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

Re: Taft Corners Associates, Inc.
Application #4C0696-11-EB

MEMORANDUM OF DECISION

This decision pertains to preliminary issues raised in the appeal of a permit amendment issued to Taft Corners Associates, Inc. (TCA) by the District #4 Environmental Commission on November 15, 1991. The amendment approves the construction of two buildings for a Wal-Mart store for retail sales (114,513 square feet) and a Sam's Discount Club warehouse for wholesale sales (132,500 square feet), with parking lots and related roadway improvements. The appeal was brought by Williston Citizens for Responsible Growth (WCRG). As is explained below, the Board has decided to expand the scope of the hearing to include Criteria l(B), 5, 6, 7, 9(A), 9(K), and 10, as well as Criterion 8 (aesthetics).

I. BACKGROUND

Land Use Permit Amendment #4C0696-11 (the -11 Amendment) authorizes the construction of two buildings of 114,513 and 132,500 square feet, respectively, with parking lots and related roadway improvements, on Lots 34 and 35 of the Taft Corners Commercial and Industrial Park (the Park) located at Routes 2 and 2A in Williston. The -11 Amendment also authorizes the combination of Lots 34, 35, and 36 into Lots 34 and 35 *and* grants conceptual approval of a 5,100-foot recreation path on Lots 34 and 35.

The application for the -11 Amendment was filed as an amendment to Land Use Permit #4C0696 (the original Permit) which was issued in 1987. In the application for the original Permit, TCA sought approval of 37 lots but that number was reduced based upon an air quality permit for only 999 parking spaces and the need for road improvements in the area. The original Permit specifically authorized the subdivision of Phase I of the Park, which included the creation of 10 to 14 lots and a maximum of 999 parking spaces, and the construction of approximately 4,400 feet of roads and utilities. It appears that the original Permit also granted conceptual approval for the subdivision of 37 lots and related improvements. The original Permit states, in Condition 5:

> [T]he subdivision is approved for the following maximum cumulative impacts which may not be exceeded without the prior written approval of the District Environmental Commission:
>
> 999 parking spaces;
> 34,000 gallon per day of sanitary wastewater and water;
> 1,223 average daily vehicle trips;
> 145 peak hour vehicle trips; and
> 3000 KVA electricity.

Some of the Findings of Fact and Conclusions of Laws relate to Phase I, others relate to a fully built-out subdivision of 37 lots, and others do not identify whether they relate to Phase I or to the 37-lot subdivision. The lots included in Phase I were not specified, but a condition in the original Permit required TCA to identify the lots that would be included in Phase I. TCA later submitted a letter to the District Coordinator stating that the 10-14 lots would be chosen from Lots l-25, 27, 29, 30, and 31.

On April 27, 1988, the District Commission issued Land Use Permit Amendment #4C0696-R-4 (the R-4 Amendment). The R-4 Amendment authorized Phase II of the Park (although it does not identify the Phase II lots) and revised certain conditions of the original Permit and its supporting Findings of Fact and Conclusions of Law. Condition 5 of the original Permit was amended as follows:

> This subdivision is approved for the following maximum cumulative impacts which may not be exceeded without the prior written approval of the District #4 Environmental Commission:
>
> 999 parking spaces and 4,900 parking spaces upon compliance with condition #6, below;
> 34,000 gallons per day of sanitary wastewater and water;
> 1,285 peak hour vehicle trips in 1988;
> 2,278 peak hour vehicle trips in 1989;
> 2,825 peak hour vehicle trips in 1990; and
> 3,000 KVA electricity.

Condition 6 referred to an expected air quality permit that would authorize a maximum of 4,900 parking spaces.

TCA contends that the original Permit and the R-4 Amendment constitute "umbrella" permits that authorize construction of the 37-lot Park, with final findings under all criteria except those delineated in Condition 6 of the original Permit, which states:

> Prior to the commencement of construction on any lot within this subdivision the Permittee, Taft Corners Associates, and any purchaser or tenant of any lot shall file an amendment application under criteria 1 (Air), l(E), l(B), 4, 7 (fire services), 8 and 9(F). This amendment application shall be accompanied by evidence of conformance to the Findings under criteria l(B), 2 and 3, 5 and 9(J) and shall file a cumulative impact statement.

