

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

RE: Roger and Beverly Potwin
Land Use Permit #3W0587-3-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns an appeal from an order authorizing the extension of a construction completion deadline in connection with a project to create a two-lot subdivision, one lot consisting of 8.1 acres (containing a farmhouse complex) and a second lot of 34.9 acres (containing eight house sites and related improvements) with an access drive and related amenities on a site off Old Town Farm Road in the Town of Quechee, Vermont ("Project").

I. PROCEDURAL SUMMARY

On September 29, 1998, Roger and Beverly Potwin ("Potwins") filed an application for a permit amendment, pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"), to extend the construction completion deadline for their planned residential development.

On June 8, 1999, the District #3 Environmental Commission ("District Commission" or "Commission") issued Land Use Permit #3W0587-3 ("the Dash 3 Permit") and supporting "Memorandum of Decision: Extension of Construction Completion Deadline" ("Decision") to the Potwins, their assigns, and successors in interest, extending the construction completion date for the development from October 1, 1998 to October 1, 2003.

Title to the development site transferred to Frederick Zeytoonjian by warranty deed filed on June 18, 1999, in Volume 273, pages 399-402, of the Town of Hartford Land Records.

On July 7, 1999, George Baldwin and David Olio ("Appellants") filed an appeal with the Environmental Board ("Board") from the Dash 3 Permit and Decision alleging that the Commission erred by (i) denying Mr. Baldwin party status as to 10 V.S.A. §6086(a)(3), (4), (8), and (9)(B) ("Criteria 3, 4, 8, and 9(B)") and (ii) extending the construction completion deadline. The appeal was filed pursuant to 10 V.S.A. §6089(a) and Environmental Board Rules ("EBR") 6 and 40.

On August 6, 1999, Board Chair Marcy Harding convened a prehearing conference with the following entities participating:

Frederick Zeytoonjian (as successor in interest¹ to the Potwins) by John C. Candon, Esq. and David Courtney
Appellants by Carl H. Lisman, Esq.

On August 6, 1999, Chair Harding issued a Prehearing Conference Report and Order ("Prehearing Order").²

On September 17, 1999, the Chair issued a Scheduling Order, setting out deadlines for filings by the parties and scheduling a hearing in this matter on December 17, 1999.

On December 6, 1999, Attorney Lisman filed³ a letter stating that the Appellant and Zeytoonjian had agreed on a stipulation of facts in this matter, and that, as a result, the scheduled December 17 evidentiary hearing could be waived. The December 6 letter stated further that Appellant and Zeytoonjian had agreed that the Board should decide this matter based upon the stipulated facts and written memoranda which the parties wished to submit in accordance with a schedule set by the Board.

In response to the December 6 letter, on December 7, 1999, the Chair issued a Preliminary Ruling canceling the December 17 hearing and setting a schedule for the filing of Stipulated Facts and memoranda from the parties stating the legal bases for their respective positions.

On December 14, 1999, the Appellant and Zeytoonjian filed Stipulated Facts.

On December 17 and 21, 1999, the parties filed legal memoranda.

¹ The Board understands that, although permits run with the land, Zeytoonjian has not filed any request with the Commission to be the named Permittee for Land Use Permit #3W0587, as amended. The Board suggests that an application for such an administrative amendment be filed.

² Among other things, the Prehearing Order set forth filing deadlines for the parties to address the issue of Mr. Baldwin's party status. The Board denied Mr. Baldwin party status in a September 17, 1999, Memorandum of Decision. David Olio is therefore the sole "Appellant."

³ This letter was received by fax at the Board's request.

The Appellant timely requested oral argument before the Board, which was heard on Wednesday, January 12, 2000. Following oral argument, the Board deliberated on this case as part of its regularly scheduled deliberations on that day; the Board also deliberated on February 16, 2000. The record in this matter is now complete, and this case is ready for decision.

II. FINDINGS OF FACT

The parties have stipulated to, and the Board finds, the following facts:⁴

1. On October 26, 1988, the Potwins filed Land Use Permit Application #3W0587 with the Commission.
2. On December 7, 1988, the Potwins were granted Land Use Permit #3W0587 ("Original Permit").
3. The Original Permit authorized the Potwins to construct eight single-family homes, access drive and related utility services on a 43.8 acre common lot off Old Town Farm Road in Quechee, Vermont.
4. Condition 25 of the Original Permit provided that all construction be completed prior to October 1, 1993.
5. Condition 26 of the Original Permit provided an expiration date of December 5, 2008 for the Original Permit, but also provided that it would expire "one year from the date of issuance if the Permittees have not demonstrated an intention to proceed with the project. In any event, substantial completion must occur within 2 years of the issuance date."

