

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

Re: P & H Transportation Co., Inc.
Application #3R0569-1-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal and motion to stay by P & H Transportation Co., Inc. (the Applicant) of various conditions in a permit amendment authorizing, among other things, the conversion of a garage and gravel storage unit to a fleet-vehicle garage and maintenance facility.

As is explained below, the Environmental Board accepts a resolution proposed by the Chair and agreed to by the parties and concludes: (a) that the appeal should be dismissed without prejudice because the Applicant no longer plans to proceed with the subject project, and has vacated and plans to sell the relevant tract; and (b) various conditions should be stayed on condition that, prior to resumption of use, the conditions are either complied with or changed by subsequent permit amendment.

1: SUMMARY OF PROCEEDINGS

This matter concerns an application for a permit amendment authorizing the construction of septic system improvements, the elimination of split-rail fences, the implementation of a landscaping plan an increase in parking to 60 spaces, a conversion to a single vehicle access, and the construction of improvements related to the conversion of a garage and gravel storage unit to a fleet-vehicle garage and maintenance facility (the Project). The Project is located on Route 5 in the Town of **Fairlee**.

On April 28, 1995, the District #3 Commission issued Land Use Permit Amendment #3R0569-1 (the Permit Amendment), authorizing the Project with conditions.

On May 25, 1995, the Applicant filed a motion to alter many of the conditions with the District Commission. On June 2, the District Commission issued a memorandum of decision denying the motion.

On July 3, 1995, the Applicant filed an appeal and motion to stay with the Board.

On August 10, 1995, Environmental Board Chair John T. Ewing convened a prehearing conference in Montpelier. On August 15, the Chair issued a preheating conference report and order, which is incorporated by reference.

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During September and October 1995, the parties filed prefiled testimony and exhibits, lists of witnesses and exhibits, and the Applicant filed various motions and memoranda.

The Chair, acting as hearing officer, convened a hearing on October 18, 1995, with the following parties participating:

The Applicant by Christopher Dye, Esq.
Karen and Peter Thurston (adjoining property owners), pro se

After opening the hearing, the Chair suggested to the parties a potential resolution which he was considering based on the filings and positions of the parties. The Chair requested the parties' responses to the possible resolution, stating that they were free to agree or disagree and, if needed, to take time to consider the matter. The parties responded favorably and questions and discussion ensued. On completion of discussion, the parties each stated that they agreed to the Chair's suggestion.

Afterward, with the consent of the parties as to procedure, the Chair ruled on all pending motions and admitted all exhibits and prefiled testimony into the record. The Chair then took a site visit, returned to the hearing room, and placed his observations from the site visit into the record. The Chair then stated that he would issue a proposed decision stating the agreement of the parties and that they would be given an opportunity to comment on the language of the decision.

On October 30, 1995, the Chair issued a proposed decision embodying the resolution agreed on by the parties, who were given an opportunity to file written requests to change the language of the decision or to make a presentation to the Board concerning such language, or both. No party filed written comments or requested to make a presentation.

On November 29, 1995, the Board convened a deliberative session. This was the first time the full Board had reviewed the matter. On that date, after review, the Board determined to approve the Chair's proposed decision with modifications, declared the record complete, and adjourned. This matter is now ready for decision.

II. ISSUES

a. Whether the appeal of several conditions in the Permit Amendment should be dismissed without prejudice.

b. Whether, pursuant to Environmental Board Rule (EBR **42**), to grant the Applicant's motion to stay.

III. FINDINGS OF FACT

1. On December 19, 1988, the District **#3** Commission issued Land Use Permit **#3R0569** (the Permit) to Frederick R. Hayward III and Jane M. Hayward. The Permit authorized the **Haywards** to construct a **42-** by **80-** foot truck maintenance garage, six **10-** by **10-foot** gravel storage bins, and related sewer and water utilities, to be located on an approximately 1.8 acre tract of land located on Route 5 in the Town of **Fairlee** (the Tract).
2. The Permit was not appealed to the Board. The Permit contained landscaping requirements which were not performed.
3. The Applicant is a successor-in-interest to the **Haywards** and filed the application for the Project described in the Summary of Proceedings, above. As noted in that description, part of the Project includes "implementation of a landscaping plan." The purpose of such implementation is in part to cure the non-compliance with the Permit.
4. The Applicant appeals various conditions of the Permit Amendment. These are described below, along with the criteria at 10 V.S.A. § 6086(a) to which they relate:
 - a. Condition **#7**, limiting the Project to 580 gallons of water per day; issued pursuant to Criterion 1(B) (waste disposal).
 - b. Condition **#8**, requiring that septic filter beds be protected by a **ten-** foot buffer marked with posts, and reserving to the District Commission the right to require the Applicant to monitor and file reports concerning water used in washing vehicles and tanks; issued pursuant to Criterion 1(B) (waste disposal).
 - c. Condition **#10**, requiring that the access apron be paved within 30 days "to reduce dust from entering and exiting traffic"; issued pursuant to Criterion 1 (air pollution - dust);
 - d. Condition **#11**, requiring that, within 30 days, the project access be completed "as shown on the approved site plan"; issued pursuant to Criteria 5 (traffic) and 8 (aesthetics).

