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

RE: Paul E. Blair Family Trust
Route 2
Williston, Vermont 05495

Land Use Permit
#4C0388-EB

This is an appeal from Land Use Permit #4C0388-EB, issued by the District #4 Environmental Commission on January 28, 1980, authorizing the Paul E. Blair Family Trust to develop a 30-lot commercial subdivision along Routes 2 and 2A in Williston, Vermont. The appeal was filed by the Chittenden County Regional Planning Commission on February 27, 1980. The Environmental Board heard evidence and oral argument on this matter on April 7, April 8 and May 27, 1980. Following the hearings of April 7 and 8, the applicant submitted additional written evidence to the Board on issues raised in the initial hearings. Subsequently, on April 30, 1980, appellant Chittenden County Regional Planning Commission submitted a request to withdraw its appeal. On May 27, 1980 the Board considered and granted this request as well. as the requests of the applicant and the State of Vermont to rule on the issues presented on the basis of the existing record. On June 11, 1980 the Board concluded that no further hearing would be necessary, and adjourned the hearing on the appeal.

The parties to the appeal are:

The Applicant, Paul E. Blair Family Trust, by Peter M. Collins, Esq.;
The Town of Williston by George Baron, Selectman, and John Heins, Chairman;
Wiliiston Planning Commission by George Gerecke, Chairman;
Chittenden County Regional Planning Commission by Arthur Hogan, Executive Director;
State of Vermont by Stephen B. Sease, Esq.;
G. Dana Alling, an adjoining property owner.

INTRODUCTION

The issues raised in this appeal were clarified by the parties at the Prehearing Conference and were set forth in a Prehearing Report and Order dated May 26,1980. That report identified the following issues in the appeal:

Issue #1. Whether this application was a proper circumstance for the use of an umbrella permit;

Issue #2. If it was a proper circumstance whether the District Commission correctly applied the umbrella permit policy to the several criteria of Act 250; and

Issue #3. Whether the District Commission correctly evaluated the evidence with respect to any of the criteria

identified by the appellant as being in dispute on a factual basis.

On April 7,1980, the Board heard evidence and oral argument on a motion, entitled a Motion for Summary Judgment, filed by appellant Chittenden County Regional Planning Commission. This motion raised for the Board's consideration issue #1 of the prehearing order as well as issue #2 to the extent that that question could be decided by reference to the permit application materials, the decision of the District Commission, and the permit itself. The issues were then submitted to the Board for decision. In an oral ruling of that date, issued on April 15, 1980 in the form of a Memorandum of Decision, the Board ruled on issue #1 and reserved judgment on issue #2. With respect to the first question, the Board ruled that, "in General the use of a broadly-conditioned permit process for the commercial park was within the discretion granted to the District Commission by the Act and the Rules of the Environmental Board, and was neither governed by nor precluded by the Board's specific policy for review of nonprofit industrial park projects." The Board reserved judgment on issue #2, however, reasoning that it was unnecessary to rule on the structure of the permit on its face at that time, since the parties were prepared to go forward with evidence on all of the criteria of the Act. As the Board observed in its later written decision, "[t]he appeal thus raises the entire application for de novo review. In this process, the Board will make an independent determination of the procedures and assumptions it will employ in evaluating this application against the standards and criteria of the Act." Following the withdrawal of the appeal of the Chittenden County Regional Planning Commission, the State of Vermont, a statutory party to the proceedings, requested a ruling from the Board on issue #2, arguing that the permit was inconsistent on its face because it appeared to approve the development of parts Of the project that had not been found to satisfy all of the substantive criteria of the Act. After deliberation, the Board ruled that it would comply with the state's request and rule on that question on the basis of the materials and evidence already submitted to the Board for its review.

In addition to those matters brought before the Board in its review of issues #1 and #2 (the application materials, the District Commission's decision, and the permit itself), the parties have submitted to the Board evidence on three of the ten criteria of the Act. Our de novo review of the factual analysis and conclusions of the District Commission pursuant to issue #3 of the prehearing order is thus limited to those criteria.

