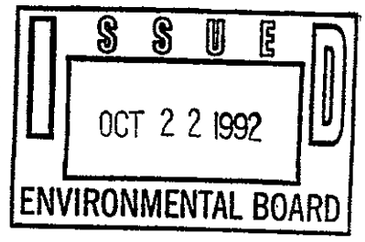
VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: John A. Russell Corp.,
Application #1R0257-2A-EB

MEMORANDUM OF DECISION

This decision pertains to an application to remove Condition #12 of Land Use Permit Amendment #1R0257-2, which prohibits the construction of a second driveway at a commercial-industrial park. 'As is explained below, the Environmental Board.concludes that the application is barred by the doctrines of res iudicata and collateral estoppel and therefore voids Land Use Permit Amendment #1R0257-2A, which removed the above condition and approved construction of the second driveway.

I. BACKGROUND

A. Auvlication #1R0257-2

On October 7, 1988, the District #1 Environmental Commission issued Land Use Permit Amendment #1R0257-2, approving with conditions the Permittee's application to amend existing Land Use Permit #1R0257. Permit #1R0257 authorizes a commercial', and industrial development off Route 7B in Clarendon known as Clarendon Park. Amendment #1R0257-2 approves the construction of two new buildings on Lot #5 of the Park to be used for unspecified commercial or industrial purposes. Amendment #1R0257-2 restricts the hours of operation of these buildings. In addition, Condition #12 of Amendment #1R0257-2 states:

> The permittee shall not construct a second driveway onto Route 7B to access any of lot #5. Prior to any construction on lot #5 the permittee shall submit to the Commission a revised building plan which utilizes a shared driveway with lot #1 and a revised building location if desired. In no case, shall more than one driveway access onto Route 7B from the commercial subdivision.

Condition #12 was issued pursuant to Finding of Fact #5, which states in relevant part:

> a) The applicant proposes to have the southerly building use a new driveway onto Route 7B and for the northerly building to share the existing drive constructed on lot #1. . . .
>
> e) The Commission believes that, unless good reason is shown to the contrary, the number of commercial driveways having direct access to a highway should be reduced so as to reduce the number of points of traffic conflict and to allow for control of the traffic at one central point.

On November 14, 1988, the Permittee filed an appeal with the Board, objecting to the restrictions on operating hours and the prohibition of a second driveway. Following a prehearing conference, two hearings, and filing of proposed findings of fact and conclusions of law, an administrative hearing panel of the Board issued a proposed decision on October 2, 1989. In relevant part, the hearing panel's decision proposed to affirm Condition #12. See Re: John A. Russell Corp., #1R0257-2-Eb, Docket #32 (Hearing Panel's Proposed Decision) at 7 (Oct. 2, 1989).

On October 20, 1989, the Permittee filed a memorandum in opposition to the proposed decision. The Board convened oral argument on November 16, 1989. On January 16, 1990, the Permittee filed further proposed findings of fact and requested that it be allowed to withdraw its appeal concerning the second driveway.

On March 27, 1990, the Board issued a final decision. This decision was not appealed to the Supreme Court. In relevant part, the decision stated:

> The Board will permit the withdrawal of the appeal concerning the second driveway. Allowing withdrawal of the second driveway appeal is not contrary to the values embodied in Act 250, particularly the traffic safety values embodied in Criterion 5, because of the continued validity of Condition 12 of the District Commission's permit, which prohibits construction of that driveway and requires that the Permittee submit a revised building plan which includes a driveway shared by traffic from both of the proposed buildings.

Adjoining landowner Joseph E. Kalakowski was granted party Status on Application #1R0257-2 pursuant to Criteria 1 (air and water pollution), 3 (existing water supplies), 5, and 8 (aesthetics, scenic and natural beauty). Mr. Kalakowski also actively participated in the proceedings before the District Commission and the Board regarding that application, as well as in earlier proceedings regarding Clarendon Park.

B. Application #1R0257-2A

On December 18, 1991, the Permittee filed Application #1R0257-2A. The Permittee stated in its application that it sought:

> [An] amendment to add an independent access to Route 7B from the southernmost of the two permitted buildings at the subject property. No other material changes to previously approved project are proposed. Amendment is sought to conform the

project's Act 250 permit to its local zoning permit issued by Rutland Superior Court on December 31, 1990.

On June 10, 1992, the District Commission issued Land Use Permit Amendment #1R0257-2A, authorizing the Permittee to construct a driveway from Route 7B "to the previously approved southly building on lot 5."