- e. Condition #12, which requires that landscaping requirements be fulfilled within 30 days; issued pursuant to Criteria 1 (air pollution) and 8 (aesthetics).
 - f. Condition #13, requiring installation within 30 days of an eight-foot wooden stockade along the Project tract's southern border; issued pursuant to Criterion 8 (aesthetics).
 - g. Condition #14, which requires the Applicant to plant, within 30 days, 25 or more six-foot trees along the southerly fence; issued pursuant to Criterion 8 (aesthetics).
 - h. Condition #15, requiring certification by affidavit from a nurseryman or landscape architect following completion of the plantings; issued pursuant to Criterion 8 (aesthetics).
5. The Applicant's motion to stay pertains to Conditions #5, and 10 through 15 of the Permit Amendment, all of which have been described above except for Condition #5, which incorporates all conditions of Water Supply and Wastewater Disposal Permit #WW-3-9184 (the WW Permit) issued by the Agency of Natural Resources' (ANR's) Department of Environmental Conservation.
6. On October 13, 1995, the Applicant ceased using the Project and the Tract. The Applicant has moved its operations to New Hampshire and plans to sell the Tract. The Project improvements will remain vacant until sale and will not be used except for routine repair and maintenance. The Project will be shown to potential buyers.
7. A purchaser of the Tract may wish to pursue a project other than the Project. If so, said purchaser will need a permit amendment under EBR 34.
8. The Thurstons are adjoining property owners who reside on their adjoining property. The Project is directly visible from their home. The Thurstons' use of their adjoining property is adversely affected by such visibility, as well as by noise and dust from the Project if active.
9. If the Project is inactive, the noise and dust impacts on the Thurstons' are significantly diminished in large part because truck traffic associated with the Project will be absent.

10. The Project and the Tract are located within a commercial zone in **Fairlee**. Other commercial properties are visible from the Thurstons' property.
11. Route **5** is a state highway.
12. The estimated cost of compliance with all of the permit conditions for which stay is sought is between \$20,000 and \$25,000.
13. At hearing on October 18, 1995, parties agreed to resolution of this matter as follows:
 - a. The appeal should be dismissed without prejudice.
 - b. The motion to stay should be granted for as long as the Project and the Tract are vacant and not used.
 - c. Prior to resumption of any use of the Project and the Tract, the conditions of the Permit Amendment shall be complied with or a further permit amendment obtained **from** the District **#3** Commission revising or deleting the conditions.
 - d. The stay should be retroactive to the date of the Permit Amendment.
 - e. During the stay period, routine repair and maintenance and showing to potential buyers should be allowed. An example of routine repair is fixing a leaking roof. An example of routine maintenance is snowplowing.

IV. CONCLUSIONS OF LAW

A. Dismissal of Appeal

The issue is whether, because the Applicant has ceased using the Project, the appeal should be dismissed without prejudice. The Board first examines whether it should be dismissed and second whether such dismissal should be without prejudice.

The Board concludes that the appeal should be dismissed because it is moot. **A case** is moot if it no longer presents a "live" controversy. **In re Moriarty**, 156 Vt. 160, 163 (1991). The mootness doctrine applies to administrative

proceedings. Town of Cavendish v. Vt. Public Power Supply Authority, 141 Vt. 144, 14'7-48 (1982).

As stated in the prehearing conference report issued in this matter, under 10 V.S.A. § 6089(a) and EBR 40(A), in this appeal the Board is to conduct a de novo hearing to determine whether the above-referenced conditions are warranted to achieve the Project's compliance with Criteria 1 (air pollution), 1(B) (waste disposal), 5 (traffic), and 8 (aesthetics). Since the Applicant has ceased the Project, there is no longer reason to make such determinations, and therefore the appeal does not present a "live" controversy.

The Board also concludes that the dismissal should be without prejudice because, under 10 V.S.A. § 6090 and EBR 32(B)(2) and 33(C)(3), the Permit Amendment runs with the land for an indefinite term. Thus, unless the dismissal is without prejudice, the full opportunity to contest the conditions raised in the appeal will not have been given.

B. Motion to Stay

The motion to stay is reviewed under EBR 42, which provides:

No decision of the board or a district commission is automatically stayed by the filing of an appeal. Any party aggrieved by a final order of the board or a district commission may request a stay by written motion filed with the board identifying the order or portion thereof for which a stay is sought and stating in detail the grounds for the request.

