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

RE: Berlin Associates by
Dana Cole-Levesque, Esq.
P.O. Box 417
Bethel, VT 05032

Memorandum of Decision
Motion for Reconsideration
Application #5W0584-9-EB

I. Background

On February 9, 1990, the Environmental Board issued a decision denying Berlin Associates' application for an Act 250 permit, pursuant to 10 V.S.A. Chapter 151, to construct a 51,000 square foot food store (known as Sun Foods) on 6.72 acres of a 66.13 acre tract of land at the Berlin Mall off Fisher Road and Route 62 in Berlin.

On February 23, 1990, the Applicant filed a Motion for Reconsideration, Modification and Correction, pursuant to Board Rules 30(B) and 31(A). On March 12, 1990, Citizens for Vital Communities (CVC) filed a letter opposing the Applicant's motion, and on March 21 CVC filed a supplemental response. On March 19, the Central Vermont Medical Staff (Medical Staff) and Emergency Medical Services #6 (EMS #6) filed a reply to the motion for reconsideration and a memorandum in opposition to the motion. On March 20, the Berlin Board of Selectmen filed a memorandum in support of the Applicant's motion for reconsideration, modification and correction./1/

On March 24, the Board deliberated on the Applicant's motion. On March 26, the Applicant filed a response to the opposition of CVC, the Medical Staff, and EMS #6. After receiving the Applicant's March 26 submission, the Board provided an opportunity for the other parties to file further response by April 6 by memorandum dated March 27. On April 6, CVC and the Medical Staff and EMS #6 filed further responses and on April 13 the Medical Staff filed another letter.

On April 13 the Board deliberated on the Applicant's motion by conference call.

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[1]Although the Town of Berlin did not participate in the hearings, as a statutory party to this appeal pursuant to 10 V.S.A. §§ 6084 and 6085, it is entitled to participate at any stage of the proceeding.

II. Filinss by Non-Parties

A number of petitions were brought to the Environmental Board offices from members of the public who would like the Board to allow Berlin Associates to construct Sun Foods at the Mall. None of these people had sought party status in the proceedings. A letter from the Central Vermont Hospital Board of Trustees was also sent to the Board offices. The Central Vermont Hospital is not a party to this appeal; it appealed from the District Commission's decision to join it as a co-applicant and did not seek party status. When the Board granted the Hospital's request not to be co-applicant, the Hospital lost its right to participate.

In making a decision, the Environmental Board members are not permitted by law to consider any information or opinions that are not a part of the official record. 3 V.S.A. § 809. The record is developed at the hearing through testimony of witnesses and also includes post-hearing submissions from persons who were admitted as parties according to the Board rules. Moreover, in deciding whether to grant or deny a permit, the only factors the Board may consider are the 10 environmental criteria listed at 10 V.S.A. § 6086(a). The Board is precluded by law from granting a permit because of the feelings of some members of the public. The evidence in this case did not prove that unsafe traffic conditions and unreasonable congestion would not result, or that the public investment in safe roads and the hospital would not be jeopardized./2/ Under the law, the Board was therefore unable to grant a permit for the construction of Sun Foods at this location.

III. Applicant's Arauments

The Applicant claims that 1) there is manifest error in many of the Board's findings and conclusions which require correction, 2) the deficiencies which the Board found in the application cannot be the basis for a permit denial, 3) closing of the Fisher Road access to the Mall is not a reasonable condition and that a more "refined" remedy is appropriate, and 4) the Board should reconsider making Central Vermont Hospital a co-applicant in light of the Hospital's numerous access points to Fisher Road which create conditions threatening to the "at-risk" population addressed in the Board's findings on Criterion 9(K). The

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2The Board notes that had the Applicant conducted the traffic study following the issuance of the Board's 1985 permit for the Mall, as required by that permit and as the Applicant promised, the evidence might have proved otherwise.

Applicant claims that certain findings are erroneous and that the Board incorrectly allocated the burden of proof under Criteria 5 and 9(K). The Applicant also claims that the Board cannot conclude that the project does not comply with Criterion 10 because the Executive Director of the Regional Planning Commission did not so testify.

