

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. §§ 6001 - 6092

Re: Maple Tree Place Associates  
Application # 4C0775 - EB  
(Interlocutory Appeal)

**MEMORANDUM OF DECISION AND ORDER**

Upon review and consideration of a Motion for Interlocutory Appeal ("Motion") filed by the Town of St. Albans ("St. Albans"), related pleadings filed by the parties and oral argument, the Environmental Board ("Board") concludes that St. Albans has failed to adequately demonstrate that ~~the development~~ at issue may affect ~~its interests under~~ 10 V.S.A. § 6086 (a)(6), (7), (9)(A) or (9)(H) or that its participation will materially assist the Board. Consequently, St. Albans is denied party status in this matter.

**I. BACKGROUND**

On April 10, 1996, Maple Tree Place Associates ("MT,," filed a revised application for a land use permit ("Application") with the District #4 Environmental Commission ("District Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") for a mixed use development consisting of a total of 299,000 square feet of retail space and 250,000 square feet of space devoted to housing, offices, services, cinema and a food market ("Project"). The Project is located on Routes 2 and 2A in Williston.

On May 3, 1996, St. Albans filed a St. Albans Petition for Party Status seeking party status under 10 V.S.A. § 6086 (a)(6), (7), (9)(A) and (9)(H) pursuant to EBR 14 (B)(1) and (2) ("Petition"). On May 24, 1996, the District Commission denied the Petition. It stated:

**Town of St. Albans; Denied: Criteria 6,7,9(A) and 9(H).** The Town's party status is denied for failure to demonstrate how the project may affect the Town under any of the 10 Criteria or how the Town may materially assist the Commission in evaluating project impacts under any of the 10 Criteria. Board Rules 14 (B)(1) and (2).

Re: Maple Tree Place Associates, #4C0775, Prehearing Conference Report and Order, May 24, 1996 at 4 (emphasis original).

On June 3, 1996 and pursuant to EBR 43, St. Albans filed the Motion. On June 10, 1996, MTP filed an Applicant's Memorandum in Response to Town of St. Albans' Motion for Interlocutory Appeal ("MTP Response"). On June 13, 1996, St. Albans filed a Supplemental Memorandum in Support of Motion for Interlocutory Appeal ("St. Albans Supplemental Memorandum"). On June 18, 1996, MTP filed Applicant's Supplemental Memorandum ("MTP Supplemental Memorandum"). On July 5, 1996, the Town of

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Williston ("Williston") filed the Town of Williston's Memorandum Opposing Petition for Party Status ("Williston Memorandum").

On July 17, 1996, the Board convened oral argument on the Motion and all related pleadings. St. Albans, Williston and MTP participated. On July 19, 1996, to not delay the District Commission proceedings, the Board issued a status memo advising the parties in relevant part: "Pursuant to Environmental Board Rule 43, the Board has reviewed the Motion and denies the Town of St. Albans' Petition for Party Status under 10 V.S.A. §§ 6086 (a) (6); (7), (9)(A) and (9)(H)."

On September 25, 1996, the Board deliberated on a draft decision. This matter is now ready for decision.

## II. ISSUES

1. Whether or not St. Albans has adequately demonstrated that the Project may **affect** its interests under 10 V.S.A. § 6086 (a)(6), (7), (9)(A) or (9)(H).

2. Whether or not St. Albans has adequately demonstrated that its participation will materially assist the **District** Commission or Board by providing testimony, cross-examining witnesses or offering argument or other evidence relevant to 10 V.S.A. § 6086 (a)(6), (7), (9)(A) and (9)(H).

## III. DISCUSSION

### 1. STANDARD OF REVIEW AND BOARD DISCRETION

The Board considers the Motion de novo V.S.A. § 6089. Re: Pico Peak Ski Resort, Inc., #1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 9 (March 2, 1995) citing Re: St. Albans Group and Wal★Mart Stores, Inc., #6F0471-EB, Memorandum of Decision at 4 (April 15, 1994).

