

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

Re: Grand Union Co. & Mrs. Ralph Huniston  
Application #1R0733-EB

MEMORANDUM OF DECISION AND PREHEARING ORDER

This decision, dated August 26, 1992, pertains to an appeal of a permit issued for a supermarket. The decision includes a prehearing report and order. The decision also addresses two preliminary matters contested by the parties: party status and scheduling. As is explained below, the Environmental Board grants the request of Grand Union Company and Mrs. Ralph Humiston (the Applicants) to dismiss that portion of the appeal of Robert L. Merkert d/b/a Triple M Markets (the Appellant) which relates to Criteria 1 (air pollution), 9(B) (primary agricultural soils) and 10 (conformance with local and regional plans) of 10 V.S.A. § 6086(a). The Board also sets a hearing date of December 16, 1992 and a schedule for filing prefiled testimony based on that hearing date.

I. BACKGROUND

On June 19, 1992, the District #1 Commission issued Land Use Permit #1R0733, authorizing the Applicants to construct and use a 19,800 square foot grocery store on Union Street in Brandon.

On July 20, 1992, the Appellant filed an appeal with the Environmental Board, alleging that the District Commission erred with respect to the project's compliance with the following criteria of 10 V.S.A. § 6086(a): 1, 5 (traffic), 8 (aesthetics, scenic or natural beauty), 9(B), and 9(K) (public investments and facilities). The appeal also alleges inadequate notice to adjoining landowners on the part of the Applicants.

On August 6, 1992, Board Chair Elizabeth Courtney convened a prehearing conference in Pittsford, with the following parties participating:

The Applicants by Jon Anderson, Esq.  
The Appellant by Mark L. Sperry, Esq.  
The Town of Brandon by Brannon Godfrey

On August 12, 1992, the Applicants filed a memorandum of law with attachments and the Appellant filed a memorandum of law and a motion concerning scheduling. The Board deliberated on August 12.

553M1

II. PREHEARING REPORT

A. Issues

The appeal raises the criteria listed above. However, the issues raised under some of the criteria are limited. With respect to Criterion 1, the Appellant's concern is noise from the proposed project. With respect to **Criteria 5 and 9(K)**, the Appellant's concern is traffic.

The Appellant also seeks to expand its appeal to include Criterion 10.

Aside from the criteria, the Appellant has raised an issue regarding notice to adjoining landowners. This issue appears to be in reference to Board Rule 10(E), which in relevant part requires that applicants provide district commissions with a list of adjoining property owners and gives the district commissions discretion to notify such owners.

The Applicants ask that the Board dismiss the appeal with respect to Criteria 1, 9(B), and 10 because the Appellant was not granted party status on those criteria by the District Commission. The Applicants also argue that Criterion 10 should be dismissed because it was not identified in the Appellant's notice of appeal. The Applicants further contend that their project meets Criteria 5, 8, and 9(K) and that the Appellant lacks standing to raise the notice issue discussed above.

A question arose at the prehearing concerning scheduling. The Appellant seeks 90 days in which to hire a traffic expert and on this basis asks for a schedule which results in a hearing sometime in 1993. The Applicants are prepared to go forward and want a hearing on September 16, 1992. The Applicants believe that if they are given a September 16 hearing they will be able to build during the current construction season.

At the prehearing, parties agreed that they would file memoranda concerning the request to dismiss, the notice issue, and the scheduling question and that the Board would make decisions on those matters in deliberative session based on written filings.

The Town of Brandon stated at the prehearing that it will remain neutral in this appeal.

B. Witnesses and Exhibits

The Applicants

Witnesses:

Thomas Adler, traffic  
David Raphael, aesthetics  
Possibly a witness from the Town of Brandon

The Applicants did not list exhibits.

The Appellant

The Appellant stated that it is not able to list witnesses and exhibits at this time but that it intends to hire a traffic expert and will have a witness on aesthetics.

III. DECISION

The Board grants the Applicants' request to dismiss Criteria 1, 9(B), and 10. We have stated before that, to appeal a criterion, one must have party status on that criterion before the district commission. There are two exceptions to this rule. First, appeal may be made on a criterion by an individual who requested and was denied party status on the criterion, if the individual can persuade us that he or she should have party status. Second, appeal may be made on a criterion where disallowing appeal would work a substantial injustice or inequity. See 10 V.S.A. §§ 6085(c), 6089(a); Board Rules 2(K), 14, 40; Re: Sherman Hollow, Inc., #4C0422-5-EB, Memorandum of Decision at 4 (Feb. 3, 1988); Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision at 5-7 (July 31, 1989).

The Appellant meets neither the rule nor the exceptions. It did not seek or obtain party status on Criteria 1, 9(B), and 10 before the District Commission. It also has not alleged, or persuaded us, that a substantial injustice or inequity will result if appeal on those criteria is disallowed.

Appeal will therefore go forward only on Criteria 5, 8, and 9(K). With respect to Criterion 8, we will consider not only issues regarding visual impacts but also the aesthetic impacts of noise. We also will allow the applicable local plan into evidence because we consider such a plan relevant

---

to the "clear written community standard" portion of our aesthetics analysis. See Re: Ouechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-20 (Jan. 13, 1986).

Concerning the notice issue, parties did not address it in their memoranda and the Board assumes that it is withdrawn.

With regard to scheduling, we will set a hearing date of December 16, 1992 and a schedule for prehearing filings based on the date (see attached order). This is more time than the Applicants want and less time than the Appellant wants. We believe that the Applicants will not be prejudiced by this date because, even if a hearing were held on September 16, 1992 as they have requested, we do not believe that a final decision would be rendered in time for them to build during the current construction season. We do not, however, believe that the Appellant should need as much time as it has requested to prepare its case; this is an appeal, not a new matter.

#### IV. ORDER

1. Criteria 1, 9(B), and 10 are dismissed from this appeal.
2. On or before November 16, 1992, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.
3. On or before November 30, 1992, parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.
4. On or before December 7, 1992, parties shall file in writing all objections to the prefiled testimony and exhibits previously identified, or such objections shall be deemed waived.
5. The Environmental Board will convene a hearing in this matter on December 16, 1992. A notice will be issued subsequently with the time and location.
6. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must

be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.

7. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

8. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8½ by 11 inches or smaller, and any other documents with the Board. Parties also shall mail one copy of all documents to each of the parties listed on the attached Certificate of Service, except that the Applicants and the Appellant shall deliver documents to each other no later than the date due.

Parties are required to file only lists identifying exhibits which are larger than 8½ by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

9. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: A for the Applicants, M for the Appellant, and T for the Town of Brandon. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Applicants will number their exhibits A1, A2, A3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. A2A, A2B, etc. (Note: each page of a multiple page document does NOT need to be labelled.) The labels on the exhibits must contain the words ENVIRONMENTAL BOARD, #1R0733-EB, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. A dozen label stickers are enclosed with the copies of this order which are going to the Applicants and the Appellant. More are available from the Board on request.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case number. There must be three columns, from left

---

to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

TOWN OF BRANDON  
LIST OF EXHIBITS  
#1R0733-EB

<u>Number</u>	<u>Description</u>	<u>Status</u>
T1	Prefiled testimony of John Smith	
T2A-D	Plan dated , sheets A1 through A4	

The Board will use the status column to mark whether the exhibit has been admitted.

10. The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by September 16, 1992. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

Dated at Montpelier, Vermont this 26th day of August, 1992.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair  
Ferdinand Bongartz  
Lawrence H. Bruce, Jr.  
Terry Ehrich  
Lixi Fortna  
Arthur Gibb  
William Martinez

Enclosure

grand.mem(awp7)