

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

Re: Times and Seasons, LLC and Hubert K. Benoit Land Use Permit Application #3W0839 -2-EB

Memorandum of Decision

This matter involves an appeal by Times and Seasons, LLC and Hubert K. Benoit to the Environmental Board (Board) from the Findings of Fact, Conclusions of Law, and Order (Decision) issued by the District 3 Environmental Commission (Commission) concerning Land Use Permit Application #3W0711-5 (Application). The Application seeks authorization to demolish an existing pole barn and construct a 4,852 ± square-foot gift shop and approximately 1,040 linear feet of access drive and parking with associated pump station, septic field and drilled well on a tract of land located on Dairy Hill Road in Royalton, Vermont. (Project)

I. History

On August 25, 2004, the Commission issued the Decision denying the Application.

On September 23, 2004, Times and Seasons, LLC and Hubert K. Benoit (collectively Times and Seasons) filed an appeal with the Board, alleging error in the Decision with respect to 10 V.S.A. §§6086(a)(1)(E), (4), (5), (8), (9)(B), (9)(C), (9)(K), and (10). The appeal also alleges that the Commission erred in granting party status to Bonnie and Brent Adkins as to 10 V.S.A. §§6086(a)(1) and (5); and Pam Sawyer, Caroline Sawyer, and Eric Sawyer as to 10 V.S.A. §§6086(a)(1)(A), (1)(B), and (9)(K).

Following an October 21, 2004 Prehearing Conference, Board Chair Patricia Moulton Powden issued a November 10, 2004 Prehearing Conference Report and Order.

On November 16, 2004, the Town of Royalton Planning Commission filed a letter requesting that the Prehearing Order be amended to include McIntosh Pond within the scope of review under 10 V.S.A. §6086(a)(9)(K) (Criterion 9(K)).

On November 24, Times and Seasons filed a response to the Planning Commission's request and an objection to the Prehearing Order, specifically the Chair's refusal to limit the issues on appeal to only the narrowly focused aspects of the criteria as stated by the applicant in its Notice of Appeal.

On December 15, 2004, the Board deliberated on the issues presented by the Planning Commission and by Times and Seasons.

II. Discussion

1. Times and Seasons asks that the Board limit the scope of its review to only those issues raised in its Notice of Appeal.

In *In re Taft Corners Associates*, 160 Vt. 583, 590-91(1993), the Vermont Supreme Court held, “Once an Act 250 criterion is noticed for appeal ... issues generally within the scope of the criterion are properly before the Board.” *Accord, In re Killington*, 159 Vt. 206 (1992); *In re Green Peak Estates*, 154 Vt. 363 (1990).

Citing *Taft Corners*, the Waste Facility Panel has written, “[I]ssues within a criterion on appeal are fair game for any party to the appeal.” *Re: City of Montpelier*, #5WO840-6, Memorandum of Decision at 9 (Sep. 9, 1999). Most recently, the Board has followed this precedent in *Re: Bethel Mills, Inc.*, #3W0898(Altered)-EB, Memorandum of Decision at 2 - 4 (Nov. 4, 2004). *And see, Re: Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, Memorandum of Decision (Dec. 27, 2000); *Re: Raymond Rowley*, #4C0534-1-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 1, 1993).

The Board declines to depart from established precedent in the instant matter. The Board therefore affirms the Prehearing Order and denies Times and Seasons’ objection.

2. The question of what is meant by “issues generally within the scope of the criterion” is more particularly presented by the point raised by the Planning Commission’s filing - - whether McIntosh Pond is within the scope of lands to be considered under Criterion 9(K).

Times and Seasons’ Notice of Appeal framed Criterion 9(K) only in terms of the project’s impacts on Dairy Hill Road. Board Chairs have routinely narrowed the scope of the public investments and lands which will be considered under Criterion 9(K) to only those specifically raised in the Notice of Appeal. *See, Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Prehearing Conference Report and Order at 4 (Jul. 10, 2003) (“Whether the Project complies with 10 V.S.A. §6086(a)(9)(K) (Lake Champlain, the Burlington Bicycle Path, and surrounding roads.)”); *Re: Peter S. Tsimortos*, #2W1127-EB, Prehearing Conference Report and Order at 4 (Nov. 8, 2002) (“Does the Project comply with 10 V.S.A. §6086(a)(9)(K) (Green Mountain National Forest and Dover Town Forest)?”).¹

¹ There are also numerous cases in which Prehearing Orders have framed Criterion 8 issues solely in terms of “aesthetics” or “historic sites.” Indeed, the issue under Criterion 8 is limited to aesthetics in this case.

In neither *John J. Flynn Estate* nor *Peter S. Tsimortos*, however, was the Prehearing Orders' restriction of the scope of Criterion 9(K) the subject of an objection, as here.² And the Board further notes that the Prehearing Order in this matter granted Caroline Sawyer party status as to McIntosh Pond under Criterion 9(K).

While precedent notes that an appeal of a part of a criterion means that the entire criterion is before the Board, this has arisen only within the context limiting review under a particular subcriterion of a criterion, *Josiah E. Lupton, supra*; or a particular Town Plan, *Re: Fred and Laura Viens, #5W1410-EB*, Memorandum of Decision at 4 (Sep. 3, 2003); or a particular Condition that had been imposed the a Commission, *Bethel Mills, supra*; or a particular wildlife habitat. *In re Killington*, 159 Vt. 206, 214 -16 (1992) (while only Commission's decision on development's impacts on beech trees had been appealed, Board could consider destruction of wetland in Criterion 8(A) review). The particular question before the Board, therefore, is one of first impression; no case has addressed an objection to a Prehearing Order which limits review under Criterion 9(K) to the particular public investment referenced in the Notice of Appeal.

The Board concludes that, concerning the scope of its review under Criterion 9(K), it should follow its historical approach of including within its scope of review all issues within a criterion which has been appealed, where, as here, a party has party status on the particular public asset (McIntosh Pond) at issue and an objection has been filed to the Prehearing Order's failure to include the asset within Criterion 9(K). To alter or narrow the Board precedent in this matter would also constitute unfair surprise to both the Planning Commission and to Ms Sawyer, a factor which the Board noted in *Bethel Mills, supra*, at 3 -4.

III. Order

The Merits Issues in this matter are:

1. Whether the Project complies with 10 V.S.A. §6086(a)(1)(E).
2. Whether the Project complies with 10 V.S.A. §6086(a)(4).
3. Whether the Project complies with 10 V.S.A. §6086(a)(5).

² Likewise, the Board's decision in *Re: Old Vermonter Wood Products and Richard Atwood, #5W1305-EB*, Memorandum of Decision (May 20, 1999), which addressed in some detail a request to expand the scope of the Board's Criterion 9(K) review, also arose only after the time for objecting to the Prehearing Order limiting such review had expired.

4. Whether the Project complies with 10 V.S.A. §6086(a)(8) (aesthetics).
5. Whether the Project complies with 10 V.S.A. §6086(a)(9)(B).
6. Whether the Project complies with 10 V.S.A. §6086(a)(9)(C).
7. Whether the Project complies with 10 V.S.A. §6086(a)(9)(K) (Dairy Hill Road and McIntosh Pond).
8. Whether the Project complies with 10 V.S.A. §6086(a)(10) (Town and Regional Plan).

Dated at Montpelier, Vermont this 3rd day of January 2005.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
W. William Martinez
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A. Gregory Rainville
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