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RE: Swain Development Corp. by
Jonathan Brownell, Esq.
Box 206
Corinth, VT 05039

Memorandum
of Decision
Land Use Permit
#3W0445-2-EB

This decision pertains to two motions to dismiss brought by the Town of Hartland and an issue regarding co-applicancy raised by the Two Rivers-Ottauquechee Regional Commission (Two Rivers). For the reasons given below, the Environmental Board denies the motions to dismiss and requests written comments on the co-applicancy issue from the Vermont Agency of Transportation and the Applicants.

BACKGROUND

Two Rivers filed an appeal on February 15, 1989 of Land Use Permit Amendment #3W0445-2. This permit amendment was issued by the District #3 Environmental Commission on January 16, 1989 and authorizes the Applicants to construct a shopping center containing a 21,000 square foot supermarket, 35,700 feet of retail space, 227 parking spaces, one public access and one emergency vehicle access, and related utilities. The proposed project is to be located on Route 4 in Hartland, Vermont.

On February 15, the Town of Woodstock also filed an appeal. Woodstock appeals the District Commission's denial of party status to that town with respect to Criterion 5 (traffic safety and congestion) of 10 V.S.A. sec. 6086(a), and the District Commission's findings of fact and conclusions of law made pursuant to that criterion. The party status denial resulted from a request by Woodstock for party status pursuant to Rule 14(B).

The Town of Hartland filed a motion to dismiss the Two Rivers appeal on February 24 and a petition for declaratory ruling seeking the same on March 10.

Chairman Leonard U. Wilson convened a prehearing conference in White River Junction on March 10. At the prehearing, Hartland stated that it challenged Woodstock's right to appeal. It was determined at the prehearing to decide the three issues addressed in this decision before proceeding to other issues identified in the case, as these three issues could result in dismissal or remand to the District Commission. At the request of the parties, the Board set a lengthy schedule for submission of legal memoranda on these issues.

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On March 13, Hartland filed a written motion to dismiss Woodstock's appeal. On March 27, the Board issued a pre-hearing conference report and order setting forth the issues in the matter and a schedule for submitting memoranda. In that report, Chairman Wilson ruled that Hartland's petition for declaratory ruling was improper and that it would be treated as a motion to dismiss. Hartland was given the opportunity to challenge this ruling in the memoranda which were later to be filed. Subsequently, at the request of Jonathan N. Brownell, Esq., attorney for the Applicants and Hartland, the Board twice extended the deadlines for submission of memoranda, each time for a period of two weeks.

On May 9, Hartland filed a memorandum in support of its motions to dismiss and Two Rivers filed a memorandum regarding the co-applicancy issue. On May 26, both Two Rivers and Woodstock filed memoranda in response to Hartland's May 9 memorandum. Woodstock attached to its memorandum a petition for party status under Rule 14(B). On June 5, Hartland filed a supplemental memorandum on its motions to dismiss. The Applicants did not file any memoranda on these issues, and Hartland did not challenge the Chairman's ruling regarding its declaratory ruling petition.

The Board deliberated on these issues on June 28 in Berlin.

DISCUSSION

The issues before the Board are:

1. Whether the Board possesses authority to dismiss the Two Rivers appeal on the basis that the vote of the Two Rivers Commission to authorize the appeal was improper under Commission procedures.

2. Whether, pursuant to Board Rule 40, Woodstock may appeal the District Commission's denial of party status with respect to Criterion 5.

3. Whether the State of Vermont should be made a co-applicant pursuant to Rule 10 because of changes to Route 4 which are proposed as part of the project, and if so, whether the Board must remand the matter to the District Commission.

The Board examines these issues in turn.

A. The Two Rivers Appeal

Hartland argues that Two Rivers cannot maintain this appeal because the vote to authorize it was improper under Commission procedures. Specifically, Hartland contends that the vote is invalid under 1 V.S.A. sec. 172, the By-Laws of the Two Rivers Commission, and Robert's Rules of Order, all of which Hartland maintains apply to Commission votes. Hartland believes that the Board has authority to inquire into whether the Two Rivers Commission properly followed its procedures in authorizing the appeal. Hartland likens this inquiry to those of (1) whether a person seeking party status in an Act 250 proceeding as an adjoining property owner actually owns said property, and (2) whether a person puporting to represent a body in such a proceeding is a valid representative of that body. Hartland asserts that the Board and district commissions routinely make these inquiries regarding property ownership and validity of representation.

Two Rivers argues that the Board does not have authority to adjudicate a question concerning the internal political decision-making of a party. It asserts that no such authority is expressly granted in Act 250. Two Rivers further believes that a Board ruling favorable to the Applicants on this issue would set a dangerous precedent because it would mean that the Board was overruling a decision of the Chairman of the Two Rivers Commission that the motion to authorize the appeal passed.

