

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., CHAPTER 151

Re: Daniel C. Lyons
RD #4
Montpelier, VT **05602**

Findings of Fact and
Conclusions of Law
Land Use Permit Amendment
#5W0556-2-EB

Berlin Associates, Ltd. by
John M. Kilmurry, Esq.
P.O. Box 190
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An appeal by Citizens for Vital Communities ("CVC") was filed with the Environmental Board (the "Board") on June 18, 1982 from Land Use Permit Amendment #5W0556-1, dated May 26, 1982, and issued by the District #5 Environmental Commission. Land Use Permit #5W0556 is a project generally described as the construction and leasing of 198,489 square feet of buildings for retail sales in the Town of Berlin, Vermont. This permit amendment acknowledges that Juster Associates, the original permittee in Land Use Permit #5W0556, no longer controls the land subject to the permit and names Daniel C. Lyons, ("Lyons") the landowner, as permittee. In addition, the permit amendment establishes a new permit expiration date and specifically authorizes the use by Berlin Associates, Ltd. ("Berlin Associates") of the well located on the property, provided that a land use permit is issued pursuant to Application #5W0584.

The Chairman of the Board held a pre-hearing conference on this appeal on July 13, 1982. The Board convened a public hearing on August 11, 1982 at City Hall, Montpelier, Vermont, Chairman Leonard U. Wilson presiding.

Parties present at the hearing were the following:
Appellant, CVC by Andrew J. Keck;
Permittee, Daniel C. Lyons by John M. Kilmurry, Esq.;
Berlin Associates, Ltd. by John M. Kilmurry, Esq.; and
Central Vermont Regional Planning Commission ("CVRPC")
by Robert Apple, Executive Director.

Although the Agency of Environmental Conservation participated in the pre-hearing conference, the Agency did not attend the public hearing.

On August 9, 1982 the Board received a written request for party status from Berlin Associates. At the August 11, 1982 hearing, Berlin Associates renewed this request. After hearing oral argument on the motion, Berlin Associates was admitted as a party to this appeal. This decision was based upon representations that: (1) Daniel C. Lyons is one of two partners in Berlin Associates; and (2) Berlin Associates has a "contingent" ownership interest in the land in question in that, following certain specified events Daniel C. Lyons will transfer the land to Berlin Associates.

10/12/82
Vol. of #182

Findings of Fact and
Conclusions of Law
#5W0556-2-EB

2.

In addition, pursuant to Board Rule 10(A), the Board, on its own motion without objection by parties, made Berlin Associates a co-applicant and thus co-permittee to Land Use Permit Amendment #5W0556-1-EB.

The Board then heard testimony and oral argument and recessed the hearing pending receipt of certain information requested by the Board, proposed Findings of Fact and Conclusions of Law, and memoranda of law on or before September 8, 1982, which date was extended to September 17, 1982.

The Board received various requested information from Lyons on August 24 and 31, 1982 and on September 8, 1982. Lyons did not submit proposed Findings of Fact, Conclusions of Law and memoranda of Law.

On September 17, 1982 CVC filed a letter with the Board offering certain objections to information submitted on behalf of Daniel C. Lyons and requesting that the Board obtain clearer information regarding ownership of the lands in question. Although the Board agrees with CVC that the information offered on behalf of Daniel C. Lyons does not fully respond to the requests made by the Board, the Board has reviewed the record and has determined that it has sufficient information upon which to base its decision, and therefore denies CVC's request of September 17, 1982. The Board adjourned the hearing on October 12, 1982.

I. ISSUES IN THE APPEAL

Appellant CVC claims that the District Commission erred in issuing Land Use Permit Amendment #5W0556-1 to Daniel C. Lyons. CVC contends that according to Board Rule 32(C) and Condition #40 of Land Use Permit #5W0556, the permit issued on November 4, 1980 in the name of Juster Associates should have expired or been revoked by the District Commission.

Appellant's alternative argument is that Land Use Permit Amendment #5W0556-1 should have been issued to Berlin Associates as controller of the land in question rather than to Daniel C. Lyons.

The Board makes the following Findings of Fact and Conclusions of Law based on the record developed at the hearing, including but not limited to testimony, oral argument, information requested by the Board, and information available at the Berlin Town Clerk's office and the Vermont Secretary of State's office properly identified at the August 11, 1982 hearing pursuant to 3 V.S.A. §810.

II. FINDINGS OF FACT

1. On November 4, 1980 the District #5 Environmental Commission issued Land Use Permit #5W0556 to Juster Associates ("Juster"), a/k/a Verjust, Inc., as the lessee of lands identified in the Land Records of Berlin, Vermont. The permit specifically authorized the permittee, Juster Associates, to construct and lease 198,489 square feet of buildings for retail sales in the Town of Berlin, Vermont. The issuance of this permit was appealed to the Board on December 1, 1980 and removed to Washington Superior Court on December 14, 1980. On April 15, 1982 Daniel C. Lyons filed a request to amend Land Use Permit #5W0556 with the District #5 Environmental Commission. As of the August 11, 1982 Board hearing, the Superior Court appeal was still pending.
2. Juster leased the lands subject to Land Use Permit #5W0556 from Daniel C. Lyons. Lyons terminated the lease in July, 1981. Exhibit #8. Whether or not Juster breached its lease with Lyons is not an issue in this appeal.
3. Lyons has granted the right to use a well on the land subject to Land Use Permit #5W0556 to Berlin Associates. Exhibit #13.
4. Berlin Associates is a limited partnership formed in Ohio. There are two partners: Lyons is the limited partner, and Developers Diversified, Ltd. ("Developers") acts as both the general partner and a limited partner. Exhibit #2 and Exhibit A to "Certificate of Limited Partnership" on file with Berlin Town Clerk.
5. Berlin Associates is an applicant for Land Use Permit #5W0584 to construct a shopping facility, located on lands owned or controlled by Berlin Associates. Exhibit #2.
6. Berlin Associates' general purpose is "to acquire, own, develop, construct,, improve, mortgage, operate, manage, lease, sell, exchange and otherwise deal in and with certain real property and interests therein, consisting of approximately 63 acres . . .". Exhibit #14.

