

Adm. 0-11

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

RE: Homestead Design, Inc. by Findings of Fact,  
David W. M. Conard, Esq. Conclusions of Law and Order  
Miller, Eggleston Land Use Permit  
& Rosenberg, Ltd. #4C0468-1-EB  
P.O. Box 1489  
Burlington, VT 05402-1489

This decision pertains to an appeal to the Environmental Board from a decision of the District #4 Environmental Commission concerning a request for extension of a construction completion date for a project which has a permit pursuant to 10 V.S.A. Chapter 151 (Act 250). As is explained below, the Environmental Board has concluded that Homestead Design, Inc. (the Permittee) must file an amendment application addressing the impacts of the uncompleted portion of the project with respect to the ten Act 250 criteria (see 10 V.S.A. § 6086(a)).

I. SUMMARY OF PROCEEDINGS

On October 5, 1989, Homestead Design, Inc. (the Permittee) filed an appeal from the decision of the District #4 Environmental Commission dated September 1, 1989, and the District Commission's denial of reconsideration dated September 25, 1989.

The District Commission's decision pertained to Land Use Permit #4C0468-1, which authorized certain activities at the Permittee's Sunwood subdivision located off Packard Road in Jericho, Vermont. Specifically, the Permittee was authorized to commence site work and foundation construction for eight units of attached housing on Lot #1. The Permittee was also authorized to construct "Phase III" of Sunwood, consisting of 12 single family residences on individual lots, 39 condominiums, 1850 feet of road, and related utilities, with municipal water and individual and community on-site subsurface disposal systems. The District Commission's decision concerned the Permittee's request to extend the construction completion date specified in the permit, which was January 31, 1986 and which the Permittee asserts was extended to January 31, 1987 by Land Use Permit #4C0468-2.

In its decision, the District Commission concluded that

where a substantial period of time has elapsed since the date of the original permit, in this instance a period of seven years, it is clear that changes may have occurred with respect to the circumstances under which the original permit was issued. The Commission must hold a hearing to determine the nature and extent of those changes.

The District Commission therefore ordered the Permittee to submit an amendment application addressing the impacts of the project under the ten criteria **"resulting** from the period of time which has elapsed since the project was originally approved."

On October 31, 1989, William Venet notified the Board in writing of his intention to seek party status in this matter and of his inability to attend the November 1 prehearing conference. On November 1, 1989, Environmental Board Chairman Stephen Reynes convened a prehearing conference in Jericho, Vermont, with the Permittee, by David W. M. Conard, Esq., participating. At the prehearing conference, the Permittee stated that it did not object to Mr. **Venet's** participation in this matter with respect to legal issues. On November 3, 1989, the Permittee filed a letter which stated that the Board can base its decision on the facts set forth in the District **Commission's** decision. On November 20, 1989, the Permittee filed a brief.

On December 7, 1989, the Board issued a prehearing conference report and order containing a statement of stipulated facts and requesting additional information from the Permittee for potential inclusion **in this** statement. On December 20, the Permittee filed the requested information. No objections were filed to the statement of stipulated facts or to the inclusion of the information received on December 20. On January 17, 1990, the Board convened oral argument in Montpelier, Vermont, with the Permittee and Mr. Venet participating. Following argument, the Board recessed the hearing pending deliberation and review of the record. The Board deliberated on February 21 in **Rutland**, March 7 in Montpelier, and May 10 in Chittenden. This matter is now ready for decision. To the extent any requested findings of fact and conclusions of law are included below, they are granted; otherwise, said findings and conclusions are denied.

## II. ISSUES

1. Whether, in the context of a request for an extension of a construction completion date, the District Commission may require an applicant to submit an amendment application to address those changes which have occurred in the circumstances surrounding the project which may be affected by the project under the ten Act 250 criteria.

2. If the District Commission may require such an application, whether the Commission may not require this Permittee to submit that type of application because the

Permittee has a vested right to an extension of the construction completion date.

