

STATE OF VERMONT

SUPERIOR COURT
Environmental Division Unit

ENVIRONMENTAL DIVISION
Docket No. 47-4-19 Vtec

BlackRock Construction LLC ACT 250

DECISION ON THE MERITS

Lori Marino appeals Act 250 Permit #4C1315 issued by the District #4 Environmental Commission (District Commission) to John Evans and BlackRock Construction, LLC (together, BlackRock) for subdivision of 26 lots, construction of 36 residential units, and construction of supporting infrastructure in Williston, Vermont (the Project).

BlackRock is represented in this proceeding by Christopher D. Roy Esq. Appellant Lori Marino is representing herself in this matter. The Natural Resources Board is represented by Evan P. Meenan, Esq.

The Court conducted a trial on November 5, 2019 at Costello Courthouse in Burlington, Vermont. The Court did not complete a site visit to the subject property.

Ms. Marino filed an original Statement of Questions (SOQ) on April 22, 2019 in which she offers 21 questions for the Court's review. On April 24, 2019, Ms. Marino filed an Amended Statement of Questions setting forth 21 additional questions and restating the original SOQ questions. In response to pre-trial motion practice, the Court dismissed several of Ms. Marino's questions. At the beginning of trial, the Court clarified the scope of review remaining for trial. Specifically, the Court observed that pursuant to Act 250, 10 V.S.A § 6086, the remaining issues were: (1) whether the project's blasting plan complies with Criterion 1 (Amended SOQ Questions 9 and 12, Original SOQ Question 19), (2) whether the project traffic complies with Criterion 5 (Amended SOQ Questions 21, Original SOQ Questions 13, 15, 17), and (3) whether the project complies with Wildlife Habitat issues under Criterion 8(A) (Amended SOQ 19, Original SOQ 7, 8).¹

¹ At trial, after preliminary discussion with the parties, Ms. Marino withdrew Original SOQ question 18.

Also at the beginning of trial, the Court addressed three pending motions. First, Ms. Marino had filed a motion for reconsideration of the Court's November 1, 2019 denial of her request to extend discovery. The Court **DENIED** this motion on the record. Next, the Court addressed BlackRock's motion in limine to exclude Ms. Marino's expert witnesses. On the Record, the Court **DENIED**, in part, the motion in limine as it relates to Ms. Marino's traffic expert Catherine Witt. Upon stipulation of the parties, the Court later accepted into evidence the Resume and Report of Ms. Marino's wildlife habitat expert witness Jim Andrews. Lastly, the Court **GRANTED** Ms. Marino's motion to allow her traffic expert to testify by telephone.

Based upon the evidence presented at trial, the Court renders the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Blackrock seeks Act 250 approval for a project called Northridge Development which includes subdividing 26 lots, construction of 39 residential units including single-family homes, carriage homes, duplexes, triplexes, construction of roads and utility infrastructure (Project).
2. The Project is located north of Metcalf Drive in Williston, Vermont on a 45-acre parcel.
3. The Project is planned in two phases. BlackRock seeks approval for Phase I.
4. Phase I includes subdividing lots 1 through 26, constructing 21 units, eight of which are single-family homes on lots 1-4 and 15-18, eight carriage homes, one duplex and one triplex on lot 25. Phase I also includes constructing a pool and common building on lot 24, constructing Kadence Road, Zoey Drive, and some of Chloe Drive.
5. The Project will include new sidewalks along all new roads
6. The Project will include a new paved path, 10 feet wide, running along the southwestern border of the Project tract.
7. A boundary line adjustment was completed between lot 115 and the existing right-of-way in the Southridge Development.
8. Phase II includes constructing 18 units including 14 single-family homes and two duplexes on lots 5-14 and 19-23 and 26. Also, this Phase includes constructing Bobcat Drive and remainder of Chloe Drive.

9. Lori Marino resides at 160 Harte Circle in Williston, Vermont.

Criterion 1:

10. Blasting may be required for installation of utilities or building foundations.
11. It is estimated that no more than 5,000 cubic yards of material would need to be blasted.
12. Blasting hours are limited to 8:30 AM to 4:00 PM Monday through Friday. Blasting is not allowed on Saturdays, Sundays or State or Federal holidays.
13. BlackRock's Blasting Plan was admitted into evidence as Exhibit J.
14. The Blasting Plan was prepared by Maine Drilling and Blasting, Inc., in accordance with industry standards.
15. Pursuant to the Blasting Plan, BlackRock must provide three days advance notice of blasting. Notice will be provided to abutting property owners and the Town of Williston.
16. Ground vibration as measured by peak particle velocity shall not exceed 2.0 inches/second as a result of blasting.
17. BlackRock will conduct pre-blast surveys and post-blast surveys for all structures located within 250 feet of blasting activity.
18. BlackRock will conduct seismic monitoring during blasting. Blast reports will be generated for each blast event.
19. BlackRock will use blasting mats to control dust and any flying debris.
20. Ms. Marino's property and house are located more than 1,000 feet from any potential blasting location; and therefore, outside of the 250-foot blasting pre- and post-survey distance.

