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

RE: Renbel Richmond Trust, Carl & Esther Parker, and Waylen & Dorothy Bowen by John R. Ponsetto, Esq.
Gravel and Shea
P.O. Box 1049
Burlington, VT 05402

Memorandum of Decision
Interlocutory Appeal
Application #4C0818-EB

This decision pertains to a motion for interlocutory appeal filed on January 19, 1990 by the above-captioned applicants (hereinafter referred to as Renbel) pursuant to Environmental Board Rule 43. Renbel sought to appeal a decision of the District #4 Environmental Commission dated January 10, 1990 that the Richmond Town Plan does not apply for purposes of review of this application under 10 V.S.A. § 6086(a)(10) (Criterion 10).

On February 22, 1990, the Board issued a decision in which it granted Renbel's motion for interlocutory appeal and established a schedule for filing legal briefs. That decision also contained a statement of facts which it assumes to be true for the purposes of making its decision. On March 15, the Town of Richmond (Town) filed a memorandum of law, on March 16 Richmond citizens for Responsible Growth (CRG) filed a memorandum of law, and on March 19 Renbel filed a brief. On March 28 CRG and Renbel filed reply briefs. Oral argument before the Board was held on April 18; participating were Renbel by John R. Ponsetto, Esq., the Town by Joseph D. Fallon, Esq., CRG by Gerald R. Tarrant, Esq., and the Chittenden County Regional Planning Commission by Art Hogan. The Board deliberated concerning this matter on April 18 in Montpelier and on May 10 in Chittenden. On June 13, the Board sent a memorandum to parties in which it announced its decision and stated that a full decision would be forthcoming.

I. ISSUES

On June 12, 1989, Renbel applied to the District Commission for approval under Criteria 9 and 10 to construct 221 single-family residential units in the Town of Richmond, and on December 8, 1989 Renbel filed an amended application for approval for 112 lots. During the course of the proceedings, the question arose.whether, pursuant to Criterion 10, the project should be reviewed for conformance with the Richmond Town Plan, which expired on January 24, 1989. The District Commission determined that the Town Plan does not apply to the'project; Renbel appeals from that decision.

Renbel argues 1) that § 16 of Act 200 extended the date that the Richmond Town Plan was in effect from January 24, 1989 to July 1, 1991 so that the Plan has not expired, and 2) that *even* if the Plan did expire in January 1989, it has a vested right to have its project reviewed for compliance with the Richmond Town Plan, based upon the local laws in effect at the time it filed its complete zoning permit application with the Richmond Planning Commission.

II. FINDINGS OF FACT

The following findings of fact are based upon the undisputed facts contained in the Board's February 22, 1990 decision as amended and supplemented by representations made at oral argument on April 18; a letter dated October 3, 1989 from Joseph Fallon to John Ponsetto filed with the Board on April 19, 1990; and four documents submitted to the Board on April 18, 1990 by Gerald Tarrant.

1. On January 23, 198~4, the Richmond Town Plan was adopted.

2. In March, 1988, Renbel filed an application for a zoning permit for a 220-lot subdivision with the Richmond Planning Commission.

3. In June 1988, the Richmond Planning Commission approved Renbel's conceptual sketch plan for its project.

4. In November 1988, the Richmond Planning Commission denied the application because certain required information was lacking and the proposal did not conform to the Town Plan.

5. The Richmond Town Plan expired on January 24, 1989, five years from the date of its adoption as provided by 24 V.S.A. § 4387.

6. On June 12, 1989, Renbel filed an application for an Act 250 permit to subdivide a 597-acre tract of land into 221 single family lots. On August 14, the District Coordinator deemed the application complete.

7. In November 1989, the Richmond Planning Commission granted Renbel preliminary approval for 112 units.

8. On December 8, 1989, Renbel filed an amended Act 250 permit application to reduce the number of units in the subdivision to 112.

9. Renbel has not yet received final approval from the Richmond Planning Commission.

III. CONCLUSIONS OF LAW

A. Exniration of the Town Plan

Renbel argues that although the Richmond Town Plan expired in January 1989, it was still in effect in June of that year when Renbel filed its application for an Act 250 permit because § 16 of Act 200, which was enacted by the legislature in the 1987 adjourned session, and took effect as of July 1, 1989, extended the expiration date of municipal plans until July 1991. The provision, upon which Renbel relies, states:

> Municipal plans that expire before July 1, 1991 hereby receive an extension of sufficient length so that they shall **remain in** effect until July 1, 1991.

