State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Lyman and Birgit Cooper, et al.
Application #2W0848-1-EB (Interlocutory Appeal)

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to a Motion for Interlocutory Appeal filed by Birgit Cooper, on behalf of herself and the Estate of her late husband, Lyman Cooper ("the Coopers"). The Coopers ask the Board to conclude that certain transfers of lots within a subdivision were made in violation of Permit conditions and therefore the transfers should be declared void. As explained below, the Environmental Board ("Board") denies the motion.

I. BACKGROUND

On April 17, 1990, Lyman and Birgit Cooper, Litchfield Financial Corporation ("Litchfield"), and Green Mountain Bank ("Green Mountain"), through counsel William Meub, Esq., filed an application for a land use permit to allow the redesign of a 20-lot, 33-acre portion of an existing 55-lot subdivision, known as Deer Meadow, located in the Town of Dover, Vermont ("the Project"). The application also requested permission to construct certain infrastructure for the Project. The application was filed in partial satisfaction of the terms and conditions of an Assurance of Discontinuance ("AOD") entered into by the Board, the Coopers, and others, and approved and accepted by the Environmental Law Division, Washington Superior Court, Docket No. S-768-89Wnc (Dec. 28, 1989).

On May 18, 1993, the District 2 Environmental Commission ("Commission") granted Land Use Permit #2W0848, authorizing the requested reconfiguration of the 20-lots and the construction of 2,335 linear feet of roadway, 3,042 feet of eight-inch sewer main, 3,000 feet of sewer line, a fire protection pond, approximately 985 feet of eight-inch fire protection water main and hydrants and the paving of roads in the development ("Permit").

Some time after the issuance of the Permit, Litchfield and Green Mountain transferred title to their holdings in the Deer Meadow subdivision to Mr. Meub in his personal capacity. The lots transferred to Mr. Meub did not coincide with the lot lines and configurations approved in the Permit. Upon discovering these transfers and recognizing that the two-year period for substantial construction had run, the Coopers filed a Motion to Extend Construction Completion Date . . . and Declare the Transfer of Lots in Violation of Permit Conditions ("Motion to Extend"). The Motion to Extend was filed with the Commission on May 27, 1997.

The Commission treated the Coopers' filing as a request for permit amendment, #2W0848-1 ("Permit Amendment Application") and so noticed the matter on June 13, 1997.

The Commission conducted a hearing on July 3, 1997, and issued a Hearing Recess Memorandum on July 9, 1997. The Commission determined that the Permit had not been abandoned and that an extension of the construction completion deadline should be granted. The Commission further determined that the lots transferred to attorney Meub were not in the configuration approved in the Permit and that the transfers were not undertaken in conformance with Permit requirements. However, in order to address the nonconformities with the Permit, the Commission directed attorney Meub to prepare all necessary deeds, property transfer forms and other documents to effectuate conveyances between himself and the Coopers and to submit these proposed documents to the Commission for its approval. The Commission indicated that it would require Mr. Meub, as a co-permittee, to accomplish all necessary transfers. Re: Birgit Cooper and William Meub, Application #2W0848-1, Hearing Recess Memorandum (July 9, 1997).

On July 14, 1997, the Coopers filed a Motion to Reconsider and Modify ("Motion to Reconsider") with regard to the transfer to Meub. They reasserted their claim that the transfers from Green Mountain and Lit&field were in violation of Conditions 3 and 7 of the Permit, and that the transfers should be declared void.

On August 5, 1997, the Commission issued a Memorandum of Decision reiterating its previous conclusions. The Commission refrained from directly addressing the alleged violation on the basis that it is "not the appropriate forum" for enforcement, but it concluded that, whether or not the transfer was made in violation, the Permit "runs with the land" and attorney Meub was now a co-permittee by virtue of his being a record owner of lots covered by the Permit. Therefore, the Commission repeated its directive that attorney Meub prepare all necessary documents to effectuate necessary conveyances and submit these proposed documents to the Commission and all parties by August 18, 1997. Re: Birgit Cooper and William Meub, Application #2W0848-1, Memorandum of Decision at 2 (Aug. 5, 1997).

