

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

Re: JRC Realty, Inc.

Declaratory Ruling #426

Memorandum of Decision

This proceeding involves a Petition for Declaratory Ruling to the Environmental Board (Board) filed by JCR Realty, Inc (JCR) from a jurisdictional opinion issued by the Coordinator for the District 2 Environmental Commission (Commission) which concludes JCR's application for an extension to Land Use Permit #2#0934, as amended, (Permit) for its sand and gravel extraction operation in Brattleboro, Vermont (Project) is not complete.

I. History

On October 23, 2003, the Coordinator issued a Jurisdictional Opinion (JO) in which she determined that an application filed by JCR to amend the Permit was not sufficiently complete to begin its processing. Environmental Board Rule (EBR) 10(D).

On November 20, 2003, JCR sought reconsideration of the JO.

On November 21, 2003, 2003, JCR filed a Petition for Declaratory Ruling (Petition) with the Board, pursuant to 10 V.S.A. §6007(c), appealing the JO. JCR contends that its application is complete.

On December 23, 2003, Board Chair Patricia Moulton Powden convened a Prehearing Conference.

On December 24, 2003, the Chair issued a Preliminary Ruling, which suspended further proceedings in this matter, pending the result of JCR's reconsideration request before the Coordinator.

On December 26, 2003, the Coordinator's December 23, 2003 decision, denying the reconsideration request, was filed with the Board.

On January 7, 2004, the Chair issued a Prehearing Conference Report and Order.

On April 21, 2004, the Board held a hearing in this matter at its offices in Montpelier. Only JCR, which as the landowner and permittee has standing to prosecute the Petition, filed testimony exhibits and appeared at the hearing in this case.

The Board deliberated on April 21, 2004. This matter is now ready for final decision.

II. Issue

The issue in this matter is:

Whether JCR's application for an amendment to Land Use Permit #2W0934 is complete under EBR 10(D).¹

III. Findings of Fact

1. The Project is a sand and gravel pit, located off Cider Hill Road in the Town of Brattleboro, on approximately 124 acres. Approximately 70 acres are involved in the pit operation.

2. Land Use Permit #2W0934 (Permit), issued October 7, 1992, authorizes the sand and gravel operation.²

3. The Permit expires on October 15, 2004, unless extended by the Commission.

4. Since the issuance of the permit on October 7, 1992, sand and gravel has been removed from the property

6. The day to day operations of the permit are supervised by Robert Anderson of Anderson Excavating Company of Marlboro, Vermont.

7. On October 10, 2003, JCR submitted an application for a permit amendment to extend the Permit's expiration date for 10 years.

8. The application proposes no changes in the Project's present operations. JCR asks to continue its sand and gravel operations at the same annual extraction rate

¹ Specifically included within this issue is the question of whether an additional application fee is required for the processing of JCR's amendment application.

² The Permit was amended on August 20, 1993 to change the names of the permittee to JCR Realty, Inc.

(60,000 yards/year) and under the same terms and conditions as set forth in the Permit.

9. In connection with its application, JCR submitted a check for the minimum application fee of \$25.00.

10. Other than the fact that reclamation of the Project site was not completed by October 15, 2003, there is no evidence that JCR has not fully complied with the terms and conditions of the Permit during the life of the Project's operations. Project reclamation did not occur because there is additional sand and gravel that is available to be excavated, which is the reason for the request to extend the Permit's expiration date.

11. Except for the following two matters, there have been no complaints concerning the Project's operations during its existence. Around 1995, a neighbor had concerns regarding noise from the Project's crusher; the crusher was moved to a different location in the pit, and the issue was resolved. In the summer of 2003, a neighbor was concerned about noise from the tail gates of the dump trucks used in the pit; the tailgates were removed, and there were no further complaints.

12. JCR has not sought a waiver of the permit fee for this application from the Chair of the Commission.

IV. Discussion

A. Completeness

The Permit authorizes JCR to extract sand and gravel from a pit in Brattleboro. The Permit expires on October 15, 2004, and JCR's present application seeks to amend the Permit to extend its expiration date.

JCR appeals from the Coordinator's JO, as reconsidered, which held that JCR's application is not sufficiently complete to begin processing. EBR 10(D). This rule reads, in pertinent part:

(D) An application that is incomplete in substantial respects shall not be accepted for filing by the district coordinator, and therefore shall not initiate the time and notice requirements of the Act and these rules. A coordinator's decision that an application is substantially incomplete may be appealed in accordance with Rules 3(C)(3) and 3(D) of these rules

Whether an application is complete will depend upon the particular circumstances of the case. There is no bright-line test for completeness; it turns on the Coordinator's judgment of whether the application provides enough information to begin its processing. See, *Re: Sam and Rachel Smith*, Declaratory Ruling #266 (Jan. 20, 1993) (Coordinator shall accept an application for a development if sufficient information is provided, despite the fact that information provided is inconsistent and incomplete).

A completeness determination is essential to a permit application moving forward in the process before a Commission, as Commissions have jurisdiction over complete applications; they do not have jurisdiction over applications which have been deemed incomplete. *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, Memorandum of Decision at 4 (Jan. 16, 2003).

