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

RE: Killington, Ltd.
Killington Road
Killington, VT 05751

MEMORANDUM OF DECISION
Application #1R0584-EB

International Paper Realty Corp.
77 West 45th Street
New York, NY 10036

On June 4, 1986, Killington, Ltd. ("Killington") filed an appeal with the Environmental Board from the April 3, 1986 decision of District Environmental Commission #1 ("Commission") that Killington's application for a snowmaking pond was not complete, and from the May 5, 1986 decision of the Commission not to reconsider its April 3 decision.

On June 25, the Chairman of the Board conducted a Prehearing Conference. The Applicant Killington was represented by Carl Spangler and Allan Keyes, Esq. Requests for party status were made by the Town of Bridgewater Planning Commission ("BPC"), the Town of Shrewsbury ("Shrewsbury"), the Shrewsbury Planning Commission ("SPC") and the Vermont Natural Resources Council ("VNRC"). Killington objected to these party status requests and to the presence of the Executive Officer at the proceedings. Killington raised three preliminary issues that were identified in its Notice of Appeal. Those present at the Prehearing Conference agreed that these legal issues should be resolved before proceeding with an appeal on the merits and that there was no need for an evidentiary hearing. The evidence consists of the record before the District Commission, submissions to the Superior Court in the matter currently pending before the court on these issues, and any legal briefs submitted to the Board before July 9, 1986.

On July 9, 1986 the Environmental Board convened a public hearing. Oral argument on party status and the three legal issues was presented by Killington, Two Rivers-Ottauquechee Regional Planning Commission ('TRORPC'), BPC, Shrewsbury, SPC, and VNRC. The hearing was then recessed pending deliberation and decision by the Board.

FINDINGS OF FACT

1. On or about January 29, 1986, Killington submitted to the Commission an application for a land use permit to construct a four-acre snowmaking pond along Madden Brook in the Town of Mendon, Vermont.

2. Notice of the application was sent to all statutory parties.

3. On February 7, 1986, the coordinator wrote to the Applicant requesting more information.

4. On February 18, 1986, the coordinator acknowledged receipt of the additional information and deemed the application complete. A public hearing was scheduled for March 17.

5. On March 6, 1986, VNRC sent a letter to the Commission requesting that the Commission grant VNRC party status and, prior to convening the hearing, determine whether Killington's application was complete.

6. On March 11, 1986, Shrewsbury and SPC petitioned the Commission to dismiss Killington's application for lack of completeness and to postpone the scheduled hearing until the completeness of the application was reviewed.

7. On March 12, 1986, TRORPC and BPC wrote to the Commission in support of Shrewsbury's motion to dismiss Killington's application and to postpone the scheduled hearing.

8. On March 17, 1986, the Commission met at the time and place specified in the notice of hearing. At that time, the Commission afforded Killington the opportunity to present an overview of the proposed project. The Commission also heard arguments from several interested parties that they believed the application was not complete and that the snowmaking pond was the first step in a larger plan by Killington to develop the area known as "Parker's Gore East.' The Commission also listened to Killington's response as to why the application was complete. No decision was made on the requests for party status and witnesses were not placed under oath and subjected to cross-examination. Before adjourning, the Commission orally informed Killington that the application was not complete.

9. On April 3, 1986, the Commission issued its Prehearing Order to Complete Application.

10. On April 17, 1986, Killington filed a Motion to Reconsider the Commission's Order to Complete Application.

11. On May 5, 1986, the Commission denied Killington's Motion to Reconsider.

12. On May 13, 1986, Killington sued the Commission in Rutland Superior Court, seeking an injunction or issuance of an extraordinary writ to compel the

Commission either to issue a permit or to convene the hearing on the merits. No decision has as yet been rendered by the Court.

CONCLUSIONS OF LAW

The preliminary legal issues raised by Killington are:

1. Do the orders of April 3, 1986 and May 5, 1986 amount to final orders from which appeals can be taken to the Board pursuant to 10 V.S.A. § 6089 and Environmental Board Rules 31(A) and 40?

