

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

RE: P&H Senesac, Inc.
Declaratory Ruling #376

DISMISSAL ORDER

This proceeding concerns the storage of trucks used in connection with a septic / sewer business operated by P&H Senesac, Inc. ("Senesac") located off industrial Park Road, TH #31, in the town of Georgia, Vermont ("Project").

I. PROCEDURAL SUMMARY

On May 3, 1991, the District #6 Environmental Commission ("Commission") issued Land Use Permit #6F0403-1 ("Permit") to James and Janet Harrison pursuant to 10 V.S.A. §§6001-6092 ("Act 250"). The Permit authorized the construction of an addition for hot water storage and truck maintenance at a previously permitted concrete batch plant.

On October 13, 1998, Commission Coordinator Geoffrey Green issued a Project Review Sheet ("PRS.") opining that the Project was not a material change to the Permit and, therefore, did not require a Permit amendment. Green denied a request for reconsideration on November 16, 1998.

On December 14, 1998, Karl and Jane Zurn ("Petitioners") filed a petition for a declaratory ruling with the Environmental Board, appealing the PRS.

On January 12, 1999, Board Chair Marcy Harding convened a prehearing conference. A Prehearing Conference Report and Order was issued the following day.

On February 25, 1999, the Board issued a Memorandum of Decision and Continuance Order which continued this proceeding until September 1, 1999. Intervening procedural history is contained in the Memorandum of Decision.

On September 3, 1999, Chair Harding convened a status conference. At the conference, Senesac represented that it had filed an application for a permit amendment with the Commission, The Chair issued a Status Conference Report and Order that same day.

On October 25, 1999, the Chair issued a Continuance Order, continuing this matter subject to further action by the Commission on Senesac's application.

On February 2, 2000, the Commission issued Land Use Permit #6F0403-2 to Senesac, authorizing a change in use of the previously approved concrete batching plant to a trucking terminal, corporate headquarters, central dispatching, and repair facilities for Senesac's septic business. A minor correction to the Findings of Fact was issued on February 10, 2000.

On March 3, 2000, the Petitioners filed a motion to reconsider the Commission's decision, which the Commission denied on March 23, 2000.

No appeal from the Commission's actions was taken within the time prescribed by the Act 250 statute and the Board's rules. 10 V.S.A. §6089(a)(4) and Environmental Board Rule ("EBR") 40.

On May 5, 2000, Senesac filed a letter with the Board, requesting that the Declaratory Ruling Petition be declared moot, dismissed and the file closed. The Petitioners have not filed any response to this letter within the time proscribed by EBR 12(F).

II. DISCUSSION

The Board and District Commissions are charged to protect and conserve the lands and environment of the state. 1969 Vt. Laws, No. 250 §1 (Adj. Sess.). An administrative agency has discretion to reject a withdrawal or dismissal of an appeal if it would prejudice the public interest that the agency is charged to protect. *Ronald L. Saldi*, #5W1088-1-EB, Memorandum of Decision at 3 (Oct. 1, 1996); and *see Rockwell Park Associates and Bruce J. Levinsky*, #5W0772-5-EB, Dismissal Order (Feb. 17, 1994); *H.A. Manosh Corp.*, Declaratory Ruling #247 (Dec. 13, 1991).

Allowing dismissal of the appeal in this matter, with the concomitant vacation of the Coordinator's PRS and a conclusion that jurisdiction over the Project exists, will not prejudice the public interest that the Board is charged to protect. **Land Use Permit #6F0403-2 now governs the Project and thereby protects the interests of the public.** See, *Mark Frohman and Christopher Sellers*, #5W1303-EB, Dismissal Order (April 20, 2000).

This matter is identical in almost all respects with the Board's recent decision in *CVPS Corporation/Roxbury*, Declaratory Ruling Request #373, Memorandum of Decision (May 27, 1999). In *CVPS/Roxbury*, the District 5 Environmental Commission Assistant Coordinator had ruled in a Jurisdictional Opinion that no permit was required for certain electric utility line work undertaken by Central Vermont Public Service Corporation ("CVPS"). The Town of Roxbury appealed the Coordinator's decision, and CVPS then conceded jurisdiction over the entire electric line project. Over the Town of Roxbury's objection, the Board granted CVPS's Motion to Dismiss:

CVPS has conceded that there is Act 250 jurisdiction over the entire Project including the Existing Corridor and it has indicated its intention to file an application for the entire Project. It is immaterial whether CVPS concedes that there is jurisdiction over the Existing Corridor on a theory which Roxbury and ANR believe to be erroneous or whether there is jurisdiction over the Existing Corridor on the basis of the legal and factual arguments advanced by Roxbury and ANR. The fact remains that CVPS has conceded jurisdiction and the Board's findings support a conclusion that jurisdiction exists and existed at the time construction commenced. CVPS was and is required to obtain a permit for the entire Project. No live issue remains for the Board to consider' in the context of this declaratory ruling. The Board concludes that the issues in this proceeding are moot.

