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

RE: Pelham North, Inc. by Findings of Fact
John R. Canney III, Esq. and Conclusions of
Carroll, George & Pratt Law and Order
P.O. Drawer 530(J) #3W0521-EB
Rutland, Vermont 05701-0530

This decision pertains to a petition to revoke Land Use Permit #3W0521 filed with the Environmental Board on May 19, 1988 by the Hartland Planning Commission (HPC). The petition alleges that Pelham North, Inc., with gross negligence, submitted incomplete information in connection with its permit application, that Pelham North did not send copies of its amended plans to the HPC, and that had the HPC been notified, it might have caused the District Commission to impose different conditions in the permit.

n A prehearing conference was held on July 15, 1988. At that time, Chairman Wilson made a preliminary ruling to remand the matter to the District Commission for a hearing, if the parties agreed that proper notice of the modifications were not submitted to the HPC on those aspects of the project that were modified subsequent to the District Commission hearing. Pelham North, the HPC, the Town of Hartland, and Two Rivers-Ottawaquechee Regional Planning Commission agreed they would attempt to settle the matter. Pelham North indicated it might request an evidentiary hearing if the parties were not able to reach a settlement. On September 15, the Board received a request from Pelham North for an evidentiary hearing.

On December 6, 1988, an administrative hearing panel convened a public hearing in Hartland, Vermont. The following parties participated in the hearing:

Pelham North, Inc. by John R. Canney, III, Esq.
Town of Hartland Planning Commission by William J. Donahue,
Esq.
Town of Hartland by Roger Lamson
Two Rivers-Ottawaquechee Regional Planning Commission (Two
Rivers) by Don Bourdon

The Hartland Planning Commission and Pelham North filed proposed findings of fact and conclusions of law on December 23, 1988. A proposed decision was sent to the parties on April 4, 1989, and the parties were provided an opportunity to file written objections and to present oral argument before the full Board. No party submitted such objections or requested oral argument. The Board deliberated concerning this matter on April 19, 1989. On that date, following a review of the proposed

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decision and the evidence in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively on the record developed at the hearing. To the extent the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise, these requests to find are hereby denied.

I. BACKGROUND

The District #3 Environmental Commission held a hearing on December 17, 1986 on Pelham North's application for a 15-lot subdivision and the construction of approximately 7,500 feet of roadway in Hartland. The HPC participated in the hearing and took the position that the project did not comply with the clustering requirements of the Hartland Town Plan. On December 22, 1986, the District #3 Commission sent a memorandum to Pelham North requesting additional information, and on January 13, 1987, the District Coordinator sent to all parties preliminary conclusions of the District Commission that the project must be redesigned to cluster the development. On July 1, 1987, Pelham North sent additional information to the District Commission and on July 22, the District Coordinator sent a memorandum to the parties acknowledging receipt of the material and instructing the Applicant to send copies of all material to all participating parties. Hearing no objections from any parties, on November 5, 1987 the District Commission issued Land Use Permit #3W0521 to Pelham North, Inc.

II. ISSUES

The HPC contends that it was unaware that Pelham North had submitted additional information with respect to its application because Pelham North did not provide copies to the HPC and the HPC did not receive a copy of the Coordinator's memorandum of July 22, 1987. The HPC claims that it would have requested a hearing on the project modifications and might have caused the District Commission to impose more restrictive conditions relating to the design of the project. The HPC believes the permit should be revoked because failure to notify the HPC of the revised plans deprived the HPC of its right to receive notice and to respond, as required by the Administrative Procedure Act and Act 250. The HPC also claims that it was not sent a copy of Pelham North's original application, as required by 10 V.S.A. § 6084, and that the District Commission therefore was without jurisdiction to review the application.

Pelham North does not dispute the claim that it did not provide copies of the additional submissions directly to the HPC, but argues that providing the material to the Hartland Town Manager was sufficient and that there is no requirement that parties be notified after the initial application is filed. Pelham North also contends that the HPC received sufficient notice of the original application to enable the HPC to attend and participate in the initial hearing. Furthermore, the HPC believes that by failing timely to file for reconsideration or an appeal, the HPC waived its right to appeal, and that Rule 38 does not authorize revocation of a permit in this instance.

The issues the Board needs to decide are:

- 1) Whether the HPC is barred from pursuing its request for revocation when it failed to file timely for reconsideration or appeal from the permit.
- 2) Whether any ground for revocation within the meaning of Rule 38 was alleged.
- 3) Whether Pelham North "with gross negligence submitted ... materially incomplete information in connection with the permit application."
- 4) Whether Pelham North provided the HPC with a copy of its initial application and, if not, whether the District Commission was without jurisdiction to review the application and issue a decision.
- 5) Whether Pelham North provided the HPC with the additional material which it sent to the District Commission on July 1, 1987 and, if not, whether the permit is therefore void.
- 6) Whether, it Pelham North failed to provide the HPC with copies of the original application or the modified plans, Pelham North violated 10 V.S.A. § 6084(a), Board Rule 10(E), or Board Rule 12(D).