⁴ In certain instances, the precise wording of the Stipulated Facts has been altered in order to avoid confusion (e.g. by referring to Roger and Beverly Potwin as "the Potwins," rather than "the Applicants") or to conform the language used in the Stipulated Facts to the Board's conventions, such as referring to amendments to the Original Permit as "the Dash 1 Permit" or the "Dash 2 Permit," referring to David Olio as the "Appellant," or defining the development, as amended, as the "Project." In addition, terms which have been previously defined in this decision are used. The meaning and the context of the facts, as stipulated by the parties have not, however, changed, except for Finding 33, as explained below.

6. Appellant was not a party to the Original Permit proceeding.
7. On January 19, 1989, the Potwins conveyed the 43± acres to the Quechee Custom Home Development Co., Inc. ("QCHD"). The deed is filed in Book 149 at Pages 454-458 of the land records of the Town of Hartford.
8. At the closing on the same date (January 19, 1989), QCHD executed and delivered to the Potwins a mortgage deed covering 34.9 acres of the 43± acre tract, while excepting from the lien of the mortgage the house, barn and 8.1 acres of the tract.
9. QCHD defaulted on the note it gave the Potwins which was secured by the aforesaid mortgage.
10. While pursuing foreclosure through the court system, on June 10, 1992, the Potwins and QCHD entered into an agreement whereby the Potwins took back a deed to the 34.9 acres covered by the lien of the mortgage, and filed the deed therefore in the Hartford Land Records on June 10, 1992.
11. The June 10, 1992 proceeding was in lieu of a foreclosure.
12. From January 1989 to June 1992, some three years and five months, the property at issue was not owned by the Potwins.
13. On or about September 27, 1993, the Potwins were notified that the aforementioned deed constituted an illegal subdivision of the 43± acre tract, and that they must apply for an amendment to their Original Permit.
14. On July 20, 1994, and prior to the December 5, 2008 expiration date recited in the Original Permit, the Potwins, by and through Roy Hathorn (Surveyor), filed Land Use Permit Application #3W0587-1 for the relocation of one of the existing house sites of the Project with the District Commission.
15. On September 14, 1994, the Potwins were granted Land Use Permit #3W0587-1 (the "Dash 1 Permit").
16. The application for the Dash 1 Permit was treated as a minor amendment and was granted without opposition by any person, including Appellant.
17. The Dash 1 Permit authorized subdivision of the Potwins' 43± acres, and

the creation of a two-lot subdivision, one lot consisting of 8.1 acres and containing a farm house with barn (farm complex), and a second lot with 34.9 acres containing eight house sites.

18. With respect to the second lot, the Dash 1 Permit allowed the reconfiguration of one house site and sewer and water easements, both previously approved in the Original Permit. The development, as amended by the Dash 1 Permit, is referred to as the "Project."

19. Appellant was not a party to the Dash 1 Permit proceeding.

20. In mid-1995, the Potwins installed a septic system on the 34.9 acre tract of land; they also established a road in the northwest corner of the tract.

21. In January 1996, and prior to the expiration of the Dash 1 Permit, the Potwins filed Land Use Permit Application #3W0587-2 for a construction completion deadline extension for the Project.

22. On February 13, 1996, the Potwins were granted Land Use Permit #3W0587-2 (the "Dash 2 Permit").

23. The Dash 2 Permit extended the construction completion date of the Potwins' project to October 1, 1998, and extended the life of the permit "for an indefinite term, as long as there is substantial compliance with each condition."

24. Appellant was not a party to the Dash 2 Permit proceeding.

25. On April 15, 1996, and prior to the construction completion deadline of October 1, 1998 (see the Dash 2 Permit), a hearing (revocation action) was requested by adjoining property owners William Dwyer (as designated representative for Noyes Lane Realty Trust) and Appellant to determine whether the Dash 1 Permit had been abandoned due to nonuse.

26. This revocation action entailed three prehearing conferences (the last of which was convened on November 25, 1996), a Stipulation of Facts and several other legal documents and oral argument prepared and filed by the parties.⁵

⁵ With the parties' consent, the Board has made a slight change to this finding and to Finding 35, as they were proposed by the parties.