III. FINDINGS OF FACT

1. Homestead Design, Inc. (the Permittee) constructed Phase I of the **Sunwood** Development in Jericho in 1980. This phase consisted of four duplex buildings. An Act 250 permit was not issued for this phase and apparently was not required.
2. The **Sunwood** Development is located off Packard Road in Jericho, Vermont.
3. Land Use Permit #4C0468 was issued to the Permittee on June 22, 1982. The permit authorized Phase II of **Sunwood**, consisting of 16 single family residences located on individual lots. Homes were subsequently constructed on these lots.
4. On February 5, 1985, Land Use Permit #4C0468-1 was issued to the Permittee. That permit authorized the Permittee to commence site work and foundation construction for eight units of attached housing on Lot #1 of an earlier phase of **Sunwood** and to construct Phase III, consisting of 12 single family residences located on individual lots, 39 condominiums, 1850 feet of road, and related utilities, with municipal water and community on-site subsurface disposal systems. The permit specified a construction completion date of January 31, 1986.
5. On June 26, 1987, Land Use Permit #4C0468-1A was issued to the Permittee. That permit authorized the Permittee to connect four of the single family homes approved in #4C0468-1 to the Town of Jericho water supply.
6. On July 30, 1985, Land Use Permit #4C0468-2 was issued to the Permittee. That permit authorized the Permittee to construct eight single family homes in lieu of the eight condominium units approved in Land Use Permit #4C0468-1. The permit specified a construction completion date of July 31, 1987.
7. On May 22, 1986, Land Use Permit #4C0468-3 was issued to the Permittee, incorporating Certificate of Compliance #4C0468-3, which renewed the site and foundation construction approval for the eight condominium units.
8. As of December 31, 1986, eight single family homes and eight condominium units had been constructed as part of **Sunwood** Phase III. No further construction occurred after

that date because of a lack of water connections from the Town of Jericho. The remaining approved but unbuilt parts of the project consist of four single family homes and thirty-one condominium units, with associated infrastructure. The remaining homes, units and infrastructure are the subject of a request for the extension of the construction completion date. This request was filed April 14, 1989.

9. **Sunwood** Phase III lacks water connections due to the denial of municipal water permits for the project by the Town of Jericho. This denial is and has been the subject of litigation pending in Chittenden County Superior Court. Homestead Design, Inc. v. Villase of Jericho, No. 273-87CnC. The complaint in that case was filed on March 12, 1987 by the Permittee.

#### IV. CONCLUSIONS OF LAW

The Permittee argues that the District Commission does not have the authority to order a submission concerning impacts on the ten criteria resulting from factors external to the proposed project. The Permittee asserts that the only considerations which the District Commission should have applied in determining whether to extend the completion date are whether the project has been abandoned pursuant to Board Rule 38(B) or whether it has changed since it was originally reviewed. The Permittee claims that the project has neither been abandoned nor changed and therefore an extension must be granted. The Permittee further claims that, pursuant to Preseault v. Wheel, 132 Vt. 427 (1974), it has a vested right to have the completion date extended because its construction of **Sunwood** has been delayed by a court dispute with the Town of Jericho over the Town's denial of permits for municipal water connections.

The Board concludes that an applicant may be required to file, in the context of a request for extension of a construction completion date, an amendment application addressing changes in the circumstances surrounding a project. The Board further concludes that this Permittee should be so required.

To understand the Board's ruling, an explanation of the purpose and structure of Act 250 is needed. Act 250 requires **that land use permits be obtained for developments and subdivisions.** 10 V.S.A. § 6081(a). Applications for permits are reviewed to ensure that proposed projects comply with the ten Act 250 criteria. 10 V.S.A. § 6086(a). The Board and

district commissions may issue permit conditions to alleviate impacts on the values protected by the ten criteria. 10 V.S.A. §§ 6086(c), 6087(b). During the course of review, the Board and district commissions may require the production of evidence and information. 10 V.S.A. § 6027(a) and Board Rule 20(A).

