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

RE: C & K Brattleboro Associates
and Gerald G. Scanlan
Application #2W0434-EB

Findings of Fact,
Conclusions of Law,
and Order

This is an appeal of Land Use Permit #2W0434, issued by the District #2 Environmental Commission on October 4, 1979 for the construction of an industrial park on a 70± acre parcel in Brattleboro, Vermont. Appeals to that permit were brought to the Environmental Board by the applicants, C & K Brattleboro Associates and Gerald Scanlan, and by the Town of Brattleboro. The Board heard testimony and oral argument on the matter on November 13 and December 11, 1979.

The following issues were raised in these appeals:

Applicant C & K Brattleboro Associates raised legal objections to Conditions #1 and #2 of the land use permit; challenged Conditions #4 and #5 as inconsistent with the intent of the Board's umbrella permit policy; and appealed the findings and conclusions of law of the District Commission on Criteria 8 (regarding aesthetics and landscaping), 8A, 1E, and 9K (regarding the effects of stormwater discharges on the ecology of the West River, Retreat Meadows wetlands, and the Connecticut River), and 9B (primary agricultural soils). Applicant Gerald Scanlan and the Town of Brattleboro appealed the findings and conclusions of law of the District Commission with respect to Criterion 9B (primary agricultural soils). These issues are addressed in the findings and conclusions below.

Findings of Fact

A. Criterion 8 - This project will not have an undue adverse effect on the scenic beauty, natural beauty, or aesthetics of the project area if proper landscaping and screening controls are implemented.

1. The aesthetic impact of the park has three components: (a) portions of the proposed industrial park are visible from the existing public highways passing the site, including Interstate Route 91, which is a designated scenic road corridor of the State of Vermont; (b) portions of the park are visible from residences across the West River from the project site; (c) the internal design of the park, and the landscaping of the park's buildings and roads will have an aesthetic impact on employees, business visitors, and other members of the public who enter the park.

2. The project site consists of three plateaus. Development on the upper plateau will be visible from both the northbound and southbound lanes of I-91. Development on the middle plateau will be partially visible from

the northbound and southbound lanes of I-91. Development on the lower plateau will be shielded from view from the Interstate by elevation and existing vegetation except where the highway passes directly by the plateau.

3. The proposed covenants for the project adequately regulate building design and color to control their aesthetic impact.

4. As presently drafted, the covenants applicable to this project do not ensure the maintenance of the vegetation proposed in the applicants' landscaping plans,

5. The covenants applicable to the project require a comprehensive landscaping plan for each industrial facility which includes plantings on all four sides of each building, and substantial screening for work and loading areas. Specific plans for each industrial facility will be submitted to the District Environmental Commission for individual review.

6. The Brattleboro Zoning Ordinance and the applicants' covenants permit building and parking area coverage of up to 70% of the project site. Some facilities may require substantial parking areas. The proposed covenants do not provide for any internal landscaping to minimize the aesthetic impact of those large parking areas.

7. The existing topography and vegetation on the site, together with the landscaping controls applicable to industrial tenants, will protect residents across the West River front any undue aesthetic impact from this project.

B. Criterion 9B - This project satisfies the requirements set out in 10 V.S.A. §6086(a) (9) (R) (i)-(iv) for developments that significantly reduce the agricultural potential of primary agricultural soils.

1. The soils on this project site that are designated for industrial development are primary agricultural soils within the meaning of that term in 10 V.S.A. §6001(15).

   a. This site has been part of a working farm owned by the family of Emerson Thomas since 1794. In 1975 Mr. Thomas sold the parcel to the applicant Gerald Scanlan. The site was in farming production until 1979. The soils on the site are Unidilla, Enfield and Windsor; these soils have a potential for growing food and forage crops, are well drained, are well supplied with plant nutrients and are responsive to

the use of fertilizer.

b. Approximately 45 acres on this site are sufficiently level and located so as to permit tilling and harvesting by mechanized equipment. This acreage is distributed evenly among the three plateaus of the total site. The slope of these areas does not exceed 15 percent.

c. These 45 acres are of a size capable of supporting or contributing to an economic agricultural operation. Russell Franklin, the farmer who most recently cultivated the site, raised approximately 700 tons of corn on these 45 and an additional 15 acres. The tillable area and the agricultural yield of the site are of sufficient size to be cultivated efficiently and thus could contribute to an economic agricultural operation.

2. The development proposal for this agricultural land will in all likelihood substantially reduce, if not eliminate, the agricultural potential of the primary agricultural soils on the site. The applicants' plans designate the areas of the highest quality soils for industrial development, parking, access roads, or other improvements.

