

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

RE: Vercon Associates by Findings of Fact and
Edward B. French, Jr., Esq. Conclusions of Law and
David B. Stackpole Law Offices Order
P.O. Box 819 Application #5L0806-EB
Stowe, VT 05672

This decision pertains to an appeal filed with the Environmental Board on February 10, 1989 by Vercon Associates (**Vercon**) from the decision of the District #5 Environmental Commission dated January 16, 1989. In its decision, the District Commission, concluded that Land Use Permit #5L0806 was abandoned due to **nonuse**, pursuant to 10 V.S.A. sec. 6091(b) and Board Rule 38(B). The permit authorized the construction of 30 condominium units on a 106-acre tract of land in Stowe, Vermont.

A prehearing conference was convened on March 20, 1989 by Acting Board Chair Jan S. Eastman. At the prehearing conference, Kerr Sparks, Jr., an **adjoining** property owner, and Susan Jenson, a neighbor, appeared at the prehearing conference but did not request party status.

An Administrative Hearing Panel of the Board convened a public hearing on May 10, 1989, with only Vercon, represented by Edward B. French, Jr., Esq., participating. On June 1, 1989, Vercon filed a brief. On July 13, 1989 a proposed decision was issued and the parties were provided an opportunity to file written objections and to present oral argument before the full Board. Having received no written comments or request for oral argument from any party, on July 19, 1989, following a review of the proposed decision, the evidence presented in the case, and the legal brief of Vercon, the Board declared the record complete and adjourned the hearing. This case is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing. To the extent the Board agreed with and found necessary any findings proposed by Vercon, they have been incorporated herein; otherwise, said requests to find are hereby denied.

I. ISSUES IN THE APPEAL

The District Commission, on its own motion, convened a hearing to determine whether Land Use Permit #5L0806 was abandoned due to **nonuse**. After the hearing, the District Commission concluded that the permit has been abandoned because "substantial construction" had not taken place on the land within two years from issuance of the permit, as required by Rule 38(B).

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Vercon believes that the permit was not abandoned because Vercon in fact "used" the permit within the meaning of the statute and rules, by attempting to obtain financing and otherwise working on the project, even though it did not begin construction within two years from the date the permit was issued. Vercon argues that because the permit contained a construction completion date of five years and stated explicitly that the permit would expire in one year if the Permittee did not demonstrate an intention to proceed with the project, and referred to the statute but not to Rule 38(B), deeming the permit abandoned would violate Vercon's due process rights. Moreover, Vercon contends, Rule 32, which requires that all conditions relating to a permit must be clearly and specifically stated in the permit, should apply in this case. Vercon also argues that Rule 38(B) does not apply to Vercon because the rule was not adopted until February 1, 1988, several years after Vercon received its permit, and that even if it does apply, Vercon has complied with it because the construction delays by matters beyond Vercon's control are analogous to litigation, as that word is used in Rule 38. Finally, Vercon argues that Rule 38 is invalid because it goes beyond the statutory language of 10 V.S.A. sec. 6091(b).

II. FINDINGS OF FACT

1. On December 20, 1985, the District #5 Environmental Commission issued Land Use Permit #5L0806 to Vercon. The permit authorized the construction of 30 condominium units, a swimming pool, a maintenance building, and on-site water and sewage disposal systems on a 106-acre tract of land off Cottage Club Road in Stowe. This project constitutes Phase I of the Maple Ledge development.
2. A. Ray Field is a limited partner of Vercon Investments, the general partner of Vercon Associates. Mr. Field was personally involved in all aspects of the Maple Ledge development.
3. The permit contains the following conditions pertinent to this appeal:
 11. Prior to any construction on these units, all necessary approvals relative to waste disposal system designs under the Environmental Protection Rules must be obtained from the Department of Water Resources [now Department of Environmental Conservation] and this permit must be appropriately amended.
 12. Prior to any construction on these units, all necessary approvals relative to water supply design and yield must be obtained from the Department of Health. ...

4. **Vercon's**

project and indicated that the request for financing would be considered further after resolution of water and electrical problems that Vercon was experiencing and after the sales market for condominiums in Stowe had improved. Financing has not been obtained to date.

5. At the time that Vercon applied for its Act 250 permit, it intended to install a subsurface on-site waste disposal system. Vercon subsequently decided to contribute money to a study of the assimilative capacity of the Little River in **Stowe under** the auspices of the Town for the purpose of determining whether sewage from properties on the Mountain Road could be processed through the Stowe wastewater disposal facility. Vercon believes that although it has sufficient on-site waste disposal capacity for Phase I of its project, waste disposal by means of the proposed new sewer line on the Mountain Road and upgrade of the municipal facility is necessary for the remainder of the project, and would be preferable for Phase I. For various reasons, the Town's sewage project has not been -- implemented.
6. The Village of Stowe Water and Light Department told Vercon that the existing electric facilities in the area are overloaded and a new distribution system would have to be completed before service could be extended to the project. The facility has not yet been completed and the Village has not yet determined the location, total cost, or cost allocation formula relating to the facility.