Rule 14 (B) provides that "the board or district commission may allow as parties" those whose interests may be **affected** by a development or who will materially assist the board or district commission. Thus, the decision whether or not to grant party status in the instant matter is solely within the Board's discretion. Re: Pico Peak Ski Resort, Inc., supra, at 9 citing Re: Sherman Hollow, #4C0422-5-EB, Memorandum of Decision at 5 (February 3, 1988).

2. RECENT CHANGES TO PARTY STATUS REVIEW

During the 1994-95 legislative session, the Vermont General Assembly added a provision to Act 250, effective March 15, 1995, which compels the district commissions to undertake a two-part party status evaluation in every Act 250 permit application review proceeding. The provision states in relevant part:

- A district commission, according to the procedures established in the rules of the Board, shall **determine party** status-with- respect to **individuals and organizations** at the commencement of the hearing process and **shall** re-examine those determinations before the close of hearings and state the results of that re-examination in the district commission decision,

10 V.S.A. § 6085(c)(2).

The Board, effective January 2, 1996, amended the Environmental Board Rules ("Rules") to establish procedures governing the new two-part district commission party status determinations. The principal change is found in EBR 14 (F) which provides:

Preliminary determinations of party status by district commissions and reexamination.

(1) The district commissions shall make preliminary determinations concerning party status. If a prehearing conference is not held, such determinations shall be made at the commencement of the first hearing on the application. If a preheating conference is held, such determinations shall be made in writing immediately following the conference and prior to the **first** hearing day on the application.

(2) If a district commission has made an oral preliminary determination concerning party status, a party or petitioner for party status may request that the district commission issue such determination in writing. The district commission shall issue such written determination no later than five **days** following the date on which the request for written determination was made.

(3) On motion of a party or on its own motion, **the** district commission shall re-examine preliminary party status determinations, unless an interlocutory appeal concerning the determination(s) has been accepted by the board under Rule 43. Any re-examination of party status shall occur prior to completion of deliberations and after each party has had opportunity to present evidence, to cross-examine, and to offer argument. In such re-examination, the

district commission shall presume that a party continues to qualify for party status, unless it is demonstrated that the party does not so qualify under the standards of Rule 14(A) or (B).

(4) The district commission shall state the results of all party status determinations and **re-examinations** in its final decision on the application.

The Board also amended EBR 43, effective January 2, 1996, to establish a procedure governing interlocutory-appeals from a **district-commission's initial party status** determination. EBR 43(B) now provides in relevant part:

Motion for interlocutory appeal regarding party status. Upon motion of any party, or person denied party status, the board in its sole discretion may review an appeal from any interlocutory (preliminary) order or ruling of a district commission if the order or ruling grants or denies party status and the board determines that such review may materially advance the application process.

EBR 43 (B).

The parties agree that Board review of the Motion would materially advance the application process. Likewise, the Board believes that its acceptance and review of the Motion would materially advance the application process. This is especially true because, in accepting and reviewing the Motion, the Board obviates the District Commission's responsibility or ability to **re-examine** St. Albans' party status and can fully and finally resolve St. Albans' party status at the outset of the District Commission's review process. **See** EBR 14 (F) (3).

Once the Board accepts an interlocutory appeal for review, the Board follows procedures designed to accommodate an expedited but thorough evaluation. EBR 43(D) **provides in relevant part:**

Proceedings on appeal. Any interlocutory appeal shall be determined upon the motion and any response without hearing unless the Board otherwise orders. ... If a motion for interlocutory appeal is granted under section (B) of this rule, board proceedings shall be confined to the specific grant(s) or denial(s) of party status identified in the motion. For any interlocutory appeal, the Board may convene such hearings to hear oral argument as it deems necessary to dispose of the appeal.

EBR 43(D).