In deciding whether to grant or deny a stay, the board may consider the hardship to parties, the impact, if any, on the values sought to be protected by Act 250, and any effect upon public health, safety or general welfare. The board may issue a stay containing such terms and conditions, including the filing of a bond or other security, as it deems just.

Unlike the appeal, the motion to stay is not rendered moot by the Applicant's vacating the Project and the Tract. The motion continues to present a live controversy because compliance with the conditions remains required unless stayed.

Based on the foregoing findings of fact, and after consideration of the factors enumerated in EBR 42, the Board concludes that the motion to stay

should be granted in accordance with the terms of the attached order. In granting the motion, the Board stresses the Applicant's representation that it has ceased all use of the Project and the Tract. The nature of the stayed conditions is such that their implementation is less significant if the Project and the Tract are not being used.

Among other items, the attached order includes provisions stating that a violation of the order is a violation of Act 250 and the Permit Amendment, to placing the burden of proof on the Applicant or a successor-in-interest to show that a disputed activity is routine repair or maintenance, and to recording the order on the land records. The Board believes that all of these provisions are necessary to ensure compliance with the order. In particular, the Board believes that the burden of proof on "routine repair and maintenance" should be allocated in a manner which ensures that the exception for such activity does not swallow the other conditions of the order.

The attached order also includes a provision clarifying the meaning of staying Condition #5, which incorporates all conditions of the WW Permit. Because the WW Permit is a separate permit issued by a different agency, it is necessary to clarify that the Board's order does not stay the WW Permit but rather means that, during the stay period, violation of the WW Permit is not also a violation of the Permit Amendment. Should the Applicant seek to stay the WW Permit, it should apply to ANR.

The attached order further includes a clarification that it applies only to the Permit Amendment, and not to any other permits, including those issued by other state agencies.

V. ORDER

1. The Applicant's appeal of Conditions #7, 8, and 10 through 15 of Land Use Permit Amendment #3R0569-1-EB issued April 28, 1995 (the Permit Amendment) is dismissed without prejudice as to the issues raised. The Applicant or a successor-in-interest may raise the issues presented by such appeal in a future permit amendment application to the District #3 Commission, as long as such application is made and amendment obtained prior to resumption of use of the Project or the Tract.

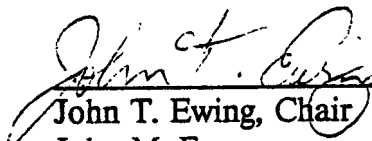
2. Conditions #5 and #10 through 15 of the Permit Amendment are stayed for as long as the Project and the Tract are vacant and not used. Such stay is subject to the following conditions:

- a. Prior to resumption of any use of the Project or the Tract, the stayed conditions of the Permit Amendment shall be complied with or a further permit amendment obtained from the District #3 Commission revising or deleting the conditions. The word "use" includes storage or placement of trucks or tanks on the Tract.
- b. The stay is retroactive to April 28, 1995. Nothing in this order precludes an enforcement action concerning matters arising prior to April 28, 1995.
- c. During the stay period, routine repair (such as fixing a leaking roof) and routine maintenance (such as snowplowing) and showing to potential buyers are allowed.
- d. The phrases "routine repair" and "routine maintenance" do not include an upgrade over an historic condition or storage or placement of trucks or tanks on the Tract. In any dispute over whether an activity is routine repair or routine maintenance, the burden of proof shall be on the Applicant or a successor-in-interest.
- e. The stay of Condition #5 of the Permit Amendment does not mean that the Applicant or a successor-in-interest need not comply with Water Supply and Wastewater Disposal Permit #WW-3-9184 (the WW Permit), issued by the Agency of Natural Resources' (ANR's) Department of Environmental Conservation. Rather, the stay of Condition #5 means that, during the stay period, violation of the WW Permit is not also a violation of the Permit Amendment.

- f. The stay of conditions in the Permit Amendment does not apply to any other permits, including permits issued by another state agency, including but not limited to permits issued by ANR or the Agency of Transportation.
 - g. AU conditions of the Permit Amendment not specifically stayed in this order remain in effect and compliance is required.
 - h. **A violation of this** order shall be a violation of 10 V.S.A. 8 6081(a) and of the Permit Amendment.
 - i. This order shall be recorded on the land records of the Town of **Fairlee**. A searcher on such land records is hereby advised that this order is part of a larger document available from the Environmental Board or District #3 Commission: Re: P & H Transportation Co., Inc., Findings of Fact and Conclusions of Law #3R0569-1-EB, December 1, 1995.
3. Jurisdiction over this matter is returned to the District #3 Commission.

Dated at Montpelier, Vermont this 1st day of December, 1995.

ENVIRONMENTAL BOARD



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