State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

MEMORANDUM OF DECISION

Re: MBL Associates
Application # 4C0948-1-EB

This is an appeal by MBL Associates ("MBL") to the Environmental Board ("Board") from the District #4 Commission's ("Commission") denial of MBL's Motion to Amend Land Use Permit # 4C0948-EB(Altered) ("Permit"). The Board makes no determination on the merits of MBL's application. Instead, we conclude that the Commission clearly felt prohibited from amending Condition #17 of the Permit due to the limiting language in Condition #18. Because the limiting language of Condition 18 had the impermissible effect of depriving the Commission of its proper jurisdiction to review amendment applications, the Board hereby strikes the last sentence of Condition #18 and remands the case to the District #4 Commission with instructions to proceed with the merits of MBL's permit amendment application utilizing the analysis of In re Stowe Club Highlands, No. 95-341, slip op. (Vt. Sup. Ct. Nov. 8, 1996).

I Procedural Background

On March 18, 1998, MBL filed this appeal with the Board from the Commission's March 13, 1998 Memorandum of Decision and Order ("Decision") denying MBL's Motion to Amend Land Use Permit # 4C0948-EB(Altered) to incorporate a certification process by which MBL could proceed with the phased development of a previously approved project without completing the entire infrastructure before selling lots. The Decision was based on a legal issue and, therefore, did not include any findings or conclusions on issues pertaining to the merits of the application.

The approved project is a residential subdivision with a 221 unit planned residential development consisting of 161 single-family lots and 60 multi-family units, internal roads which will become public streets and related infrastructure, to be served by municipal water and sewer on 202 acres of land ("Project"). It is located off Dorset Street in the City of South Burlington ("City"), Vermont.

MBL filed its initial Land Use Application #4C0948 for this Project with the Commission on January 18, 1994. The Commission denied the application on the basis that the Project did not comply with several of the Act 250 criteria. Subsequently, MBL filed a Motion to Alter the Decision and the Commission denied it as well.

On July 13, 1994, MBL appealed the denial to the Board. On May 2, 1995, the Board

issued Findings of Fact, Conclusions of Law and Order #4C0948-EB concluding that the Project complied with all the criteria on appeal except for Criterion l(B) and Criterion 8 (historic sites). MBL withdrew its appeal on Criterion 8, and on June 20, 1995, the Board issued Land Use Permit #4C0948-EB and Supplemental Findings of Fact, Conclusions of Law and Order #4C0948-EB which concluded that, with conditions, the Project complied with Criterion l(B).

Subsequently, MBL filed several Motions to Alter during June and July of 1995 and, on November 15, 1995, submitted a phasing plan to the Board. Because the phasing plan was new evidence, the Board could not accept it and therefore lacked sufficient evidence to grant MBL's request in its entirety. As a result, on January 30, 1996, the Board issued Findings of Fact, Conclusions of Law and Order (Altered) #4C0948-EB and Land Use Permit #4C0948-EB (Altered) which contains the two conditions giving rise to the current appeal.

On or about October 2 1, 1997, MBL filed a Motion to Modify Condition 17 of the Permit by administrative amendment with the Commission.

On December 24, 1997, Chief Coordinator Louis Borie, issued a letter on behalf of the Commission determining that MBL's requested modifications were beyond the scope of the amendments to Condition 17 that were authorized by Permit Condition 18.

On December 30, 1997, MBL filed a land use permit amendment application with the Board, seeking to amend Permit Condition 17 despite MBL's stated, continuing belief that the condition could be amended administratively pursuant to Environmental Board Rule ("EBR") 34(D).

On January 14, 1998, the Chair of the Board issued a Chair's Preliminary Ruling ("Preliminary Ruling") which dismissed the matter with prejudice.

On January 20, 1998, MBL filed an Objection to the Preliminary Ruling ("Objection") and on January 28, 1998, the Board deliberated.

On January 29, 1998, the Board issued a Memorandum of Decision which incorporated the Preliminary Ruling by reference and dismissed the matter of the application with prejudice because applications cannot be reviewed in the first instance by the Board. The Board reiterated its statement from the Preliminary Ruling, that if MBL wished to amend Permit Condition 17, it should file its application with the Commission which will review it in accordance with its statutory mandate.

MBL filed the application with the Commission, and, on March 13, 1998, the Commission issued its decision declining to evaluate or rule on the merits of MBL's application

request. This appeal followed.

On Friday, April 10, 1998, Environmental Board Chair Marcy Harding convened a prehearing conference. During the conference, the Chair noted that in its Notice of Appeal, MBL raised three issues, two of which the Commission had not ruled on as they were related to the merits of the application and the Commission never reached the merits of the application.

The Board has no authority to decide issues that were not ruled upon by the District Commission, In re Taft Corners Associates, 160 Vt. 583,591 (1993), because "[i]nitial consideration of a land use proposal is a function assigned by the Legislature to the District Commission," In re Juster Associates, 136 Vt. 577, 581 (1978). Thus, the Chair advised that Preliminary Issues had to be decided before consideration of the merits of MBL's application could proceed.