On August 18, 1997, the Coopers, through attorneys Tarrant, Marks & Gillies, filed a timely Motion for Interlocutory Appeal with the Board pursuant to Environmental Board Rule ("EBR") 43(A). The Coopers asked the Board to determine that the transfer of lots within the Project were in violation of Conditions 3 and 7 of the Permit and therefore should be declared void. The Coopers asked the Board to take official notice of the Commission's files in Application #2W0848 and the Board's files relating to the Assurance of Discontinuance in Docket No. S-768-89Wnc. The Coopers did not move for a stay of the Commission's decision. EBR 42.

No reply memorandum was filed by attorney Meub as provided by EBR 43(C).

By memorandum from the Board's Chair, the parties were notified that this matter

would be considered by the Board, without hearing or oral argument. The Board reviewed the Coopers' pleadings and deliberated on September 24, 1997. This matter is now ready for decision. Pursuant to 3 V.S.A. §810(4) and subject to the right of any party to file a timely written objection, the Board takes official notice of the AOD approved by the Environmental Law Division, Washington Superior Court, Docket No. S-768-89Wnc (Dec. 28, 1989); the Commission's files in #2W0848 and 2W0848-1; and the pleadings filed by the Coopers.

II. DISCUSSION

A. Interlocutory Appeal Not Pertaining to Party Status

In reviewing the Cooper's motion, the Board bears in mind the admonition of the Vermont Supreme Court that interlocutory appeals are an exception to the customary appellate route and should be entertained only in unusual circumstances. In re Pyramid Co. of Burlington, 141 Vt. 294 (1982). The three-part test of V.R.A.P. 5(B) examined by the Court in Pyramid is also contained in EBR 43(A), which states:

> Upon motion of any party, the board may permit an appeal to be taken from any interlocutory (preliminary) order or ruling of a district commission if the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the application process. The appeal shall be limited to questions of law.

Having received an interlocutory appeal that does not pertain to party status, the Board must first examine the appeal and determine whether it is suitable for interlocutory appeal under the standards of EBR 43(A). Re: Sugarbush Resort Holdings, Inc., Application #5W1045-15-EB (Interlocutory), Memorandum of Decision at 2 (Aug. 21, 1997). Under EBR 43(A), the Board considers three factors in granting permission for an interlocutory appeal: (i) controlling question of law; (ii) difference of opinion; and (iii) materially advance of the application. Re: Manchester Commons Associates, #8B0500-EB (Reconsideration) (Interlocutory), Memorandum of Decision at 2 (May 14, 1996). These three factors do not establish "bright lines," but rather, are intentionally vague so as to further the "goals of the interlocutory appeal mechanism." Re: Sugarbush Resort Holdings, Inc. at 4; see Pyramid, 141 Vt. at 302. "The three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." Id. (citing 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3930, at 156 (1977)).

B. The Coopers' Motion for Interlocutory Appeal

The Coopers assert that the transfer of lots within the Project from Green Mountain and Lit&field to attorney Meub was in violation of Conditions 3 and 7 of the Permit and therefore should be declared void and given no effect. The basis for their argument is that:

(i) Mr. Meub was not one of the permittees to the underlying permit. He was acting as legal counsel during those hearings.

(ii) The transfer attempted to shift ownership from two permittees (the Banks) to a non-permittee without transferring the entire 20 lots to him.

(iii) The transfer attempted to shift ownership to Mr. Meub in a configuration not approved by the Commission.

The Coopers assert that the Commission erred in recognizing Mr. Meub as a "co-permittee" for the purpose of taking corrective action to bring the configuration of the subject lots into conformance with the design requirements of the Permit. They assert that the Commission should have invalidated the transfers in order to give effect to the AOD and Conditions of the Permit.

i. controlling question of law

An issue is a "question of law" if no facts are required to resolve the issue or if a factual record has been previously developed by the district commission in a manner that allows the Board to assume the relevant facts without engaging in factual determinations. Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 10 (Dec. 22, 1988).

Based on a review of the' Cooper's filings, the AOD, the Permit, and the Commission's file in this matter, the Board can assume the relevant facts necessary to adjudicate the Motion for Interlocutory Appeal. The facts are these:

1. Permit #2W0848 was issued for the Project on May 18, 1993.

2. Condition 3 of the Permit provides in relevant part that: "By acceptance of the conditions of this permit without appeal, the permittees confirm and agree for themselves and all assigns and successors in interest that the conditions of thispermit shall run with the land and will be binding upon and enforceable against the permittees and all assigns and successors in interest."

