

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., CHAPTER 151

RE: Eugene Ettlenger
Tara Interval
West Dover, VT 05356

Land Use Permit #2W0543-EB
Findings of Fact, Conclusions
of Law and Order

On October 22, 1982 Paolo Cugnasca filed an appeal with the Environmental Board (the "Board") from Land Use Permit #2W0543 granted by the District #2 Environmental Commission (the "District Commission") to Eugene Ettlenger on September 11, 1982 and revised October 15, 1982. Land Use Permit #2W0543 specifically authorizes the permittee Eugene Ettlenger to construct 52 two-bedroom units in 13 buildings and grants conceptual approval for 88 two-bedroom units in 22 buildings on 70± acres of land on Cross Town Road in the Town of Dover, Vermont. Paolo Cugnasca appeals the District Commission's denial of party status. Appellant claims that he should have been admitted as an adjoining property owner so that he could have participated on the following substantive criteria under 10 V.S.A. §6086(a): Criterion 1 (water pollution), 2 and 3 (sufficiency of water), 5 (highway safety), 8 (aesthetics), 9(A) (impact of growth), and 9(G) (utility services).

On November 4, 1982 the Appellant filed with the Board a Motion to Order Stay, ex parte, the construction of this project. The Board reviewed this Motion on November 10, 1982 and issued a Memorandum of Decision denying the Motion.

Chairman Leonard U. Wilson held a pre-hearing conference on November 12, 1982 in Bennington, Vermont on the issues raised by Appellant's appeal from the denial of party status.

The Board convened and adjourned the public hearing on this appeal on November 23, 1982 at Snow Mountain Conference Center in Mount Snow, Vermont. Prior to testimony and oral argument, the Board visited the site.

Parties present at the hearing were the following:

Appellant, Paolo Cugnasca by Robert B. Cohen, Esq.;
Permittee, Eugene Ettlenger by Lawrin P. Crispe, Esq.,
Donald Albano and Eugene Ettlenger; and
Town of Dover by Doris Knechtel, Administrative Assistant,
and Selectman Elspeth Kirkland.

This matter is now ready for 'decision. Our Findings of Fact and Conclusions of Law are based on the record developed at the hearing and a series of stipulated facts set forth in the pre-hearing conference report as amended at the hearing.

I. ISSUES RAISED BY THE APPEAL

Appellant's Notice of Appeal raises both procedural and substantive issues; however, at the pre-hearing

conference the parties narrowed the issues to be addressed at the public hearing to those issues that relate to the validity of the District Commission proceedings, i.e., adequate notice. Therefore, the question before the Board is whether the District Commission adequately noticed the Applicant's proposed project as required by 10 V.S.A. §6084 and Board Rule 10(G) so that Appellant's request for party status was properly denied by the District Commission pursuant to 10 V.S.A. §6085(c) and Board Rule 14(A) (3).

II. FINDINGS OF FACT

1. Applicant Eugene Ettlenger filed an application with the District #2 Environmental Commission on April 8, 1982 to construct 96 two-bedroom units (called **Tara Interval**) on 16.2 acres on Cross Town Road in the Town of Dover.
2. District #2 Environmental Commission published notice of this application on April 12, 1982 in the Brattleboro Reformer according to the requirements of 10 V.S.A. §6084(b) and Board Rule 10(G).
3. The Brattleboro Reformer has been designated as the official newspaper for the Town of Dover. Exhibit #15.
4. The project, as described in the initial application and as noticed by the District Commission, was to be located on 16.2 acres owned by Eugene Ettlenger and adjacent to Cross Town Road. Exhibits #1, #2, and #10.
5. Eugene Ettlenger controls Environmental Consultants, Inc., a Vermont corporation with its principal place of business in Dover, Vermont. On May 12, 1982 Environmental Consultants purchased 53.8 acres of land adjacent to the 16.2 acre parcel (described in Finding #1) on the southwest, and adjacent to Cross Town Road on portions of its southern and southeastern borders. Exhibits #1, #5 and Stipulated Facts.
6. Legal title to a lot shown as #164 on Exhibit #1 is in the name of Paolo Cugnasca. Appellant's property adjoins the southeastern border of this 53.8 acre parcel directly across Cross Town Road. Exhibits #1, #5 and Stipulated Facts.
7. Eugene Ettlenger test-dug two wells on this 53.8 acre parcel to provide a source of water for the project located on the 16.2 acre parcel.