III. FINDINGS OF FACT

1. David Courtney is the president of Pelham North, Inc. In November, 1987, Mr. Courtney met with the HPC as a matter of courtesy to describe his proposal for a subdivision. He showed the plans to the members of the HPC but did not leave a copy when he left. His engineer then sent two of 21 sheets of plans to the HPC and sent the full plans and copy of Act 250 application to the Town Manager.
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2. On December 3, 1986, Mr. Courtney filed an application for an Act 250 permit with the District #3 Environmental Commission. The application requested approval for a 12-lot subdivision with 3 lots reserved for common land and the upgrading and construction of approximately 7,500 feet of road on 88.8 acres of land in Hartland, Vermont. When Mr. Courtney submitted the application, the District Coordinator told him to notify all statutory parties. Mr. Courtney did not provide a full copy of the application or the plans to the HPC.
3. On December 17, 1986, the District #3 Environmental Commission held a public hearing regarding Pelham North's application. Two members of the HPC attended the hearing and stated their position that the proposed project did not conform to the Town Plan because the buildings were not clustered.
4. At the December 17, hearing, Mr. Courtney stated that a complete application would be at the Town Manager's office available for anyone to review.
5. On January 13, 1987, the District Coordinator sent a memorandum to the parties with proposed conclusions from the District Commission. The Commission concluded that it was concerned about the layout of the project and would not approve it unless it were redesigned to cluster the buildings. The HPC received a copy of this memorandum.
6. Mr. Courtney proceeded to revise his application to address the District Commission's concerns. He developed a forest management plan, restrictive covenants, and perpetual conservation restrictions. He sent the revisions to the District Coordinator and hand-delivered one copy to the Hartland Town Manager and one copy to the Executive Director of Two Rivers. He did not provide a copy of the revisions to the HPC.
7. The District Coordinator acknowledged receipt of Mr. Courtney's submissions by memorandum to the parties dated July 22, 1987. That memorandum contains the following statements:

The applicant is instructed (if it has not already done so) to distribute all materials to all participating parties. Written certification of distribution must be sent to my office so the Commission may impose reasonable deadlines for responses from the parties.

(Emphasis as in original)

- a . Mr. Courtney received the July 22 memorandum from the Coordinator but the HPC did not receive a copy. After receiving the memorandum, Mr. Courtney did not send a copy of the revisions to the HPC.
9. On August 19, 1987, the Hartland Town Manager sent a letter to David Courtney stating that the project will not burden the roads and that the Selectmen do not object to the project. The letter contains no indications that copies were sent to anyone. The HPC did not receive a copy of the letter.
 10. The HPC had no knowledge that Mr. Courtney had submitted additional information to the District Commission with respect to his application until after the Land Use Permit was issued, and assumed the application had been withdrawn.
 11. The District Environmental Office secretary kept records of the distribution lists for all documents pertaining to Pelham North. The distribution lists indicate that copies of all documents generated by the District Office in this matter were sent to Audrey O. Collins, a member of the HPC, at P.O. Box 135, Hartland, Vermont 05048. Ms. Collins does not recall receiving any documents relating to Pelham North except the Land Use Permit after it was issued. The HPC receives its mail at P.O. Box 75, Hartland, Vermont.
 12. David Courtney attended the HPC meeting on April 6, 1988, at which he stated that he had not provided the HPC with copies of documents because he had incorrectly assumed that the Hartland Town Manager was providing copies of Pelham North documents to the HPC.
 13. The District Commission issued a permit to Pelham North on November 5, 1987, without holding a hearing on the revisions to the application.

IV. CONCLUSIONS OF LAW

Several legal issues have been raised regarding this revocation petition which require resolution. The first issue is whether the HPC is barred from pursuing the revocation request because it failed to appeal timely from the permit itself. A related issue is whether any grounds were alleged for revocation within the provisions of Rule 38. These issues will be addressed together, as they are interrelated.

Appeals are brought to the Board by parties to district commission proceedings who are aggrieved by a decision of the District Commission. 10 V.S.A. § 6089 and Rule 40.

