11/8/90

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

Re: Swain Development Corp. by
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and by
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and

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Memorandum of Decision, Application #3W0445-2-EB

This decision pertains to a motion for reconsideration filed by the Applicants. As is explained below, the motion is denied, except with respect to an issue regarding the Hartland Town Plan. Among the reasons for the denial are: (a) the Board's decision is not manifestly erroneous, (b) several of the Applicants' arguments are incorrect; and (c) several of the Applicants' arguments are inappropriate to make after a final decision has been issued.

I. BACKGROUND

The Board issued a decision in this matter on August 10, 1990, denying the application. On August 24, 1990, the Applicants filed a motion for reconsideration. On September 10, memoranda in opposition to the motion were filed by the Two Rivers-Ottauquechee Regional Commission (Two Rivers), the Town of Woodstock, and the State of Vermont Agency of Development and Community Affairs (DCA). On September 24, the Applicants filed a response to the opposing memoranda, including objections to the Board's consideration of DCA's memorandum and of Woodstock's memorandum to the extent that it contains argument with respect to 10 V.S.A. § 6086 (a)(10) (conformance with reaional plans). Woodstock does not have party status with respect to the application's conformance with local or regional plans. The Board deliberated on September 26 in St. Albans Bay.

II. DISCUSSION

The Board denies most of the Applicants' motion as set forth below. The Board declines to address the Applicants' objections to the DCA and Woodstock memoranda because its decision is not affected by the memoranda.

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The Applicants' motion to reconsider was filed "pursuant to Environmental Board Rules 30(B) and 31(A)." Rule 30(B) no longer exists. During the pendency of this appeal, the Board combined Rule 30(B) with Rule 31(A). The current Rule 31(A) contains the same substance as both of the old rules, so applying the current Rule 31(A) to the Applicants does not impinge on any of their rights.

The current Rule 31(A) allows the Board to correct typographical and manifest errors similar to the old Rule 30(B). Concerning Rule 30(B), the Board has stated:

> [I]ts purpose is to allow the Board to correct typographical errors and omissions,. as well as manifest errors and mistakes. It is not a vehicle for an applicant to submit further evidence or legal argument in support of its application, or to authorize reopening of the hearing.

Re: Berlin Associates, Application #5W0584-9-EB, Memorandum of Decision at 4 (April 24, 1990).

The current Rule 31(A) also allows the applicant to file motions to alter a decision "as are appropriate with respect to the decision," similar to the old Rule 31(A). Concerning this part of Rule 31(A), the Board has said:

> The Board believes that the purpose of Rule 31(A) is not to change a permit denial based upon a new proposal from the applicant, but rather to provide an opportunity for a party to raise issues such as a request to delete an unnecessary permit condition or an objection to improper procedures on the part of the Board or commission in arriving at itsdecision. See In re Ouechee Lakes Corp., No. 87-108, Slip Op. at 9 (Vt. Sept. 22, 1989).

Id., Memorandum of Decision at 5.

The Applicants' motion must be viewed in light of this precedent. The motion concerns traffic and regional plan issues which arise under 10 V.S.A. § 6086(a)(5) (traffic), 9(K) (impact on public facilities), and 10 (conformance with regional plans). With respect to traffic, there are five points: (1) the Applicants challenge the Board's finding concerning safe qaps for drivers turning into the western driveway; (2) the Applicants challenge the Board's use of the most conservative reasonably reliable traffic evidence

presented; (3) the Applicants challenge the Board's conclusion that level of service E is unacceptable in this case; (4) the Applicants assert that the Board is imposing a less strict standard under Criterion 9(K) than under Criterion 5, and (5) the Applicants ask the Board to require by permit condition that the project be built in phases rather than deny the application.

Challenging the finding concerning safe gaps between cars in traffic on the basis of evidence already in the record is appropriate under Rule 31(A). However, the Board's decision is not manifestly erroneous. The Applicants do not challenge the Board's finding that the average gap faced by cars turning left into the western project driveway will be 5.4 seconds and that an average gap of 6.5 seconds is needed. Clearly, with an average of 5.4 seconds, many of the gaps will be long enough to turn safely, but those gaps will not occur often enough to prevent cars from waiting on Route 4 to make a turn and causing traffic queues behind them or from trying to make a turn through an unsafe gap.

The challenge to the use of the most conservative evidence is also proper under Rule 31(A), but it is incorrect. The Applicants argue that the Board is avoiding its duty to find facts by simply taking the most conservative projections regarding traffic impacts. This is not the case. The Board first found these projections as a whole to be reasonably reliable. The Board also did not accept all of these projections; for example, it disagreed with the assertion that traffic turning into the western driveway would encounter level of service "A" conditions. Further, the Board, as the trier of fact, has the right to believe all of the testimony of any witness, or to believe it in part and disbelieve it in part, or to reject it altogether. In re Quechee Lakes Corp., No. 87-108, slip op. at 11 (Vt. July 13, 1990); citing In re Wildlife Wonderland, Inc., 133 Vt. 507, 511 (1975). Accordingly, the Board's decision on this point is not manifestly erroneous.

