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

Re: Liberty Oak Corporation
by A. Jay Kenlan, Esq.
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71 Allen Street
Rutland, VT 05701

Reconsideration
#3W0496-EB-1
Findings of Fact,
Conclusions of Law
and Order

On June 3, 1987, the Applicant filed a Request for Reconsideration of the Board's decision dated May 21, 1987 that denied a land use permit to the Applicant. On September 8, the Applicant filed a memorandum in support of its request for reconsideration that included revised plans for the project. On October 6, the Board reconvened the hearing in this matter. The following parties participated in the hearing:

Applicant Liberty Oak Corporation by A. Jay Kenlan, Esq.
Appellants Interchange Services, Inc.: Interchange Realty, Inc.: Cashman-Cairnie, Inc.; and Vermont Motor Inn, Inc. by C. Daniel Hershenson, Esq.

I. BACKGROUND OF THE APPEAL

On May 21, 1987, the Board issued a decision denying a land use permit for a 96-room motel and a 200-seat restaurant on 4.1 acres of land in Hartford, Vermont. The Board's denial was based upon its inability to find that the project would not create an undue adverse effect upon the aesthetics of the area, under Criterion 8. The Board concluded that without substantial changes in the design of the project to mitigate the visual intrusion created by its massiveness and high visibility, it could not approve the application. The Board also was concerned that since a large portion of the proposed landscaping was to be located on land owned and controlled by the Vermont Agency of Transportation (VAOT), VAOT needed to be a co-applicant to ensure compliance with any permit conditions the Board might impose relating to landscaping on VAOT land.

The Board suggested a number of possible actions the Applicant might take that would mitigate the undue adverse effect of the project and encouraged the Applicant to submit a new plan incorporating the Board's recommendations.

On June 3 the Applicant filed a Motion for Reconsideration and on September 8 submitted new plans for the Board to consider. At the October 6 hearing the Appellants filed a Motion to Dismiss; on October 13 the Applicant filed a Memorandum in Opposition to the motion. On October 22 the Appellants filed Requests to Find and on October 26 the

Applicant filed proposed Findings of Fact, Conclusions of Law and Order. On November 3, December 8 and January 12 the Board conducted deliberative sessions on this appeal. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing. To the extent that the Board agreed with and found necessary any findings proposed by the parties, those findings have been incorporated herein; otherwise, said requests to find are hereby denied.

II. MOTION TO DISMISS

The Appellants moved to dismiss the Applicant's reconsideration request on the ground that the Board has no jurisdiction under either Rule 31(A) or 31(B) to consider the new plans. The proper procedure, the Appellants contend, is for the District Commission to review the new plans in the context of an amendment proceeding.

The Applicant contends that the Board has allowed Applicants to submit modifications to proposed developments under Board Rule 31(A) and that in this instance, the Applicant submitted new plans in response to the Board's own request. The Applicant argues that the Board has the authority to review modifications that the Board itself encouraged and that requiring applicants in this position to refile their application with the Commission would be unreasonable.

The Board agrees with the Applicant that it has the authority to review the proposed changes to the project without the need for amendment proceedings before the District Commission. In its May 21 decision, the Board specifically retained jurisdiction over this project for the purpose of allowing the Applicant to modify the design of the project to achieve compliance with Criterion 8. The Appellants' reliance on In re Juster Associates, 136 Vt. 577 (1978), to support its contention that the Board does not have jurisdiction to review the modified plans, is inapposite. In Juster, the Environmental Board had determined that the permittee needed an amendment for modification of an additional, non-contiguous parcel of land for construction of a new waste disposal system. The court held that where a proposal involves a new parcel of land that may affect additional people other than those who were parties to the original proceedings, initial consideration must be by the District Commission. Here, the project is essentially the same, it is on the same parcel of land, and there is no potential for new parties to request to participate. This situation differs significantly from that contemplated by the court in Juster. The Board believes it has the authority to review the proposed modifications to this project and therefore denies the Motion to Dismiss.

III. FINDINGS OF FACT

1. The Applicant has submitted a new proposal that includes the following changes from the original application:

   a. The existing knoll on the northeast corner of the site, including the existing vegetation, except for a small portion to the immediate north of the proposed restaurant, will be retained.

   b. The floor elevations and ridge line of the motel have been "stepped" in 4-foot increments. The grade of the entrance driveway will be approximately 8%.

   c. More trees of zone-hardy species have been added, although the total number of trees is less because landscaping on land owned or controlled by VAOT is eliminated.

   d. The truck parking area between the restaurant and the motel has been eliminated and replaced by an island that will contain six 3½" caliper European mountain ash trees.

   e. The center buffer area between the restaurant and the motel has been enlarged.

2. The proposed signs include one 4'9" x 14'6" "515 Standard Estate Sign" on a 30' pole at the southwesterly corner of the project site and one at the easterly side of the project at the easterly end of the landscaped island; one 1'7" x 4' entrance sign west of the main entrance to the motel; and a restaurant sign containing the logo of the restaurant, no larger than 4'9" x 14'6". All signs will be internally lit. The Comfort Inn signs contain the standard logo.

