

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

RE: John Roach
Bay Harbor Yachts, Ltd.
P.O. Box 156
No. Hero, Vermont 05474

Findings of Fact,
Conclusions of Law
Petition for Revocation
and Appeal #6G0220-3-EB

On August 18, 1981, the Champlain Islands Lake Protection Association (the "Association") and adjoining property owners Allan and Janet Curtis ("Curtis") filed a petition to revoke Land Use Permit #6G0220-1-EB, and any amendments thereto. On September 16, 1981, the Association filed an appeal from Land Use Permit Amendment #6G0220-2. An appeal of this amendment was also filed on September 17, 1981, by adjoining property owners, Allan and Janet Curtis. The Land Use Permit, as amended, relate-s generally to a proposal to develop the Bay Harbor Yachts Marina, a 13-acre project on Pelot's Point, North Hero, Vermont. Land Use Permit Amendment #6G0220-2 approved an "alternative proposal" with respect to certain road improve-ments presented by John Roach, d/b/a Bay Harbor Yachts, Ltd. (the "Permittee") as provided by Land Use Permit #6G0220-1-EB, and extended the construction completion date for the entire project.

A pre-hearing conference was held on September 21, 1981, in South Burlington, Vermont, Chairman Leonard U. Wilson pre-siding. With agreement of the parties, the revocation request and appeal were consolidated.

I. BACKGROUND

On March 17, 1980, the District #6 Environmental Commission (the "District Commission") issued Land Use Permit #6G0220 to John Roach for the construction and operation of a marina on 13 acres, located on Pelot's Point, North Hero, Vermont. In general, the project consists of the installation of floating docks for 75 rental slips, the conversion of four small existing camps to be used as a sales office, ships hardware store, a grocery store, and a marina office, placement of a travel-lift track on piers into Lake Champlain for the launching and retrieval of boats, installation of a pump-out facility for boat wastes and a comfort station for employees and the public, and regrading the existing site to accommodate the storage of boats during the winter months and to provide parking for cars during the summer months.

On April 16, 1980, Champlain Islands Lake Protection Association (the "Association") filed an appeal from this permit with the Board. At issue on appeal, among other matters, was the vehicular access to the marina.

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the marina is by Station Road, a paved surfaced Town Road for a distance of approximately two miles, then along Pelot's Point Road, an unimproved Town road, for approximately two miles and finally along a private right-of-way, also unimproved, for a distance of approximately three-tenths of a mile.

On April 19, 1980, Allan and Janet Curtis, adjoining property owners, joined in the appeal filed by the Association. On May 5, 1980, the Agency of Environmental Conservation (the "Agency") also filed an appeal. On May 13, 1980, the Permittee requested an indefinite postponement of action by the Board. A pre-hearing conference was subsequently held on July 15, 1980. A hearing was held on August 12, 1980, and a site visit made on September 30, 1980. An additional delay in the proceedings was then requested by the parties. A second pre-hearing conference was held on February 17, 1981, with hearings before the Board on February 24, March 17, and April 14, 1981. The Board adjourned the hearings on May 26, 1981, and issued Land Use Permit Amendment #6G0220-1-EB and corresponding Findings of Fact and Conclusions of Law.

On July 15, 1981, the Permittee submitted to the District Commission an "alternative proposal" to the road improvements required by Amendment #6G0220-1-EB issued by the Board. On August 1, 1981, the District Commission approved the "alternative proposal" and extended the construction completion date for the project from October 1, 1981 to April 1, 1983, as specified in Land Use Permit Amendment #6G0220-2.

II. ISSUES

A. Issues Raised by the Petition for Revocation:

1. Violation of Condition #2 of Land Use Permit Amendment #6G0220-1-EB as evidenced by an increased number of boats at the site.
2. Violation of Condition #2 of Land Use Permit Amendment #6G0220-1-EB as evidenced by additional dockage at the site,
3. Contrary to approved plans, a cable providing electricity to the marina was lying on top of the ground fully exposed rather than buried underground.
4. The pump-out facility referred to in Land Use Permit #6G0220 has never been installed; however, a temporary pump-out facility has been used.
5. The holding tank referred to in Condition #6 of Land Use Permit #6G0220 has not been installed.

