

AA
enf 91-55

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

RE: Rome Family Corporation by Eugene Rakow, Esq. Biederman & Rakow 92 Allen Street Rutland, VT 05701	Findings of Fact, Conclusions of Law and Order Application #1R0410-3-EB
---	---

This decision pertains to a permit amendment request by Rome Family Corporation for approval of an **already-**constructed parking lot adjacent to the Ski Shack, a commercial facility at the intersection of Route 4 and the Killington Access Road in Sherburne. As is explained below, the Board has found that the as-built project creates unsafe traffic conditions and materially jeopardizes the safety of the intersection of Route 4 and the Killington Access Road because it limits sight distance to less than 560 feet looking west down Route 4.

I. SUMMARY OF PROCEEDINGS

On November 9, 1988, the District #1 Environmental Commission denied the Applicant's amendment request. The District Commission found, pursuant to 10 V.S.A. § 6086(a) (5) (Criterion 5), that the parking lot as constructed causes unsafe traffic conditions because the slope of the parking lot obstructs sight distances for cars turning onto Route 4 from the Killington Access Road. The District Commission also found, pursuant to 10 V.S.A. § 6086(a) (9) (K) (Criterion 9(K)), that these unsafe traffic conditions endanger public investments by jeopardizing safety on public roads. On November 18, 1988, the Applicant filed an appeal with the Environmental Board.

On December 22, 1988, a prehearing conference was convened by Environmental Board Chairman Leonard U. Wilson in **Rutland**, Vermont. On December 30, 1988, the Board issued a prehearing conference report and order summarizing the issues and setting a schedule for further proceedings in this matter. During January and February, 1989, a preliminary issue raised by the Town of Sherburne was briefed and decided. A further issue raised by the Applicant in a motion to limit filed January 23, 1989 was placed on hold pending evidentiary hearing.

An administrative hearing panel of the Board convened a public hearing on March 15, 1989, concerning the Applicant's motion to limit and the criteria at issue in the case, Acting Chair Jan S. Eastman presiding. Appearing at the hearing were Eugene Rakow, Esq. for the Applicant and Mark Sperry, Esq. for the Town of Sherburne. After taking testimony, the panel recessed the hearing pending various

10/11/90
416

filings and preparation of a proposed decision. On April 3, the Town filed requests for findings and a supplemental memorandum of law. On April 5, the Applicant filed proposed findings and conclusions of law.

On review of the evidence, the panel sent a proposed decision on the merits to the parties on June 12, 1989. At the request of the Town, the Board convened oral argument on August 23, 1989 in Montpelier, with the Applicant and the Town participating. Following oral argument, the matter was recessed to allow parties an opportunity to settle the matter. No settlement was reached. On October 24, the Board convened a site visit, with the Applicant and the Town participating. Following the site visit, the Board determined to reopen the hearing. The initial date for the hearing was delayed at the Applicant's request. The Board convened public hearings on April 25, 1990 in Montpelier, and May 23, 1990 in **Rutland**, with the Applicant and the Town participating. After taking testimony, the Board recessed the hearing pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision. The Town and the Applicant filed proposed findings and conclusions on June 28 and 29. The Board deliberated on July 17 in **Rutland**, and on September 26 in St. **Alban's** Bay. On September 26, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearings. To the extent the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein: otherwise, said requests to find are hereby denied.

II. ISSUES IN THE APPEAL

The issues before the Board are:

1. Whether the Town is estopped from asserting that the parking lot is unsafe because the lot, as built, was approved prior to construction by the Town of Sherburne Planning Commission.
2. Whether, pursuant to Criterion 5, the parking lot creates unsafe traffic conditions because it results in inadequate sight distances for motorists turning onto Route 4 from the Killington Access Road.

3. Whether, pursuant to Criterion 9 (K), any unsafe traffic conditions caused by the parking lot materially jeopardize the safety of Route 4 or the Killington Access Road.