2. Did the Commission have a duty to hold a hearing on the merits of Killington's application?

3. Is Killington entitled to the issuance of an Act 250 permit as a matter of law, on account of the Commission's failure to timely grant or deny the application?

1. The first question raises the issue of whether the Board has jurisdiction over this appeal. 10 V.S.A. § 6089 provides that appeals from district commission decisions are to the Board, and that an appeal from the Board "will be allowed for all usual reasons, including the unreasonableness or insufficiency of the conditions attached to a permit. An appeal from the district commission will be allowed for any reason ...." 10 V.S.A. § 6089(d).

Regardless of the reason for an appeal, the usual rule is that decisions must be final before they can be appealed, Neither 10 V.S.A. § 6089 nor Board Rule 40 specifies which decisions of a commission are final for purposes of appeal.

The law in Vermont regarding finality of court judgments is that a judgment is final when "the case is so far ended that [if it is not appealed] it will go out of court." Beam v. Fish, 105 Vt. 96, 97 (1933). Since a commission proceeding is not a trial that ends in "judgment," but rather a hearing that ends in the issuance or denial of a permit, one must analyze the effect of that decision in order to determine whether the Commission's denial of Killington's reconsideration motion was final for purposes of appeal. When the Commission refused to go forward on the merits of Killington's application unless Killington submitted additional information, the Commission in effect dismissed Killington's application. Although Killington would not have to submit a completely new application in order to have the Commission go forward with its review,

the Commission will not hold a hearing on Killington's application unless Killington submits the information required. In essence, the Commission's action has the same effect as a court's dismissal of a lawsuit. A court's order of dismissal of a case is a final order for purposes of appeal.

Therefore, we conclude that since the effect of the Commission's action is the same as if it were dismissed, its order of May 5, 1986 is an appealable order. Killington filed its appeal within 30 days of the issuance of the Commission's Denial of Motion to Reconsider. Therefore, the appeal is properly before the Board and the Board has jurisdiction to hear it.

2. As framed by Killington, the second legal issue to be decided, whether the Commission had a duty to hold a hearing on the merits of Killington's application, assumes that the Commission did not actually hold a hearing. An examination of the transcript of the March 17 "meeting" suggests that a hearing was held for purposes of meeting the due process requirements established by the Administrative Procedure Act, in that all parties had the opportunity 'to respond and present evidence and argument on all issues involved." 3 V.S.A. § 809(c). In addition, the proceedings were recorded and thereafter transcribed. 3 V.S.A. § 809(f).

The Board does not believe, however, that the issue of whether the March 17 "meeting" was a formal hearing or a prehearing conference makes any practical difference, for the reasons set forth under section 3, below.

Regardless of the nature of the March 17 "meeting," there is no dispute that a hearing was not convened on the merits or that the Commission decided, on its own motion, to raise the issue of completeness of the application.

10 V.S.A. § 6083 provides that "[a]n application for a permit shall be filed with the district commissioner as prescribed by the rules of the board ..." and sets forth the minimum documents and information that must be included. By implication, Board Rule 10(D) authorizes the coordinator to review applications and determine whether they are complete. The rule also provides that once the commission convenes a hearing on the merits, the application is deemed complete. . .

When an application is filed, the coordinator reviews it for completeness under Rule 10(D). When the coordinator has received sufficient information to convene a hearing, he or she deems the application to be complete. That decision is

simply an administrative decision for purposes of moving forward to the next procedural step. The coordinator's decision that an application is complete is not appealable./1/

After the Commission has warned a hearing, it formally convenes the hearing on the application. It takes the appearances of the statutory parties, rules on requests for party status under Rule 14(B), and decides other preliminary issues raised by the parties. The preliminary issues may include, among other things, whether other persons should sign the application as co-applicants (Rule 10(A)), whether the Commission should hold joint hearings with another affected governmental agency (Rule 15), and whether additional or supplementary information is necessary to fairly and properly review the proposal (Rule 10(B)).

