

State of Vermont
NATURAL RESOURCES BOARD
DISTRICT #2 ENVIRONMENTAL COMMISSION
100 Mineral Street, Suite 305, Springfield, VT 05156-3168

RE: Kindle Farm School
PO Box 393
Newfane, VT 05345

Application #2W1140-2
**Memorandum of Decision and
Second Hearing Recess Order**
10 V.S.A. §§ 6001-6093 (Act 250)

and
Health Care and Rehabilitation of Southeastern Vermont
390 River Street
Springfield, VT 05159

I. Background Information

On August 24, 2017, Kindle Farm School (“Applicant”) filed an application for a project described as the previous construction of improvements such as addition to farmhouse; yurts; sugar house; greenhouse; pavilion; pond; parking lot; and others. The project is located on Route 30 in Townshend. A site visit and hearing were held on October 20, 2017. The District Commission (“Commission”) issued a recess order and received additional information. The District Coordinator issued a Jurisdictional Opinion concluding that jurisdiction attaches to the entire property.

II. Decision on Act 250 Rule 34(E)

In the Commission’s first recess order, it asked for a Rule 34(E) (Stowe Club) argument pertaining to the yurt(s) that was not removed in 2009 pursuant to Land Use Permit (“LUP”) 2W1140-1. After receiving and reviewing a memorandum of law from the Applicant the Commission decides this matter as follows.

The threshold question for an amendment application is “whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.” Act 250 Rule 34(E)(1).

LUP 2W1140-1 was issued on August 24, 2006 and authorized:

the permittees to construct two, 20-foot diameter, temporary yurts (up to three years on site) and the previously permitted Kindle Farm Children’s Service facility (the “Onyon Farm” lot) to be used as classrooms and to expand an existing parking lot to accommodate existing parking needs.

LUP 2W1140-1 Condition #8 states:

the permittee shall remove the temporary yurts prior to September 1, 2009.

The Permittee stated in its application that the project was temporary. The Commission granted a permit specifically for temporary installation of two yurts. To further underscore the temporary status of the project, the Commission set a specific deadline for removal of the yurts. The entire basis for granting the permit under all the Act 250 Criteria was because the yurts were temporary. The Commission made no decision concerning any Act 250 Criteria in relation to the yurts, because they were temporary. The Commission holds that condition #8 of the permit was included to resolve issues critical to the Commission’s issuance of the 2006 permit and therefore, following the Stowe Club Highlands analysis, amendment of that condition is not allowed.

Next, the Commission must balance flexibility against finality as required by Act 250 Rule 34(E)(3). In balancing these factors, the Rules state that the Commission should consider factors including the following:

Rule 34(E)(3)(a) states that the Commission should consider changes in “facts, law or regulations beyond the permittee’s control.” The Applicant argues that a change in facts has occurred, namely that the Applicant intended to rebuild a barn that burned down but was unable to do so. The Applicant stated in LUP 2W1140-1 Exhibit 18 that:

Kindle Farm School does not plan on the temporary yurts remaining on the property for longer than three years. The yurts will be used as temporary classrooms during the process in which Kindle Farm Children’s Services, Inc. plans, raises funds for, and builds a multi-purpose barn to replace the Onyon Farm barn destroyed in a fire a number of years ago.

The “fact” relevant to consideration of this factor is that a barn burned down necessitating the construction of additional classroom space. This event occurred prior to the Commission’s issuance of the 2006 permit. This “fact” has not changed since 2006. The Applicant apparently argues that the “fact” relevant to the consideration of this factor is that it has been unable to secure funding to construct permanent classroom space. The Commission finds that this is not a change of facts within the meaning of Rule 34(E)(3)(a) because it is clearly a matter within the permittee’s control. The Applicant has had 12 years since the 2006 permit to secure funding for (whether from grants or by allocations from its operating budgets) and construct additional classroom space. That it has failed to do so is the result of decisions and considerations within its control.

The Commission finds that the factors set out in 34(E)(3)(b-e) are not relevant in this matter to the balancing of flexibility and finality determination. The Applicant’s arguments set out in its memorandum of law in relation to these factors are unpersuasive.

