

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

Re: Donald and Gary Thomas

Application #2S0993-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

For the reasons stated below, this application is denied.

I. SUMMARY OF PROCEEDINGS

On March 22, 1995, Donald and Gary Thomas ("**Appellants**") filed an appeal from the District #2 Environmental Commission's February 22, 1995 Findings of Fact, Conclusions of Law and associated Commission Order regarding application #2S0993 ("**Decision**"). The Decision denied the Appellants' application for a permit to construct a 40 foot x 60 foot building for use as an automotive repair and gun shop on Route 103 in the Town of Cavendish ("**Project**").

The Appellants believe that the District #2 Environmental Commission ("**District Commission**") erred with respect to 10 V.S.A. § 6086(a) -- Criterion 10. In their appeal letter ("**Notice of Appeal**"), they state: "**The basis for this appeal is that the District Commission was in error when it found that the project would not conform to the Town Plan.**"

Pursuant to 10 V.S.A. § 6027(g) (Supp. 1994) and Environmental Board Rule ("**EBR**") 41, Environmental Board ("**Board**") Chair John T. Ewing appointed Board member Arthur Gibb as Hearing Officer to hear this appeal. On May 1, 1995, Hearing Officer Gibb convened a prehearing conference ("**Prehearing Conference**") in Montpelier, Vermont. Only the Appellants, through their attorney, William A. Hunter, Esquire, attended the Prehearing Conference. On May 4, 1995, Hearing Officer Gibb issued a Prehearing Conference Report and Order ("**Order**"). Among other things, the Order directed those statutory parties wishing to participate in this appeal to submit a memorandum of law, final lists of witnesses and exhibits, prefiled testimony, objections and proposed findings of fact, conclusions of law and order.

As indicated by the Order, the following preliminary issues were raised by the Notice of Appeal:

1. Is the Notice of Appeal sufficient under 10 V.S.A. § 6089 (a) (2) (Supp. 1994)?
2. If the Notice of Appeal is not sufficient under 10 V.S.A. § 6089 (a)(2) (Supp. 1994), may it be amended at a time more than 30 days after the Decision so that it is sufficient under the statute?

3. If the Notice of Appeal is not sufficient under 10 V.S.A. §6089 (a)(2) (Supp. 1994) and cannot be amended at a time more than 30 days after the Decision, should the Appeal be dismissed?

In a June 5, 1995 memorandum to the parties, Hearing Officer Gibb ruled that the Notice of Appeal was sufficient under 10 V.S.A. § 6089 (a)(2) (Supp. 1994). As a result, he did not reach preliminary issues 2 and 3.

The Appellants filed prefiled direct testimony on June 22, 1995. On June 27, 1995, they filed a certified copy of the current Cavendish Town Plan ("**Town Plan**"). No other prefiled evidence was filed. In addition, none of the parties filed objections or proposed findings of fact, conclusions of law and order.

On July 5, 1995, Hearing Officer Gibb convened a hearing in the Town Hall in Cavendish ("**Hearing**"). Appellants were present and represented by Mr. Hunter. Cavendish Town Manager and Health Officer Richard Svec was present. Mr. Svec sought permission to represent the Cavendish Town Selectmen ("**Town**") and the Cavendish Town Planning Commission ("**Town Planning Commission**") during the Hearing. Mr. Svec had represented the Town before the District Commission. Hearing Officer Gibb acknowledged that Mr. Svec could represent the Town during the Hearing. However, the Town Planning Commission had been represented throughout the District Commission proceedings by Bruce **McEnany**. Hearing Officer Gibb, without written notice from the Town Planning Commission confirming a change in representation, refused to allow Mr. Svec to represent the Town Planning Commission. As a result, the Town Planning Commission was not represented during the Hearing.

Hearing Officer Gibb, on his own motion, next considered whether or not the Town was precluded from participating further in the Hearing since the Town failed to submit many of the filings mandated by the Order. Section VI, paragraph 17 of the Order provides in pertinent part:

Pursuant to Board Rule 16, each and every aspect of this Order will be binding on all parties who have received notice of the prehearing conference unless a written objection specifically identifying the provision at issue and the basis for the objection is filed on or before Monday, May 22, 1995.

