

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

RE: Developers Diversified, Ltd.
23200 Chagrin Blvd.
Cleveland, Ohio 44122

FINDING OF FACT
AND CONCLUSIONS
OF LAW
10 V.S.A. Chapter 151 .
(Act 250)

On February 8, 1980 the Vermont Agency of Environmental Conservation brought an appeal from an order of the District #5 Environmental Commission dated February 1, 1980 denying the motion to postpone hearings in the application of Developers Diversified, No. 5W0584, pending issuance of a final decision in the application of Juster Associates, No. 5W0556. Both applications are for permits for the construction and operation of major commercial facilities on adjacent properties in the Town of Berlin, Vermont.

On February 13, 1980 the Environmental Board appointed Margaret P. Garland, Chairman of the Board, to sit as a hearing officer in this appeal, pursuant to Hoard Rule 17; on February 28, 1980 the hearing officer heard testimony and oral argument on the appeal with the agreement of the parties as provided for in that Rule. The Board reviewed this matter at its regular meeting of March 11, 1980. The following parties participated in this appeal:

The applicant, Developers Diversified, Ltd. by
John Kilmurry, Esq.
The appellant, Agency of Environmental Conservation
by Stephen B. Scase, Esq.
The City of Barre by John Nicholls, Esq.
Central Vermont Regional Planning Commission by
Robert Apple;
Citizens for Vital Communities by Steven Stitzel.

This appeal effectively raises two issues: (1) Must the District Commission suspend hearings on the application of Developers Diversified, Ltd. pending resolution of the application of Juster Associates, pursuant to Board Rule 13 (A)? and (2) If not, must the District Commission take into account the likely impacts of both developments when evaluating the impacts of either one or both of the applications?

FINDING OF FACT

1. On February 28, 1980, the date of hearing on this matter, and on March 11, 1980, the date of the Board's decision, the District #5 Environmental Commission had not issued a final decision in either of the permit applications that are the basis of this appeal. Proceedings are still continuing in both applications, and the Commission is actively reviewing those applications at this time.

CONCLUSIONS OF LAW

1. **Board Rule 13(A)**, the basis of this appeal, states that the "district commissions shall consider each application in **the order** presented" This Rule requires the commissions to initiate proceedings on major applications in **the order** in which the **completed applications** are filed. The Rule **does not, however**, require the commissions to delay proceedings on all applications subsequently filed, **pending** final resolution of those filed earlier. To begin with, **the Rule on its face** does not require the commissions to follow **the procedure** appellant requests. The Rule states that the applications shall be considered in the **order presented**, not that final orders shall be issued in the **sequence** that applications are received; and it **certainly does not** state that consideration of an earlier permit will bar concurrent proceedings on any application filed subsequently.


There are convincing practical reasons for this result as well. The **processing** of a major development application might easily take several months from the date of application to the issuance of a land use permit or an order denying a permit. **Frequently**, delays in the proceedings occur as the **applicant** prepares plans and other information in response to concerns addressed by the commission or the parties to the **hearings**. Issuance of a final permit is often delayed pending receipt of final approvals or certifications from other state **agencies**. It would be both inefficient and **inequitable** if the applicants or parties to an earlier-filed application could **effectively** block the commission's review of applications filed later. Moreover, such delays would violate the statutory mandate of 10 V.S.A. §6085(b) that hearings **commence** within 40 days of the filing of a completed application.

2. The parties to this appeal have presented a variety of theories that could possibly be used to guide the District Commission in its review of the competing and potentially synergistic **effects** of these two applications. Some of these **suggestions** have merit. However, we **decline** the invitation to **intervene** into the proceedings of the District Commission. The **issues** raised on this appeal are **substantive** in nature, **concerning** the factual assumptions underlying **the Commission's** review, and **implicate** the Commission's decisions on the merits of **these applications**. We are **unable** at this **time** to **judge** whether the Commission has made a proper determination of **these factual** issues under the requirements of the Act, because the Commission has not yet issued a final permit or order in **either** case. The appellant will not be foreclosed from raising **these issues** following the issuance of a final decision by the Commission. Insofar

as this appeal relates to the assumptions by which the Commission is evaluating the evidence in these ongoing proceedings, we conclude that an appeal to the Board is untimely and it is therefore dismissed. See In Re Paul E. Blair Family Trust (Application #4C0388-EB, November 2, 1979).

Dated at Montpelier, Vermont this 18th day of March, 1980.

ENVIRONMENTAL BOARD

By 
Margaret P. Garland
Chairman

Members voting to
issue this decision:
Margaret P. Garland
Ferdinand Bongartz
Melvin H. Carter
Michael A. Kimack
Roger N. Miller
Donald B. Sargent
Leonard U. Wilson

Member not participating:
Daniel C. Lyons