III. FINDINGS OF FACT

1. The Ski Shack is a commercial facility owned by Rome Family Corporation and leased by Summersage Corporation. It is located on the southwest corner of the intersection of Route 4 and the Killington Access Road in Sherburne. Slightly to the west of this intersection, Route 100 intersects with Route 4. The parcel on which the Ski Shack is located is bordered by the Killington Access Road on the east and Route 4 on the north. A parking lot is located near the parcel's eastern border, next to the Killington Access Road. This parking lot extends north almost to Route 4 and west to a building which houses the Ski Shack business. Between the parking lot and Route 4 and the Killington Access Road are narrow strips of land.
2. The entrance to the parking lot is in front of the Ski Shack building, leading in from Route 4. On the east side of the parking lot entrance is a large commercial sign indicating the existence of the Ski Shack and the types of wares it sells. The sign is within a few feet of the parcel's boundary with Route 4. It is in front of the Ski Shack building.
3. In early 1981, the Applicant applied for approval of various improvements it proposed for the Ski Shack facility. These improvements included expansion of the Ski Shack's parking lot. The applications were made separately to the Town of Sherburne Planning Commission and the District #1 Environmental Commission.
4. The Town of Sherburne Planning Commission approved an expansion of the parking lot on March 17, 1981. The District Commission approved a parking lot expansion on August 5, 1981 in Land Use Permit #1R0410.
5. The District Commission's permit approved an expansion of the parking lot based on exhibits dated July 30, 1981, prepared by **Nimtz/Berryhill** Architects. These are Exhibits 21 and 22 submitted to the Board. Exhibit 22 shows specific sight lines allowing traffic on the Killington Access Road to see oncoming Route 4 traffic. The exhibit also contains sufficient indications of grading and contours to allow a construction contractor

to build in compliance with the exhibit. Although the contractor would have to make a few assumptions to so build, these assumptions would only cause potential variation in parking lot height of less than one foot. Accordingly, the permit, in approving the expanded parking, did so contingent on parking lot construction in compliance with the grading and contours specified in the exhibit.

6. The parking lot may have been constructed as early as fall 1981 but was built no later than fall 1982. The parking lot was not constructed in accordance with the exhibits submitted to the District Commission. **Its** grade was and is between three to four feet higher than the required grade that is evident from Exhibit 22.
7. On April 21, 1986, the Applicant filed a permit amendment application with the District Commission for the parking lot as constructed. The District Commission denied this application on November 9, 1988.
8. The intersection of Route 4 and the Killington Access Road consists of the Killington Access Road running from the south and terminating at Route 4, which runs east-west and perpendicular to the Killington Access Road.
9. The Killington Access Road has two lanes on the northbound side as it nears Route 4. The righthand or easternmost lane is legally required to be for right turns only. Similarly, the **lefthand** lane is for left turns only. Motorists driving north on the Killington Access Road are required to stop prior to entering Route 4. A stop bar has been painted on the pavement of the Killington Access Road (Exhibit #42).
10. The sight distance to the west along Route 4 from the stop bar located on the Killington Access Road is approximately 410 feet. Most motorists stop their cars at a point in front of the stop bar, part way into the intersection.
11. Route 4, near the intersection of the Killington Access Road, is a four-lane highway with a posted speed limit of 40 miles per hour (mph). It is designed to accommodate vehicles traveling at a 50 mph speed. Vehicles turning left onto Route 4 from the Killington Access Road have to cross two lanes of traffic. **For an** intersection such as that of Route 4 and the Killington Access Road, the American Association of Highway and Transportation officials (AASHTO) recommends safe sight

distances for vehicles turning left onto Route 4 of 560 feet at a 40 mph design speed and 680 feet at a design speed of 50 mph. These recommendations are for new or reconstructed roads. Route 4 narrows to a two-lane highway with a 50 mph posted speed limit east and west of the area of its intersection with the Killington Access Road.

