

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 the Motion to Deny, Exclude, Bifurcate, and/or Present Live Surrebuttal Testimony filed by Friends on May 22, 2002. As set forth herein, the Board grants the Motion to Bifurcate, denies the Motion to Deny, grants in part the Motion to Present Live Surrebuttal Testimony, and rules that issues raised in the Motion to Exclude will be addressed at the second prehearing conference.

I. PROCEDURAL SUMMARY

On February 28, 2001 Pittsford Enterprises, LLP (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 United States Postal Service. The deadline for replies to this motion is June 13, 2002. To date, no party has filed a reply.

On June 4, 2002, Pittsford Enterprises filed a copy of its application for an amended CUD.

On June 7, 2002, the Board deliberated on Friends' Motion to Deny, Exclude, Bifurcate, and/or Present Live Surrebuttal Testimony at the Hearing.

II. DISCUSSION

A. Motion to Deny

Friends moves to deny the permit application on the grounds that Pittsford Enterprises has failed to obtain an amended conditional use determination (CUD) from ANR for this Project, which now includes removal of a pond and associated activities. There is no dispute that the pond in question is located in a Class II wetland, and that Pittsford Enterprises obtained a CUD from ANR which authorizes the Project as originally proposed. It is also undisputed that Pittsford Enterprises now proposes to alter the Project by removing the pond, as recommended by ANR. On June 4, 2002, Pittsford Enterprises informed the Board and parties that it recently filed an application for an amended CUD.

Friends argues that the Project must fail Criterion 1(G) without an amended CUD and that the permit should be denied without hearing on those grounds. Criterion 1(G) is only one of several issues on appeal, and the Board must take evidence in any event to resolve the other issues on appeal. In other words, a hearing is necessary regardless of the Board's decision on the merits of Criterion 1(G). Moreover, there is no question that ANR recommended removal of the pond and restoration of the area to address its concerns under Criteria 1(B) and 1(E). While an amended CUD, or lack thereof, is directly relevant to Criterion 1(G), the proposal to remove the pond may have implications with respect to other criteria on appeal. Friends' Motion to Deny goes to the merits of this appeal, and the Board declines to rule on the merits without a hearing.

B. Motion to Bifurcate

In the alternative, Friends asks the Board to bifurcate the hearing and postpone hearing evidence on Criteria 1(B), 1(E), 1(G) and 4 until after Pittsford Enterprises has obtained an amended CUD from ANR and the parties have an opportunity to submit rebuttal evidence. ANR supports the Motion to Bifurcate.

The hearing has been set in this matter for over two months, and the Board's schedule has been set accordingly, as have the schedules of the parties and witnesses. To delay the hearing on issues related to the pond removal until ANR issues an amended CUD, that CUD becomes final, and the parties have an opportunity to submit rebuttal evidence -- simply because the applicant chose not to apply for an amended CUD until after all evidence was prefiled -- is neither efficient nor convenient. However, because these late developments may have direct bearing on several issues on appeal, and because the amended CUD and related rebuttal evidence will be necessary for the Board to decide those issues, bifurcating the hearing is necessary. See, 10 V.S.A. § 6085(f) and EBR 18(F)(both stating that a hearing shall not be closed until the Board provides an opportunity to

all parties to respond to the last evidence submitted). Friends' Motion to Bifurcate is granted.

The hearing on Criteria 1(B), 1(E), 1(G) and 4 will be held after ANR issues its determination on the application for amended CUD.

C. Motions to Exclude and Present Live Surrebuttal Testimony

Also in the alternative, Friends asks for an opportunity to present live surrebuttal testimony on certain issues first raised in Pittsford Enterprises' rebuttal evidence, in particular, the details of the proposal to remove the pond and certain evidence regarding traffic. The Board recognizes that some of this rebuttal evidence, if admitted, would raise new issues to which the parties should have an opportunity to respond. See, 10 V.S.A. § 6085(f) and EBR 18(F).

However, Friends moves to exclude all of this rebuttal evidence on the grounds that it should have been submitted as direct. Whether live surrebuttal is necessary depends on whether the rebuttal evidence in question is admitted. Also, the fact that the hearing will be bifurcated means that the requested surrebuttal may be prefiled rather than presented live. Issues raised in the Motion to Exclude, which include hearsay objections as well as objections described above, are evidentiary objections which will be ruled upon at the second prehearing conference, in accordance with the Memorandum of Decision issued April 18, 2002. Friends' Motion to Present Live Surrebuttal is granted insofar as the parties will be given an opportunity to prefile surrebuttal to any of the rebuttal exhibits in question that are admitted into evidence, in advance of the reconvened hearing.

III. ORDER

1. Friends' Motion to Deny the Permit Application is DENIED.
2. Friends' Motion to Exclude certain portions of Pittsford Enterprises' rebuttal evidence will be considered as evidentiary objections and ruled upon at the second prehearing conference, in accordance with the Memorandum of Decision issued April 18, 2002.
3. Friends' Motion to Present Live Surrebuttal is GRANTED IN PART.
4. Friends' Motion to Bifurcate the hearing is GRANTED. The hearing in this matter shall commence on Wednesday, June 12, 2002 as previously scheduled. The previously scheduled Thursday, June 13, 2002 hearing date is CANCELLED, and the hearing on Criteria 1(B), 1(E), 1(G), and 4 shall be reconvened at a time and place to be announced later.

5. Pittsford Enterprises shall file a status report with the Board within one week of the date that ANR makes a determination on the application for an amended CUD, and shall file a second status report with the Board within one week of the deadline for appeals from ANR's decision.

DATED at Montpelier, Vermont this 7th day of June, 2002.

ENVIRONMENTAL BOARD

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