STATE OF VERMONT

ENVIRONMENTAL COURT
Docket No.

Land Use Panel of the
Natural Resources Board,
Petitioner,

v.

Robert and Lourdes Eustance,
Respondents

ADMINISTRATIVE ORDER

VIOLATION: *Violation of Land Use Permit 2W0908 and Act 250 Rule 34*

Having found that Robert and Lourdes Eustance Respondents) have committed a violation as defined in 10 V.S.A. §8002(9), the Land Use Panel, pursuant to 10 V.S.A. §8008, hereby issues the following Administrative Order:

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS

1. On February 23, 2003, the District 2 Environmental Commission issued Land Use Permit 2W0908 to Arthur Hurst and James Ellis. The Permit authorized the permittee to create a subdivision and related infrastructure and amenities in the Town of Winhall, Vermont.

2. Condition 1 of Land Use Permit 2W0908 reads in pertinent part: "No changes shall be made in the project without the written approval of the District Environmental Commission." Condition 27 contains similar prohibitive language.

3. On March 13, 2009, the Vermont Supreme Court issued a decision in the matter of *In re Eustance*, 2009 VT 16. The decision included the following paragraphs:

> ¶ 2. The following facts are not disputed. The Eustances own 47.64 acres on French Hollow Road in Bondville, Vermont. The French Hollow property, with a house on it, was purchased by the Eustances from James Ellis in 1999. Their land abuts that of Harold and Valerie Solomon, who in 1992 purchased their 40.05-acre parcel, with a vacation home on it, from Arthur Hurst. Ellis and Hurst were partners in a residential subdivision plan to include fourteen lots—including the lots later sold to the Solomons and Eustances—on 162 acres. In 1991, Ellis and Hurst applied for an Act 250 permit for the proposed subdivision.
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> ¶3. In 1993, the District Environmental Commission granted the permit to allow the subdivision of five lots which had wastewater permits from the Vermont Agency of Natural Resources, construction of

necessary roads and utilities for the permitted lots, and construction of certain common facilities on another part of the involved land. The permit did not provide for the subdivision to create the lots now owned by the Solomons and Eustances, although these lots were included in the permit application. Ellis and Hurst requested that the decision be modified to remove these lots from consideration in the permit proceeding, but the Commission refused, concluding that it had jurisdiction over the lots as part of the proposed subdivision and because of the length of the road to them. The Commission added that "we regard the transfer of the 40.05 lot to Solomon prior to the issuance of this permit as a violation."

¶4. The Commission's permit decision stated that "[a]ny sale, further construction, or subdivision of the remaining eight lots compromising the balance of this 162-acre tract of land is specifically not approved without an amendment to this permit." A series of conditions followed, several of which are relevant for the instant appeal. Condition one stated that "[n]o changes shall be made in the project without the written approval of the District Environmental Commission." Condition three added that "[b]y acceptance of the conditions of this permit without appeal, the permittees confirm and agree for themselves and all assigns and 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 permittees and all assigns and successors in interest." Condition twenty-five further stated that "[n]o further subdivision, alteration, or development of any parcels in this project shall be permitted without the written approval of the District Environmental Commission."

¶5. Responding to the Commission's conclusion that the subdivision that created the Solomons' lot was a violation of Act 250, the Solomons sought and obtained a permit amendment to authorize the subdivision and an addition to the house. Neither Ellis nor the Eustances sought a permit amendment when the Eustances purchased their subdivided lot. Shortly after the purchase, the Eustances began improvements intended to serve an alpaca breeding operation, starting with the clearing of trees. They then constructed a barn, the westerly part of which is used as a veterinarian room for birthing and treating the alpacas. On the second floor of the westerly portion is a fiber studio, in which alpaca fiber is stored and sold. The easterly portion of the barn houses stalls for the female alpacas. Nearby, the Eustances added a manure bin, built in the form of a ten-by-ten-by-four foot concrete block. Down-slope, they constructed a secondary barn for the male alpacas, cleared land for fenced pastures, and added a second manure bin. The Eustances enclosed the property in wire fencing. Finally, they added a pond at the northern end of the property that caught any surface run-off to

protect the wetlands that were further downhill. As completed, the alpaca operation occupies 9.9 acres, and approximately 7.4 acres were cleared for the pasture, pond, and one of the barns.

¶6. The Eustances' operation currently houses fifty-three alpaca and five llamas, which are kept to protect the alpacas against predators. In addition to breeding alpacas and llamas, the operation stores and sells alpaca fiber and other products manufactured in the United States and South America, conducts animal husbandry seminars, and gives weekend tours of the property.

