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

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

Findings of Fact and
Conclusions of Law
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. A pre-hearing conference was held on this appeal on October 15, 1980. Hearings were held on October 28 and November 25, 1980. 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 Kanlan, Esq.; and
Appellants, Madeline Fleming, George and Wanda Krantz, by John D. Hanson, Esq.

The hearings were recessed on August 25, 1981. On September 30, 1981, the Environmental 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.

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 1800 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 therdof 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 might 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' counsel is an example of guidelines issued by the Board. As guidelines, these are discretionary aids 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.

show Rule 10(b)

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. §0083(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. §6081. They claim that the Quaglias' failure to notify the Town of Mendon created an underlying jurisdictional defect and therefore, the DEC proceeding; 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

Having resolved these preliminary matters, 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 1(A), 1(B), 3 and 4. On appeal, Appellants requested the right to participate (in addition to Criteria 1(A), 1(B), 3 and 4) on Criteria 1(C), 2 and 10. The Quaglias objected to this last request. By order dated July 20, 1981, the Quaglias' motion to deny party status to Appellants on Criteria 1(C), 2, and 1.0 was denied.

Accordingly, the Criteria at issue on appeal are 1(A), 1(B), 1(C), 2, 3, 4, and 1.0. With respect to these criteria the Board finds as follows:

Criterion 1(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)(1)(A).

Criterion 1(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) (1). 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 1(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. 96086(a) (1) (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. 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. According to testimony on behalf of the Appellants, at least a portion of the waterline is incorrectly shown on the

Erosion Control Plan (see Exhibit #12). Instead, the waterline is marked by trees, marked with blue paint, 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 Board heard testimony on behalf of the Quaglias that 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. The wells that will serve the proposed subdivision are identified as drilled wells which the Quaglias anticipate will be drilled into bedrock. According to other testimony on behalf of the Quaglias, 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 Board heard testimony on behalf of the Appellants that there was "a strong possibility" that the spring was an artesian spring with a source of water in the bedrock. However, no definite source of water for the spring was identified.

10. Testing done on behalf of the Appellants indicates that the spring provides approximately 2800 gallons of water per day. Testimony heard by the Board indicates that a single family residence uses less than 300 gallons of water per day on the average.

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

12. 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 not 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).

13. 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:

14. 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.

15. 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:

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

17. Mrs. Quaglia testified that the Property was located in an R-3 district as specified in the Sherburne Town Plan (Exhibit #16). The Sherburne Town Plan suggestsapproximately three acre lot:; and single family homes in this area. The land districts proposed by the Sherburne Town Plan are shown on Exhibit #18. Elbow Road, located near the Property, is shown on Exhibit #18 as being in a so-called R-3 district.

18. 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 RESPONSE TO COMMENTS AND EXCEPTIONS TO PROPOSAL FOR DECISION

On October 2, 1981, the Board issued its Proposal for Decision in this matter pursuant to 3 V.S.A. $811. Comments were subsequently received on behalf of the Quaglias and the Appellants. Following review of the comments, the Board has made certain revisions to its decision. To the extent however that the comments arc inconsistent with the Board's Findings of Fact and Conclusions of Law, the comments have' not been incorporated into the Board's decision.

Appellants submitted nine comments on the Board's Proposal for Decision. The Board's response to most of these is evident from the changes made in its decision. Certain of the Appellants' comments require some elaboration here. With reference to 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 i.f 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.

With reference to Comment #6, the Board again overrules the Appellants' objection regarding the foundation for admitting the "Certificate of Compliance". Generally, all records and reports prepared by public officials pursuant to a duty imposed by law are admissible as proof of the facts stated therein even though they are not verified or authenticated by the person who actually made the entries. 30 Am. Jur. 2d, Evidence §991.

On its face, the document in question purports to be a Certificate of Compliance issued by the Division of Protection of the Agency of Environmental Conservation as part of that Division's statutory duty. If there was any question as to the authenticity of the document, this could have been resolved by cross-examination of the Quaglias or their representatives or by submitting other evidence demonstrating that it was not authentic.

V. CONCLUSIONS OF LAW

The Quaglias applied for and presented testimony in support of a 10 lot single family residential subdivision. Conditions 11 and 20 of Land Use Permit #1R0382 allow the construction of duplex houring 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 20th day of October, 1981.

ENVIRONMENTAL BOARD

By /s/ Jan S. Eastman
Jan S. Eastman
Executive Officer

Members, participating in this decision:
Leonard U. Wilson
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Melvin H. Carter
Donald B. Sargent
Priscilla Smith