



August 3, 2017

Jeffrey Holden
965 Deer Brook Way
Woodstock, VT 05091
Jeffholden111@gmail.com

Re: Jurisdictional Opinion 3-196
Land Use Permits #3W0360 series, Woodstock

Dear Mr. Holden:

This letter is in response to your written request via email to Kim Lutchko, Act 250 Specialist, received on June 14, 2017 (Exhibit 001). You requested a jurisdictional opinion as to whether an Act 250 permit amendment was or is required for changes made to the private subdivision road, Deer Brook Way, in Woodstock. The information I relied on is from the Engineer's Report that you submitted, emails from you, phone conversations, and the Act 250 files. It is my opinion that there has been a material change to the previously permitted subdivision road and an Act 250 permit amendment was and is required.

Facts as I Understand Them

1. The 20-lot subdivision located off Route 4 in Woodstock, was issued Act 250 permit #3W0360-EB on October 19, 1981. The permit approved a 5,700-foot road to serve the subdivision. The private road is now known as Deer Brook Way and ends in a cul-de-sac. Two driveways off the north side and east side of the cul-de-sac serve two previously approved lots (Lots #19 and #20).
2. The topography of the area is such that there is a change of approximately 500 feet in elevation from Route 4 at the low elevation up to the cul-de-sac at the top of Deer Brook Way.
3. The Holden's own one of the lots and have occupied their home at 965 Deer Brook Way since 1999. Originally, this was Lot #17 of the permitted subdivision.
4. Since 2010, the Holden's have experienced excessive stormwater runoff on to their property causing their driveway to wash out, trees to be uprooted, and eroded soil has exposed rocks and created channeling through their property. There were no impacts on their property related to stormwater runoff and erosion prior to 2010.
5. In 2010 a catch basin with a grate and a new culvert were added to the cul-de-sac. The culvert discharges 15 feet north of the previously approved culvert located at the south end of the cul-de-sac.

6. Ralph Michael, P.E., Michael Engineering, was the original designer of the road layout, lot layout, and sewer and water systems for the subdivision. Mr. Michael surveyed the existing condition of Deer Brook Way and prepared the "Engineering Report of Investigation" (the "Report"). Exhibit 005.
7. One of the conclusions in the Report was that "the roadway south of the cul-de-sac has not changed significantly from its original construction in the 1980's." "South of the cul-de-sac" is downhill toward Route 4.
8. The Report also states that "the previous construction of a catch basin and culvert closer to the center of the cul-de-sac without permission added additional run-off to discharge to a point very close to the culvert crossing the road."

Permits and Findings

9. On October 19, 1981, Act 250 permit #3W0360-EB was issued to White Sands Realty Company for a project described as a subdivision of 246 acres into 20 lots with a 5,700-foot road, located north of Route 4 in Woodstock near the Woodstock-Bridgewater town line.
10. The second paragraph of LUP #3W0360-EB and similarly repeated in LUP #3W0360-1-EB, states:

The permittee, its successor and assigns, are obligated by this permit to complete and maintain the project *only* as approved by the District #3 Environmental Commission in accordance with the following conditions. (Emphasis added).

11. On February 25, 1982, condition #1 of LUP #3W0360-1-EB was amended to read:

The project shall be completed as set forth in Findings of Fact and Conclusions of Law #3W0360, except as modified by the Findings of Fact and Conclusions of Law of the Environmental Board, #3W0360-EB and #3W0360-1-EB; in accordance with the plans and exhibits stamped "Approved" and on file with the District 3 Environmental Commission, and in accordance with the conditions of this permit, as amended. *No changes shall be made in the project without the written approval of the District Environmental Commission.* (Emphasis added).

12. Condition #7 of LUP #3W0360-EB states:

The permittee shall comply with Environmental Board Exhibit #16 for erosion control. All erosion control devices shall be periodically cleaned, replaced and maintained until vegetation is permanently established on all slopes and disturbed areas.

13. Condition #8 of LUP #3W0360-EB states:

The permittee shall construct the road as outlined in Environmental Board Exhibit #16, including four turnouts, identified on said exhibit; however, paving of the road is not required.

