

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

Re: Berlin Associates, Ltd.
34555 Chagrin Blvd.
Moreland Hills, Ohio 44022

Memorandum of Decision
Motions to Alter
Decision
Land Use Permit
#5W0584-2-EB

On January 23, 1985, the Environmental Board ("the Board") issued the above land use permit. On February 4, 1985, the Agency of Transportation ("the Agency") filed a Motion to Amend and on February 19 the Permittee filed a "Motion for Clarification and Reconsideration." At the Board's request, the Agency filed a supplementary memorandum describing the basis for its motion. On February 20 the Board conducted a deliberative session in respect to the Agency's motion and decided at that time to deny the Motion; the reasons for this decision are set forth below.

At the Permittee's request, oral argument was held on February 27 in respect to the February 19 motion. The Board has decided to grant in part and deny in part, the Permittee's motion.

I. Agency Motion

The Agency objects to Conditions #13, 14, 27, 28, 31 and 35. Conditions #13 and 31 are derived from the original Commission permit issued in 1982 and were agreed to by the Agency in the Stipulation between the parties dated December 12, 1984 ("the Stipulation"). The Agency has waived any objections to these conditions.

The Agency requests pertaining to Condition #14 and 28 are denied. The Board concluded, based upon the evidence of record, that installation of an access to the Mall off Route 62 would not cause unreasonable congestion or unsafe conditions with respect to traffic. The Agency has made no showing to support any change to these conditions.

To the extent that the Agency's request concerning condition #27 seeks to avoid the erection of the snowfence in a manner which would cause highway safety problems, we agree that the fence should not interfere with traffic. However, in that the fence is a temporary device designed to protect a fragile environment during the course of construction, we are confident that the Department does not object to protecting that portion of the wetland which may lie on State lands.

II. Permittee's Motion

The Permittee raised objections in respect to Conditions #2, 10, 11, 12, 16, 23, 25, 28, 31, 35 and 37. Objection to condition #4 was withdrawn at oral argument. By way of introduction, we note that the Permittee has chosen to interpret the terms of the January 23 permit in a strained fashion, on occasion selecting the least rational construction of words where the plain meaning of conditions amply express our intent. We hope this is not a hint of things to come. Furthermore, the Permittee labors under a misconception concerning the status of the parties' Stipulation. Irrespective of the parties' agreements, we are directed by 10 V.S.A. §6086(a) to make certain affirmative findings before we are permitted to approve a project. We cannot accept stipulated provisions which run contrary to the terms of previous permits issued for this project or which negate specific findings made by the Commission in the decision now on appeal, unless the Permittee and other parties offer additional evidence upon which we can base altered findings and conclusions. The Permittee's efforts at securing a consensus among the parties does not discharge its obligation to provide evidence in respect to the ten criteria. Contrary to the Permittee's understanding, we did not accept the Stipulation as a final resolution of issues contained therein; rather, we accepted that document as an expression of the parties' positions on the merits of this appeal.

Condition #2: We agree with the Permittee's objection to this condition. We did not intend that each lease of retail space require prior Commission approval. This condition will be altered accordingly.

Conditions #10 and 11: The Permittee reads these conditions as prohibiting the continuation of interior work during winter months. These conditions as written pertain only to exterior earth work and do not limit performance of other construction. Further, should the Permittee wish to perform earth work beyond the deadlines fixed by Condition 10, it may seek approval from the Commission based upon more substantial erosion control plans designed for winter conditions.

Condition #12: The design of the Fisher Road access to the Mall does not form with Condition 17a of Land Use Permit #5W0584-1-EB issued by this Board on April 13, 1983. The pending proceeding relates to an application to amend an existing permit. In such circumstances, conditions of the existing permit remain intact except to the extent altered by revisions to the project. The Commission's September 6, 1984 decision makes no findings to support elimination of Condition 17a/1/ and the Permittee presented no evidence during hearings before this Board to support elimination of the Condition. We, therefore, concluded that the traffic circulation system of the revised Mall was sufficiently similar to previous designs that retention of Condition #17a was required.

Condition #16: The phase changes referred to in this Condition pertain to alterations of signal timing and do not refer to any geometric reconstruction of the intersections. Assumption of this minimal obligation by the Permittee is reasonable in that the **Permittee's** traffic expert concluded that current signalization is unsafe; in an effort to avoid exposing Mall patrons to this unsafe condition, it is appropriate that the Permittee assume the cost of re-signalization.

Condition #23: The Department of Public Service (PSD) has worked efficiently with the Permittee to develop energy system plans which conform to the requirements of Criteria 9(F) and 9(J). In fact, these efforts will result in substantial operating cost savings to the Permittee. There is no indication that PSD will not provide similar, timely assistance in the future. Nonetheless, we believe it would be reasonable to add performance deadlines to Condition #23 rather than leaving the reporting requirement solely to PSD's discretion. This Condition will be altered accordingly. The Permittee should bear in mind that it offered no evidence in respect to specific energy system equipment selected for the project and the burden remains with the Permittee, not PSD, to establish the requirements of Criteria 9(F) and 9(J).