6. The required sanitation facilities have not been constructed.
7. Three inches of "pea stone" gravel have not been added to the boat storage and 100 lot parking areas.
8. The boat storage area has not been elevated above the floodplain.
9. The access roads serving this project were not widened, as of August 15, 1981, as required by Condition #2c of Land Use Permit Amendment #6G0220-1-EB.
10. The access roads serving this project have not been improved to provide for proper drainage as required by Land Use Permit Amendment #6G0220-1-EB.

The parties stipulated at the pre-hearing conference to the facts set forth in paragraphs 4,5,6,7, and 8 above.

B. Issues Raised in the Appeal:

1. Whether the proposal concerning the access roads approved by the District Commission in Land Use Permit Amendment #6G0220-2 is an "equally-effective alternative proposal" as required by Condition #4 of Land Use Permit Amendment #6G0220-1-EB; and
2. Whether the Permittee is entitled to an extension beyond October 1, 1981, to complete the required construction at the project site.

The hearing on these matters was convened on November 10, 1981. At that time the Board heard testimony and oral argument on the following issue:

Whether the proposal concerning the access roads approved by the District Commission in Land Use Permit Amendment #6G0220-2 is an "equally-effective alternative proposal" as required by Condition #4 of Land Use Permit Amendment #6G0220-1-EB.

At the request of the parties, the Board made a preliminary decision on this issue as set forth in the Board's Memorandum of Decision dated December 15, 1981. The Board heard testimony and oral argument on the remaining issues on December 22, 1981. Proposed findings and conclusions were filed by the parties as of January 12, 1982. On February 10, 1982, the Board directed the Chairman of the Board to meet with the parties to discuss the various issues raised by the petition for revocation and appeal. Such discussions were held on March 1 and 22, 1982. On April 14, 1982, the Board adjourned the hearing.

The following parties participated in these proceedings:

Permittee by John P. Roach, Jr., Alan Overton, Esq. and Michael Danley, Esq.;
Appellants, adjoining property owners, Allan and Janet Curtis, by Joseph Cahill, Esq.; and
Appellants, Champlain Islands Lake Protection Association, by Steven F. Stitzel, Esq.

C. PROCEDURAL ISSUE

Before making Findings of Fact and Conclusions of Law, the Board finds it necessary to address a procedural issue raised by the Permittee's proposed findings of fact. The recommended findings interpret Board Rule 12 (C) (now Rule 14(B)) to limit the scope of the appeal now before the Board to the District Commission's record below. Board Rule 12(C) provides only that the Board or a district commission may allow certain individuals or groups to participate as parties. Appeals from a district commission decision to grant party status are limited to the information supplied to the district commission. In contrast, appeals from a district commission decision to grant, deny, or amend a permit are de novo. An individual or group, granted party status pursuant to Board Rule 12(C), therefore, is not limited to the record of the proceedings before a district commission when participating in a de novo appeal before the Board. See 10 V.S.A. §6089 (a).

In the case at hand, the district commission's decision to amend a permit is at issue; therefore, the appeal before the Board is a de novo proceeding and Rule 12(C) is not applicable.

III. FINDINGS OF FACT

1. Land Use Permit Amendment #6G0220-1-EB included the following conditions:
 2. The applicant may not rent or install additional mooring slips at the project site until he has completed the following:
 - a. The applicant shall add a gravel base six inches in depth to Pelot's Point Road and the private right-of-way providing access to this project. The gravel used must not contain more than seven per cent silt. Drainage along the roads must be improved to prevent accumulation of additional sediment on the road surface.

- b. The applicant shall erect or cause to be erected speed limit signs on Pelot's Point Road and the private right-of-way posting the roads for a maximum speed of 25 mph.
- c. The applicant shall improve or cause to be improved the access roads serving this project, creating a minimum width of 18 feet in the traveled way, and eliminating curves with unsafe drive-sight distances.

The above improvements to the road shall be completed no later than August 15, 1981.

