

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

Re: *Design Contempo, Inc.*

Land Use Permit Amendment #3W0370-2-EB

Findings of Fact, Conclusions of Law, and Order

This proceeding concerns an appeal by Design Contempo, Inc. (DCI) from a decision by the District 3 Environmental Commission (Commission) in which the Commission authorized certain action taken by DCI at its operations in Royalton, Vermont but denied DCI permission to operate its generator on, evenings, nights and weekends.

I. Procedural Summary

On May 11, 2000, DCI filed Land Use Permit Amendment Application #3W0370-2 for an Act 250 (10 V.S.A. Ch. 151) permit for the previous installation of a 15,000 gallon underground diesel fuel tank and the previous addition of a generator enclosed in a steel container adjacent to DCI's sawmill in Royalton (Project).

On August 3, 2000 the Commission issued Land Use Amendment #3W0370-2 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order. The Permit authorized the installation of the fuel tank and the generator. Condition 9 of the Permit states:

Hours of operation of the generator shall be limited to 6:00 a.m. until 4:30 p.m. weekdays. No weekend operation of the generator is permitted.

On September 5, 2000, DCI filed a timely motion to alter Condition 9, in which it requested unlimited use of the generator during the week and on Saturdays. Other parties, including the Royalton Planning Commission (Planning Commission) opposed this motion.

On November 27, 2000, the Commission issued a Memorandum of Decision in which it denied DCI's motion (Decision).

On December 22, 2000, DCI filed a Notice of Appeal from the Decision with the Environmental Board. DCI's Notice raises two issues on appeal: first, whether Condition 9 should be amended to extend the operation hours of the generator to weekdays until 7:00 p.m. and Saturdays from 6:00 a.m. to 4:30 p.m.; and second, whether the Commission erred in considering a letter from the Royalton Planning Commission when it decided DCI's motion to alter.

On January 30, 2001, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

DCI, by Andrea L. Gallitano, Esq. and Greg Winnie
Town of Royalton (Town) by Joshua Powers
Planning Commission by Garret Hobart
Helen Dumville and Stuart Dumville, by John Dumville
Kathryn Rathmann
Sherburn Cilley

On February 1, 2001, Chair Harding issued a Prehearing Order. This Prehearing Order granted party status to DCI, the Town, the Planning Commission, Helen Dumville, Stuart and Bonnie Dumville, and Kathryn Rathmann.

Following the Prehearing Conference, the parties met to discuss settling this matter. In furtherance of the parties' settlement negotiations, and at the parties' request, the Chair issued Continuance Orders on March 9, April 13, May 23 and June 29, 2001.

Between November 1 and December 5, 2001, the parties filed signed copies of a *Stipulation of Findings of Fact, Conclusions of Law and Order (Stipulation)*. In this *Stipulation*, the parties have agreed that the Board can find certain facts, and, based on those facts, issue a permit to DCI.

II. Issue

As stated in the February 1, 2001 Prehearing Order issued in this case, the issue in this matter is:

Whether, pursuant to 10 V.S.A. §6086(a)(8), the Project will "have an undue adverse effect on the scenic or natural beauty of the area, [and] aesthetics...."

III. Discussion of settlement agreements and the Board's obligations

Act 250 and the Board favor the non-adversarial resolution of issues by parties, see 10 V.S.A. §6085(e) and EBR 16(D). Public policy also "strongly favors settlement of disputed claims without litigation." *Dutch Hill Inn., Inc. v. Patten*, 131 Vt. 187, 192 (1973). However, the Board has the obligation to review any settlement reached between the parties. *Cersosimo Lumber Co.*, Land Use Permit #2W0957-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Nov. 29, 1995). This review must determine whether an affirmative finding can be made under all criteria on appeal, and the Board need not accept a settlement agreement if the necessary affirmative findings

cannot be made, *Faucett Builders, Inc.*, Land Use Permit #4C0763-2-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Aug. 6, 1996), or if the agreement contravenes any of the Act 250 criteria. *Pico Peak Ski Resort, Inc.*, Land Use Permit #1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Nov. 22, 1995). *Accord, Andrew and Peggy Rogstad*, Land Use Permit #2S1011-EB, Findings of Fact, Conclusions of Law, and Order at 4 (December 12, 1996).

IV. Official Notice

Under 3 V.S.A. §810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, and with limited exceptions, "[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 Handy*, 144 Vt. 610, 612 (1984). Official notice of a 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).

