Vermont Environmental Board
10 V.S.A., Chapter 151

RE: Sunrise Group by
F. Ray Keyser, Esq.
Keyser Crowley Banse & Facey
P.O. Box 975
Rutland, VT 05701

Findings of Fact, Conclusions of Law and Order:
Land Use Permit Application #1R0501-8(A)-EB

This decision pertains to appeals filed with the Environmental Board ("the Board") on March 12, 1985, by the Shrewsbury Planning Commission and April 1, by the Sunrise Group, from the March 6, 1985 decision of the District #1 Environmental Commission ("the Commission") granting Land Use Permit Amendment Application #1R0501-8(A). That application seeks authorization to conduct limited site clearing prior to the issuance of a land use permit for the second phase of a housing project consisting of 104 housing units and associated facilities.

A public hearing was convened in this matter on April 10, Chairman Darby Bradley presiding. The following participated in the hearing:

Applicant Sunrise Group by John Facey, Esq.;
Appellant Shrewsbury Planning Commission by Peter Cosgrove, Chairman, and Jonathan Gibson and Nancy Bell.

In addition, the Agency of Environmental Conservation (AEC) appeared in this matter through its attorney, Stephen Sease, Esq., by the filing of a prehearing statement on April 9, 1985. The hearing was recessed on April 10, pending a review of the record for completeness and deliberation. On April 25, the record was determined complete and this matter was adjourned. 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. To the extent that the Board agreed with and found necessary requests to find filed by the parties, they have been incorporated herein; otherwise, those requests to find are denied.

I. ISSUES IN THE APPEAL

The principal issue presented by this appeal is whether it was proper for the Commission to issue a permit authorizing what all parties concede was the commencement of construction on a housing project, prior to the close of evidence on and issuance of a land use permit for the housing project. The Planning Commission further argues that the Commission erred in not requiring the Sherburne Corporation to be a co-applicant with the Sunrise Group in that the Corporation has a substantial property interest in lands involved in the housing project.

Finally, the Planning Commission believes the District Commission erred in denying its Motion for Stay on March 14, and that request was renewed on the same date before the Board.

Sunrise raises two preliminary, procedural issues. First, by way of a cross-appeal, Sunrise argues that the Commission erred in allowing the Shrewsbury Planning Commission to participate as a so-called "statutory party." Second, by way of a motion filed April 9, Sunrise argues that, because it has completed the tree cutting authorized in the Amended Permit, this appeal is now moot.

II. FINDINGS OF FACT

1. On November 26, 1984, the Sunrise Group filed Land Use Permit Application #1R0501-8 with the District #1 Environmental Commission, seeking approval for 104 condominium dwelling units (eight units in four buildings and 96 units in another four buildings), a 4,520 square foot multi-purpose building (to include a 55-seat restaurant, a retail store, exercise facilities and pool), a 1,400 foot extension of Sunrise Mountain Drive, two ponds, tennis and paddle tennis courts, ski trails, underground utilities, pedestrian walkways, parking lots and driveways, landscaping and lighting. The project site is located southeast of the Killington Bear Mountain Base Lodge and west of Route 4 in Sherburne, Vermont.

2. On December 18, 1984, the Commission convened a public hearing to consider application #1R0501-8. The hearing was reconvened on January 4, 1985, and was recessed on that date, pending Sunrise's submission of additional information.

3. One outstanding item to be submitted was a certification of compliance which Sunrise expected to be issued by the Department of Water Resources. Sunrise intended to rely upon this certification under Board Rule 19 in lieu of proceeding with affirmative evidence under Criterion 1(B), waste disposal. A certification had not been issued as of the time the Commission issued its decision in Application #1R0501-8(A) but it apparently was issued prior to this Board's April 10 hearing.

