

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

Re: John Rusin
Land Use Permit #8B0393-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of a decision of the District #8 Environmental Commission concerning abandonment and jurisdiction. For the reasons explained below, the Environmental Board has concluded that John Rusin did not abandon his permit and that jurisdiction continues over his project notwithstanding a change in the project's design.

I. BACKGROUND

On May 12, 1989, the District #8 Environmental Commission issued Land Use Permit #8B0393 to John Rusin (the Permittee). The permit authorizes the creation of a four-lot subdivision with a 1,100 foot roadway located off Wideawake Road in Manchester (the subdivision). On March 5, 1990, the District Commission issued an amendment to the permit to authorize construction of two ponds at the subdivision. On February 21, 1992, the District Commission issued a Memorandum of Decision amending the permit and adding conditions.

On May 11, 1992, the Permittee requested a determination concerning whether there was continuing jurisdiction over the subdivision. On August 6, 1992, after a hearing, the District Commission issued a Memorandum of Decision, in which it ruled that jurisdiction continues over the subdivision even though it was not completed as originally proposed and permitted, and that the permit was not abandoned.

The Permittee appealed to the Board on September 8, 1992. A notice of the appeal was sent to the parties and published in the Bennington Banner. On October 20, the Permittee, through his attorney, filed a statement of facts, and on November 12 he filed a memorandum of law. On October 22, the Manchester Planning Commission filed an entry of appearance.

The Board convened a public hearing on December 16, 1992, with the following parties participating:

John Rusin by William Meub, Esq.
Manchester Planning Commission (MPC) by Lee Krohn

The hearing was recessed pending submission of proposed

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findings and deliberation. Proposed findings of fact and conclusions of law were filed by the MPC on January 18 and by the Permittee on January 19, 1993.

The Board deliberated concerning this matter on March 10 and May 6, 1993. On May 6, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact, and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether the project authorized by Land Use Permit #8B0393, as amended, was abandoned.
2. Whether Act 250 jurisdiction over the project authorized by Land Use Permit #8B0393, as amended, is dissolved.

II. FINDINGS OF FACT

1. On August 6, 1987, the Permittee filed an application for a six-lot residential subdivision with a 1,100-foot roadway located off Wideawake Road in Manchester. Subsequent to the filing of the application, the number of lots was reduced to four.
2. On May 12, 1989, Land Use Permit #8B0393-EB (the permit) was issued to the Permittee authorizing creation of a four-lot subdivision and 1,100 feet of roadway on an approximately 8.9-acre parcel of land.
3. The site plan for the project showed an approximately 740-foot long, 25-foot wide road leading to a cul-de-sac. Two roads lead off the cul-de-sac: an approximate 100-foot spur leading to Lots 1 and 2, and an approximately 480-foot long branch leading to Lots 3 and 4.
4. On March 5, 1990, Land Use Permit Amendment #8B0393-1 was issued to the Permittee authorizing the construction of two ponds in the subdivision.
5. The Permittee constructed the roadways and two ponds. The Permittee also constructed a house on Lot 4. At some time the Permittee decided to eliminate Lot 3.

6. The Permittee may have marketed the subdivision as a four-lot subdivision after the roadway was constructed.
7. In, approximately April 1992 the Permittee sought an amendment to its wastewater permit from the Agency of Natural Resources. On May 5, 1992, the Agency of Natural Resources issued a permit authorizing the elimination of one lot in the subdivision.

IV. CONCLUSIONS OF LAW

A. Abandonment

10 V.S.A. § 6091(b) states:

Nonuse of a permit for a period of two years following the date of issuance shall constitute an abandonment of the project and the permit shall be considered expired. For purposes of this section, for a permit to be considered "used," substantial construction must have commenced within the two-year period, unless construction is delayed by litigation to secure other permits or unless, at the time the permit is issued, the district commission or board provides that construction may be commenced more than two years from the date the permit is issued.