Criterion 5 - Traffic

21. BlackRock's Traffic Impact Assessment was prepared by Lamoureux and Dickinson Consulting Engineers, Inc. and was admitted into evidence as Exhibit L.
22. Phase I and II of the Project will generate 25 vehicle trips per hour during the AM Peak Hour and 33 vehicle trips per hour during the PM Peak Hour.
23. The Project will have a minimal effect on traffic congestion and level of service. There will be no reduction in the level of service.

24. Blackrock introduced a memorandum addressing construction traffic and safety issues, which was prepared by Roger Dickinson and admitted into evidence as Exhibit M (the “vehicle and pedestrian safety plan”).
25. Construction hours are limited to 8:00 AM to 6:00 PM Monday through Friday, 8:00 AM to 5:00 PM Saturdays, and no construction on Sundays or State or Federal holidays.
26. Construction traffic will be most significant during the first month or two, and then construction traffic will decrease.
27. Construction traffic will access the Project as follows (circulation route):
 - a. Ingress will be from US Route 2 to South Ridge Road, left onto Metcalf Drive, right on to Goodrich Drive and right onto Metcalf Drive and into the Project;
 - b. Egress will be from the Project, left onto Metcalf Drive, right onto Harte Circle, right onto Lawnwood Drive, left onto Metcalf Drive, right onto Southridge Road, and finally to US Route 2.
28. Construction vehicles will not pass each other in opposite direction with this circulation route.
29. The construction vehicle circulation route does not pass in front of Ms. Marino’s property.
30. The speed limit for all roads in the circulation route is 25 miles per hour (MPH).
31. Intersection sight distances for large vehicles exceeds recommended standards for oncoming traffic traveling at 25 MPH within the circulation route.
32. Construction traffic directional and warning signs will be erected in the circulation route and at the entrance to the Project.
33. Signs advising construction vehicles to yield to pedestrians and cyclists will be erected in the circulation route.
34. Pedestrian sidewalks exist within the circulation route except for a section at the south end of Southridge Road near US Route 2.
35. There are no VTrans High Crash Locations in the vicinity of the Project.

Criterion 8(A) – Wildlife Habitat

36. There are no rare, threatened or endangered species occupying the Project area.
37. There is no habitat to support rare, threatened or endangered species in the Project area.

38. Existing residential developments are located adjacent to the south and west and these restrict wildlife corridors.
39. ANR has not mapped any of the Project area as used by rare, threatened or endangered wildlife.
40. The eastern portion of the Project tract contains a class II wetland, a man-made pond, and a stream which together represent the most significant habitat on-site. The Project does not materially impact this habitat, as the area will remain almost entirely intact.
41. The proposed “Kadence Road” will cross a Class II wetland and wetland buffer in one location near the center of the tract. BlackRock has received wetland permits for the crossing.
42. The Project area is not heavily used by wildlife.
43. The Project area is not resource-rich habitat.
44. The Project area has limited core habitat.
45. The Project area has limited connectivity with other habitats.
46. The wood frog is located on the Project tract.
47. The wood frog is not an endangered species.
48. The man-made pond in the east and woodlands in the northwest of the Project tract are being retained so there will be minimal impact on the wood frog.
49. Bobcat sightings have been reported in the Project area. Bobcats are transient and may travel through the area, but the Project tract does not support a bobcat population.

Conclusions of Law

Criterion 1 – Air Pollution:

Our evaluation of the Project under Act 250 Criterion 1 is limited to the potential impacts of blasting in the course of construction. Ms. Marino asserts three (3) questions which we interpret to ask whether the project’s blasting plan complies with Criterion 1 – Air Pollution; whether the Project results in undue air pollution. Ms. Marino’s specific questions ask whether ground vibrations from blasting may cause damage (physical damage and radon gas emissions) to residences. (Amended SOQ Questions 9 and 12, Original SOQ Question 19).

