



May 5, 2017

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Subject: Jurisdictional Opinion #2-305 – East Tract / Comtuck, LLC – Wilmington

Dear Mr. Anderson:

This letter is in response to your March 29, 2017, request for a Jurisdictional Opinion and revised request for a Jurisdictional Opinion submitted on April 20, 2017, herein collectively referred to as “Request,” provided for in 10 V.S.A. §6007.

I. Summary of Opinion

A full Act 250 permit application and review under all criteria is required before any subdivision or construction on the East Tract or Old Ark Road commences. There is no longer a valid Land Use Permit on the East Tract and if there was, the proposed project is a material change to what was previously permitted.

II. Facts and Documents

1. On October 6, 1970, 47 years ago, Land Use Permit 700002 (“700002”) was issued for a project described as: “Recreational Development to include 2004 dwelling units and 700 hotel units.” The permit also describes the project as: “development of 2004 units, of which 909 are individual private building lots and 1095 are condominium units located in multi-family buildings, 700 hotel units in the commercial area, and recreational facilities as shown on the plan.” Exhibit 1.
2. Plans for 700002 show three distinct development areas: Haystack Ski Area; Haystack Golf and Country Club; and Haystack East. Exhibit 1.
3. The portion of 700002 called “Haystack East” is now referred to as the “East Tract.” Exhibit 1.
4. On July 2, 1985, Land Use Permit numbers 700002-3; 700033-2; 2W0204-2; and 2W0531-2 were issued as a single Permit Amendment. This Permit Amendment contains the following conditions:

29. All construction of the Mirror Lake and associated snowmaking equipment and buildings, the replacement of double chairlift #1 with a triple chairlift, replacement of the base to summit gondola with a triple chairlift and construction of the golf course maintenance building must be complete by October 15, 1986.

30. Construction completion dates for all other phases of the project will be established by the District II Environmental Commission with each amendment application.

31. This Permit shall expire on December 6, 2006, unless extended by the District Environmental Commission.

32. Notwithstanding, the Permit shall expire on a year from date of issuance if the permittees have not demonstrated an intention to proceed with the project.

Exhibit 1.

5. Findings of Fact and Conclusions of Law for Application #s 700002-3; 700033-2; 2W0204-2; and 2W0531-2 includes:

This Permit extends the expiration dates for Permits 700002-3 and 700033-2 which had previously expired. Permit #2W0204-2 was also extended so that all Permits have a uniform expiration date of December 6, 2006.

Permits 700002-3, 700033-2, 2W0204-2 and 2W0531-2 were also given umbrella status and for future amendments applicants will not need to present evidence under the following Criteria: 1A Headwaters, 1D Floodways (Haystack property), 6 Educational Services, 8 Wildlife, Natural Areas and Historic Sites, 9B & C Agricultural and Forestry Soils, 9L Rural Growth Areas, 10 Conformance with the Local Plan (Wilmington) and conformance with the Regional Plan.

This Permit covers only the land currently owned or leased by the permittees. An amendment will be required for any additional land which is purchased or leased by the applicants. Any project to be built on tracts of land not covered by this Permit will need to address all ten environmental criteria.

This Permit also sets a construction completion date for construction of the approved ski lifts, Mirror Lake, snowmaking pipeline and associated buildings and the golf course maintenance building. All future phases of the project will require an amendment at which time

the District Environmental Commission will establish a construction completion date.

Exhibit 1.

6. Site Plans on record for 700002 show only one access road to "Haystack East." This access is off of Cold Brook Road. Exhibit 1.
7. Attorney Robert Fisher, on behalf of the Hermitage Inn Real Estate Holding Company LLC in Land Use Permit Application 700002-25, stated that:

[T]he common roads and other common areas of the East Tract Villages all have their access entering and exiting from Coldbrook/Handle Road through Haystack Village East. I have reviewed the Haystack Master Plan maps and surveys prepared for the initial Act 250 permit in 1970 and none of the surveys depict any access via Old Ark Road. All of the roadways and common lands show the access via the road entering off of Coldbrook Road through Haystack Village East and crossing the brook into the east Tract. The Declaration provides that each owner shall have the right to ingress and egress over, upon, and across the Common Area necessary for access to his or her lot. These common areas and roads are all depicted on the original surveys and plans and do not show any other access. The numerous individual lot owners within the East Tract all have deeds with legal access over these common roadways entering from Coldbrook Road.

Exhibit 5.

8. The Request states that:

Cold Brook Fire District has stated that it does not have the ability to provide water service to the East Tract and it has waived such right as it may have to provide sewer service for the East Tract Parcel. Accordingly, Comtuck expects to sell several lots together to provide enough land so that water and septic may be provided on site for a home built on each combination of lots.

