

STATE OF VERMONT

Superior Court

Environmental Division
Docket No.

Natural Resources Board,
Petitioner

ADMINISTRATIVE ORDER

v.

Michael Lee, Lee's Small Engine, Inc.,
Darwin Lee, and Marjorie Lee,
Respondents

Having found that Michael Lee, Lee's Small Engine, Inc., Darwin Lee, and Marjorie Lee ("Respondents") committed a violation as defined in 10 V.S.A. § 8002(9), the Natural Resources Board ("Board"), pursuant to 10 V.S.A. § 8008, hereby issues the following Administrative Order:

VIOLATIONS

1. Land Use Permit 9A0029, Conditions 2, 5, 6, 7, and 8.
2. Land Use Permit 9A0029-2, Conditions 1, 5, 6, and 7.
3. Land use Permit 9A0029-3, Conditions 1 and 5.
4. Act 250 Rule 34(A) – Failure to obtain a Land Use Permit Amendment.

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS

General Background

1. Michael Lee owns a 15.9-acre parcel of land located at 3065 Ethan Allen Highway in New Haven, VT identifiable by parcel ID 135-1-432-490 and SPAN 432-135-11314 (the "3065 Property"). Michael Lee acquired the 3065 Property in 1995.
2. Darwin and Marjorie Lee own a 0.67-acre parcel of land located at 5673 Ethan Allen Highway in New Haven, VT identifiable by parcel ID 135-1-432-194 and SPAN 432-135-10974 (the "5673 Property").
3. Lee's Small Engine, Inc. is a Vermont corporation. According to the Vermont Secretary of State's Office, its principal place of business is located at the 3065 Property. Michael Lee is the president, vice president, treasurer, and director of Lee's Small Engine, Inc. Darwin Lee is the secretary.
4. Lee's Small Engine, Inc. owns a 1.2-acre strip of land on the southeast corner of the 3065 Property identifiable by parcel ID 135-1-532-489 and SPAN 432-135-11313 (the "Small Engine Property"). The 3065 Property, 5673 Property, and

the Small Engine Property are sometimes collectively referred to as the "Property."

5. Lee's Small Engine, Inc. owns the trade name New Haven Power Equipment.
6. Michael Lee, Lee's Small Engine, Inc., and Darwin Lee operate a business known as New Haven Power Equipment at the Property.
7. On May 22, 1975, the District 9 Environmental Commission (the "Commission") issued Land Use Permit 9A0029 (the "Permit") to Dutton Smith, Catharine Smith, Thomas Russell, and Virginia Russell. The Permit authorized the conversion of an existing barn at the 3065 Property to a commercial sales warehouse.
8. On September 12, 1977, the Commission issued Land Use Permit 9A0029-1 (the "-1 Amendment") to Camoils, Inc., Arthur D. Pepin, and Andre G. Pepin. The -1 Amendment permitted transfer of the 3065 Property to the Pepins and the construction of ten 10,000-gallon storage tanks and two buildings.
9. On February 3, 1981, the Commission issued Land Use Permit 9A0029-2 (the "-2 Amendment") to Thomas and Shirley Dwyer. The -2 Amendment authorized the operation of a commercial sales warehouse at the 3065 Property. It also recognized that the -1 Amendment "is abandoned because the permittee has no intention of constructing the improvements authorized in that permit."
10. On October 9, 1986, the Commission issued Land Use Permit 9A0029-3 (the "-3 Amendment") to Thomas and Shirley Dwyer. The -3 Amendment authorized, at the 3065 Property, the construction of a 44' x 24' showroom addition to the previously approved commercial sales warehouse.
11. On January 13, 2016, the Board's Enforcement Officer inspected the 3065 Property and the Small Engine Property (the "Inspection") and spoke with Michael Lee. Michael Lee admitted he knew there was an Act 250 Land Use Permit covering the 3065 Property, but he never read it until it was brought to his attention during a town zoning dispute. *Town of New Haven v. Michael Lee*, Docket Nos. 17-3-15 Vtec and 61-5-15 Vtec ("Zoning Dispute").

Summary of Relevant Conditions in the Permit, the -2 Amendment, and the -3 Amendment

12. Condition 2 of the Permit reads, "This project must be completed as set forth in the plans and exhibits on file, the findings of fact attached hereto, and the conditions of this permit. No changes in the project as set forth in these documents may be made without prior approval of the District Office."

13. The Permit's Findings of Fact and Conclusions of Law state, in part:

"There are some existing trees on the site. It is the intention of the applicant to install additional plantings around the building.