The Preliminary Issues involve a procedural matter and do not address the merits of the application. The purpose of the review of these Preliminary Issues is to address the procedural impediment which has blocked review of the application and to facilitate review of MBL's amendment application using the most expeditious route that is in compliance with Vermont law and Board procedures.

As a result, party status issues for purposes of the merits hearing would not be determined until and unless the decision on the Preliminary Issues led to the Board proceeding on the merits of the application. However for the purposes of participation on the Preliminary Issues, John and Kathy Pennucci ("Pennuccis") and Alexander and Mary Blair ("Blair?) were recognized as cross-appellants and permitted to participate on the Preliminary Issues.

In an effort to expedite the process, and pursuant to consensus of those present at the prehearing conference, Board deliberation was scheduled for April 29, 1998 with filing deadlines of April 20, 1998 and April 23, 1998 respectively for memoranda on the Preliminary Issues and response memoranda. MBL, the Blairs and the Pennuccis filed memoranda on the Preliminary Issues and rebuttal filings. To the degree that the filings addressed the merits of the application or the Blairs' and the Pennuccis' party status on the merits, these filings were not considered as they were not ripe for consideration.

Prior to commencement of the Board's deliberations, John T. Ewing recused himself from the deliberations due to past relationship with MBL through his position at the Bank of Vermont. On April 29, 1998, the Board deliberated on the Preliminary Issues and the matter is now ready *for* decision.

Relevant Conditions of Land Use Permit #4C0948-EB(Altered)

Land Use Permit #4C0948-EB(Altered) provides, in part:

> 1. The Project shall be completed, operated and maintained in accordance with: (a) the plans, exhibits, and testimony submitted by the Permittee to the Environmental Board and the District #4 Environmental Commission (the District Commission); (b) Findings of Fact, Conclusions of Law, and Order #4C0948-EB (Altered), issued on the same date as this permit; (c) Findings of Fact and Conclusions of Law and Order #4C0948, issued April 13, 1994 by the District Commission; and (d) the conditions of this permit. No changes shall be made in the project without the written approval of the District Commission. The District *Commission retains jurisdiction to ensure* compliance.
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> 17. Prior to the first sale of any Single-Family Lot or Multi-Family Unit within the Project, the Permittee shall obtain from the District Commission a certificate of compliance under Environmental Board Rule 37 with respect to the construction of all Project improvements to be used in common, or held in common, by the lot and unit owners at the Project, including but not limited to all improvements related to sewage disposal, water, roads, recreation path, and landscaping.
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> > a. In filing for such certificate of compliance, the Permittee shall include a copy of the "as-built" drawings for all improvements related to sewage disposal, water, roads, and recreation path. Such "as-built" drawings shall be certified by a registered engineer and approved by the engineer for the City of South Burlington. In filing for such certificate of compliance, the Permittee shall also include a certificate by a registered landscape architect that all landscaping has been installed in compliance with this permit and a copy of the landscape bonds filed with the City, which bonds shall remain in effect for three years beyond the date of planting. In connection with obtaining a certificate of compliance, the Permittee further shall supply the

District Commission any information the District Commission deems relevant.

b. The issuance of a certificate of compliance under this condition shall apply only to construction and shall not relieve the Permittee or its successors and assigns of the obligation to operate and maintain such improvements in accordance with the conditions of this permit. If the District Commission finds noncompliance, it shall have jurisdiction to decline to issue a certificate with respect to any or all improvements which are not in compliance and instead to issue such additional conditions as it may deem appropriate under 10 V.S.A. §6086(c) to correct the non-compliance.

c. Any certificate of compliance issued under this condition shall be recorded on the land records of the City of South Burlington, at the Permittee's expense.

18. Prior to commencement of construction, the Permittee may submit, and obtain a decision from the District Commission on, modifying Condition 17, above to accommodate a phasing plan. Such phasing plan shall identify the lots or units within each phase, and the Project improvements to be used in common, or held in common, by the lot and unit owners at the Project, which are to be constructed as part of that phase. Such improvements include but are not liited to all improvements related to sewage disposal, water, roads, recreation path, and landscaping. On review of the phasing plan, the District Commission may issue an amendment to Condition 17, above, which allows the Permittee to sell lots or units in each phase of the project following receipt of a certificate of compliance for that phase. However, **in no other way may the District Commission modify** Condition 17. (Emphasis added).

III. PRELIMINARY ISSUES

A. Whether the Commission was constrained from consideration of the merits of MBL's application to amend Permit Condition #17 due to the limiting language in the last sentence in Condition #18.[1]

B. If the Commission was constrained from considering MBL's request, whether the Board should remove the restrictive language of Condition #18 and remand the case to the Commission with directions to proceed in conducting the initial review as is consistent with In re Juster Associates, 136 Vt. 577,581 (1978).

