARY

The Board Decision contains a detailed summary of the background and procedural history of this case prior to issuance of the Board Decision and Permit, and therefore it will not be repeated here.

Permittee filed its Motion on January 6, 2000.

The Board deliberated on the Motion on January 19, 2000.

II. ENVIRONMENTAL BOARD RULE 3 1(A)

EBR 3 1 (A) authorizes motions to alter as follows:

(A) Motions to alter decisions. A party may file within 30 days from the date of a decision of the board or district commission one and only one motion to alter with respect to the decision. However, no party may file a motion to alter a decision concerning or resulting from a motion to alter.

(1) All requested alterations must be based on a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or allegedly improper use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to decision. New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence.

(2) A motion to alter should number each requested alteration separately. The motion may be accompanied by a supporting memorandum of law which contains numbered sections corresponding to the motion. The supporting memorandum should state why each requested alteration is appropriate and the location in the existing record of the supporting evidence. Any reply memorandum of law should also contain numbered sections corresponding to the motion. Additional requirements concerning motions and memoranda are set out in Rule 12 of these rules.

(3) The board or district commission shall act upon motions to alter promptly. The running of any applicable time in which to appeal to the board or supreme court shall be terminated by a timely motion filed under this rule. The full time for appeal shall commence to run and is to be computed from issuance of a decision on said motion. It is entirely within the discretion of the board or district commission whether or not to hold a hearing on any motion.

EBR 3 l(A)(1)-(3).

In general, Board decisions under EBR 3 l(A) indicate that a motion to alter is in the nature of reconsideration and that the motion should not ask the Board to reconsider matters it was not asked to consider originally. Re: Vermont Egg Farms, Inc., Declaratory Ruling #3 17, Memorandum of Decision (September 4, 1996); Re: Finard Zamas Associates, #1R0661-EB, Memorandum of Decision (January 16, 1991). Such motions must be based on the existing record. Re: Charles and Barbara Bickford, #5W1186-EB, Memorandum of Decision at 3 (September 12, 1995). No new hearings are held, nor is new evidence taken. Ibid. One reason for these limits is to discourage parties from using motions to alter to convert Board decisions into "proposed" decisions to which they can later respond. Ibid.

III. DECISION

Permittee requests alteration of Board Permit Conditions 11 .b. and 13 on the grounds that the requirements of these Conditions are excessive and unduly expensive.

Board Permit Condition **11** sets out requirements for earth disturbance on the Project site during the winter months. 11 .b. specifies the following special winter erosion controls:

b. An engineer, who shall be a professional engineer licensed by the State of Vermont ("Project Engineer"), employed by the Permittee or lot owner, shall inspect and maintain the special winter erosion control measures daily (Monday through Friday plus weekend days if moderate to heavy rain occurs on those days) until the

earthwork is fully stabilized. Affidavits certifying that the special winter erosion controls are being properly maintained shall be completed by the Project Engineer and mailed to the District Commission twice a week.

Permittee asserts that the erosion concerns addressed by 11 .b. could be adequately met through once per week inspections and twice monthly filing of affidavits by the Project Engineer, and urges that the language of 11 .b. be modified accordingly.

Board Permit Condition 13 sets forth year-round erosion control requirements. In regard to inspection and reporting, Condition 13 provides:

[T]he Project Engineer shall inspect the Project Tract at least once per week and after significant rainstorms and file with the Commission weekly inspection reports certifying that all erosion controls specified [in the Permit] are in place and properly maintained. The reports shall also document any non-compliance. Following completion of construction, Project Engineer shall continue to certify to the Commission, at such intervals as the Commission may require, that the erosion controls specified herein remain in place and are properly maintained.

Permittee asserts that the requirements of this Condition, too, are excessive and unduly expensive and submits that the erosion control concerns addressed by Condition 13 could be adequately met through every-other-week inspections and reporting,

After carefully reviewing the Conditions at issue, the existing record, relevant law and Permittee's arguments, the Board alters in part the requirements of Condition 11. b., but allows to stand the requirements of Condition 13.

Any permit condition imposed on a project must be reasonable. In re Denio, 158 Vt. 230, 240 (1992); Re: Charles and Barbara Bickford, #5W1186-EB, Findings of Fact, Conclusions of Law and Order at 24 (May 22, 1995); Re: Taft Corners Associates, Inc., #4C0696-11-EB (Remand), Memorandum of Decision at 18 (May 5, 1995). In view of the record of this case, which shows that the Project Tract is located on a steep, sensitive, undeveloped mixed forest site, adjacent to a shoreline and traversed by an important deer wintering area, the erosion inspection and reporting requirements imposed by Conditions 11 .b. and 13 are reasonable. They insure against adverse erosion effects and insure compliance, both of which are legitimate exercises of the Board's police power pursuant to 10 V.S.A. § 6086(c). See also EBR 32(A) (expressly authorizing Board to require a permittee to file affidavits of compliance with respect to specific conditions of a permit at reasonable intervals).

Still, the Board is mindful of the time and expense involved in complying with Conditions 11 .b. and 13, in particular that part of 11 .b. requiring the Project Engineer's daily presence on the Project site to inspect and maintain the special winter erosion control measures. While relaxing the requirement of Engineer inspections from once per day to once per week clearly would not provide adequate monitoring of the special winter erosion control measures, the Board is willing to accept twice per week inspections, so long as they occur on non-consecutive days, plus additional days if moderate to heavy rains occur, and so long as affidavits are mailed to the District #2 Environmental Commission twice per week.

Accordingly, Board Permit Condition 11. b. will be altered to read:

b. An engineer, who shall be a professional engineer licensed by the State of Vermont ("Project Engineer"), employed by the Permittee or lot owner, shall inspect and maintain the special winter erosion control measures twice per week on non-consecutive days, plus additional days if moderate to heavy rain occurs on those days, until the earthwork is fully stabilized. Affidavits certifying that the special winter erosion controls are being properly maintained shall be completed by the Project Engineer and mailed to the District Commission twice a week.

No other alterations will be made. As regards Permittee's request to clarify whether house construction sites are exempt from the requirements of Condition 13, they are not. Permittee must comply with Condition 13 with respect to all construction.

IV. ORDER

1. The Board partially grants and partially denies Permittee's Motion as set forth below.
 2. The Board hereby alters and amends Board **Permit** Condition 11 .b. to read as follows:
 - b. An engineer, who shall be a professional engineer licensed by the State of Vermont ("Project Engineer"), employed by the Permittee or lot owner, shall inspect and maintain the special winter erosion control measures twice per week on non-consecutive days, plus additional days if moderate to heavy rain occurs on those days, until the earthwork is fully stabilized. Affidavits certifying that the special winter erosion controls are being properly maintained shall be completed by the Project Engineer and mailed to the District Commission twice a week.
 3. The Board denies Permittee's request to alter Board Permit Condition 13 and clarifies that this Condition applies to all construction on the Project site.
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4. To the extent that the Board grants Permittee's Motion, the Board will reissue the Board Permit and incorporate the alterations set forth above.

Dated at Montpelier, Vermont this 27th of January, 2000

ENVIRONMENTAL BOARD

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