The evidence is undisputed that the Permittee used the permit within one year of issuance of the permit and the permit amendment. The Permittee constructed the infrastructure, including the roadway, as well as ponds and at least one house. Even if the Board were to conclude that jurisdiction dissolves because the Permittee's final project would not have been subject to jurisdiction had it been proposed & constructed, the only firm evidence of the date on which the subdivision design changed is the date of issuance of the revised wastewater permit from ANR. That permit amendment was issued in May 1992. Thus, from the date of issuance of the permit in 1989 until May 1992, the Permittee's construction was under the authority of the permits authorizing the four-lot subdivision. The Board must conclude, therefore, that the permit and the permit amendment were used within the meaning of 10 V.S.A. § 6091(b) and that they were therefore not abandoned.

B. Jurisdiction

The Permittee asserts that at some time after he received the Act 250 permit and commenced construction, he decided to eliminate a lot in the subdivision and construct a driveway connected to the cul-de-sac rather than a road. The Permittee contends that because an Act 250 permit would not have been required for the project as constructed, which he asserts consists of a road of less than 800 feet providing access to only three lots, the Act 250 permit which was issued for the proposed project should be voided.

The Board disagrees with the Permittee's contention that jurisdiction is removed because the Permittee did not complete the project as proposed and permitted. The Permittee applied for and obtained a permit to construct a 1,100 foot road and create four lots. The Permittee commenced construction on this project, and appeared to have constructed what was proposed and permitted, with the exception of the elimination of one lot. By commencing construction on a project for which a permit was required, the Permittee became subject to the jurisdiction of Act 250, regardless of subsequent changes in the design of the project.

Prior Board rulings support the Board's conclusion that jurisdiction does not dissolve based upon subsequent events. In Re: Richard Farnham, Declaratory Ruling #250 (July 17, 1992), the Board ruled that once construction had commenced on a housing project subject to Act 250, jurisdiction remained notwithstanding the sale of the property to an individual who would not have required a permit had the construction begun under his ownership. Citing In re Agency of Administration, 141 Vt. 68, (1982), the Board concluded that once there is construction on a project that is subject to Act 250 jurisdiction at the time the construction... commenced, jurisdiction remains.

Similarly, in the context of a subdivision created and sold without the required Act 250 permit, the Board ruled that jurisdiction is not released upon the sale of the land to a party who did not create the subdivision. Re: Stevens and Gyles, Declaratory Ruling #240 (May 8, 1992).

In In re Wildcat Construction Co., Inc., No. 91-523 (Vt. May 4, 1993), the Vermont Supreme Court recently ruled that jurisdiction does not dissolve when, after the issuance of an Act 250 permit, a town adopts permanent zoning and

subdivision bylaws that change the threshold acreage for determining Act 250 jurisdiction.¹ The Court stated:

The issue of Act 250 jurisdiction is determined at the commencement of the project. In re Agency of Administration, 141 Vt. 68, 79 (1982). Once jurisdiction attaches, and a permit conditioning land use is issued, that permit and its conditions, remain in force even if the town subsequently adopts zoning bylaws that would have preempted Act 250 jurisdiction from attaching had the project commenced on the date of adoption. To retroactively divest the Board of its jurisdiction by automatically dissolving all Act 250 permits in existence when a town adopts bylaws would frustrate the purposes of the protection afforded by Act 250.

The Board believes that the Court's decision in Wildcat Construction is applicable to this case. Jurisdiction attached when the Permittee filed an application for a project that was subject to jurisdiction. An Act 250 permit was issued, and development was commenced on the project. Subsequent events do not dissolve jurisdiction. Accordingly, Land use Permit #8B0393, as amended, remains in force.

¹"Development" is defined at 10 V.S.A. § 6001(3) as the construction of improvements for a commercial or industrial purpose on more than 10 acres of land in a municipality which has adopted permanent zoning and subdivision regulations, and on more than one acre of land in a municipality which has not adopted both permanent zoning and subdivision regulations.

V. ORDER

1. Land Use Permit #8B0393, as amended, is not abandoned.

2. Act 250 jurisdiction over the project authorized by Land Use Permit #8B0393, as amended, is not dissolved and remains in force.

Dated at Montpelier, Vermont this 10th day of June, 1993.

ENVIRONMENTAL BOARD

Elizabeth Courtney

Elizabeth Courtney, Chair
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