Before granting a permit, we must find that the development will not result in undue air pollution. 10 V.S.A. § 6086(a)(1). Air pollution under Act 250 includes airborne contaminants, dust, fumes, and noise. Re: Pike Indus., Inc., No. 5R1415-EB, Findings of Fact, Conclusions of Law, and Order, at 31 (Vt. Envtl. Bd. June 7, 2005). Noise is not at issue in this case. Whether air pollution is “undue” is highly fact-specific and can depend on a series of factors, which may include an analysis of the nature and amount of the pollution, a proposed project’s location and topography, prevailing winds, whether the pollutant complies with certain standards or recommended levels, and whether effective measures will be taken to mitigate the pollution. See Goddard Coll. Act 250 Reconsideration, 175-12-12 Vtec, slip op. at 8 (Vt. Super. Ct. Envtl. Div. Jan. 6, 2014) (Walsh, J.); Re: McClean Enters. Corp., No. 2S1147-1-EB, Findings of Fact, Conclusions of Law, and Order, at 41 (Vt. Envtl. Bd. Nov. 24, 2004).

The former Environmental Board has concluded in a previous case that blasting within a subdivision project will not result in undue air pollution. Re: Landmark Dev. Corp., No. 4C0667-EB, Findings of Fact, Conclusions of Law, and Order, at 10 (Vt. Envtl. Bd. July 9, 1987).² There, the applicant submitted blasting guidelines which would limit ground vibrations and “flying debris.” See id. at 6. The Board found the likelihood of damage to surrounding structures to be “very low.” Id.

In this matter, the proposed Blasting Plan will successfully mitigate any undue harm to environment or neighboring land uses. The plan follows industry standards and incorporates limitations on ground vibration. The plan also calls for blasting mats to minimize dust and prevent flying debris. Seismic monitoring will be conducted for all blasting events. We note that Ms. Marino’s property is well outside the area where pre- and post-blasting surveys will be required. Further mitigation includes limited hours of construction and limited blasting hours. Other than offering concerns, Ms. Marino failed to provide evidence of the Project’s potential blasting activities causing undue air pollution or, to the extent it is relevant, causing damage to surrounding properties. The evidence introduced by BlackRock shows that the Project will not result in undue air pollution. We find that the Project complies with Criterion 1.

² Prior decisions of the Environmental Board are given the same weight and consideration as prior decisions of the Environmental Division. 10 V.S.A. § 8504(m).

Criterion 5 - Traffic

Ms. Marino asserts four (4) questions which we interpret to ask whether pursuant to Act 250 Criterion 5, the project will cause unreasonable congestion or unsafe conditions with the use of highways (Amended SOQ Questions 21, Original SOQ Questions 13, 15, 17). Ms. Marino's specific questions ask whether further studies can be done of the impact of construction traffic within the Southridge neighborhood and concerning the egress from the Project.

Under Criterion 5, we must find that the subdivision or development "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways." 10 V.S.A. § 6086(a)(5). "A permit cannot be denied for a project that creates unsafe conditions within the meaning of criterion 5, but permit conditions can be imposed to remedy those conditions." In re Agency of Transp., 157 Vt. 203, 207 (1991) (citing 10 V.S.A. § 6087(b)); see also In re N. E. Materials Grp., LLC, 2017 VT 43, ¶ 21, 205 Vt. 490. With respect to Criterion 5, a party opposing the application has the burden of proof to show that the development will cause "an unreasonable or adverse effect," but the applicant has the initial burden of producing sufficient evidence for us to make positive findings. See 10 V.S.A. § 6088(b); In re Route 103 Quarry, No. 205-10-05 Vtec, slip op. at 8 (Vt. Env'tl. Ct. Nov. 22, 2006) (Durkin, J.) (stating that § 6088(b) relates to the burden of persuasion and that the "applicant always carries the initial burden of production"). Here, if BlackRock meets the initial burden of production, Ms. Marino must meet the high burden of persuasion that the proposed development will "cause unreasonable congestion or unsafe conditions" on area highways. See Route 103 Quarry, No. 205-10-05 Vtec at 22 (Nov. 22, 2006) (noting that the burden is "fairly high").

BlackRock introduced a thorough site-specific traffic impact assessment prepared by Lamoureux and Dickinson Consulting Engineers, Inc., and BlackRock's traffic expert witness Roger Dickinson offered detailed testimony. Mr. Dickinson also offered a vehicle and pedestrian safety plan establishing Project-specific practices for construction traffic. This evidence satisfies BlackRock's burden of production. The Project will not reduce the current level of service on roadways. Construction vehicles will not pass each other in opposite directions following the proposed clockwise circulation route. Furthermore, the construction vehicle circulation route does not pass in front of Ms. Marino's property. The speed limit for all roads in the circulation route is 25 mph. Intersection sight distances for large vehicles exceeds recommended standards for oncoming traffic traveling at

25 mph within the circulation route. Pedestrian sidewalks exist within the circulation route except for a section at the south end of Southridge Road near US Route 2. BlackRock will place signs at the entrance of the subdivision roads as part of the safety plan. The former Environmental Board found similar efforts to be appropriate mitigation to offset the level of unsafe pedestrian use of an access road. See Re: Okemo Mountain, Inc., No. 2S0351-10B-EB, Findings of Fact, Conclusions of Law, and Order, at 9 (Vt. Env'tl. Bd. Oct. 14, 1993).

