

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

RE: Berlin Associates
Land Use Permit Application #5W0584-14-EB

MEMORANDUM OF DECISION

This decision, dated January 10, 1992, pertains to an appeal filed with the Environmental Board on May 29, 1991 by Berlin Associates from the Memorandum of Decision issued by the District #5 Environmental Commission on April 29, 1991. In that decision, the District Commission dismissed Application #5W0584-14 for lack of jurisdiction. Application #5W0584-14 seeks approval for construction of a 51,000 square foot food store at the Berlin mall in Berlin. For the reasons explained below, the Board has determined that the District Commission should review the application for a land use permit as a new application.

I. SUMMARY OF PROCEEDINGS

A prehearing conference was convened by Chair Elizabeth Courtney on July 8, 1991. Participating in the prehearing conference were the Applicant by John R. Ponsetto, Esq., Concerned Physicians (CP) by Duane Natvig, M.D., Citizens for Vital Communities (CVC) by Andrew Keck, the City of Montpelier (the City) by Ryan Cotton, and Central Vermont Hospital (CVH) by James Brock, Esq. A letter indicating intent to participate was filed by the Town of Berlin by Robert Halpert, Esq. At the prehearing conference, requests for party status were made by CP, CVC, and the City. The Board issued a decision granting party status to CP and CVC pursuant to Rule 14(B) and to the City as an adjoining property owner.¹

With its Notice of Appearance, CVC filed a motion to dismiss the appeal for mootness. The parties filed legal memoranda on this issue and the Board heard oral argument on October 30, 1991. The Board issued a decision on November 21, 1991, in which it denied the motion to dismiss to the extent that the application seeks approval for a food store with the same potential impacts as indicated by the Applicant in its application.

¹The City subsequently informed the Board that it has discovered that it does not own land adjoining the Berlin Mall, but requests party status nevertheless. Since the Board is remanding this matter to the District Commission, the issue of the City's party status in the appeal is moot. Prior to convening hearings on the application, the District Commission will provide the City an opportunity to request party status in those proceedings.

At the prehearing conference, the parties agreed to file a stipulation of facts and legal memoranda on the substantive issues and to waive an evidentiary hearing unless the Board determines one necessary.

On September 6, 1991 the parties filed a stipulation of facts and then filed memoranda of law. With its memorandum of law, CP submitted a request that the Board revoke the Applicant's permit for failure to comply with Condition 28 or, in-the alternative, to order Fisher Road closed.

The Board deliberated on December 19, 1991 in Essex Junction.

II. BACKGROUND

On February 9, 1990, the Environmental Board denied an application for the construction of a 52,000 square foot food store on "Outlot E" at the Berlin Mall. At the time, Berlin Associates had a contract with Hannaford Bros. Inc. whereby Hannaford would lease and operate a grocery store known as Sun Foods. The basis of the Board's denial was failure of the project to comply with Criteria 5, 9(K), and 10 because of traffic safety concerns. The mall has two entrances: one on Fisher Road across from the Central Vermont Hospital and physicians* offices, and the other on Route 62. The Board essentially concluded that insufficient information concerning background traffic had been presented in order to find that unsafe traffic conditions and undue congestion would not result, that the public investment in the hospital would be jeopardized, and **that** because of the traffic concerns the project did not comply with the Regional Plan. In its application, the Applicant did not propose any restrictions on the use of the Fisher Road access.

Subsequent to the Board's denial, the Applicant filed for reconsideration with the Board pursuant to Board Rule 31, with the suggestion to prohibit left-hand turns into the Mall from Fisher Road to reduce the amount of traffic that would go past the hospital. The Board denied the request for reconsideration, primarily because 10 V.S.A. § 6087(c) and Rule 31(B) require that a motion for reconsideration of permit denial be filed with the District Commission, not the Board.

The Applicant did not file a request for reconsideration with the District Commission within six months from the permit denial, as required by the statute and rule.

On March 4, 1991, Berlin Associates filed an application with the District Commission for a land use permit authorizing the construction of a 52,000 square foot food store on "Outlot E" of the Berlin Mall. In a Prehearing Conference Report dated April 4, 1991, and a Memorandum of Decision dated April 29, 1991, the District Commission dismissed the application. The basis for its dismissal was that the application sought approval for a project that was not significantly different from the one denied by the Board, and that the doctrine of res judicata barred the Commission from reviewing the same project. The Commission also determined that it could not review the application as a motion for reconsideration under § 6087(c) and Rule 31(B) because it was filed more than six months after the Board's denial. The District Commission also dismissed the application for failure of the Applicant to complete the traffic study required by Condition 28 of the Board's 1985 permit for the Berlin Mall. The District Commission reached these conclusions after holding a hearing at which it took testimony in an effort to determine whether significant changes in circumstances had arisen since issuance of the Board's 1990 denial.