WCRG contends that the project authorized in the -11 Amendment is significantly larger and has the potential for greater impacts than any uses reviewed and approved by the District Commission in either the original Permit or the R-4 Amendment. WCRG argues that because of the reconfiguration of the three lots into two, and the potential for significant impacts due to the nature of the proposed project, a substantial change has occurred and a full review of the project under all critera is required, pursuant to Board Rule 34. WCRG seeks party status on Criteria l(B), 5, 9(A), 9(K), and 10, in addition to its appeal on Criterion 8 (aesthetics), both as a party whose interests may be affected under Rule 14(B)(l)(a) and a party whose participation will materially assist the Board under Rule 14(B)(l)(b).

The City of Burlington believes that the size and nature of the proposed project are substantially different from any use identified or considered as part of the original Permit application, and that the impacts of a project such as this were never reviewed. The City contends that the Wal-Mart and Sam's stores will have regional impacts and that the Board should expand its review to include a number of criteria. The City seeks party status on Criteria 5 (traffic), 6 (schools), 7 (municipal services), 8 (aesthetics), 9(A) (impact of growth), 9(H) (scattered development), 9(K) (public investments), and 10 (conformance with local and regional plans). The City believes it qualifies for party status pursuant to Board Rule 14(B) both because its interests are affected and because its participation will materially assist the Board by the presentation of witnesses and cross-examination.

The State of Vermont, Agency of Natural Resources, believes the Board's proceeding should be expanded to include Criterion 9(A) because the proposed project may have significantly different impacts from those reviewed when the original Permit was issued.

Parties filed legal memoranda to support their positions and cited to the original Permit, the -11 Amendment, the R-4 Amendment, and supporting exhibits. The Board deliberated on February 12, 1992 in St. Johnsbury, March 12 in Chittenden, and March 25 in Stowe.

II. ISSUES

The Board considered the issues that were delineated in the prehearing conference report dated January 29, 1992, but in examining the relevant permits and findings, the Board discovered deficiencies in the review and the findings on a number of criteria. Therefore, the issues that the Board addresses in this decision are modified from those delineated in the prehearing report. The issues are as follows:

1. Whether a so-called "umbrella permit" may include final findings on criteria when the nature and character of the uses have not been identified.

2. Whether the application needs to be reviewed for potential impacts not previously considered by the District Commission.

3. If the Board concludes the application should be reviewed under additional criteria, which criteria are applicable.

4. Whether this application constitutes a substantial change to the original Permit and the R-4 Amendment.

III. DECISION

Umbrella Permits

Both the original Permit and the R-4 Amendment make references to "umbrella permits." Umbrella permits are issued under the authority of the "Umbrella Permit Policy and Procedure" adopted by the Board on May 22, 1975. The purpose of the policy is to provide a mechanism for review of an industrial or commercial park for its impacts as a

whole under certain criteria, leaving other criteria to be reviewed as amendment applications are filed by prospective tenants in the future. This allows commercial and industrial parks to attract tenants with assurances that certain services would be available. The policy states, in pertinent part:

> (1) If an industrial park is to be a viable undertaking and an attractive development package for prospective tenants, essential services and facilities must be assured. Careful attention in reviewing a proposed industrial park must be given to the availability of services and utilities essential to the park's operation, and the term of the commitment. Evidence of agreement of public authority responsible for provision of the services to the commitment must be included in the application.
>
> (2) Most of the applicable criteria under Act 250 are concerned with the magnitude and character of the impact of a proposed development on basic community resources. In order to make a proper evaluation, development plans must be specific as to the nature of the proposed development, the type and character of activities to be associated with the development including numbers of people, and the timing and sequence of development plans. If, however, a local corporation is seeking an umbrella permit to cover prospective tenants, it is essential that the class and character of tenants to be included under the umbrella be identified.