The signs for the proposed warehouse are shown on the plan submitted at the meeting on May 8, 1975. The applicant has agreed to reduce the height of the sign to approximately 7 ½ feet."
14. Condition 5 of the Permit reads, "The height of the sign shall be no higher than approximately 7 ½ feet."
15. Condition 6 of the Permit reads, "There shall be no storage outside the warehouse."
16. Condition 7 of the Permit reads, "The applicant shall plant additional trees and/or shrubs around the proposed sign and in front of the building."
17. Condition 8 of the Permit reads, "The project must be completed as shown on the plans prepared by Dutton Smith and which have been stamped 'APPROVED' by the Division of Environmental Engineering."
18. Condition 1 of the -2 Amendment states, "The project shall be completed as set forth in Findings of Fact and Conclusions of Law #9A0029 and 9A0029-2, in accordance with the plans and exhibits stamped 'Approved' and on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission."
19. The -2 Amendment's Findings of Fact and Conclusions of Law state, in part:

"The only exterior storage associated with this project will be the approximately six pieces of commercial and agricultural equipment presently owned by the applicant.

Two pieces will be stored next to the warehouse in a location visible from Route 7, while the rest will be stored out of sight behind the warehouse.

All exterior storage and display on the site will terminate as of September 1, 1981. Any unsold pieces of machinery will be removed from the site as of that date."
20. Condition 5 of the -2 Amendment states, "The height of the sign shall be no

higher than approximately 7 ½ feet.”

21. Condition 6 of the -2 Amendment states, “There shall be no storage outside of the warehouse, except that industrial and agricultural equipment may be displayed near the warehouse and visible from Route 7 until September 1, 1981. All such industrial or agricultural equipment shall be removed from such site or stored inside after that date.”
22. Condition 7 of the -2 Amendment states, “The applicant shall plant additional trees and/or shrubs around the proposed sign and in front of the buildings.”
23. Condition 1 of the -3 Amendment states, “The project shall be completed as set forth in accordance with the plans and exhibits stamped ‘Approved’ and on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission.”
24. Condition 5 of the -3 Amendment states, “All outdoor lighting shall be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view substantially beyond the perimeter of the area to be illuminated.”

Summary of Act 250 Rule 34(A)

25. Pursuant to Act 250 Rule 34(A):

A permit amendment shall be required for any material change to a permitted development or subdivision, or administrative change in the terms and conditions of a land use permit. Commencement of construction on a material change to a permitted development or subdivision without a permit amendment is prohibited.

26. Act 250 Rule 2(C)(6) defines “material change” as “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).”

Violations

27. During the Inspection, the Board’s Enforcement Officer observed that no additional trees and/or shrubs had been installed and maintained around the signage and in front of the building. By failing to install and maintain such trees and/or shrubs, Michael Lee, Lee’s Small Engine, Inc., and Darwin Lee have

violated Conditions 2 and 7 of the Permit and Condition 7 of the -2 Amendment.

28. During the Inspection, the Board's Enforcement Officer observed at least two free-standing roadside signs and three building-mounted signs, including an internally-illuminated sign.
29. This signage is not consistent with the signage approved in the Permit, the -2 Amendment, or the -3 Amendment. By installing and maintaining this signage, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee have violated Conditions 2 and 5 of the Permit and Condition 5 of the -2 Amendment.
30. Installing and maintaining this signage also constitutes a material change for which a permit amendment was needed because it has a significant impact under the findings of fact listed in paragraph 13 above, Conditions 2 and 5 of the Permit, and Condition 5 of the -2 Amendment. Consequently, by installing and maintaining this signage, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee have violated Act 250 Rule 34(A).
31. Michael Lee, Lee's Small Engine, Inc., and Darwin Lee have placed 24 semi-trailers at the 3065 Property to store equipment for the New Haven Power Equipment business. This fact is confirmed by the conversations between the Board's Enforcement Officer and Michael Lee, the Enforcement Officer's observations during the Inspection, a review of the municipal zoning file for the 3065 Property, and a review of the written court decisions and trial transcripts from the Zoning Dispute. These trailers are visible to the neighbors and travelers on nearby Route 7.
32. Based on this same information, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee have stored and displayed lawn mowers and other equipment for sale in front of the commercial building located at the 3065 Property for approximately two decades. For the purposes of doing so, they also moved earth and placed gravel to construct an elevated equipment display area.
33. Neither the above-referenced trailers nor the equipment display area are depicted on the plan on file with the Commission. Nor are they approved by the Permit, the -2 Amendment, or the -3 Amendment.
34. Placing and maintaining these trailers at the 3065 Property, storing and displaying equipment outside the warehouse, and constructing and using the equipment display area have a significant impact on Conditions 2, 6, and 8 of the Permit, Conditions 1 and 6 of the -2 Amendment, and Condition 1 of the -3 Amendment. Consequently, by placing the trailers, storing and displaying equipment outside the warehouse, and constructing and using the equipment display area, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee, violated

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these conditions and Act 250 Rule 34(A).

