STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A. CHAPTER 151

RE: Lee and Catherine Quaglia
Star Route
Killington, Vermont 05751

Findings of Fact,
Conclusions of Law and
Land Use Permit #1R0382-1-EB

This is an appeal from Land Use Permit #1R0382 issued on August 20, 1980, by the District #1 Environmental Commission to Lee and Catherine Quaglia (hereinafter referred to as the Quaglias). The permit authorizes the creation of a 10 lot subdivision with approximately 1800 feet of access road located on the westerly side of Currier Road in the Towns of Mendon and Sherburne, Vermont. A notice of appeal was filed on September 19, 1980, by adjoining property owners and interested parties, George and Wanda Krantz and Madeline Fleming (hereinafter referred to as the Appellants). Notice of a public hearing and a pre-hearing conference was served on the parties and forwarded for publication in the Rutland Herald on October 2, 1980. Hearings were held on October 28 and November 25, 1980. Hearings were then recessed at the request of the parties. A second pre-hearing conference was held on June 29, 1981, with additional hearings on July 28 and August 25, 1981. The issues on appeal were determined at the pre-hearing conferences.

The following parties participated in the hearings:

Applicants, Lee and Catherine Quaglia, by A. Jay Kenlan, Esq.; and
Appellants, Madeline Fleming, George and Wanda Krantz, by John D. Hansen, Esq.

The hearings were recessed on August 25, 1981. On September 30, 1981, the Environmental Board (the "Board") determined that the record was complete, and adjourned the hearings. Pursuant to 3 V.S.A. §811 a proposal for decision was prepared, reviewed by the Board, and served upon the parties. Written comments, prepared by the parties were filed with and reviewed by the Board.

On October 21, 1981, the Board issued Land Use Permit Amendment #1R0382-1-EB and corresponding Findings of Fact and Conclusions of Law. On November 2, 1981, Appellants filed a motion to vacate the Board's decision as Appellants did not have the opportunity to present oral argument according to the procedures outlined in 3 V.S.A. §811. On November 10, 1981 the Board granted Appellants' motion to vacate. Oral argument was heard January 12, 1982.

This matter is, therefore, ready for a final decision by the Board.

I. INTRODUCTION

On May 16, 1980, the Applicants, Lee and Catherine Quaglia, submitted an application to the District #1 Environmental Commission seeking approval for a 10 lot subdivision, with minimum lot sizes of three acres and approximately 1806 feet of access road, located on the westerly side of Currier Road in the Towns of Mendon and Sherburne, Vermont (the "Property").

Appellant George J. Krantz has the right to take water from a spring located on the Property and the right to install and maintain a waterline to convey the water from the spring to his premises, all in accordance with a deed from Ruth B. Mersch dated November 30, 1978 and recorded in Book 42, Page 137 of Sherburne Land Records (Exhibit #3). Said rights are more particularly described therein as follows:

> "There is included in this conveyance the right to use one third of the water from a certain spring located on other lands of Ruth B. Mersch in common with Maurice C. Flemming and wife and Hugh P. Husband, Jr., and their heirs and assigns together with the right to enter upon the lands of Ruth B. Mersch to construct, repair, replace, and maintain any reservoirs, catchbasins, spring houses, and fences, pumps, pipe lines, and aqueducts necessary or convenient to collect and protect the waters of said spring and to conduct the same to the premises hereby conveyed."

Appellant, Madeline C. Fleming also has the right to take water from the spring used by George J. and Wanda Krantz located on the Property and the right to install and maintain a waterline to convey the water from the spring to her premises, all in accordance with a deed from C. F. Mersch and Ruth B. Mersch dated February 13, 1961 and recorded in Book 21, Page 373 of Sherburne Land Records (Exhibit #4). Said rights are more particularly described therein as follows:

> "Conveying also hereby one-third of the water from a spring located approximately 900 feet westerly of the old barn foundations on property of C. F. Mersch and wife, together also with the right to enter upon and cross other lands of said C. F. Mersch and wife, for the purpose of gaining access to said spring and to maintain such pipelines, aqueducts, reservoirs, spring houses and other installations necessary or convenient for the collection and storage of said water and the transmission thereof from the spring to the premises hereby conveyed."