Mr. Dickinson explained the traffic assessment and safety plan, and gave his opinion that safety concerns were mitigated by the combination of: a construction traffic circulation route where construction vehicles do not pass in opposite directions and mostly make right turns; directional and warning signage; signage advising construction vehicles to yield to bicycles and pedestrians; adequate sight distances; and a minimum posted speed limit of 25 MPH. Mr. Dickinson also noted that the most significant Project construction traffic will occur within the first month or two and then the construction traffic would diminish.

Ms. Marino's traffic witness, Catherine Witt, provided testimony on safety issues created by construction traffic conflicting with pedestrians and bicyclists. This testimony was not site-specific or Project-specific as Ms. Witt never performed a site visit or visited the roadways at issue. Ms. Witt's basic premise is that the introduction of construction traffic poses a safety concern for pedestrians and bicyclists. No detailed analysis was provided, and Ms. Witt's testimony did not contradict Mr. Dickinson's opinion that the vehicle and pedestrian safety plan mitigates safety concerns. The Project proposal further accounts for pedestrian safety after construction has finished by adding sidewalks along all new roads and adding a path 10 feet wide running along the southwestern boundary of the development.

Based upon the evidence before the Court, we conclude that the Project will not cause unreasonable congestion or unsafe conditions with the use of highways. Ms. Marino failed to meet her burden of persuasion that the Project will "cause unreasonable congestion or unsafe conditions."

Criterion 8(A) – Wildlife Habitat

Ms. Marino asserts three (3) questions which we interpret to ask whether pursuant to Act 250, Criterion 8(A), the Project will "destroy or significantly imperil necessary wildlife habitat or any endangered species" (Amended SOQ 19, Original SOQ 7, 8). 10 V.S.A. 6086(a)(8)(A). Ms.

Marino's specific questions ask whether the wildlife assessment was accurate; whether the Project will eradicate existing wildlife habitat; and whether the acreage of land to be developed can be reduced to maintain viability of female bobcats in the area?

Criterion 8(A) (Wildlife Habitat and Endangered Species) involves a three stage inquiry: "(a) whether the alleged habitat constitutes 'necessary wildlife habitat;' (b) if so, whether the Project will destroy or significantly imperil such habitat; and (c) if so, whether one or more of subcriteria (i) through (iii) [under 10 V.S.A. § 6086(a)(8)(A)] is satisfied." Re: Mark and Pauline Kiesel, No. 5W1270-EB, Findings of Fact, Conclusions of Law, and Order (Altered), at 37 (Vt. Env'tl. Bd. Aug. 7, 1998), rev'd on other grounds, In re Kiesel, 172 Vt. 124 (2000); Re: Vermont Dep't of Forests, Parks and Rec., No. 5W0905-7-EB, Findings of Fact, Conclusions of Law, and Order, at 10 (Vt. Env'tl. Bd. Sept. 7, 2005). If Blackrock meets its initial burden of production to allow for positive findings, Ms. Marino has the burden of persuasion on the first two stages of the Criterion 8(A) inquiry. Route 103 Quarry, No. 205-10-05 Vtec at 8 (Nov. 22, 2006) (applicant has the initial burden of production on each of the Act 250 criteria); Vermont Dep't of Forests, Parks, and Rec., No. 5W0905-7-EB, at 10 (Sept. 7, 2005) (opponent must show (a) the existence of necessary wildlife habitat, and (b) that such habitat will be destroyed or significantly imperiled). Where a project will not destroy or significantly imperil necessary wildlife habitat, we need not reach subcriteria 8(A)(i)-(iii). Re: Henry J., Jean A., and Ronald J. LaVictoire, No. 1R0018-4-EB, Findings of Fact, Conclusions of Law, and Order, at 7 (Vt. Env'tl. Bd. Mar. 16, 1993).

Under Act 250, "necessary wildlife habitat" is a "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods." 10 V.S.A. § 6001(12); see In re Southview Associates, 153 Vt. 171, 174-76 (1989) (holding that the definition considers the "the survival of the population of a particular species that depends upon the habitat"); ; In re Killington, Ltd., 159 Vt. 206, 216 (1992) (adhering to the definition from Southview).

