STATE OF VGRMOMT
ENVIRONMENTAL BOARD
10 V.S.A. CHAPTER 151

RE: Albert and Doris Stevens
6 Unit Apartment Building
11 Lamoille Street
Essex Junction, Vermont

Findings of Fact,
Conclusions of Law
and Order
Land Use Permit Amendment
#4C0227-3-EB

This is an appeal from the decision of the District #4 Environmental Commission, dated April 29, 1980, finding that an apartment project proposed by Albert and Doris Stevens complies with the requirements of Criteria 9 and 10 of 10 V.S.A. §6086(a). The appeal is brought by Milo Reynolds, a nearby landowner admitted by the District Commission as an interested party under Environmental Board Rule 12(C). The applicants propose to construct a six-unit apartment building to replace an existing house at 11 Lamoille Street, Essex Junction, Vermont. The application was reviewed with respect to Criteria 9 and 10 alone, pursuant to the provisions of 10 V.S.A. 56086(b), and the appeal was brought as authorized in that section.

A public hearing was held before the Environmental Board on June 24, 1980, with Chairman Margaret P. Garland presiding. The following parties participated in the hearing:

Applicants, Albert and Doris Stevens, by Vincent Paradis, Esq.
Appellant, Milo Reynolds, by Edward J. Cashman, Esq.

Following testimony and extensive argument, the hearing was recessed at the request of the parties while the Board considered whether additional testimony or written submissions would be necessary to decide the appeal. At its regular meeting of July 8, 1980, the Board determined that no additional information was necessary, adjourned the hearing, and notified the parties that a decision would be issued within 20 days Of' that date.

This appeal raises for the Board's de novo review a single issue: Does the proposed apartment building satisfy the requirements of the Chittenden County Regional Plan as required by the terms of 10 V.S.A. §6086(a)(10)?

Findings of Fact

1. The applicants propose to construct a six-unit apartment buildfng on a parcel of land, consisting of 26,214 square feet, fronting on 11 Lamoille Street, Essex Junction, Vermont. A single family house now standing on this parcel would be removed to allow construction of the apartment building.

2. The applicants also own a parcel of 44,471 square feet, fronting on 17 East Street, Essex Junction, which adjoins the Lamoille Street property in the rear. This property has been developed by the Stevens and presently contains seven multiple-family units; four additional units proposed for that site were approved by the District Environmental Commission in Land Use Permit #4C0227.

3. The 17 units proposed for these adjoining parcels by the applicants constitute a coordinated development of 10 or more dwelling units "on a tract or tracts of land owned or controlled by ,a person" and thus subject to the jurisdiction of Act 250 under 10 V.S.A. §6001(3). The history of the applicants' proposals for these parcels reveals the shifting of the lot lines to facilitate various development proposals, coordinated planning of the buildings to be constructed, and a prior judicial admission that "the property subject to the appeal is composed of two lots and single ownership being developed as a single entity.' (Answers to Requests for Admissions, dated February 4, 1977, by Albert and Doris Stevens, Chittenden Superior Court, Docket No. S38-76 CnM).

4. The Town of Essex Junction did not at any time relevant to these proceedings have in effect a duly adopted local plan.

5. The Chittenden County Regional Planning Commission's regional plan entitled, "We Are Not the Last Generation," adopted on April 26, 1976, is applicable to this development proposal. Under that plan the Stevens' property is located in a "Growth Unit 1" area. Although the plan delineates several criteria for appropriate development in Growth Unit 1 areas, only one of those criteria is relevant here: the plan recommends that the density of residential development in such areas be limited "as per local ordinance." We find, therefore, that the regional plan recommends, but does not require, residential development on the Stevens' property to be in conformance with the density requirements of the applicable Essex Junction zoning ordinance.

6. The parties have presented two Essex Junction zoning ordinances arguably applicable to the Stevens' application. Under both ordinances, the Stevens' property is located in a zone designed "AR-3" ("Urban District (high density)").

   a. The current Essex Junction interim Zoning Regulations state that multiple-family units in AR-3 zones must be located on parcels large enough to provide 5,000 square feet of land area per unit. The Stevens' property, totalling 70,685 square feet, could thus satisfy the existing lot area requirements for a maximum of 14 multiple-family units.

b. The ordinance in effect in February, 1977, the time of the Stevens' initial zoning application in this case, required only 4,000 square feet of lot area for each multiple-family unit in the AR-3 zone. Under that requirement, the Stevens' property has sufficient lot area for the construction of the 17 units now proposed to be built.

7. The applicants filed their initial application with the Town for a building permit for the six units here at issue on February 22, 1977. The permit was granted by the Town Zoning Board of Adjustment, and that decision was appealed to the Chittenden Superior Court by parties opposing the project. On January 14, 1979, the court ruled that the project conformed to the local zoning ordinance in all respects, including density requirements.

The Superior Court decision was appealed by opponents of the project to 'the Vermont Supreme Court, where it is currently pending decision.

8. The Act 250 application for this project was filed with the District Environmental Commission on December 20, 1979. At the time of that application, the present Interim Zoning Regulations of the Village of Essex Junction were in effect. The proposed six-unit apartment project does not satisfy the 5,000 square foot lot area requirement of those regulations, regardless of whether the project is viewed as a six-unit building on a parcel of 26,214 square feet, or a 17-unit development on a parcel of 70,685 square feet.

