

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

Re: George Stump and Joelle King
Declaratory Ruling #309

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a petition for declaratory ruling regarding whether the construction of a storage building/garage, access drive, and fence ("**Project**") is subject to 10 V.S.A. Chapter 151 ("**Act 250**"). As explained below, the Environmental Board concludes **that an Act 250 permit is not required.**

I. BACKGROUND

On August 14, 1995, the District #5 Assistant Coordinator issued a project review sheet to George Stump and Joelle King ("**Respondents**") regarding the proposed construction of a storage building/garage and access drive by the Respondents on a 20.11 acre tract in Stowe, Vermont ("**Premises**").

The Premises is subject to Act 250 permits #5L0394, #5L0394-1, #5L0394-2, #5L0394-A, #5L0394-3, and #5L0394-3A ("**#5L0394 Permits**").

On August 31, 1995, the District #5 Assistant Coordinator issued jurisdictional opinion #5-95-3 to the Respondents regarding the proposed construction of a fence at the Premises.

On September 1, 1995, Allen and Heide Horsley, Michael and Sally Stack, Geoffrey and Deborah Lindemer, Peter and Karen Monsen, and Gail Kiesler ("**Petitioners**") filed a petition for a declaratory ruling.

On September 11, 1995, the Respondents filed a Supplemental Petition for Declaratory Ruling.

On September 13, 1995, the Respondents filed a Request for Prehearing Conference and Prehearing Order, and a Request for Hearing.

On October 11, 1995, the Respondents filed a motion to dismiss ("**Motion**") the Petition and the Supplemental Petition (collectively, the "**Petitions**").

On October 16, 1995, the Petitioners filed an objection to the Motion.

On October 16, 1995, Environmental Board Chair John T. Ewing convened a prehearing conference and, on October 18, 1995, issued a Prehearing Conference Report and Order

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("Prehearing Order"). In part, the Prehearing Order denied the Motion. No party objected to the Prehearing Order.

The parties filed prefiled testimony and exhibits, proposed findings of fact and conclusions of law, and evidentiary objections during November and December, 1995.

On January 10, 1996, Chair Ewing convened a hearing with the following parties participating:

George Stump and Joelle King by James R. Dean
Mahoney, Esq.
Allen and Heide Horsley, Michael and Sally Stack,
Geoffrey and Deborah Lindemer, Peter and Karen
Monsen, and Gail Kiesler by Harold B. Stevens, Esq.

On February 7, 1996, Chair Ewing issued a proposed decision which was sent to the parties. Pursuant to 10 V.S.A. § 6027(g), parties were allowed to request oral argument before the Board. In addition, parties were allowed to file written objections.

On February 21, 1996, the Petitioners filed a request for oral argument and a written objection to the proposed decision. On February 26, 1996, the Respondents filed a reply to the Petitioners' written objection.

On February 28, 1996, the Board convened oral argument relative to the Petitions with the Petitioners and Respondents participating, and a deliberation concerning this matter. Following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned this proceeding. This Petition 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. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. ISSUE

The issue is whether, pursuant to Environmental Board Rule ("**EBR**") 2(B), 2(G), 2(P) and 34(A), the Project is a material or substantial change to the #5L0394 Permits such that the Respondents were required to obtain an Act 250 permit amendment prior to the commencement of the Project's construction.

III. OFFICIAL NOTICE AND STIPULATION BY THE PARTIES

At the October 16, 1995 prehearing conference, the parties requested that official notice be taken of the **5L0394** Permits, including the respective applications, plans, and exhibits on file with the District #5 Environmental Commission ("District Commission") relative to the permits. The Prehearing Order so provided in Section VII. No party objected to the Prehearing Order. Accordingly, official notice is taken of the **5L0394** Permits and the respective applications, plans, and exhibits.