12. The Killington Access Road leads to the Killington ski area. Route 4 is an important arterial east-west highway leading from New York state to I-89 in eastern Vermont. Large volumes of traffic pass through the intersection of Route 4 and the Killington Access Road, particularly during the ski season.
13. Traffic volume at the intersection increased from an average of 5938 vehicles per day in January 1981 to 8640 vehicles per day in December 1988. This represents an increase of approximately 45%.
14. The Vermont Agency of Transportation issues periodically a report known as High Accident Locations. This report has listed the Route 4/Killington Access Road/Route 100 intersection as having the 36th worst accident history of 938 Vermont intersections listed as being the subject of federal aid. Further, the intersection has been listed as having the 15th worst accident history in its class.
15. The sight line from the stop bar looking west on Route 4 is blocked by the northernmost portion of the parking lot, by cars parked on that portion, and by the sign described in Finding 2, above. This blockage is exacerbated during the winter, when snow is piled at the northern edge of the parking lot. Snow piles reduce sight distance looking west down Route 4 from the Killington Access Road to approximately 375 feet. Without snow piles, the sight distance is approximately 410 feet.
16. If all obstructions to sight distance caused by the Ski Shack facility were removed, a sight distance of at least approximately 645 feet would be achieved looking west down Route 4 from the Killington Access Road.
17. The parking lot as built creates unsafe traffic conditions. By blocking a portion of the view from the stop bar west on Route 4, the parking lot forces motorists to move beyond the stop bar into the Route 4/Killington Access Road intersection to obtain better sight distance. This movement creates a significant

risk of accident and injury to these motorists. The risk is increased by the relatively high-speed design of Route 4, the high traffic volume and historic traffic increase at the intersection, and the presence of a sign near the entrance to the parking lot which impedes the view looking west down Route 4 from the stop bar. Further, the parking lot appears to be a substantial factor in the intersection's high accident rate. Even if it is not such a factor, it is unsafe to force movement of vehicles out into such a dangerous intersection in order to achieve greater sight distance.

18. The conditions created by the parking lot materially jeopardize the safety of Route 4 and the Killington Access Road by subjecting motorists to increased risk of accident due to vehicles' moving part way into the intersection to achieve better sight distance when turning onto Route 4 from the Killington Access Road.
19. The Applicant and the Town have offered alternative remedies to the denial of the permit amendment application. The Applicant's remedy includes achieving a 440-foot sight distance for vehicles stopped behind the stop bar preparing to turn left from the Killington Access Road onto Route 4. The Town's remedy includes achieving a 680-foot sight distance for such vehicles.
20. The driver of a vehicle which is stopped at a stop bar is sitting in the vehicle at a point approximately six feet behind the stop bar and 3.75 feet above the elevation of the pavement.

IV. CONCLUSIONS OF LAW

Prior to evaluating whether the proposed permit amendment meets the requirements of Criteria 5 and 9(K), the Board must dispose of the Applicant's motion to limit.

A. Motion to Limit

The Applicant's motion is based on the theory of equitable estoppel, a judicial doctrine. This doctrine bars parties from taking positions contrary to positions earlier taken, under certain circumstances. In re McDonald's, 146 Vt. 380, 3214 (1985). The Applicant argues that the Town of Sherburne is estopped or barred from opposing the proposed permit amendment because the Town of Sherburne Planning Commission approved the parking lot as built.

The record in this case does not definitively show that the Planning Commission approved the parking lot as constructed. Nonetheless, even if the Planning Commission did so approve, the Town of Sherburne cannot be barred from opposing this permit amendment application on the basis of what the Planning Commission did. In Act 250, the Legislature treats towns and town planning commissions as distinct entities separately entitled to notice and party status. 10 V.S.A. §§ 6084(a), 6085(c). Thus, for purposes of Act 250, the Town of Sherburne and the Planning Commission are separate parties, and as a matter of law the Town cannot be estopped by reason of a Planning Commission action.

B. Criteria 5 and 9(K)

In relevant part, Act 250 provides that, prior to issuing a land use permit, the Board must find that a proposed project will not create unsafe traffic conditions (Criterion 5) or materially jeopardize or interfere with the safety of public highways (Criterion 9(K)). 20 V.S.A. § 6086(a) (5), (9) (K). With respect to Criterion 5, the Applicant must come forward with enough evidence for the Board to make a positive finding, but the ultimate burden of proof is on the opponent of a proposed project. 10 V.S.A. § 6088(b). With respect to Criterion 9(K), the burden of proof is squarely on the Applicant. 10 V.S.A. § 6088(a). The Board may impose appropriate conditions if it issues a land use permit. 10 V.S.A. § 6086(c).