Revocation of permits is authorized by 10 V.S.A § 6090(c). Board Rule 38 provides that revocation petitions may be brought by a person who was a party to an application as well as by "any adjoining property owner whose property interests are directly affected by an alleged violation, any municipal or regional planning commission, or any affected municipal or state agency." Grounds for revocation include:

- (a) The applicant or his representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission or board to deny the application or to require additional or different conditions on the permit; or (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

Since appeal and revocation are separately authorized and are based upon different grounds, one's rights to bring a revocation petition cannot be barred by failure to timely appeal from a decision. Of course, a revocation petition will be entertained only as long as the petition alleges a reason for revocation that is grounded in Rule 38. Given a proper revocation petition, matters relative to an appeal of a permit are not relevant to the Board's consideration of a revocation petition.

In this case, the HPC has alleged that with gross negligence Pelham North submitted materially incomplete information in connection with its permit application and has violated the Rules of the Board. These are both grounds for revocation stated in Rule 38. The Board therefore finds that sufficient grounds were alleged for the Board to consider revocation.

Turning to the substance of the allegations, the Board concludes that Pelham North did not provide the HPC with copies of its initial application or with copies of the amended application after it modified its plans in July, 1987. The statute and Board Rules are clear regarding the requirement that **specified** parties must receive copies of the application and of **all** subsequent filings. 10 V.S.A. § 6084; Rule 10(E); Rule 12(D). Although Mr. Courtney provided copies of the application and subsequent plan modifications to the **Hartland** Town Manager, the Town Planning Commission is a separate party entitled to

receive its own copies. 10 V.S.A. § 6084(a). By not giving copies of the application and modifications, to the HPC, Pelham North violated the above mentioned statute and rules. These violations constitute grounds for revoking the permit.

However, the Board does not believe that Pelham North's failure to send copies of the revised plans to the HPC constituted gross negligence in submitting materially incomplete information because the Board interprets this provision as referring to applications submitted to the District Commission, not to information that other parties did not receive. In this case, a complete and accurate application and subsequent modifications were submitted to the District Commission. The Petitioner's allegation in this respect, therefore, does not constitute a basis for revoking the permit.

In addition to requesting that the permit be revoked, the HPC contends that Pelham North's failure to provide copies of the original application and the subsequent revisions deprived the District Commission of jurisdiction over the application, and that the permit is therefore void.

The Board agrees that basic due process requires notice and the opportunity to present and rebut evidence. See, e.g., Zagoreos v. Conklin, 109 N.Y.A.D.2d 1981, 491 N.Y.S.2d 358 (1985); Gay v. County Commissioners of Bonneville County, 103 Idaho 626, 651 P.2d 560 (1982). A statutory requirement for notice and hearing is jurisdictional; lack of notice invalidates the decision. See, e.g., Corporation Service, Inc. v. Zoning Board of Review, 114 R.I. 178, 330 A.2d 402 (1975); Moore v. Cataldo, 356 Mass. 325, 249 N.E.2d 578 (1969). However, due process requires only that parties be sufficiently informed to be able to participate; appearance at the hearing avoids the need to remand the matter. Aprile v. Lo Grande, 89 N.Y.A.D.2d 563, 452 N.Y.S.2d 104 (1982); Madison v. Clarke, 288 N.W.2d 312 (S.D. 1980). Because the HPC was aware of the initial application and appeared at and participated in the December 17 District Commission hearing, the Board determines that the District Commission had jurisdiction over the application and this matter need not be remanded for a full hearing on the application. However, because Pelham North failed to notify the HPC of the modification to its application, the Board must conclude that the findings and conclusions made by the District Commission with respect to the project's modifications are void. For this reason, the Board will remand the matter to the District Commission for a hearing on the revised plans submitted to the District Commission on July 1, 1987.

With respect to the HPC's request to revoke the permit, the Board must follow the mandates of Rule 38. Rule 38(A)(3) provides that the Board must give a permittee a reasonable opportunity to correct a violation prior to revoking a permit,

unless there is a clear threat of irreparable harm to public health, safety or general welfare or to the environment by reason of the violation, or unless the permittee is responsible for repeated violations. The lack of notice to the HPC has not resulted in irreparable harm, and two occasions of neglect in providing notice do not rise to the level of "repeated violations." The Board is therefore obligated to provide Pelham North an opportunity to correct the violations of the statute and rules committed by failing to send copies of its application and modifications to the HPC. The Board believes this can be accomplished if Pelham North will now provide a copy of its amended plans to the HPC and the District Commission will hold a hearing on the revisions.

V. ORDER

1. Land Use Permit #3W0521 is void.
2. Pelham North shall provide all parties with copies of the revised plans previously submitted to the District Commission on July 1, 1987. The District Commission shall hold a hearing to review these revisions and shall reissue its decision.

Dated at Montpelier, Vermont this 24th day of April, 1989.

ENVIRONMENTAL BOARD

Jan S. Eastman

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