

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 objections to the Scheduling Order issued on March 26, 2002.

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.

II. DISCUSSION

Appellants object to part of the Scheduling Order and ask the Board to rule on evidentiary objections at least one week before the hearing. The Board addresses each issue in turn.

The Scheduling Order set a deadline of Thursday, May 16, 2002 for filing proposed findings and conclusions, requests for additional hearing time, and evidentiary objections. Appellants ask the Board to move the filing deadline back one day, to Friday, May 17, 2002. In support of this request, Appellants argue that the May 16 deadline does not give them enough time to file proposed findings and conclusions, and evidentiary objections, since it is only eight days after the deadline for filing rebuttal evidence. The Board concludes that the requested delay of one day is reasonable, particularly since it does not affect the hearing schedule. The Scheduling Order shall be amended to change the May 16 deadline to Friday, May 17, 2002.

Appellants also ask that the Board issue a ruling on evidentiary objections at least one week before the hearing. As noted in their objection letter, this is not the

Board's practice. Generally, the Chair issues preliminary rulings on evidentiary objections at the second prehearing conference, and any objections to these rulings are decided by the full Board at the hearing.

Appellants argue that, "[w]ithout knowing which objections will be sustained and which will be overruled, a great deal of time can be wasted preparing cross-examination of testimony that ends up being excluded." The Board appreciates the time and effort parties put into preparing their cases, and does not like to see anyone waste time. However, the unexpected can occur at evidentiary hearings, even with prefiled evidence. For instance, a party may spend time preparing to cross-examine a witness who does not appear at the hearing. Short of issuing subpoenas for every witness, there is no way to prevent this. At least in the case of prefiled evidentiary objections, the parties have some idea of what testimony or exhibits are in question and can prepare accordingly. Parties and the Board must retain some flexibility in order to facilitate the timely processing of appeals.

To have the Board rule on evidentiary objections at least one week before the hearing would require postponement of the hearing until at least one week after the Board meets to deliberate. In this case, that would mean postponing the hearing from June 12 and 13, 2002 to begin at least one week after June 19, 2002 -- a minimum delay of two weeks. This is hard to justify, particularly when it is possible that no evidentiary objections will be filed or granted, or, if granted, that any resulting exclusion of evidence would not result in any significant change in the parties' cross-examination. The Board also notes that this differs from *Re: The Van Sicklen Limited Partnership, #4C1013R-EB*, Scheduling Order at 2 (Aug. 30, 2001), in which the Chair ruled that the Board would rule on evidentiary objections in advance of the hearing, because in that case the parties agreed to delay the hearing for several weeks for other reasons.

The Board denies Appellants' request that the Board issue a ruling on evidentiary objections at least one week before the hearing.

III. ORDER

1. Appellants' request to change the deadline for filing evidentiary objections, proposed findings and conclusions, and requests for additional time from Thursday, May 16, 2002 to Friday, May 17, 2002 is GRANTED. Accordingly, Sections A(3), A(4), and A(5) of the Scheduling Order are modified to read as follows:
 3. On or before **Friday, May 17, 2002**, the parties shall file any written requests for additional time beyond the time

allotments set forth in Section A, Hearing Schedule. The Chair may allow more time if good cause is shown.

4. On or before **Friday, May 17, 2002**, the parties shall file any evidentiary objections to the evidence filed or such objections shall be deemed waived.

5. On or before **Friday, May 17, 2002**, the parties shall file proposed findings of fact and conclusions of law, and any stipulation of material fact.

The rest of the Scheduling Order shall remain in force.

2. Appellants' request for the Board to issue a ruling on evidentiary objections at least one week before the hearing is DENIED.

DATED at Montpelier, Vermont this 18th day of April, 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding

Marcy Harding, Chair

John Drake

Alice Olenick

Jean Richardson

Donald Sargent