The challenge to the Board's conclusion regarding the level of service E issue is not proper because it is based on Re: Steven and Stanley Tanaer, Application #3W0125-3-EB, Findings of Fact, Conclusions of Law, and Order (May 22, 1990). The Tanger and Swain records are not the same. The criteria on appeal and the evidence presented in the cases differ; it is not appropriate to base a motion for reconsideration on evidence outside of the record. In this

regard, the Board recognizes that the Applicants attempted through cross-examination of a traffic expert who testified in both cases to elicit information about the expert's analysis in Tanaer, but this at best placed an incomplete statement of the Tanaer record into the record of this case.

The Applicants' assertion that the Board is imposing a less strict standard under Criterion 9(K) than under Criterion 5 is erroneous. The decision says that Criterion 9(K) requires a "higher threshold" than under Criterion 5. As indicated in the decision, Criterion 5 involves an inquiry into whether the proposed project would cause unreasonable congestion or unsafe conditions, and that a project may not be denied simply because of such conditions. By contrast, the inquiry under Criterion 9(K) involves the additional evaluation of whether the proposed project will "materially jeopardize or interfere" with the function, efficiency, or safety of the public highway or with the public's use or enjoyment of or access to the highway. 10 V.S.A. § 6086(a)(9)(K). For example, a project might create unreasonable congestion (perhaps mitigated by permit conditions imposed pursuant to 10 V.S.A. § 6087(b)), without necessarily causing a "material" interference with highway function or efficiency. Similarly, a project might create unsafe conditions, subject to mitigating conditions, without necessarily causing @*material*' jeopardy to traffic safety.

The Applicants' request that the Board issue a permit with a condition requiring phasing of the project is not appropriate under Rule 31(A). There is no evidence in the record regarding phasing, nor did the Applicants argue that their project should be phased in their proposed findings. A new hearing would be required to take evidence on this issue. This is exactly the type of request the Board found to be inappropriate in Berlin Associates, suora. The applicant, if it chooses, may propose a phasing plan to the district commission. 10 V.S.A. § 6089(c).

Turning to the regional plan issues, the Applicants make three arguments: (1) that the Two Rivers-Ottauquechee Regional Plan no longer applies to the project because the Town of Hartland left the Two Rivers region on July 1, 1990, (2) the Board should have applied the Hartland Town Plan to the project even though it was adopted after this application was filed, and (3) in applying the Hartland Plan, the Board must approve the project because the project is consistent with that plan and that plan overrides any conflicting provisions in the Two Rivers plan.

The arguments regarding withdrawal from the region and conflict with the Town Plan are inappropriate under Rule 31(A). There is no evidence in the record concerning the Town of Hartland's withdrawal from the Two Rivers region. There is no evidence or argument in the record from the Applicants or any party that the Two Rivers plan conflicts with the Hartland Town Plan or that the Two Rivers plan should not be applied to this project. These issues would require further hearings and therefore are not the proper subject of a Rule 31(A) motion.

The Applicants' argument that they could not have known about the Town's withdrawal from the Two Rivers region is not well founded. The Applicants argue that they did not and could not know during the hearings in this matter, which occurred in November 1989 and January 1990, that the Town would withdraw. Assuming the Applicants' alleged facts concerning this withdrawal are true, the withdrawal occurred on July 1, 1990. The Board's decision was issued on August 10, 1990. The Applicants could have moved to re-open the hearing based on the alleged new facts on July 2, 1990, or as soon as practicable thereafter. It is inappropriate to wait until after a decision is issued to seek to introduce new facts which were known before the date of issuance.

With regard to the Board's application of the Hartland Town Plan, the Board concludes that reconsideration is merited. Upon reconsideration, the Board determines that the Hartland Town Plan is not at issue in this proceeding. Rule 40(D) states that the issues in an appeal are limited to those raised in the notice of appeal unless a substantial inequity or injustice would occur. The Criterion 10 appeal was filed by Two Rivers only with regard to the Regional Plan. The prehearing conference report identifies issues only regarding the Regional Plan. The District Commission concluded that the Town Plan was not applicable to this project and the Applicants did not appeal that conclusion.

The Board's decision recapitulated the District Commission's decision that the Town Plan does not apply. The Board concludes that it was manifestly erroneous to discuss the Town Plan in its decision. Therefore, previous finding number 77 is deleted; subsequent findings are renumbered accordingly; and the second paragraph under Criterion 10 in the Conclusions of Law portion of the decision (page 36) is amended accordingly. The corrected pages are enclosed herewith.

Dated at Montpelier, Vermont, this 8th day of November, 1990.

ENVIRONMENTAL BOARD

Stephen Reynes, Chairman
Ferdinand Bongartz
Elizabeth Courtney
Arthur Gibb
Samuel Lloyd
W. Philip Wagner

Enclosure

swain.mem(awpl)