IV. FINDINGS OF FACT

Pursuant to EBR 43(D), the Board must base its decision upon the Motion, **any** response thereto and oral argument. The Board will **afford** the specific facts asserted by **St. Albans** and unrebutted by the other parties a presumption of correctness. Where certain facts are disputed in the pleadings and/or at oral argument, the Board will weigh **the** credibility of the competing assertions and, if possible, reach a finding of fact relating thereto. Consequently, based largely upon the **St. Albans** Supplemental Memorandum and the exhibits attached thereto, the Board finds **the following** relevant -facts-in this matter.

**St. Albans** is located in Franklin County. The Project is located in Chittenden County. Unemployment rates in Franklin County are persistently 3%-5% higher than such rates in Chittenden **County**. Between 1990-1994, 2.1% more new manufacturing jobs were created in Franklin County than were created in Chittenden County. Between 1990- 1994, .5% more new trade jobs were created in Chittenden County than were created in Franklin County. As early as 1992, about 42% of all expenditures by Franklin County residents for shopping goods, were occurring somewhere outside of Franklin County. Consequently, as early as 1992, Franklin County suffered "sales leakage" in excess of 24 million dollars. Further sales leakage may result in a reduction in available jobs in Franklin County.

**St. Albans** is about 35 miles north of the Project. Residents of **St. Albans** can travel to the Project via Interstate 89. Many existing Chittenden County retail facilities are closer to **St. Albans** than is the Project. The dominant pattern of commercial and economic development in the Town centers around the City of **St. Albans**. Combined, **St. Albans** and the City of **St. Albans** constitute the regional growth center of Franklin County. **St. Albans** and Williston have similar population and housing trends. In 1995, Williston enjoyed a somewhat greater diversity in tax base -- 19% of the aggregate fair market value on the Williston Grand **List** was in commercial real property but 12% of the aggregate fair market value on the **St. Albans** Grand List was in commercial real **property**. However, in 1995, Williston spent more than twice that which was spent by **St. Albans** on school services. This striking difference in school services expenditures in 1995 does not correlate to a greater percentage of commercial real property on the Williston Grand List in 1995 than that which occurred on the **St. Albans** Grand List.

**St. Albans** would like to present expert testimony and cross-examine witnesses regarding issues relating to Criteria 6,7,9(A) and **(H)**. **St. Albans** has commissioned a study to document the amount of sales leakage of shopping goods **from** Franklin County to Chittenden County ("Study"). The consultant retained by **St. Albans** to "oversee" the Study believes it will demonstrate that the Project, in combination with other

developments proposed for Williston in the next five years, are oversized for the Chittenden County market and will therefore rely on the ability to export retail services to, and shoppers from, other markets, including Franklin County.

V. CONCLUSIONS OF LAW

1. AFFECTED INTERESTS

St. **Albans** seeks party status, in **part**, pursuant to **EBR 14(B)(1) which provides:**

Parties by Permission. The Board or a district commission may allow as parties to a proceeding individuals or groups, including adjoining property owners, not otherwise accorded party status by statute upon petition if it finds that the petitioner has adequately demonstrated:

(1) That a proposed development or subdivision may affect the-petitioner's interest under any of the provisions of § 6086(a).

EBR 14 (B)(1).

St. **Albans** contends that the District Commission erroneously required St. **Albans** to demonstrate "how" the Project may affect its interest under the subject criteria. St. **Albans** asserts that all it must do is "simply show that its interest may be affected to clear the barrier raised by Environmental Board Rule 14 (B)(1)." Motion at 2. Because this matter is reviewed by the Board de novo, the District Commission's analysis, while reasonable from the Board's point of view, is not controlling or determinative herein.

St. **Albans** understates the requirements of EBR 14 (B). Any entity which seeks party status by permission must adequately demonstrate that its interest may be affected by a development. Thus, such **an entity bears** a certain burden to convince the Board or district commission that its interest may be affected by a development. This burden is not satisfied by unsupported assertions that vaguely defined interests may be affected. Instead, an entity seeking party status by permission must first establish a connection between the development and certain specified interests. Then, **such an entity must show** that, due to the demonstrated connection, the specified interests may be affected.