Berlin Associates has **appealed** the District Commission's dismissal of the application; - but says that the Condition 28 study is not an issue because it has recently completed it and will file it with the District Commission.

III. ISSUES

1. Whether an applicant whose project has been denied a permit who has not filed a request for reconsideration under 10 V.S.A. § 6087(c) within the required six-month period may thereafter correct the deficiencies identified in the denial and file a new application.
2. Whether the project presented in Application #5W0584-14 is sufficiently different from the project that the Board denied in Application #5W0584-9-EB so that it may be reviewed as a new application pursuant to 10 V.S.A. § 6083.
3. Whether under Criterion 9(K), there must be a determination that a project is "necessary" separate from the determination of whether a project will endanger the public investment in a public facility.

4. Whether the permit for the Mall should be revoked for failure of the Applicant to comply with the Condition 28 study or, in the alternative, whether the Mall entrance at Fisher Road should be closed or closed to all traffic except right turn entries.
5. Whether the City of Montpelier is entitled to party status as a permitted party under Rule 14(B) because it is not an adjoining property owner as it had believed.

III. FINDINGS OF FACT

1. On March 4, the Applicant filed an application for a land use permit for a 52,000 square foot food store and related improvements on 6.72 acres of a 66.13 acre tract of land owned by the Applicant on which is located the Berlin Mall. Included in the application was a proposal to restrict the Fisher Road access to the Mall by prohibiting left turns into the Mall from Fisher Road and right turns from the Mall onto Fisher Road.
2. Except for the proposed restriction on the use of the Fisher Road access, the application is essentially the same as the one the Environmental Board reviewed and denied on February 9, 1990.

IV. CONCLUSIONS OF LAW

A. Reconsideration

10 V.S.A. § 6087(c) states that:

A denial of a permit shall contain the specific reasons for denial. A person may, within 6 months, apply for reconsideration of his permit which application shall include an affidavit to the district commission and all parties of record that the deficiencies have been corrected. The district commission shall hold a new hearing upon 25 days notice to the parties. The hearing shall be held within 40 days of receipt of the request for reconsideration.

Rule 31(B) states:

(B) Application for reconsideration of permit denial.

(1) Procedure. An applicant for a permit which has been denied by the board or district commission may, within six months of the date of that decision, apply to the district commission for reconsideration of his application. The applicant for reconsideration shall certify by affidavit in the application that he has forwarded notice and copies of the application to all parties of record, and that he has corrected the deficiencies in the application which were the basis of the permit denial. The district commission shall hold a new hearing upon 25 days' notice to the parties. The hearing shall be held within 40 days of receipt of the request for reconsideration.

(2) Scope of review. The district commission may, but need not necessarily, limit its scope of review to those aspects of the project or application which have been modified to correct deficiencies noted in the prior permit decision. The findings of the board or district commission in the original permit proceeding shall be entitled to a presumption of validity in the reconsideration proceeding, insofar as those findings are not affected by proposed modifications in the project. However, those presumptions may be rebutted by the district commission or by any party upon a showing that the circumstances of the application have changed, or upon a review of evidence not previously presented.

The purpose of these provisions is to give an applicant whose application has been denied an opportunity to revise its proposal to correct the deficiencies identified in the denial without having to file a new application. Under a reconsideration request, a district commission reviews only those aspects of the application that have been modified in response to the

problems identified by the District Commission (or the Board). The Applicant enjoys a presumption of validity for all the affirmative findings that were made in the original decision and the benefit of not having to pay a new fee. Such a reconsideration request, however, may only be entertained within six months from the date of the denial. After the six month period has expired, an applicant that wishes his project considered again must file a new application. This requires the payment of a new fee and there are no presumptions of validity of any findings. Moreover, the doctrine of res judicata requires that the new application be substantially different from prior applications.

