

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

Re: *TCI Development, LLC*
[EB Docket #862]

Land Use Permit Application #2S1174-EB

Memorandum of Decision

This matter involves an appeal by TCI Development, LLC (TCI) to the Environmental Board (Board) from Findings of Fact, Conclusions of Law, and Order (Decision) issued by the District 3 Environmental Commission (Commission) denying Land Use Permit Application #2S1174. The application seeks authorization to construct a residential subdivision on 33 acres in the Town of Ludlow, Vermont (Project).

I. History

On February 13, 2004, TCI filed Land Use Permit Application #2S1174 for the Project with the Commission.

On November 2, 2004, the Commission issued the Decision denying the Application.

On November 30, 2004, TCI filed an appeal with the Board from the Decision, alleging that the Commission erred in its conclusions concerning 10 V.S.A. §6086(a)(10) (failure to conform to the Ludlow Town and Regional Plans).¹

On January 7, 2005 Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

TCI by Frederick M. Glover, Esq., Angela Benson-Ciufo and Glenn Sutton.

The Chair issued a Prehearing Conference Report and Order on January 14, 2005. The Prehearing Order states that parties to this matter include TCI and the Black River Valley Rod and Gun Club, Inc.

On March 2, 2005, TCI filed a motion for summary decision and a statement of material facts pursuant to Environmental Board Rule (EBR) 23.² Accordingly, the merits

¹ The appeal further requests the refund of the application fee, if the Board also denies the application. See Part II, *Issues, infra*.

² TCI had filed a February 15, 2005 motion, requesting that the Board's decision be governed by the 2004 Ludlow Town Plan. That motion is addressed within this decision.

hearing set for this matter has been suspended, pending the Board's decision on the motion.

No party has filed a response to TCI's motion or statement.

The Board deliberated on the motion on April 13, 2005.

II. Issues

The issues in this matter are:

1. Whether the Project complies with 10 V.S.A. §6086(a)(10) (Town and Regional Plan).
2. If the application is denied, whether TCI is entitled to a return of the application fee.

III. Discussion

The Commission denied the Project solely for TCI's failure to satisfy Criterion 10.

A. *Town Plan*

As to the Town Plan, the Commission found that the Project did not comply with a specific objective of the Land Use section of the 2002 Ludlow Town Plan (adopted January 14, 2002), which reads:

Ensure that conflicting uses are separated by a sufficient land area to protect the health, safety and welfare of residents and visitors.

2002 Town Plan at LU-17. While the Commission cited other provisions of the Town Plan in its discussion of Criterion 10, see Decision at 18, the Commission did not subject such provisions to the analysis developed by the Board when determining whether a Town Plan provision should be given effect within a consideration of Criterion 10. See, *Re: Peter S. Tsimortos, #2W1127-EB*, Findings of Fact, Conclusions of Law, and Order at 18 – 20 (Apr. 13, 2004).

On September 20, 2004, while this matter was pending before the Commission, Ludlow adopted a new Town Plan (2004 Town Plan).³ While this Plan was adopted *after* TCI filed its application with the Commission, "the Board has consistently held that,

³ Apparently, neither the Commission nor TCI was aware of the new Plan.

at an applicant's request, Town Plan amendments which occur after the application date and which favor an applicant may govern.” *Re: Peter S. Tsimortos, supra*, at 18, *citing, Re Fred and Laura Viens, #5W1410-EB*, Memorandum of Decision at 4 - 5 (Sept. 3, 2003); *Re: Juster Development Corp., #1R0048-8-EB*, Findings of Fact, Conclusions of Law, and Order at 33 (Dec. 19, 1988). The Board therefore grants TCI’s February 15, 2005 motion and considers Criterion 10 under the 2004 Town Plan.

The 2004 Town Plan differs from the 2002 Town Plan. The specific objective which forms the basis for the Commission’s denial under Criterion 10 has been deleted from the later Plan.

The Board concludes that this deletion is crucial to this case, as, without the objective, there is no basis to find that the Project does not meet the town plan provisions of Criterion 10. Other portions of the 2002 Town Plan which were noted by the Commission and which have survived into the 2004 Town Plan do not employ language which is sufficiently mandatory so as to rise to the level of prohibitions on which to base a denial under the criterion.

The Board therefore concludes that the Project is in compliance with the 2004 Ludlow Town Plan.

B. Regional Plan

The Commission also held that the Project did not meet the Southern Windsor County Regional Plan (SWCRP).⁴ The decision as to the Regional Plan was based, in part, on a provision in the SWCRP that requires projects to comply with their local plans. Decision at 23, *citing SWCRP at 20*. Because we find that the Project complies with the Town Plan, this portion of the Regional Plan does bar this Project.

The Commission also found that the Project failed to comply with a policy in the Land Use Section of the Regional Plan which states:

6. Where towns support residential, resort, and mixed use development tailored to the tourist and ski industries, such development should be sited and designed to protect settlement patterns and the natural resources of the town and region.

Decision at 23. The Decision concluded that the Project’s failure to protect critical wildlife habitat in the Town of Ludlow results in a conflict with Policy 6.

