

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: J. D. Apartment Corporation Findings of Fact, Conclusions
79 River Street. of Law and Order
Rutland, Vermont 05701 Land Use Permit #1R0408-3-EB

This decision pertains to an appeal filed on June 29, 1984, with the Environmental Board ("the Board") by the J. D. Apartment Corporation from the Findings of Fact, Conclusions of Law, and Amended Land Use Permit #1R0408-3 issued by the District #1 Environmental Commission on May 29, 1984. The amended permit authorized the Permittee to construct units 17 and 18 (in lieu of units 9 and 10) and to add a garage to unit 17 of the Mountain View Condominiums located on Dorr Drive, Rutland, Vermont. The Commission, however, withheld approval of an additional 32 units in that development.

On July 3, 1984, the Board notified the parties of its intent to designate its Chairman to act as administrative hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. §811. Having received no objection, a public hearing was convened on July 31, 1984, in Pittsford, Vermont, with Margaret P. Garland acting as hearing officer. The only party present at the hearing was the Permittee through its attorney, David D. Robinson, Esq.

The hearing was recessed on July 31, pending the Permittee's filing of a memorandum of law (on or before August 14), preparation of a proposed decision, a review of the record and deliberation by the full Board. The Permittee's memorandum was filed on November 21, 1984. No party having requested a hearing before the full Board, the record was determined complete and the hearing was adjourned on December 19. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

I. ISSUES IN THE APPEAL

In March of 1981, the Permittee sought Act 250 approval for a 40 unit condominium project but received a permit for only eight units in view of then-existing limitations of the Rutland Sewage Treatment Plant. Condition #3 of the 1981 permit required Commission approval prior to construction of the remaining 32 units, but stated that future review of those units would be limited to water quality issues. In March, 1984 the Permittee sought approval of the remaining 32 units, together with other less significant changes to the original approval. In its May 29, 1984 decision, the Commission denied approval of the additional units based upon an analysis of the City of Rutland Municipal Development Plan under Criterion 10 of 10 V.S.A. §6086(a).

The Permittee argues that the Commission is foreclosed from considering Criterion 10 issues because Condition #3 of the

original approval limited future review of additional units to sewage discharge and treatment issues.

II. FINDINGS OF FACT

1. On March 6, 1981; J. D. Apartment Corporation applied to the District #1 Environmental Commission ("the Commission") pursuant to 10 V.S.A., Chapter 151 (Act 250) for authorization to construct 40 condominium units and related facilities on Dorr Drive in the City of **Rutland**, Vermont. In its decision issued May 25, 1981, the Commission was unable to make the affirmative finding required by Criterion 1 of 10 V.S.A. §6086(a) in view of certain inadequacies in the **Rutland Sewage Treatment Plant.**, to which the project would discharge waste. The Commission, therefore, approved only eight units for construction.
2. Subsequent to the May 25, 1981 decision, the Permittee sought clarification of the status of the remaining 32 unapproved units. In response, the Commission issued Land Use Permit Amendment #1R0408-1 on July 20, 1981. Revised Condition #3 as set forth in the amended permit stated:
 3. Prior to the construction of any of the remaining (32) thirty-two units to be constructed, application for said construction shall be made to the District Environmental Commission. Future Commission review under that application for the additional condominium units shall be limited strictly to the water quality of Otter Creek and the level of treatment provided by the City of **Rutland** wastewater treatment plant, both as related to the additional proposed units.

In support of this revised condition, the Commission made the following finding:

In regard to condition 3 of Land Use Permit 1R0408, the permittee did not wish to have to build the eight units prior to applying for further units and wanted to insure that the future review of the Commission would be based on the status of the Otter Creek and the impact of this project and the **Rutland** wastewater treatment plant upon water quality of the Otter Creek. The

Commission considers that the applicant can apply at any time for the remaining thirty-two units, and that future review of those thirty-two units will be based strictly on the water quality issue.

3. The **Commission** affirmatively found in its May 25 decision that the project was in conformance with the **Rutland City Plan**.
4. On November 29, 1982, the Commission issued Land Use Permit Amendment **1R0408-2** authorizing certain changes to building configuration not relevant to this appeal. Condition **#3** referred to above was not modified by the November, 1982 decision and, by the terms of that decision, remained in effect.
5. On March 24, 1983, the Permittee sought an amendment to its permit authorizing additional building reconfigurations (not at issue in this appeal) and approval to construct the remaining 32 units. In its May 29, 1984 decision, the Commission approved the building reconfigurations but denied approval for the 32 additional units. The decision made an affirmative finding under Criterion 1(B) of 10 V.S.A. **§6086(a)** based upon a Certification of Compliance issued by the Department of Water Resources./1/
6. However, the May 29 decision found under Criterion 10 of 10 V.S.A. **§6086(a)** that the Municipal Development Plan for the City of **Rutland** (1980) provided for a density of no more than four housing units per acre in the district where the project is located. The Commission, therefore, concluded that it could approve no more than 18 units on the Permittee's 4.5 acre **site**. This decision was based upon a review of the same plan applicable to the project when first reviewed by the Commission in 1981.

