VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Pittsford Enterprises, LLP, and Joan Kelley — Land Use Permit Application #1R0877-EB

MEMORANDUM OF DECISION

This appeal was filed by the Friends of Pittsford Village (Friends) and Margaret Armitage (collectively, Appellants), regarding the proposed construction of a post office building, and related construction and subdivision, in Pittsford, Vermont. This Memorandum of Decision addresses Friends' Motion to Require Co-Applicancy of the United States Postal Service (USPS), the prospective lessee. As set forth below, the Board grants Friends' Motion, subject to an opportunity for Pittsford Enterprises, LLP (Pittsford Enterprises) to secure an agreement from the USPS.

I. PROCEDURAL SUMMARY

On February 28, 2001 Pittsford Enterprises filed Land Use Permit Application #1R0877 with the District 1 Environmental Commission (Commission), seeking authorization for the removal of an existing commercial sales building and the construction of a 3,630 square-foot post office building, with parking and landscaping (the Project). The Project also includes the subdivision of the 2.7-acre parcel into two lots: 1.5 acres for the post office and 1.2 acres for an existing single family home. The Project is located in the Town of Pittsford, Vermont, at the intersection of Route 7 and Plains Road.

On December 5, 2001 the Commission issued Land Use Permit #1R0877(Permit) and corresponding Findings of Fact, Conclusions of Law, and Order (Decision).

On December 31, 2001 Appellants filed an appeal with the Environmental Board (Board) from the Permit and Decision alleging that the Commission erred in its conclusions with respect to 10 V.S.A. § 6086(a)(1)(B), (1)(E), (1)(G), (4), (5), (8)(aesthetics and historic sites), (9)(K), and (10) (Criteria 1(B), 1(E), 1(G), 4, 5, 8 (aesthetics and historic sites), 9(K), and 10, respectively). Friends also appealed the Commission's denial of party status on Criterion 9(K) and petitioned for party status on that Criterion in this appeal. The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules (EBR) 6 and 40.

On February 5, 2002, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

Pittsford Enterprises, by Frank von Turkovich, Esq., with Jack Wallace
Appellants, by Stephanie J. Kaplan, Esq., with Margaret Armitage and Baird Morgan
Vermont Agency of Natural Resources (ANR), by Elizabeth Lord, Esq., with

Greg Farkas

William J. Bloomer, Esq., entered an appearance on behalf of Margaret Rawlings, who had been granted party status by the Commission on Criteria 5 and 8. Mr. Bloomer notified the Board that he and Ms. Rawlings were unable to attend the prehearing conference, but that Ms. Rawlings wishes to participate as a party on Criterion 8 (aesthetics).

On February 6, 2002, the Chair issued a Prehearing Conference Report and Order (PCRO). Among other things, the PCRO identified issues and set deadlines for briefs on preliminary issues.

On February 12, 2002, Pittsford Enterprises filed a Motion to Dismiss and a Motion to Continue. On February 27, 2002, Friends filed its Opposition to the Motion to Dismiss and took no position on the Motion to Continue. Oral argument on the Motion to Dismiss was not requested.

The Board deliberated on March 20, 2002 and issued a Memorandum of Decision on March 21, 2002. In accordance with the Memorandum of Decision, Chair Harding issued a Scheduling Order on March 26, 2002, setting this matter for hearing.

On April 3, 2002, Petitioners filed objections to the Scheduling Order. The Board deliberated on April 17, 2002 and issued a Memorandum of Decision on April 18, 2002.

On May 22, 2002, Friends filed a Motion to Deny, Exclude, Bifurcate, and/or Present Live Surrebuttal Testimony at the Hearing. The deadline for replies to this motion was June 6, 2002. ANR and Pittsford Enterprises filed replies.

On May 29, 2002, Friends filed a Motion to Require the Co-Applicancy of the USPS.

On June 4, 2002, Pittsford Enterprises filed a copy of its application for a new conditional use determination (CUD).

On June 7, 2002, the Board deliberated on Friends' Motion to Deny, Exclude, Bifurcate, and/or Present Live Surrebuttal Testimony at the Hearing, and issued a Memorandum of Decision on the same date.

On July 17, 2002, the Board deliberated on Friends' Motion to Require the Co-Applicancy of the USPS.

II. DISCUSSION

Friends moves the Board to require the co-applicancy of the USPS under EBR 10(A). The USPS is the prospective lessee of the Project.

EBR 10(A) provides, in relevant part, that:

> An application shall be signed by the applicant and any co-applicant, or an officer or duly-appointed agent thereof. . . . The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ownership or control and shall describe the extent of their interests. The district commission or board may, upon its own motion or upon the motion of a party, find that the property interest of any such person is of such significance that the application cannot be accepted or the review cannot be completed without their participation as co-applicants.