8. Eugene **Ettlinger's** application was not amended to include the 53.8 acre parcel. Nor did the District Commission publish notice of the additional 53.8 acre parcel which was to be used in part as the source of water for the project.
9. A six-acre site located on Cross Town Road known as **Tara** Townhouse is also owned by Environmental Consultants. Exhibit #7 and Stipulated Facts.
10. A two-acre site located on Route #100 known as the **Tara** Racquet site is owned by Eugene Ettlinger. Exhibit #8 and Stipulated Facts.
11. An additional **70±** acre site located on Cross Town and Country Club Roads is owned by Eugene Ettlinger. Exhibit #11.
12. The District Commission held hearings on this project on April 29, May 20, and June 1, 1982. The District Commission reviewed the information on September 9, 1982 and then issued the permit on September 22, 1982. Appellant requested party status on September 14, 1982, but the District Commission denied this request on September 22, 1982 and subsequently denied Appellant's motion for reconsideration.

III. CONCLUSIONS OF LAW

1. We conclude that the 53.8 acre parcel described in Finding #5 and owned by Environmental Consultants, Inc. is "involved land" within the meaning of 10 V.S.A. §6001(3) and Board Rule 2(F) (2) for the following reasons: (1) the original 16.2 acre project site is owned by Eugene Ettlinger, (2) the adjacent 53.8 acre parcel, although owned by Environmental Consultants, is controlled by the Applicant Eugene Ettlinger, and (3) the wells located on the 53.8 acre parcel are incident to the use of the project because they are proposed to supply water to the buildings to be constructed on the 16.2 acre site. In Committee to Save the Bishop's House v. Medical Center Hospital of Vermont, Inc., 137 Vt. 142, 153 (1978) the Vermont Supreme Court held that:

[L]and is involved within the meaning of 10 V.S.A. §6001(3) only where it is incident to the use within the meaning of that section, or where it bears some relationship to the land actually used in the construction of

improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially increased by reason of that relationship.

Land incident to the use is defined in 10 V.S.A. §6001(3) to include such things as lawns, parking areas, roadways, leaching fields and accessory buildings. Certainly the land used as the well sites for the project is as involved as leaching fields and bears a relationship to the project in that water conservation and water supply are values that Act 250 is designed to protect. See 10 V.S.A. §6086(a) (1) (C), (2), and (3). The Applicant's argument that the land with the two wells providing water to the project is not part of the project cannot stand in the face of the statute's intent nor the Court's holding.

2. As involved land, the 53.8 acre parcel is part of the Applicant's project; therefore, we conclude that the District Commission's failure to publish notice of this involved land constitutes a lack of adequate notice. Under 10 V.S.A. §6084(b) notice of Act 250 applications must be published in a local newspaper generally circulated in the area where the land is located. To the extent that he could show that the proposed development would have a direct effect on his property, Appellant's right to participate in the District Commission proceedings was denied due to this lack of notice. In-re Great-Waters of America, Inc., 140 Vt. 105 (1981).

In In re Juster Associates, 136 Vt. 577, 581 (1978) the Court stated that "The statute [Act 250] is intended, by a system of notice and hearings, to assure full consideration of land use proposals for all parcels of land." In the Juster Associates case the Board granted an amendment to a permit that included land not previously considered by the District Commission. The Court held that development on new land must be properly noticed to permit the participation of those persons affected and must initially be considered by the appropriate district commission.

We remind Appellant that adjoining landowners are not-entitled to personal, actual notice of an Act 250 permit application. In the Great Waters case, cited above, the Court decided that as far as adjoining property owners were concerned:

[S]ince there is no "liberty" or "property" interest involved that is protected by the Fourteenth Amendment, and thus requiring full due process notice and hearings protection, the constructive notice procedures are legally adequate.

However, because notice of the additional 53.8 acre parcel was not published as required by 10 V.S.A., §6084(b), 3 V.S.A. §809(b), and caselaw, we must conclude that the lack of notice invalidates the District Commission proceedings and therefore, the land use permit granted to Eugene Ettlinger is void.

3. The Board deliberated on the issue of adequate notice on the day of the hearing and informed the parties of its decision at that time. Consequently, the Board did not hear Appellant's renewed Motion to Stay further construction on this project. Without a valid permit, however, the Applicant cannot proceed with the project. 10 V.S.A. §6081; In re Juster Associates, 136 Vt. at 580.

ORDER

Land Use Permit #2W0543 is declared null and void. Jurisdiction over this application is returned to the District #2 Environmental Commission for further proceedings consistent with this decision.

Dated at South Burlington, Vermont this 8th day of December, 1982.

BOARD MEMBERS:

Leonard U. Wilson
Warren M. Cone
Ferdinand Bongartz
Dwight E. Burnham
Priscilla N. Smith

Members participating in
this decision:

Leonard U. Wilson
Warren M. Cone
Ferdinand Bongartz
Dwight E. **Burnham**
Priscilla N. Smith