IV. FINDINGS OF FACT

1. The Respondents own the Premises. The Premises is a 20.11 acre tract **located** on Hollow View Road (Town Highway 84) in **Stowe**, Vermont. The Premises is subject to the **#5L0394** Permits. Except for Land Use Permit **#5L0394**, the remaining **#5L0394** Permits were issued pursuant to EBR 51.
2. The Premises is also known as "Lot C". The Premises has been subdivided into two lots: a 3.05 acre lot ("Lot C-1"), and a 17.06 acre lot ("Lot C-2"). The Respondents have constructed a house on both Lot C-1 and Lot C-2.
3. The Project consists of the construction of a storage building/garage, access drive, and fence on the Premises. The Project is not used for any commercial purpose.
4. The storage **building/garage is** a single story, cedar sided, **40-by-64-foot** structure, constructed on Lot C-1 of the Premises. The Respondents store landscaping equipment, motorcycles and/or motorcycle equipment, cars, and trucks inside the storage building/garage.
5. The newly constructed access drive adjacent to the storage building/garage on Lot C-1 links with the pre-existing access drive on Lot C-2 such that there is a 1,600 foot "loop-through" driveway on the Premises.
6. The loop-through driveway intersects with Hollow View Road in two locations.
7. The fence is a 4,300 foot long, five foot high, galvanized chain link fence that surrounds the Premises' perimeter. Posted on the fence at **500 foot intervals** are **yellow and red no trespassing signs**.

- a. There are gaps along the bottom of the fence which will allow for the passage of wild-life under the fence.
9. The Premises and adjoining properties are wooded **parcels**, generally ranging in size from one to twenty acres in size.
10. Allen and Heide Horsley own an adjoining lot, Lot-B, which borders the Premises to the west. An approximately one-hundred feet portion of the fence is visible from Lot-B.
11. Geoffrey Lindemer owns a 1.67 acre lot which adjoins the Premises to the east. The storage building/garage and approximately a seventy-five foot portion of the fence are visible from Mr. Lindemer's lot.
12. Land Use Permit #5L0394 ("Base Permit") authorizes the creation of an 18 lot subdivision. The Base Permit requires, in part, that the approved subdivision be completed as shown on the plans prepared by Walter L. ~~Urie, D.E., in January, 1977 revised May 9 1977~~ **The plans do not depict where** the individual houses and driveways are to be built within each lot, nor are any fences depicted. The plans depict lot lines.
13. The Base Permit also provides, in part, that construction of other type dwellings, including public buildings, duplexes and condominium units, is not allowed without prior review and approval by the [Department of Environmental Conservation, Agency of Natural Resources] ("DEC").
14. The findings of fact and conclusions of law which resulted in the Base Permit's issuance do specify where the individual houses and driveways are to be built within each lot.
15. Land Use Permit #5L0394-1 ("Dash One Permit") authorizes the subdivision of a 37.5 acres portion of the **58** acres **Original** subject to the Base Permit into three lots, the third lot being the Premises.
16. Condition 1 of the Dash One Permit provides:

The project shall be completed in accordance with the plans and exhibits 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.

17. Condition 4 of the Dash One Permit incorporates all of the conditions of the Certification of Compliance **5L0394-1** issued on August 4, 1986 by the Assistant Regional Engineer, [DEC].
18. Condition 1 of Certification of Compliance **5L0394-1** provides, in part, that the project must be completed as shown on "**Plot Plan, dated 6/86, prepared by Charles Burnham.**"
19. The **6/86 Charles Burnham Plot Plan** referred to in Certification of Compliance **5L0394-1** is on file with the District Commission as part of the Dash One Permit application, is date stamped received by the District Commission **on** June 23, 1986, and depicts the Premises as Lot c.
20. The **6/86 Charles Burnham Plot Plan** depicts where on then Lot C, now Lot C-2, a house is to be built, and the location of the proposed house's driveway off of Hollow View Road. A wire fence is also depicted on the **6/86 Charles Burnham Plot Plan**. At the time the Respondents purchased the Premises, there was perimeter fencing on the southerly and southwesterly perimeter lines.
21. Condition 1.3 of Certification of Compliance **5L0394-1** provides, in part, that (i) the project has been reviewed and is approved for the construction of one single family residence on each approved lot, and (ii) construction of other type dwellings, including public buildings, duplexes and condominium units, is not allowed without prior review and approval by the [DEC].
22. Land Use Permit Amendments **#5L0394-2** and **#5L0394-A** ("Dash Two Permits") authorize construction off of the Premises.
23. Land Use Permit Amendment **#5L0394-3** ("Dash Three Permit") authorizes the subdivision of the Premises into Lots C-1 and C-2.
24. Condition 1 of the Dash Three Permit provides:

The project shall be completed, maintained and operated in accordance with the plans and exhibits 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.

