STATE OF VERMONT
CHITTENDEN COUNTY, SS.

In Re: Land Use Permits 300004	**) District Environmental Commission # 4**
and Land Use Permit 4CO828 "Revised"	**)**
Petition Regarding Abandonment	**)**

PETITIONER'S RESPONSE TO DISTRICT COMMISSION'S RECESS ORDER

Petitioner, Northern Vermont Financial Corporation ("NVFC") files the following response to the District Commission's Recess Order, dated February 5, 2016 (the "*Recess Order*")

The *Recess Order* directed Petitioner to provide documents or information responsive to the following two issues:

A. Testimony at the Hearing indicated that the subject parcel has been conveyed to Vermont Railways, Inc. The Commission requires a copy of the warranty deed for the most recent conveyance of the subject parcel.

B. Although the Original Petitioner, Northern Vermont Financial Corp., had Standing to initiate the Petition to Abandon, pursuant to Act 250 Rule 38(C), the Original Petitioner, through conveyance of the subject parcel, may now lack Standing to pursue the Petition. The current owner must file a letter with the District Commission indicating its intent to proceed with the Petition to Abandon. Alternatively, the Original Petitioner may file a brief indicating why such a letter is not necessary.

A. Attached is a copy of the deed dated December 28, 2015 from Northern Vermont Financial Corporation to Vermont Railway, Inc.

B. Petitioner offers the following:

1. Introduction.

The pending proceeding is governed by the abandonment statute, 10 V.S.A. 6091, and by Rule 38 of the Act 250 Rules. The statute provides that "[n]onuse of a permit for a period of three years following the date of issuance shall constitute an abandonment of the development or subdivision and the permit shall be considered expired." 10 V.S.A. § 6091(a). The statute imposes a two part test for the project to satisfy the "use" requirement. "[C]onstruction must have commenced and substantial progress toward completion must have occurred within the three-year period." *Id.* [A] permit is deemed to have been 'used' only when a project is substantially completed under the authority of a permit. *In re Edward E. Buttolph Revocable Trust,* Docket No. 19-2-09 (Appeal from District #5 Environmental Decision), Decision on Motion to Alter, at 3 (Oct. 29, 2009).

Rule 38 controls the process for implementing section 6091he Abandonment Statute. The Rule provides two methods or routes by which a permit can be abandoned: One is involuntary, Rule 38(A), where a permit "shall be considered to have been abandoned, unless construction has commenced and substantial progress toward completion has occurred within the three year period following the date of issuance." The other is voluntary. "A permittee may voluntarily abandon a permit for a project at any time prior to the commencement of construction on the project." Rule 38(B). Once a petition has been filed, the Rule requires the District Commission to promptly resolve the petition. *See* 38(D).

2. A letter from the current owner is not needed to allow the proceedings to continue.

Neither section 6091, nor the rule requires the participation of the current owner of the lands subject to the permit. An involuntary abandonment proceeding may be initiated by the

permit holder, the District Commission, or "by any person who was a party to the application proceedings, or by any person entitled to party status under 10 V.S.A. § 6085(c)." *See* Rule 38(C). The Rule also does not require that a permit holder attend a hearing, if a hearing is held. *See* 38(D) ("If the permittee does not request the right to be heard, the District Commission may declare the permit void without a hearing."). [1]

Because the Rule expressly provides a mechanism for proceeding without the participation of the current property owner, the absence of the current property owner, does not render the Petition moot or otherwise relieve the Board of the requirement to reach a resolution on the abandonment issue. *See* 38(D)

3. The District Commission must continue its review of the Abandonment Petition.

Not only can the District Commission proceed without the participation of the current owner, under the Rule, once a Petition has been filed the District Commission must continue until it renders a decision on the Petition. The Rule expressly provides that once an Abandonment Petition has been filed, the District Commission must act promptly in resolving the matter. *See* Rule 38(D). Both the statute and Rule mandate that a permit "shall be abandoned" where it has not been used during the statutory period. Once a petition has been filed, the District Commission must act on the petition and proceed with the abandonment request.

4. Petitioner retains its standing.

On August 15, 2015, NVFC, filed the petition to abandon or declare void two permits for two different projects on land it owned in Shelburne, Vermont. One permit was issued 45 years

---

[1] Northern Vermont Financial Corporation is a "party to the application proceedings."

ago in 1970, was not used within the statutory period, was voluntarily abandoned by the permittee over 40 years ago in 1974, and expired by its own terms in 1985. The other was issued in 1990, and amended in 1991, was not used within the statutory period, commencement of construction did not take place within the two years required under the permit, and the project was not completed in 1997, the date by which the permit required construction completion. The two permits authorize two different projects.

NVFC had standing when it initiated the proceeding and retains its standing to participate in the abandonment action. To initiate an involuntary abandonment proceeding, all that is required is a Petition. The process for initiating a Rule 38 abandonment proceeding is set out in subsection (C):

> (C) *Initiation of proceeding*. A petition to declare a permit abandoned may be filed by the permittee, by any person who was a party to the application proceedings, or by any person entitled to party status under 10 V.S.A. § 6085(c). The District Commission having jurisdiction over a permit may also, on its own motion, initiate an abandonment proceeding.

At the time it filed the Petition, NVFC was the permittee and satisfied the requirements of Rule 38(D) to initiate an abandonment proceeding. NVFC's standing was determined and established at the time it filed the subject Petition. *See Putney Paper Company, Inc.* DR #335 (5/29/97). The standing determination is made at the time the application or initial filing is made. *See id.* NVFC demonstrated its standing in August 2015when it filed the Petition and the District Commission commenced this proceeding.