The Board concludes that it does not have authority to determine whether the Two Rivers Commission properly followed its procedures in authorizing this appeal. Act 250 does not grant such authority expressly. Further, such authority is not implicitly granted by 10 V.S.A. secs. 6084 and 6085, which enable regional planning commissions to be parties in Act 250 proceedings.

In this regard, the Board does not believe that inquiry -- into voting procedures is the same as asking a purported representative of a commission or other body to prove the validity of his or her representation. The latter question involves only the production of a document officially issued by the body in question stating that the representation is valid. The former inquiry involves an exercise in the construction of statutes, rules, and procedures governing the internal workings of another body, as well as a determination of what that body did or did not do.

The Board views the Applicants' contention regarding ownership of adjoining property similarly. With respect to adjoining property owners, the Board and district commissions can only seek to have produced those documents which are the indicia of ownership, such as title, warranty deeds, etc. The Board and district commissions do not have authority to determine whether a person is the legal owner of property. That authority resides with the civil courts.

Accordingly, the Board denies Hartland's motion to dismiss the Two Rivers appeal because the Board is not authorized to adjudicate whether the Two Rivers Commission properly followed its procedures in authorizing the appeal.

B. The Woodstock Appeal

Hartland asserts that Woodstock cannot bring its appeal because Woodstock was not a party before the District Commission. Hartland argues that persons not granted party status by a district commission lack standing to appeal to the Board. Hartland also appears to assert that allowing parties denied party status to appeal such denials undermines the discretionary nature of grants and denials of party status under Rule 14(B). In addition to seeking dismissal based on lack of party status before the District Commission, Hartland asserts that Woodstock did not timely file its appeal.

In response, Woodstock relies primarily on the Board's prior decision in Re: Maple Tree Place Associates, Land Use Permit Application #4C0775-EB, Memorandum of Decision (December 22, 1988), asserting that the Board stated there that appeals of party status denials by district commissions are permissible following the district commissions' final decisions on permit applications.

The Board concludes that Woodstock's appeal may be brought. 10 V.S.A. sec. 6089 states that "[a]n appeal from the district commission shall be to the board," and requires it to be made within 30 days. Further, Rule 40(A) states in pertinent part:

> Any party aggrieved by an adverse determination by a district commission may appeal to the board and will be given a de novo hearing on findings, conclusions and permit conditions issued by the district commission. An appeal shall be filed with the Board within 30 days after the date of the decision of the commission.

The Board interprets the word "decision" in Rule 40(A) to refer to the final decision of the district commission approving or denying the application. The scheme of the Board's rules supports such an interpretation: since the Board has adopted Rule 43 for appeals taken prior to final district commision decisions on permit applications, Rule 40 must govern appeals following such final decisions.

In the Maple Tree Place decision, the Board stated:

> Any person denied party status may appeal that denial to the Board following a district commission's decision to approve or deny a permit application. ... The Board interprets Rule 40 ... as allowing persons denied party status by a district commission the right to appeal that denial to the Board followins the district commision's final decision approving or denying the application in question. This right applies whether the person was denied on all criteria for which the person requested party status or was granted status on some criteria but denied status on others.

Maple Tree Place at 12-13.

Consistent with this decision, the Board believes that the term "party" for purposes of Rule 40 includes persons who have requested and been denied party status by a district commission. The Board makes this interpretation because it believes, for several reasons, that it must allow persons denied party status the right to appeal such determinations following district commission decisions approving or denying applications.

First, the Board believes that discretionary determinations must be appealable. Rule 14(B) states that "[t]he board or a district may allow as parties to a proceeding individuals or groups not otherwise accorded party status by statute. ..." This rule intends that grants or denials of party status made pursuant to the rule be discretionary. In a case regarding Board and district commission party status determinations, the Vermont Supreme Court stated:

> In the law, discretionary rulings are always subject to the limitations that such discretion not be withheld or abused. Abuse is defined as the purported exercise of discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable.

In re Lunde Construction Company, 139 Vt. 376, 379 (1981). Accordingly, if no appeal of party status decisions were allowed, no mechanism would exist to assure the fundamental legal requirement that discretion to grant or deny party status not be abused.

Second, Act 250 grants the right of appeal from district commissions to the Board. 10 V.S.A. sec. 6089(a). If the Board were completely to deny persons denied party status the right to appeal such denials, the Board would be contravening the statute. Thus, Act 250 mandates that the Board provide some route of appeal for party status decisions.

Third, if the Board were to forbid appeals of party status denials following district commission decisions approving or denying permits, then the only avenue for appeal of party status denials would be through interlocutory appeal pursuant to Rule 43. Rule 43 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 an opinion and an immediate appeal may materially advance the application process. ... The appeal shall be limited to questions of law.