The Board cannot agree with Renbel's assertion that § 16 of Act 200 was intended to revive town plans that had expired prior to the effective date of Act 200; particularly since the General Assembly made some sections effective upon passage but § 36 expressly states that § 16 shall not take effect until July 1, 1989. See also the note following 24 V.S.A. § 4387. It is one thing to extend the life of existing **plans; it is another to bring expired plans back to life. If the legislature intended § 16 to take effect upon passage or retroactively, it would have so stated. Moreover, were this section to be applied retroactively, there would be no way of determining from how far in the past old town plans would be revived. Accordingly, the Board concludes that the Richmond Town Plan, which had expired in January 1989, was not revived by § 16 of Act 200.**

B. Applicability of the Town Plan

Criterion 10 of Act 250 requires a district commission or the Board to find, before granting a permit, that a project "[i]s in conformance with any duly adopted local or regional plan ...." 10 V.S.A. § 6086(a)(10).

Renbel contends that the Richmond Town Plan, which expired six months before Renbel filed its application for an Act 250 permit, should govern for purposes of the District Commission's review under Criterion 10. The essence of Renbel's argument is that its rights to have its **proposed project reviewed under the Richmond Town Plan for purposes of both local zoning permit and Act 250 review became vested at the time it filed its local zoning permit application.**

In support of its argument, Renbel cites Re: Poor, Declaratory Ruling #64 (Jan. 30, 1975), in which the Environmental Board ruled that the town plan that was in effect at the time the Poors applied for a zoning permit governed in the subsequent Act 250 review. In that case, when the Poors filed for a zoning variance, their project was in conformance with the town plan. After being denied a variance, the Poors appealed to Superior Court, which reversed the local decision and issued a permit to the Poors. Prior to the court's ruling, a new town plan was adopted which was inconsistent with the Poors' project. Renbel contends that the Board's ruling in the Poor case controls, and that the Board should rule here that "[a]n applicant's rights under an effective town plan vest, for purposes of both local permits at the Planning Commission level and Act 250 permits at the District Commission level, when the applicant files a complete permit application with the town." Applicant's Brief at page 7.

In Smith v. Winhall Planning Commission, 140 Vt. 178 (1980), the Vermont Supreme Court adopted the position that an applicant had a vested right to have his project reviewed under the law "as of the time when proper application is filed." Id. at 181. Subsequent case law has made clear that "Smith should not be interpreted as an open-ended right to 'freeze' the applicable regulatory requirements. ..." In re Ross, 151 Vt. 54, 56 (1989). There is a balancing of competing policy interests. See In re McCormick Management Co., Inc., 149 Vt. 585, 588-590 (1988) and Ross, 151 Vt. at 56-58.

It is true that in the 1975 Poor declaratory ruling the Board considered the local and state land use permit processes as a single process. But in the subsequent case of Re: Albert and Doris Stevens, #4C0227-3-EB, Findings of Fact and Conclusions of Law (July 28, 1980), the Board explicitly rejected the applicant's argument that an application for a local permit freezes the terms of municipal laws and regulations applied in the review of development proposals under the criteria of Act 250. The Board stated:

> 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 . . . . 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 government 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 the project's environmental and fiscal effects.

Id. at 4-5. See also Re: Heritage Group, Inc., #4C0730-EB, Findings of Fact, Conclusions of Law at 3 (March 27, 1989) ("the town plan in effect on the date that a complete application for an Act 250 permit is applicable." [Emphasis added]); Re: Raymond F. Ross, #2W0716-EB, Memorandum of Decision and Order at 3 (Nov. 2, 1987) (apply the town plan in effect at the time a complete Act 250 application is filed [emphasis added]), affirmed by the Vermont Supreme Court on grounds of insufficient application to trigger vested right, In re Ross, 151 Vt. 54 (1989); Re: J.P. Carrara & Sons, Inc., #1R0589, Memorandum of Decision (Sept. 28, 1988) (regional plan does not apply to the project because it expired before the notice of appeal was filed).

The Board believes that the policies it articulated in the Stevens case are sound and are applicable to this matter. To the extent that it has not already done so, the

Board overrules the proposition in the 1975 Poor declaratory ruling that the local and state Act 250 permit processes are one process for the purpose of vesting rights.

In summary, the Board concludes that the Richmond Town Plan was not in effect when Renbel filed its Act 250 application, and that Renbel did not have a vested right to have its Act 250 application reviewed for conformance with the expired Richmond Town Plan. Accordingly, the application will be reviewed by the District Commission for conformance with any duly adopted regional plan. 10 V.S.A. § 6086(a)(10).

IV. ORDER

1. The Applicant's interlocutory appeal is denied. The application will be reviewed for conformance with any duly adopted regional plan.

2. Jurisdiction is returned to the District #4 Environmental Commission.

Dated this 15th day of January, 1991.

ENVIRONMENTAL BOARD

Stephen Reynes

Stephen Reynes, Chairman
Ferdinand Bongartz
Elizabeth Courtney
Rebecca J. Day
Arthur Gibb
Samuel Lloyd
Charles F. Storrow
W. Philip Wagner

C:renbel.mem(P)