B. New Application

The Board denied a permit for a food store at the Berlin Mall primarily because the Applicant failed to prove that the project will not cause unsafe conditions with respect to traffic and will not materially jeopardize the safety of the roads and access to the hospital. The application which the Board reviewed did not restrict the use of Fisher Road. The Applicant now seeks to submit a new permit application which includes restricting the use of Fisher Road by prohibiting left turns into the Mall from Fisher Road and right turns out of the Mall onto Fisher Road.

The Board believes that in light of the importance of the traffic at the Fisher Road access to the Board's denial, the restrictions on the use of the Fisher Road **access to** the Mall change the application significantly enough that it should be accepted and reviewed by the District Commission as a new application for an amendment. The application will be treated as a new application: a new fee must be paid and information concerning compliance with every criterion must be submitted. To the extent that all parties stipulate to earlier findings of the District Commission or the Board, and the District Commission accepts the findings as evidence that the criteria are satisfied, the need for certain information may be waived. However, the Applicant must still meet prior requirements and standards established by the District Commission or the Board in previous decisions concerning the Berlin Mall.

C. Criterion 9(K)

Criterion 9(K) requires the Applicant to demonstrate that a development adjacent to public lands and facilities, including highways and hospitals, **"will** not unnecessarily or unreasonably endanger the public or quasi-public investment in

the facility . . . or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility ... or lands."

In its decision dated February 9, 1990, the Board stated Concerning Criterion 9(K):

The hospital is a public facility within the meaning of this Criterion. We conclude that the Applicant has not met its burden of proof in demonstrating that the traffic generated by Sun Foods will not unnecessarily or unreasonably endanger the public investment in the highways and the Central Vermont Hospital or materially interfere with the safety of the roads and access to the hospital. ... [and] the Board cannot find that the safety of the roads and access to the hospital will not be materially jeopardized. Furthermore, the Board is not convinced that construction of Sun Foods at the designated site is "necessary," as other sites closer to Route 62 exist at the mall on which the Sun Foods store may be constructed. Even if this site were the only one possible for construction of the store, the Fisher Road access is not necessary, since the Route 62 driveway exists and was, in fact, intended to be the primary access to the mall. The Board concludes, therefore, that this project as proposed does not comply with Criterion 9(K). This conclusion is based solely upon the proposed use of the Fisher Road driveway for access to the Sun Foods store.

The District Commission ruled that the Applicant must prove that the location of the food store as proposed is "necessary" as a separate and distinct standard under Criterion 9(K), based upon the language quoted above. We think the District Commission misunderstood our intent, perhaps because the language is not as clear as it could have been. We believe that once it has been determined that a project will endanger the public or quasi-public investment, then a determination must be made as to whether the investment is being **"unnecessarily"** endangered. Thus, the question of whether the food store must "necessarily" be located at a particular site only arises if the finding is made that the food store project will endanger the public or quasi-public investment, in this instance because of the effect of Fisher Road traffic generated by the food store on the hospital. If, after reviewing the application, the District Commission concludes that there **is no**

concern about the effect of traffic on the hospital, then there is no need to consider whether the chosen location for the food store is "necessary." Accordingly, the District Commission may accept and review this application for compliance with Criterion 9(K) initially without the need for information concerning the necessity of siting the food store in its chosen location.

D. Revocation

CP requests the Board to revoke Berlin Associates' permit for repeated failures to comply with Condition 28, of the Board's prior permit, or, in the alternative, to order the closure of the Fisher Road access to the Mall.

The Board does not have the authority to order closure of the access road without a hearing on the revocation request. With regard to the revocation request, the Board believes that when this application is reviewed by the District Commission for compliance with the ten criteria, the issue of the safety of the use of the Fisher Road access to the Mall will be fully reviewed; a permit will not be issued if the Mall creates unsafe traffic conditions. If the District Commission denies this application, CP may refile its request for revocation and the Board will consider it at that time.

E. Montpelier's Party Status

The City of Montpelier informed the Board that, contrary to its former understanding, it does not own property that adjoins the Berlin Mall, and is therefore not an adjoining property owner. The City seeks party status as an interested party pursuant to Rule 14(B).

The Board believes that the issue of the City's party status in this proceeding before the Board is now moot because the Board is remanding the matter to the District Commission. The City may pursue its request for party status with the District Commission in its proceedings.

IV. ORDER

This matter is remanded to the District #5 Environmental Commission with instructions to accept Application #5W0584-14 as a new amendment application and to proceed accordingly.

Dated at Montpelier, Vermont this *10th* day of January, 1992.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
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