Because the settlement documents that have been filed by the parties to the Board do not include some pertinent facts, the Board will take official notice, pursuant to 3 V.S.A. §810(4), of the Findings of Fact, Conclusions of Law and Order, issued by the Commission with Land Use Permit Amendment #3W0370-2 on August 3, 2000. Official notice is expressly *not* taken of any evidence, testimony or exhibits which underlie said Findings and Conclusions. *Cf.*, *In re White*, 12 Vt. L.W. 121, 124 (June 1, 2001) (Board took official notice of entire District Commission file, including all exhibits).

V. Findings of Fact

Generally, a settlement agreement will present the Board with proposals on which the Board can base Findings of Fact, which can then, in turn, form the basis for the Board to make positive Conclusions of Law on the Criteria. See, *Cersosimo Lumber Co.*, *supra*; *Faucett Builders, Inc.*, *supra*; *Andrew and Peggy Rogstad*, *supra*. The parties' *Stipulation* has presented such proposed findings in this case, and the parties have agreed, for the purposes of their agreement, that the Board may adopt their proposed Findings of Fact as a basis for a Conclusions of Law which will support the issuance of a Land Use Permit Amendment which will allow DCI to operate its generator at times presently prohibited by the Commission's Permit.¹ The Board therefore adopts

¹ Except as modified herein, the Board adopts the parties' proposed Findings of

those Findings and Conclusions, except as modified herein, and they, along with the findings made by the Commission, lay the groundwork for the Board's analysis of the proposed settlement.

1. The Project involves, in part, the installation of a generator adjacent to the already-permitted sawmill building. (Commission Finding 3).

2. The generator is housed within an insulated metal building or box. The box helps to absorb the noise from the generator. Fire safety precautions prevent the generator being located within the sawmill building. The generator can be heard off site, at adjoining properties and properties in the valley. (Commission Finding 6)

3. The generator adds noise to the sawmill operation, but does not appreciably increase the level of noise when the louder machinery that was previously approved is operating. (from Commission Finding 8)

4. Noise from the generator and the sawmill machinery has wakened the parties in the morning. (Commission Finding 9)

5. The site is a previously approved sawmill, located within a bowl-type setting. The site originally was a gravel pit. The sawmill is located off Waterman Road. A number of commercial establishments are located on Waterman Road. At least two residential lots are also located on Waterman Road. (from Commission Finding 19)

6. The Department of Labor and Industry has issued a construction permit dated October 17, 2000 (L&I File No. 50268, authorization #742469). That permit concerns the enclosure of the debarker room located on the sawmill premises.

7. DCI shall enclose the debarker room as provided by the L&I permit. The permit provides for the extension of the debarker roof 15 feet to the east. The roof shall contain a downward pitch. It will reduce the opening height from 11 feet to 6 or 7 feet on the easterly side. The southern wall of the debarker room will be enclosed by a

Fact and Conclusions of Law in furtherance of the provisions of Act 250, the Board Rules, and Vermont case law, all of which favor negotiated non-adversarial resolution to disputed matters. Had it held an evidentiary hearing and heard argument from the parties as to the application of the evidence to the Findings of Fact and the application of the Findings of Fact to the Conclusions of Law, however, the Board may well have reached conclusions in this case different from the resolution proposed by the parties. Thus, neither the parties nor others should read such acceptance as establishing precedent as to any of the questions which the Board might have addressed, had this matter been presented to the Board for full review.

metal insulated wall. That wall will have a 3-foot x 6-foot opening for the bark conveyor. It will also have a 4-foot x 8-foot glass window. The wall will have a width and height of approximately 18 feet. The southern wall will be extended to the east beneath a roof extension. The bottom portion of the wall will be parallel to the debarker room floor. There will be some open space between the ground and floor to remove problem logs. The west wall will consist of three insulated metal doors constructed with two 4-foot x 8-foot glass windows in two of three panels. The doors will hang from the eaves to approximately 4 feet above the floor. The 4-foot space above the floor is necessary to remove problem logs. The enclosure of the debarker room will reduce sound emanating from the DCI sawmill.

8. DCI shall enclose the generator located on the premises. The generator shall be enclosed on all four sides. Three of the sides shall be enclosed by a board fence. The fourth side shall be enclosed by the mill wall. The board fence shall have a thickness between 2 –3 inches. The fence will be 6 feet 8 inches in height. Two sides of the fence shall have 4-foot doors. The sides of the fence facing the DCI parking lot shall consist of two barn doors with a width of approximately 10 feet each. The interior of the enclosure shall contain sound baffling panels opposite the generator container vent openings. The enclosure of the generator will reduce sound emanating from the DCI sawmill.