FINDINGS OF FACT

1. Applicant proposes to construct a project consisting of 5,700 feet of roadway and other improvements and a 30-lot

commercial subdivision on a parcel of 109 acres in Williston, Vermont. This project is presently planned and designe only in outline form. The application contains detailed information on the design of the roadway, stormwater management system and some utility services for the project. The applicant does not, however, identify any particular commercial tenants for the lots of the subdivision.

2. Despite the lack of concrete information on many important aspects of the project's design and its consequent environmental. and economic impacts, the District Commission found that the project as a whole satisfied the substantive criteria of Act 250 and issued a land use permit for the entire project. This permit was a heavily-conditioned one, however. Condition #14 of the permit states:

   Prior to the commencement of any construction on any of the 28 commercial lots, except for improvements specifically permitted herein, the purchasers or lessees of said lots shall apply to become co-permittees to Land Use Permit #4C0388 by requesting a permit amendment. The District Commission shall evaluate amendment requests and may impose conditions with respect to commercial facilities within this park in accordance with the following criteria of Act 250: 1 (air pollution); 1(B) (waste disposal); 1 (stormwater management); 1(C); (4); (5); (7); (8);9(A);9(F); and 9(K). A rebuttable presumption exists as a result of this permit that commercial developments in (conformance with the applicant's overall plans and covenants satisfy the other criteria of Act 250. However, the District Commission reserves the right to review a project under any criteria if it is not consistent with the plans or our findings of fact.

3. The applicant has planned and presented the project in three phases: Phase 1, consisting of 4 or 5 lots, is scheduled to be built first. This phase will be served by an on-site septic system capable of handling 4300 gallons/day of wastewater. Phases 2 and 3 cannot be served by an on-site system because the soils on the site are not suitable for wastewater disposal. The applicant plans to serve developments in these phases through a hookup to a municipal sewer system.

   The municipal sewer system necessary to serve Phases 2 and 3 of this development does not exist. At the time of this application and appeal, the Town of Williston has not yet voted to authorize construction of a municipal sewer line that could serve the Blair Park site. The applicant has not demonstrated t-o the District Commission or to this Board that municipal sewer facilities will be available to serve this project, or that a discharge of the magnitude planned for the project can be served adequately by those as-yet-unbuilt facilities. The applicant has therefore been unable to address the issue of wastewater disposal

from Phases 2 and 3 with the specificity necessary to meet its burden of proof as required by the Act. On the basis Of the evidence submitted to us, we are unable to find that all three phases of this project can be built as planned without imposing, an undue adverse effect on water quality, and we are unable to find that this project willsatisfy all applicable Health and Water Resources Department regulations regarding the disposal of wastes.

4. The applicant projects that this project, when complete, will generate approximately 19,000 automobile trips per day. A trip generation rate of this magnitude creates the possibility of a potentially serious adverse effect on the air quality of the Town of Williston and neighboring towns. Recognizing the potential significance of this problem, the District Commission placed a condition on the permit requiring repeated air quality impact studies at stated points in the development process. The District Commission did not, however, review the project as a whole with respect to this criteria of the Act.

   The applicant has prepared an air quality impact study for the project as a whole and has presented that study to the Board. Serious questions may be raised concerning the assumptions employed and results reached in that study. On the basis of the evidence submitted to us, we are unable to find that this project, if built as planned, will not create an undue adverse effect on air quality.

5. We find that this project has considered water conservation techniques and has incorporated them into the project design. The applicant 's protective covenants will require the installation of water-conserving plumbing fixtures in all structures built in the project.

6. We find that the stormwater discharge management system proposed for this project, as approved by the Agency of Environmental Conservation and the District Commission, will satisfy the requirements of the Act with respect to stormwater discharges.

7. We find that sufficient water is available to supply this project and no existing water supply will be unreasonably burdened because of the development of the project. The Champlain Water District will supply water to the project through the Town of Williston's water system. These systems have adequate capacity to serve the project without adversely affecting current users. Adequate water supply for fire protection will be provided by a 500,000 gallon storage tank located near Taft Corners, and 6" service mains and sprinkler systems in any building over 12,000 square feet.