A Coordinator's completeness determination is a JO, subject to Board review within a Declaratory Ruling Petition proceeding. *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, *supra*, at 5; *Re: Ingleside Equity Group*, Declaratory Ruling #397, Findings of Fact, Conclusions of Law, and Order (Aug. 15, 2001)

Based upon the Finding that the permit amendment application proposes no changes to the Project's operations and seeks only an extension of the Permit's expiration date, the Board finds that sufficient information has been presented such that the present application is complete. The process may begin before the Commission, with the caveat that, if the application does not include all of the information that the Commission may ultimately require in order to make positive findings under 10 V.S.A. §6086(a), this will only work to JCR's disadvantage, as the process will be delayed while the Commission waits for the submission of necessary evidence.

B. Fees

As a part of its application for its 1992 Permit, JCR paid a \$6000.00 fee. This amount was based on JCR's intended annual extraction rate of 60,000 cubic yards of sand and gravel. The relevant permit fee statute reads

- 4) For projects involving the extraction of earth resources, including but not limited to sand, gravel, peat, topsoil, crushed stone or quarried material, a fee as determined under subdivision (1) of this subsection or a fee equivalent to the rate of \$0.10 per cubic yard of maximum estimated annual extraction, whichever is greater.

10 V.S.A. §6083a(a)(4).

The Coordinator's decision that the application was incomplete depended, in part, on her determination that JCR had not submitted a proper fee relative to the extension of the Permit's life. In her October 23, 2003 JO, the Coordinator concluded that the fee that was paid by JCR in connection with its original application was for a project with a ten year life and that "this application is viewed as a new project and a new fee needs to be paid for the next ten year period." In its Petition, JCR contends that, because no changes to the Project are intended, a new fee should not be required.

Two related issues are raised in connection with the fee issue before the Board in this matter.

1. *The Board does not have jurisdiction to address the fee question.*

An argument that a fee is excessive or is not necessary must be made, in the first instance, to the chair of the Commission:

(f) In the event that an application involves a project or project impacts that previously have been reviewed, *the applicant may petition the chair of the district commission to waive all or part of the application fee.* If an application fee was paid previously in accordance with subdivisions (a)(1) through (4) of this section, the chair may waive all or part of the fee for a new or revised project if the chair finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, or that there will be substantial savings in the review process due to the scope of review of the previous applications.

10 V.S.A. §6083a(f) (emphasis added). JCR has not petitioned the Commission Chair to reduce or waive the fee for the present amendment application.

The Coordinator's completeness decision was predicated, at least in part, on her determination that a \$6000.00 fee for this amendment application was required. This, in itself, is not error. Whether a fee should be required for an amendment application, and the amount of that fee, is a question that the Coordinator may initially address within a completeness determination. See, *Re: Rapid Rubbish Removal, #CA-721-WFP*, Findings of Fact, Conclusions of Law, and Order at 13 (Jun. 12, 1997) (application for renewal of interim certification is complete when ANR receives the full application fee and the required signatures).

JCR may dispute the Coordinator's determination that a new fee is required, but JCR must, under 10 V.S.A. §6083a(f), present its claims, in the first instance, to the Commission Chair. Should the Chair decide not to waive the fee, this can be appealed

to the Board for review; but, until the Chair has determined the matter, there is no decision that the Board can review.

The Board is an appellate body. It has jurisdiction only over those matters that are properly before it. *In Re Juster Associates*, 136 Vt. 577, 580-81 (1978) (Board may act only consistent with its role as an appellate body); *In re State Highway No. 1, Peru, Vermont*, 133 Vt. 4, 8 (1974) (Board cannot hear initial proposal to develop new lands not considered by Commission). *And see, Re: Stratton Corporation, #2W0519-17(Revised)-EB*, Dismissal Order at 5 (Jan. 10, 2001) (Board lacks authority to hear appeals from Commission decisions that are, in effect, jurisdictional opinions, because Commissions are not authorized to issue jurisdictional opinions). This aspect of the Coordinator's JO must therefore be referred to the Commission Chair for a determination.

2. *The amount of the fee*

The Board does not, in this decision, make any determination as to the proper amount of the fee at issue here. The Board does note, as guidance for the Commission Chair, that the purpose of a fee is to pay for the administrative costs of processing the application. *In re Richard Roberts Group, Inc. et al.*, 161 Vt. 618, 619 (1994) (administrative fees must be reasonably related to the cost of the governmental function).³

If the present permit renewal application actually raises no issues that the Commission has not already reviewed in connection with the application for the original Permit, there may be little justification to require a fee in the amount that was required for the original application. The Commission Chair, however, is likely far more familiar with JCR's sand and gravel pit operation than is the Board, and he is therefore in the best position, perhaps after an initial review of the application and its accompanying exhibits on the proposed Project's merits, to determine whether its previous review of the original project is sufficient such that no new fee (or a reduced fee) is required.

³ It is interesting to note that the statute, 10 V.S.A. §6083a(a)(4), does not relate the fee to the *total amount product* to be extracted; it is based on *annual* extraction rates, not total extraction. A project that will extract 60,000 cubic yards of sand and gravel for 20 years (1,200,000 cy) therefore pays the same fee as a project that will extract 60,000 cubic yards of sand and gravel for only 10 years (600,000 cy).

V. Order

1. JCR's application for an amendment to Land Use Permit #2W0934 is complete under EBR 10(D), as it presents sufficient information to allow the Commission to begin its review.

2. The Board does not have jurisdiction to review the question of the amount of the fee required from JCR for the processing of its application for an amendment to Land Use Permit #2W0934. The question is referred to the Chair of the District 2 Environmental Commission for an initial determination pursuant to 10 V.S.A. §6083a(f).

Dated at Montpelier, Vermont this 7th day of May 2004.

ENVIRONMENTAL BOARD

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