9. There are residences located within hearing distance of the sawmill. Given this fact, it is reasonable to restrict the hours of operation of the generator from 6:00 a.m. until 4:30 p.m. weekdays, but permit DCI to operate the generator an additional 525 hours annually provided that: (1) the hours of additional operation shall be conducted only between 4:30 p.m. and 7:00 p.m. weekdays, and Saturdays between 6:30 a.m. and 4:30 p.m.; and (2) the additional hours are to be used for emergency or reasonable business necessities including, but not limited to maintenance and mill repairs, make up for lost time, meeting customer needs and rush orders, and processing an oversupply of wood.

10. There are no historic sites or rare and irreplaceable natural areas which will be affected by this project. (Commission Finding 18)

VI. Conclusions of Law

Under 10 V.S.A. §6086(a)(8) (Criterion 8), before issuing a permit, the Board must find the proposed Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare or irreplaceable natural areas.

The burden of proof under Criterion 8 is on those who oppose the Project, 10 V.S.A. §6088(b), but DCI, as the applicant for the permit, must provide sufficient

information for the Board to make affirmative findings. See, e.g., *Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997) and cases cited therein. Thus, even when there is no opposing party or evidence in opposition with respect to Criterion 8, an applicant will not automatically prevail in the aesthetics issue. See, e.g., *Re: Herndon and Deborah Foster*, #5R0891-8B-EB, Findings of Fact, Conclusions of Law, and Order at 12 (June 2, 1997).

A. Criterion 8 analysis

The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17 - 20 (Nov. 4, 1985).² First, it determines whether the proposed project will have an adverse effect under Criterion 8:

[T]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will “fit” the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 25 (Aug. 19, 1996), *citing*, *Quechee Lakes, supra*, at 18.

Second, if the Board concludes that the Project has an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is “undue.” See, *Quechee Lakes, supra*, at 19-20. *And see, Black River, supra*, at 19-20; *Hand, supra*, at 25-29.

² The Board has applied the *Quechee Lakes* analysis to adverse impacts caused by noise. “While the ‘Quechee analysis’ was developed in the context of visual aesthetics, it provides a useful framework for evaluating whether the noise from construction of this project will have an undue adverse effect upon aesthetics.” *John and Joyce Belter*, #4C0643-6R-EB, Findings of Fact, Conclusions of Law, and Order at 14 (May 28, 1991).

1. Adverse effect

Noise that does not fit in its surrounding has been held to be adverse. *Pike Industries, Inc.*, #400008-2-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Oct. 23, 1997); *Black River Valley Rod & Gun Club*, *supra*, at 19; *David and Nancy Brooks, et al.*; *Bull's Eye Sporting Center*, #5W0743-2-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Feb. 27, 1997) (same); *Re: Charles and Barbara Bickford*, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 33 (May 22, 1995); *John and Marion Gross, d/b/a/ John Gross Sand and Gravel*, #5W1198-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 27, 1995); *H.A. Manosh Corp.*, #5L0690-EB, Findings of Fact, Conclusions of Law, and Order at 17 (Aug. 8, 1986).

a. the context of the Project

To determine whether this Project would “fit” the context of the area, the Board first has to determine what that context is.

There are residences located within hearing distance of the sawmill. The Board has no other facts before it which specifically address the context of area where the Project is located.

b. the impact of the Project on the area

Once the Board determines the context of the Project site, the Board then must consider the scope and extent of the Project's impacts on that context.

The Commission's Conclusions of Law note at page 7:

The project is the addition of a generator to an existing sawmill. The generator creates additional noise that can be heard when the sawmill machinery is not operating and can be distinguished from the machinery noise.

The parties' *Stipulation* requires DCI to construct improvements at the Project. These improvements include the enclosure of the debarker room and the generator; these enclosures will reduce sound emanating from the DCI site. Given the parties' stipulated facts, the Commission's decision, and the mitigation measures that DCI will install pursuant to the *Stipulation* and as required by the conditions of Land Use Permit Amendment #3W0370-2-EB issued on even date herewith, the Board concludes that the Project, as it has been amended, will not have an adverse effect on the scenic or natural beauty of the area or on aesthetics. 10 V.S.A. §6086(a)(8).

VII. Order

1. Land Use Permit Amendment #3W0370-2-EB is issued.
2. Jurisdiction is returned to the District 3 Environmental Commission.

Dated at Montpelier, Vermont this 20th day of December 2001.

ENVIRONMENTAL BOARD

_____/s/Marcy Harding_____

Marcy Harding, Chair

John Drake

George Holland

W. William Martinez *

Alice Olenick

Jean Richardson

Don Sargent

Nancy Waples

* Board Member Martinez was not present at the December 19, 2001 deliberations in this matter, but he has reviewed and concurs with the decision.