CONCLUSIONS OF LAW

1. The Board's review of the matters originally raised in this appeal has been limited by the decision of the appellant? Chittenden County Regional Planning Commission, to withdraw its appeal after the first two days of hearings.' The scope of the Board's review of District Commission decisions is limited to those matters brought to the Board and opened up for its review by the parties. However, the Board's de novo review of a permit for compliance with the substantive requirements of the Act and the Board's Rules does not necessarily require a complete review of all of' the factual background of the project's environmental and economic impacts. The Board may review the application and supporting materials de novo, and may discern factual and legal deficiencies in a permit or in the decision of the District Commission on the face of those documents.

   The proper scope of our review in the present case is defined by the scope of the issues originally raised in the appeal and subsequently heard by the Board. As noted in the Introduction, this appeal raised the entire permit for the Board's review. The Board has been asked to review the Commission's overall approach to the application - the structure of the permit and the Commission's decision on its face - as well as the Commission's evaluation of the factual evidence on the substantive criteria of the Act. Our present decision addresses only those issues heard by the Board and submitted for our review - that is, the overall structure of the permit, and the evidence on three of the criteria of the Act. Our decision to return this permit to the District Commission is independently based on our decisions on each of these issues.

2. One of the appellant's grounds of appeal in this case is an argument that the District Commission does not have the authority to grant an umbrella-type permit for this project because it is a private, commercial, for-profit project not comprehended within the terms of the Board's Industrial Parks Permit Policy, adopted March 12, 1975. We do not accept this argument. The Act must be applied flexibly within its broad terms and in support of its broad objectives - to facilitate reasonable, planned economic development as well as to minimize the undesirable economic and environmental effects of proposed developments. The Act grants broad discretion to the District Commissions to achieve these goals through the permit process: "A permit may contain such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to "[the criteria of the Act]." 10 V.S.A. *$6086(c). We* conclude, in general that the Commission's use of a broadly-conditioned permit

process for the commercial park was within the discretion granted to the District Commission by the Act and the Rules of the Environmental Board, and was neither governed by nor precluded by the Board's specific policy for review of nonprofit industrial park projects.

3. It does not necessarily follow, however, that the Commission properly exercised its discretion in applying a broadly-conditioned review process to the circumstances of this case. Despite the broad discretion granted to the District Commissions to condition permits to insure compliance with the substantive criteria of the Act, the District Commission does not have authority to grant a land use permit when the applicant has not met his burden of proof on the criteria of the Act. The Act contemplates the satisfaction of the criteria at a common point in time, or over a relatively narrow time period. Neither the Commission nor the Board is authorized to grant a permit on the "condition" that the criteria of the Act be satisfied at some unspecified future time.

Our review of the application and supporting documentation, and the decision and permit issued by the District Commission reveals that the District Commission incorrectly applied the "umbrella" permit process to the several criteria of Act 250 in this case. As this Board recently stated in the appeal of C & K Brattleboro Associates, the chief purposes of the umbrella permit policy are to facilitate the environmental review of complex developments and to decrease the cost and uncertainty of the Act 250 process for prospective tenants in a complex project, while at the same time insuring that the vital interests of the public and the natural environment are safeguarded as required by the Act. To achieve these goals the District Commission, the applicants for overall project review, and the other parties to the Act 250 process must work to establish clearly the scope of review and approval given by the umbrella permit itself and the scope of review that will remain for individual tenants. In the present case, the District Commission failed to distinguish these issues properly.

In order to carry his burden of proof for receipt of an umbrella permit, an applicant must carefully define the intended scope of the development as a whole; calculate the magnitude of impacts that will result from that scale of development in terms of the criteria of the Act ("total project" impacts); and satisfy the requirements of the Act for the project as a whole, taking those total project impacts into account. If the project as a whole does not satisfy the strict standards of the criteria of the Act, a permit cannot be granted. The process is designed to minimize uncertainty to prospective tenants in the umbrella

project, not to relieve the umbrella applicant from the requirement of meeting his burden of proof by postponing review of some of the criteria of the Act. We emphasize that this process is designed not only to protect the interests of the public, but to protect prospective developers and investors from making investments in projects that ultimately might not be able to satisfy the criteria of the Act.