II. PROCEDURAL ISSUES

Before making Findings of Fact and our Conclusions of Law, it is necessary to resolve three preliminary matters raised by Appellants. First, Appellants claim that the District Environmental Commission (hereinafter referred to as the DEC) erred because the Quaglias' application to the DEC was "'incomplete and did not contain all of the information necessary for a proper evaluation and adjudication under the Act 250 criteria."

The Quaglias contend that their application was complete or, alternatively, that any deficiencies were corrected during the evidentiary hearings before the DEC.

At the October 28, 1980 hearing before the Environmental Board (hereinafter referred to as the Board), counsel for Appellants attempted to show that the application was incomplete by demonstrating that it did not include all of the information that conceivably might be placed in an application as set forth in an attachment to the Master Land Use Permit Application. 10 V.S.A. §6083 describes the information that must be submitted in an application. This includes, inter alia, "any other information required by this Chapter [151], or the rules promulgated thereunder." 10 V.S.A. §6083(a)(2). Board Rule 6 provides that the Board "shall from time to time issue guidelines for the use of commission and applicants in determining the information and documentation that is necessary or desirable for thorough review and evaluation of projects under applicable criteria."

The document referred to by Appellants is an example of guidelines issued by the Board. As guidelines, these are discretionary as to applicants and are intended to assist them in preparing their applications. By issuing guidelines the Board did not intend to burden applicants with excessive paperwork, requiring them to provide information that may be marginally relevant to their project. Under Section 6083, aside from certain routine requirements, such as the applicant's name and address, an applicant must provide a plan that shows "the intended use of the land, the proposed improvements, the details of the project, and any other information required by this chapter". 10 V.S.A. §6083(a)(2).

Reviewing this record, especially Exhibits #1 and #12, it is evident that the Quaglias have shown the intended use (a subdivision), the proposed improvements (e.g. a road, proposed well sites), and the project details (e.g. lot lines). Appellants point out no other information "required" by Chapter 151 or Rule 6. Accordingly, the Board concludes that the Quaglias' application complied with Section 6083 and Rule 6.

Appellants' second claim is that because they have a legal interest in a spring and right-of-way on the project site,

they are necessary co-applicants to this project. It is undisputed that each of the Appellants has an easement entitling them to certain rights to use water from a spring located on the Quaglias' property. Appellants claim that the application and DEC review process were improper because the application was made without their consent.

The Quaglias disagree.

Section 6083 requires an Act 250 application to state the applicant's name and any other information required by the rules promulgated thereunder. Id. §6083 (a).

Rule 6, promulgated to implement this section, requires that applications "list the name or names of all persons who have a substantial interest in the tract of involved land by reason of ownership or control."

The Board concludes that a one-third interest in a spring and waterline right-of-way located on a 30+ acre parcel is not a "substantial" interest within the meaning of Rule 6. Were the Board to rule that a waterline easement constitutes a substantial interest, it would be difficult in future proceedings not to require every easement holder to be listed as a co-applicant. For example, the Board is aware from numerous other proceedings before it that most residential and commercial properties are subject to utility easements. Were the Board to adopt the position asserted by Appellants, future applicants would have to join utility companies as co-applicants in virtually every case. Moreover, the Appellants further suggest that easement holders as co-applicants under Act 250 have the legal right not to consent to a proposed development. The Board believes that the Appellants' interpretation goes far beyond the spirit of Rule 6 and declines to adopt this interpretation.

The Board's decision notwithstanding, Appellants may have certain rights by statute or virtue of the common law with respect to use of the Property.

Finally, the Appellants claim the Town of Mendon should have been, but was not, notified of the application as required in 10 V.S.A. §6084. They claim that the Quaglias' failure to notify the Town of Mendon created an underlying jurisdictional defect and therefore, the DEC proceedings are without legal effect.

