

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

RE: Circumferential Highway Dismissal Order
State of Vermont Application #4C0718-1-EB
Agency of Transportation
Administration Building
133 State Street
Montpelier, VT 05602
and
Chittenden County Circumferential
Highway District
Lincoln Hall
P.O. Box 175
Essex Junction, VT 05453

This decision pertains to an appeal filed by the Town of Colchester from a condition in Land Use Permit Amendment #4C0718-1-EB issued by the District #4 Environmental Commission on November 29, 1989. The permit amendment approves a stipulation filed with the District Commission by all parties except the Town of Colchester. The stipulation outlines a process to mitigate for impacts on primary agricultural soils induced by the Chittenden County Circumferential Highway and requires the towns of Colchester, Essex, and Williston (all of which are members of the Chittenden County Circumferential Highway District) to prepare independent plans to protect agricultural and scenic resources affected by the Highway and further provides that no Highway construction activity in any of the towns may begin prior to approval by the District Commission of the plan for the town in which construction activity will occur.

In its appeal, Colchester claims that the District Commission has no jurisdiction over Colchester as a non-applicant and no authority to require submission of a mitigation plan to protect primary agricultural soils from future development that may occur as a result of construction of the Highway. Colchester also believes that the Commission's condition is vague in that it does not identify the lands that are to be covered by the mitigation plan.

A prehearing conference was convened on February 6, 1990 at which the parties discussed the issues and procedures to be followed in this appeal. On February 23, a Prehearing Conference Report and Order was issued that included deadlines for filing an outline of the evidence the Board will need to resolve the issues under appeal and a stipulation of whatever relevant facts may be agreed upon by the parties. Since the issuance of the Prehearing Order, Environmental Board Chairman Stephen Reynes reviewed this

matter and determined that it should be dismissed because the District Commission's decision is not a final, appealable order. On March 30, 1990, a proposed dismissal order was issued and parties were provided an opportunity to object and to request oral argument before the Board. Having received no objections or requests for oral argument, on April 18, 1990 the Board deliberated and voted to issue the decision.

I. Background

A. The Chittenden County Circumferential Highway

In late 1982, the voters of the Towns of Colchester, Essex, and Williston and the Village of Essex Junction approved the creation of a special purpose union municipal district, known as the Chittenden County Circumferential Highway District (the District) for the purpose of developing, in conjunction with the Vermont Agency of Transportation (VAOT) the Chittenden County Circumferential Highway. The Highway is to be a limited access, 16.7 mile highway running from Interstate 89 in Williston to Route 127 in Colchester that will be built in stages, or segments, based upon availability of funding.

B. The Memorandum of Understanding

The District and VAOT filed an application for Act 250 approval for construction of the Highway on February 25, 1987. Applications by VAOT for highway construction projects are reviewed pursuant to a Memorandum of Understanding (MOU) between the Board and VAOT dated October 12, 1982.¹ The MOU establishes procedures for phased review of VAOT highway projects under the criteria of Act 250 and includes the following: Review of the project is commenced before final plans have been developed, and findings of fact and interim decisions are issued with respect to as many of the Act 250 criteria as the Commission deems appropriate. The interim findings and decision are binding on all parties "unless significant project revisions are made as more detailed design is completed." When final ("**Step Four**") plans are developed, they are submitted to and reviewed by the District Commission. At that time, all parties are entitled to notice and to request additional hearings. Although preliminary party status decisions are made at the initial hearings,

¹This MOU was introduced into the record of the District Commission as Exhibit 16.

final rulings on party status are reserved until Step Four plans are filed, at which time the Commission reviews the party status requests and issues final rulings. The interim findings of fact and decision become final if, upon review of the Step Four plans, the Commission determines that the more detailed plans have not resulted in a substantial change in the impact the project will have under the ten criteria or upon the interests of the parties. If the Commission determines that the Step Four plans have created a substantial change, the Commission may convene additional hearings and revise its prior findings of fact and decision. Upon completion of review of Step Four plans, the Commission issues a final decision.

