



May 14, 2015

Austin Hart  
209 Battery Street, PO Box 988  
Burlington, VT 05402

RE: Jurisdictional Opinion #6-010 (2015) – Leverenz – North Hero, VT

Dear Austin;

This letter is in response to your request for a jurisdictional opinion regarding the issue of whether a four lot subdivision will trigger the need for a permit amendment to Land Use Permit #6G0464 (“Permit”). In summary it is my opinion that Permit has not expired and that the proposed four lot subdivision is a material change to the existing permit and therefore requires a permit amendment. The following are the facts used to support this conclusion:

1. The Permit was issued on June 2, 1993 and authorized the operation of a seasonal summer and demonstration site for Herrmann’s Original Royal Lipizzan Stallions of Austria...and included the construction of an entrance road, restroom facility, six trailer sites, parking area, riding ring, tent, barn, ticket booth and bleachers.
2. Condition 1 of Permit states:
  1. The project shall be completed, operated and maintained as set forth in accordance with the plans and exhibits stamped “Approved” and on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission.
3. Conditions 8, 9, 10 and 14 of Permit states:
  8. The Permittee shall maintain a 150’ undisturbed, natural buffer zone along the shoreline.
  9. No trees larger than 2” in diameter shall be cut.
  10. No permanent structures shall be erected on site and all temporary facilities shall be removed each year by October 1 and shall be be erected prior to May 1 of each year.
  14. No further subdivision and/or development of any parcels of land approved herein shall be permitted without the written approval of the District Commission.
4. Conditions 15 and 16 of Permit states:
  15. This permit shall expire on October 1, 2003 unless extended by the District Commission. Notwithstanding the later date, this permit shall expire within two years from date of issuance if the Permittee has not demonstrated an intention to proceed



with the project. In any event, substantial construction must occur within two years of the issuance date.

16. Failure to comply with all of the above conditions may be grounds for permit revocation pursuant to 10 V.S.A. Section 6090(b).

5. The improvements were constructed and the facility was used as a public site for the Lipizzan Stallions.
6. There has been no commercial activity on the land since September 2003.
7. The site has returned to its natural state other than an access road and electric power lines.

On June 21, 1994 the statute was amended such that “expiration dates contained in permits issued before July 1, 1994...are extended for an indefinite term, as long as there is compliance with the conditions of the permits.” 10 VSA § 6090(b)(2). The Petitioner argues that the Permit is not in compliance with Condition 1 of the Permit and therefore the permit’s expiration date should not be extended. I disagree. Once Act 250 jurisdiction is triggered and a permit obtained and used,<sup>1</sup> subsequent events will not lift such jurisdiction, nor can jurisdiction be waived.<sup>2</sup> Lifting jurisdiction on the bases of non-compliance would lead to the absurd result of attempting to seek or address a compliance issue without underlining authority to do so.

Next the Petitioner argues the Permit should be abandoned and therefore the land is no longer subject to Act 250. However, Act 250 Rule 38(B) *Voluntary* states:

A permittee may voluntarily abandon a permit for a project at any time prior to the commencement of construction on the project. A permit cannot be abandoned once commencement of construction has occurred.

There is no dispute that construction has occurred and the permit used, therefore it is my opinion the Permit cannot be abandoned.

Finally, the Petitioner argues for the Permit to be revoked. However, since the statute was changed nearly a decade ago, only the Natural Resource Board can petition the Court to revoke a permit for

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<sup>1</sup> Work conducted under the authority of a permit, causes the permit to be “used” within the meaning of 10 VSA 6091(b). *In re John Rusin*, 162 Vt 185, 190 (1994).

<sup>2</sup> *In Re John Rusin*, 162 Vt.185, 189 (1994), affirming, Re: John Rusin, #8B0393-EB, FCO at 5 (6/10/93). [EB#560]; *In Re Wildcat Construction*, 160 Vt. 631, 632 (1993), affirming, Re: Wildcat Construction Co., Inc., #6F0283-1-EB (11/4/91). [EB#458]; Re: Richard and Elinor Huntley, DR #419, MOD at 4 - 7 (7/3/03), (includes a summary of case law from the Vermont Supreme Court and Board), rev’d, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004) (distinguishing prior Vermont Supreme Court case law); Re: McDonald’s Corporation, #1R0477-5-EB, MOD at 6 (5/3/00). [EB#747]; Nelson Lyford, DR #341 (FCO at 27) (12/24/97 (but see [111.4](#)); Black River Valley Rod and Gun Club, Inc., #2S1019-EB (7/12/96). [EB #651M1]; Bernard and Suzanne Carrier, DR #246 (FCO at 26) (12/7/95); Charles and Barbara Bickford, #5W1186-EB (FCO at 25) (5/22/95). [EB#595]; City of Barre Sludge Management Program, DR #284 (FCO at 13-14) (10/11/94); U.S. Quarried Slate Products, Inc., DR #279 and #283 (FCO at 18) (10/1/93); [EB # 560]; Richard Farnham, DR #250 (FCO at 7) (7/17/92); John Stevens and Bruce Gyles, DR #240 (FCO at 16) (5/8/92).