The Board assumes that the intent of the District Commission was to review the proposed 37-lot commercial and industrial park under the Umbrella Permit Policy. However, after reviewing the original Permit and the R-4 Amendment issued to TCA, the Board concludes that the Umbrella Permit Policy was not followed. The application filed by TCA in 1987 stated that a permit was sought for 37 lots to be sold and developed over 5-8 years, and that land uses would be "mixed commercial -- offices, retail sales, wholesale sales, and warehousing." In 1988, with the application for the R-4 Amendment, TCA submitted an estimate of uses for the lots as retail, office, general business. As noted above, the Umbrella Permit Policy states: "In order to make a proper evaluation, development plans must be specific as to

the nature of the proposed development, the type and character of activities to be associated with the development . . . ."

We believe that both the language and the intent of the policy require more specific identification of the type and character of activities than simply "retail" or "major retail" as stated by TCA. Identification of the nature of the proposed development and the type and character of activities must be specific enough so that the potential impacts can be meaningfully reviewed and potential parties have sufficient information to identify their interests that might be affected. Anything less than that would be inconsistent with the statutory language of Act 250, which states, at 10 V.S.A. § 6086(a): "Before granting a permit, the board or district commission shall find that the subdivision or development ... [complies with the ten criteria]." The Board and district commissions cannot conclude that an unidentified "retail" project, whose type and character is not specified, complies with the criteria when the impacts cannot be discerned.

The type of review contemplated by the Umbrella Permit Policy involves those aspects of a proposed project whose impacts are known at the time of application for the Umbrella Permit. For the most part these are limited to the natural resources on the site, such as primary agricultural soils, wetlands, and wildlife habitat, the review of sewage allocation and, in some cases, of traffic impacts. Potential offsite impacts, on the other hand, and impacts from individual uses, cannot be addressed until the specific uses of each tenant are identified. Thus it would not be appropriate for final approval to be granted under Criteria 6, 7, 9(A), 9(K), and 10, or, in some cases, under Criteria 1(B), 2, 3, 4, 5, or 8 (aesthetics).

Accordingly, the Board believes that the original Permit and the R-4 Amendment were insufficient to the extent that the impacts from a use such as that proposed in this application, including the regional impacts, were not reviewed. Without a review of the impacts of a proposed project, a permit cannot be granted. 10 V.S.A. § 6086(a).

Furthermore, it is not clear that the conditions in the original Permit, or the supporting Findings of Fact and Conclusions of Law, were intended to cover the entire 37-lot subdivision or, if they were, which criteria were reviewed for conformance with the entire project. The

original Permit itself states that it approves Phase I, consisting of 10-14 lots. These lots were not identified. The R-4 Amendment grants approval for Phase II of the subdivision but does not identify which lots are included in Phase II. Language in the R-4 Amendment implies that the original Permit was intended to grant approval for the entire subdivision, but, again, the original Permit itself does not so state.

Concerning TCA's argument that the original Permit allowed review only on those criteria specified in Condition 6, the Board must disagree for several reasons. One, as discussed above, an umbrella permit can and should be reopened when uses are proposed that have the potential to create impacts not previously considered because the uses were not previously identified.[1] Two, Condition #6 does not limit review to the enumerated criteria, but merely states that future applications must be reviewed under those criteria. Three, Board precedent supports reopening parts of an umbrella permit in certain circumstances: In a previous decision concerning an umbrella permit, the Board stated: "We emphasize at this point that a positive finding on one of the criteria of Act 250 as part of an umbrella permit does not automatically block review under that criterion in the later application of an industrial tenant." Re: C & K Brattleboro Associates, #2W0434-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Jan. 2, 1980). Finally, as stated above, the district commissions and the Board are obligated under the statute to review major developments for their impacts under the ten criteria; such review cannot be avoided by permit condition.