Rule 34(E)(3)(f) states that the Commission, in balancing flexibility/finality, should “consider the degree of reliance on prior permit conditions or material representations of the applicant in prior proceeding(s) by any party, the District Commission, the environmental board, the environmental court, or any other person who has a particularized interest protected by 10 V.S.A. Ch. 151 that may be affected by the proposed amendment.” The Applicant’s material representations that the yurts were temporary, lasting no more than three-years, adversely impacted the Townshend Planning Commission. The Townshend Planning Commission is a statutory party and one who articulated a particularized interest in Criterion 8 (aesthetics). It detrimentally relied upon the Commission’s imposition of a three-year limit as evidenced by the town not requesting a hearing or filing a motion to alter. The Townshend Planning Commission specifically stated, “if the yurts will remain on the property longer than 3 years we object.” The Townsend Planning Commission relied upon the representation of temporary use of the yurts under Rule 34(E)(3)(f).

Rule 34(E)(3)(g) states that the Commission, in balancing flexibility/finality, should consider “whether the applicant is merely seeking to relitigate the permit condition or to undermine its purpose and intent.” The Commission finds that the Applicant, in its application for an amendment to the Permit in relation to the yurts, is seeking to transform a temporary permit into a permanent one, undermining the purpose and intent of the original permit condition. The Commission finds that the Applicant is seeking to relitigate the status of the yurts that was clearly set out in the 2006 permit.

The Commission concludes that the three-year temporary status of the yurts set out in Condition #8 of LUP 2W1140-1 is final. The facts and circumstances surrounding the issuance of LUP 2W1140-1 balanced against the present facts and circumstances weigh heavily for finality rather than flexibility. The Commission will not accept a permit amendment for the yurts.

III. Supplemental Evidence

Pursuant to Act 250 Rule 13(B), the hearing is still in recess pending submittal of additional information by the Applicant as set forth below.

1. Provide a schedule for removing the yurts.
2. Provide an alternative location for the tractor shed.
3. Provide a site map of the entire property that includes: all streams; 50' stream buffers; stream crossings (existing and proposed); and improvements (existing and proposed) that are currently not permitted and were constructed after jurisdiction attached in 2001. Improvements include but are not limited to: trails; roads; stream crossings; cutting that occurred within the 50' stream buffer; dams, wells, and buildings.
4. Submit a Riparian Management Plan to address proposed plantings, maintenance and/or activities restrictions for the full extent of all riparian areas on site. Include a monitoring plan that requires replanting where restoration plantings have failed and proposed methods to permanently mark all riparian area boundaries on site.
5. Provide detailed information concerning the location and use of each of the wells on site, including relevant water supply permits for each well.

IV. Distribution

1. The Commission requests the above documentation be provided to all parties listed on the attached certificate of service (above the "information only" line) attached as an email to the NRB public folder (nrb.act250Springfield@vermont.gov) or, if larger than 3 MB in size, uploaded to the NRB ftp site (see <http://www.nrb.state.vt.us/lup/publications/efilingguidelines.pdf>). Any upload to the NRB ftp site should be followed up with an email to the NRB public folder and to the District Coordinator informing that the files have been uploaded.
2. A certificate of service should be included to identify how, when and to whom the information has been distributed as required by statute.

V. Appeal

An appeal from this order may be filed with the Environmental Division of the Vermont Superior Court in accordance with 10 V.S.A. Chapter 220 and the Rules for Environmental Court Proceedings.

After the above information has been received, the Commission will reconvene the hearing only if there are outstanding questions or if a party has reasonable questions about the additional information. If the information has not been received as requested, or if the hearing is not

Hearing Recess Order 2 #2W1140-2

November 28, 2018

Page 4

reconvened, the Commission will set a date for adjournment and issue a final decision based on the existing record following a full deliberation of the issues.

If any party has any questions or wishes to request the hearing be reconvened, please contact Stephanie Gile at Stephanie.gile@vermont.gov or 802-289-0597.

Dated at Springfield, Vermont this 28th day of November, 2018.

By: 
James Olivier, Chair
District #2 Environmental Commission
Natural Resources Board

Other Commission members participating in this decision: Cheryl Cox
Julia H. Schmitz

E-Notification CERTIFICATE OF SERVICE # 2W1140-2

I hereby certify that I, the undersigned, sent a copy of the foregoing Hearing Recess Order on November 28, 2018, 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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FOR INFORMATION ONLY

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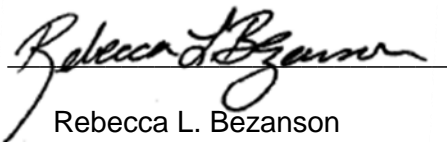
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