non-compliance and is therefore not an issue I can opine on. Yet there is Environmental Board precedent that holds that revocation does not lift Act 250 jurisdiction.<sup>3</sup>

It is my opinion the Permit has not expired and the material change analysis applies to determine jurisdiction over the proposed four lot subdivision. A material change means “any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the project’s permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. §§ 6086(a)(1) through (a)(10).”<sup>4</sup>

The Petitioner proposes a four lot residential subdivision which will have a significant impact on Conditions 8, 9, 10 and 14 of the Permit. The scope of the permitted development was very limited and the Commission’s conclusion was based on the very limited development and disturbance proposed by the project. The subdivision and subsequent construction of four residences will significantly impact at least the following criteria: Criterion 1B, 1F, 8, 9B and 9H.

In summary, it is my opinion that the subdivision of four lots for residential purposes is a material change to Land Use Permit #6G0464 and therefore constitutes a development and requires a permit amendment.

Sincerely,

/s/ Geoffrey W. Green

Geoffrey W. Green, District Coordinator

This is a jurisdictional opinion, and pursuant to 10 V.S.A. §6007(c) and Board Rule 3, it may be reconsidered by the District Coordinator or it may be appealed directly to the Environmental Board by the applicant, by individuals or entities that may be affected by the outcome of the opinion, or by parties that would normally be entitled to notice under 10 V.S.A. §6084 and Board Rule 14(A).

Any appeal must be filed directly with the General Counsel, Environmental Board, National Life Records Center Building, Drawer 20, Montpelier, Vermont 05620-3201, within 30 days of the mailing of the opinion to the person appealing. Failure to appeal within the prescribed period shall render the jurisdictional opinion a final determination with respect to jurisdiction under this chapter, unless the opinion has not been properly served on parties that would normally be entitled to notice under 10 V.S.A. §6084 and Environmental Board Rule 14(A), and on persons and entities who may be affected by the outcome of the decision, according to the Rules of the Environmental Board.

Appeals shall be by means of a petition for a declaratory ruling pursuant to Environmental Board Rule 3(D) and must be accompanied by a \$100.00 filing fee. In addition, the petitioner must include the original and ten copies of the petition and the jurisdictional opinion appealed from, and a certificate of service showing that the following persons have been served with the petition: all statutory parties under 10 V.S.A. §6084 and Environmental Board Rule 14(A) and other persons on the attached certificate of service. If you have any questions regarding this jurisdictional determination, please call me at

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<sup>3</sup> In Re Jeffrey and Nancy Houghton, #2W0659-EB (Revocation).

<sup>4</sup> Act 250 Rule 2(C) 6.



## CERTIFICATE OF SERVICE

I hereby certify on this 14<sup>th</sup> day of May, 2015, a copy of the foregoing **Act 250 Jurisdictional Opinion #JO-6-010(2015)**, to **Austin Hart, DINSE, 209 Battery Street, Burlington, VT re: Keith and Patricia Leverenz, North Hero, VT** and sent by U.S. mail, postage pre-paid to the following individuals without email addresses and by email to the individuals with email addresses listed.

**Note: any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes.** All email replies should be sent to [nrb-act250essex@state.vt.us](mailto:nrb-act250essex@state.vt.us). Please note you can now fill out and submit the Act 250 survey online at: <http://permits.vermont.gov/act250-survey> instead of printing and mailing the attached pdf version.

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### FOR YOUR INFORMATION

District #6 Environmental Commission  
111 West Street  
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Jon Groveman, Chair  
Lou Borie, Executive Director  
Kimberly Lashua, Business Manager  
Melanie Kehne, General Counsel  
Natural Resources Board  
Dewey Building/National Life Drive  
Montpelier, VT 05620-3201

Dated at Essex Jct., Vermont, this 14<sup>th</sup> day of May, 2015.

/s/ Barbara J. Cady  
879-5614  
[Barbara.cady@state.vt.us](mailto:Barbara.cady@state.vt.us)