¶7. The land uses on the Eustances' property affect the Solomons' use of their property. A fifty-foot-wide right-of-way from French Hollow Road runs between the two properties. The Eustances' main driveway is 148 feet down the right-of-way, with the Solomon driveway another 270 feet beyond. However, the Eustances built a second driveway directly across from the Solomons' to access one of the barns and the associated manure bins. The barn and manure bins are visible from the Solomons' house when the leaves are off the trees. The second driveway is used by farm vehicles and trucks, including trucks that remove manure twice per day. The Solomons claim that the manure bins regularly emit an odor that reaches their house.

¶ 8. On May 31, 2005, the Eustances filed an application with the District Environmental Commission to amend the 1993 revised permit, seeking approval of their subdivided lot and the alpaca operation on the property. The Commission recessed the hearing in order for the Eustances to gather more information, and they tried to appeal at that time, arguing that the Commission had no jurisdiction over their development. In order to properly bring the jurisdictional question to a head, the Solomons sought a jurisdictional opinion from the District Coordinator. The District Coordinator issued this opinion on December 23, 2005, holding that the Eustances' activities: (1) required amendment of the 1993 revised permit under the express terms of the document; (2) were subject to Act 250 jurisdiction; and (3) required an amendment of the revised permit insofar as the improvements and activities represented a material and substantial change. In the jurisdictional ruling, the District Coordinator ruled that although farming is not development under Act 250, jurisdiction can attach to farming activity if the activity otherwise requires an amendment to an existing Act 250 permit.

¶ 9. The Eustances appealed this decision to the Environmental Court. Both parties moved for summary judgment as to whether Act 250 applied to the facts of the case. Joined by the Vermont

Agency of Agriculture, the Eustances relied particularly on 10 V.S.A. § 6001(3)(D)(i), which states that farming on land below 2,500 feet in elevation is not development for purposes of Act 250. The Solomons made three arguments in response: (1) the permit governing the subdivision specifically required a permit amendment for further construction; (2) there is no exemption for farming where Act 250 jurisdiction is based on the presence of a subdivision; and (3) the project required an Act 250 permit as a material and/or substantial change to the permit.

¶ 10. On February 16, 2006, the Environmental Court granted summary judgment to the Solomons on the issue of Act 250 applicability. First, the court addressed the bearing of the revised 1993 permit on the facts of the case. Reasoning that the revised permit had not been appealed and was therefore final, the court concluded that, under the express terms of the permit, the Eustances were "required to seek further amendments . . . prior to their constructing any barns . . . or other related infrastructure."

¶ 11. The court turned next to the issue of whether there was a farming exemption for Act 250 amendment jurisdiction. The court began by surveying the Act 250 exemption set out in § 6001(3)(D), which states that development does not include, for the purposes of the statute, "construction of improvements for farming, logging or forestry purposes below the elevation of 2,500 feet." The court also mentioned that "the statute was amended in 2004 to clarify that, when development is proposed for a tract of land that is devoted to farming, only those portions of the land 'that support the development shall be subject to regulation under' Act 250, and permits 'shall not impose conditions on other portions' of the property," citing § 6001(3)(E). The court noted first that the issue of Act 250 jurisdiction over a parcel of land proposed for development is determined at the commencement of the project and thereafter runs with the land unless the permit has expired or the proposed activity is governed by an alternative statutory scheme giving another state agency exclusive jurisdiction to regulate it. Once Act 250 jurisdiction attached, the court reasoned, "Environmental Board Rule 34(A) requires a permit amendment to be obtained 'for any material or substantial change in a permitted project, or any administrative change in the terms or conditions of a land use permit.' " The court concluded that once Act 250 jurisdiction has attached to a project, subsequent changes to a permit's terms or conditions, or material or substantial changes in a planned project, require a permit amendment. The court explained that such a conclusion vindicated the reasonable reliance of "neighboring landowners and prospective purchasers" on "the terms and conditions of a permit

governing future activity on the property, or at least rely on their right to be heard in an amendment proceeding."

¶ 12. The court turned next to the Eustances' arguments about the farming exemption, stating:

> While the so-called farming exemption from Act 250 jurisdiction serves an important function in preserving individual farms and Vermont's strong farming tradition, it is not an unlimited exemption, especially in the context of land that has already received and been sold subject to an Act 250 permit binding successors in interest. Rather, other considerations come into play, including reliance on the terms of an issued Act 250 permit by other parties . . . .
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> Moreover, the principles of land management embodied in the Act 250 criteria could not be implemented through the permitting program if subsequent exemptions could remove land from the ambit of an issued permit.

Accordingly, the court granted summary judgment to the Solomons on the issue of whether a permit amendment was required. This appeal followed.