III. CONCLUSIONS OF LAW

We have previously addressed the concept of res judicata as it applies to Act 250 permitting proceedings. See Re: John A. Russell Corporation, Land Use Permit #1R0257-1-EB, issued November 30, 1983. In Russell we concluded that a party in

/1/ Board Rule 19 allows commissions to accept various permits, including Department of Water Resources certifications of compliance, in lieu of evidence under applicable criteria as more specifically identified in the Rule.

Opposition to an industrial park which had been issued a land use permit-in 1977, could not, by way of a subsequent amendment request, relitigate issues previously raised and **addressed in the original permit proceedings.** 3

This concept has a firm basis in the Board's rules. Board Rule 21 which provides for partial review of project applications states, in pertinent part:

The findings of fact and conclusions of law made under the terms of this section shall be binding upon all parties during the period specified by the commission or board unless it is clearly shown that there was misrepresentation or fraud or that the facts relevant to the matter have so materially changed as to render the findings or conclusions clearly erroneous, contrary to the **purpcses** of the act and without basis in fact.

Board Rule 30 ("Approval or Denial of Applications") provided:

The board or commission shall make all findings and conclusions for which **sufficient** evidence was offered within 20 days of the final hearing. Such findings and conclusions shall constitute final action of the board or commission with regard to the applicable criteria and shall be valid and binding for a reasonable period as determined by the **commission or board.**/2/

Clearly then, the Board's Rules do not contemplate the rehashing of settled issues unless the Commission has fixed an expiration date for its findings of fact or unless the Rules provide **otherwise.**/3/

/2/ Board Rule 30 has been amended since the Commission's proceedings on Amendment Application #1R0408-3.

/3/ The Rules provide **some** exceptions. For example, Rule 35 pertaining to renewal of permits allows limited re-evaluation of issues previously addressed in original permit proceedings. The portion of Rule.21 quoted above also contains an exception. Finally, our decision in Russell allows reconsideration of criteria impacted by project changes presented in a permit amendment request.

In the circumstance of J. D. Apartment Corporation, the Commission's findings of fact in #1R0408 addressed Criterion 10 with a view toward the entire 40 unit condominium project. The Commission concluded that the project conformed with the 1980 City of **Rutland** Plan. The Commission did not fix any time limit to the viability of its finding under Criterion 10. We have previously found that in its proceedings on the #1R0408-3 amendment, the Commission applied the same municipal plan that was at issue in the original permit proceedings. Finally, there is no evidence of fraud, misrepresentation or changed circumstances justifying a reevaluation of Criterion 10. We must, therefore, conclude that the project cannot now be denied on the basis of a new interpretation of the 1980 **Rutland** City Plan.

This conclusion leaves only the issue of the proper disposition of this case. Under normal circumstances, we would issue a permit to the Appellant setting forth such conditions as appear reasonable in respect to issues presented to the Board and **incorporating** any conditions stated in the Commission decision appealed from. However, in this case, Appellant has not provided sufficient information upon which we could prepare an amended permit and the Commission decision does not speak of conditions it would have imposed absent the perceived Criterion 10 problem. Therefore, we will remand this matter to the District Commission with a request that it issue an amended land use permit with such conditions as it deems **appropriate./4/**

/4/The Commission should afford interested parties the opportunity to address matters which the Commission determines are appropriate for conditioning. For example, the fixing of construction completion and permit expiration dates may require additional evidence.

IV. ORDER

That portion of the Commission's May 29, 1984 decision pertaining to Criterion 10 of 10 V.S.A. §6086(a) is vacated. This matter is remanded to the Commission for the issuance of an amended land use permit authorizing construction of an additional 32 condominium units, subject to such conditions as the Commission finds appropriate.

Dated at Montpelier, Vermont this 19th day of December, 1984.

ENVIRONMENTAL BOARD

By:



Margaret P. Garland, Chairman

Ferdinand Bongartz

Lawrence H. Bruce, Jr.

Dwight E. Burnham, Sr.

Melvin H. Carter

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