At trial, BlackRock's wildlife habitat expert Errol Briggs provided detailed testimony and introduced his habitat assessment. Mr. Briggs prepared the assessment based his expertise and four days of on-site observation. While BlackRock has satisfied its burden of production here, Ms. Marino has not met her burden of showing that the Project "will destroy or significantly imperil necessary wildlife habitat or any endangered species" at the Project site. See 10 V.S.A. § 6086(a)(8)(A); Vermont Dep't of Forests, Parks, and Rec., No. 5W0905-7-EB, at 10 (Sept. 7, 2005).

First, neither party offered evidence of threatened or endangered species occupying the Project area. Mr. Briggs found no habitat likely to support rare, threatened or endangered species at the Project area. Existing residential developments are located adjacent to the south and west and these restrict wildlife corridors. ANR has not mapped any of the Project area as used by rare, threatened or endangered wildlife. In short, the Court received no credible evidence of any disturbance to endangered species.

Second, Ms. Marino failed to demonstrate that the Project area is necessary wildlife habitat. Ms. Marino provided evidence of wildlife being present at the Project location, including but not limited to the bobcat. The presence of wildlife, however, does not equate to an area being necessary wildlife habitat. See In re Southview Associates, 153 Vt. 171, 176 (1989) (a necessary wildlife habitat “is one that is decisive to the survival of the population of a particular species”). Mr. Briggs testified that bobcat sightings in the area make sense, as they are transient by nature, but any bobcats seen near the Project site would be merely passing through. The possibility of their occasional presence did not change Mr. Briggs’s conclusion that there is no necessary wildlife habitat at the Project site.

The eastern portion of the Project tract contains a class II wetland, along with a man-made pond and a stream. These features represent the most significant habitat on-site. The Project will leave the easterly half of the tract largely untouched, including the wetland and wetland buffers, and Mr. Briggs testified that the development will not materially impact the habitat associated with the wetland, pond, or stream. The wood frog is located on the Project tract. The pond and woodlands in the northwest of the Project tract are being retained so there will be minimal impact on the wood frog. The Project proposal includes a single crossing of a Class II wetland and wetland buffer near the center of the tract for the “Kadence Road,” and BlackRock has obtained wetland permits for the crossing. Ms. Marino did not offer evidence to show habitat in any part of the tract that is “decisive to the survival” of a particular species. See In re Southview Associates, 153 Vt. 171, 176 (1989). Rather, we find Mr. Briggs’s assessment and opinion to be the most credible evidence offered at trial. His assessment indicates that the Project tract may have a certain habitat value in its undeveloped state, but it offers limited connectivity and limited “core habitat.”

The Project area is not heavily used by wildlife. The Project area is not resource-rich habitat. And, even if the wetland, pond, and stream in the eastern portion of the Project tract were found to be “necessary wildlife habitat,” there is no evidence that the Project would threaten that habitat. See 10 V.S.A. § 6086(a)(8)(A). Those areas will remain mostly intact, and Ms. Marino did not offer any reason to question Mr. Briggs’s opinion that the development will not have a material impact. Under the three-stage inquiry for Criterion 8(A), Ms. Marino has not shown the existence of “necessary wildlife habitat” and has not shown that any such habitat will be destroyed or significantly imperiled. See Vermont Dep’t of Forests, Parks, and Rec., No. 5W0905-7-EB, at 10 (Sept. 7, 2005). There is no need for us to consider the third stage. See Re: Henry J., Jean A., and Ronald J. LaVictoire, No. 1R0018-4-EB, at 7 (Mar. 16, 1993).

We conclude that the Project will not destroy or significantly imperil necessary wildlife habitat or any endangered species, and therefore, the Project complies with Criterion 8(A). See 10 V.S.A. § 6086(a)(8)(A).

Conclusion

For all the reasons discussed above, we conclude that the Project will not result in undue air pollution. Thus, the Project complies with Act 250 Criterion 1.

We also conclude that the Project will not cause unreasonable congestion or unsafe conditions with the use of highways. Thus, the Project conforms to Act 250 Criterion 5.

Lastly, we conclude that the Project will not destroy or significantly imperil necessary wildlife habitat or any endangered species, and therefore, the Project complies with Criterion 8(A). Accordingly, we affirm Act 250 Permit #4C1315 issued by the District #4 Environmental Commission.

A Judgment Order accompanies this Decision. This completes the current proceedings before this Court.

Electronically signed on December 04, 2019 at 10:33 AM pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink, appearing to read "Tom Walsh", with a stylized flourish at the end.

Thomas G. Walsh, Judge
Superior Court, Environmental Division