Based on Exhibits #5 through #9, the Board concludes that the Quaglias sent notice to the Town of Mendon, inter alia, as required by 10 V.S.A. §6084(a).

III. FINDINGS OF FACT

These preliminary matters resolved, the Board reaches the merits of this appeal. During the hearings before the DEC, Appellants requested and the DEC permitted them to

participate as adjoining property owners on Criteria l(A), l(B), 3 and 4. On appeal, Appellants requested the right to participate (in addition to Criteria l(A), l(B), 3 and 4) on Criteria l(C), 2 and 10. The Quaglias objected to this request. By order dated July 20, 1981, the Quaglias' motion to deny party status to Appellants on Criteria l(C), 2, and 10 was denied.

Accordingly, the Criteria at issue on appeal are l(A), l(B), l(C), 2, 3, 4, and 10. With respect to these criteria the Board finds as follows:

Criterion l(A):

1. The Quaglias submitted a Certificate of Compliance with respect to Vermont State Board of Health Regulations, Chapter 5, Sanitary Engineering, Subchapter 10, Part I, Subdivisions (hereinafter referred to as the "Certificate") (Exhibit #12). Nothing in the record indicates that any other Health and Water Resources Department regulations are applicable to this project. Therefore, the Quaglias have demonstrated that the subdivision will meet any applicable regulation regarding reduction of the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development as required by 10 V.S.A. §6086(a) (l)(A).

Criterion l(B):

2. Under Rule 13(C), the Certificate, when obtained, creates a rebuttable presumption that "sewage can be disposed of through installation of sewage collection, treatment and disposal systems without resulting in undue water pollution." Rule 13(C)(l). Nothing in the record rebuts this presumption; hence, the Quaglias have demonstrated that sewage can be disposed of without resulting in undue water pollution.

Criterion l(C):

3. The Quaglias agreed to require by covenant the inclusion and the continued use and maintenance of water conserving plumbing fixtures, including but not limited to, low-flush toilets, low-flow showerheads, and aerator-type or flow restricted faucets. Thus, the Quaglias have demonstrated that the subdivision "design has considered water conservation, incorporates multiple use recycling where technically and economically practical, utilizes the best available technology for such applications, and provides for continued efficient operation of these systems." 10 V.S.A. §6086(a)(l)(C).

4. The Board finds that the subdivision will not result in undue water pollution under 10 V.S.A. §6086(a) (1).

Criterion 2:

'5. The wells that will serve the proposed subdivision are identified as drilled wells which the Board anticipates will be drilled into bedrock. Under Rule 13(C), the Certificate, when obtained, also creates a rebuttable presumption that a sufficient supply of potable water is available. Nothing in the record rebuts this presumption; hence the Board finds that there is sufficient water available for the reasonably foreseeable needs of the subdivision under 10 V.S.A. §6086(a)(2).

Criterion 3:

6. The spring which serves the Appellants is located on the boundary line between Lots 3 and 4 of the project as shown on Exhibit #12. The waterline which runs from this spring to serve Appellants is a plastic pipe buried in the ground at a depth of approximately' three feet. At least a portion of the waterline is incorrectly shown on the Erosion Control Plan (see Exhibit #12). Instead, , trees, marked with blue paint, indicate the waterline on the site itself. The Quaglias propose to relocate a portion of this waterline along the edge of the limits of the proposed road right-of-way.

7. The source of water for the spring is either an adjacent stream and/or the groundwater in the overburden to a depth of approximately ten feet.

8. Well logs in the area indicate that water is most likely to be found at a depth of anywhere from 90 to. 250 feet and none of the proposed wells would tap the same water source as that of the spring which serves the Appellants.

9. The spring provides approximately 2800 gallons of water per day and a single family residence uses less than 300 gallons of water per day on the average.

10. The proposed subdivision road is approximately 90 feet from the spring at its closest point, however, no blasting would be necessary in the area of the spring.