4. The Commission scheduled a hearing for April 12, to consider the certification of compliance but had not, as of the date of the Board's hearing, issued any findings of fact, conclusions of law, order or land use permit with respect to #1R0501-8. The Commission has indicated that "the Commission [is] reasonably sure that approval of the

entire project would be possible in the not too distant future as evidenced by correspondence from the Agency of Environmental Conservation which indicated that the Certification of Compliance would be soon forthcoming . . . ."/1/

5. In response to the delay in AEC's issuance of the necessary certification, Sunrise filed Amendment Application #1R0501-8(A) with the Commission on February 13, 1985. The application sought authorization "[t]o proceed with site clearing this winter season in accordance with our erosion control plans." The site clearing constituted the commencement of construction on the project proposed in Application #1R0501-8: the clearing was confined to areas associated with the locale of improvements identified in that application; the cutting was conducted as a clearing operation, not as a commercial logging operation/2/; and the site and erosion control plans submitted in relation tc the application for permission to clear were substantially similar to those which supported the underlying project (#1R0501-8).

6. The Commission approved Application #1R0501-8(A) and issued a Land Use Permit on March 6, 1985, authorizing Sunrise to "conduct limited site clearing (tree cutting only) as specified in the plans prior to the issuance of the land use permit for the second phase of the Sunrise project in Sherburne, Vermont. This phase consists of 96 one-bedroom dwelling units, four four-bedroom townhouses ..." and related support facilities. Clearing commenced on March 11, and was completed on March 30, 1985. Sunrise did not clear the areas surrounding two of the proposed buildings despite being authorized to do so by the permit.

7. Sunrise desired to perform site clearing on an expedited basis for two reasons: Sunrise believed that performance of this task while the ground was still frozen would diminish the likelihood of erosion; Sunrise also secured a three week head start, enabling it to proceed more rapidly when the construction season commences. No site preparation beyond tree removal was conducted: stumps'were not removed and no excavation or grading was performed, although brush was burned on the site.

/1/ See Findings of Fact and Conclusions of Law in #1R0501-8(A), page 3.

/2/ The trees that were cut ranged from saplings to 10-12 inches in diameter. While some logs were cut for firewood, most trees were burned at the site.

III. CONCLUSIONS OF LAW

A. Preliminary Issues

The first issue which the Board must decide is whether the District Commission erred in granting party status to the Shrewsbury Planning Commission under Board Rule 14. As the discussion below will make clear, the Board views this case as an appeal of an interim order allowing preliminary site preparation of a larger project (Application #1R0501-8) to commence construction prior to the issuance of an Act 250 permit. Because the principal case is still pending before the District Commission, the Board will overturn the Commission's decision on party status only if the Commission has made a clear error in interpreting Rule 14 or has abused its discretion in granting party status. See Re: Paul and Dale Percy, Land Use Permit Application #5L0799-EB, interlocutory appeal order issued March 27, 1985.

Although the details of the principal (#1R0501-8) case are sketchy, it does appear that the Shrewsbury Planning Commission has been an active participant in those proceedings, and may have assisted the District Commission by providing testimony, cross-examining witnesses and/or offering other evidence relevant to the provisions of 10 V.S.A. § 6086(a). It also appears that land owned by one of the co-applicants, International Paper Realty Corporation, and by the Sherburne Corporation, which holds easements through the project site connecting it to the Killington Ski Area, does border the Shrewsbury town line. Under the circumstances, the Board is unable to conclude that the District Commission has made a clear error in law or has abused its discretion in granting party status under Rule 14.

The Board also declines to decide the question of whether the Sherburne Corporation should have been required to be a co-applicant in the principal case. Because the principal case is still pending, it would be inappropriate for the Board to interfere with matters which are still within the Commission's purview. See Re: Frank W. Whitcomb Construction Corporation, Declaratory Ruling #159 issued September 26, 1984, and Re: UniFirst Corporation, Declaratory Ruling #166 issued February 20, 1985.

The Board would point out, however, that should the parties still believe that the District Commission's treatment of these two matters is in error at the time the Commission issues its

final decision on Application #1R0501-8, they may pursue the appellate remedies, which will be heard de novo, as provided by 10 V.S.A. § 6089./3/

The Applicant's mootness claim stands in a different posture. We assume, for the sake of argument, that "there must be an actual controversy between the parties to confer jurisdiction." Town of-Cavendish v. Vermont Public Power Supply Authority, 141 Vt. 144, 147 (1982). However, we conclude that this controversy is not moot for two reasons. First, Sunrise is still theoretically authorized by Permit #1R0501-8(A) to conduct further tree removal; as we found in Finding #6, Sunrise did not clear the site of two buildings. While such activity would require an extension of the construction completion date set forth in Permit Condition #5 (unless "frozen ground conditions allow further clearing operations"), the permit is not scheduled to expire until May 1, 1985.

