

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. §§ 6001-6092

Re: James E. Hand and John R. Hand, d/b/a Hand Motors  
and East Dorset Partnership, #8B0444-6-EB (Revised)

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to (i) a Motion to Alter filed by Lorraine D. Eckert and Mildred O'Neal; and (ii) a request by James E. Hand and John R. Hand, d/b/a Hand Motors, for an extension of a construction completion deadline. As explained below, the motion to alter fails, and the Environmental Board declines to extend the project's construction completion deadline.

I. BACKGROUND

On July 29, 1994, James E. Hand and John R. Hand d/b/a Hand Motors ("Hand") and East Dorset Partnership ("Partnership") (collectively the "Applicants") tiled an application with the District #8 Environmental Commission ("Commission") for the construction of a 23,000 square foot automobile sales/service facility ("Project") on a 6.94 acre tract of land in the Dorset Business Park on Route 7A in East Dorset, Vermont ("Project Tract").

On February 14, 1995, the Commission issued Land Use Permit #8B0444-6 and supporting findings of fact, conclusions of law, and order ("District Permit") authorizing the Project.

On March 10, 1995, Lorraine Eckert ("Eckert") and Mildred O'Neal ("O'Neal") (collectively the "Appellants") filed an appeal from the District Permit with the Board.

On July 12, 1995, the Board convened a hearing and, on October 17, 1995, issued Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 17, 1995) ("Board Decision") and Land Use Permit #8B0444-6-EB ("Board Permit"). The Board Permit authorized the Project subject to the submission of a revised landscaping and lighting plan ("Revised Landscaping and Lighting Plan"). The Board Permit required the Board to give its final approval of the Revised Landscaping and Lighting Plan before the Board Permit would become final.

On February 29, 1996, in response to Motions to Alter filed by the Bennington County Regional Commission, the Applicants, and the Appellants, the Board issued a Memorandum of Decision relative to the pending motions which re-opened the evidence relative to Criterion 8, scheduled further proceedings, and held in abeyance a decision on the other issues raised by the various motions.

On June 12, 1996, the Board re-opened this proceeding and held an **evidentiary** hearing and a site visit. The Board deliberated on June 12, July 10 and 31, 1996. Following a review of the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing on July 31, 1996.

On August 19, 1996, the Board issued Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1996) ("Revised Board Decision"), and Land Use Permit #8B0444-6-EB (Revised) (Aug. 19, 1996) ("Revised Board Permit").

On September 10, 1996, Hand filed a Motion to Alter in response to the Revised Board Decision and the Revised Board Permit.

On September 18, 1996, the Appellants filed a Motion to Alter in response to the Revised Board Decision and the Revised Board Permit.

On October 7, 1996, Hand filed a response to the Appellants' Motion to Alter. Hand also filed a letter withdrawing its September 10, 1996 Motion to Alter.

On October 8, 1996, the Partnership filed a response to the Appellants' Motion to Alter.

On November 20, 1996, the Board convened a deliberation regarding the Appellants' Motion to Alter and Hand's request that the Project's construction completion deadline be extended, notwithstanding Hand's withdrawal of its Motion to Alter on this issue.

## II. APPELLANTS' MOTION TO ALTER

Under Environmental Board Rule ("EBR") 31 (A), a party may file within 30 days from the date of a decision of the Board one motion to alter with respect to the decision.

During its November 20, 1996 deliberation, the Board discussed whether to alter the Revised Board Decision and Revised Board Permit as requested by the Appellants' Motion to Alter. Board member Steve E. Wright moved that the Board grant the Appellants' Motion to Alter. Member Samuel Lloyd seconded the motion. Board members Wright, Lloyd, and Harding voted in favor of the motion. The following members were against the motion: Board Chair John T. Ewing, and members Page, Farmer, and Martinez. Accordingly, the motion failed due to the lack of five votes in favor of the motion to grant the Appellants' Motion to Alter.