27. The hearing on this matter was not adjourned until July 9, 1997.

28. On July 15, 1997, one year and three months after the revocation action had been initiated, the Environmental Board rejected the revocation petition, and found that the Original Permit, as amended, had not expired.

29. On September 29, 1998, the Potwins filed a land use application for an extension of the Project's construction completion deadline.

30. On June 8, 1999, and prior to the expiration of the Dash 2 Permit, the Potwins were granted the Dash 3 Permit.

31. The Dash 3 Permit extended the completion date of the project from October 1, 1998 to October 1, 2003.

32. Along with the Dash 3 Permit, a Memorandum of Decision: Extension of Construction Completion Deadline was issued, stating that the Original Permit, as amended, had not expired, and that the earliest possible date the Project could be deemed abandoned is July 15, 2000.

33. The Appellant was a party to the Dash 3 Permit proceeding.⁶

34. Title to the Project site transferred to Frederick Zeytoonjian by warranty deed filed on June 18, 1999 in Volume 273, pages 399-402 of the Town of Hartford Land Records.

35. On July 7, 1999, George Baldwin and Appellant filled an appeal with the Board from the Dash 3 Permit and Decision alleging that the District Commission erred in extending the construction completion deadline.

36. There have been no physical changes to the Project. Proposed residential use continues.

⁶ The Parties' Stipulated Fact 33 states that the Appellant was *not* a party to the Dash 3 Permit proceeding. However, it is clear from the Commission's June 8, 1999 Memorandum of Decision at 2, ¶19, that the Appellant was a party before the Commission.

III. ISSUE

As set out in the Prehearing Order, the sole issue on appeal is whether the application for an extension of the Project's construction completion deadline to October 1, 2003 should be granted.

IV. DISCUSSION

A. Burden of Proof

On September 29, 1998, the Potwins filed an application with the Commission, seeking to amend their original permit to extend its construction completion date. As the parties seeking to change the "present state of affairs" generally have the burden of proof, the Potwins had the burden of proving their entitlement to an amendment. See *Re: W. Joseph Gagnon*, Declaratory Ruling #173, Memorandum of Decision (July 3, 1986) at 5, *citing* McCormick, *Evidence* 949. As the Project was subsequently transferred to Frederick Zeytoonjian, he now has this burden.⁷

B. Board Rule on Abandonment

Environmental Board Rule ("EBR") 38(B) states, in pertinent part:

Abandonment by non-use. Non-use of a permit for a period of three years following the date of issuance shall constitute an abandonment of the development or subdivision and the associated land use permit. For the permit to be "used," construction must have commenced and substantial progress toward completion must have occurred with the three year period, unless

⁷ The Board notes that the Commission's decision recharacterized the question before it as "whether Land Use Permits #3W0587 or #3W0587-1 have been abandoned." *Commission's Memorandum of Decision* at 3 (June 8, 1999). Treating this matter as a petition for revocation by virtue of abandonment could ostensibly shift the burden of proof to the Appellant. However, the Commission's recharacterization did not change its ultimate order extending the construction completion date, and there has never been any indication that Zeytoonjian has withdrawn his application. The Board therefore considers this matter to be an appeal of an application and decision to extend the construction completion deadline, and the burden of proof is thus on Zeytoonjian.

construction is delayed by litigation or proceedings to secure other permits or to secure title through foreclosure....

(1) Initiation of proceeding. A petition to declare a permit void for non-use may be filed by any person who was a party to the application proceedings, by a local or regional planning commission, or by any municipality or state agency having an interest potentially affected by the development or subdivision.

EBR 38(B) is very similar to the statutory provision which addresses non-use, 10 V.S.A. § 6091(b).

C. Analysis

Claiming that the Commission erred by extending the construction completion deadline, the Appellant argues that the permit has been abandoned under EBR 38 because the Potwins (and Zeytoonjian) did not commence construction within three years of the date the permit was issued.⁸

Zeytoonjian replies that the filing of the revocation petition (filed by David Olio, the present Appellant) on April 15, 1996, tolled the three-year period for the 15 months that the petition was pending before the Board.⁹

⁸ The Appellant asserts that no construction has commenced and that there has been no claim by Zeytoonjian that other permits were required prior to commencement. Interestingly, these specific facts are not listed as facts in the Stipulated Facts submitted by the parties. The first sentence in Stipulated Fact 36 states, "There have been no physical changes to the Project." Perhaps this can be read to mean that construction has not commenced, but because this statement appears in conjunction with the next sentence in Fact 36, "Proposed residential use continues," Fact 36 could also be read to refer to the proposed *use* of the project lands, not the question of whether there has been the commencement of construction within the requisite three-year period.