Exhibit 1.

9. The Request states that no water or sewer systems were installed and no houses were built. Exhibit 1.
10. Comtuck, LLC has submitted two applications to the Department of Environmental Conservation for Wastewater System & Potable Water Supply permits. These have received the following application numbers: WW-2-5329 and WW-2-5329-1. Exhibit 6.

11. WW-2-5329 describes the project as: “[c]onstruct a new 4-bedroom home on a previously subdivided property. Lots #21-#24 and #41-#42 of Saddle Ridge will be combined into a single parcel.” Access is from Old Ark Road. Exhibit 6.
12. WW-2-5329-1 describes the project as: “[c]onstruct a new 3-bedroom home on a lot comprised of formerly subdivided lots 26, 39, and 40 of Saddle Ridge.” Access is from Old Ark Road. Exhibit 6.
13. The Town of Wilmington Development Review Board has publicly noticed the following project:

Application #2017-014: Owner; Comtuck, LLC. (Keith Jurgens & Brian Jurgens). Agent; Gordon Bristol. Application is being made for a 25-lot re-subdivision/ reconfiguration of lots within Saddle Ridge Village in the East Tract. Resort-Residential zoning district. Sections 450 D, 710, 721 & 722: location: Saddle Ridge Village. [Emphasis added].

Exhibit 7.
14. April 26, 2017 Brattleboro Reformer article (“Reformer article”) quotes the Wilmington Zoning Administrator: “The first phase of this re-subdivision is for 25 lots or 25 building sites. Their intent is single-family homes. It’s a potentially big subdivision. The first phase is only 25 but with subsequent phases, I think they’re hoping for more than 100 building sites.” The Zoning Administrator also provides: “Originally, that [East Tract] area was plotted back in 1970 with close to 400 lots...” Exhibit 4.
15. The Reformer article also states that: “Old Ark Road, a dirt road off Route 100 near the Creemee Stand, has been proposed as the access point to the project.” Exhibit 4.
16. Additional site plans submitted on April 20, 2017 appear to show a new access from Old Ark Road and Shirley Lane but the accompanying written submissions lack explanation. Exhibit 2.

III. Issues

1. Whether 700002, dated October 6, 1970, remains in effect with respect to the East Tract.
2. Whether the proposed project on the East Tract is a material change to 700002.

IV. Analysis

At the outset of this opinion, I must disclose that I have been unable to gather the full evidence normally required for a complete and thorough jurisdictional opinion. My requests for additional information¹ (typically a routine process), were met with resistance and a general lack of cooperation.² As a result, and to expedite the issuance of this opinion, I elected to proceed based upon information assembled from publicly available sites. The result is that while I have gathered a preponderance of evidence to support my opinion, I remain confident that there is an abundance of additional information that I was not provided with that would further bolster my opinion.³

In 1970, the District Environmental Commission issued 700002 for the construction of 2004 dwelling units of which 909 are individual private building lots and 1095 are condominium units located in multi-family buildings and 700 hotel units in the commercial area. The commercial area covered by 700002 includes "Haystack Ski Area; Haystack Golf and Country Club; and Haystack East." Haystack Ski Area and Haystack Golf Course, are not owned by the current Requestor, and not at issue in this Request. Haystack East is now known as the East Tract. On July 2, 1985, Land Use Permit numbers 700002-3; 700033-2; 2W0204-2; and 2W0531-2 were issued as a single Permit Amendment. This Permit Amendment contains the following conditions:

31. This Permit shall expire on December 6, 2006, unless extended by the District Environmental Commission.

32. Notwithstanding, the Permit shall expire on a year from date of issuance if the permittees have not demonstrated an intention to proceed with the project.

As the Request discloses, no water or sewer systems were installed and no houses were built. Consequently, the Permittees did not demonstrate an intention to proceed with the project between July 2, 1985, when the permit was issued, and July 2, 1986. The Vermont Legislature amended 10 V.S.A. §6090 as follows: "[e]xpiration dates contained in permits issued before July 1, 1994...are extended for an indefinite term, as

¹ See Exhibit 3.

² See Exhibit 2, particularly: "We do not have proposed condition maps for the East Tract...Unless you can convince me that you need to see all such plans in order to make your ruling, we do not plan to submit any more to you. Nor do I believe you have jurisdiction to review such plans."

