

VERMONT ENVIRONMENTAL BOARD
§§ 6001-6092

RE: Judge Development Corporation


FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns a proposal to construct Phase III of a commercial development located at Taft Comers in Williston, Vermont.

I. PROCEDURAL SUMMARY

On October 27, 1988, the District #4 Environmental Commission ("District Commission") issued Land Use Pen-nit #4C0388-A-13B ("13B Permit") to Investors Management Co. pursuant to IO V.S.A. §§ 6001-6092 ("Act 250"). In part, the 13B Permit authorized the construction of the building known as Building III of the Taft Corners development.

On April 12, 1991, the District Commission issued Land Use Permit #4C0388-A-13D ("13D Permit") to Judge Development Corp. ("Judge") and Investors Management Company which, in part, authorized the construction of Building III in a different location.

On May 13, 1998, the Coordinator of the District Commission issued jurisdictional opinion #4-137 ("Opinion") concluding that Judge's proposal to construct Building III in the location approved by the 13B Permit constitutes a material change to the 13D Permit and, therefore, requires an Act 250 permit amendment. The Opinion also states that the construction completion deadline set forth in the 13B Permit cannot be extended.

On June 11, 1998, Judge filed a Petition for Declaratory Ruling, alleging that the Opinion is in error.

On July 20, 1998, Vermont Environmental Board ("Board") Chair Marcy Harding convened a prehearing conference with the following entities participating:

Judge by Martin K. Miller, Esq.
Town of Williston ("Williston") by Richard A. Spokes, Esq.

On July 20, 1998, Chair Harding issued a Prehearing Conference Report and Continuance Order which, in part, granted the continuance verbally requested by the parties present at the prehearing conference.

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On August 31, 1998, Judge filed a Motion for Continuance requesting that the matter be stayed until January 8, 1999.

On September 16, 1998, the Chair issued an Order granting the requested continuance.

On November 17, 1998, a Motion for Withdrawal of Counsel and Substitution of New Counsel was filed by Attorney Miller and McCormick, Fitzpatrick, Casper & Burchard, P.C. on behalf of Judge.

On December 24, 1998, Judge filed a Motion requesting that the Chair schedule a status conference to be conducted by telephone after January 8, 1999.

On January 6, 1999, Chair Harding issued an Order scheduling a status conference and granting the Motion for Withdrawal of Counsel and Substitution of New Counsel.,

On January 22, 1999, Chair Harding convened a status conference with the following entities participating by telephone:

Judge by John P. Cain, Esq.
Williston by Richard A. Spokes, Esq.

On February 4, 1999, Judge submitted documents regarding which the parties requested the Board take official notice.

On February 4, 1999, Judge submitted the parties' Stipulation of Facts.

On March 31, 1999, Williston filed its Preliminary Issue Memorandum.

On April 1, 1999, Judge filed a Memorandum of Law ("Judge's Memorandum").

On April 28, 1999, the Board convened a hearing for the limited purpose of accepting oral argument into the record. The Board recessed the hearing and conducted deliberations.

Based upon a thorough review of the record, oral argument, and the parties' memoranda of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUES

1. Whether the terms and conditions of the 13B Permit that have been amended by the 13D Permit are valid terms and conditions such that no permit amendment is required in order to complete the project authorized by the 13B Permit ("Preliminary Issue").

2. If the Preliminary Issue is answered in the affirmative, whether the construction completion deadline set forth in the 13B Permit can be extended ("Construction Completion Issue").

Pursuant to the parties' request, consideration of the two issues has been bifurcated. The Board will determine the Preliminary Issue on the basis of stipulated facts, additional findings based upon documents of which the Board will take official notice, and the opportunity for oral argument and limited fact finding.

III. OFFICIAL NOTICE

Pursuant to 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases before administrative bodies. Id. § 810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Hardyc il44 Vt.61D612 61984. judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

At the January 22, 1999 status conference, Judge and Williston orally waived their right to an evidentiary hearing provided that official notice was taken of the facts to which they have stipulated. Accordingly, the Status Conference Report and Order issued February 12, 1999 took official notice of the facts to which the parties have stipulated with minor amendments ("Officially Noticed Facts") and to the following documents:

- (i) The 13B Permit together with the Findings of Fact, Conclusions of Law, and Order issued on even date therewith.

(ii) The 13D Permit together with the Findings of Fact, Conclusions of Law, and Order issued on even date therewith.

No timely objections were received concerning the Status Conference Report and Order and it is therefore final. Accordingly, the Preliminary Issue, set forth in Section II. ISSUES above, will be decided on the basis of the evidence of which official notice has been taken.

IV. FINDINGS OF FACT

1. Land Use Permit #4C0388-A-13 ("Permit") was issued on July 1, 1986 for the construction of an 80,000 square foot office building on Lot #29 of a previously approved commercial subdivision. Section 23 of the Permit indicated that all construction on the project must be completed by June 30, 1987.
2. Land Use Permit #4C0388-A-13A incorporated Public Building Permit PB-4-1275 for the 80,000 square foot building and was issued on April 29, 1987.
3. On October 27, 1988, Investors Management Company received Land Use Permit #4C0388-A-13B for the construction of three **office** buildings at the southwest corner of Routes 2 and 2A in Williston, Vermont (previously defined as the 13B Permit).
4. Section 2 1 of the 13B Permit stated that Phase I of the construction (Building I) was to be completed by December 15, 1989. Phase II (Building II) was to be completed by October 15, 1990. Phase III (Building III) was to be completed by October 1, 1991.
5. On December 28, 1988, Investors Management Company received Land Use Permit #4C0388-A-13C. This permit amendment incorporated all of the conditions of Public Building Permit PB-4-1275- 1.
6. On April 6, 1991, Judge received Land Use Permit #4C0388-A-13D (previously defined as the 13D Permit).
7. The 13D Permit authorized the construction of Building III in a different location from that approved by the 13B Permit. The 13D Permit required that construction be completed by October 15, 1992.