Conclusions of Law

1. Based on the findings contained herein, we conclude that the Stevens' development is a coordinated development of 17 multiple-family units located on two parcels of land with a total lot area of 70,685 square feet. For that reason, the proposed six units are not to be viewed in isolation. Review of this project pursuant to Act 250 must therefore take into account the cumulative effect of the additional proposed units, placed in the context of the eleven units already built or authorized.

2. We do not agree with the appellant's assertion that the Stevens' development is a Planned Unit Residential project, and thus subject to the unit development requirements of the Essex Zoning Regulations. The planned unit provisions of the zoning ordinance offer an option for increased flexibility to developers who choose to design an integrated development project and make application for special review and approval under the ordinance. This project is clearly not eligible for such consideration for several reasons, including the fact that it is not five acres in size. The simple fact that multiple buildings are involved does not mean, however, that a developer must accept review

under the planned unit ordinance. The ordinance merely offers an option to the developer of a large, planned project; it does not provide grounds to deny permits to smaller, multiple-building projects.

3. In the absence of a justification of exception, residential developments in Chittenden County must comply with the density recommendations of the Chittenden County Regional Plan in order to be in conformance with that plan as required under Criterion 10 of 10 V.S.A. §6086(a). We conclude that in the circumstances of this application, the Stevens' proposed project is in conformance with the terms of that plan because it meets the density specifications of the Essex Junction zoning ordinance that is applicable to this review.

As a general rule, we do not accept the applicants' argument that an application for a zoning variance or a building permit freezes the terms of state, regional, or municipal laws and regulations that are applied in the review of development proposals under the criteria of Act 250. That argument is an unwarranted extension of the doctrine of vested rights in Vermont, as set forth in 1 V.S.A. §213 and established by judicial precedent. Our conclusion on this matter is consistent with the Board's prior decisions, **see e.g.,** In re John Poor, (D.R. #64 January 30, 1975) and In re State Agency of Transportation - New Haven Project (#9A0071-EB, September 14, 1979), and is based upon a careful evaluation of the relationship between local zoning and the Act 250 process. To begin with, the local zoning application and the Act 250 process are distinct procedures. An Act 250 permit may be sought before, after, or concurrently with a local zoning permit; in fact, an Act 250 permit may be granted whether or not permission is ever sought from or granted by the local officials. We do not believe that the distinct procedures that a developer may go through to obtain a variety of permits that may be required by local, state, and federal law can be considered "a suit" within the meaning of that term in 1 V.S.A. §213.

Secondly, there are important administrative and policy reasons to refrain from establishing such a rule. By pursuing a set of required permits for development in succession, a developer may create a review period for a project running several years. In the interim, numerous plans and regulations of significance to the Act 250 criteria might change -- e.g., Water Resources and Health Department regulations regarding the disposal of wastes, town plans, regional plans, federal and state air quality regulations, state highway access requirements, and town road specifications. The efforts of agencies at all levels of government to respond to improved information and changing economic and environmental conditions would be seriously undercut if developers could forestall

the application of new regulations to a proposed development simply by presenting a credible application to the first entity whose approval is required to be obtained. This principle applies with particular force to the Act 250 process, which is a comprehensive review of many aspects of a proposal, involving a wide variety of regulations and requirements from other governmental entities. Moreover, an application for a development permit that may not be sufficiently complete to be accepted for filing before the District Commission might well be accepted by a town zoning official.

Finally, we do not believe that the policy expressed here works an undue hardship on applicants. The purpose of the vested rights doctrine is to protect those who have made investments in reliance upon governmental approvals from being denied the opportunity to complete their projects because of litigation by opponents or a change in governmental regulations. An applicant who has applied for local zoning approval but has not yet received an Act 250 permit has no reasonable expectation of automatic approval of his project through Act 250, which involves a far broader review of a project's environmental and fiscal effects.

4. Despite this general rule, the circumstances of the present case compel a different result. We conclude that the applicants herein are entitled to review under the terms of the Essex Junction Zoning Ordinance in effect at the time their local building permit was appealed to the Superior Court. The zoning permit granted at the local level was appealed to the Superior Court, and then to the Supreme Court by opponents of the Stevens' project. The Stevens reasonably delayed making their application to the District Commission until the Superior Court action was resolved. In the interim, the local zoning changed. The Superior Court held that the applicants had "met the legal requirements for" approval of the six unit project. This case thus falls within the narrow category of cases anticipated in Preseault v. Wheel, 132 Vt. 247 (1974) and In re Preseault, 132 Vt. 471 (1974), where the Act 250 process is affected by ongoing litigation involving parties with standing to oppose the development. Moreover the altered regulation is precisely the regulation involved in the litigation and ruled on by the court. We therefore conclude that the "local ordinance" referred to in the Chittenden County Regional Plan for determination of permissible density for this project is the local zoning ordinance applied to this project by the Superior Court. Under the density requirements of that ordinance, the project satisfies the regional plan and the requirements of Criterion 10 of 10 V.S.A. $6086(a).

ORDER

The appeal of Milo Reynolds is hereby denied. Jurisdiction over this application is returned to the District Commission for appropriate proceedings under the remaining criteria of the Act.

Dated at Montpelier, Vermont this 28th day of July, 1980.

ENVIRONMENTAL BOARD

BY Margaret P. Garland
Chairman

Members voting to issue
this decision:
Margaret P. Garland
Ferdinand Bongartz
Dwight E. Burnham, Sr.
Melvin H. Carter
Michael A. Kimack
Daniel C. Lyons
Roger N. Miller
Leonard U. Wilson