Thus, Rule 10(A) requires the co-applicancy of any person:

1. with a substantial property interest (such as ownership or lease, etc.); and

2. whose property interest is of such significance that review of the application "cannot be completed" without requiring co-applicancy.

"The issue of who should co-sign an application may be raised at any time during the permit application proceedings." *In re Flanders Building Supply, Inc.*, #4C0634-EB, Findings of Fact, Conclusion of Law, and Order, at 3 (Oct. 18, 1995).

A. *Substantial Property Interest*

Friends argues that co-applicancy should be required because the lease, which has a 20-year renewable term, places the USPS in control of operations at the Project site for an extended period of time. There is no question that this lease arrangement gives the USPS a substantial property interest in the site. *See, O'Brien v. Black*, 162 Vt. 448, 451 (1994)(a lease agreement is a conveyance of an estate in land)(cited in *Re: Sugarbush Resort Holdings, Inc*., #5W1045-15-EB (Interlocutory), Memorandum of Decision at 6 (Aug. 12, 1997)). But this does not necessarily mean that the USPS must be made a co-applicant. *See, Re: Hawk Mountain Corporation*, #3W0299-EB, Findings of Fact, Conclusions of Law and

Order at 5 (Nov. 29, 1979)(EBR 10 does not automatically require that all persons having a property or contractual interest in a proposed project must be co-applicants). Where, as here, a substantial property interest is established, the question under EBR 10(A) is whether the application can be reviewed without the proposed co-applicant.

B. *Whether Review Can be Completed Without Co-Applicancy of USPS*

Generally, co-applicancy will be required of any person whose consent will be required to fulfill any permit condition. This ensures that the permit can be enforced. *See, Re: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon*, #1R0426-2-EB, Findings of Fact, Conclusions of Law and Order (Dec. 18, 1997)(citing *Re: David Enman*, Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 13 (Dec. 23, 1996); *Re: Tanger*, #3W0125-3-EB, Memorandum of Decision at 2 (Aug. 29, 1989); *Re: Flanders Building Supply, Inc.*, #4C0634-EB, Findings of Fact, Conclusion of Law, and Order, at 5 (Oct. 18, 1995)(enforceability of a permit must not depend upon the ability of the permit holder to secure the consent of another landowner)). The co-applicancy requirement also addresses "the need to ensure that the owners of lands involved in a subdivision or development have consented to the activity under review, and the need to ensure that persons with a substantial interest in the involved lands have an opportunity to participate in the permit proceedings." *Re: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon*, #1R0426-2-EB, Findings of Fact, Conclusions of Law and Order (Dec. 18, 1997)(quoted in *Re: Richard Madowitz and Douglas Kohl d/b/a The Woods Partnership*, #1R0522-10-EB (Revocation), Memorandum of Decision and Dismissal Order at 3 (Aug. 15, 2001)). In this case the landowners are the applicants, and the USPS has not expressed any interest in participating in the permit proceedings. Therefore, the question is whether the permit can be complied with and enforced without the co-applicancy of the USPS.

Friends argues that certain conditions in the Commission Permit indicate that the USPS's co-applicancy is required. These conditions include requirements that lights be turned off at certain hours, and that delivery bay doors be shut between deliveries. Pittsford Enterprises counters that, as the permittee, it will be responsible for compliance with the permit, and that this duty cannot be "evaded or nullified" by leasing the property to another. (Pittsford Enterprises' Response Memo, at 2-3.) As set forth below, this is accurate.

In *Eastern Landshares* the Board held that it was not necessary to make certain parties co-applicants because "Compliance with permit conditions is the responsibility of the permit holder; lack of compliance can result in the revocation of

a permit." *Re: Eastern Landshares, Inc.*, # 4C0790-EB, Memorandum of Decision at 1 (Aug. 13, 1991). This does not mean that there cannot be facts or circumstances which would warrant the co-applicancy of a lessee (see discussion of the *Drown* case, below). However, as a general matter, the permittee is responsible for compliance with its permit, and the permit is subject to revocation and enforcement should any violation occur.

The Board took a similar approach in the *Flanders Building Supply* case, waiving co-applicancy of the owner of the driveway to the project, over which the applicant had an easement, on the grounds that there was "no substantial reason why any conditions which the Commission might impose with regard to the Road would not be fully enforceable against the Applicant." *Flanders Building Supply*, Findings, Conclusions and Order at 4. The Board noted that, should the permit contain conditions involving the road, the applicant would have to bear full responsibility, and "[a]ny right the Applicant might have to seek contribution from [the record owners] would be a matter of negotiation or the courts." *Id.* Likewise, Pittsford Enterprises may have some remedy against the USPS should USPS cause a permit violation, but that would be beyond the Board's jurisdiction.

Most co-applicancy cases concern a permittee who is the lessee, and the question is whether to make the landowner a co-applicant. In fact, EBR 10(A)'s waiver provision expressly contemplates this situation. This case presents the reverse situation – the landowner is the permittee and the question is whether to make the lessee a co-applicant.