Second, it is the essential nature of a de novo appeal that the Board has the authority to alter the terms of a permit issued by the District Commission, impose additional conditions, or deny the permit if Act 250's criteria are not satisfied. If a permit holder chooses to commence construction during the pendancy of an appeal, the Board may subsequently require an applicant to alter or reverse the work which has been completed, if such is not consistent with the Board's decision on appeal. No permit is automatically stayed by the filing of an appeal (see Board Rule 42), and the permit holder is free to proceed with construction without violating Act 250. However, he does so at his own risk. As the Vermont Supreme Court stated in Preseault v. Wheel:

> Any construction commenced by the developer prior to the issuance of all the necessary permits and prior to a final judicial determination of the validity of the initial issuance of these permits is commenced at his peril.

132 Vt. at 254

Third, the Vermont Supreme Court has recognized'the exception to the mootness doctrine articulated in Roe v. Wade, 410 U.S. 113 (1973): mootness is not an impediment "for situations which are 'capable of repetition, yet evading

---

/3/ We note in passing that AEC entered its appearance in this appeal, generally supporting the Planning Commission's position. Therefore, it would appear that, whether or not the Planning Commission is a proper party, the pending appeal would remain viable.

review."' In re J.S., 139 Vt. 6, 7 (1980). We are here presented with such a situation. Site clearing can occur within a time frame far shorter than the period it customarily takes to process an appeal before this Board, as evidenced by this case: clearing occurred within a twenty day period and, despite the filing of the appeal within six days of the Commission's decision, cutting was completed prior to the convening of our hearing. Because 10 V.S.A. §§ 6085 and 6089 direct that we provide published notice and that parties.be given ten days advanced notice of any hearing, it is evident that the factual context of this appeal is one which is capable of repetition yet would continue to evade review.

Finally, we also decline to act on the Planning Commission's stay request. That request was first filed with the District Commission and was denied on March 14. The request was renewed before the Board shortly thereafter. However, the Board was unable to schedule a hearing, conforming with the notice requirements of 10 V.S.A. § 6085, prior to the March 30 deadline imposed in Permit #1R0501-8(A). Because the Applicant represented at our April 10 hearing that it had terminated all cutting, no useful purpose would be served by issuing a stay.

B. Site Clearing Approval

10 V.S.A. § 6081(a) states, in pertinent part: "No person shall ... commence construction on a ... development, or commence development without a permit." 10 V.S.A. § 6001(3) defines the term "development" to mean, inter alia, "the construction of improvements for commercial or industrial purposes on more than one acre of land in a municipality which has not adopted permanent zoning and subdivision bylaws." Finally, Board Rule 2(C) defines the term "commencement of construction" as follows:

> "Commencement of construction" means the construction of the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a right-of-way or in any way incidental to altering the land according to a plan or intention to improve or to divide land by sale, lease, partition, or otherwise transfer an interest in the land.

Sunrise readily concedes that the clearing activity performed in March was the first step in its plan to develop the second phase of its condominium project. Our findings support this conclusion: clearing was confined to areas where Sunrise plans to construct improvements, those improvements cannot be installed without the prior removal of vegetation, the cutting

was not conducted as a logging operation, and the cutting and erosion control plans were substantially similar to those submitted in support of the underlying application #1R0501-8.

10 V.S.A. § 6086(a) requires, in no uncertain terms, that the Commission make all findings identified in subparagraphs (1) through (10) before granting a permit. 10 V.S.A. § 6002 provides that the Vermont Administrative Procedure Act (3 V.S.A., Chapter 25) applies to the Commission's permit proceedings. 3 V.S.A. § 812 provides, in part:

> A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated.

Furthermore, Board Rule 30(A) requires that Commission decisions "contain findings of fact and conclusions of law specifying the reasons for the decisions reached on all issues for which sufficient evidence was offered."