3. Condition 7 of the Permit states: "The four co-permittees (Lyman and Birgit Cooper, Green Mountain Bank, and Litchfield Financial Corporation) may transfer lots to each other and/or sell the entire 20 lots to a single entity. There shall, however, be no sale or development of individual lots or commencement of construction on the project, until the District II Environmental Commission has reviewed and approved a submittal from the permittee on cost estimates, phasing, bonding, and long term maintenance of the private utilities for the project."

4. Condition 41 of the Permit states that the permit would expire in two years from the date of issuance if the permittees had not demonstrated an intention to proceed with the Project. Condition 41 also provides that "[s]ubstantial construction must occur within two years of the permit issuance date, unless construction has been delayed by litigation to secure other necessary permits or approval, in accordance with Environmental Board Rule 38."

5. The specific lots involved in the Project are identified in the Town of Dover Land Records as: Lots 9, 10, 12, 13, 14, 15, 30, 42, 47, and 48 (Book 22, Page 20, subject of deeds to Lyman and Birgit Cooper); Lots 11, 36, 37, and 41 (Book 118, Pages 436-437, subject of deeds to Green Mountain); and Lots 32, 33, 34, 35, 38, and 39 (Book 124, Pages 70-83 and 84-102, subject of deeds to Litchfield).

6. Some time after the issuance of the Permit but before the expiration of the two-year period provided in Condition 41 of the Permit, Green Mountain and Lit&field transferred title to their lots to Mr. Meub, in his personal capacity.

7. The lots transferred to Mr. Meub were not configured in conformance with the design requirements of the Permit.

There being no factual dispute requiring independent resolution by the Board, the Board must consider whether the legal issue presented is a "controlling question of law." The Vermont Supreme Court has described a "controlling question of law" as follows:

> Whether a question of law is controlling is not defined by whether the question governs the outcome of the litigation. This factor requires a practical application that focuses upon the potential consequences of the order at issue. "Since the core purpose of interlocutory appeal is to avoid unnecessary proceedings in trial courts, the criterion that an order raise a controlling question of law would seem, at a minimum, to require that reversal result in an immediate effect on the course of litigation and in some savings of resources either to the court system or to the litigants."

Pyramid, 141 Vt. At 302 (citations omitted).

The Board determines that the Coopers have presented a "controlling question of law." Whether or not Mr. Meub is a "co-permit-tee" with respect to the Project, has significant consequences with respect to how and whether the conditions contained in the Permit, as well as the specific requirements imposed by the Commission in its Memorandum of Decision, will be complied with and made enforceable.

ii. difference of opinion

The Board must next determine whether there is substantial ground for difference of opinion with regard to whether the Commission had authority to determine that Mr. Meub was a "co-permittee" for purposes of conducting review of Application #2W0848-1. In considering this second factor, the Board places "little stock in the vehemence of disagreeing counsel" nor is swayed by claims of "the unique character of a particular issue." Pyramid, 141 Vt. at 306. Rather, a standard consistent with the policy underlying this factor requires that there be a chance of a reversal of the challenged order. Id. at 307. Where there is little or no precedent relative to the order or ruling being appealed from, there is likely to be substantial ground for difference of opinion. On the other hand, where the law is clear, the Board does not hesitate to withhold its discretion and deny a motion for interlocutory appeal. See Re: Waterbury Shopping Village, #5W1068-EB (Interlocutory), Memorandum of Decision (June 15, **1990).**

The Board concludes that there is no ground for difference of opinion in this matter. It is axiomatic that if a person owns or controls land involved in a subdivision subject to Act 250 jurisdiction, he or she is subject to the permit conditions which run with that land. 10 V.S.A. § 6001(3), § 6001 (14)(A) and EBR 2(A), 10(A), 32(B), and33. Further, the Commission is legally authorized to determine at any time during a proceeding that a person's property interest in the project under review is sufficiently significant that review cannot be completed without that person's participation as a co-applicant. See EBR 10(A). Indeed, the Board has voided a permit amendment extending a construction completion date where the district commission failed to either require that all owners of involved land to be made co-applicants or to determine, after hearing, that the requirement might be waived. Re: South Burlington Realty Co., #4C0154-EB, Memorandum of Decision (May 4, 1989).