From our review of the permit and the other evidence submitted to the Board, it is apparent that the District Commission did not test, the Blair Park proposal as a whole against all of the criteria of the Act when it granted the permit at issue in this case. The permit is therefore invalid until such time as the applicant can demonstrate to the District Commission or this Board that the criteria of the Act are satisfied for the entire project, taking the impacts of the total project into account.

4. With respect to air pollution, the applicant has projected the Park's ceiling level traffic impact at 19,000 ADT; the Commission, however, failed to conduct any review whatsoever of the impact that this traffic load would have on air pollution in Williston or neighboring towns. The Commission reasoned that because the overall project was not yet subject to review under the federal Clean Air Act, that a pre-permit review was not required by Act 250. This conclusion must fall in view of the Act's requirement that positive findings be made on all of its substantive criteria before a permit can be granted. The District Commission must evaluate the air quality effect of the project as a whole before granting a permit for the entire project. The applicant has prepared and submitted to the Board a study of the air pollution anticipated to result from development of the project. The District Commission has not had the opportunity to review that report. Upon return of this application to the Commission, the applicant will have the burden of showing, through this and other evidence, that the project as a whole will not result in undue air pollution.

5. In its Findings of Fact, the Commission concluded that if Blair Park is fully developed as planned, the total project will generate at least 20,000 gal/day in wastewater discharges. Yet the permit. issued by the Commission, which is a permit for the entire project, limits wastewater discharges from the project to 4300 gal/day, the load resulting from development of Phase 1 alone. The Commission stated, "Further development of the lots beyond the capacity of 4,300 gallons per day disposal system will not be allowed until acceptable means of wastewater disposal have been approved." It is therefore apparent on the face of the permit that the Commission could not properly authorize development of any part. of this project beyond Phase 1. Our

independent review of the application materials reveals that an on-site disposal system will accommodate 4,300 gal/day, the flow expected from Phase 1 of the project, but that no reasonable on-site capability exists to service Phases 2 and 3 of the project. These materials also reveal that at present there is no municipal sewer in place, under construction, or even authorized to service Phases 2 and 3 of the project. We conclude, therefore, that the Commission could not properly have found that the applicant had satisfied his burden of proof with respect to wastewater disposal for Phases 2 and 3 of the project. The Commission attempted to make this finding by creating a condition requiring the applicant to seek review at some future time of the means of servicing wastewater discharges from Phases 2 and 3. We conclude that this contingent review does not satisfy the strict requirements of the Act. The applicant has failed to satisfy its burden of proof on this criterion with respect to the impacts of the total project in the de novo review of that issue by this Board. We conclude, therefore that the permit issued for Phases 2 and 3 of this project is invalid until the applicant satisfies his burden of proof on this criterion.

ORDER

Jurisdiction over this permit is returned to the District Commission for review consistent with the terms of the Act as set out in this decision. No phase of this project can be approved until the Commission is able to make positive findings on the total project impacts of that phase with respect to all criteria of the Act for which total project impacts are appropriate. The Commission must review its findings with respect to all of the criteria of the Act to determine which issues are as yet not properly resolved. In particular, the land use permit for Phase 1 of this project is invalid until the Commission has reviewed the full impact of Phase 1 on air pollution and found positively that it will create no undue adverse effect on air quality. The land use permit for Phases 2 and 3 is hereby declared invalid until the applicant satisfies his burden of proof with respect to all the Criteria of the Act. In particular, the applicant must demonstrate that the overall level of air pollution generated by the project as a whole will not create an undue adverse effect on air quality, and must demonstrate the capability to service the wastewater demand created by Phases 2 and 3, either by an approved connection to an existing or reasonably imminent municipal treatment system, or by some other means. The Commission's findings on the other criteria of the Act are subject to revision as required by changing circumstances between the date of those findings and the date on which positive findings can be made for the project as a whole.

Dated at Montpelier, Vermont this 16th day of June, 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
Roger N. Miller
Donald B. Sargent