The purpose of Rule 10(B) is to make the hearing process more efficient. If thecommission realizes at the outset of a hearing that there are significant gaps in the information submitted in an application, such that the commission cannot fairly and properly review the proposal, it may require this information to be submitted before the hearing on the merits begins. However, a commission should not expect an applicant to submit every piece of evidence relevant to its decision in advance of a hearing. The need for efficiency in the hearing process must be balanced with the right of an applicant to receive a decision on the merits of the project being proposed. If a commission

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/1/ Killington argues that under Rule 10(D), a coordinator's decision that an application is complete can be appealed under Rule 3 as an advisory opinion. Killington has misconstrued the plain language of the rule, which states: "A coordinator's decision that an application is substantially incomplete is an advisory opinion subject to review as provided for in Rule 3(C) of these Rules." [Emphasis added.] The lack of a provision for appeal of a coordinator's decision that an application is complete was designed so that an application would not get held up by appeals before it even got to the hearing stage of the permit review process. Thus, not allowing appeal or review of the coordinator's determination of completeness is consistent with the overall intent of the legislature and of the Board to allow a permit application to be accepted and acted upon as quickly as possible and to provide for participation of parties other than the applicant only after a hearing is convened and proper parties to the proceedings identified.

concludes during the course of the hearing on the merits that additional information is needed, Rule 20(A) gives it ample authority to require that information be submitted. If the information is not submitted, and the commission finds that the information is necessary to make an adequate evaluation of an application under the criteria of 10 V.S.A. § 6086(a), it must deny the application. It is therefore in the applicant's best interest to provide the commission with the information requested.

The issue which the Commission was essentially deciding in its April 3 and May 5 orders was the scope of the project; that is, whether the four-acre snowmaking pond was the first step in a larger plan to develop the area known as "Parker's Gore East." A decision on the scope of a project goes to the merits of the application rather than to the question of whether it is complete. That decision must be made based upon factual information which, unless stipulated to by the parties, has been-elicited by sworn testimony and subjected to cross-examination. Since the Commission's decision in this case was based upon oral representations and other information provided by persons seeking party status, rather than upon testimony given under oath and subjected to cross-examination, the procedure was in error. The Commission should have convened the hearing on the merits. The Commission may subsequently decide that it needs information about Killington's projected use of lands adjoining the four-acre site in order to make an adequate evaluation of the application. If so, Rule 20(A) clearly authorizes the Commission to require an applicant to submit the relevant supplementary data.

The Board will remand this case to the Commission with instructions to convene a hearing on the merits of the application. After deciding party status issues and other preliminary matters that may arise, the Commission shall permit Killington to present, under oath and subject to cross-examination, an overview of the proposed project including, if Killington desires, testimony about its plans for lands adjoining the project site. Other parties may then present sworn testimony, subject to cross-examination, on any larger plans they believe the applicant may have. The Commission may rule on the scope of the project at that point, as an interlocutory order, or at the conclusion of the presentation of evidence on the ten criteria, In either case, the decision on the scope of the project is reviewable by the Board, either as an interlocutory appeal under Rule 43 or as an appeal from a final decision on the permit application.

3. The third issue raised by Killington is whether an Act 250 permit must be granted to Killington because of the Commission's alleged failure to timely grant or deny the

The Board has determined that it has jurisdiction over this appeal. Therefore, we are remanding the case to the District Commission with instructions to convene a hearing on the merits of Killington's application.

Since the Board has decided to remand this case to the District Commission for a hearing on the merits, it is not necessary for the Board to decide the questions of party status or participation of the Executive Officer.

ORDER

This appeal is remanded to the District #1 Environmental Commission for a hearing on the merits to be scheduled as soon as possible in accordance with the procedures set forth in this decision.

Dated at Montpelier, Vermont this 8th day of August, 1986.

VERMONT ENVIRONMENTAL BOARD

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