A major purpose of requiring such determinations is to ensure that any permit conditions imposed by a district commission will be enforceable, to ensure that the owners of land involved in that subdivision have consented to the proposed activity, and to allow persons owning involved land to participate in the permit proceedings and to define the scope of review. Re: Flanders Building Supply, Inc., #4C0634-EB, Findings of Fact, Conclusions of Law and Order (Oct. 18, 1985). In determining whether a person should be joined as a co-applicant, it is

immaterial how that person acquired title to his property or whether that person has violated the requirements of Act 250 with respect to a pending application or a previous permit. Re: Peter Guille, Jr., Application #2W0383-EB, Findings of Fact and Conclusions of Law at 11 (March 18, 1980). This is because the legal question of whether that person's performance was in violation of the Act or of a previous permit is generally an issue for consideration in enforcement proceedings alone. Id.

As the successor in interest to lots owned by Green Mountain and Litchfield, Mr. Meub accepted the conditions that attach to the Project by virtue of the issuance of the Permit -- in other words, the conditions that "run with the land." EBR 32(B). For all intents and purposes Mr. Meub became a "permittee" -- indeed, a "co-permittee" with the Coopers at the time he acquired a substantial interest in the Project. It was within the discretion of the Commission to so identify Mr. Meub, and to join him in its consideration of Application #2W0848-1. Therefore, the Board believes that this is not an instance where "a reasonable appellate judge" could vote for reversal of the Commission's order. Re: Waterbury Shopping Village at 2 (citing Re: Maple Tree Place Associates, Application #4C0775-EB, Memorandum of Decision at 15 (Dec. 22, 1988)).

Therefore, the Board concludes that the Coopers have failed to meet the second factor for obtaining permission for Interlocutory Appeal.

iii. materially advance the application

Fundamental to whether an interlocutory appeal will materially advance an application is the potential for a substantial delay in the issuance of a district commission's final decision, and the potential for a substantial increase in the amount of time it may take to reach a fmal decision with respect to a land use permit application in the event of a series of appeals to the Board.

The Board has previously determined that an interlocutory appeal will not materially advance the application process where the district commission's final decision was due to be issued within one month of the Board's deliberation on the motion for interlocutory appeal. Re: Manchester Commons Associates, #8B0500-EB (Reconsideration) (Interlocutory), Memorandum of Decision at 1 (May 14, 1996). Acceptance of the interlocutory appeal in that case would have delayed the issuance of the district commission's decision.

The Board concludes that the granting of the Coopers' Motion will delay the Commission in issuing its final decision with respect to the Permit Amendment Application. In issuing its Memorandum of Decision, the Commission gave specific instructions to the parties to correct the irregularities in lot configuration in order to make the Project conform with the Permit. The expectation was that a final order could then issue, thereby granting the extension requested by

the Coopers and reconciling the lot lines to conform with the Permit. To grant interlocutory appeal would merely frustrate the pending process.

Therefore, the Board concludes that to allow an interlocutory appeal at this stage would not materially advance consideration of the present application and has the great potential for creating substantial delay in the issuance of the Commission's final decision.

C. Conclusion

The Coopers have failed to satisfy the Board that they have met all three of the factors justifying the grant of interlocutory appeal pursuant to EBR 43(A). Therefore, their Motion for Interlocutory Appeal is denied.

Finally, the Board observes that the Commission was correct in concluding that it is not the proper forum to "void" or "invalidate" the transfer of lots to Mr. Meub, even if such transfer was made in violation of Conditions 3 and 7 of the Permit. Indeed, the Secretary of the Agency of Natural Resources, who has the power to seek enforcement of the terms of an AOD or land use permit, does not have the *supreme* power to "void" title or "invalidate" a transfer made in violation of permit conditions. Only a court of competent jurisdiction may do so for reasons cognizable at law. For this reason, the Board has declined in the past to adjudicate disputes over ownership of property. See Re: Eastern Landshares, Inc., #4C0790-EB, Memorandum of Decision at 2 (Aug. 13, 1991) (Board accepted an applicant's assertion of ownership for purposes of reviewing an application for an Act 250 permit). The Commission did not err in declining to act upon the Coopers' request.

III. ORDER

1. The Board denies the Coopers' Motion for Interlocutory Appeal with respect to the Commission's Memorandum of Decision dated August 5, 1997.

Dated at Montpelier, Vermont, this 24 day of September, 1997.

ENVIRONMENTAL BOARD

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