By law, the Board consists of nine members. 10 V.S.A. § 6021(a). Under 1 V.S.A. § 172, when authority is given to a body of three or more, the concurrence of a majority of "such number" is required for action. Under the Supreme Court's precedent, Section 172 requires the concurrence of a majority of the full legal membership of a body, and not just a majority of those members assembled to decide. In re Application of 66 No. Main St. 145 Vt. 1, 3 (1984). Accordingly, since the full Board consists of nine members, there must be five votes in favor of a motion. Consequently, the Appellants' Motion to Alter the Revised Board Decision and the Revised Board Permit fails, and the Revised Board Decision and the Revised Board Permit stand as issued on August 19, 1996. See Re: St. Albans Group and Wal\*Mart Stores, Inc. Application #6F0471-EB, Memorandum of Decision at 5 (May 11, 1994).

### III. HAND'S REQUEST

On September 10, 1996 Hand filed a letter which stated, in part:

Please consider this letter a Motion to Alter the above referenced permit under [EBR] 31(A). ... the Applicants hereby request the Environmental Board to modify the construction completion date set forth in Paragraph 20 of [the District Permit]. Applicants request that the construction completion date be extended the length of time this matter was under appeal-i.e. that all construction and site work associated with this project be completed by September 20, 1999.

On October 7, 1996 Hand filed a letter which stated, in part:

Applicants hereby withdraw the letter of September 10, 1996 in so much as it stated that it was a Motion to Alter under [EBR] 3 1 (A) and motions to alter are not allowed in response to the Board's decision of August 19, 1996. Under 10 V.S.A. § 6091(d) the Environmental Board **shall provide that the completion dates be extended** where completion has been delayed by litigation or proceedings to secure other permits. (Emphasis in original.)

10 V.S.A. § 6091(d) provides:

Completion dates for developments and subdivisions. Permits shall include dates by which there shall be full or phased completion. The board, by rule, shall establish requirements for review of those portions of developments and subdivisions that fail to meet their completion dates,

giving due consideration to fairness to the parties involved, competing land use demands, and cumulative impacts on the resources involved. If completion has been delayed by litigation, proceedings to secure other permits, proceedings to secure title through foreclosure, or because of market conditions, the district commission or board shall provide that the completion dates be extended for a reasonable period of time.

Accordingly, the Board has adopted EBR 32(B)(1) which provides:

Project completion date. In determining the dates for phased or full completion of construction or subdivision, the board or district commission shall consider the impacts of project development under the criteria of the Act, and shall give due regard to the economic considerations attending the proposed development or subdivision (such as the type and terms of financing, and the cost of development or subdivision) and the period of time over which the development or subdivision will take place. If a project, or portion of a project, is not completed by the specified date, such project or portion may be reviewed for compliance with 10 V.S.A. § 6086. In any such review, due consideration shall be given to fairness to the parties involved, competing land use demands for available infrastructure, and cumulative impacts on the resources involved. If completion has been delayed by litigation, proceedings to secure other permits, proceedings to secure title through foreclosure, or because of market conditions, the district commission or the board shall provide that the completion dates be extended for a reasonable period of time during which construction can be completed.

Condition #20 of the District Permit provides:

All construction and site work associated with this project shall be completed in accordance with the approved plans by March 15, 1998, unless an extension of this date is approved in writing by the Commission. Such requests to extend must be filed prior to the deadline and approval may be granted without public hearing.

There has been no appeal from condition #20 of the District Permit, nor did the Applicants request that the construction deadline be extended at any time prior to Hand's September 10, 1996 letter. Since Hand withdrew its Motion to Alter, the Board is without authority to extend the construction deadline. At this time, if the Applicants need

an extension, then such request is properly made to the Commission in accordance with District Permit condition #20 and EBR 32(B)(1).

IV. ORDER

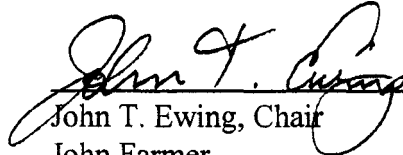
1. The Appellants' Motion to Alter fails due to the lack of five votes in favor of the motion to grant the Motion to Alter.

2. The Applicants' request to extend the Project's construction completion deadline is denied.

3. Jurisdiction is returned to the District #8 Environmental Commission.

Dated at Montpelier this 10th day of December, 1996.

VERMONT ENVIRONMENTAL BOARD



John T. Ewing, Chair

John Farmer  
Marcy Harding  
Samuel Lloyd  
William Martinez  
Dr. Robert Page  
Steve E. Wright