On July 10, 1992, adjoiners Joseph E. Kalakowski, Paul F. Shedd, and Albert Trombley (the Appellants) filed an appeal with the Board. The Appellants raise issues concerning the applicability of the doctrine of res iudicata, the fairness of the District Commission's hearing process, the appropriateness of treating Application #1R0257-2A as a "minor" pursuant to Board Rule 51, and the compliance of the application with 10 V.S.A. § 6086(a)(5) (traffic) and (9)(K) (public investments and facilities). All of the Appellants were granted party status before the District Commission under Criteria 5 and 9(K).

On July 16, 1992, the Permittee filed a notice of cross-appeal and motion to dismiss. The Permittee challenges the party status of the Appellants and asks that the Board dismiss the appeal.

On July 30, 1992, the Board issued a notice of hearing. The notice stated that the Board would limit the hearing to legal argument concerning two issues (see Issues section, below). The notice also stated that the Board would take notice of various documents.

On August 19, 1992, Mr. Kalakowski filed a memorandum of law on behalf of himself and the other Appellants. On August 20, the Permittee filed memoranda of law.

The Board held oral argument on August 26, 1992, with the following parties participating:

The Permittee by James P.W. Goss, Esq.
The Appellants by Joseph E. Kalakowski

During argument, the Permittee stated that the question of Mr. Kalakowski's party status under Criterion 5 had been previously litigated and that it would withdraw that portion of its cross-appeal. After hearing argument, the Board recessed the matter pending additional submissions by the parties, deliberation, and decision. The Board also conducted a deliberative session.

On September 1, 1992, the Permittee and the Appellants filed additional submissions. On September 11, the Permittee filed a rebuttal memorandum. On that date, the Appellants filed a rebuttal memorandum attaching various exhibits. On September 18, the Permittee filed an objection to those exhibits. The Board deliberated on October 2. This matter is now ready for decision.

II. ISSUES

Pursuant to the Board's notice of July 30, 1992, the following issues are before the Board:

a. Whether the Board should conclude that Application #1R0257-2A is barred by the doctrines of res iudicata or collateral estoppel.

b. Whether the Board should conclude that the cross-appeal and motion to dismiss, or a portion thereof, are barred by the doctrine of collateral estoppel.

In addition, the Permittee has raised the following issue:

C. Whether the Board should strike the exhibits submitted by the Appellants with their September 11 memorandum.

III. DISCUSSION,

A. Preclusion of Application #1R0257-2A

1. Res Judicata

Res iudicata is a Latin phrase meaning "thing decided." It is a legal doctrine invented by the courts to provide a semblance of finality to litigation so that a matter which has already been decided need not be decided again. Under the doctrine, a lawsuit can be barred if, with respect to a previous lawsuit, the parties, subject matter, and causes of action are substantially identical, and the previous lawsuit was pursued to final judgment. Berisha v. Hardy, 144 Vt. 136, 138 (1984).

Res iudicata has been applied to proceedings before administrative agencies. Town of Soringfield. Vermont v. Environmental Board, 521 F.Supp. 243 (1981). The Vermont Supreme Court has stated that the doctrine may be applied to zoning applications. In re Anvlication of Carrier, 155 Vt. 152, 158 (1990). On numerous occasions, we have recognized

the applicability of the doctrine to Act 250 proceedings. See, e.g., Re: Rome Family Corn., #1R0410-3-EB, Memorandum of Decision at 3-5 (May 2, 1989). One of these occasions involved a decision on an earlier application concerning Clarendon Park. Re: John A. Russell Corp., #1R0257-1-EB, Memorandum of Decision at 5-6 (Nov. 30, 1983).

With respect to Application #1R0257-2A, the presence of the elements of res iudicata is shown by a comparison with Application #1R0257-2. First, both the Permittee and Mr. Kalakowski were parties to the earlier application and are parties to the present application.

Second, the subject matter and causes of actionare the same because each application concerns approval of a substantially identical project. Application #1R0257-2 sought approval for the.construction of two buildings on Lot #5 to be served by an existing access road and a new access road for which approval also was requested. Application #1R0257-2A seeks approval for the new access road which had been denied by the District Commission's decision on the earlier application. Thus, approval of Application #1R0257-2A would result in the same project proposed by Application #1R0257-2.

Third, the earlier application was pursued to final judgment: The District #1 Commission issued a final decision on Application #1R0257-2 in the form of Amendment #1R0257-2. This permit amendment contained a condition prohibiting construction of the second driveway. It was and is a valid and binding permit.