IV. DECISION

A. Effect of Limiting Language

It is clear from the Commission's decision that it felt prohibited from amending Condition #17 due to the limiting language in Condition #18. It concluded:

> that the restrictions imposed by the Board limit the Commission's ability to amend the permit as requested by the applicant. The Board expressly stated that other than specifically stated in the permit, "in no other way may the commission modify Condition 17." See Condition 18. . . . [T]he Commission concludes that it would be disregarding the express directive of the Board if it were to grant the Motion to Amend.

Decision at 4.

The Commission made no findings and conclusions as to the substantive issues

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[1] The Board is cognizant of MBL's request to expand this issue to include the first clause of Condition 18. The Board declines to do so because it is not necessary to the purpose of removing the procedural impediment to the Commission's review of MBL's application. While the Commission indicated that the Board expressly required completion of all improvements prior to sale of the first lot or unit, Decision at 4, they were referring to the language of Condition 17. Id. Once the last sentence is stricken from Condition 18, the Permit no longer restricts the Commission in its review or amendment of either Condition 17 or 18 of the Permit. Furthermore, the first clause of Condition 18 may be integral to the Commission's analysis of the merits.

pertaining to the application. In addition, the Commission, after having preliminarily granted party status, denied party status to two adjoiners because the issues pertaining to the merits of the application as raised by the potential parties were not in issue.

Arguably, the Commission could have acknowledged the offending language of Condition #18, noted that it improperly conflicted with the Commission's jurisdictional mandate md proceeded to issue a decision on the merits. Factually, however, the Commission did not proceed in that fashion. Understandably, it felt compelled to defer to the Board's directive in Condition 18. Accordingly, the Commission was constrained from consideration of the merits of MBL's application to amend Permit Condition #17 due to the limiting language in the last sentence in Condition #18.

B. Removal of Restrictive Language of Condition 18

As the answer to Preliminary Issue A confirms that the Commission was improperly constrained from considering MBL's request, the Board concludes that it should remove the restrictive language of Condition #1 8 and remand the case to the Commission with directions to proceed consistent with In re Juster Associates, 136 Vt. 577,581 (1978) utilizing the analysis of In re Stowe Club Highlands, No. 95-341, slip op. (Vt. Sup. Ct. Nov. 8, 1996).

The effect of the language of the last sentence of Condition 18 was to deprive the Commission of its statutory jurisdiction. While the Board may retain jurisdiction over a development pursuant to EBR 34(A), to do so, it must specifically reserve that right. Id. Through the last sentence of Condition 18, the Board did not specify its intent to retain jurisdiction. Any implication of an intent to retain jurisdiction is contrary to and nullified by the language of Condition 1 which specifically reserves jurisdiction with the Commission. Thus, application of the last sentence of Condition 18 improperly strips the Commission of its statutory authority.

In addition, application of the last sentence of Condition 18 could produce other serious consequences. The availability of an appeal pursuant to 10 V.S.A. § 6089 and EBR 40 is dependent upon an initial review by the district commission having occurred. The effect of Condition 18's restrictive language is to require initial review of the permit amendment to be before the Board. Therefore, an aggrieved party would be deprived of its opportunity for appellate de novo review of an adverse determination. Those whose party status is based on being an adjoining property owner, would be deprived of any appellate review. See 10 V.S.A. § 6085(c)(l) (emphasis added).

To rectify the situation, the Board can simply eliminate the problematic sentence in Condition 18 thereby making the condition internally consistent with other conditions of the Permit and in compliance with Board rules, statutory procedures and relevant case law. Accordingly, the Board shall strike the last sentence of Condition 18. The application shall be remanded to the Commission with a strong recommendation to pursue the expedited continuation of the initial review for complete consideration and decision on the merits of the application.

This approach is necessary and consistent with the purpose of the Board rules and relevant statutory provisions. It provides the most expeditious review of MBL's application while guaranteeing that MBL or any other party aggrieved by the Commission's decision will have an opportunity for the de novo review provided by the relevant statutes, rules, and principles of due process.

V. ORDER

1. The last sentence of Condition #18 of Land Use Permit #4C0948-EB (Altered) that reads "However, in no other way may the District Commission modify Condition 17" is hereby stricken from the permit.

2. This case is remanded to the District #4 Commission with instructions to expeditiously proceed on the merits of MBL's permit amendment application[2] utilizing the analysis of In re Stowe Club Highlands, No. 95-341, slip op. (Vt. Sup. Ct. Nov. 8, 1996).

Dated at Montpelier, Vermont this 4th day of May, 1998.

VERMONT ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
Arthur Gibb
Rebecca Nawrath
Bill Martinez
Bob Opel
George Holland

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2 The Board expects that the Commission will, as a matter of course, revisit the issue of the adjoiners' party status before proceeding on the merits.