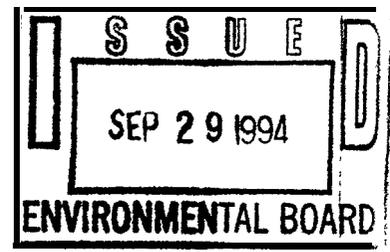


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VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort,
Application #5L1125-10-EB (Master Plan - Base Lodge)

MEMORANDUM OF DECISION AND DISMISSAL ORDER

This decision dismisses the recent appeals in the above-referenced matter, without prejudice. It concludes that the appeals may be re-filed after, and within 30 days of, the date that the District #5 Commission has issued a complete decision with findings of fact on all criteria. It also includes a conclusion that the District Commission has the discretion to hear or not to hear additional evidence with regard to the issues that have been appealed.

BACKGROUND

On August 11, 1994, the Environmental Board received an appeal filed by Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort (the Applicant) from Partial Findings of Fact and Conclusions of Law #5L1125-10 (the Partial Findings), issued by the District #5 Environmental Commission on July 12, 1994. The Partial Findings concern a portion of a master plan application submitted by the Applicant. This portion concerns various plans and activities associated with the so-called Base Lodge at the Applicant's resort.

The Applicant appeals various decisions made by the District Commission regarding 10 V.S.A. § 6086(a)(9)(K) (public investments and facilities). These include decisions to restrict and limit non-winter use of the relevant buildings and structures (including the Base Lodge and a transfer lift), preparation of a summer master plan, and restrictions regarding colors at the so-called Cliff House, as well as other matters. In its appeal, the Applicant also includes a "motion for leave to submit additional facts and evidence to district environmental commission," seeking the Board to remand jurisdiction back to the District Commission to take additional evidence on the disputed issues.

On August 22, 1994, the Board received a cross-appeal from the Green Mountain Club (GMC) with respect to Criteria 8 (aesthetics) and 9(K). GMC's appeal also includes a memorandum in response to the Applicant's motion to submit additional evidence.

On September 7, 1994, Board Chair Arthur Gibb issued a memorandum to parties proposing to dismiss this matter without prejudice, to conclude that the appeals may be re-filed in the manner stated above, and to conclude that the District Commission has discretion concerning whether to hear additional evidence. In the memorandum, the Chair stated that the Board would hold oral argument concerning dismissal if a written request for argument were received by

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September 14. The Chair also stated that parties could file written comments concerning the proposed dismissal no later than September 21.

No party requested oral argument and no written comments were received by the Board. On September 20, 1994, the Board issued a memorandum disclosing a capital contribution that had been made by member John Farmer to GMC and offering an opportunity for objection to member Farmer's participation. No party objected by the deadline of September 27. The Board deliberated concerning this matter on September 28 and made the decision reflected below.

DISCUSSION

The Board concludes that it lacks jurisdiction to accept the appeals at this time because of a 1990 statutory amendment that limits appeals of partial findings to Criterion 10 (local or regional plans).

In a normal application, the district commissions review a project for compliance with all ten criteria listed in Act 250, and then either issue a permit or a denial. See 10 V.S.A. §§ 6083-6087. However, for the convenience of applicants, the Board has issued Rule 21, which allows an applicant to have its project reviewed "under any of the criteria or sub-criteria under the Act in such sequence as the applicant finds most expedient and practicable," subject to the district commission's approval. The purpose of Rule 21 is to provide applicants with an opportunity to avoid unnecessary or unreasonable expense in preparing detailed applications for complex projects.

Generally decisions under Rule 21 are not appealable because they are not complete decisions on all criteria. This is because it is more efficient for the district commissions to complete their work on applications before appeal is taken. Otherwise, parties, including applicants, may find themselves before both the Board and a district commission at the same time, with the possibility of confusing and conflicting determinations and significant expense.

Rule 21(A) makes one exception to this: "For the purposes of this section, any findings of fact or conclusions of law made by a district commission based upon criteria 6086(a)(9) and (a)(10) shall be a final decision and subject to appeal to the board *as provided for under the law ...*" (Emphasis added.) The reason that Rule 21(A) makes this exception is because, at the time Rule 21(A) was promulgated, the General Assembly had provided that partial decisions under Criteria 9 and 10 were appealable to the Board. Specifically, prior to 1990, 10 V.S.A. § 6086(b) provided as follows, in relevant part:

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If the district commission or the board first issues its findings and decision on only subdivisions (9) and (10) of subsection (a) of this section, that decision shall be appealable under section 6089 of this title.

But in 1990 the General Assembly changed 10 V.S.A. § 6086(b) to delete the provision for appeals of partial decisions under Criterion 9. Specifically, the relevant portion of 10 V.S.A. § 6086(b) presently provides:

If the district commission or the board first issues its findings and decision on only subdivision (10) of subsection (a) of this section, that decision shall be appealable under section 6089 of this title.

1989 Vt. Laws No. 234 § 1 (Adj. Sess.).¹

Accordingly, since the law no longer provides for appeals of partial findings on Criterion 9, the Board concludes that the 1990 statutory amendment supersedes Rule 21(A) with respect to appeals of such partial findings, that the Board presently may only accept appeals of partial findings under Criterion 10, and that therefore the Board lacks jurisdiction at this time to accept the Applicant's appeal and GMC's cross-appeal.

This does not mean that the District Commission's decisions on Criteria 8 and 9(K) may never be appealed. Rather, it means that the District Commission has not issued a complete, final decision on the application², and that the parties may appeal the District Commission's decisions on Criteria 8 and 9(K) after, and within 30 days of, the date that the District Commission issues a complete and final decision on the application. 10 V.S.A. § 6089; Rule 40(A).

Because the Board currently lacks jurisdiction to accept these appeals, the

¹*In Act 232 of the recent biennium, the General Assembly further amended 10 V.S.A. § 6086(b) in a manner which would allow the present appeals. However, this amendment does not take effect until March 15, 1995. 1993 Vt. Laws No. 232 §§ 32, 50 (Adj. Sess.).*

²*The District Commission specifically has not issued a decision finding that this application complies or does not comply with Criteria 1 (A) (headwaters) and 1 (B) (waste disposal).*

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Applicant's motion to submit additional evidence is properly directed to the District Commission. This is based on Rule 21(C), which states that:

The procedures authorized under this section are intended to minimize costs and inconvenience to applicants and shall be applied liberally by the board or district commission for that purpose consistent with the rights of other parties and the requirements of law and any pertinent regulations.

If Rule 21 is to be applied liberally for the convenience of applicants, then a district commission should have the discretion to hear or not to hear evidence concerning partial findings that are not yet appealable.

ORDER

The Applicant's appeal and GMC's cross-appeal are dismissed, without prejudice. They may be re-filed after, and within 30 days of, the date that the District #5 Commission has issued a complete decision with findings of fact on all criteria.

Dated at Montpelier, Vermont this 29th day of September, 1994.

ENVIRONMENTAL BOARD



Arthur Gibb, Chair*

John T. Ewing*

John Farmer

Samuel Lloyd

William Martinez

Steve E. Wright

*During deliberation on September 28, 1994, Chair Gibb and member Ewing stated that -they are presently members of GMC by reason of making a yearly contribution. Member Ewing stated this his GMC membership is due to expire. Chair Gibb and member Ewing believe they have been and can be fair and impartial in this matter.

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