14. Condition #9 of LUP #3W0360-EB states:

The permittee shall implement Exhibit #15, Road Maintenance Covenants, to ensure that the road is properly maintained by an Owner's Association, provided, however, that such Covenants must be revised to require proper grading of the project road at least semi-annually.

15. Findings #3W0360-EB under Criterion 4 Soil Erosion at 9:

Permanent erosion controls consist of stone fill in road ditches where the gradient is in excess of 8 percent. Culverts are also to be placed in roadway ditches to prevent large accumulations of surface water. (Exhibit #16).

16. Findings #3W0360-EB under Criterion 4 Soil Erosion at 11:

According to testimony of the Applicant's expert, the road, if properly graded, will not erode abnormally.

17. Ralph Michael, P.E., Michael Engineering, designed the original project in 1981, including the road layout. He also provided an "Engineering Report of Investigation," dated January 30, 2017, to address whether the road was constructed as approved. Mr. Michael suggests solutions to correct the road failures in the Report.

18. The access road that was constructed to serve the 20 lots is now called Deer Brook Way and is a privately maintained road. The Deer Brook Farm Owners Association (the "Owner's Association") was, apparently, formed as required by the Act 250 permit. There are bylaws and covenants.

19. Deer Brook Way ends at a cul-de-sac at the top of the hill. The road was constructed as approved and the Owner's Association maintains the road.

20. There is no evidence that a request for a jurisdictional opinion with respect to changes to the subdivision road was received by the District Coordinator.

Statute and Rules

A material change to a permitted development or subdivision requires a permit amendment. Act 250 Rule 34 (A).

"Material change," in relevant part, means any cognizable change to a development or subdivision subject to a permit under Act 250 . . . which has a significant impact on any finding, conclusion, term, or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria that Act 250 addresses. Act 250 Rule 2(C)(6).

"Cognizable change" means any physical change or change in use, including, where applicable, any change that may result in a significant impact on any finding, conclusion, term or condition of the project's permit. Act 250 Rule 2(C)(26).

Act 250 Rule 3. Jurisdictional Opinions, in relevant part, states:

- (A) . . . Any person seeking a ruling as to whether an activity constitutes a development, subdivision, *material change to a permitted project*, . . . may request a jurisdictional opinion from a district coordinator. . . in the environmental district where the potential project is located. . . (Emphasis added).

Discussion

The subdivision road was constructed as approved in the 1981 Act 250 permit. A homeowner's association was created, road covenants were in place and the road was maintained. Until 2010 the Holdens property was not adversely impacted from runoff and soil erosion from changes made to the road. The installation of a culvert and grate in the area of the cul-de-sac was a cognizable and material change to the approved and permitted subdivision road. At a minimum, there may be significant impacts related to Criteria 1 Water Pollution, as it relates to stormwater runoff, 4 Soil Erosion, and 5 Traffic Safety.

Conclusion

It is my opinion that changes to the approved and permitted subdivision road constitute a material change to the permitted project and required and require an Act 250 permit amendment.

Sincerely,



Linda Matteson
District 3 Coordinator
Linda.Matteson@vermont.gov
802-289-0598

cc: see certificate of service
Attachments: see Exhibit List

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. As of May 31, 2016, with the passage of Senate Bill 123 (Act number pending), Act 250 Rule 3(C) (Reconsideration by the Board) is no longer in effect. Instead, any appeal of this decision must be filed with the Superior Court, Environmental Division (32 Cherry Street, 2nd Floor, Ste. 303, Burlington, VT 05401) within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is \$295.00. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

E-Notification CERTIFICATE OF SERVICE # JO 3-196

I hereby certify that I, the undersigned, sent a copy of the foregoing Jurisdictional Opinion JO 3-196 on August 3, 2017 by U.S. Mail, postage prepaid, to the individuals without email addresses, and by electronic mail to the following with email addresses. All email replies should be sent to NRB.Act250Springfield@vermont.gov. **Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the NRB District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify the District Office of any email address changes.**

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