Based upon the Board's review of the original Permit and the R-4 Amendment, we conclude that there is a potential for impacts from this project that have not been reviewed or fully reviewed under the following criteria:

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[1] There is precedent in District Commission decisions for reopening umbrella permits under these circumstances. See, e.g., Re: Wveth Nutritionals, Inc. and Georsia Industrial Development Corporation, Land Use Permit #6F0252-2, District #6 Environmental Commission (March 15, 1982).

Criterion 1(B)

Finding of Fact 6 that supports the original Permit states, in pertinent part:

> **The stormwater system for this subdivision has been developed to account for all of the stormwater runoff which will be generated when the subdivision is developed to a 30% lot coverage for buildings and improvements. ...**

Finding of Fact 23 in the -11 Amendment states that the total impervious coverage of Lot 34 and Lot 35 is 49 percent each, and Finding of Fact 79 states that the total coverage of buildings and improvements on those lots is 51 percent. The increase in lot coverage from 30 percent to approximately 50 percent raises the potential for impacts not previously considered.

Criterion 5

The original Permit approved Phase I of the subdivision under Criterion 5, based upon the construction of new roads and other improvements. A Stipulation was presented to the District Commission that established an ageement among TCA, the Town of Williston, the State Agency of Transportation, and the Chittenden County Regional Planning Commission concerning improvements that would be made to area roads. The Commission stated on page 10 of the Findings of Fact and Conclusions of Law attached to the original Permit:

> **[T]he Commission finds that there is sufficient evidence in the record to demonstrate that Phase I of the subdivision, 10 to 14 lots, will not cause or result in unreasonable traffic congestion or unsafe conditions. However, the Commission cannot make affirmative findings for the traffic associated with the entire subdivision because the cooperative traffic effort must be finalized before a similar demonstration can be made for the subdivision in its entirety. ... The Commission will require that the intersection improvements be completed prior to the occupancy of any building on any lot and will require that traffic signalization be installed prior to any development beyond Phase I. ...**

The improvements that were agreed to in the 1987 Stipulation were identified in Exhibits attached to the Stipulation.

In February, 1988, the parties entered into another Stipulation. This was submitted to the District Commission for the R-4 Amendment. Although not specifically stated in the R-4 Amendment, it appears that the District Commission intended to grant approval for the entire 37-lot subdivision under Criterion 5, based upon future compliance with the terms of the 1987 Stipulation.

There is no indication in either the original Permit, the R-4 Amendment, or the -11 Amendment that the regional impacts from the traffic generated by the uses proposed by a project of this nature were reviewed. Regional impacts, however, are relevant for consideration under Criterion 5. When the District Commission's denial of a permit to the Pyramid Company of Burlington to construct a mall at Taft Corners was appealed by the Applicant to the Chittenden Superior Court, the Applicant asked the Court to rule that "'traffic congestion at remote intersections as far as five miles from the mall site, and otherwise outside the boundaries of Williston' and 'the allocation of all increased traffic through the year 2000 may not be considered on this issue." In re Pyramid Company of Burlinaton, Chittenden Superior Court, No. S59-78CnM (Oct. 14, 1980). The Court ruled concerning Criterion 5:

> In the absence of any limiting language in the statutory criterion, the Court cannot limit the Appellees' evidence to any particular geographical area or time period but must consider and weigh all of the evidence presented as to traffic conditions so long as they are relevant to highway, water, railroad and airport traffic congestion and safety and are causally related to the proposed development.

Id. at 2.

It is also unclear whether the required improvements have been completed. Thus consideration of Criterion 5 must include testimony on the potential regional traffic impacts and on whether the required improvements have been completed.