The Vermont Supreme Court and this Board have stated 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, 300-301 (1982); Re: Howard and Louise Leach, Land Use Permit Application #6F0316-EB, Memorandum of Decision at 2 (June 3, 1985). Rule 43 sets forth standards which must be met for interlocutory appeal to be accepted by the Board and which therefore necessarily limit the instances in which such appeal will be accepted. Accordingly, if party status appeals can only be made pursuant to Rule 43, then the opportunity to appeal party status denials is a narrow one in which persons cannot be certain that their grievances will be heard. Thus, Rule 43 is not an adequate means to ensure that district commissions are properly exercising their discretion.

For these reasons, the Board interprets Rule 40(A) to allow appeals of party status denials following the final decision of a district commission approving or denying a permit application as long as the appellant alleges in good faith that he or she is aggrieved by the determinations of the district commission made pursuant to the criteria concerning

which the appellant seeks party status. In this case, Woodstock seeks to overturn a party status denial with regard to Criterion 5 and alleges that it is aggrieved by the District Commission's determinations made pursuant to that criterion concerning the proposed project. Woodstock therefore meets the requirements for appeal based on party status denial.

The Board also determines that Woodstock's appeal was timely. It was filed on February 15, 1989, the thirtieth day following the District Commission's decision of January 16, 1989 on the application in question. Thus, Woodstock is able to maintain this appeal, and Hartland's motion to dismiss is denied.

The Board does not mean to imply that it will review Woodstock's appeal or other party status appeals under the "abuse of discretion" analysis outlined above by the Supreme Court in the Lunde case. Appeals to the Board are de novo. 10 V.S.A. sec. 6089(a); Rule 40(A). Consequently, the Board will ask Woodstock and similar appellants to demonstrate that they requested and were denied party status before the district commission. If such a demonstration is made, the Board will then review the question of party status de novo. If the Board determines to grant party status, the Board will then accept an appeal regarding those criteria concerning which it has granted party status.

In this case, the District Commission's decision states that Woodstock sought and was denied party status on Criterion 5. Further, Woodstock has filed a petition outlining the basis for its party status request. The Board will therefore consider this request, and will offer parties an opportunity to respond in accordance with the attached order.

C. Co-applicancy

Two Rivers asserts that this project involves substantial modifications to U.S. Route 4. As set forth in Finding of Fact 5c of the District Commission's January 16 decision, the Applicants propose to reduce the curve of Route 4 and to install two access points. The Applicants also propose to add left and right turning lanes and to share in the cost of putting up a traffic signal should such be required. The District Commission found that the Vermont Agency of Transportation would have to approve the proposed Route 4 modifications.

Two Rivers contends that the Route 4 modifications are an integral part of the proposed project and that therefore the potentially modified portions of Route 4 are "involved land" pursuant to Rule 2(F). Two Rivers further contends that Rule 10(A) requires the Agency, as the record owner of Route 4, to be a co-applicant in this proceeding. Rule 10(A) provides in relevant part:

> The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement.

Two Rivers asserts that the substantial nature of these modifications makes it important to have the Agency as co-applicant.

The Board is concerned with the magnitude of Two Rivers' contentions. The Board believes that nearly every development or subdivision project in this state requires some modification to highways and roads, many of which are substantial. Thus, if the Board were to find for Two Rivers on this issue, it is possible that a large number of applications would require the signature of an appropriate Agency representative. The ramifications for proposed developments and for the Agency are enormous: for example, the Agency would be liable for compliance with permit conditions.

In view of this potential, the Board is concerned that neither the Applicants nor the Agency has filed written comments on this issue. The Board would prefer to rule on the issue after hearing comments from all involved parties, particularly the Agency. Accordingly, the Board determines not to decide the issue at this time, but to solicit formally the comments of the Agency and to allow the Applicants a further opportunity to submit a memorandum.

ORDER

1. The motions to dismiss filed by Hartland regarding the appeals of Two Rivers and Woodstock are denied.

2. The Chairman of the Board will send a written request to the Vermont Agency of Transportation asking that they submit written comments on the co-applicancy issue on or before Friday, August 11, 1989.

3. Parties and persons seeking party status may file further comments on the co-applicancy issue on or before Thursday, August 17, 1989.

4. Any party seeking to respond to Woodstock's petition for party status must file written comments on or before August 17.

5. The Board will set dates for hearing and submission of testimony and lists of witnesses and exhibits following its decision on the Agency of Transportation issue, if such is appropriate.

Dated at Montpelier, Vermont, this 31st day of July, 1989.

ENVIRONMENTAL BOARD

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