

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

RE: Raymond F. Ross, Lois K. Ross, and Rochelle Levy by Jonathan Bump, Esq. Fitts, Olson, Carnahan, Anderson and Bump
P.O. Box 801
Brattleboro, VT 05301

Memorandum of Decision and Order
Land Use Permit #2W0716-EB

I. PROCEDURAL HISTORY

On February 17, 1987, the Applicants filed a permit application for the construction of a mixed commercial and residential project adjacent to Route 100 in West Dover, Vermont. The application was made pursuant to 10 V.S.A. 6086(b) which allows an applicant to file for a permit by first submitting the application under Criteria 9 and 10. The project consists of 15 stores in a shopping mall, 51 multi-family dwellings, and one amenity building. On March 24, 1987, the application was amended to 55 multi-family dwellings, 11 stores and one amenity building. On April 10, following a public hearing, the District #2 Environmental Commission (Commission) determined it was unable to make positive findings on Criteria 9 and 10 without the additional information about the project on Criteria 1 through 8. The Commission therefore required the Applicants to submit a complete application on all criteria. The Applicants filed an appeal on May 4, 1987.

A prehearing conference was convened by Environmental Board Chairman Darby Bradley on June 15, 1987 at the Municipal Center, Jacksonville, Vermont. The following parties participated in the prehearing conference:

Applicants Raymond F. and Lois K. Ross and Rochelle Levy (Applicants), by Jonathan Bump, Esq.
Town of Dover (Town), by Robert H. Miller
Dover Planning Commission (Planning Commission), by George Humphreys, Ralph Gerstle, Howard R. Morse and Linda Kersten
Windham Regional Planning Commission, by Stephen J. Holmes, Executive Director

On June 25, the Applicants filed a memorandum of law. The Chairman issued a preliminary decision on July 3, 1987. On July 17, the Applicants filed an objection to the preliminary decision and on July 20 the Town of Dover filed its objections to the preliminary decision. On August 11, the Applicants submitted a further comment. On August 5 the Board conducted a deliberative session. This matter is now ready for decision.

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II. ISSUES IN THE APPEAL

A. Applicable Town Plan

One issue raised by the parties is whether the filing of an application under 10 V.S.A. 6086(b), which allows an applicant first to file under Criteria 9 and 10, is to be governed by the town plan in effect at the time of the application or by subsequent amendments to the town plan enacted while the application was pending before the Commission.

The Dover Town Plan was approved in January 1985, amended in July 1985 and again in December 1986. On January 28, 1987, the Dover Planning Commission held a public hearing on proposed amendments to the Town Plan. The Applicants filed their application pursuant to 10 V.S.A. 6086(b) for consideration of Criteria 9 and 10 on February 17, 1987. The Dover Town Plan was revised on May 19, 1987 to include changes in density for various areas including the Applicants' property.

The Applicants maintain that once an application is accepted for review by the Commission, the application is complete and any review of the application is based upon the town plan in effect at the time the application is filed. The Town claims that because the application is not complete, the Town is not able to make accurate comments. The Windham Regional Planning Commission and the Dover Planning Commission believe that the application filed under Criteria 9 and 10 contains insufficient evidence for them to judge whether the project is in conformance with the town plan.

Decision

The Board does not agree with the Applicants' position that if an application is deemed complete by the coordinator, it is considered complete for purposes of having certain rights vest. A coordinator's review of an application for completeness pursuant to Board Rule 10(D) is simply an administrative decision for purposes of starting the application in the permit process. It means that the application contains sufficient basic information so that a hearing can be convened. See Killington Ltd. and International Paper Realty Corporation, Application #1R0584-EB, Memorandum of Decision issued August 8, 1986.

An application filed for partial review pursuant to 10 V.S.A. § 6086(b), however, is not a complete application for purposes of determining what laws and regulations apply. An application is not complete--based upon the common meaning of the word--until an application covering all ten criteria is filed. At that time, certain rights vest, in accordance with the rule announced by the Vermont Supreme Court in Smith v. Winhall Planning Commission, 140 Vt. 178 (1981).

In this case, however, the right to be reviewed under the town plan in effect on February 17 might not have vested even if the Applicants had filed a complete application on that date. A careful reading of Smith v. Winhall indicates that the so-called vesting rule--that the laws and regulations that govern are those in effect at the time an application is filed--applies only in situations where no amendments to the town plan had been proposed or were in the process of enactment. See Smith v. Winhall at 180-82. Since amendments to the Dover Town Plan had been proposed and were in the process of being amended, the Smith v. Winhall vesting rule is not applicable.

The Board concludes that under these circumstances, the project must be reviewed for conformance with the town plan in effect at the time an application that covers all ten criteria is filed.

B. Propriety of District Environmental Commission Determination

A second issue raised by the parties is whether the Commission can require an applicant to file a complete application under all the criteria before deciding whether an application satisfies Criteria 9 and 10, when that application is filed pursuant to 10 V.S.A. § 6086(b).

Pursuant to Board Rule 21(B), an applicant may request the Commission first to consider Criteria 9 and 10 before reviewing Criteria 1 through 8. Once the Commission accepts an application filed under Rule 21(B), the Commission must comply with the requirements of 10 V.S.A. 6086(b). Pursuant to 10 V.S.A. 6086(b), the Commission must either 1) issue its findings and decision, or 2) proceed to a consideration of Criteria 1 through 8.

In this case the Commission found the review of Criteria 9 and 10 to be inextricably intertwined with Criteria 1 through 8 and therefore was unable to make a determination on Criteria 9 and 10 without also reviewing Criteria 1 through 8. Since comprehensive review under Criteria 9 and 10 was impractical and unduly difficult without the benefit of the information pertinent to Criteria 1 through 8, the Commission required the additional information.

Decision

The Board concludes that the Commission's deferral of a decision under Criteria 9 and 10 was permissible under 10 V.S.A. § 6086(b) because the statute clearly allows the Commission to

do so and the Commission's rationale was sound. The Commission had the discretion to require the Applicants to submit a complete application covering all ten criteria, and the Board cannot find that that discretion has been **abused**./1/

/1/ Had the Commission issued findings and a decision on Criteria 9 and 10, the Commission's decision could have been appealed under Board Rule 43 pertaining to interlocutory appeals, except that the appeal as filed was not timely. However, even if the request for interlocutory appeal had been timely, it would not have been accepted because it would not have materially advanced the application process as required by Rule 43.

ORDER

1. The application must be reviewed under Criterion 10 for conformance with the version of the Town Plan in effect on the date a complete application that addresses all ten criteria is filed.

2. The Commission did not abuse its discretion in deferring findings and a decision on Criteria 9 and 10 until it has reviewed the complete application under all criteria.

Dated at Montpelier, Vermont this 2nd day of November, 1987.

ENVIRONMENTAL BOARD


Darby Bradley, Chairman
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Jan S. Eastman
Arthur Gibb
Samuel Lloyd
Roger N. Miller

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