Because adjacent properties had experienced difficulties finding adequate water, Vercon wanted to locate its water well on a parcel of land it had conveyed to the Franklin Lamoille Bank. When Vercon conveyed the property, it reserved a right to enter

upon the land to participate in the development of a water well at a mutually agreed location. The Franklin Lamoille Bank subsequently conveyed portions of its land to Baraw Enterprises, Inc. The negotiations with the bank and Baraw Enterprises were prolonged because the parties had to agree on potential well locations which would not inhibit their respective developments. Vercon has also since 1988 contacted the Vermont Department of Health for approval of an on-site well. In a letter to the District #5 Environmental Coordinator dated July 15, 1988, Mr. Field set out a schedule for completion of the well on Vercon's property. This schedule represented that the well would be drilled in August, 1988 and construction of the first two buildings in Phase I would begin by the spring of 1989.

8. Mr. Field relied upon the terms of Vercon's Act 250 permit requiring the Permittee to demonstrate an intention to proceed with the project within one year from the date of issuance of the permit and to complete construction on the project before October 15, 1990. He did not know that it was necessary to begin construction within one year and assumed he could request an extension of the construction completion date if necessary.

III. CONCLUSIONS OF LAW

The applicable statutory provision is 10 V.S.A. sec. 6091(b), which states:

Nonuse of a permit for a period of one year following the date of issuance shall constitute an abandonment of the project and the permit shall be considered expired.

Rule 38(B), entitled "Abandonment by **non-use**," purports to interpret sec. 6091(b), and states, in pertinent part:

Use of a permit within one year as required in 10 V.S.A. sec. 6091(b) shall include but not be limited to actions by the permit holder to arrange financing, obtain other permits or otherwise demonstrate an intention to proceed with the project. However, in any case, substantial construction must occur on a development within two years from the date on which the permit was issued unless construction has been delayed by litigation to secure other necessary permits or approvals.

The primary issue that the Board must resolve in this case is whether Vercon should be deemed to have abandoned its permit because it did not begin construction within two years of the permit's issuance, as required by Rule 38(B). Mr. Field did take a number of actions that indicate his intention to proceed with the project, including trying to get financing and to work out sewage disposal, water system, and utility problems. Nonetheless, Vercon admittedly did not do any construction on this project within two years from issuance of the permit, and construction has not been delayed by litigation to secure other necessary permits or approvals. Therefore, the Board is required to conclude that the permit is abandoned, unless it decides, in light of all the circumstances in this case, that Rule 38(B) should not be applied.

A general rule of administrative law is that an agency's validly promulgated rules have the full force and effect of law and an agency is bound by its own rules, as are the people affected by them. See, e.g., Bishop v. Town of Barre, 140 Vt. 564, 578 (1982). Exceptions to this principle exist, however, in certain situations. For instance, an administrative agency may waive the requirements of procedural rules in the interest of justice provided such a waiver will not prejudice other parties. Amcor, Inc. v. Brock, 780 F.2d 897 (11th Cir. 1986).

In this case, the Board believes that fairness dictates that Rule 38(B) not be applied to Vercon, for the following reasons. The permit contains conditions establishing a construction completion date of 1990 and an expiration date of 2005, and one condition explicitly states that the permit will expire if the permittee has not demonstrated an intention to proceed with the project within one year. The permit does not contain a requirement that construction must begin within two years, and it does not contain a reference to Rule 38(B). While people are required to comply with the laws that apply to them and are not excused from complying simply because they were not aware of them, in this instance the Permittee was provided notice in its permit of specific provisions of the law regarding construction, and the Board believes it was reasonable for Mr. Field to rely on those provisions that were made explicit in the permit. Had the permit not included the restatement of the law that the permit will expire unless the Permittee demonstrates an intention to proceed with the project within one year, the Board might have come to a different conclusion. Because of the inclusion of that statement, however, the Board believes that Mr. Field justifiably assumed that he was complying with the law by attempting to work out the various matters that needed to be resolved before construction could begin. The Board therefore concludes that Vercon "used" the permit within one year as required by 10 V.S.A. sec. 6091(b).

The Board is mindful that waiving application of one of its rules could establish a dangerous precedent, and emphasizes that it is doing so only because of these particular circumstances. Moreover, the Board notes that the statute requires that the permit be "used" within one year from issuance, and that given the extensive problems that must be resolved before construction can begin, this application may have been prematurely filed. 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.

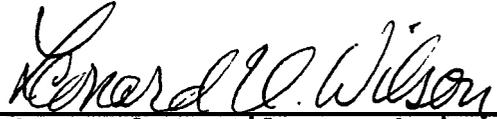
Because the Board has determined that the permit is not abandoned, it declines to address the arguments of the Permittee.

IV. ORDER

Land Use Permit #5L0806 is deemed not abandoned and is hereby reinstated.

Dated at Montpelier, Vermont this 21st day of July, 1989.

ENVIRONMENTAL BOARD



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