Criteria 6 and 7

In the original Permit, the District Commission concluded that the project will not place an unreasonable burden on the ability of the Chittenden South Supervisory School District to provide educational services. Concerning municipal services under Criterion 7, in the original Permit the District Commission addressed local water and sewage capacities, fire and police protection from the Town of Williston, and the burden on the ability of Williston to provide municipal traffic services. In the -11 Amendment, the District Commission only addressed the ability of the Williston Fire Department to provide fire service coverage to the project. There are no findings in either permit, however, concerning the school districts of other municipalities that might be affected by the regional impacts of the project or the economic burden that might be placed on other municipalities in the region, such as Burlington. In the Pvramid decision, the Superior Court stated concerning municipal services:

> Appellant asks the Court to rule as a matter of law that evidence of decline in shoppers' goods sales, lowering of property values and reductions in tax revenues and services in a municipality (Burlington) which does not adjoin the town in which the development is located (Williston) cannot be considered on this issue.
>
> The statutory criterion by its very wording refers to "local governments" in the plural and does not limit evidence of "unreasonable burden" to the municipality in which the development is located. Moreover, a reading of the statutory language to allow a consideration of such evidence carries out the intent of Act 250 to provide a mechanism for State review where "activity on a very major scale is planned" and where "large-scale changes in land utilization" might have an impact on "values of State concern." See Committee to Save the Bishop's House v. Medical Center Hospital of Vermont, 135 Vt. 142, 151 (1979). . . . If the very purpose of the Act is to consider the impact of-large-scale developments on State as opposed to local concerns, a narrow

reading of the statutory criterion to prevent consideration of impact beyond the limits of Williston is not justified.

Id. at 3.

Accordingly, the potential impacts under Criteria 6 and 7 on municipalities in the region must be considered.

Criterion 8

The District Commission limited its review in the -11 Amendment to a determination of whether the project meets the standards enumerated in Condition 25 of the original Permit. The Board believes this was insufficient given the increase in coverage of the lots with buildings, parking spaces, and roadways from 30 percent to 49-51 percent. Furthermore, the District Commission did not approve a landscaping plan but instead imposed a condition requiring submission of a "landscape design, maintenance, and planting program for the parking lots" in spite of the Commission's finding that TCA failed, "despite direct requests, [to submit] a landscape plan that addresses the difficulties of sustaining viable growth within a parking lot or that indicates that an analysis of these issues has been made." -11 Amendment, Finding of Fact 59.

Accordingly, the visual impacts of this project under Criterion 8 (aesthetics) must be reviewed. A landscaping plan must be reviewed and approved before a permit can be issued.

Criterion 9(A)

Criterion 9(A) states, in pertinent part:

> (A) Impact of growth. In considering an application, the district commission or the board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for

education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the district commission or the board shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision.

(Emphasis added.)

Criterion 9(A) was addressed in the original Permit only with regard to the Town of Williston; in the R-4 Amendment, Criterion 9(A) was mentioned only with respect to the Stipulation of the parties regarding traffic; and Criterion 9(A) was not addressed in the -11 Amendment. Criterion 9(A) requires an evaluation of the potential growth impacts of a proposed project. Re: Washington Electric Coooerative, Inc., #5W1036-EB, Findings of Fact, Conclusions of Law, and Order at 6-10 (Dec. 19, 1990). Based on the language of 9(A), this includes growth impacts on the region as well as the town in which the project is located. Thus, the effect of this project on the financial capacity of the towns in the region to accommodate the project must be evaluated.

Criterion 9(K)

In the Findings of Fact attached to the original Permit, the District Commission found that Criterion 9(K) was satisfied for Phase I based upon the Commission's findings concerning traffic impacts under Criteria 5 and 9(A). No further analysis concerning compliance of the project with Criterion 9(K) was provided.

The Board has previously found that the interstate corridor is an important scenic state resource deserving of protection. Re: Heritaae Group, Inc., #4C0730-EB, Findings of Fact, Conclusions of Law, and Order at 12 (March 27, 1989).

Accordingly, Criterion 9(K) must be reviewed for the effect of this project upon the Interstate as well as upon other highways and public facilities in the region.