The Board concludes that the parking lot creates unsafe traffic conditions and materially jeopardizes the safety of Route 4 and the Killington Access Road. The parking lot does so by creating an obstruction which limits sight distance west along Route 4 for cars turning left onto that route from the Killington Access Road. The parking lot limits such sight distance to below recommended standards and forces vehicles to move beyond the stop bar on the Killington Access Road into the Killington Access Road/Route 4 intersection in order to obtain better sight distance down Route 4. This condition creates a risk of accident at an intersection which, during the time the condition has been in existence, has been cited by the Vermont Agency of Transportation as one of the most accident-prone in the state. Although it is impossible to conclusively determine from the record that the condition has been responsible for the high accident rate, even if it is not so responsible, the Board cannot condone forcing vehicles into an intersection known to be dangerous. **Further, this danger is** increased by the high-speed design of Route 4, the high traffic volume at the intersection, and the presence of a sign near the entrance to the parking lot which partly

obstructs the view down Route 4 west from the stop bar on the Killington Access Road.

The Board recognizes that it is relying in part on AASHTO sight distance standards which are intended primarily for new or reconstructed roads, and that Route 4 and the Killington Access Road are existing roads. The AASHTO standards, however, are based on safety. Further, the Board has previously found that these standards are informative with regard to conditions on existing roads as long as other factors such as historical function and safety record are taken into account. Re: Old Mill Pond, Land Use Permit #2S0753-FB, Findings of Fact, Conclusions of Law and Order at 5 (April 24, 1989).

Based on the AASPTO standards and the intersections's history and safety record, this parking lot will remain unsafe unless it is reconstructed such that a 560-foot sight distance is achieved for a driver who is in a vehicle stopped at the stop bar preparing to turn left from the Killington Access Road onto Route 4. The point from which this distance would be achieved would have to be six feet behind the stop bar and 3.75 feet above the elevation of the pavement on the Killington Access Road. All obstructions to achieving such a sight distance would have to be removed, including parked cars, any necessary regrading, and the removal of signs. No snow could be piled in such a way as to obstruct this sight distance.

The Board has determined that a 560-foot sight distance is necessary to protect traffic safety rather than a 680-foot sight distance as recommended by the Town. The Board believes that, in this case, it should be guided by the posted speed limit of 40 mph instead of the design speed of 50 mph (see Finding 11, above). The reason for this conclusion is that, east and west of the area of the Route 4/Killington Access Road intersection, Route 4 has a posted speed limit of 50 mph. Vehicles traveling into the area of the intersection encounter a 40 mph posted speed limit. The Board infers therefore that vehicles are intended to slow down as they reach the intersection for safety reasons. Further, the 40 mph posted speed limit is enforceable through the legal system. Accordingly, the Board believes that it would be unreasonable to require this Applicant to achieve a sight distance of greater than 560 feet.

The parking lot as-built does not achieve a sight distance of 560 feet for drivers on the Killington Access Road looking west down Route 4. Instead, the parking lot limits this sight distance to 410 feet without, and 375 feet with, snow piles. Accordingly, the parking lot materially

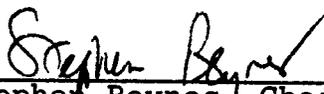
jeopardizes the safety of the intersection of Route 4 and
the Killington Access Road, and the application is denied.

V. ORDER

Application #1R0410-3-EB is denied.

Dated at Montpelier, Vermont this 11th day of October,
1990.

ENVIRONMENTAL BOARD



Stephen Reynes, Chairman
Ferdinand Bonqartz
Elizabeth Courtney
Rebecca Day
Arthur Gibb
Charles Storrow
W. Philip Wagner

FF 1R0410-3-EB (19)