35. Between approximately 1996 and 1997, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee constructed a 57-foot by 33-foot addition to the western end of the barn without a Land Use Permit Amendment. Between approximately 1999 and 2000, they also constructed a 24-foot by 45-foot parts room addition on the south side of the 1996 addition to the barn, without a Land Use Permit Amendment. These facts are likewise confirmed by the conversations between the Board's Enforcement Officer and Michael Lee, a review of the municipal zoning file for the 3065 Property, and a review of the written court decisions and trial transcripts from the above-referenced Zoning Dispute. Constructing these additions has a significant impact on Conditions 2 and 8 of the Permit, Condition 1 of the -3 Amendment, and several Act 250 Criteria.
36. Based on this same information, between approximately 1995 and 2013, Michael Lee, Lee's Small Engine, Inc. and Darwin Lee placed an estimated 200,000 to 300,000 cubic yards of earth fill on nearly 9 acres of prime agricultural soils located at the 3065 Property and the Small Engine Property for the purposes of operating New Haven Power Equipment. Doing so has a significant impact on Conditions 2 and 8 of the Permit, Condition 1 of the -3 Amendment and Act 250 Criterion 9(B).
37. Neither this fill nor the above-referenced additions appear on the plan on file with the Commission. The only development depicted on this plan is the original barn in its 1975 configuration with a storage shed located south of the barn and internal access drives.
38. By placing this fill on the 3065 Property and constructing the two above-referenced additions, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee violated Conditions 2 and 8 of the Permit, Condition 1 of the -3 Amendment, and Act 250 Rule 34(A).
39. During the Inspection, the Board's Enforcement Officer observed light fixtures that were not shielded so as to conceal light sources and reflector surfaces from view substantially beyond the perimeter of the area to be illuminated. By installing and maintaining such light fixtures, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee have violated Condition 5 of the -3 Amendment.
40. Michael Lee, Lee's Small Engine's Inc., and Darwin Lee have been operating New Haven Power Equipment out of the entire Property. This fact is confirmed by the conversations between the Board's Enforcement Officer and Michael Lee and a review of the written court decisions and trial transcripts from the Zoning Dispute. Consequently, the 5673 Property constitutes "involved land" as defined in Act 250 Rule 2(C)(5). Neither the Permit, -2 Amendment, -3 Amendment, or

any other Land Use Permit authorize operation of a business at the 5673 Property.

41. By operating New Haven Power Equipment out of the 5673 Property, Michael Lee, Lee's Small Engine's Inc., and Darwin Lee have violated Act 250 Rule 34(A). Because Marjorie Lee co-owns the 5673 Property and has allowed New Haven Power Equipment to be operated out of it, she has also violated Act 250 Rule 34(A).

ORDER

- A. Respondents shall immediately cease all use of the 5673 Property for the New Haven Power Equipment business and shall not use that property for such business until authorized by a Land Use Permit Amendment issued by the Commission.
- B. No later than **60 days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee shall:
1. Replace all lighting existing at the 3065 Property with lighting that complies with Condition 5 of the -3 Amendment.
 2. File with the Commission and diligently pursue a complete application for a Land Use Permit Amendment for the following:
 - i. The existing signage existing at the 3065 Property.
 - ii. The building additions referenced in paragraph 35above.
 - iii. A revised planting plan for around the signage and the building.
 - iv. The outdoor display of equipment and use of the equipment display area referenced in paragraph 32 above.
 - v. The semi-trailers referenced in paragraph 31above.
- C. For purposes of this AOD, "diligently pursue" shall mean (a) responding to all requests for information from the Commission, the Coordinator for the Commission, or ANR (as applicable) by the date set by the Commission or Coordinator or ANR; and (b) in good faith meeting and complying with all scheduling or other orders or memoranda issued by the Commission or ANR. Michael Lee, Lee's Small Engine, Inc., and Darwin Lee shall not be responsible for delays outside their control, including those caused by the Commission or ANR or by other parties to its applications.
- D. Should the Commission not issue a Land Use Permit Amendment for any of the items described in paragraph B, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee shall remove any unpermitted items within six months of the

Commission's decision.