The Applicant requests that the Board issue a permit conditioned upon a prohibition of left turns into the Mall from Fisher Road, which condition would be subject to review after the Applicant completes a study of actual traffic conditions upon full occupancy of the Mall, similar to the "Condition 28" study ordered by the Board in its earlier permit for the Berlin Mall dated January 23, 1985. The Applicant suggests that the condition could be deleted if the traffic study concludes that the Sun Foods store does not cause "extreme congestion."

IV. Decision

The Board has carefully reviewed all of the Applicant's claims of error and arguments, as well as its proposal that a permit be issued subject to the above-described condition, and the related memoranda filed by other parties.

The Board has decided to deny the Applicant's motion for reconsideration, modification and correction for the reasons explained below. The Board has addressed the Applicant's arguments with respect to Rules 30(B), 31(A), 20(A) and (B), and Criterion 10. Further, the Board rejects the Applicant's arguments that the Hospital should be made co-applicant because the Hospital contributes to traffic safety problems in the area. The Board may consider only the application that is before it and does not have the authority to impose conditions on other entities that are not the subject of the development proposal. The Board also rejects the Applicant's argument that a condition requiring the closing of the Fisher Road access to the Mall is not reasonable, for the simple reason that the Board has not imposed any condition on Berlin Associates but has denied the permit.

A. Rule 30(B)

Board Rule 30(B) states, in pertinent part:

> Corrections. Within 15 days of the date of a final decision, a party may file a motion to correct manifest error in the findings of fact, conclusions of law or permit. ... It is entirely within the discretion of the board ... whether or

> not to hold a hearing on a motion for a corrected decision or permit. ... Corrections shall be limited to instances of manifest error, mistakes, and typographical errors and omissions.

As the rule states, its purpose is to allow the Board to correct typographical errors and omissions, as well as manifest error and mistakes. It is not a vehicle for an applicant to submit further evidence or legal argument in support of its application, or to authorize reopening of the hearing.

After careful scrutiny of the Applicant's motion we believe that the issues raised by the Applicant are not appropriate for review under Rule 30(B). The Board's decision does not contain typographical errors or omissions. With regard to whether the decision contains manifest error or mistakes, the Board notes that "manifest" means "evident; obvious; clear; plain," according to Webster's New World Dictionary, Second College Edition (1984), or "that which is clear and requires no proof," according to Black's Law Dictionary, Revised Fourth Edition (1968). The types of errors alleged by the Applicant apparently are not clear or obvious to the other parties to this appeal since they dispute the Applicant's assertions, and they are not clear to the Board. Moreover, based upon a careful review of the record, the Board concludes that its findings are supported by evidence in the record that was not objected to or contested by the Applicant. Although the Applicant does not agree with the testimony of the other parties' witnesses and argues that the Board should find in favor of its witnesses, resolution of conflicting evidence lies with the Board as the trier of fact. In re Robert B. and Deborah J. McShinsky, No. 88-312, slip op. at 3 (Vt. Feb. 9, 1990).

Because the Board's decision contains no manifest errors or mistakes, or typographical errors or omissions, the Board will deny the motion for correction under Rule 30(B).

B. Rule 31(A)

Board Rule 31(A) states, in pertinent part:

> Motions to alter decisions. A party may file within 15 days from the date of the decision such motions as are appropriate with respect to the decision. . . . It is entirely within the discretion of the board .. . whether or not to hold a hearing on any motion.

The Board believes that the purpose of Rule 31(A) is not to change a permit denial to approval based upon a new proposal from the applicant, but rather to provide an opportunity for a party to raise issues such as a request to delete an unnecessary permit condition or an objection to improper procedures on the part of the Board or commission in arriving at its decision. See In re Ouechee Lakes Corporation, No. 87-108, slip op. at 9 (Vt. Sept. 22, 1989).

Support for this interpretation is found by reference to 10 V.S.A. § 6087(c) and Rule 31(B). 10 V.S.A. § 6087(c) states, in pertinent part:

> A person may, within 6 months, apply for reconsideration of his oermit which application shall include an-affidavit to the district commission and all parties of record that the deficiencies have been corrected.