One case that involves the co-applicancy of a lessee is *Re: George and Marjorie Drown*, #7C0950-EB, Findings of Fact, Conclusions of Law, and Order (Jun. 19, 1995). In *Drown*, the Board required that the operator of a quarry, an informal lessor, be made a co-applicant because:

> The day-to-day and long-term avoidance of unduly harmful impacts will depend upon Mr. Beattie's conduct as the Project's operator. Mr. Beattie will be the one who excavates the Project and processes the material into marketable products. Ultimately, making Mr. Beattie a co-applicant makes him legally responsible for the Project's operation. Given that the Permittees are residents of Florida, it is imperative that Mr. Beattie--and all other future operators--be made a co-applicant with the Permittees.

Id. at 9. The Board also required the quarry operator's co-applicancy as a permit condition under Criterion 9(E), because "the day-to-day and long-term avoidance of unduly harmful impacts will depend upon the conduct of the third party or parties

that operate the Project for the Permittees." *Id.* at 16.

Unlike operation of the quarry in *Drown*, which involved daily excavation and processing of earth resources, daily operation of the post office is unlikely to result in long-term, unduly harmful environmental impacts. The only earthmoving activities or other activities with significant potential for long-term, unduly harmful impacts proposed here will occur during construction, under the direct control of Pittsford Enterprises, not the USPS. The present case also differs from *Drown* because the permittee does not reside outside Vermont. *Drown* does not govern this case because Pittsford Enterprises, a Vermont limited liability partnership, is responsible for construction of the Project and other significant improvements, such as removal of the pond and restoration of streams. The facts here do not weigh as heavily in favor of co-applicancy as those in *Drown*, although there is some risk that noncompliance by the USPS could cause significant environmental impact.

The Board generally does not require commercial lessees to be co-applicants. In fact, it is not uncommon for the Board or district commission to review a developer's application for a permit for a commercial development without knowing who the tenants will be. This case is unusual because the tenant's identity is known, and even more unusual because the Board has a copy of the lease. As set forth below, the lease is somewhat problematic from an Act 250 enforcement perspective, which tends to weigh in favor of requiring co-applicancy rule.

The fact that a permit runs with the land does not necessarily mean that its terms bind lessees on the property, and Pittsford Enterprises cites no law or lease provision that would require the USPS to comply with Pittsford Enterprises' Act 250 permit. It is troubling that the lease does not appear to require the tenant (USPS) to comply with applicable permits. Certainly, in the event of any violation, Pittsford Enterprises and Joan Kelley would be liable and could face revocation of the permit, injunctive relief, penalties, or any combination thereof. *See, Secretary, Vermont Agency of Natural Resources v. Handy*, 163 Vt. 476, 487 (1995)(Environmental Law Division must apportion liability among different co-applicants). What rights and liabilities Pittsford Enterprises might have with respect to the USPS are less than clear under the lease.

For instance, Section A.21 on page A-5 of the lease allows the USPS to make alterations and additions to the premises; and Section A.22, also on page A-5, requires that the USPS comply with applicable codes and ordinances, but there is no requirement that the USPS comply with applicable permits. The Board is not aware that any such agreement between Pittsford Enterprises and the USPS exists.

Without any legally binding commitment by the USPS to comply with

applicable permits, Pittsford Enterprises may be proceeding at its own peril. More to the point, without any provision obliging the USPS to comply with applicable permits, the Board cannot complete its review without the co-applicancy of the USPS. *See, In re Pilgrim Partnership*, 153 Vt. 594, 597 (1990)(co-applicancy decisions under EBR 10(A) are within the discretion of the district commissions and the Board)(cited in *Re David Enman*, Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 13 (Dec. 23, 1996)). The Board concludes that the co-applicancy of the USPS is required unless Pittsford Enterprises files a binding and enforceable agreement, such as an addendum to the lease, or guarantee, in which the USPS agrees to comply with all applicable Act 250 permits. It is reasonable to allow Pittsford Enterprises thirty days in which to file such an agreement or guarantee, and, if necessary, an additional week beyond that in which to file the co-applicancy signature of the USPS.

III. ORDER

1. Friends' Motion to Require Co-Applicancy of the United States Postal Service is GRANTED unless Pittsford Enterprises files an agreement or guarantee in which the USPS agrees to comply with all applicable permits in its occupancy and operation of the Project, within thirty (30) days, in which case the Motion is DENIED.

2. If Pittsford Enterprises does not file the agreement or guarantee of the USPS within thirty (30) days of the date of this decision, it shall file the co-applicancy signature of the USPS within thirty seven (37) days of the date of this decision, or one week after the agreement or guarantee was due.

DATED at Montpelier, Vermont this 19th day of July, 2002.

ENVIRONMENTAL BOARD

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