

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

MEMORANDUM OF DECISION

Re: H. B. Partners
a.k.a Walker II Project
Application #8B0500- 1 -EB (Interlocutory)

This Memorandum of Decision pertains to a motion for interlocutory appeal with respect to the issues of party status and involved land. As explained below, the Board denies the motion for interlocutory appeal.

1. BACKGROUND

On December 12, 1997, H.B. Partners ("Applicants") filed an application with the District #S Environmental Commission ("Commission") for redevelopment of three existing buildings into 5,750 square feet of retail space and other improvements, including 45 parking spaces, on 1.02 acres on Depot Street, Manchester, Vermont ("Project").

On February 17, 1998, the Commission issued Re: H. B. Partners a.k.a. Walker II Project, Application #8B0500-1, Hearing Recess Order #2 (Feb. 17, 1998) ("Commission Order").

On February 24, 1998, James Sparkman filed a Motion for Interlocutory Appeal and a Motion for Stay ("Motion") from the Commission Order.

On February 25, 1998, the Board Chair issued an Order which denied Mr. Sparkman's Motion for a Stay pending the Board's ruling on his Motion for Interlocutory Appeal.

On March 18, 1998, the Board deliberated with respect to the Motion.

I I . PARTY STATUS INTERLOCUTORY APPEAL

The first ruling which the Motion seeks permission to appeal is the Commission Order's denial of Mr. Sparkman's request for party status under Criterion 9(A) as a materially assisting party pursuant to Environmental Board Rule ("EBR") 14(B)(2).

Under EBR 43(B), the Board in its sole discretion may review an appeal from any party status ruling if it determines that such review may "materially advance the application process." In making this determination, the Board interprets "application process" to mean the process that has or could occur at the Commission, Board, and Vermont Supreme Court levels. See Re: Maple Tree Place Associates, Application #

4C0775-EB (Interlocutory Appeal), Memorandum of Decision and Order (Oct. 11, 1996), aff'd, In re Maple Tree Place Associates, Docket No. 96-559 (Oct. 10, 1997).

The Board is not persuaded that granting the Motion will materially advance the application process. Mr. Sparkman's request for party status under Criterion 9(A) asserts that there is a link between the Project and twenty-six other business enterprises owned or controlled by the Applicants in Manchester, Vermont. The Board concludes that acceptance of the Motion would force the Board to determine whether such a linkage, in fact, exists between the Project and the twenty-six other business enterprises. The Board concludes that the application process would not be materially advanced if the Board were to conduct such an inquiry. Accordingly, the Board denies the Motion with respect to Mr. Sparkman's appeal from the Commission Order's denial of his request for party status under Criterion 9(A).

III. PROJECT'S INVOLVED LAND

The second ruling which the Motion seeks permission to appeal is the Commission Order's ruling that the Project's involved land is 1.02 acres, and that none of the land associated with the twenty-six other business enterprises constitutes part of the Project's involved land. An interlocutory appeal which does not pertain to party status is brought pursuant to EBR 43(A) which provides:

Upon motion of any party, the board may permit an appeal to be taken from any interlocutory (preliminary) order or ruling of a district commission if the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the application process, The appeal shall be limited to questions of law,

Under EBR 43(A), the Board considers three factors in granting permission for an interlocutory appeal: (i) controlling question of law; (ii) difference of opinion; and (iii) material advance of the application. See Re: Sugarbush Resort Holdings, Inc., Application #5 W 1045-15-EB (Interlocutory), Memorandum of Decision (Aug. 12, 1997); Re: Manchester Commons Associates, #8B0500-EB (Interlocutory Appeal), Memorandum of Decision (Oct. 17, 1994). These three factors do not establish "bright lines." but rather, are intentionally vague so as to further the "goals of the interlocutory appeal mechanism." See In re Pvrmaid Company of Burlington, 141 Vt. 294,302 (1982). "The three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." Id. (citing 16

C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3930, at 156 (1977)).

An issue is a “question of law” if no facts are required to resolve the issue or if a factual record has been previously developed by the Commission in a manner that allows the Board to assume the relevant facts without engaging in factual determinations. Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 10 (Dec. 22, 1988).

The Commission Order rejected Mr. Sparkman’s contention that the Project’s involved land includes the land upon which the other twenty-six business enterprises are constructed and operated. Whether the Project’s involved land includes this land is a factual question for which there is insufficient evidence. The Board cannot determine whether the Project’s involved land includes twenty-six other business developments from the limited record before it, nor can it assume the relevant facts without engaging in factual determinations. Because the involved land issue is not a question of law, it is not a controlling question of law. Accordingly, the Board denies the Motion with respect to Mr. Sparkman’s appeal from the Commission Order’s ruling that the Project’s involved land is 1.02 acres.

Because the Board concludes that the Motion seeks permission to appeal an issue which is not a controlling question of law, the Board will not consider the second and third factors of difference of opinion and material advance of the application.

IV. ORDER

The Board denies Mr. Sparkman’s Motion for Interlocutory Appeal of the party status and involved land issues.

Dated at Montpelier, Vermont, this 24th day of March, 1998.

ENVIRONMENTAL BOARD

Marcy Hard&g
Marcy Hard&g, Chair
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