3. The proposed restaurant will be highly visible from the I-91 off-ramp that runs into Route 5. The grasses, annuals and perennials proposed for the northerly boundary will be inadequate to provide screening since they do not grow much higher than 3'. Retaining the existing red pines would add to the screening and help buffer the stark effect of the restaurant on motorists coming onto Route 5 from I-91. The addition of two Washington Hawthornes and six little leaf lindens instead of three would help to achieve a successful screening from this view.

4. The view into the site from travellers south on I-91 is highly visible. The only on-site plantings along the eastern boundary are relatively small because they are

located in the utility corridor and must be low enough not to interfere with the wires. The addition of 21 white pines in the adjacent VAOT land would help significantly to buffer this view into the site.

5. The proposed plantings at the southeast corner of the site are insufficient in number, too far apart, and too small to provide adequate screening. The addition of four white pines, 10-12' high and 10' on center, on the south side of the parking lot would help alleviate the view into the site from I-91.

6. The proposed three little leaf lindens on the south side of the motel are too small and too few in relation to the width of the building to provide any meaningful screening. The planting of five lindens, each 4"-5" caliper, would help to mitigate the adverse visual effect of the broad expanse of the building.

7. The seven proposed river birch on the west side of the site provide adequate screening.

8. The plantings proposed for the parking lot do not adequately mitigate the visual effect of the buildings which are highly visible from I-91 southbound. The Washington Hawthorne is too small a tree to scale down the mass of the motel at the east end of the building. Mountain ash do not grow tall enough to provide an effective visual separation of the two buildings when viewed from southbound on I-91 and the I-91 off-ramp. The one mountain ash proposed for the eastern end of the island is inadequate to screen the parking lot from the southbound I-91 site line.

   The following plantings will provide the screening of the buildings necessary in order to mitigate their adverse visual effect: 1) Four 4"-5" caliper little leaf lindens should be planted at the east end of the motel instead of the two Washington Hawthornes. 2) In the motel parking lot island, the planting of eight little leaf lindens instead of the four mountain ash trees will help to break up the visual massiveness created by the unbroken view of the two buildings, by providing a view of tree tops between the buildings. 3) In the island between the motel island and the restaurant, nine 3½" caliper mountain ash trees should be planted, four of which should be located on the northeast corner, two in the center, and three in the western corner.

9. There is no written community standard relating to aesthetics.

IV. CONCLUSIONS OF LAW

When reviewing an application for compliance with Criterion 8 (aesthetics), the Board relies on the standards set forth in Re: Quechee Lakes Corporation, Findings of Fact, Conclusions of Law and Order, Land Use Permit #3W0411-EB and 3W0439-EB (November 4, 1985). A project is not considered to have an "adverse" visual impact if, after considering the nature of the project's surroundings, the design of the project, the colors and materials of the buildings, the visibility of the project, and the impact of the project upon the open space in the area, the Board can conclude that the project will "fit" into its surroundings.

In this case, the Board concludes that the project will have an adverse visual effect upon the area. The partially wooded open space provides a visual break from the surrounding commercial development for motorists travelling on I-89 and I-91. The minor changes which the Applicant made to the building's design have not decreased the massive scale of the buildings which will be highly visible from the interstates. The buildings and parking areas will cover most of the site.

The next step in the analysis set forth in the Quechee decision is a determination whether the adverse impact is "undue." If any of the following three questions is answered in the affirmative, then the Board must find that the adverse impact is undue: 1) Does the project violate a clear, written community standard intended to preserve the aesthetics of the area? 2) Does the project offend the sensibilities of the average person? 3) Has the applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

The first question is not relevant because no written community standard exists. The Board believes that the answer to the second question would be positive without extensive mitigation. The almost total coverage of the 4.8 acre site with two large buildings and extensive parking areas in such a highly visible location would offend the average person.

The Applicant's revised plans address many of the concerns the Board had when it denied the application for failure of the applicant to mitigate the undue adverse visual impact of this project, but it does not go far enough. The Board believes that if the Applicant implements the additional plantings as indicated in the findings, the adverse effect of the project would be adequately mitigated so that it would not be undue. The Board will therefore issue a permit with conditions requiring such mitigation.

The Board believes it is not necessary for VAOT to be a co-applicant in order for the Board to impose conditions relating to landscaping by the Applicant in the VAOT right-of-way. As permit holder, the Applicant, or its successors in interest, are responsible for complying with the conditions of the permit as a condition of retaining the permit. The method by which the permit holder achieves compliance is not of concern to the Board. Since plantings in the VAOT right-of-way will substantially contribute to mitigating the adverse visual impact of this project, the Board will condition the permit to require landscaping in that location.

Dated at Montpelier, Vermont, this 14th day of January, 1988.

VERMONT ENVIRONMENTAL BOARD

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