25. On file with the District Commission and date stamped received October 18, 1988 is a plot plan prepared by Robert W. Frey, dated March 1988, entitled "Subdivision of Lot 'C' George Stump & Joelle King" ("March 1988 Plot Plan"). The March 1988 Plot Plan depicts the boundaries of Lot C-1 and Lot C-2 and a driveway leading off of Hollow View Road, but does not depict any existing or proposed structures, nor fences.
26. Condition 5 of the Dash Three Permit provides, in part, that "[t]his permit hereby incorporates all of the conditions of Subdivision Permit #EC-5-1740 issued on November 21, 1988."
27. Condition 11 of the Dash Three Permit provides:

Except as specifically amended herein, all terms and conditions of Land Use Permit **5L0394** and subsequent amendments remain in full force and effect.
28. Land Use Permit Amendment #5L0394-3A ("Dash Three Administrative Permit") provides, in part, that it "**administratively** amends Land Use Permit **5L0394-3**, for the purpose of incorporating the two permits recently issued by the Protection Division. This Permit specifically authorizes increasing to four the number of bedrooms in the approved house and the construction of a one-bedroom apartment on the same lot."
29. Condition 1 of the Dash Three Administrative Permit provides, in part, that "[t]he permit hereby incorporates all of the conditions of Water Supply and Wastewater Disposal Permit WW-5-0346 and Subdivision Permit **EC-5-1740-1** issued on December 17, 1991."
30. Subdivision Permit EC-5-1740-1 authorizes a project consisting of an increase in the number of bedrooms for a residence, and the construction of a one-bedroom apartment, as approved under Waster Supply and Wastewater Disposal permit WW-5-03465.
31. Subdivision Permit EC-5-1740-1 provides, in part, under condition 1.1, that the project authorized therein must be completed as shown on the "**50** Scale Plot Plan, dated

October, 1991, prepared by Charles **Burnham.**" The plot plan depicts for Lot C-1 the location of a driveway and a house.

32. Condition 2 of the Dash Three Administrative Permit provides that "[e]xcept as amended above, all conditions of Permits 5L0394 and subsequent amendment remain in **effect.**"

V. CONCLUSIONS OF LAW

Pursuant to 10 V.S.A. § 6007(c) and EBR 3(D), a petition for declaratory ruling is conducted de novo to determine the applicability of any statutory provision or of any rule or order of the Board.

Pursuant to EBR 2(B) and 34(A), a permit amendment is required for any material or substantial change to a **subdivision.**¹

A. Material Change

EBR 2(P) defines "Material change" as an "alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act."

The Board's material change test involves a two-step analysis. Re: City of Barre Sludae Manaaement Proccram, Declaratory Ruling #284, (Oct 7, 1994); Re: Robert Blair and CS Architecture, Declaratory Ruling #241 (April 29, 1992). First, the Board must find that an alteration has taken place or will take place. This alteration may be either a physical change or a change in use. Re: Mount Mansfield Co., Inc., Declaratory Ruling #269 (July 22, 1992); Re: Town of Sunderland, Declaratory Ruling #200 at 10 (June 24, 1988). Second, the Board must find that the alteration has a significant impact on any finding, conclusion, term or condition of the project's permits and that the alteration affects one or more of the values Act 250 protects.

¹In 1985 the Legislature ratified the Board's rules such that they have the same effect as any law passed by the Legislature in the first instance. The ratified Board rules have "effectively become part of the Act 250 legislative scheme codified at chapter 151 of Title 10." In re Barlow, 160 Vt. 513, 521 (1993).

i. Base Permit

Based on the preceding findings of fact, the Project is not a material change to the Base Permit since the Project is not an alteration to the lots authorized by the Base Permit. The Base Permit's plans do not depict individual house or driveway locations, nor fences. Rather, only lot lines are shown. Nor has the Project resulted in any change of use. The Project is not a dwelling as defined in EBR 2(I) and nor does it **serve** any commercial purpose as defined in EBR 2(L). Therefore, the Project is not an alteration. Likewise, the Project does not have any impact on the Base Permit's findings of fact because the findings do not specify where individual houses and driveways are to be built, or whether fences will be constructed.

ii. Dash One Permit

Based on the preceding findings of fact, the Project is not a material change to the Dash One Permit.

