

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

Re: *Estate of Evangeline DesLauriers*  
*and Bolton Valley Corp.*

Land Use Permit  
Application #4C0436-11E-EB

**Memorandum of Decision and Order**

This proceeding concerns an appeal from the dismissal of an application by the District 4 Environmental Commission (Commission).

**I. Facts <sup>1</sup>**

1. On June 27, 1991, the Commission issued Land Use Permit #4C0436-11 (Permit) to the Estate of Evangeline DesLauriers and Bolton Valley Corporation (collectively, Permittees) for a 20-lot residential subdivision, with a common area and a 2,100 foot access road (Project).

2. Over the years, the Commission issued three permit amendments (Land Use Permits #4C0436-11A, #4C0436-11C and #4C0436-11D) to the Permittees, extending the construction completion deadline in the Project's Permit, the last extending the deadline to October 15, 2001.

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<sup>1</sup> Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, and with limited exceptions, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases before administrative bodies. *Id.* § 810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); see *In re Handy*, 144 Vt. 610, 612 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of Fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

The Environmental Board (Board) takes official notice of the official file maintained by the Board and the Commission in this matter. The facts which appear herein are drawn from documents in such files, see, *Re: Nelson Lyford*, Declaratory Ruling #341, Findings of Fact, Conclusions of Law, and Order at 3 (Dec. 24, 1997) (Board's findings of fact based on matters officially noticed), and do not appear to be in dispute.

3. On October 10, 2001, Bolton Valley Corporation and East Cote, LLC (collectively, Bolton Valley) filed the present application, seeking to extend the construction completion deadline to October 15, 2004.

4. By a letter dated October 23, 2001, the Coordinator for the Commission informed Bolton Valley that its latest application to extend the construction completion deadline (#4C0436-11E) was incomplete. The letter states:

The Commission has ruled in the past that when a substantial period of time has elapsed between the date when we issued the original permit and the date when an application for extension of the construction completion date is filed, that it has the authority and the obligation to determine whether the passage of time may have resulted in changes with respect to the circumstances under which we issued the permit....

The letter requests that Bolton Valley submit a revised application which identifies changes in the Project's impacts on the ten criteria of Act 250 (10 V.S.A. Ch. 151) which result from the passage of time.

5. No appeal was taken from the Coordinator's October 23, 2001 letter finding the application to be incomplete.

6. On March 8, 2002, the Coordinator sent another letter to Bolton Valley. The March 8 letter notes that, despite the Coordinator's October 23, 2001 letter, the Commission had not received any correspondence from Bolton Valley since that date. The March 8 letter states further that the Commission requires "that you submit a written request to this office no later than April 12, 2002 if you intend to keep your application active. If you do not meet the aforementioned filing date, the Commission will dismiss your application."

7. On April 11, 2002, in response to the Coordinator's March 8 letter, Bolton Valley filed a letter with the Coordinator. This letter states, in pertinent part, that Bolton Valley would be "submitting an amended application for less intensive use of the property in the coming weeks. However, it is very important we do not loose (sic) our rights for water and sewer while this amendment is being prepared. Please consider this letter as notification of our intent to proceed in this regard."

8. On September 13, 2002, the Coordinator issued an "Act 250 Notice – Intent to Dismiss Inactive Application #4C0436-11E." This Notice reads:

Notice is hereby given that on October 10, 2001, an application was filed by the Estate of Evangeline DesLauriers and Bolton Valley Corporation for a project generally described as the extension of the construction completion deadline for the Snow Pond Subdivision, 20 lot single family lots and common land. The last amendment to the original permit specified that all construction must be completed by October 15, 2001.

No information has been submitted to the District Environmental Commission by the Applicants in response to a notice of incomplete application dated October 23, 2001. No submittals have been received by the Commission to a letter requesting completeness of the application, sent to the Applicants on March 8, 2002. No submittals have been received by the Commission based on an April 10, 2002 telephone conversation with the District Coordinator by Charles DesLauriers, of the Estate of Evangeline DesLauriers, stating that a new application will be forthcoming. Based on this inactivity, the Commission intends to dismiss this application pursuant to Environmental Board Rule 18(D).

Prior to dismissal, the Applicants or any Party to this case may request the opportunity to present oral argument concerning dismissal by contacting the District Coordinator on or before October 14, 2002.

9. On October 10, 2002, a representative for Bolton Valley met with the Coordinator to discuss the revised application. There are no notes or other writings in the Commission's file documenting the substance of this meeting.

10. Bolton Valley filed no revised application as of November 13, 2002.

11. On November 13, 2002, the Commission issued a Dismissal Order, dismissing Application #4C0436-11E, "because the applicant has failed to respond to the Commission's September 23, 2002 letter<sup>2</sup> requesting a status update and has not demonstrated an intention to proceed with the application." The Order concludes, "Pursuant to Environmental Board Rule 18(D), the District Commission concludes that dismissal of Application #4C0436-11E is not contrary to the values sought to be

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<sup>2</sup> The Board cannot find any copy of a September 23, 2002 letter in the Commission's files, but the Board assumes that the Commission meant to refer to its September 13, 2002 Notice.

protected by Act 250. Accordingly, Application #4C0436-11E is hereby dismissed without prejudice."