Rule 31(B) states, in pertinent part:

> Application for reconsideration of permit denial. (1) Procedure. An applicant for a permit which has been denied 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 ... corrected the deficiencies in the application which were the basis for the permit denial.

The statute and the rule provide clear procedures that apply to the Applicant's situation. The Board denied a permit because it could not find that the additional traffic that would use the access to the Mall from Fisher Road would not materially jeopardize or interfere with the safety of the roads and access to the hospital under Criteria 9(K) and 10. The Board could not make a positive finding under Criterion 5 because insufficient information was presented for the Board to find that the project would not create unreasonable congestion and unsafe conditions. The Applicant now suggests that prohibiting left turns into the Mall from Fisher Road would alleviate the safety concerns expressed by the Board in its decision. The procedure contemplated by 10 V.S.A. § 6087(c) and Rule 31(B) would be for the Applicant to take its new proposal for alleviating the concerns of the Board to the District Commission in the

form of a motion and affidavit. See RE: Sherman Hollow, Inc., Application #4C0422-5-EB (Revised), Findings of Fact and Conclusions of Law and Order at 13 (Feb. 17, 1989).

The Applicant argues that the Board should issue a permit with a condition prohibiting left hand turns into the Mall from Fisher Road, and that this condition could be deleted if a subsequent traffic study reveals that the traffic from the Sun Foods store does not create "extreme congestion."

In addition to the problem that reversal of the Board's decision is not procedurally appropriate at this point, several other obstacles preclude such action by the Board.

First, the statute requires the Board to make positive findings on the criteria before granting a permit. 10 V.S.A. § 6086(a). In its decision, the Board concluded that sufficient evidence was not introduced into the record to support a finding that unsafe conditions or unreasonable congestion will not result from this project. The Applicant's motion cannot change the Board's conclusion; an idea put forth by the Applicant's attorneys supported merely by speculation does not constitute evidence. Therefore, the Board still cannot make positive findings under Criteria 5, 9(K), and 10. The Board has no authority to issue a permit when substantial information needed to make positive findings is lacking. Approval of a'project and issuance of a permit subject to future proof of compliance would contradict the purpose of Act 250, which is to review impacts and make positive findings before a permit is issued. In order for the Board to consider the Applicant's new proposal, the hearing would have to be reopened. As discussed above, the procedure established by statute and rule for consideration of a proposal to alleviate the deficiencies in an application is by motion and affidavit to the district commission, which would hear the matter in accordance with the requirements of Rule 31(B).

Second, the Applicant is essentially asking the Board to reimpose Condition 28 of the Board's January 23, 1985 permit for the Berlin Mall (#5W0584-2-EB) which required further traffic studies because insufficient information was available at the time. As explained in our February 9, 1990 decision, our inability to make positive findings with respect to 'traffic was caused, at least in part, by the failure of the Applicant to comply with Condition 28 and do a proper traffic study. The Applicant's history with respect to follow-up studies raises doubts about the prudence of conditioning a permit for a substantially expanded Mall in the absence of compliance with a similar condition that had been imposed for the original Mall.

Finally, the Applicant's proposal itself is troubling. Although the Applicant suggests that the permit condition prohibiting left hand turns could be deleted upon a showing that the traffic from Sun Foods does not create "extreme congestion," it fails to address what action should be taken if the subsequent study reveals facts which demonstrate unreasonable congestion or unsafe conditions with respect to the then-constructed project. Presumably the Board would have to close the Fisher Road access to the Mall, an action that may not be acceptable to the Applicant.

In summary, Rule 31(A) does not provide a procedure for the Board to change its denial to approval of the project with no additional evidence, nor does it authorize the Board to reopen the hearing. Therefore, the Board must deny the Applicant's motion for reconsideration under Rule 31(A). If the Applicant wishes to have its proposal to prohibit left turns into the Mall from Fisher Road considered, it may file a motion for reconsideration of permit denial with the District Commission pursuant to 10 V.S.A. § 6087(c) and Rule 31(B).

Both Rule 30(B) and 31(B) provide that a hearing on a motion to correct a decision or to alter a decision is discretionary. Because the Board has found that neither of these rules applies in this situation, the Board declines to hold a hearing.

