

LAND USE PANEL of the
NATURAL RESOURCES BOARD

Petitioner,

v.

LARKIN REALTY, and
JOHN LARKIN,

Respondents.

ADMINISTRATIVE ORDER

Having found that Larkin Realty and John Larkin (collectively Respondents) committed violations as defined in 10 VSA § 8002(9), the Land Use Panel of the Natural Resources Board (the Panel), pursuant to the authority set forth in 10 VSA § 8008, hereby issues the following Administrative Order:

VIOLATIONS

- 1) Failure to obtain a Land Use Permit Amendment prior to performing blasting in violation of Condition No. 6 of Land Use Permit Amendment #4C1138-3 and Act 250 Rule 34 (A).
- 2) Failure to follow the terms and conditions of Individual Stormwater Discharge Permit 3602-INDC (NPDES No. VTS000020).

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS

- 1) On November 3, 2005, the District 4 Environmental Commission (the Commission) issued Land Use Permit #4C1138 (the Permit) to John Larkin, Larkin Realty and Cupola Golf Course, Inc. specifically authorizing "the Permittees to create a three-lot subdivision and construct 64 apartments in two buildings." This permit applies to the lands described and identified in Book 107 Page 84 of the land records of the City of South Burlington. (the project tract) The project tract is located on Quarry Hill Road in South Burlington, Vermont.

I.

- 2) The Commission has amended the Permit on three occasions with Amendments #4C1138-1 (the Dash 1 Amendment), issued December 1, 2005; #4C1138-1A (the Dash 1A Amendment), issued February 16, 2007; and #4C1138-3 (the Dash 3 Amendment), issued May 18, 2009 (collectively referred to as the Amendments).

- 3) The Dash 3 Amendment specifically authorizes modifications of the project approved in the Permit to allow the enlargement of the building footprints, relocation of the parking lots, revision of the stormwater system, revision of the roadway width and revision of the landscaping plans.
- 4) Condition No. 3 of the Dash 3 Amendment states: “[t]he project shall be completed, operated and maintained in accordance with: (a) Findings of Fact and Conclusions of Law #4C1138, (b) the plans and exhibits on file with the District Environmental Commission, and (c) the conditions of this permit.”
- 5) Condition No. 6 of the Dash 3 Amendment states: “[n]o changes shall be made to the design or use of this project without the written approval of the District Coordinator or the Commission, whichever is appropriate under Act 250 Rules.”
- 6) Condition No. 7 of the Dash 3 Amendment states: “[p]ursuant to Act 250 Rule 51(G), the permit application and material representations relied upon during the review and issuance of this permit by the District Commission shall provide the basis for determining future substantial and material changes to the approved project and for initiating enforcement actions.”
- 7) Nowhere in the Findings of Fact and Conclusions of Law #4C1138, the plans and exhibits on file with the Commission for the Permit or its Amendments, or the conditions of the Permit or its Amendments did the Commission address or consider the possibility that Respondents would undergo blasting during the construction phase of this project.
- 8) Respondents blasted numerous times between August 1, 2009 and September 24, 2009.
- 9) On August 28, 2009, District Coordinator Peter Keibel became aware of blasting on the project tract and informed Respondents’ engineer that blasting was not approved by the Permit or its Amendments and that such blasting is a material change to the approved project that requires a permit amendment.
- 10) On September 18, 2009, the Panel’s Permit Compliance Officer (PCO), John Wakefield, became aware that Respondents were continuing to blast on the project tract.
- 11) On September 21, 2009, PCO Wakefield became aware that Respondents blasted that afternoon.
- 12) To date, Respondents have not obtained an amendment to the Permit which would allow them to blast on the project tract.
- 13) Respondents violated Condition No. 6 of Land Use Permit Amendment #4C1138-3 by blasting on the project tract without the written approval of the District Coordinator or the District 4 Environmental Commission.
- 14) Respondents, by blasting on the project tract, have created a material change to the development allowed in the Permit and its Amendments.

- 15) Respondents have violated Act 250 Rule 34 (A) by failing to obtain the required permit amendment to Land Use Permit series #4C1138 for a material change to the permitted development.
- 16) On September 22, 2009, the Panel issued an Emergency Administrative Order (the Order) against the Respondents for the unpermitted blasting described herein. The Order was served on the Respondents on September 24, 2009.
- 17) Respondents did not request a hearing regarding the Order.
- 18) On October 12, 2009, the Environmental Court entered the Order as a final Judicial Order.

II.

- 19) On September 1, 2005, the Vermont Department of Environmental Conservation issued Individual Stormwater Discharge Permit 3602-INDC (NPDES No. VTS000020) (the Stormwater Permit) to John Larkin authorizing the discharge of stormwater runoff from construction activities on the project tract.
- 20) On September 25, 2009, Environmental Analyst, Kevin Burke, from the Vermont Agency of Natural Resources, Department of Conservation's (DEC) stormwater program conducted a site visit at the project tract. Respondents had commenced construction prior to that site visit.
- 21) Paragraph C of Part III of the Stormwater Permit requires the permittee to post, at a location visible to the public, notice of the Stormwater Permit.
- 22) Respondents failed to post notice of the Stormwater Permit prior to commencing construction.
- 23) Paragraph E of Part III of the Stormwater Permit requires the Permittee to designate an "On-site Plan Coordinator" for the project and to submit the On-site Plan Coordinator's name and telephone number to DEC.
- 24) Respondents failed to submit the name and telephone number of their On-site Plan Coordinator to DEC before commencing construction.
- 25) Paragraph G of Part III of the Stormwater Permit requires the On-site Plan Coordinator to keep inspection and monitoring records on site and make those records available upon request.
- 26) Respondents failed to have inspection and monitoring records on site or available when Mr. Burke from DEC requested to see those records on September 25, 2009.