Interpreting these authorities, it is clear that the purpose of Act 250 is to protect the values included in the ten criteria, which include protection against certain negative effects on the environment and on the public fisc caused by developments and subdivisions within the jurisdiction of the Act. See 10 V.S.A. § 6086(a); In re Pilarim Partnershin, No. 88-545, slip. op. at 3 (Feb. 9, 1990); Committee to Save Bishop's House v. M.C.H. of Vt., 137 Vt. 142, 153 (1979). Permit conditions, which are issued to mitigate or prevent adverse effects on the Act 250 values, play a critical role in the Act 250 program's ability to protect the environment.

A proposed project's effects are judged based on circumstances as they exist at the time the review occurs. As the Board has stated-previously:

Applications are reviewed based upon the circumstances that exist at the time of the application, and if too much time passes before construction is completed, the circumstances and context of the approval could change substantially. In that event, the Board believes it would be appropriate to review any changes that have occurred that affect any of the ten criteria at the time an application is filed for extension of the construction completion date.

Re: Vercon Associates, Application #5L0806-EB, Findings of Fact, Conclusions of Law, and Order at 6 (July 21, 1989). As Vercon Associates shows, this Board interprets Act 250 to embody a policy that projects be built during the time in which the circumstances which led to approval still apply.

In view of the structure and purpose of Act 250, it may be necessary to require applicants for extensions of construction completion dates to file information concerning changes in the circumstances surrounding a project which have occurred subsequent to a previous approval. If a lengthy interval occurs between an original approval and a request to extend the construction completion date, significant changes **may have occurred which would, when combined with a project's impacts, result in a different evaluation of a project's effects on the values protected by Act 250.** For example, surrounding traffic conditions may have changed so significantly

that new permit conditions may be needed to address a project's traffic impacts. See 10 V.S.A. § 6086(a)(5); Pilsrim Partnership, slip op. at 3 (Board may impose conditions to alleviate existing traffic hazards which are exacerbated by a project).

In this case, the applicable construction completion date is January 31, 1986. This was the initial completion date for the whole of Phase III of **Sunwood** (Land Use Permit #4C0468-1). That date was extended to January 31, 1987 for part of the project only and that part of the project has been constructed. The unconstructed remainder of the project includes that part of the project which was approved in #4C0468-1 and for which the construction completion date was not extended by #4C0468-2. The Permittee did not request an extension of the construction completion date for the remainder of the project until April 14, 1989.

There is a more than four-year period between the **Permittee's** extension request and the issuance of the permit containing the construction completion date which the Permittee asks to be extended. Further, there is a three-year gap between the actual construction completion, date and the date of the request for its extension.

In this context, the authority of the Board and district commissions to require production of information should be exercised. When such a long period has passed, the project's impacts on the Act 250 values may be changed from those which would have occurred had the project been built when planned. It is therefore relevant to require supplemental information on the effects of the project under the circumstances which exist at the time the extension request is pending. In addition, it is appropriate to request this information in the form of an application concerning those changes in the circumstances surrounding the project which may affect the Act 250 criteria, because that is the most efficient means of obtaining the information needed concerning the criteria.

The Board's conclusion is consistent with and upholds the integrity of its rules concerning construction completion and expiration dates. Rule 32 concerns the setting of construction completion and permit expiration dates. As specified in Rule 32, the Board and district commissions set construction completion dates after considering the impacts of project development under the Act 250 criteria, the economic factors which attend development, and the period of time over which the development or subdivision will take place.