The Permittee argues that there was no final judgment because it filed an appeal concerning the second driveway which it later withdrew. In support of this argument, the Permittee points out that the Board's dismissal of the driveway appeal did not state that the appeal was dismissed with prejudice. The Permittee states that, under Vermont Rule of Civil Procedure (VRCP) 41(a)(2), a voluntary dismissal is without prejudice unless otherwise specified in the dismissal order.

The VRCP do not apply to administrative tribunals. International Association of Firefighters v. Montpelier, 133 Vt. 175, 177 (1975).

Moreover, the Permittee had no reason to believe that it could revive the issue of the second driveway. In our approval of the Permittee's withdrawal request, we stated that

we were allowing withdrawal because the condition prohibiting the second driveway would remain in place.[1] This statement was clear and unequivocal.

Our statement was made pursuant to the standard which we have applied for many years in evaluating withdrawal requests, namely, whether dismissal is contrary to the values embodied in Act 250. This standard is based on federal case law which states that administrative agencies have discretion to reject a withdrawal if allowing it would prejudice the public interests they are charged to protect. Jones v. Securities & Exchange Commission, 298 U.S. 1, 22 (1936); Oil, Chemical & Atomic Workers International Union, AFL-CIO v. National Labor Relations Board, 806 F.2d 269, 272 (DC Cir. 1986).

Thus, our statement necessarily and clearly meant that, had the condition not been in place, withdrawal of the appeal would have been disallowed for being contrary to the values embodied in Act 250.

Accordingly, when we approved the Permittee's request to withdraw its appeal, the District Commission's decision on Application #1R0257-2 became the final judgment concerning the second driveway.

2. Collateral Estoppel

The doctrine of collateral estoppel is similar to but more limited than the doctrine of res iudicata. Under it, a party may be barred from relitigating those issues "necessarily and essentially determined" in a prior action. Berisha, sunra, 144 Vt. at 138. The Vermont Supreme Court has stated that the doctrine may be applied to zoning applications. Carrier, sunra, 155 Vt. at 158. We conclude that, like res judicata, collateral estoppel may be applied to Act 250 applications as well.

The following criteria must be met for collateral estoppel to apply:

(a) Preclusion must be asserted against one who was a party or in privity with a party in the earlier action:

(b) The issue was resolved by a final judgment on the merits;

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[1] This is consistent with Vermont Rule of Appellate Procedure 42(a), which states that "[a]n appeal may be dismissed on motion of the appellant upon such terms as agreed upon by the parties or fixed by the Court." (Emphasis added.)

(c) The issue is the same as the one raised in the later action;

(d) There was a full and fair opportunity to litigate the issue in the earlier action; and

(e) Applying preclusion in the later action is fair.

Trenanier v. Getting Orsanized. Inc., 155 Vt. 259, 265 (1990). To satisfy the last two criteria, the party opposing collateral estoppel bears the burden to show "the existence of circumstances that make it appropriate for an issue to be relitigated." Id. at 266.

The Permittee only challenges the applicability of the elements of final judgment and fairness. However, we believe that we must ascertain whether all elements are met.

The first element of collateral estoppel is met in this case because preclusion is asserted against the same applicant.

The second element, that of resolution by final judgment, is also met, for the reasons stated above with respect to res iudicata.

Under the rubric of collateral estoppel, the Permittee makes an additional argument to support its contention that the District Commission's decision on Application #1R0257-2 was not a.final judgment. It argues that the District Commission did not impose the ban on the second driveway based on adverse findings regarding traffic safety and congestion. Rather, it based the condition on a policy consideration that developments generally should not be allowed more than one curb cut.

This argument, however, is really a contention that the District Commission's decision may not have been supported by adequate findings. The argument was appropriate to the Permittee's appeal of that decision, but that appeal was withdrawn. The argument does not alter the fact that the District Commission decided the issue of the second driveway.

The third element of collateral estoppel is met in this case because the issue of a second driveway serving the southerly building on Lot #5 is exactly the same issue litigated in Application #1R0257-2.

The fourth element, a full and fair opportunity to litigate, is met as well. The Permittee not only had the benefit of a hearing and consideration before the District Commission, it also filed an appeal on the second driveway

with the Board and participated in two hearings before a Board hearing panel and an oral argument before the full Board prior to withdrawing its appeal.