3. The applicant must implement and maintain dust-suppressive measures on the gravel roads serving this project. The District Environmental Commission shall retain continuing jurisdiction to ensure that the project does not result in undue air pollution or unsafe traffic conditions as a result of fugitive dust from the roadway.
 4. With respect to **Conditions #2 and #3** herein, the applicant may, with the approval of the District Highway Engineer, present to the District Environmental Commission an equally-effective alternative proposal for the use of gravel, dust palliatives and speed limits to ensure compliance with the requirements of the Act, in regard to air pollution and traffic safety. If approved by the District Commission, such proposal will replace the terms of **Conditions #2 and #3** herein.
2. In its previous Findings, this Board determined, among other things, that: (a) the project would cause undue air pollution unless properly conditioned, (b) the project would cause unreasonable congestion and unsafe conditions with respect to the access roads to the site unless properly conditioned, and (c) the project would cause an unreasonable burden on the ability of the Town of North Hero to provide municipal services if the cost of **necessary** road improvements and dust control measures were to **be** borne entirely by the Town; however, no unreasonable burden would result if such costs were borne largely by the Applicant. These findings and the testimony upon which they were based are not the subject of review by the Board at this time.
3. **Conditions #2 and #3** of Amendment **#6G0220-1-EB** relate to road improvements, changes and maintenance procedures for both the public portion of Pelot's Point Road and the private right-of-way providing access to this project. **Condition #4** allows the Permittee to present "equally-effective alternatives" to **Conditions #2 and #3**. On July 15, 1981, the Applicant requested the District **#6** Environmental Commission to consider "equally-effective

alternatives" pursuant to Condition #4 of Amendment #6G0220-1-EB regarding the public portion of Pelot's Point Road. Conditions #2 and #3 of Amendment #6G0220-1-EB remain in effect for the private right-of-way and are not in issue.

4. The Permittee's proposed alternatives were set forth in a letter to the Permittee from John Bushey, the Assistant District Transportation Administrator. See Exhibit B. The proposals were made with specific reference to Conditions #2a, #2b and #3 of Amendment #6G0220-1-EB.
5. The Permittee's alternative proposal set forth in Exhibit B does not address all the issues raised by Conditions #2 and #3 of Amendment #6G0220-1-EB. The alternative proposal states that the required six inches of gravel with no more than a seven per cent silt content are unnecessary. It also provides that a 35 mph limit is low enough and that a 25 mph limit is unnecessary. Finally, the alternative provides that calcium chloride will be applied whenever necessary to achieve dust control. The alternative proposal does not address the issue of drainage raised in Condition #2a, nor does it address the issues of minimum width and sight distances raised in Condition #2c.
6. Based upon a review of the alternative outlined in Exhibit B, the Board finds that it is not an "equally-effective alternative" as required by Condition #4 of Amendment #6G0220-1-EB. The proposal is not acceptable because it does not address all of the issues raised in Conditions #2 and #3 and because the proposal does not suggest alternatives to the conditions in question but merely states that the conditions are unnecessary.
7. The ten issues raised by the petition for revocation have been set forth above. The parties stipulated to the following issues: issue #4, no permanent pump-out facility, issue #5, no holding tank, issue #6, no permanent sanitation facilities, issue #7, no "pea stone" gravel, and issue #8, no required elevation of the boat storage area above the floodplain. Temporary pump-out, holding tank and sanitation facilities, however, were used by the Permittee.
8. The Board also finds that, although some widening has taken place on the public portion of Pelot's Point Road and some attempts to improve drainage have been made, the public road is not uniformly 18 feet wide. In addition, no required improvements have been made to the private right-of-way.