12. On December 13, 2002, Bolton Valley filed an appeal from the Commission's Dismissal Order with the Board. Bolton Valley contends that the October 10, 2002 meeting met the requirements of the Commission's September 13, 2002 Notice, as it "demonstrated an intention to proceed with the application and showed substantial progress toward completing an application and pursuing other information necessary to complete the application."<sup>3</sup>

## **II. Discussion**

The question presented by this case is whether the Commission acted properly in dismissing Application #4C0436-11E based on its belief that Bolton Valley had failed to respond to its earlier September 13, 2002 Notice and its perception that Bolton Valley had not "demonstrated an intention to proceed with the application."

There have been occasions when an applicant's or petitioner's failure to abide by an order issued by the Board has led to the dismissal of that party's case. See, *Re: Security Self Storage, Inc.*, Declaratory Ruling #386, Memorandum of Decision and Dismissal Order (Jun. 19, 2001); *Re: Kapitan Gravel Pit*, Declaratory Ruling #388, Dismissal Order (Sept. 8, 2000). In both of these dismissals, however, the Board recognized the severity of such a sanction, and reached its decision to dismiss only after determining that the particular facts in those cases required dismissal as an appropriate remedy for a willful failure to abide by a Board order. The instant matter, however, presents a less complex situation.

Commissions have jurisdiction over complete applications; they do not have jurisdiction over applications which have been deemed by the Coordinator to be incomplete. See, 10 V.S.A. §6086(b); *In re Ross*, 151 Vt. 54, 57 (1989); EBR 10(D).

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<sup>3</sup> Bolton Valley Notice of Appeal also contests the Commission's "authority to revoke a permit..." and it claims that, pursuant to Environmental Board Rule (EBR) 38(B)(2), the Commission erred by not holding a hearing prior to issuing the Dismissal Order. While EBR 18(D), requires the Commission to entertain oral argument, if requested, before dismissal, there is no record of any such request in the Commission's files. Further, this matter does not involve a revocation; it concerns a dismissal.

EBR 10(D) reads: "An application that is incomplete in substantial respects shall *not be accepted for filing*<sup>4</sup> by the district coordinator, and therefore shall not initiate the time and notice requirements of the Act and these rules." (Emphasis added). A Coordinator's determination that an application is not complete is a jurisdictional opinion, subject to review by the Board through a Declaratory Ruling Petition proceeding. *Re: Ingleside Equity Group*, Declaratory Ruling #397, Findings of Fact, Conclusions of Law, and Order (Aug. 15, 2001); *and see Re: Paul & Dale Percy*, #5L0799-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Mar. 20, 1986) (advisory opinion); *Re: Flanders Building Supply, Inc.*, #4C0634-EB, Findings of Fact, Conclusions of Law, and Order at 4 n.1 (Oct. 18, 1985) (advisory opinion). In effect, therefore, a determination that an application is incomplete is the equivalent of a decision by the Coordinator that the Commission lacks the jurisdiction to hear the application.

The Coordinator's October 23, 2001 letter is such a determination.<sup>5</sup> Thus, the Commission should not have dismissed Application #4C0436-11E, because it did not have jurisdiction over the Application and therefore lacked the authority to act on it.<sup>6</sup>

The Board recognizes the desires of the Commissions to keep their dockets active and free of cases that, once begun, fall into a state of inactivity as a result of the neglect or inability of the applicant to complete the case. But the sanction or remedy for applicant's failure to complete an application is not dismissal; rather, the application should either be returned to the applicant or held, not filed, in the Commission files until such time as it is either withdrawn or completed. Applicants gain no advantage from

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<sup>4</sup> If an incomplete application cannot be accepted for filing, a Commission cannot address it.

<sup>5</sup> As the Coordinator's October 23, 2001 letter was not appealed, that determination, like other unappealed jurisdictional opinions, is final and binding. See, 10 V.S.A. §6007(c); *see, Central Vermont Public Service Corporation*, Declaratory Ruling #401, Findings of Fact, Conclusions of Law, and Order at 11 (Apr. 2, 2002).

<sup>6</sup> This decision should not be read to imply that a Commission cannot dismiss an application for an applicant's failure to prosecute or other valid reason. Once an application is deemed complete, jurisdiction is vested in the Commission, and an applicant's refusal to comply with a valid Commission order can result in dismissal, as long as the elements outlined in *Security* and *Kapitan* are present.

filing incomplete applications; rights do not vest until completion is attained. *In re Ross, supra*, at 58.<sup>7</sup>

**III. Order**

The Commission's November 13, 2002 Dismissal Order is vacated.

Dated at Montpelier, Vermont this 16<sup>th</sup> day of January 2003.

ENVIRONMENTAL BOARD

    /s/Marcy Harding\_\_\_\_\_  
Marcy Harding, Chair  
Bernie Henault  
George Holland  
Samuel Lloyd  
W. William Martinez  
Alice Olenick  
Jean Richardson  
Donald Sargent

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<sup>7</sup> Nor will the delays experienced as a result of an applicant's failure to complete his application reflect negatively on the Commission's performance, because statistics concerning processing time do not begin to run until a complete application is filed.