⁹ There are other examples where the law provides for the tolling of certain deadlines because of the existence of other operative facts. E.g., the tolling of the statute of limitations, 12 V.S.A. Ch. 23, subch. 3; the tolling of the running of an appeal period, VRAP 4; EBR 31(A)(3).

Under the present circumstances, a claim that the three-year period was tolled by the revocation petition has merit. Rule 38(B) speaks only in terms of "litigation" which delays construction within the three-year period. "Litigation" is not defined in the Rule, nor are there any Board cases defining it. *Black's Law Dictionary* defines the word in terms of a *court* process, but this does not exclude proceedings before the quasi-judicial Board. See, e.g., *Re: Equinox Resort Associates, L.P.*, #8B0209-5-EB, Memorandum of Decision at 3 (Sept. 24, 1997) (Board is a quasi-judicial body).

The Board concludes that a revocation proceeding before the Board constitutes litigation, as the intent of Rule 38 is to toll the three-year period while questions about a project are being resolved. See *John A. Russell Corporation*, #1R0257-2-EB-1, Memorandum of Decision at 2 (June 14, 1990) (construction completion date extended because appeal to Board was pending for much of the time during which the project was to have been constructed). Certainly, while a revocation petition is pending, it makes no sense at all for a permittee to commence or continue with construction on the subject project.

Citing 10 V.S.A. § 6090(b)(1) and EBR 32(B)(1), Zeytoonjian also asserts that litigation – the revocation proceeding – delayed the completion of construction, and that he is therefore entitled to an extension of the construction completion deadline. Rule 32(B)(1) provides that "If completion has been delayed by litigation, ... the district commission or the board shall provide that the completion dates be extended for a reasonable period of time during which construction can be completed." And see *New Haven Savings Bank*, #2W0769-1-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Nov. 23, 1992) (construction completion date extended to account for the time that progress on project was delayed by an appeal by a party whose actions were beyond the permittee's control).

The Commission agreed and extended the completion date to October 1, 2003, five years beyond the completion date set by the Dash 2 Permit. The Board finds no reason, based upon the circumstances presented in this case, to rule otherwise.

The Board notes that, unlike the case of *Homestead Design, Inc.*, Land Use Permit #4C0468-1-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Sept. 6, 1990), there appear to be no facts in this case to indicate that "the circumstances and context" that existed at the time of the grant of the initial permit in this case have changed so significantly that further review of the ten Act 250 criteria is warranted at this time. See *Re: Vercon Associates*, Application #5L0806-EB, Findings of Fact,

Conclusions of Law, and Order at 6 (July 21, 1989); *and see Lilly Propane, Inc.*, #2S0859-3-EB, Findings of Fact, Conclusions of Law, and Order at 7-8 (Nov. 3, 1995) (Board found no material or substantial change to the project and therefore granted extension request without re-evaluation of criteria); EBR 32(B)(1) *Project completion date*: "If a project, or portion of a project, is not completed by the specified date, such project or portion may be reviewed for compliance with 10 V.S.A. § 6086."

A further request by Zeytoonjian or his successor for an extension of the construction completion date might, however, require such review. The Board leaves this question to another day.

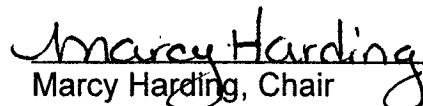
Because the Board decides this case based upon Zeytoonjian's tolling argument, it does not address the other arguments raised by Zeytoonjian's memorandum.

V. ORDER

1. Land Use Permit #3W0587-3-EB, extending the construction completion deadline from October 1, 1998 to October 1, 2003, is issued.
2. Jurisdiction is returned to the District #3 Environmental Commission.

Dated at Montpelier, Vermont this 17th day of February, 2000

ENVIRONMENTAL BOARD


Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
W. William Martinez
Rebecca M. Nawrath
Alice Olenick
Donald B. Sargent

Board Member Robert H. Opel did not participate in the Board's deliberations on this decision but has reviewed and concurs in the decision.

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