Concerning the final element, we conclude that applying preclusion is fair. The Permittee's argument regarding this element centers on an alleged conflict between its Act 250 and town zoning approvals. Since the Permittee also raises this argument with respect to the issue of res iudicata, it is addressed in a separate section immediately below.

3. Conformance with Town Zoning

Our application of the doctrines of res iudicata and collateral estoppel is not simply a mechanical exercise. The law recognizes that the need for finality in administrative proceedings is often outweighed by considerations of policy or practice. Town of Springfield, Vermont v. Environmental Board, 521 F.Supp. 243 (1981). Thus, the Vermont Supreme Court has stated that these doctrines should not apply to administrative proceedings as "inflexible rules of law." Carrier, supra, 155 Vt. at 157.

In this regard, the Permittee contends that it filed Application #1R0257-2A to conform to its local zoning approval. It states that the approved site plans submitted to the zoning authorities show a second driveway and that failure to build the second driveway will therefore result in a zoning violation. For this reason, it argues, the Board should forbear applying res iudicata and collateral estoppel out of a policy of allowing developers to achieve consistent local and state approvals, and should conclude that application of collateral estoppel would be unfair.

There is merit in a policy of allowing achievement of consistent permits. However, the history of this matter significantly undermines the Permittee's arguments.

By the Permittee's own admission on January 30, 1990, it "submitted applications for the two buildings on Lot #5 to the local zoning administrator. These applications showed the buildings as being served by two driveways rather than one as required by the District Commission's 1988 decision. The date of the applications - January 30 - is only two weeks after the date the Permittee filed its request with the Board to withdraw the second driveway appeal - January 16.

The Permittee received approvals from the zoning administrator which were appealed to the zoning board of adjustment and then to the Superior Court. Our examination of the Superior Court's decision, In re John A. Russell Corp., No. 471-90RcCa (Rutland, Dec. 31, 1990), shows that the issue

of the second driveway was not addressed by the Court. Moreover, at oral argument the Permittee conceded that the second driveway was not at issue in the zoning litigation and that at no time did the Permittee ever seek approval from local zoning authorities of a site plan with one driveway serving both buildings.

Thus, the inconsistency between the Permittee's state and local permits was created by the Permittee. Further, with respect to fairness, we note that the Permittee withdrew its appeal concerning a prohibition on a second driveway after a Board hearing panel issued a proposed decision affirming that prohibition. Almost at the same time, the Permittee submitted an application for that very driveway to local zoning authorities.

We conclude, therefore, that in this case a policy of achieving consistent permits does not outweigh the application of res iudicata and collateral estoppel. We also conclude that, under the circumstances of this matter, application of collateral estoppel is fair.

B. Preclusion of Cross-appeal

We conclude that the Permittee's cross-appeal with respect to Mr. Kalakowski's party status under Criterion 5 is barred by the doctrine of collateral estoppel. Since the prohibition on the second driveway was issued pursuant to Criterion 5, it is therefore appropriate to hear Mr. Kalakowski concerning the preclusion of the current application.

We also conclude that the remainder of the cross-appeal is not barred by collateral estoppel.

C. Objection to Exhibits

The Permittee's objection to various exhibits submitted by Mr. Kalakowski, filed September 21, 1992, is sustained. We have disregarded those exhibits in reaching our decision.

IV.' CONCLUSION

The Board has concluded that Application #1R0257-2A is barred by the doctrines of res iudicata and collateral estoppel. We will therefore void Amendment #1R0257-2A. Since that amendment likely was recorded on the land records under 10 V.S.A. § 6090(a), we will record a copy of our order.

Because of our conclusions, we need not reach the remainder of Mr. Kalakowski's appeal or those portions of the Permittee's cross-appeal which are not precluded.

V. ORDER

1. Application #1R0257-2A is barred by res iudicata.

2. Application #1R0257-2A is also barred by collateral estoppel.

3. The Permittee's cross-appeal with respect to Mr. Kalakowski's party status under Criterion 5 is barred by collateral estoppel.

4. Land Use Permit #1R0257-2A is void.

5. Condition #12 of Land Use Permit #1R0257-2 remains in effect.

6. A copy of this order shall be recorded in the appropriate land records.

ENVIRONMENTAL BOARD

Terry Ehrich, Acting Chair
Ferdinand Bongartz
Lixi Fortna
Samuel Lloyd
Steve E. Wright

Member Arthur Gibb was present for the hearing and deliberation in this matter which occurred on August 26, 1992. However, he has chosen to abstain from participating in the final decision because he was not available for the deliberation which occurred on October 2, 1992.

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