In addition to retaining its standing as a Petitioner because it was a permit holder at the time it filed the Petition, NVFC also qualifies as a party entitled to party status under 10 V.S A sec 6085(c), which qualifies it again as a petitioner under Rule 38(C). NVFC has presented

written evidence, oral testimony, and briefing over the past six months attempting to enforce the abandonment statute and Rule as they apply to the property in Shelburne. The abandonment statute is an integral part of the State Land Use Law and promotes and protects the interests of land use and property owners by removing Act 250 jurisdiction when a permit has not been used. Furthermore, when NVFC conveyed its interest in the property by a warranty deed, it warranted therein that the property was free from encumbrances and agreed to warrant and defend against any claim. NVFC has demonstrated a particularized interest protected by the abandonment statute and the Rule which will be affected by any decision of the District Commission regarding this matter.[2]

Although not required because it retains its standing as a Petitioner, NVFC can continue to participate because it was a party to the permit proceedings regarding the 1990 permit under Rule 38(D). Rule 38 (D) requires that notice of any hearing shall be provided to "all persons who *were* parties to the permit proceedings" (emphasis added). Although the Rule does not define "permit proceedings" because the focus of the abandonment statute is on the use of the property after the permit is issued, the term should encompass the period of time that would be material to an abandonment determination. NVFC acquired the property in 1994, and engaged the District Commission regarding the permit and its status. NVFC owned the property at the expiration of the statutory use period and in 1997 when the permit required construction completion. NVFC was a party to the 1990 permit proceedings.

---

[2] In addition, as the initiator of the abandonment proceeding, NVFC's status is similar to that of an applicant and it has party status as the party initiating or bringing the action. *See* 10 V.S.A§ 6085 (c) (1) (A). The applicant or initiator is not required to be the landowner. *See* 10 V.S.A. § 6085 (c) (1) (B).

NVFC also retains its standing and party status in its Rule 38(B) request for voluntary abandonment. NVFC filed its request for abandonment as the permit holder in August 2015. To the extent the District Commission did not appreciate its intent to request a voluntary abandonment under Rule 38(B), NVFC expressly made such a request at the September 11, 2015 hearing and has repeated it in its subsequent filings. Although NVFC has presented written evidence, oral testimony, and briefing on its voluntary request, the District Commission has failed to resolve this request.

Rule 38(F) further compels a finding that once the Petition is accepted, the Petitioner retains its standing until the District Commission renders its abandonment decision. Rule 38(F) provides the following:

> In the case of an action for voluntary abandonment under subsection (B) if [sic] this rule or an action for involuntary abandonment under subsection (C) if [sic] this rule, the person who initiated the action shall file any decision which results in the abandonment of a permit in the land records in accordance with Rule 33(A) of these Rules.

The cost of the recording is at the expense of the Applicant, which in this case would be the Petitioner.

5. The District Commission does not have jurisdiction over the 1970 permit which expired in 1985.

The District Commission does not have jurisdiction over the 1970 permit because that permit expired by its own terms 30y years ago in 1985. The 1970 permit had an express expiration date of 1985. *See* Exhibit 2 to NVFC Proposed Findings of Fact. Once the permit expired Act 250 jurisdiction no longer attaches to the property. *See In re Huntley*, 2004 VT 115, ¶ 15, 177 VT 596 (2004) (holding that when permit expired by its own terms, land subject to permit is no longer subject to Act 250 jurisdiction).

The 1990 Permit application expressly provided that the 1970 permit had expired. The application for the 1990 permit included the following: "Previous Act 250 #30004[sic] ex. Date 11-5-85." The 1990 permit itself makes no reference of the 1970 permit or otherwise indicates that the project under review is in conformance with or represents a modification or amendment to project authorized by the 1970 permit. By issuing a permit for a project on property a portion of which was once covered by the 1970 permit, the District Commission must have adopted the expiration of the 1970 permit. The District Commission could not have issued a new permit for the project if a valid permit was already in place.[3]

Conclusion

For the reasons stated above, the current owner is not required to participate in the Abandonment action, the District Commission must continue with the Abandonment action, and the Petitioner NVFC maintains its standing and qualifies for party status under 38(B)(C) and (D) and the current owner is not required to participate in order.

In addition, for the reasons stated above, as well as in the Proposed Findings of Fact and Conclusion of Law, and Response to the Town of Shelburne, the Commission no longer has jurisdiction over the 1970 permit because it was extinguished 30 years ago in 1985.

---

[3] The 1970 permit expired in 1985, nine years before the1994 Amendment to 10 V.S.A § 6090, which eliminated expiration dates for permits not involving extraction of minerals. Likewise, the 1990 permit application, and notice to the District Commission that the 1970 permit had expired occurred 4 years before these amendments. Once a permit has expired the District Commission no longer has jurisdiction. The District Commission cannot rely on the 1994 statute to invoke jurisdiction that expired in 1985. *See In re Huntley*, 2004 VT 115, ¶ 15, 177 VT 596 (2004) (holding that when permit expired by its own terms, land subject to permit is no longer subject to Act 250 jurisdiction).

Respectfully submitted this 19th day of February, 2016.

LISMAN LECKERLING, P.C.
Attorneys for Northern Vermont
Financial Corporation

By: _____

Carl H. Lisman, Esq.
clisman@lisman.com
Judith L. Dillon, Esq.
jdillon@lisman.com

Z:\17013\039\legal\Response to Recess Order 02.19.16