11. The Board finds that the evidence does not support a finding that the source of water for the spring is the same as that proposed for the wells and hence that the Appellants' water supply will be utilized. Even if it were utilized, it will not cause an unreasonable burden on an existing water supply under 10 V.S.A. §6086(a)(3).

12. The Quaglias have also agreed to employ certain safeguards to insure that the spring is not adversely affected by the subdivision. These safeguards are set forth in Finding of Fact iii under Criteria 2-3 of the DEC's decision dated August 20, 1980.

Criterion 4:

13. An erosion control plan was submitted as part of Exhibit #12. Erosion control measures used as part of any relocation of the existing waterline will include the addition of topsoil and seeding.

14. The Board finds that the subdivision will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result under 10 V.S.A. §6086(a)(4).

Criterion 10:

15. The Mendon Town Plan, revised as of July 1, 1979 (Exhibit #20), suggests minimum lot sizes of two acres.

16. The Sherburne Town Plan, readopted as of August, 1981, suggests approximately three acre lots and single family homes in a so-called R-3 district (Exhibit $16). The land districts proposed by the Sherburne Land Use Plan are shown on Exhibit #18. The Property abuts both so-called Currier Road and Elbow or Old Coffee House Road (Exhibit #19). Elbow Road is shown on the Sherburne Land Use Plan (Exhibit #18) as being in an R-3 District. In order to determine the land use district in which the Property is located, the distance between the.intersection of Elbow and Currier Roads and the boundary between the R-3 and Forest Reserve districts as shown on Exhibit #18 was compared with the distance between the intersection of the same two roads and the southwestern most point of the Property as shown on Exhibit #19. The distance between the intersection of Elbow and Currier Roads and the point where the R-3 and Forest Reserve Districts in Sherburne intersect with the town line (between Sherburne and Mendon) is somewhere between 1250 feet and 1300 feet. The distance between the intersection of Elbow and Currier Roads and the southwestern corner of the Property is approximately 1275 feet. Although it is impossible to be more specific in the identification of the distances involved, due to imprecise scales used on Exhibits #18 and #19, the Board finds that the Property lies within a so-called R-3 District as indicated by the Sherburne Town Plan (Exhibit #16) and the Sherburne Land Use Plan (Exhibit #18). The Board believes that the Sherburne Town Plan specifies general areas of use. To require Applicants in this case to be more specific in satisfying the requirement of "conformance" with a duly adopted local plan as specified in 10 V.S.A. §6086(a)(10) would be "unwarranted". See In re Patch, No. 334-79 (S. Ct. Vt., decided September 1, 1981). 140VT158, 437A.2d121.

17. As noted previously, the minimum lot size of this subdivision is three plus acres with single family residences (Exhibit #1). The Board, therefore, finds that the subdivision is in conformance with the duly adopted local plans of the Towns of Mendon and Sherburne, Vermont.

IV. BOARD'S RESPOMSE TO COMMENTS AND EXCEPTIONS TO PROPOSAL FOR DECISION

On 10/2/81 the Board issued its Proposal for Decision on this appeal, pursuant to 3 V.S.A. §811. The Appellants and the Quaglias subsequently submitted comments to the proposed decision. After the Board's review of these comments and the oral argument heard on 1/12/82, the Board revises its decision. These revisions are contained in the Findings of Fact. The Board's response to certain issues raised by the parties' written comments and oral argument require some elaboration at this point.

1. Appellants' written Comment #5 re: legal interests in the Property

With reference to Appellants' written Comment #5, Condition #5 of Land Use Permit #1R0382, indicates:

> "Nothing in this condition shall be deemed to confer upon the permittee/applicant any power to enter upon any lands or undertake any construction on any lands without legal authorization of the owner or other person with authorization under the law to confer or grant such authority."