Order, 5. No such objection was filed by the Town.

Hearing Officer Gibb determined that the had Town failed to comply with specific provisions of the Order. However, he waived the Order's filing requirements in accordance with section VI, paragraph 14 of the Order which provides: "Hearing Officer Gibb may waive the filing requirements upon a showing of good cause. ..." *Id.* at 4. Hearing Officer Gibb concluded that his interests in hearing **"both sides"** in this appeal constituted good cause. Although the Appellants did not object to this ruling, they reserved the right to respond to any testimony presented by the Town that they had not addressed in their prefiled testimony.

Hearing Officer Gibb, accompanied by the Appellants and Mr. Svec, conducted a site visit. He visited the site and drove west and east of the site on Routes 103 and 131. He observed Black River Produce, the Cavendish Pointe motel, the Joseph Cerniglia winery across Route 103 from the site, Canterbury Farms and Fletcher Farms. Hearing Officer Gibb described the site visit during the Hearing.

Hearing Officer Gibb, at the request of the Appellants, allowed Gary Thomas to adopt and present as his own the June 22, 1995 prefiled testimony of Donald Thomas. Mr. Svec did not object.

After hearing testimony and receiving exhibits, Hearing Officer Gibb recessed the Hearing on July 5, 1995. He *extended the deadline by which the parties could file proposed findings of fact, conclusions of law and order to July 17, 1995. None were filed.

Hearing Officer Gibb deliberated on this matter on August 9, 1995 and October 4, 1995. He issued proposed findings of fact, conclusions of law and order on October 6, 1995 ("Proposed Decision"). On November 1, 1995, following a review of the Proposed Decision and the evidence presented in the case, the Board declared the record complete, **adjourned** the hearing and deliberated. The matter is now **ready** for decision.

II. ISSUE

The issue on appeal is whether, pursuant to 10 V.S.A. § 6086(a) (10), the Project conforms with the Town Plan.

III. FINDINGS OF FACT

1. The Appellants seek a land use permit to build a 40 foot by 60 foot building ("**Building**") on land owned by Appellant Gary Thomas and located in

- Cavendish ("Project **Site**"). The Appellants may operate a U-Haul business from the Building.
2. The Appellants intend to operate a commercial automotive repair and gun shop in the Building. The Appellants will not provide automobile body **repair or restoration services** on the Project Site.
 3. Site preparation activity related to the Building's foundation has recently occurred on the Project Site.
 4. The Project Site is approximately 43 acres in size. It is predominantly wooded. It contains steep slopes and thin soils. A transmission line and a related right of way occur on the western boundary of the Project Site.
 5. The Project Site is on Route 103. Route 103 is a busy state highway. It runs generally east - west. It is a main truck traffic route from **Rutland** to Boston.
 6. The Cavendish Pointe motel is located on Route 103 to the east of the Project Site. The Castle Inn is located on Route **131** to the east of the Cavendish Pointe motel. The Black River Produce/Singleton's Restaurant site is located on Route 103 to the east of the Project Site. Seamack Tree Incorporated is located on Route 131 to the East of the Black River Produce/Singleton's Restaurant site approximately one mile to the east of the Project Site. Canterbury Farm, an alcohol treatment facility, is located on Route 103 immediately to the west of the Project Site. The Joseph Cerniglia Winery is located directly across Route 103 from the Project Site. These commercial enterprises are all located in the Town.
 7. Route 131 is the major east - west roadway in the Town. It follows the Black River corridor.
 - a. Town water and sewer occurs in the Town's two village areas, Cavendish and Proctorsville, and along that portion of Route 131 which connects these two village areas. Town water and sewer does not extend beyond the western boundary of the Proctorsville village area, and, as a result, Town water and sewer service terminates **quite** some

distance from the Project Site. The Town has no current plans to expand the area currently serviced by Town water and sewer. Town water and sewer is not available to the Project Site. According to the Town's Health Officer, the Town would not approve an on site septic system for the Project due to the thin soils on the Project Site.