7. The 'Certificate of Information by Berlin Associates, Ltd.' (the "Certificate"), on file with the Berlin Town Clerk, contains an excerpt from the December 1, 1981 "Agreement of Limited Partnership for Berlin Associates, Ltd." (the "Agreement"). Exhibit #17. Section 2.1 of Article II of the Certificate states that 'concurrently with the execution of the Agreement,' Lyons will deliver a limited warranty deed to the Lyons property to Berlin Associates.
8. Section 6.4 of the 'Certificate of Limited Partnership' (Exhibit #14) states that if the "construction of the Mall" has not commenced within three (3) years of the date of the agreement, the "Lyons property" described in Section 2.1 (see Finding #7) would be returned to Lyons.
9. The "Lyons property" described in the Certificate is the property subject to this appeal.
10. Conditions #39 and #40 of Land Use Permit #5W0556 relate to permit expiration and provide as follows:

Condition 39. This permit shall expire on November 1, 2000, unless extended by the District Commission.

Condition 40. Notwithstanding Condition #39, this permit shall expire one year from date of issuance if the permittee has not demonstrated an intention to proceed with the project. In addition, this permit shall also expire in two years from the date of issuance unless the permittee has demonstrated that substantial progress towards the completion of this project has been achieved. This determination will be made in writing by the District Environmental Commission after notice has been given to all parties and a public hearing has been held.

III. CONCLUSIONS OF LAW

1. In Allenbrook Associates, Inc., #4C0466-1-EB (April 19, 1982) ("Allenbrook"), the Board addressed an issue similar to the first issue raised in this appeal. In Allenbrook we held that the district commission has the authority to bind subsequent purchasers of permitted subdivision

lots to the terms and conditions of the land use permit because permits run with the land. See Board Rule 32(D). The same principle applies to the issue raised here of whether a permit expires when the permittee ceases to lease the land subject to the permit.

Act 250 regulates land use and development in the State of Vermont. If a permit did not run with the land, Act 250 regulation would be rendered ineffective and meaningless. A permit does not expire because the permittee no longer leases, owns, or controls the land. As long as there is a landowner or controller actively pursuing a project, the permit does not expire.

On November 4, 1980 Juster received a permit to complete the proposed project. This permit was subsequently appealed on December 1, 1980 and continued to be the subject of that appeal as of August 11, 1982. 10 V.S.A. §6091(b) provides that **nonuse** of a permit for a period of one year constitutes abandonment of a project, and such permits expire automatically. Board Rule 32(C) defines use to include actions by the permittee to arrange financing, obtain other permits or otherwise demonstrate an intention to proceed with the project."

The Board is of the opinion that protecting a permit by participating in an appeal demonstrates an intention to proceed with the project. See Preseault v. Wheel, 132 Vt. 247 (1974). Therefore, until such time as Juster could no longer be considered the permittee, the permit did not expire due to **nonuse**. Following Juster's alleged breach, Lyons, the landowner, has continued to take the appropriate steps to secure permits necessary to proceed with the project. The permit does not expire merely because Juster Associates, the original permittee, no longer leases the land.

2. Pursuant to 10 V.S.A. §§6090(a) and 6091(b) and Board Rule 32, the District Commission or Board has the authority to determine the duration of a land use permit and to determine whether a permit has been abandoned by "nonuse." We find sufficient activity by Juster and subsequently Lyons to indicate that the permit has not been abandoned.

We conclude, therefore, that Land Use Permit #5W0556 does not expire according to Condition #40 for failure to proceed with the project within one year of the permit's issuance.

3. We also conclude that Lyons is the owner and/or controller of the land in question. Whether Lyons currently owns the land as an individual or owns or controls the land as a limited partner of Berlin Associates, our conclusion would be the same. We find substantial evidence to conclude that Lyons either owns or controls the land subject to Land Use Permit Amendment #5W0556-1 according to the requirements of 10 V.S.A. §6001(3) and Board Rule 10(A); therefore, Daniel C. Lyons is a co-permittee to Land Use Permit Amendment #5W0556-1.
4. We further conclude that although Berlin Associates may not own the land in question, it has sufficient control of the land to allow the Board to conclude that Berlin Associates should be a co-permittee. The Board received conflicting evidence regarding Berlin Associates' ownership of the land. As Finding #7 indicates, at the time the limited partnership was formed, December 31, 1981, Lyons was to deliver a limited warranty deed to Berlin Associates. Other evidence indicates that such a deed was not conveyed. However, we find that according to the terms of the partnership agreements, Berlin Associates has such control over the land that the Board must consider Berlin Associates as a co-permittee to Land Use Permit Amendment #5W0556-1.

Dated at Winooski, Vermont this 12th day of October, 1982.

Members participating
in this decision:

Leonard U. Wilson
Warren M. Cone
Melvin H. Carter
Dwight E. Burnham
Ferdinand Bongartz

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