

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A. CHAPTER 151

Re: Richard Cooper
RR #2
Stowe, VT 05672

Findings of Fact
Conclusions of Law, and
Order
Application #5L0590-EB

This is an appeal from Land Use Permit #5L0590 issued on December 14, 1979, by District #5 Environmental Commission, authorizing the creation of a 13-lot subdivision and a roadway on a parcel of 59.1 acres in Stowe, Vermont. The appeal was filed with the Environmental Board on April 22, 1980, by Knight, Ltd., an adjoining landowner. This appeal raised for the Board's de novo review the decision of the District Commission with respect to Criteria 1 (water pollution), 4 and 8.

Notice of a hearing date and the intention of the Board to appoint Margaret P. Garland as administrative hearing officer was sent to all parties on June 16, 1980. A hearing was held on June 23, 1980, in Montpelier, Vermont, before Margaret P. Garland, Chairman, sitting as hearing officer, by agreement of the parties pursuant to Board Rule 17. Parties participating were:

The applicant by Richard Cooper, Leighton Detora, Esq.,
Charles Grenier and Charles Burnham

Adjoining landowner, Paul J. Dumont, appellant under
Criterion 4

Lamoille County Development Council by Anthony Ciaraldi
Knight, Limited by affidavit of Howard Knight, appellant

FINDINGS OF FACT: Procedural Issues

1. Land Use Permit #5L0590 was issued by District #5 Environmental Commission on December 14, 1979. Appellant Knight, Limited, an adjoining landowner, filed an appeal directly to the Vermont Supreme Court on January 11, 1980 -- within the thirty day filing requirement. On April 21, 1980, the Vermont Supreme Court dismissed the appeal for want of jurisdiction. Knight, Limited transferred its appeal to the Environmental Board on April 22, 1980, and filed an application for a stay of the permit pending disposition of the appeal on April 24, 1980. In the request for a stay, the appellant contended that continued construction would cause irreparable harm and injury if the Cooper application were denied on appeal. In the initial review of the case, however, this Board found little evidence that appellant

Knight, Limited was likely to prevail on the merits, The potential harm to appellant resulting from the subdivision was neither great nor irreparable. Most of the potential for water pollution exists in the future, when the subdivision is occupied, and neither the asserted erosion nor aesthetic problems are irreversible, However, harm to the applicant in construction delays was quite real. The construction season is short, and a stay would have resulted in an unreasonable delay to the developer. Evidence was presented that a construction delay could have resulted in the applicant losing required financing.

2. On May 2, 1980, the applicant submitted a motion to dismiss the appeal of Knight, Limited, contending that it was filed out of time, beyond the thirty day appeal period of 10 V.S.A. 86089(a).
3. On June 16, 1980, the Environmental Board denied appellant's motion for stay and applicant's motion to dismiss in a written memorandum of decision.
4. On June 17, 1980, Paul J. Dumont submitted a statement of concerns regarding the proposed subdivision to the Environmental Board. Mr. Dumont had participated in the District Commission hearings on Criterion 4, but had not participated in the Supreme Court proceedings in this case.

FINDINGS OF FACT: Substantive Issues

1. This project will not result in undue water pollution, will meet applicable regulations regarding the disposal of wastes, and will not involve the injection of harmful materials into ground water or wells.
 - a. The proposed subdivision will contain 13 separate leach-fields for the onsite subsurface disposal of wastewater. On November 9, 1979, the Regional Engineer issued a Certification of Compliance for the project, which approved the location and construction of the septic fields for lots #1-12.
 - b. The Cooper subdivision potentially affects only two water bodies relevant to this appeal: a spring and a small pond on land owned by the appellant.
 - c. The potential sources of pollution of appellant's spring and pond are:
 - i. Sewage generated by future residents of the subdivision, and
 - ii. Stormwater runoff from the project, especially the subdivision road.

