

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

Re: Larkin Tarrant Hoehl Partnership
Land Use Permit Amendment #4C1057-1-EB

MEMORANDUM OF DECISION

This Memorandum of Decision addresses the objection of the Larkin Tarrant Hoehl Partnership (LTH) to the Chair's Proposed Dismissal Order issued on February 26, 2002. As set forth below, the Vermont Environmental Board (Board) holds that it is appropriate to set this matter for a merits hearing.

I. PROCEDURAL SUMMARY

On February 24, 2000, the District #4 Environmental Commission (Commission) issued Land Use Permit #4C1057 (Original Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Original Decision) to Permittee for the construction of a 71-room hotel on 5.61 acres of land at the corner of Dorset Street and Williston Road in South Burlington, Vermont (the University Inn), a central utility building, and parking and traffic circulation improvements to an existing 89-room Howard Johnson's hotel and 275-seat Friendly's restaurant, (Original Project).

On July 27, 2000, Permittee filed a permit amendment application, for the demolition of part of the existing Howard Johnson's hotel building that is connected to the Friendly's restaurant, and the construction of a 24-foot wide driveway between the two buildings with walkways and other landscape improvements, among other things (together with the University Inn changes described below, referred to herein as the Project).

On August 18, 2000, Permittee amended its permit amendment application to seek retroactive approval for changes that Permittee had made to the University Inn, including changing from a brick veneer façade, to a stucco façade on the top three stories with a real brick façade on the first story, and changing the building-mounted signage from cast aluminum letters backlit with white neon, to green, internally illuminated letters.

On January 25, 2001, the Commission issued Land Use Permit Amendment #4C1057-1 (Amended Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Decision) to Permittee. The Commission denied the amendment application insofar as it sought retroactive approval for University Inn signage that differed from that authorized by the Original Permit.

On February 26, 2001, Permittee filed an appeal with the Board from the Amended Permit and Decision alleging that the Commission erred in its conclusions under 10 V.S.A. § 6086(a)(8)(Criterion 8), concerning the signage.

On March 30, 2001, Board Chair Marcy Harding convened a Prehearing Conference. The Permittee, represented by Carl Lisman, Esq., was the sole participant. On April 2, 2001, Chair Harding issued a Prehearing Conference Report and Order (PHCRO). Among other things, the PHCRO identified preliminary and merits issues and set a schedule for prehearing filings.

On April 10, 2001, Permittee filed a Motion to Continue the appeal for sixty days. On April 13, 2001, Chair Harding issued a Chair's Preliminary Ruling granting Permittee's Motion and ordering that Permittee file a status report on or before June 13, 2001. Permittee did not file any objection to the Chair's Preliminary Ruling.

On July 16, 2001, over one month after the deadline for filing a status report had passed, the Chair issued a Chair's Proposed Dismissal Order. The Chair's Proposed Dismissal Order proposed dismissal of the case, subject to an opportunity for any party to object or to make oral argument to the Board, or both.

On July 18, 2001, Permittee filed an objection to the Chair's Proposed Dismissal Order. In the objection, Permittee stated that it did not wish to make oral argument to the Board. Permittee requested that the case be continued for another 60 days.

The Board deliberated on the Permittee's objections on August 15, 2001 and August 29, 2001.

On August 30, 2001, the Board issued a Memorandum of Decision granting Permittee's request for a continuance, and requiring that Permittee file a status report and request for further action on or before September 18, 2001, or the case would be dismissed.

On September 18, 2001, Permittee filed a status report and motion to continue the appeal for another 45 days. On October 2, 2001, the Chair proposed to grant this motion in a Chair's Proposed Continuance Order. No objection was filed and the continuance went into effect through November 2, 2001.

On November 5, 2001, Permittee filed a status report and a motion to continue the appeal for another 45 days.

On November 6, 2001, the Chair denied LTH's request for a continuance and ordered LTH to brief preliminary issues on or before December 26, 2001. The Order also provided that the matter would be scheduled for hearing after preliminary issues were resolved. LTH filed a brief on December 26, 2001.