Act 250 requires that certain subdivisions or developments be reviewed against the criteria specified in 10 V.S.A. $6086. The Board's decision to issue a permit means only that if the Quaglias complete their subdivision as proposed and comply with the conditions imposed by Land Use Permit #1R0382, as amended by the Board, the subdivision will meet the standards for development set forth in Section 6086. It is not a determination that the Quaglias have such legal interest in the Property to create the subdivision as proposed nor, for that matter, that the subdivision complies with all other applicable statutes and regulations.

2. Appellants' written Comment #6 and oral argument re: admission of Certificate of Compliance

The Board again overrules Appellants' objection to the Board's evidentiary admission of the Certificate of Compliance submitted by the Quaglias. Appellants argue the Certificate was improperly admitted because the Quaglias failed to lay a proper foundation. The Quaglias counter that Board Rule 13 creates certain rebuttable presumptions when the Certificate of Compliance is obtained by an applicant. The Quaglias further argue that the rebuttable presumptions in Rule 13(C) do not prejudice Appellants' case since Appellants could have called witnesses to rebut the Certificate of Compliance.

10 V.S.A. §6002 provides that "the provisions of Chapter 25 of Title 3 shall apply unless otherwise specifically stated." Chapter 25 of Title 3, the Administrative Procedure

Act, requires that the "rules of evidence as applied in civil cases" be followed in contested cases. 3 V.S.A. §810. In its proposed Findings of Fact the Board found that the Certificate of Compliance was accepted pursuant to Board Rule 13(C) and pursuant to the public records exemption from the general rules of evidence. The Certificate of Compliance is a document issued by the Division of Protection of the Agency of Environmental Conservation as part of that Agency's statutory duty. As such it concerns matters to which the official who signed the document could testify if the official were called as a witness. When a Certification of Compliance is obtained and submitted by an applicant, the Board accepts the Certificate for the purpose that the plans and conditions included in the document regarding the applicant's proposed project comply with the Agency's specific rules and regulations. The Board does not accept the Certificate for the purpose of describing the applicant's proposed project.

The Board continues to interpret Rule 13(C) to specifically provide that a Certification of Compliance issued by the Agency of Environmental Conservation under 18 V.S.A. Chapter 23 creates certain rebuttable presumptions when obtained. Rule 13(E) further provides that the rebuttable presumption created by certifications filed under this rule may be challenged by any party and that such party must offer evidence to support its challenge.

3 V.S.A. §810, in addition to requiring that the rules Of evidence be followed, states that when "a hearing will be expedited and the interest of the parties will not be prejudiced substantially, any part of the evidence may be received in written form". The Board believes that all parties had notice of the provisions of Rule 13 and were consequently on notice of the rebuttable presumption created by a Certificate of Compliance. Inaddition, this issue was raised at hearings held during the fall of 1980 and again at hearings held during the summer of 1981. During that time Appellants could have made arrangements for the testimony of the Certificate's signee as a witness and/or provided other rebuttal evidence.

For all of these reasons, the Board has decided not to reverse its earlier acceptance of the Certificate of Compliance for use in this proceeding.

V. CONCLUSIONS OF LAW

The Quaglias applied for a permit to create and presented testimony in support of the creation of a 10 lot single family residential subdivision. Conditions 11 and 20 of Land Use Permit #1R0382 allow the construction of duplex housing units after issuance of a Certificate of Compliance by the Division of Protection of the Agency of Environmental Conservation. No evidence regarding these units was presented to the Board, consequently the Board has amended Conditions #11 and #20 of Land Use Permit #1R0382. If completed and maintained in conformance with all of the terms and conditions of the application and Land Use Permit #1R0382, as amended herein, the subdivision will conform to the Criteria set forth in 10 V.S.A. §6086(a). Pursuant to such section, the permit previously issued, as amended, is approved by the Board.

Jurisdiction over this permit shall be returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont this 11th day of February, 1982.

ENVIRONMENTAL BOARD

By Jan S. Eastman
Jan S. Eastman
Executive Officer

Members participating
in this decision:

Leonard U. Wilson
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Dwight E. Burnham, Sr.
Melvin H. Carter
Warren H. Cone