C. District Commission Review

The District Commission began its review of this application in April, 1987 and held a number of hearings. On November 24, 1987 the Commission issued interim findings of fact. On April 4, 1988, the Commission issued a decision in which it ruled that it had the authority to impose conditions under Criterion 9(B) to mitigate the direct and indirect effects of the Highway on agricultural lands. Interlocutory appeals to the Board were filed but the Board declined to accept the appeals. The Commission reconvened the hearings to take evidence on the Humstone-Squires Report on the impacts of the Highway on primary agricultural soils.

On December 5, 1988, the District Commission issued a Land Use Permit and Findings of Fact, Conclusions of Law and Order and on January 10 the Commission issued a corrected permit. After reviewing the application and the plans that had been submitted, the Commission concluded that a number of criteria had been satisfied, and that "[f]ollowing the Commission's consideration of Step IV design plans and other additional evidence, final findings will be made for each highway construction segment under Criteria 1, 1(B), 1(E), 1(S), 4, 5 (with respect to intersection and interchange configuration and signalization), 8 and 8(A)." Findings of Fact, Conclusions of Law and Order #4C0718 at 42 (Dec. 5, 1988). The permit states that approval of the Highway construction is "conditioned on the successful review of Step IV plans for each highway segment and successful completion of all pertinent conditions of this Land Use Permit." Land Use Permit #4C0718"Corrected" at 1.

Condition 5 of the January 10 permit required the Permittees to submit a plan to protect farmland in accordance with the recommendations of the Humstone-Squires report. The

Commission's approval of the report was a prerequisite to any further approval of construction. This condition was appealed to the Board. Based upon a stipulation signed by all parties except the Town of Colchester, the appeal was dismissed.²

On October 3, 1989, the District and VAOT filed an amendment application with the District Commission for the purpose of approval by the Commission of a stipulation that addresses agricultural land conservation in the District towns. On November 29, 1989, the Commission issued a decision that incorporates the stipulation and amends the permit to require, instead of one plan that provides for conservation of the farmland in all the District towns that will be affected by the Highway, independent plans "for the protection of agricultural and scenic resources affected by the highway in mitigation of the primary and secondary impacts on primary agricultural soils created by the construction of the highway." The condition further provides that "no construction activity in any Town may begin prior to review and approval of the Plan for the Town in which construction activity will occur." The Town of Colchester, which did not sign the stipulation, now appeals from this condition, claiming in essence that the Commission does not have the authority to require Colchester to submit such a plan.

II. Decision

Appellate jurisdiction is normally restricted to the review of final judgments. The policy considerations supporting the finality requirement include the unnecessary delay and expense and the waste of judicial resources that result from piecemeal review. In re Pyramid Company of Burlinton, 141 Vt. 294, 300 (1982).

A careful review of both the Memorandum of Understanding between the Board and the Agency of Transportation and the Commission's November 29, 1989 decision reveals that it is not a final decision that is ripe for appeal. The MOU states clearly that until Step Four plans are reviewed and approved, any decision of the Commission is interim, and that after

²Although Colchester did not sign the stipulation, it did not object to the dismissal of the appeal.

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submitted to the District Commission, the Commission will review those plans and issue a final decision on that segment. If the Commission grants a permit for the Colchester segment, the permit presumably will include a condition requiring submission and approval of a farmland conservation plan before construction on that segment can commence. At that time, if Colchester still wishes to challenge the Commission's authority to impose such a condition, it may appeal that final decision to the Board.

IV. Order

The appeal of Land Use Permit #4C0718-1 is hereby dismissed. Jurisdiction is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 26th day of April, 1990.

ENVIRONMENTAL BOARD

Stephen Reynes

Stephen Reynes, Chairman
Ferdinand Bongartz
Rebecca J. Day
Arthur Gibb
Charles F. Storrow

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