3. The applicants can realize a reasonable return on the fair market value of its land only by devoting the primary agricultural soils to nonagricultural uses:

a. Applicant Gerald Scanlan paid approximately $1700 per acre for this land in 1975. The present negotiated sales price of the project site is between $6,000 and $20,000 per acre.

b. The rental value of this land For agricultural purposes is no more than $50 per acre per year. The last farmer to rent the land paid $20 per acre in 1975.

c. This Board is unable to find the fair market value of this property on the state of the evidence presented at the hearings. We do find, however, that a reasonable return can be obtained on the fair market value of the land, within the meaning of those terms in 10 V.S.A. §6086(a)(9)(B)(i), only by devoting the parcel to nonagricultural uses.

4. The applicants to this permit do not own or control any nonagricultural or secondary agricultural soils in the project area that are suitable for development as an industrial park. Dr. Scanlan owns parcel's of 4 acres

and 38 acres in the vicinity. The 4-acre parcel is far too small for an industrial development. The 38-acre parcel consists of 13 low-lying acres, which are unsuitable for industrial development, and 25 acres of agricultural land comparable to the soils planned to be developed in the present application.

5. The proposed industrial park has been reasonably designed in terms of density, lot location, utility costs, vehicular access, and land usage. We cannot find that the use of cluster planning in this park would have any desirable effect on the disturbance of agricultural soils. At the same time, a requirement that industrial buildings be clustered would have undesirable consequences, including: (a) limiting on-site truck maneuvering room, (b) restricting fire fighting access to each building and increasing the danger of spreading fires, (c) creating larger parking lots and, (d) decreasing the flexibility of each tenant for future expansion.

6. This development will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential. The project site is located in an area zoned for industrial development since 1964. The land is bounded by an interstate highway and a state highway, and by industrial and commercial developments including shopping centers and a car dealership. There are no viable farms or forests in the immediate vicinity.

Conclusions of Law

1. Appellants have objected to the language of Condition #1 of the land use permit issued by the District Commission. The condition requires the applicants to complete the project in conformance with their stated and approved plans, in accordance with conditions of the permit and in conformance with the District Commission's Findings of Fact and Conclusions OF Law. This is a reasonable condition to limit and define the scope of the permit granted without restating in the permit itself all the details of the project application. Appellants' objection to Condition #1 will be sustained in part, however, because the decision in this case contains many statements labeled "Findings of Fact" which are not actually the findings of the District Commission. For that reason, the language of the condition that incorporates the Commission's findings into the land use permit shall be deleted.

2. Appellants have also raised an objection to Condition #2 of the permit. That condition states that the permit runs with the land, and shall bind any assigns and successors in interest; it also requires the applicant to obtain a permit amendment before granting or selling any part of the project site.

The Board concludes that this is a reasonable condition to ensure that the substantive requirements of Act 250 are complied with. Appellants' objection to this condition is therefore denied.

3. Appellants' objections to Conditions #4 and #5 of the land use permit raise for our review the District Commission's application of our so-called "umbrella" permit policy to this project. That policy was first established by the Board on March 12, 1975 for industrial parks that are established by public, nonprofit development corporations. We now conclude that the policy is equally applicable to privately financed, for-profit industrial parks, except that certain assumptions relating to state review and the accountability of local development corporations do not apply to private industrial park developers.

The chief purposes of the umbrella permit policy are to facilitate the environmental review of industrial developments and to decrease the cost and uncertainty of the Act 250 process for prospective industrial park tenants, while at the same time insuring that the vital interests of the public and the natural environment are safeguarded as required by the Act. To achieve these goals, the District Environmental Commissions, the applicants for industrial park permits, and other parties to the Act 250 review process must work to establish clearly the scope of review and approval for the umbrella permit and the scope of review that will remain for individual industrial tenants. We emphasize at this point that a positive finding on one of the criteria of Act 250 as part of an umbrella permit does not automatically block review under that criterion in the later application of an industrial tenant. It does, however, create a rebuttable presumption of a positive finding on that issue with respect to the tenant's facility. The creation of any such rebuttable presumption requires careful consideration of the umbrella permit application and careful delineation of the boundaries of review in the District Commission's written decisions.

With these considerations in view, we turn to appellants' objections to the District Commission's order in the present matter. We conclude that language of Condition #4 of the land use permit is ambiguous and overly broad as presently drafted. The condition will therefore be amended to read:

4. Construction 0 f any improvement or industrial facility within the park except for landscaping, utility services and internal roads developed by the applicant in accordance with the overall plans for the industrial park as approved in this permit, is prohibited until amendments to this permit are issued for each individual proposed industrial or other USC. In such event, the proposed tenant or other developer shall be a co-applicant with the applicant C & K Brattleboro Associates.

We also conclude that *the* broad scope of review retained by the District Commission for each industrial tenant is contrary to the purposes of the umbrella permit process and is not consistent with the Commission's own Findings of Fact and Conclusions of Law. The District Commission has found that if this project is developed in accordance with the plans and projections presented in the public hearings on this matter, the proposed industrial park will not have an undue adverse impact under the following criteria of Act 250: l(A); l(D); l(F); 2; 3; 6; 7; 9(C)-(E); 9(C)-(J), 9(L), and 10.