- d. The leachfield closest to appellant's spring is located 315 feet horizontally from the spring, The spring water is murky and does not supply the well's drinking water. Although the spring is lower in elevation we find that the distance between the leachfield and the spring precludes the possibility of undue pollution of the spring as a result of sewage disposal. The distance between the two areas is far in excess of any minimum distance requirements of either the Vermont Subdivision or Health Regulations.
- e. The leachfield closest to appellant's pond is located 665 feet horizontally from the pond and is 140-150 feet above the pond. The pond is supplied by water from a natural groundwater area, which includes the spring, northeast of the pond, The evidence suggests that the water source is almost exclusively on appellant's land. A settling area for surface water is enhanced by a dam near the pond. The pond water is also murky and not used for drinking. This Board finds that there will not be undue pollution of the pond resulting from sewage disposal. The distance between the pond and the closest leachfield is far in excess of the minimum distance requirements of either the Vermont Subdivision or Health Regulations. Although the direction of the flow from the Lot 11 leachfield would be down toward the pond, very little danger of undue pollution exists because of the great distance between the two areas.
- f. The road which will service the subdivision loops in the southern corner of the subdivision, just north and west of appellant's land. This strip of land slopes downhill toward appellant's land. Presently water runs onto appellant's land into a natural drainage area below the pond and flows under **Moscow** Road through an existing culvert. The road is below the elevation of the spring so that any runoff from the road will flow away from the spring. Therefore, the possibility of pollution of appellant's spring as a result of stormwater runoff from the road is exceedingly remote.
- g. The applicant has taken a number of precautions against runoff from the road onto appellant's land, thus eliminating the possibility of undue pollution of appellant's pond. The road loop will be banked away from appellant's land, channeling most of the runoff along the inside of the curve and into the existing culvert under Moscow Road, thus avoiding appellant's land entirely. Any flow off of the bank will drain into a natural drainage swale on appellant's land

through which appellant's pond presently drains. The drainage swale is lower in elevation than the pond, and stones will be installed to reinforce the uphill slope to the pond. Because of these precautions, it is highly unlikely that any runoff will reach the pond and cause any pollution.

2. This project, if constructed as proposed and as restricted by the District Commission, will not cause unreasonable soil erosion or **reduction** in the capacity of the land to hold water.
 - a. The applicant has submitted soil erosion control plans to the District #5 Environmental Commission and the District Engineer, The applicant has agreed to abide by additional recommendations suggested by the engineer.
 - b. **Most** of the road has already been constructed and the required fill is in place, so that most soil erosion problems during construction have passed. Applicant intends to mulch and seed the side slopes of the road.
 - c. The average road grade is 10%, but there are short sections of 12% grade. The steeper grades are in areas where ledge cuts were made for the road and, therefore, no substantial erosion problem will result.
 - d. We find that the applicant's construction plans as presented contain sufficient precautions to virtually preclude any soil erosion problem on appellant's land. The increase in volume of runoff as a result of the road will be approximately 10% and there will be no appreciable increase in velocity. The road loop above the land of Knight, Limited has been banked with fill to a 1:2½ grade on the low side of the curve, away from appellant's property. Because of the drainage system water will not run off the hill across the fill area. The runoff will be channeled to the inside of the curve along the ledge cut and ditch to an existing culvert under Moscow Road. The applicant has agreed to **line** the ditch with gravel to minimize erosion of the ditch itself. To absorb excess runoff the applicant has seeded and placed over the seeded area temporary jute matting below the banked road section. A berm, reinforced by a snowfence and haybales, has been constructed below the seeded area. Any further runoff will flow into an existing natural drainage swale on appellant's land to the culvert under Moscow Road to appellant **Dumont's** property.

- e. Appellant Dumont, admitted as a party under Criterion 4 only, owns land adjoining the proposed subdivision to the west and south. As a result of the minimal increase in the volume and velocity of runoff under Moscow Road, no unreasonable soil erosion or adverse effects will occur on appellant **Dumont's** land to the south.
 - f. During construction of the subdivision road the applicant encountered a ledge outcropping on the westernmost point of the road pathway. The road pathway was moved to the west in one place and to the east in another to avoid the ledge. Appellant Dumont asserts that increased and unreasonable soil erosion will result from the movement of the subdivision road west toward his property line. He asserts this increase is due to increased runoff because of the closer proximity of the road and to water from melting snow plowed from the road onto his property.
 - g. There are no state or local regulations requiring a minimum setback of roads from property lines.
 - h. This Board finds that the movement of the road will not cause an increase in soil erosion or cause a decrease in the capacity of the land to hold water on appellant Dumont's land. Evidence was presented that the realignment of the road will result in less erosion into the road ditches because of milder side slopes, and the Board so finds. Although the area in question slopes downhill toward appellant's property there is no indication that any erosion will result greater than that before the movement of the road.
3. If built as proposed and as conditioned herein, this project will not have an undue adverse effect on aesthetics or on the scenic or natural beauty of the area.
- a. The Knight, Limited house lies approximately 250 feet south of the subdivision road loop near his land, and cars heading south and around the loop of the road face the Knight house. The burden is on the opponent to show that the applicant has provided insufficient screening to maintain the aesthetic quality of the area.
 - b. Testimony was offered by the applicant that at no point on the road can headlights shine onto the Knight house because of the manner in which the road is banked and because of substantial screening by existing trees. Although the Board makes no finding on the intensity of light on the Knight house and finds that it is not reasonable to require the applicant to construct a total screen, cars and headlights on the subdivision are visible from the Knight house.

