

**LEGAL AND REGULATORY NOTES, AUGUST-SEPTEMBER 2016**

**The Binding Effect of a Written DRB Decision**

In April of this year, the Vermont Environmental Court held that the Hinesburg Development Review Board (DRB) was bound to follow the conclusions of its own sketch plan decision when engaged in a second round of sketch plan review for the same project. *BlackRock Construction LLC*, 31-4-15 Vtec (2016).

In 2014, developer BlackRock Construction sought to subdivide a parcel of land to create a large mixed-use development in the town of Hinesburg. The Hinesburg zoning regulations require that a major subdivision must go through a three-step review process with the town's DRB: sketch plan review, preliminary plat review, and final plat review. The regulations also require that the DRB hold separate hearings and issue separate decisions at each of these three steps.

In August of 2014, the Hinesburg DRB issued a decision denying sketch plan approval for BlackRock's project. One of the DRB's stated conclusions was that "the project will have substantial impacts on the Town's water supply and wastewater treatment capacities." However, the decision also stated that "[t]hese are not grounds to deny the proposed sketch plan, but do warrant further review at later stages of any subdivision review (i.e., preliminary and final plat review) before compliance with these planning standards can be determined."

In February of 2015, BlackRock submitted a second and modified application to the DRB for sketch plan approval. The DRB denied the second sketch plan for several reasons including the town's lack of wastewater capacity for the entire development. BlackRock subsequently appealed that decision to the Environmental Division of the Vermont Superior Court. That court ruled that because of its decision on the first sketch plan application, the DRB was precluded from denying the project for lack of wastewater capacity at any later sketch plan proceedings.

Because of the way the case was presented on appeal, the court did not decide whether insufficient wastewater capacity is proper grounds for sketch plan denial. Therefore, it is unresolved whether the Hinesburg DRB could have denied BlackRock's initial subdivision sketch plan on this basis. In this situation it did not do so, and in fact the court actually stated in its decision that wastewater capacity "was not grounds to deny" the sketch plan. All the court found was that the DRB was bound to its prior decision regarding the wastewater capacity issue when reviewing the subsequent sketch plans for that project.

Citing its own decision in the 2006 case of *In Re Simpson Dev. Corp.*, No. 54-3-05 Vtec, the court's stated rationale for this decision was that "a preliminary determination that goes unappealed, provides finality for certain legal determinations properly made at that stage of the subdivision review proceeding," adding that "if it was proper for the DRB to make certain legal determinations about the Project's compliance with applicable subdivision regulations in its sketch plan review, then those determinations are entitled to finality if they are not appealed.

Accordingly, because the DRB’s conclusions in its August 27, 2014 Decision were not appealed, they are final and binding even if they are in error. As a result, BlackRock and the Town are bound by that decision.”

The court also pointed to the purpose of sketch plan review – as stated in the Hinesburg regulations – which is to allow an applicant to discuss a project with the DRB “conceptually, before the applicant invests substantial effort and resources in design and planning for the project.” The court emphasized that land use regulation should provide predictability and fairness to applicants. Although the DRB’s initial sketch plan decision had identified several problems with the proposed project, it specifically stated that wastewater capacity was not an issue at the sketch plan stage. As such, BlackRock should have been able to rely on the DRB’s statement and assume that wastewater capacity would only be addressed at a later stage of review. The court wrote that “after time, effort, and capital has been expended addressing issues BlackRock was told were relevant,” the DRB could not “derail the Project at this preliminary stage with an issue BlackRock had no notice of and, what is more, was specifically told need not be addressed at the sketch plan stage.”

In legal terms, the court decided that the DRB’s sketch plan decision became “precedent” since it was not challenged or appealed. Precedent is a legal term for a principle or rule established in a previous case that is either binding on or persuasive for a decision-making authority when deciding subsequent cases with similar issues or facts. Traditionally, legal systems place great value on deciding cases according to consistent rules so that similar facts will yield similar and predictable outcomes. Although the court in *BlackRock* did not decide that the DRB’s sketch plan decision was binding precedent for all of the DRB’s future decisions, it did decide that such decision was binding precedent for a future sketch plan decision on that same project.

The decision in this case was not tantamount to approval of the proposed project, but merely allows the applicant to proceed to the next stage of the town’s subdivision review process (preliminary plat review). Moreover, the court did not state that wastewater issues could never be the basis for denial of this (or any other) project. Instead, it acknowledged that “any wastewater capacity issue will need to be addressed at later stages of the permitting process.”

The practical effect of the *BlackRock* decision is limited but it still provides an important lesson for DRBs (and other local land use boards) regarding the effect of their own written decisions. A DRB must be aware that the statements they include in a written decision about a project will constrain the way they are able to treat subsequent applications for that same project. If, as in the *BlackRock* case, a DRB states that a certain issue is not a basis upon which to deny a stage of review, it may not later deny a second round of that same stage of review based on that same identified issue.

The case is archived [here](#).

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