Based largely upon facts as noted above, St. **Albans** makes a few assertions regarding the Project and its potential effects upon St. **Albans'** interests under criteria 6, 7,9(A) and **9(H)**: St. **Albans** will experience a revenue drain and tax base erosion if the Project is built (Petition at 3 and 9 respectively). Based upon these assertions, St. **Albans** declares: "the [project] will erode [St. **Albans'**] ability to provide public education and

other governmental services, implicating Act 250 Criteria 6, 7, 9(A) and 9(H). Therefore, [St. Albans] should be granted permissive party status under EBR 14 (B)(1)(a)." Petition at 9.

Upon review of the materials before it and consideration of oral argument, the Board does not see a meaningful connection between the Project and the asserted revenue drain from or tax base erosion in St. Albans which comports with 14 (B)(1)(a). The facts do **not** even support the conclusion that there is such a connection between the Project and such effects **in Franklin County**. **Further, even if the facts indicated the** existence of the necessary connection between the Project and St. Albans' interests, there are no facts to support a conclusion that, due to such a connection, any of St. Albans' interests under Criteria 6,7,9(A) or 9(H) may be sufficiently affected. Consequently, the Board concludes that St. Albans has failed to adequately demonstrate that the Project may affect its interests under Criteria 6,7,9(A) or 9(H). If the Board were to rule **otherwise**, then general **shifts** in the comparative levels of economic development among regions would give rise to party status requests beyond the parameters of the **Environmental Board Rules**, and this could place an impossible burden on the system.

## 2. MATERIALLY ASSIST

St. Albans also seeks party status, in part, pursuant to EBR 14(B)(2) which provides:

Parties by Permission. The Board or a district commission may allow as parties to a proceeding individuals or groups, including adjoining property owners, not otherwise accorded party status by statute upon petition if it finds that the petitioner has adequately demonstrated:

\* \* \*

(2) That the petitioner's participation will materially assist the board or commission by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant to the provisions of § 6086(a).

St. Albans asserts that it will materially assist the board by conducting cross-examination and by presenting the Study. The Board considers several factors when determining whether or not a party status petitioner should be granted party status pursuant to EBR 14 (B)(2). They are: the petitioner's expertise regarding the matters at issue; complexity of the matters at issue; the public's general understanding of the matters at issue; relevancy of the proffered testimony, if any; and the Board's familiarity with the subject matters at issue. Re: Putney Paper Co. Inc., Declaratory Ruling #305 at 6

(October 30, 1995) citing Re: Pico Peak Ski Resort, Inc., supra, at 10.

St. Albans enjoys a certain expertise in the relatively complex economic issues inherent in Criteria 6,7,9(A) and 9(H) which are the focus of its efforts in this matter. However, the Board has developed a significant amount of expertise in these issues. Further, the public's familiarity with these issues has increased recently because major development has helped fuel public interest in and awareness of issues inherent in Criteria 6,7,9(A) and 9(H). Finally, the Study will not be particularly relevant Its focus **is too broad. It addresses impacts upon Franklin County -- not St. Albans. The Board** concludes that St. Albans has not adequately demonstrated that it will materially assist the Board.

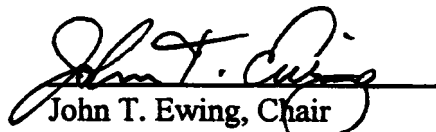
V I . **ORDER**

1. The Board accepts and reviews St Albans' Motion for Interlocutory Appeal pursuant to EBR 43(B).

2. The Board denies St. Albans party status under 10 V.S.A. § 6086 (a)(6), (7), (9)(A) and (9)(H).

Dated at Montpelier, Vermont, this October day of \_\_\_\_\_, 1996.

**ENVIRONMENTAL BOARD**



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