Condition #26 and Approval of the "Outlots": For the reasons previously stated (see Findings of Fact and Conclusions of Law in #5W0584-2-EB, issued January 23, 1985, pages 8-9), we reaffirm our denial of approval to subdivide 5 commercial "outlots." We cannot issue "preliminary" approval as requested by the Permittee until such time as affirmative findings can be made in respect to all Criteria of 10 V.S.A. §6086(a). See Re: Paul E. Blair Family Trust, Permit #4C0388-EB issued June 16, 1980. Because the **Permittee's** landscaping plan was apparently prepared in contemplation of development on the **outlots**, we can only partially approve the plan. Further, the Commission in part based its negative findings and conclusions under Criterion 8 on removal of a tree buffer located on the **outlots**. No evidence was submitted during Board proceedings to justify alteration of these negative findings. Future use **or** alteration of the **outlots** may be permitted by the Commission through amendment proceedings as the final sentence of Condition #26 provides.

Condition #28: This Condition is a reasonable requirement to assure that actual traffic conditions upon completion and occupancy of the Mall are consistent with factual representations made by the Permittee. The parties submitted extensive evidence concerning accident rates at the

/1/ A review of the Commission's record does not reveal any indication that the Permittee requested elimination of Condition 17a.

intersections surrounding the project site. While we agreed with the Permittee that introduction of a new Route 62 Mall access would not create an unsafe traffic condition, we nonetheless believe this intersection should be monitored to assure no unsafe condition results from operation of the Mall. Furthermore, the Paine Turnpike and Fisher Road intersections with Route 62 have a history of high accident rates and the Mall will contribute additional traffic to these intersections. Therefore, a study of limited duration to monitor actual conditions at these intersections is reasonable.

The Permittee objects to a study of traffic capacity. However, the Permittee failed to furnish the Board with any analysis of trip generation identifying likely points of origin or means of access to the Mall. Further, the Commission would have retained jurisdiction to assure that the Mall did not cause a reduction in the current level of service of affected intersections and road segments. A study of road capacity is, therefore, reasonable.

The Permittee makes the untenable argument that Condition #28 would require that the Mall be left vacant while the two year pre-opening baseline traffic study is completed. As the other parties have pointed out and as the Permittee well knows, there have been numerous and ample traffic studies conducted in relation to the Mall over the last several years. A synthesis' of this material, together with Transportation Agency information should satisfy the requirements of Condition #28(a), especially if the Permittee immediately implements a one-year counting program to run concurrent with Mall construction. However, should the Permittee continue to defer initiating its performance under Condition #28 the Mall may well lie vacant.

Condition #31: This Condition derives from Conditions #28 and 29 of original Land Use Permit #5W0584. We find no basis in the record for altering the pre-existing conditions. Should the Permittee find these requirements burdensome, it should seek an amendment from the Commission,

Condition #35: The Fisher Road Mall access as proposed does not conform to the requirements of the Board's amended 1983 permit. In issuing an amended permit at this juncture, we are obliged to assure consistency between the new permit and previous permits, except where the parties have submitted additional evidence to support a change in previous conditions. Any curb cut in the new drive allowing **access** to the Lyons' property is likely to encourage the creation of a "short-cut" from Fisher Road, through the Lyons' property, to the Mall. We believe this route would create both unsafe conditions as well as unreasonable congestion with respect to traffic on the drive and on Fisher Road.

Condition #37: We agree with the Permittee's comment in respect to this Condition. In view of the fact that the access road has been relocated a substantial distance from the Central Vermont Hospital wells and in that Central Vermont Hospital has not insisted on the retention of Condition #38 from our 1983 Permit, we will delete this condition.

Finally, the Board has been informed by the District #5 Commission that issuance of permit #5W0584-2-EB has engendered numerous calls from various representatives of the Permittee and that these calls often address ground previously discussed with the Commission's staff. Because the Commission must allocate a finite amount of staff resources to a large number of projects, contact between the Commission and any one permittee must be kept to a minimum, consistent with providing adequate assistance. Therefore, we will require that the Permittee designate a contact person who will serve as the conduit for all communications with the Commission.

III. Order

The Agency of Transportation's Motion is denied. The Permittee's Motion is granted in part and denied in part. Conditions #2, 23 and 37 will be amended in accordance with this decision.

Dated at Montpelier, Vermont, this 6th day of March, 1985.

VERMONT ENVIRONMENTAL BOARD

BY


Margaret P. Garland, Chairman
Warren M. Cone
Melvin H. Carter
Lawrence H. Bruce, Jr.
Donald B. Sargent