The Board deliberated on January 16, 2002.

On January 22, 2002, the Board issued a Memorandum of Decision on preliminary issues, and the Chair issued a Scheduling Order setting this matter for hearing. Among other things, the Scheduling Order set a deadline of February 13, 2002 for prefiled evidence on the two merits issues. No objection to the Scheduling Order was filed.

On February 26, 2002, Chair Harding issued a Chair's Proposed Dismissal Order, proposing dismissal of the case for LTH's failure to file any evidence by the February 13, 2002 deadline.

On March 6, 2002, LTH filed an objection to the proposed dismissal. On March 20, 2002, the Board deliberated on the objection.

II. DISCUSSION

LTH objects to the Chair's Proposed Dismissal Order issued February 26, 2002, in which Chair Harding proposed to dismiss this matter for LTH's failure to prefile any evidence by the February 13, 2002 deadline.

The February 13, 2002 deadline was set in the Chair's Scheduling Order dated January 22, 2002, and was issued consistent with the Board's January 22, 2002 Memorandum of Decision. The relevant provision of the Scheduling Order states that:

On or before **Wednesday, February 13, 2002**, each party shall file:

- a. prefiled direct testimony for each witness that the party intends to present,
- b. exhibits,
- c. a list of exhibits, and
- d. a list of witnesses.

Scheduling Order, at 2 (Jan. 22, 2002). LTH does not dispute that it failed to file any testimony or evidence by February 13th deadline set in the Scheduling Order.

Instead, LTH states in its objection that it "did not timely file because counsel for the appellant does not believe that either the Memorandum of Decision [or] the Scheduling Order were received by him." LTH asks the Board to allow this case to proceed to hearing, and states that it can prepare testimony and exhibits, etc., for filing in the near future.

The Chair's Proposed Dismissal Order is properly based on the assumption that the parties had notice of the January 22, 2002 Memorandum of Decision and Scheduling Order. Ordinarily parties receive the orders that the Board serves by mail. The Certificate of Service in the official file indicates that the Board did, in fact, serve the January 22, 2002 orders by mail on that date. See, VRCP 5(b)(service by mail is complete upon mailing); see also, *In re Milton Arrowhead Mountain*, 169 Vt. 531, 531 (Jan. 8, 1999)(mem.)("Ordinarily, notice of a decision is 'given' at the time it is mailed, not the time it is received.")(citations omitted). However, counsel for LTH does not believe he had actual notice of the orders until March 3, 2002, after Board staff mailed him a second copy. Thus, this case presents unusual circumstances.

The Board does not take noncompliance with the Chair's orders lightly. "[A] party's failure to comply with an Order of the Chair is prejudicial to the administration of Act 250 as a whole. A fair and efficient administration of the Act does not permit parties, without good cause, to disregard the Chair's or the Board's orders." *Re: Security Self Storage, Inc., Declaratory Ruling #386, Memorandum of Decision and Dismissal Order at 5* (Jun. 19, 2001). Even assuming that Mr. Lisman did not have actual notice of the January 22, 2002 orders before March 2002, dismissal might be appropriate if the failure of actual notice were attributable to Mr. Lisman's office. However, to hold an evidentiary hearing on the actual notice issue would only result in further delay of a case which has been continued for many months at LTH's request. The Board prefers to resolve this case on its merits at the earliest opportunity. Doing so will not prejudice any other party. Nor will it disserve the purposes of Act 250.

Accordingly, the merits hearing and related prehearing deadlines in this matter shall be rescheduled.

III. ORDER

1. LTH's request that this matter be reset for merits hearing is GRANTED.
2. The Chair shall issue a Revised Scheduling Order setting this matter for hearing.

DATED at Montpelier, Vermont, this 21st day of March, 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding
Marcy Harding, Chair
Samuel Lloyd
W. William Martinez
Alice Olenick

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