Id., at 6 (footnote omitted).

Likewise, the instant matter is moot, because there no longer is an "actual case or controversy" before the Board. E.g., *Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982). "As a general rule, a case is moot if 'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *In re Barlow*, 160 Vt. 513, 518 (1993), quoting *In re Moriarty*, 156 Vt. 160, 163 (1991). Here, the Petitioners have "obtain[ed] relief by another means" – Senesac has applied for and obtained the Permit amendment – and there is "nothing further that would be ordered" by the Board. *In re Barlow*, 160 Vt. at 518, quoting *Town of Cavendish*, 141 Vt. at 147 and 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §3533.2 at 238 (2d ed. 1984).

The Board's holding that this matter is moot is founded on the prerequisite conclusion that Senesac has conceded jurisdiction over the Project. The Board is cognizant that this matter differs from *CVPS/Roxbury* in that no such specific concession has been made by Senesac. However, by voluntarily filing an application for a permit amendment and receiving but not appealing such amendment, the Board concludes that Senesac has conceded Act 250 jurisdiction over the Project. The Board finds such concession in the provisions of Land Use Permit #6F0403-2:

3. The District Environmental Commission maintains continuing jurisdiction during the lifetime of the permit

4. By acceptance of the conditions of this permit without appeal, the Permittee confirms and agrees for itself and any successors in interest that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the Permit-tee and all assigns and successors in interest.

19. Failure to comply with all of the above conditions may be grounds for permit revocation pursuant to 10 V.S.A. §6090(b).

To conclude that Senesac has not conceded jurisdiction under the circumstances of this case would lead to the anomalous situation where a person could hold a final permit from the Commission which asserts jurisdiction, and could seek dismissal of a Declaratory Ruling Petition on the grounds that the Petition was moot because he had obtained a permit, while simultaneously refusing to accede to Act 250 jurisdiction over his land. Under these circumstances, as the question of jurisdiction would still be in dispute, this Petition would not be moot, and the Board could not grant Senesac's dismissal motion.

¹ This matter is therefore distinguishable from the circumstances in *Barlow*, where the permittees were under the coercive effect of an order, which required them to obtain a permit if they wished to continue to operate. *In re* *Barlow*, 160 Vt. at 518 and 520.

The Board also notes that if jurisdiction is not established, serious questions concerning the Board's ability to enforce Land Use Permit #6F0403-2 would be raised. The Board has previously held that it "will not write a permit condition which it believes is unenforceable at the time it is written." *Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Aug. 19, 1999), citing, *In re Denio*, 158 Vt. at 240. Likewise, the Board will not sanction a dismissal of a Declaratory Ruling Petition under circumstances that would allow the subject of such a Petition to argue that no enforcement could be taken were there to be violations of a permit which had been voluntarily sought and accepted.

The Board will therefore dismiss this case only with the proviso that Senesac's actions in this matter constitute a concession that Act 250 jurisdiction over the Project exists.

The Board also concludes, as it did in *CVPS* and also in *Killington, Ltd., et al.*, #1R0835-EB (Master Plan), Memorandum of Decision (Oct. 22, 1999), that there is no bar to Senesac's concession to jurisdiction:

Despite VNRC's implication to the contrary, this is not a situation where Killington is impermissibly attempting to concede subject matter jurisdiction where no such jurisdiction exists. ... Subject matter jurisdiction concerns the authority of a tribunal to review the issues raised (*e.g.* a traffic court has no jurisdiction to issue a divorce decree, even if the parties seeking a divorce "concede" to the jurisdiction of the traffic court). See, *e.g.*, *Shufe v. Shufe*, 158 Vt. 242, 248 (1992); *Gerdel v. Gerdel*, 132 Vt. 58, 65 (1973). The Board and the district commissions are not exceeding their jurisdiction, however, because they are precisely the administrative bodies empowered with jurisdiction to review a project for compliance with Act 250.

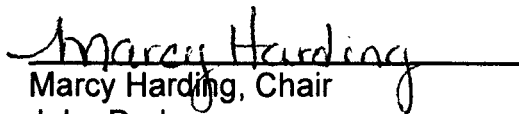
Id., at 6. See also, *CVPS/Roxbury* at 7.

III. ORDER

1. The October 13, 1998 Project Review Sheet, issued by District Commission Coordinator Geoffrey Green, opining that the Project does not require an amendment to the Permit, is vacated.
2. Jurisdiction pursuant to 10 V.S.A. Ch. 151 exists over the Project.
3. The Declaratory Ruling Petition is dismissed as moot.

Dated at Montpelier, Vermont this 22nd day of June 2000.

ENVIRONMENTAL BOARD



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