In re Eustance, 2009 VT 16 (2009), ¶¶ 2 - 12 (footnotes omitted).

4. The Supreme Court affirmed the decision of the Environmental Court on March 13, 2009, concluding that the "farming" exemption did not relieve the Eustances from obtaining a permit amendment.

5. By constructing the improvements noted in ¶5 of the Supreme Court's decision, the Respondents violated conditions of Land Use Permit 2W0908 and former Environmental Board Rule (now Act 250 Rule) 34(A).

6. As of the date of this Order, the Eustances have not obtained an amendment to Land Use Permit 2W0908 which authorizes the construction of improvements noted above. The Eustances did not attend a May 12, 2010 hearing held on their pending application.

ORDER

Based on the aforementioned Statement of Facts and Description of Violations, the parties hereby agree as follows:

A. Respondents shall comply with Land Use Permit 2W0908.

B. Respondents shall cease the use of or operations in any and all of the construction noted in *In re Eustance*, 2009 VT 16 (2009), ¶5, until the District 2 Environmental Commission issues a Land Use Permit authorizing its use.

C. Respondents shall diligently pursue their Act 250 Land Use Permit application presently pending before the District 2 Environmental Commission for the construction noted in *In re Eustance*, 2009 VT 16 (2009), ¶5.

D. If the said Act 250 permit application is denied by the Commission or a court on appeal, within sixty (60) days after the denial becomes final, Respondents shall remove all of the construction noted in *In re Eustance*, 2009 VT 16 (2009), ¶5.

E. Respondents shall pay to the State of Vermont, pursuant to 10 V.S.A. Ch. 201, a civil penalty in the amount of Fifteen Thousand Five Hundred ($15,500.00 US) Dollars for the violation(s) noted herein to date.

Payment shall be by check made payable to the "Treasurer, State of Vermont," which shall be sent to:

Denise Wheeler, Business Manager
Land Use Panel of the Natural Resources Board
National Life Records Center Building
National Life Drive
Montpelier, Vermont 05620-3201

Any payment by Respondents pursuant to this Assurance is made to resolve the violations set forth in this Assurance and shall not be considered to be a charitable contribution, business expense, or other deductible expense under the federal or state tax codes. Respondents shall not deduct, nor attempt to deduct, any payments, penalties, contributions or other expenditures required by this Assurance from Respondents' state or federal taxes.

The Panel shall file a notice of this Administrative Order in the land records of the Town of Winhall. On or before the date that this Administrative Order is entered as a Order of the Environmental Court, the Respondents shall forward payment in the amount of Ten Dollars ($10.00), by check made payable to the "Town of Winhall, Vermont" to the Land Use Panel at the address listed above for the purpose of paying the recording fee.

RESPONDENT'S RIGHT TO A HEARING BEFORE THE ENVIRONMENTAL COURT

Pursuant to 10 V.S.A. §8012, any Respondent has the right to a hearing before the Environmental Court concerning this Administrative Order, if such Respondent files a Notice of Request for Hearing within **fifteen (15) days** of the date the Respondent receives this Administrative Order. The Notice of Request for Hearing must be filed with both the Land Use Panel and the Environmental Court at the following addresses:

John H. Hasen, General Counsel
Natural Resources Board
National Life Records Center Building
National Life Drive
Montpelier, VT 05620-3201

Clerk, Environmental Court
2418 Airport Road, Suite 1
Barre, VT 05641-8701

If a hearing is requested, the Land Use Panel reserves the right to seek additional penalties for additional costs of enforcement and other relevant penalty factors. 10 V.S.A. §8010(b).

EFFECTIVE DATE OF THIS ADMINISTRATIVE ORDER

This Administrative Order is effective as to a Respondent on the date it is received by such Respondent. However, if such Respondent files a Notice of Request for Hearing within **fifteen (15) days** of the date such Respondent receives this Administrative Order, such filing shall stay all of the provisions of this Administrative Order as to such Respondent, pending a hearing by the Environmental Court. Unless a Respondent files a timely Notice of Request for a Hearing, this Administrative Order shall become a Judicial Order as to such Respondent when this Administrative Order is filed with and signed by the Environmental Court. 10 V.S.A. §8008(b)(6).

COMPLIANCE WITH A JUDICIAL ORDER

If this Administrative Order becomes a Judicial Order and a Respondent fails or refuses to comply with the conditions of that Judicial Order, the Land Use Panel shall have cause to initiate an enforcement action against such Respondent pursuant to the provisions of 10 V.S.A. Chapters 201 and 211.

Dated: JUNE 2, 2010

Peter F. Young, Jr., Chair
Land Use Panel

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