C. Rule 20(A) and (B)

The Applicant argues that under Board Rule 20(A) and (B), it is entitled to present additional evidence after a final decision is issued. The Board strongly disagrees. At least four hearing days were devoted to the Board's review of this application. The Applicant had ample opportunity to present its case, including any proposals for mitigation of adverse traffic conditions that it wished to present. Acquiescence to the Applicant's requests would be contrary to the principle of judicial economy: each time the Board denied a permit, an applicant could merely ask to present more evidence to try to persuade the Board to grant a permit. The purpose of Rule 20(A) and (B) is for the Board to be able to seek additional information when it determines that additional information is necessary. The Board does not believe that this rule is designed to allow an applicant to supplement a deficient application or that it authorizes the issuance of a permit contingent upon some future study that might or might not prove compliance with the criteria after a final decision is issued.

D. Burden of Proof

The Applicant claims that the Board misallocated the burdens of proof under Criteria 5 and 9(K), arguing that because it had introduced sufficient evidence to demonstrate compliance with Criterion 5, the burden of proof is on the opponents to show unreasonable congestion or unsafe conditions.

10 V.S.A. § 6088 states that the burden of proof shall be on the applicant with respect to § 6086(a)(l) through (4), (9), and (10), and on any party opposing the applicant with respect to § 6086(a)(5) through (8) to show an unreasonable or adverse effect.

The Board has addressed the issue of burden of proof in previous decisions. See, e.g., RE: Pratt's Propane, #3R0486-EB, Memorandum of Decision at 3-10 (Jan. 27, 1987); RE: Imported Cars of Rutland, Inc., #1R0156-2-EB, Findings of Fact and Conclusions of Law at 2-3 (Oct. 12, 1982). In summary, the burden of proof consists of the burden of production (producing sufficient evidence to support a positive finding) and the burden of persuasion (the party bearing the burden of persuasion wins if its evidence is more persuasive than the other party's by a preponderance of the evidence). The burden of production is always on the applicant, which means that the applicant must produce sufficient evidence for the Board to find compliance with the criteria. Once the applicant has shown compliance with the criteria, an opponent has the burden of persuasion, or of proving that the project would have an unreasonable or adverse effect.

In this case, the Board was not persuaded that the project would not cause unreasonable congestion or unsafe conditions and thus the Board concluded that the Applicant had not met its burden of producing sufficient evidence under Criterion 5 for the Board to make a positive finding. Therefore, the burden did not shift to the other parties to show unreasonable congestion or unsafe conditions.

Under Criterion 9(K), the applicant has both the burden of production and of persuasion. The Board found that the Applicant also did not meet its burden of providing sufficient evidence for the Board to find that the traffic from Sun Foods would not materially jeopardize the safety of the roads and access to the hospital or that the construction of Sun Foods at the designated site is "necessary." In reaching this decision, the Board relied on the evidence relating to traffic that was introduced by the Applicant in the context of the issues raised by the Medical Staff and EMS #6, and found insufficient evidence to make a positive finding on Criterion 9(K).

E. Criterion 10

The Applicant argues that the project does not violate Criterion 10 because the Executive Director of the Central Vermont Regional Planning Commission did not so testify. The Board has the obligation to make independent findings under all criteria; the opinion of a witness is only one piece of evidence. The Board must review the regional plan and determine for itself whether the project conforms with the plan. The Board concluded that because insufficient evidence was provided for it to find that the additional traffic from Sun Foods would not create unreasonable congestion or unsafe conditions, it could not find that the application complies with the policy in the plan that "roadway efficiency and safety is an overall priority." Our conclusion therefore had to be that the project does not conform with the regional plan.

III. ORDER

Berlin Associates* motion for reconsideration, modification and correction of the Board's February 9, 1990 decision is hereby denied.

Dated at Montpelier, Vermont this 24th day of April, 1990.

ENVIRONMENTAL BOARD

Leonard U. Wilson, Acting Chair
Samuel Lloyd
Arthur Gibb
Ferdinand Bongartz
W. Philip Wagner
Elizabeth Courtney

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