9. The Building would be open to the public. It would not contain an indoor restroom or other indoor toilet facilities. Drinking water for public use may be "trailed" to the Project Site. There would be no running water on the Project Site for use by the public, the Appellants or the Appellants' employees.
10. Persons working at the Project Site would be expected to use an outdoor vault privy that would be pumped periodically. No toilet facilities, indoor or outdoor, would be available to the public. The Appellants and their employees would be expected to use paste or lotion hand cleanser as necessary.
11. Bijan Bahramian is an expert land use planner familiar with the Project and the Town Plan.
12. The Town does not have a zoning ordinance.
13. The Town Plan sets forth several goals and objectives. It provides:

The people of Cavendish desire to maintain the rural character of the community while encouraging the economic well being of its residents. ... Growth which is good for the Town should enhance the social, environmental, cultural, and economic values of our rural community. It should not undermine ability of the taxpayers to support the Town on a sound financial basis. In order to maintain these goals, the following objectives are set forth:

* * *

9. To encourage business and industrial growth in areas adjacent to where business and industry now exist and where village

water and sewer are available.

Town Plan, 4 and 5 (emphasis added).

14. The Town Plan contains several policies. It provides in relevant part:

"The policies which follow throughout this document are intended as specific recommendations to be used in the implementation of the Cavendish Town Plan and its Goals and Objectives."

Town Plan, 6.

15. The Town Plan contains a Land Use and Development Section. It provides in relevant part:

The two most important considerations in determining desirable land uses are: (1) 'Will it be good for the Town?' and, (2) 'Can the land support it?'

Either of these considerations may have veto power over the other. A use which the land cannot support should not be undertaken, even if it might otherwise be good for the Town. The land use recommendations of the Town Plan should reflect both of these criteria in guiding the future growth of the Town.

Town Plan, p. 8.

16. The Town Plan contains a provision entitled "Planning for Growth". It provides:

Cavendish is characteristic of the traditional Vermont Village. The Town considers this an important social and economic asset. Therefore, it is the policy of the Town of Cavendish to recommend that all development be compatible with the tradition of single or multi-family houses on acreage as outlined under suggested densities.

Town Plan, 9.

17. The Town Plan contains four densities and types of

uses. They are forestry area, low density, moderate density and high density. Town Plan, 9 and 10.

18. Low Density - Resource Residential (R - 10) provides:

Most of Cavendish falls into this classification. These areas, served by Glass 3 roadways, are rural in nature and have moderate to steep slopes with thin soils. Due to the nature of the land, a density requirement of 10 acres per dwelling is recommended. The land's natural resource value for agriculture, forestry, and recreation merit the retention of these areas in a relatively undeveloped condition. Cluster development could be considered in these areas for the maximization of open lands preservation.

Town Plan, 9.

19. Moderate Density - Rural Residential (R - 3/5) provides:

These areas, served by Class 1 and 2 roads (except where in village districts), have, for the most part, gentle slopes and good soils. Since much of the better agricultural land of Cavendish is located in "Moderate Density" areas, positive measures to ensure the agricultural potential of these lands shall be applied in order to protect their natural resource value. A minimum density requirement of 3 acres per dwelling is recommended for slopes per dwelling where slopes are in excess of 15%.

Town Plan, 9.

20. High Density - Village' **Districts** provides:

The two village centers are "**High Density**" and should remain as they are in character and settlement pattern. A density requirement of **1/2** acre per lot is acceptable. Commercial development

has historically centered in and around the villages and is encouraged to occur in these areas because of the availability of Town water and sewage. Cavendish is a rural community which has historically seen family-by-family growth. Cavendish residents wish to continue this steady and well-paced pattern of growth, and to the extent possible, prevent sudden large increases in population which would place undue stress on Town facilities and village character.

Suggested acres per dwelling are for general guidance. Each parcel of land should be judged on its own merits, taking into consideration Act 250 standards and the Town of Cavendish sewage and sanitary regulations.

Town Plan, 10.

21. The four densities and types of uses described in the Town Plan are illustrated on Cavendish Town Resource Maps ("**Maps**"). In addressing the Maps, the Town Plan provides:

These maps are Cavendish Land Use/Resource Maps. The land use areas enumerated above are illustrated in the Cavendish Land Use Resource Maps. These maps are key to the Town's planning for its future and the development of fair policies for well-paced growth and land use management. As a tool to implement the goals and objectives of this plan, these maps depict those areas which are sensitive to development and those areas where development should occur within the natural constraints of the Town's topography and resources. In effect, these maps constitute a legal document and are on display in the Town Offices.