The Environmental Board has found that as proposed, the project as a whole satisfies the requirements of Criterion 9(B). We therefore conclude that this review provides a rebuttable presumption that only the following criteria of the Act will bc subject to review by the District Commission when an amendment is sought for development of an industrial project within this park: 1 (regarding air pollution); l(B); l(C); l(E); (4); (5); (8); 9(A); 9(F); and 9(K).

Condition #5 of the land USC permit will be amended to incorporate these conclusions.

4. The District Environmental Commission has expressed serious concerns about the potential impact of the industrial park on the ecology of the West River, the Retreat Meadows wetlands, and the Connecticut River, particularly with respect to the effect of stormwater discharges on the Atlantic salmon restoration program. These issues were raised by the representatives of the state Agency of Environmental Conservation. That Agency, together with the other parties to this appeal., presented a motion to the Environmental Board for a ruling that the issuance of a stormwater discharge permit for this project by the Agency of Environmental Conservation would constitute a rebuttable presumption that the project's' stormwater discharges would not have an undue adverse environmental effect under Criteria 1E, 8A, and 9K of the Act. Under the

provisions of the Administrative Procedure Act, 3 V.S.A. §809(d), the parties to a contested case may make informal disposition of the case by stipulation, unless otherwise precluded by law. We find that the resolution of this issue proposed by the parties is not in conflict with the requirements of Act 250 and is consistent with the Rules and procedures of the Environmental Board, We therefore grant the Agency's motion. However, if no such permit is required, or if none is issued, the presumption will fail, and the Board will reopen the hearing on this permit with respect to Criteria 1(E), 8(A) and 9(K). Finally, as noted above, these criteria are subject to review by the District Commission in connection with the applications of industrial park tenants under our decision on the scope of the umbrella permit. We therefore direct the District Commission to apply this presumption in its review of those criteria for any tenant whose discharges have been authorized by the Agency of Environmental Conservation.

5. Based on the Findings of Fact herein, we conclude that if this project is completed and maintained in conformance with the terms and conditions of the application and with Land Use Permit #2W0434-EB as amended herein, it will not have an undue adverse effect on the natural or scenic beauty or aesthetics of the project area.

6. Appellants presented considerable evidence to the Board concerning the economic viability of farming operations on the project site, and argued that the site did not contain "primary agricultural soils" as defined in 10 V.S.A. §6001(15) because the site was not zoned for agriculture and because the high cost of the land made farming unprofitable at that location. We conclude, however, that the plateau portions of the site do contain primary agricultural soils as defined in the Act. This conclusion does not, of course, mean -that those soils cannot be developed, but merely requires careful consideration of the factors set forth in Criterion 9(B) (i) - (iv).

Our review of the evidence in this appeal, with respect to the location, zoning, and cost of holding the site, the nature of the surrounding land, and the design plans for the project, leads us to conclude that this project satisfies the requirements of Criterion 9(B) (i) -(iv).

Critical to this holding is our conclusion that the applicants' plan for this development satisfies Criterion 9(B) (iii). The applicants have considered alternative designs for this project that could' cause the physical disturbance of a somewhat smaller area of primary agricultural soils than does the design we have approved. However, the evidence convinces us that those alternative designs

have serious deficiencies as noted in the findings on this point. Moreover, we cannot find that an alternative design would result in the retention of any usable areas of primary agricultural soil. This is in part due to the location of the land, which, as noted in our findings, is not adjacent to any working farms; and is in part due to the space requirements of the industrial park itself. We believe that in enacting Criterion 9(B)(iii), the legislature intended to require careful consideration of design alternatives that could reduce a project's impact on primary agricultural soils, and to require adoption of a land-conserving design when it is reasonable to do so. The applicants have considered alternative designs; the evidence persuades us that the imposition of a land-conserving design would not be reasonable in this case.

7. Based on the Findings of Fact above, the Environmental Board concludes that if this project is completed and maintained in conformance with the terms and conditions of the application and with Land Use Permit #2W0434 as amended herein, it will not cause or result in a detriment to the public health, safety or general welfare under the criteria described in 10 V.S.A. §6086(a).

ORDER

Jurisdiction over this application and permit shall remain with the Environmental Board until the applicants receive a discharge permit as required in Conclusion of Law #4 above. Jurisdiction shall thereafter return to the District Environmental Commission.

Dated at Montpelier, Vermont this 2nd day of January, 1980.

ENVIRONMENTAL BOARD

By Margaret P. Garland
Chairman

Voting to issue
this decision:
Margaret P. Garland
Ferdinand Bongartz
Dwight E. Burnham, Sr.
Melvin H. Carter
Michael A. Kimack
Roger N. Miller
Donald B. Sargent
Leonard U. Wilson