- E. The parties agree that the fill placed on the property does not constitute development that would be permitted under Act 250, but that the Court recognized in its decision from the Zoning Dispute that removing it could cause even more damage. Consequently, Respondents are not required to apply for a Land Use Permit Amendment for the fill, but shall immediately stop all placement of fill at the Property.
- F. No later than **30 days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, the Respondents shall pay, by separate checks, the following:
1. Pursuant to 10 V.S.A. Ch. 201, a civil penalty in the amount of Twenty-Three Thousand One Hundred Dollars (**\$23,100.00**) for the violations noted herein, by check made payable to the "State of Vermont."
 2. Pursuant to 10 V.S.A. §8010(e)(2), the amount of Two Thousand Two Hundred Fifteen Dollars and Sixteen Cents (**\$2,215.16**) to reimburse the Natural Resources Board for the costs of this enforcement action by check made payable to the "State of Vermont."
 3. The amount of Ten Dollars (**\$10.00**) to pay the recording fee for the filing of a notice of this Assurance in the Town of New Haven land records, by check made payable to the "Town of New Haven, Vermont."
- G. No later than **120 days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, Michael Lee, Lee's Small Engine, Inc., and Darwin Lee shall, pursuant to 10 V.S.A. § 6093, either:
1. Permanently preserve via a conservation easement in favor of a qualified holder, as defined in 10 V.S.A. § 821, 21.935 acres of prime agricultural soils. The identity of the qualified holder and the language of the conservation easement shall be subject to the review and approval of the Board. The conservation easement shall be recorded in the land records of the municipality in which the preserved soils are located. Michael Lee, Lee's Small Engine, Inc., and Darwin Lee shall pay all costs associated with the preservation of these soils, including but not limited to the costs of recording the conservation easement.
- OR
2. Pay the amount of Thirty-Four Thousand Seven Hundred Forty-Five Dollars and Four Cents (**\$34,745.04**) as an offsite mitigation fee into the Vermont

Housing and Conservation Trust Fund, by check payable to VHCB, Project Counsel, 58 East State Street, Montpelier, VT 05602.

- H. Respondents are jointly and severally liable for all obligations under this Assurance. Notwithstanding the forgoing, with respect to the payments listed in paragraph F, Marjorie Lee shall only be jointly and severally liable for One Thousand Four Hundred Forty-Three Dollars and Seventy-Five Cents **(\$1,443.75)** of the civil penalty and One Hundred Thirty-Eight Dollars and Forty-Five Cents **(\$138.45)** of the Board's enforcement costs.
- I. All payments and documents required by this Assurance shall be sent to the following address unless otherwise noted:
- Natural Resources Board
10 Baldwin Street
Montpelier, Vermont 05633-3201
- J. The Board 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 Board for the enforcement of the described violation, the amount of economic benefit gained by Respondents from the violations, the need for deterrence, and all other penalty factors enumerated in 10 V.S.A. § 8010(b), each according to proof at the hearing.
- K. Any payment by Respondents pursuant to this Administrative Order is made to resolve the violations set forth in this Administrative Order and shall not be considered 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 Administrative Order from Respondents' state or federal taxes.
- L. The State of Vermont and the Board reserve continuing jurisdiction to ensure compliance with all statutes, rules, and regulations applicable to the facts and violations set forth herein.
- M. Nothing in this Order shall be construed as having relieved, modified, waived or otherwise affected the Respondents' continuing obligation to comply with applicable state or local statutes, regulations or directives.

**RESPONDENTS' RIGHT TO A HEARING
BEFORE THE SUPERIOR COURT, ENVIRONMENTAL DIVISION**

Pursuant to 10 V.S.A. §8012, any Respondent has the right to a hearing before the Superior Court, Environmental Division 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 Natural Resources Board and the Environmental Division at the following addresses:

Natural Resources Board
10 Baldwin Street
Montpelier, Vermont 05633-3201

Vermont Superior Court
Environmental Division
32 Cherry Street, 2nd Floor, Suite 303
Burlington, VT 05401

If a hearing is requested, the Natural Resources Board 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 the provisions of this Administrative Order as to such Respondent, pending a hearing by the Environmental Division. 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 Division.

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 Natural Resources Board 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: _____

Diane B. Snelling, Chair
Natural Resources Board