Criterion 10

In the original Permit, the District Commission addressed conformance of the original application with the

Williston Town Plan and the Chittenden County Regional Plan. It concluded that the "project" complies with the Town Plan based upon statements from Town officials. It did not draw a conclusion concerning the Regional Plan, because "the plan does not contain sufficient current information ...." Neither the Town Plan nor the Regional Plan was addressed in any of the amendments to the original Permit.

As discussed above, the original Permit grants approval for Phase I of the Park. Although the Phase I lots were not specifically identified, according to the letter dated August 4, 1987 from the Applicant to the District Coordinator, they were to be chosen from Lots l-25, 27, 29, 30, and 31. Lots 34, 35, and 36 were clearly not included in Phase I. Since none of the amendments addresses compliance of these lots with the Town and Regional Plans, it appears that there has been no review.

Furthermore, as discussed above concerning other criteria, there has been no review under Criterion 10 of the conformance of a use of the type and character of this project with the Town and Regional Plans. When the specific type and character of a proposed use is not identified, as in this case, meaningful review under Criterion 10 cannot take place.

The general principle concerning review of town and regional plans is that projects are reviewed for conformance with the plans in effect on the date a complete application is filed. In re Ravmond F. Ross, 151 Vt. 54 (1989); Smith v. Winhall, Planning Commission, 140 Vt. 178 (1981). The Board believes that, with regard to so-called umbrella permits, this means that the plans apply that are in effect on the date that applications for approval of specific, identified uses are filed. Until that date, the application cannot be considered "complete" within the meaning of the Court's rule of vesting. Ross at 57-59.

Accordingly, this project must be reviewed for conformance with the Town and Regional Plans in effect on the date the application for the -11 Amendment was filed.

Substantial Change/Remand

The question has been raised whether the reconfiguration of lot lines is a substantial change to the umbrella permit that requires review under all ten criteria pursuant to Rule 34. Rule 34 requires an amendment for any material

or substantial change in a project, and, if a substantial change has occurred, provides that the amendment will be considered as a new application.

"Substantial change" is defined at Rule 2(G) as "any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(l) through (a)(10)." As more fully discussed above, the Board believes that the proposed project constitutes a change to the original Permit and the R-4 Amendment because many of the potential impacts from this project were never considered. The Board also has identified a number of criteria under which this project may result in significant impacts. Thus the Board must conclude that a substantial change has occurred. In re H.A. Manosh Corvoration, 147 Vt. 367, 369-71 (1986).

If a substantial change has occurred, Rule 34 requires that an amendment application be filed with the District Commission. The -11 Amendment application did not address all the criteria which the Board has concluded must be considered. The Board will therefore remand this matter to the District Commission and order that the amendment application be supplemented with sufficient information for the District Commission to review Criteria l(B), 5, 6, 7, 8 (aesthetics), 9(A), 9(K), and 10, as discussed above.

Ordinarily, consideration of a permit amendment includes review of all ten criteria. Because this project was originally reviewed as an umbrella permit, however, it is not necessary to duplicate the review that has already taken place. Therefore, the scope of the District Commission's review should be limited to those criteria and issues that were not previously adequately reviewed, as discussed at pages 8-13, above.

Party Status of WCRG

The District Commission must determine eligibility for party status when it reconvenes the hearings in these proceedings. Based on the arguments submitted by WCRG and the City of Burlington, the Board believes WCRG is eligible for party status on Criteria l(B), 5, 8, 9(A), 9(K) and 10, and the City is eligible for party status on Criteria 5, 6, 7, 9(A), 9(K), and 10. The District Commission may consider additional requests for party status.

IV. ORDER

This appeal is remanded to the District #4 Commission. TCA shall supplement its amendment application with information sufficient for the District Commission to determine compliance of this project with Criteria l(B), 5, 6, 7, 8 (aesthetics), 9(A), 9(K), and 10. The District Commission shall reconvene the hearings to review these criteria consistent with this decision.

Dated at Montpelier, Vermont this 31st day of March, 1992.

ENVIRONMENTAL BOARD

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