The Dash One Permit authorizes the creation of the Premises as Lot C according to the 6/86 Charles **Burnham** Plot Plan. This plot plan shows where on Lot C (now Lot c-2) a house and driveway are to be built, and the existing wire fence. The Project is not shown, and the Dash One Permit did **not** proscribe future non-dwelling construction, including driveways, or fences, nor can such a prohibition be read into the Dash One Permit. The fence and loop-through driveway are not alterations to that approved by the Dash One Permit, nor do they serve any commercial purpose as defined under EBR 2(L). Therefore, the fence and loop-through driveway are not a material change to the Dash One Permit.

iii. Dash Two Permits

Based on the preceding findings of fact, the Project is not a material change to the Dash Two -Permits since these permits do not pertain to the Premises.

iv. Dash Three Permit and Dash Three Administrative Permit

Based on the preceding findings of fact, the Project is not a material change to the Dash Three Permit or Dash Three Administrative Permit.

The Dash Three Permit authorizes the subdivision of the Premises into Lots C-1 and C-2, and the resulting residential construction on Lot C-1. The March 1988 Plot Plan depicts the

boundaries of Lot C-1 and Lot C-2, and a driveway leading off of Hollow View Road, but does not depict any existing or proposed structures, nor fences.

The Dash Three Administrative Permit provides, in part, that it "administratively amends Land Use Permit 5L0394-3, for the purpose of incorporating the two permits recently issued by the Protection Division. This Permit specifically authorizes increasing to four the number of bedrooms in the approved house and the construction of a one-bedroom apartment on the same lot."

Condition 1 of the Dash Three Administrative Permit provides, in part, that "[t]he permit hereby incorporates all of the conditions of ... Subdivision Permit EC-5-1740-1 issued on December 17, 1991."

Subdivision Permit EC-5-1740-1 provides, in part, under condition 1.1, that the project authorized therein must be completed as shown on the "50 Scale Plot Plan, dated October, 1991, prepared by Charles Burnham." The plot plan depicts the location of a driveway and a house on Lot C-1, but does not depict the Project.

While the Project is not depicted in the March 1998 Plot Plan and the October, 1991 plot plan, the Board concludes that the Dash Three Permit and Dash Three Administrative Permit do not proscribe future non-dwelling construction, including driveways, or fences, nor can such a prohibition be read into these permits. This is especially true given the limited scope of what the Dash Three Administrative permit authorizes and its reliance on Subdivision Permit EC-5-1740-1.

The Project is not an alteration to that approved by the Dash Three Permit and the Dash Three Administrative Permit, and, as noted above the Project does not trigger EBR 2(L) or EBR 2(I). The Board concludes that the Project is not a material change to the Dash Three Permit or the Dash Three Administrative Permit.

B. Substantial Change

EBR 2(G) defines "Substantial change" as "any change in a development or subdivision which may result in significant impact with respect to any of the 10 Act 250 criteria."

The Board's substantial change test involves a two-step analysis. First, there must be a cognizable change to the project. A "cognizable change" is a physical change. See Re: Village of Ludlow, Declaratory Ruling #212 (Jan. 30, 1990);

Re: L.W. Haynes, Inc., Declaratory Ruling #192 (Oct. 7, 1987).
Second, the change must have the potential for significant impacts under one or more of the ten Act 250 criteria. The Board's test has been upheld by the Vermont Supreme Court. In re Barlow, supra; In re Manosh Corn., 147 Vt. 367, 369 (1986); In re Orzel, 145 Vt. 355, 360-361 (1985).

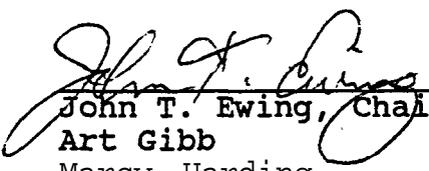
As discussed above, the Board concludes that the Project has not resulted in any change to what was approved in the #5L0394 Permits, and does not trigger EBR 2(L) or 2(I). Therefore, the Project is not a substantial change to any of the #5L0394 Permits.

VI. ORDER

The Project is not a material or substantial change to the #5L0394 Permits and, therefore, the Project does not require an Act 250 permit.

Dated at Montpelier, Vermont, this 29th day of February, 1996.

ENVIRONMENTAL BOARD



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