⁴ TCI’s memorandum in support of its present motion does not address the Commission’s denial under the Regional Plan.

Generally, a project must comply both with the applicable Town Plan and Regional Plan. *Re: Green Peak Estates, #8B0314-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Jul. 22, 1986), aff'd, In re Green Peak Estates, 154 Vt. 363 (1990).*

If there is a conflict between the Town Plan and the Regional Plan, however, the Project need only comply with the Town Plan, unless the Project has regional impacts. 24 V.S.A. §4348(h)(2); *Re: Peter S. Tsimortos, supra, at 24; In re Green Peak Estates, supra, 154 Vt. at 368; Re: Richard Provencher, #8B0389-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Oct. 19, 1988)* (when conflict exists between town and regional plan, 24 V.S.A. §4348 provides that the regional plan applies to the extent that it is not in conflict with the local plan, in which case the regional plan will apply if project has substantial regional impacts; if project does not have substantial regional impacts, town plan, not regional plan, applies)

The Board has held that where a Town Plan would allow a project that a Regional Plan would prohibit, this is a conflict. *Re: Peter S. Tsimortos, supra, at 24.* Assuming, without deciding, that the Board would find, as did the Commission, that the Project does not conform to the Regional Plan, a conflict exists. Under such a scenario, the question is whether the Project has a regional impact.

No party has submitted direct evidence on the question of whether the Project has regional impacts. However, the Board takes official notice of the Commission's file in this matter (including the application and the Commission's findings), see 3 V.S.A. § 810(4), and concludes that this Project does not have substantial regional impacts. The Board therefore concludes that the Project complies with 10 V.S.A. §6086(a)(10).⁵

This matter must be remanded to the Commission for the issuance of a permit. The Board does so with certain caveats.

Clearly, as the Commission recognized and the former Town Plan sought to address, there are substantial conflicts that exist between residential developments and shooting ranges. There have been a myriad of cases before the Commissions and the Board in which such conflicts are all too apparent. See, *Re: Hale Mountain Fish and Game Club, Inc., Declaratory Ruling 435* (presently pending before the Board); *Re: Bull's Eye Sporting Center and David and Nancy Brooks, Wendell and Janice Brooks, #5W0743-2-EB (Revocation), Findings of Fact, Conclusions of Law, and Order (Jun. 23, 2000); Re: James L. McGovern, III, #700002-17A-EB, Memorandum of Decision (Dec. 6, 2002); Re: Talon Hill Gun Club, Inc. and John Swington, #9A0192-EB(Revocation), Findings of Fact, Conclusions of Law, and Order (Oct. 8, 1993).* Indeed, the Project's neighbor, the Black River Valley Rod and Gun Club, Inc., (Gun Club) has been the

⁵ As a result of this conclusion, the second Issue raised in TCI's appeal is moot.

subject of Act 250 proceedings, *Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 27, 1997), although no present conflicts are apparent.

It is the proximity of the Project to the Gun Club that gives the Board some pause. While the Board recognizes that it would be paradoxical to restrict development on the TCI parcel because of potential dangers caused by its location next to the Gun Club, safety is always a concern. The Board is aware, from a review of the Commission Decision, that the Commission is sensitive to this concern, see Decision Finding 58 and Conclusions at 19 - 20, and the Commission may decide, as a condition to the issuance of a permit to TCI, that TCI must secure the approval of the Gun Club to engage in substantial modifications to the Gun Club operations and site.⁶ The Board believes that the Commission should exercise caution in its review in order to ensure the safety of the future residents of the TCI Project.

IV. Order

1. The Project complies with 10 V.S.A. §6086(a)(10).
2. Jurisdiction is returned to the District 2 Environmental Commission.

Dated at Montpelier, Vermont this 26th day of April 2005.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden*____
* Patricia Moulton Powden, Chair
George Holland
W. William Martinez
* Patricia Nowak
Alice Olenick
Karen Paul
Richard C. Pembroke, Sr.
A. Gregory Rainville
Christopher Roy

⁶ These modifications may require an amendment to the Gun Club's Land Use Permit. The Board, however, leaves the decision as to whether any changes require review to the Coordinator, see 10 V.S.A. §6007(c), and the scope of any such review to the Commission.

* Chair Moulton Powden and Board Member Nowak, concurring. We concur in the decision in this matter, as we must conclude that, with the amendments to the Town Plan, the Project now complies with Criterion 10. We share the Board's disquiet concerning safety, however. And we also must express a further apprehension that the construction of this residential development so close to the existing Gun Club is, to our thinking, an invitation to conflict.

All too often, in our experience, people move to sites near what they consider to be nuisances (e.g. shooting ranges and farms) and then assert claims against them. It is of little consequence, and the Gun Club should take little solace in the fact that purchasers of homes in the TCI Project will do so with full knowledge that the Gun Club exists. Claims may still be filed, and the Gun Club may find itself defending against petitions and other actions designed to end or severely curtail its existence.

The Board has no authority to deny TCI's application on this ground, so there is little that the Board can do to resolve these foreseeable conflicts before they may arise. We note them only to put the parties on notice that this is a very real problem that they should endeavor to address before the Project is constructed.