

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

RE: Larry & Diane Brown
Application #5W1175-1-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a Motion to Dismiss in Part (the Motion) filed by Larry and Diane Brown (the Permittees). As explained below, the Environmental Board grants the Motion.

I. BACKGROUND

On November 5, 1993 the District #5 Environmental Commission (the District Commission) issued Land Use Permit #5W1175-1 (the Permit) to Larry and Diane Brown (the Permittees) for the construction of a one story commercial building, 74' by 160' in size, on a 19.3 acre tract of land located on Route 14 in East Montpelier, Vermont, for use in the Permittees' printing business (the Project).

The Permit authorizes, and the Project includes, the construction of an access road from Route 14, a connecting road between the proposed new building and an existing, permitted commercial building on an adjacent 12.9 acre tract, and a wooden sign no larger than three feet by five feet at the access drive entrance.¹

On December 3, 1993 Donald H. Donnelly, an adjoiner to the Project, appealed from the District Commission's issuance of the Permit.

On December 3, 1993 Peter Noel Duhamel, also an adjoiner to the Project, appealed from the District Commission's issuance of the Permit.

On July 28, 1994 the Permittees filed the Motion pursuant to Board Rule 18(D). As part of the Motion, the Permittees voluntarily relinquished their right to construct the building authorized by the Permit. The Permittees did not relinquish their right to construct the access and connecting roadways, and sign as authorized by the Permit.

On August 3, 1994 Mr. Duhamel filed a request for an extension of time to file prefiled testimony. Prefiled direct testimony was to be filed on or before August 3, 1994 as provided for in the Acting Chair's memorandum to parties dated

¹The existing permitted commercial building on the adjacent 12.9 acre tract is authorized pursuant to Land Use Permit #5W1175. Land Use Permit #5W1175 is not on appeal.

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May 2, 1994. Mr. Duhamel has not filed prefiled direct testimony.

On August 11, 1994 the Permittees filed a memorandum in opposition to Mr. Duhamel's request for an extension.

On August 19, 1994 Acting Chair Wright issued a memorandum to the parties relative to Mr. Duhamel's extension request.

Prefiled rebuttal testimony from the parties was due to be filed on or before August 31, 1994.

On August 31, 1994 Mr. Duhamel filed a "Motion for a Ruling by the Board on Permittees' Motion to Dismiss" and a "Motion to Compel the Permittees to Make a More Definite Statement." Mr. Duhamel did not file prefiled rebuttal testimony.

On September 2, 1994 the Permittees filed a response to Mr. Duhamel's August 31, 1994 motions. On September 9, 1994 Mr. Duhamel filed a reply to the Permittees' September 2, 1994 response.

On September 15, 1994 the Board issued a Memorandum of Decision in which the Board motioned for oral argument relative to the Permittees' Motion, and denied Mr. Duhamel's request for an extension of time to file prefiled testimony, his request that the Board issue a ruling on the Permittees' Motion prior to the hearing scheduled for September 28, 1994, and his request that the Board order the Permittees' to file a more definite statement as to the scope of the Project.

On September 28, 1994 the Board convened oral argument and conducted a site visit relative to the Permittees' Motion with the following parties participating:

The Permittees by Frederick G. Cleveland, Esq.
Peter Noel Duhamel, pro se
Donald H. Donnelly, pro se

After the site visit, the Board deliberated regarding the Motion, re-convened the oral argument, and announced its decision. The Board now issues this decision pursuant to Board Rule 18(D).

II. FINDINGS OF FACT

1. The Permit provides, in part:

This permit specifically authorizes the permittees to construct a one story commercial building, 74' by 160' in size, for use in their printing business. The project includes construction of an access road from Route 14 and a connecting road between the new building and existing commercial buildings on an adjacent tract.

2. In addition to the Permit, the District Commission issued Findings of Fact, Conclusions of Law, and Order. The District Commission evaluated the Project under the ten Act 250 criteria.
3. On July 28, 1994 the Permittees filed the Motion with an accompanying affidavit.
4. The Permittees have abandoned all aspects of the Project authorized by the Permit except with regard to the access and connecting roadways, and the sign authorized therein. The Permittees' Motion does not require the Board to consider proposed construction which was not reviewed by the District Commission.
5. The access and connecting roadways authorized by the Permit have been constructed in substantial conformity with District Commission Exhibit 20 (the erosion/road plan dated June 18, 1993).
6. The Permittees have voluntarily offered to file with the District Commission an application for a permit amendment when ordered or permitted to do so by the Board.
7. On September 28, 1994 the Board convened an oral argument relative to the Permittees' Motion. At oral argument, the Permittees, through their attorney, affirmed their voluntary relinquishment of their right to construct the building authorized by the Permit.
8. The access and connecting roadways extend from Route 14 to the Permittees' home and are constructed on two contiguous tracts of land. The two contiguous tracts are 12.9 and 19.3 acres, respectively. The involved land of the constructed access and connecting roadways is 32.2 acres.

III. CONCLUSIONS OF LAW

The Permittees' seek the partial dismissal of the appeal made by Mr. Duhamel and Mr. Donnelly based on their voluntary relinquishment of their right to construct the building authorized by the Permit.

A waiver is the voluntary relinquishment of a known right. Green Mountain Insurance Co. v. Maine Bonding & Casualty Co., 158 Vt. 200, 206 (1992).

The Board concludes that the Permittees' have waived their right to construct the one story commercial building authorized by the Permit. Further, the Permittees' waiver is binding regardless of whether the Board issues a permit for the portion of the Project which the Permittees seek to retain and which is on appeal before the Board.

Although Mr. Duhamel contends that he does not oppose the grant of the Motion, he requests that if the Board grants the Motion, that the Permittees then be remanded to the District Commission to obtain a permit amendment. We note that the Permittees have stated that they would seek an amendment when ordered or permitted to do so by the Board.

The Board concludes that the grant of the Motion does not require a remand to the District Commission. The Permittees' waiver does not require the Board to consider potential impacts under the Act 250 criteria which have not first been reviewed by the District Commission. The Board has never required that a change made to a project during the pendency of an appeal mandates automatic remand for the filing of a new permit amendment application. See Re: Sherman Hollow, Inc., #4C0422-5R-1-EB, Findings of Fact, Conclusions of Law, and Order at 5 and 19 (Nov. 19, 1991). Therefore, the Permittees will not be ordered, and nor are they required, to seek a permit amendment for the access and connecting roadways and proposed sign. Rather, the appeal pending before the Board under criteria 8 and 10 shall proceed relative to the constructed access and connecting roadways and proposed sign.

IV. ORDER

1. The Permittees' Motion to Dismiss in Part is granted.

2. The appeal brought by Mr. Duhamel and Mr. Donnelly under criteria 8 and 10 shall proceed relative to the constructed access and connecting roadways and proposed sign.

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Dated at Montpelier, Vermont, this 17th day of
October, 1994.

ENVIRONMENTAL BOARD

/s/ Steve E. Wright (dlg)
Steve E. Wright, Acting Chair
Arthur Gibb
Samuel Lloyd
William Martinez
John Ewing
John Farmer

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