8. Condition 1 of the 13D Permit states as follows:
 1. All of the conditions of Land Use Permit #4C0388-A-13 and its amendments are in full force and effect, except as amended herein.
9. Condition 2 of the 13D Permit states as follows:
 2. 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.
10. Judge did not appeal the 13D Permit.
11. On March 13, 1998, John Collins, then the counsel for Judge, wrote to James Boyd, District Coordinator for District #4 Environmental Commission, to request a jurisdictional opinion that the 13D Permit did not revoke Judge's right to construct Building III in accordance with the 13B Pert-nit.
12. On May 13, 1998, the District Coordinator issued Jurisdictional Opinion #4-137 (previously defined as the Opinion) stating that a permit amendment was necessary.

V. CONCLUSIONS OF LAW

A. Scope of Review

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. 10 V.S.A. § 6007(c) and Environmental Board Rule ("EBR") 3(D). Although the petition may come to the Board as an appeal of a jurisdictional opinion, the issue in a declaratory ruling proceeding is not whether a jurisdictional opinion, or any part thereof, is correct. Thus, facts stated or conclusions drawn in the jurisdictional opinion are not considered by the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or of any rule or order of the Board over the project described in the jurisdictional opinion.

B. Effect of Permit Amendment on Amended Permit

The Board must consider whether the terms and conditions of the 13B Permit that have been amended by the 13D Permit are valid terms and conditions such that no permit amendment is required in order to complete the project authorized by the 13B Permit.

The 13D Permit was issued subject to the following conditions:

1. All the conditions of Land Use Permit #4C0388-A-13 and its amendments are in full force and effect, *except as amended herein*.
2. 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.*

13D Permit (emphasis added).

EBR 32(A) states that “[a]ll conditions relating to a permit shall be clearly and specifically stated in the permit.” This requirement ensures that permittees and successors in interest are put on notice as to the parameters of the permit. Condition #1 is clear: those terms within the 13B Permit that were amended by the 13D Permit are superseded. When a permit condition is amended, it no longer has any force and effect in its pre-amended form. *Cf. Montgomery v. Brinver Corp.*, 142 Vt. 46 1,464 (1983) (the most recent of two irreconcilable statutes controls because it is the latest expression of legislative intent; an amendment shows legislative intent to change the effect of the existing law).

Judge concedes that the 13D Permit superseded the 13B Permit. Judge’s Memorandum at 3. Judge argues, however, that the 13B Permit was revived when Judge “renounced” the 13D Permit. Id. Therefore, Judge concludes, it may construct Building III pursuant to the terms of the 13B Permit.

Judge’s argument is flawed in at least two respects. First. Judge cannot simply “renounce” the 13D Permit by declaring that it no longer wishes to be bound by its terms

and conditions.' Rather, EBR 38(B) establishes the only procedure by which a permittee may obtain a determination that its permit is void because it has been abandoned. Until Judge obtains such a determination from the District Commission, the 13D Permit supersedes those terms the 13B Permit which it amended.

Second, even if the District Commission voids the 13D permit for non-use pursuant to EBR 38(B), the 13B Permit would not automatically be "revived" because its construction completion date expired in 1991. The 13D Permit's construction completion deadline expired in 1992. Therefore, not even the 13D Permit had a pending construction completion deadline at the time that Judge requested the J.O. from the District Coordinator in 1998. If Judge succeeds in obtaining a declaration that the 13D Permit is void, then it may request an extension of its construction completion deadline from the District Commission. See EBRs 32(B)(1) and 34.

The Board concludes that any terms and conditions in the 13B Permit that were amended by the issuance of the 13D Permit are superseded by the 13D Permit. Accordingly, to the extent that Judge now proposes to construct the project pursuant to the superseded terms and conditions, it must either obtain a land use permit amendment authorizing such proposal or it must obtain both a declaration that the 13D Permit is void pursuant to EBR 38(B) and an amendment to its 13B Permit extending the construction completion deadline.

¹ Judge states that it "received" the 13D Permit which authorized the construction of Building III in a different location and that it "abandoned" the 13D Permit "because of its onerous conditions and restrictions." Judge's Memorandum at 6. Without even considering whether the conditions are "onerous," the Board notes that (i) the 13D Permit was issued only after Judge filed an amendment application requesting that Building III be moved from its 13B location to the location ultimately authorized in the 13D Permit and (ii) Judge did not file a timely appeal from the "onerous conditions and restrictions" of the 13D Permit. Cf. *In re Taft Corners Assocs.*, 160 Vt. 583, 593 (1993) (where a permit and its amendment were not appealed to the Board, the permit conditions are not subject to attack in a subsequent proceeding).

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VI. ORDER

1. The terms and conditions of the 13B Permit that have been amended by the 13D Permit are superseded by that amendment. The superseded terms have not been revived by any action or declaration Judge has taken to "renounce" the 13D Permit.
2. Because the Board does not reach an affirmative conclusion as to the Preliminary Issue, Issue #2 is no longer a live issue before the Board.
3. Jurisdiction is hereby returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 28th day of April, 1999.

ENVIRONMENTAL BOARD*

Marcy Harding
Marcy Harding, Chair
John Drake
John T. Ewing
George Holland
W. William Martinez
Rebecca M. Nawrath
Alice Olenick
Robert H. Opel

* Board Member Samuel Lloyd did not participate in the April 28, 1999 deliberations concerning the Preliminary Issue.

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