Town Plan, 10.

22. A portion of the Maps was admitted into evidence as **Appellee's Exhibit #2**. The Project Site appears on Exhibit #2 in an area designated Low Density - Rural Residential (R - 10).

23. The Proctorsville and Cavendish village areas are located to the east of the Project Site in the Town. The Project Site is not in either of these village areas.
24. The Proctorsville village area is designated High Density - Village District. The Cavendish village area ranges from Moderate Density - Rural Residential (R - 3/5) to High Density - Village District.
25. The Cavendish Pointe motel, the Castle Inn, the Black River Produce/Singleton's Restaurant site and Seamack Tree Incorporated are located in a High Density - Village District area in the Proctorsville village area.
26. The Town contends that the Project is inconsistent with the Town Plan because the Building would be very close to Route 103 and the Project is a commercial enterprise.

IV. CONCLUSIONS OF LAW

Prior to issuing a permit, the Board must find that the Project **"is** in conformance with any duly adopted local or regional plan or capital program under chapter 117 of title 24." 10 V.S.A. § 6086 (a) (10). Only the Town Plan is at issue in this appeal.

The relevant provisions of the Town Plan are set forth in the findings of fact. They indicate that the Town's overriding goal is to maintain its rural character and healthy natural environment. Town Plan, 4. Although the Town is concerned about the economic well being of its **residents**, this concern does not appear to outweigh its interest in maintaining its rural character and healthy **natural** environment. Id.

The Town plan contains a series of objectives which are designed to **enable** the Town to attain its goals. Town Plan, 5. Objective 9 is quite specific. It encourages business and industrial growth in areas adjacent to where business and industry now exist and where village water and sewer are available. Id.

The Town Plan includes several policies which address resource use and conservation, land use and economic

development and government facilities and public utilities. Town Plan, 6 - 17. It states that these policies should be interpreted as mandatory. It provides in relevant part: "[t]he policies which follow throughout the [Town Plan] are intended as specific recommendations of the Cavendish Town Plan and its Goals and Objectives. Id. at 6 (emphasis added).

Several policies in the Town Plan direct commercial development to those areas in the Town serviced by Town water and sewer. The Town Plan states: "It is the policy of the Town of Cavendish to protect its waters by ... encouraging development to take place along existing settlement corridors and established villages. Town Plan, 6. Likewise, in the discussion of density and types of uses in the Town Plan, it provides "[c]ommercial development has historically centered in and around the villages and is encouraged to occur in these areas because of Town water and sewer." Town Plan, 10. By contrast, the Town Plan provides that Low Density - Rural Residential (R -10) areas in the Town merit retention "in a relatively undeveloped condition" due to their value for agriculture, forestry and recreation. Town Plan, 9. These are clear, unambiguous and specific policies.

When considered collectively, the goals, objectives and policies of the Town Plan evince a clear and specific policy to concentrate business and industry in areas serviced by Town water and sewer. Accordingly, the Board concludes that the Project does not conform with the Town Plan. Town water and sewer occurs only in the established villages of Proctorsville and Cavendish and along that portion of Route 131 which connects them. The Project is not in these areas. The Project is not serviced by Town water and sewer. Instead, the Project is located in an area which is designated Low Density - Rural Residential (R - 10) on the Maps.

V. CONCLUSION

The Board concludes that the Project does not comply with Criterion 10 because it is not located in an area serviced by Town water and sewer, does not have an on site water supply system and does not have indoor toilet facilities available for public use. Accordingly, the Project would be detrimental to the public welfare.

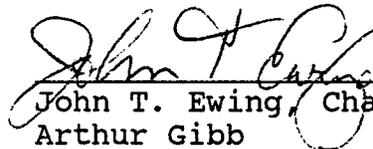
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VI. ORDER

Application #2S0993-EB is denied.

Dated at Montpelier, Vermont this 20th day of November,
1995.

ENVIRONMENTAL BOARD


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