³ The evidence that I requested, but was not provided by the Requestor, is as follows:

1. The JO request states that "Comtuck expects to sell several lots together to provide enough land so that water and septic may be provided on site for a home built on each combination of lots." Provide a site plan that shows which lots will be combined together. The site plan should also include proposed access to the lots and other proposed infrastructure, access, or site construction or improvements.
2. Provide a copy of a typical deed for a lot previously conveyed in each "development regime" and a copy of a proposed deed if materially different.
3. The permit and findings you submitted apply to the entirety of the East Tract/Hermitage/Haystack property. When you refer to them, please detail which parts apply to the East Tract.

Exhibit 3.

long as there is compliance with the conditions of the permits.” Because the Permittees did not demonstrate an intention to proceed with the project as outlined in Condition 32 above, the Permittees were not in compliance with their permit and the permit expired on July 2, 1986. 700002, including amendments, are not in effect for the East Tract. An Act 250 permit will be required for the creation of more than five lots on the East Tract.⁴

In the alternative, if 700002 is found to remain in effect, the project currently proposed on the East Tract is a material change to what was originally permitted and requires an Act 250 permit amendment, addressing all Act 250 criteria.

One material change involves project access. The project on the East Tract, approved in 700002, is permitted with only one access road. This access road is now known as the East Tract Road and enters the East Tract property from Coldbrook/Handle Road. No other access roads are shown on any exhibits related to 700002. When the Hermitage owned the East Tract, its attorney Robert Fisher submitted a document as part of the 700002-25 record, that states:

[T]he common roads and other common areas of the East Tract Villages all have their access entering and exiting from Coldbrook/Handle Road through Haystack Village East. I have reviewed the Haystack Master Plan maps and surveys prepared for the initial Act 250 permit in 1970 and none of the surveys depict any access via Old Ark Road. All of the roadways and common lands show the access via the road entering off of Coldbrook Road through Haystack Village East and crossing the brook into the east Tract. The Declaration provides that each owner shall have the right to ingress and egress over, upon, and across the Common Area necessary for access to his or her lot. These common areas and roads are all depicted on the original surveys and plans and do not show any other access. The numerous individual lot owners within the East Tract all have deeds with legal access over these common roadways entering from Coldbrook Road.⁵

The project proposed by the Requestor is to create a minimum of 25 lots all accessing the East Tract property using Old Ark Road.⁶ Old Ark Road is off of Route 100 and would have to be significantly extended to reach the East Tract lots. This access has never been reviewed by the District Commission and constitutes a material change⁷ to the permitted project. Accessing the project via Old Ark Road as well as extending Old Ark Road are cognizable changes to the subdivision and may result in a significant adverse impact with respect to many Act 250 criteria including, but not limited to: 1(B) Stormwater; 1(E) Streams; 1(G) Wetlands; 4 Soil Erosion; 5 Transportation; 7 Municipal

⁴ 10 V.S.A. §6001(19).

⁵ Exhibit 5.

⁶ See Exhibits 4 and 6 for project description.

⁷ Act 250 Rule 2(C)(6): "**Material change**" means any cognizable change to a development or subdivision subject to a permit under Act 250 or findings and conclusions under 10 V.S.A. § 6086b, 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 specified in 10 V.S.A. § 6086(a)(1) through (a)(10).

Services; 8(A) Necessary Wildlife Habitat; 9(B) Primary Agricultural Soils; 9(C) Productive Forest Soils; 9(H) Costs of Scattered Development; 9(K) Public Investments; 9(L) Settlement Patterns; and 10 Local and Regional Plans.

The proposed project poses additional material changes as well. The lots that were approved in 700002 were .25 acres and depicted on the site plans approved in 700002. The lots proposed in the Requestor's supplemental information and State of Vermont Wastewater System and Potable Water Supply applications⁸ show several lots being combined together. This is also a cognizable change that may result in a significant adverse impact under several Act 250 criteria including, but not limited to: 1(B) Waste Disposal; 7 Municipal Services; 9(B) Primary Agricultural Soils; 9(H) Costs of Scattered Development; 9(L) Settlement Patterns; and 10 Local and Regional Plans.

V. Conclusion

A full Act 250 permit application and review under all criteria is required before any construction on the East Tract or Old Ark Road commences. There is no longer a valid, unexpired Land Use Permit on the East Tract and even if there was, the proposed project is a material change to what was previously permitted.

VI. Appeal

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A). 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 Act 150, 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, which is \$295.00. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources Board, Dewey Building, 1 National Life Drive, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Best regards,



Stephanie Gile
District 2 Coordinator

cc: See Certificate of Service

⁸ See Exhibits 2 and 6.

E-Notification CERTIFICATE OF SERVICE # JO 2-305

I hereby certify that I, the undersigned, sent a copy of the foregoing Jurisdictional Opinion and Exhibit List on May 5, 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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