Rule 35 addresses the renewal of permits. Under Rule 35, if a renewal request is made prior to the expiration date, the district coordinator will evaluate the request and determine whether there is a potential for significant impacts under the Act 250 criteria. If there is no such potential, the coordinator will treat the request as a "minor" under a streamlined application procedure authorized in 10 V.S.A. § 6025(b) and Rule 51. If there is a potential for significant impacts, the application is reviewed under all the Act 250 criteria. Further, if the request for renewal is made after the expiration date, then the request automatically will be reviewed under all the criteria.

These rules are designed to ensure the integrity of Act 250 review and permit conditions. If projects are not built while the circumstances under which they were reviewed still obtain, Act 250 review and the issuance of permit conditions will be rendered a meaningless exercise. If Permittees wait too long to build, their projects may have impacts which have not been reviewed, and for which corrective permit conditions have not been issued. Thus, Rule 32 seeks to ensure that projects which are not built within the necessary time receive further review. Similarly, Rule 35 requires that projects which have expired permits are automatically reviewed for compliance with the Act 250 criteria. The Board believes that, in many cases, requests for construction completion dates may be analogous to requests for permit renewals, and therefore should be treated in the manner set out in Rule 35 for treatment of permit renewal requests.

With respect to the "vested rights" issue raised by the Permittee, the concept of vested rights has been applied by the Supreme Court only in cases in which the applicable law or regulations have changed since the initial approval was granted or the application was filed. In those cases, applicants have been denied permits due to those changes in law or regulation. See, e.g., Preseault v. Wheel, 132 Vt. at 249-250, 253 (1974); In re McCormick Management, 149 Vt. 585, 586 (1988). In this case, there has been no change of law or regulation which would require denial of Act 250 approval for the **Permittee's** project. Nor is the **Permittee's** request to extend the completion date being denied. Instead, because the Permittee filed its request long after the deadline for doing so, the Permittee is being required to supply information relating to the passage of time.

Further, even if the vested rights concept were to apply to this case, the Board believes that a balancing of the policies favoring review under the Act 250 criteria with other

factors would be consistent with Supreme Court rulings regarding vested rights. Preseault v. Wheel, 132 Vt. at 252-254; McCormick Management, 149 Vt. 588-89. On one side of the balance, the policies favoring review under the criteria are to ensure that Act 250 review and permit conditions address the actual impacts of projects. Permit conditions are the heart of the Act 250 program's safeguard against adverse environmental impacts under the ten criteria, and if development is built after circumstances changed, that safeguard may be rendered illusory. Upholding the **Permittee's** position would undermine the Act 250 program's ability to review environmental impacts as they are expected to occur.

Turning to the other side of the balance, the Permittee waited over three years to request an extension for that part of the project which it has not constructed. Although litigation did commence concerning water availability in March of 1987, nothing about the **Permittee's** dispute and litigation with the Town of Jericho prevented the Permittee from filing a request to extend the construction completion date prior to that date. Thus, the Board cannot conclude that the Permittee acted in a timely manner to secure its rights. In contrast, in Preseault v. Wheel, the applicant did make a timely request for reissuance of building permits. 132 Vt. at 249. Thus, the Board believes that its conclusion is consistent with Supreme Court case law relating to the "vested rights" concept.

Accordingly, the Permittee must submit an amendment application to the District Commission for that part of the project which it has not built. This application must address those changes in the circumstances surrounding the project which affect the potential impacts of the project with respect to the ten Act 250 criteria.

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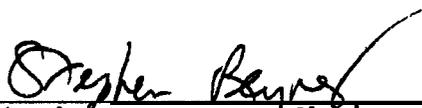
V. ORDER

1. The Permittee shall submit an amendment application to the District #4 Environmental Commission for that part of the project which it has not built. This application shall address those changes in the circumstances surrounding the project which affect the potential impacts of the project with respect to the ten Act 250 criteria.

2. Jurisdiction over this matter is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 6th day of September, 1990.

ENVIRONMENTAL BOARD

  
Stephen Reynes, Chairman  
Ferdinand Bongartz  
Arthur Gibb  
Samuel Lloyd  
W. Philip Wagner

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