In short, construction cannot commence without a permit, no permit can be issued until the Commission makes affirmative findings in respect to all Criteria identified in 10 V.S.A. § 6086(a), and those findings must be provided to all parties. As we have previously noted in Re: Blair Family Trust, #4C0388-EB issued June 16, 1980:

> Despite the broad discretion granted to the District Commissions to condition permits to insure compliance with the substantive criteria of the Act, the District Commission does not have authority to grant a land use permit when the applicant has not met his burden of proof on the criteria of the Act. The Act contemplates the satisfaction of the criteria at a common point in time, or over a relatively narrow time period. Neither the Commission nor the Board is authorized to grant a permit on the "condition" that the criteria of the Act be satisfied at some unspecified future time.

The Commission's proceedings in this matter fall far short of the requirements outlined above. At the time Permit #1R0501-8(A) was issued, the proceedings on the underlying permit application were in recess, no certification of compliance had apparently been issued for the project by AEC, the record was not closed in respect to Criterion 1(B) - waste disposal issues, and little or no evidence had been offered by the Applicant in respect to those issues. Other parties to the

proceedings had not yet had the opportunity to hear or respond to the Applicant's Criterion l(B) evidence, and the Commission had not rendered any findings or conclusions with respect to that or any other § 6086(a) issue. The Commission, therefore, breached its statutory duties by authorizing the commencement of construction prior to hearing evidence on all criteria and making findings on all issues.

The Commission has, in essence, prejudged the Applicant 's likelihood of success in respect to Criterion l(B) without hearing any evidence in respect to this issue. In doing so, the Commission has deprived other parties of rights guaranteed by law: 3 V.S.A. § 809 requires that all parties be given the opportunity to respond to, and present evidence and argument on, all issues involved in a contested case. See Town of West Rutland v. Highway Board, 130 Vt. 91 (1971) and Petition of Green Mountain Power Corporation, 131 Vt. 284 (1973). Because 10 V.S.A. § 6086(a) makes waste disposal issues a mandatory component of all land use permit proceedings, the Commission's issuance of Permit #1R0501-8(A) deprived parties of an entitlement to hear and respond to the Applicant's waste disposal evidence prior to the commencement of development.

Furthermore, the Commission's action carried with it the risk that Criterion l(B) issues would not ultimately be resolved in the Applicant's favor: at the time #1R0501-8(A) was issued, there was no guarantee a certification would be issued or that the Applicant could meet its burden in respect to Criterion l(B). Should the Applicant ultimately fail in its attempt to secure a land use permit there is no way that the site can be restored to its original condition.

We further disagree that issuance of site clearing approval was a rational response to the Applicant's time constraints. First, from a purely environmental perspective, little was gained in allowing tree removal. We agree that winter-time tree removal produces fewer negative impacts than removal in other seasons. However, the Applicant still must grub the site by removing stumps and other debris, and earth moving and excavation must occur to prepare the site for foundations, roads, and other improvements. Because these activities will occur (if at all) during non-winter months, the advantage gained by tree removal is minimal. Second, the Applicant had available to it two alternative avenues, both of which would have complied with the statute and the Board's rules. The Applicant could have taken necessary steps to secure a certification from AEC/4/

/4/ It should not be entirely unexpected by Sunrise that as of February 13, 1985, a certification would not be issued by AEC for an application filed in November of 1984, in relation to a project of the magnitude proposed in Application #1R0501-8.

or the Applicant could have proceeded under Board Rule 19(D) to meet its burden of proof under Criterion l(B) through affirmative evidence without the certification.

We are now left with the issue of designing an appropriate remedy. We conclude that Application #1R0501-8(A) should not have been granted by the Commission and cannot be granted on appeal by this Board: Sunrise submitted no evidence in respect to Criterion l(B) during the appeal proceedings. Therefore, land use permit application #1R0501-8(A) is denied. However, because the Commission has not yet taken final action with respect to Application #1R0501-8, it is premature to consider other remedies such as site restoration. We will instead remand this matter to the Commission for the selection of a remedy appropriate to its final decision on the underlying application.

IV. ORDER

Land Use Permit Amendment Application #1R0501-8(A)-EB is denied. Jurisdiction over this matter is returned to the District #1 Environmental Commission to determine an appropriate remedy upon the conclusion of its proceedings in respect to Application #1R0501-8.

Dated at Montpelier, Vermont this 29th day of April, 1985.

VERMONT ENVIRONMENTAL BOARD

By: Darby Bradley

Darby Bradley, Chairman
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Melvin H. Carter
Donald B. Sargent