- c. The Board notes that the Knight house fronts Moscow Road, a heavily travelled town road, but finds that appellant's enjoyment of his land is affected by the presence of the subdivision road, especially at night. We therefore find that a moderate planting program is necessary to screen the roadway, and we will condition the permit to provide such a requirement.

CONCLUSIONS OF LAW: Procedural Issues

1. By the terms of 10 V.S.A. 86089(a) and Board Rule 16(A) notice of appeal from a District Environmental Commission decision must be filed with the Environmental Board within thirty days. As this Board noted in the appeal of In Re: Stanmar, Inc., Application #5L0590-EB (December 21, 1979) this time limitation is "to reduce the effects of delay and uncertainty on developers, contractors and investors." Nevertheless, we conclude that in the circumstances of this case the filing of a notice of appeal with the Board satisfied the requirements of the Act even though it did not occur within the thirty day period. In this case the appellant filed a timely appeal in the wrong forum which resulted in a three month delay in a resolution of the merits of the appeal. The applicant cites several cases in support of his motion to dismiss. Those cases, however, are inapposite; all involved late filing of an appeal to any forum. Applicant cites no cases, and we find none in which there was a timely appeal to an incorrect forum and a subsequent, remote appeal to the correct forum. In the present case, although the Board's hearing on the appeal was delayed by the Supreme Court appeal, this Board and all parties had full and timely notice of appellant's intention to appeal the decision of the District Environmental Commission. Applicant suffered no uncertainty on that question and construction continued, thus causing no delay in completion of the subdivision. This Board concludes that by virtue of the timely appeal to the Vermont Supreme Court, the time for filing an appeal to the Board, the correct forum, was tolled. The present appeal was filed within one day of dismissal by the Vermont Supreme Court and is, therefore, valid.
2. Mr. Dumont, as an adjoining landowner, has a substantial interest in the Cooper application and in the outcome of this appeal. He was granted party status before the District Commission pursuant to 10 V.S.A. 86085(c). Since he had participated under Criterion 4 at the District Commission hearings, he is entitled to party status on that issue in this appeal.

3. The opponent to a development or subdivision bears the burden before the Board in a request for a stay. The appellant herein did not sustain that burden. Act 250 seeks to balance the needs of developers and the interests of opponents, and here the developer's needs outweigh the interest of the appellant. Public policy in this case dictated that construction continue and the request for a stay be denied.

CONCLUSIONS OF LAW: Substantive Issues

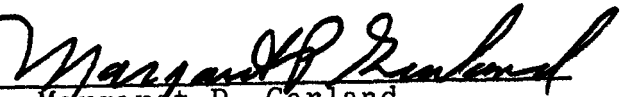
1. The burden is on the appellant to rebut the presumption, created by the Certification of Compliance, that no undue water pollution will result from this proposed subdivision. This Board concludes that appellant has failed its burden of proof, and the appeal under Criterion 1 is, therefore, denied.
2. This Board concludes that no unreasonable soil erosion or decrease in the capacity of the land to hold water will result from the subdivision as a result of significant precautions planned by the applicant. The separate appeals of appellants Knight, Limited, and Dumont under Criterion 4 are, therefore, denied.
3. Opponent has met his burden under Criterion 8, and this Board concludes that applicant may proceed with the subdivision on the condition that he provide an area of trees along the road loop to lessen the impact of the road. The applicant shall plant a minimum of 20 trees (either red pine, white pine, spruce or a mixture as recommended by the county forester), staggered 20 feet apart for a minimum distance of 200 feet, placed in such a fashion to maximize the screening effect. Precise location of the trees shall be set out in a plan submitted to and approved by the county forester. The trees shall be a minimum of 4'-5' tall at the time of planting, and the applicant shall insure the survival of all plantings for five years. The applicant shall submit evidence of satisfaction of this requirement to the District Coordinator.

ORDER

The appeal of Knight, Limited under Criteria 1 and 4 is denied and under Criterion 8 is granted in part. The appeal of Paul J. Dumont under Criterion 4 is denied. Jurisdiction over this permit is returned to District #5 Environmental Commission.

Dated at Montpelier, Vermont this 11th day of July, 1980.

ENVIRONMENTAL BOARD

By 
Margaret P. Garland
Chairman

Members favoring this
decision:

Margaret P. Garland
Ferdinand Bongartz
Dwight E. Burnham, Sr.
Melvin Carter
Michael A. Kimack
Daniel C. Lyons
Roger N. Miller
Leonard U. Wilson