- 27) Paragraph H of Part III of the Stormwater Permit requires the Permittee to keep a copy of their Erosion Prevention and Sediment Control (EPSC) Plan on site at all times and available upon request.
- 28) Respondents failed to have a copy of the EPSC Plan on site or available when Mr. Burke from DEC requested to see that Plan on September 25, 2009.
- 29) Paragraph B of Part IV of the Stormwater Permit requires the Permittee to designate an Engineer/Environmental Specialist to perform inspections on the project tract. That Engineer/Environmental Specialist must file bi-weekly reports with DEC during project construction.
- 30) Respondents failed to have any bi-weekly report filed with DEC by September 25, 2009.
- 31) Paragraph H of Part IV of the Stormwater Permit requires the Permittee to hold a pre-construction conference with DEC before commencing construction.
- 32) Respondents failed to hold a pre-construction conference with DEC prior to commencing construction on the project tract.
- 33) Respondents have violated multiple provisions of Individual Stormwater Discharge Permit 3602-INDC (NPDES No. VTS000020) as described in paragraphs 16 through 29 herein.

ORDER

Having found that Respondents have committed violations as defined in 10 V.S.A. § 8002(9), **it is hereby ORDERED:**

A) The Respondents shall pay a penalty of Twenty Thousand Five Hundred and Seventy-Eight Dollars (\$20,578.00) within thirty (30) calendar days of the receipt of this Order. Payment shall be by check made payable to the "Treasurer, State of Vermont" and forwarded to:

Denise Wheeler, Business Manager
Natural Resources Board
National Life Records Center Building
National Life Drive
Montpelier, Vermont 05620-3201

B) Any payment by the Respondents pursuant to this paragraph is made to resolve the violations set forth in this Order 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 Order from Respondents' state or federal taxes.

C) The Respondents shall obtain the necessary Land Use Permit Amendment prior to any further blasting on the project tract.

D) The Respondents shall comply with all terms and conditions of Land Use Permit series #4C1138 and Individual Stormwater Discharge Permit 3602-INDC (NPDES No. VTS000020).

E) The above penalty amounts do not include the costs incurred by the Panel for the enforcement of the above described violations, or the amount of economic benefit gained by the Respondents from the violations. The Panel reserves the right to augment the above stated penalties through evidence presented at hearing. In accordance with 10 V.S.A. § 8010, the penalties may be increased by the costs incurred by the Panel for the enforcement of the described violations, the amount of economic benefit gained by the Respondents from the violations, the need for deterrence, and any and all other penalty factors enumerated in 10 V.S.A. § 8010(b), each according to proof at the hearing.

RESPONDENTS' RIGHT TO A HEARING BEFORE THE ENVIRONMENTAL COURT

The Respondents have the right to request a hearing on this Administrative Order before the Environmental Court under 10 V.S.A. § 8012 by filing a Notice of Request for Hearing within **fifteen (15) days** of the date the Respondents receive this Administrative Order. The Respondents must file, within the time limit, a Notice of Request for Hearing with both the Land Use Panel and the Environmental Court at the following addresses:

Natural Resources Board, Land Use Panel
c/o Ken Smith, Associate General Counsel
National Life Records Center Building
National Life Drive
Montpelier, VT 05620-3201

Clerk
Environmental Court
2418 Airport Road
Barre, VT 05641

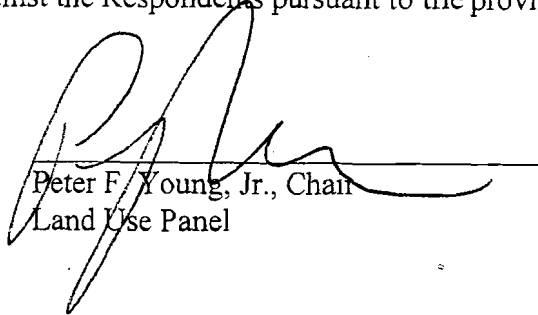
EFFECTIVE DATE OF THIS ADMINISTRATIVE ORDER

This Administrative Order shall become effective on the date it is received by the Respondents unless the Respondents file a Notice of Request for Hearing within **fifteen (15) days** of receipt as provided for in the previous section hereof. The timely filing of a Notice of Request for Hearing by the Respondents shall stay the provisions (including any penalty provisions) of this Administrative Order pending a hearing by the Environmental Court. If the Respondents do not timely file a Notice of Request for a Hearing, this Administrative Order shall become a Judicial Order when filed with and signed by the Environmental Court. 10 V.S.A. § 8008(d).

COMPLIANCE WITH A JUDICIAL ORDER

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

Dated: 11/19/09



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