9. It could be argued that the construction completion date for the project, but for the road improvements, was October 1, 1981. The issues raised by the petition for revocation filed on August 18, 1981, would, therefore, be premature as on August 31, 1981, the construction completion date was extended to April 1, 1983. The Permittee had previously assured the Board that certain facilities, including restroom and pump-out facilities, would be in place prior to operation of the marina. The Board assumed that such facilities would be installed according to approved plans prior to operation of the marina. This was not the case. Instead, the Permittee proceeded to operate the marina at approximately 50% of its allowed capacity without completing the installation of requisite facilities.
10. It can also be argued that the Permittee was only acting according to the terms of his permit by attempting to find alternatives to approved road improvements. However, the Permittee acknowledges that he sought alternatives for the public portion of the road only and not for the private right-of-way.
11. Based upon the evidence presented to the Board and the language of the outstanding land use permits, the Board is unable to find that the conditions of the permits have been violated so as to require permit revocation pursuant to 10 V.S.A. §6090(b) and Board Rule 38 (formerly Rule 24).
12. Furthermore, the Board is unable to find that an extension of the October 1, 1981 project completion date to April 1, 1983 is justified. Instead, the Board has determined that the following requirements, identified in previous permits, must be completed by June 30, 1982:
 - a. Any cables providing electricity to the marina must be buried according to previously approved plans (See Revocation Issue #3);
 - b. Requisite, permanent restroom facilities must be installed according to approved plans (See Revocation Issue #6);
 - c. Three inches of "pea stone" gravel must be added to the boat storage and 100 lot parking areas (See Revocation Issue #7);
 - d. **The boat storage area must be elevated above the floodplain (See Revocation Issue #8);**
 - e. Access roads, both public and private, must be widened at least 18 feet (See Revocation Issue #9);

- f. Drainage along the access roads must be improved as required by Condition #2a of Land Use Permit Amendment #6G0220-1-EB. The District Highway Engineer or his representative will assist the Permittee in determining where drainage improvements are necessary; and
- g. Unsafe drive-sight distances must be eliminated as required by Condition #2c of Land Use Permit Amendment #6G0220-1-EB. The District Highway Engineer or his representative will assist the Permittee in determining what steps must be taken in order to eliminate unsafe drive-sight distances. The Board suggests that the Permittee and District Highway Engineer or his representative comply with the requirements of the "Policy on Geometric Design of Rural Highways" (a portion of which was identified as Exhibit #30 before the Board) when considering the alternatives available to eliminate unsafe drive-sight distances.

The pump-out and holding tank facilities referred to in Revocation Issues #4 and #5 must also be completed no later than June 30, 1982, unless an earlier date is set by the Water Resources Board. The Permittee must also implement and maintain dust-suppressing measures as needed on the gravel roads serving this project. At a minimum, these measures must be implemented each time the roads are graded. The Permittee shall certify to the District Commission that the requirements to be completed by June 30, 1982, have been satisfied.

- 13. Condition #3 of Land Use Permit Amendment #6G0220-2 states that the District #6 Environmental Commission shall convene a hearing on September 16, 1982, to review the effectiveness of the measures relative to the issues of fugitive dust and traffic congestion/safety on the public portion of Pelot's Point Road. The Board finds that a traffic count on the public portion should be made during the week of July 4, the week of August 8, and the week of September 5, 1982. The traffic count will be conducted by the Agency of Transportation. The information from the traffic count will be made available to the District Commission at or before its September 16, 1982, hearing.
- 14. The Board exempts two improvements to the public access road from its June 30, 1982, completion date of the items contained in Finding #12. These improvements are the 25 mph speed limit and six-inch gravel base with no more than seven per cent silt. At its September 16, 1982, hearing, the District Commission shall determine

whether these two road improvements are required in light of its review of the effectiveness of the other measures. Should the District Commission determine the remaining or other improvements are necessary, the District Commission, at that time, shall also determine the date of their completion.

IV. CONCLUSIONS OF LAW

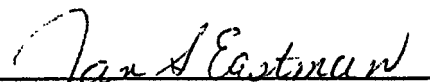
Based upon the foregoing Findings of Fact and the testimony and oral argument presented to the Board, the Board concludes that the project described above, if completed and maintained in conformance with all of the terms and conditions of Land Use Permit #6G0220-3-EB, will not cause or result in a detriment to public health, safety or general welfare under the criteria described in 10 V.S.A. §6086(a) and that, pursuant to such section, a permit amendment is therefore issued.

Jurisdiction over this permit shall be returned to the District #6 Environmental Commission.

Dated at Montpelier, Vermont this 22nd day of April, 1982.

ENVIRONMENTAL BOARD

By


Jan S. Eastman
Executive Officer

Members participating in
this decision:

Leonard U. Wilson
Ferdinand Bongartz
Dwight E. Burnham, Sr.
Melvin H. Carter
Priscilla N. Smith