

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' most recent filing, which contains several requests. Friends' requests fall into two categories: How Friends intends to submit evidence on issues that their deceased expert witness, Henry Paynter, was going to testify; and requests concerning the Board's traffic expert from the Vermont Agency of Transportation (AOT), Amy Gamble. These requests are discussed below as separate motions, in roughly the same order in which they appear in Friends' filing.

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 June 12, 2002, the Board convened a hearing, conducted a site visit, and heard evidence from the parties. The hearing was adjourned to another date.

On June 19, 2002, the Board deliberated and decided to request the participation of an expert witness on traffic from AOT, pursuant to EBR 20(B)(2). A Hearing Recess Order was issued on June 25, 2002 requesting that an expert from AOT review and offer testimony on expert testimony and exhibits in the case.

On July 17, 2002 the Board deliberated on Friends' Motion to Require the Co-Applicancy of the USPS, and issued a Memorandum of Decision on July 19, 2002.

On July 22, 2002, Friends filed a letter containing several requests concerning the death of expert witness Henry Paynter, and concerning the Board's request that an expert from AOT review and offer testimony on expert testimony and exhibits on traffic. The Board deliberated on Friends' requests on August 14, 2002.

II. DISCUSSION

A. Friends' Motions Concerning the Death of Expert Witness Henry Paynter

The hearing in this matter was bifurcated, with testimony on water criteria delayed until after Pittsford Enterprises obtains a CUD for its plans to remove the pond. The second hearing date, which will be set upon receipt of the CUD, has not been scheduled. In the interim, Friends' expert witness on water and related issues, Henry Paynter, has passed away. Because the hearing was bifurcated to accommodate Pittsford Enterprises' need for a new CUD, Mr. Paynter's prefiled testimony has not been admitted. In addition, Mr. Paynter was going to address other water-related issues, such as the CUD and rebuttal to the specific plans for removing the pond and restoring that area which Pittsford Enterprises submitted on rebuttal. None of this testimony is in the record. As a result, Friends asks the Board to:

1. Consider admitting Mr. Paynter's testimony on some of these issues from a related Environmental Court proceeding.
2. Allow at least 3 weeks from the date the CUD is issued until the date any live or prefiled testimony is due, to allow their new water consultant time to review the CUD, etc.

3. Allow Margaret Armitage to submit additional prefiled testimony on an issue covered in Henry Paynter's prefiled testimony, the stream leading from the pond to her property.

Each request will be addressed in turn.

- 1. Mr. Paynter's Testimony from a Related Environmental Court Hearing.**

The issue of admissibility is not ripe because Friends does not have a transcript of the testimony and cannot make a specific proffer. However, Friends may prefile the testimony it seeks to introduce, subject to evidentiary objections by other parties. The Board notes that VRE 804(b)(1) does make an exception to the hearsay rule for such testimony, provided that Pittsford Enterprises had an opportunity to cross-examine, etc., in the prior proceeding, but admissibility cannot be determined until the Chair (and, if her ruling is challenged, the Board) sees the proffered evidence and considers any evidentiary objections.

- 2. Allow at least 3 weeks from the date the CUD is issued until the date any live or prefiled testimony is due, to allow their new water consultant time to review the CUD.**

Friends' request for three weeks' time is not unreasonable, particularly since there is no indication that Friends has had any opportunity to review a proposed CUD. See, Vermont Wetland Rules 8.2 and 8.3 (requiring ANR to provide notice of a request for a CUD, including certain information from the CUD application, to owners of adjacent property). It has been over two months since Pittsford Enterprises notified the Board that it applied for a CUD, and to date, there is no indication that a CUD has been issued. Timely processing of this appeal is a growing concern, however, the Board notes that this delay is due to Pittsford Enterprises' failure to apply for the new CUD much earlier in the process. Despite the Board's concerns for timely processing of this appeal, there is no reason to cut short the amount of time the other parties would otherwise have to review and submit rebuttal evidence on the CUD. Friends' request is GRANTED.

- 3. Allow Margaret Armitage to submit additional prefiled testimony on an issue covered in Henry Paynter's prefiled testimony, the stream leading from the pond to her property.**

Despite the language in the PCRO limiting parties to witnesses identified in the prefiled witness list, when a previously identified witness dies, there is no reason not to allow the sponsoring party to use a new witness or witnesses to fill the evidentiary void. However, as with the prior testimony of Mr. Paynter, admissibility cannot be determined at this point. Friends may prefile Ms. Armitage's testimony and it will be subject to evidentiary objections by other parties.

B. Friends' Motions Concerning the Board's Witness from AOT

Friends asks the Board to send AOT its lay testimony on traffic, specifically, the prefiled testimony of Baird Morgan (Exhibits F13 and F31), Margaret Armitage (Exhibit F15), Ruth Earman (Exhibit F16), Jean Davies (Exhibit F17), Lois Blittersdorf (Exhibit F43), and a survey, Exhibit F14.

In the June 25, 2002 Hearing Recess Order, the Board asked an expert from AOT to review and offer testimony on the live and prefiled expert testimony, and related exhibits, on traffic issues. Since that time, AOT engineer Amy Gamble has submitted written comments on these issues.¹ As Friends points out, several of its fact witnesses gave at least some testimony on traffic and pedestrian safety. There is also some lay testimony on these issues from one of Pittsford Enterprises' witnesses. Asking Ms. Gamble to review lay testimony goes beyond the scope of the June 25 Hearing Recess Order. The Board called this witness to comment on expert testimony, not lay testimony. Moreover, Friends may question Ms. Gamble at the hearing to determine whether certain information, if true, would change her opinion. Friends' request that the Board's witness review lay testimony on traffic is DENIED.

Friends also asks that AOT prefile testimony. To be clear, Friends' request was filed before AOT witness Amy Gamble submitted her written comments. While these comments are not in the form of prefiled testimony, the Board intends to offer them as an exhibit for Ms. Gamble to adopt and be questioned on under oath at the hearing. The written comments give the parties sufficient notice of what Ms. Gamble's and Mr. Thompson's testimony will be, so there will be no unfair surprise. The Board denies Friends' request as moot.

III. ORDER

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It should also be noted that Ms. Gamble's comments incorporate conclusions drawn by another AOT engineer, Roger Thompson. It is the Board's intention to make Mr. Thompson available at the reconvened hearing as well.

1. Friends' request to delay the prefiling deadline for 3 weeks after the CUD is issued is GRANTED.
2. Friends may prefile testimony and evidence not previously identified on prefiled witness and exhibit lists, on issues that Henry Paynter was going to address, including issues addressed in Mr. Paynter's prefiled testimony, and rebuttal to the new CUD, if issued, and pond removal plans.
3. Friends' request that the AOT witness review lay testimony on traffic is DENIED.
4. Friends' request that AOT prefile testimony is DENIED as moot.

DATED at Montpelier, Vermont this 26th day of August, 2002.

ENVIRONMENTAL BOARD

Marcy Harding, Chair
George Holland
Samuel Lloyd
A. Gregory Rainville
Jean Richardson
Donald Sargent