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

RE: David and Joyce Gonyon
Land Use Permit #5W1025-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal filed with the Environmental Board by Glen and Lisa Torres (the Appellants) on February 5, 1991, from Land Use Permit #5W1025 and supporting Findings of Fact and Conclusions of Law issued by the District #5 Environmental Commission on January 30, 1991. The permit authorizes the completed construction by David and Joyce Gonyon (the Applicants) of a 2,000 square foot auto body repair facility on a five-acre tract of land on Route 100 in Duxbury.

As is explained below, the Board has concluded that the project complies with Criteria l(A), l(B), l(E), 8 and 10 if the conditions of Land Use Permit #5W1025-EB are complied with.

An administrative hearing panel of the Board convened a public hearing *on* April 25, 1991, with the following parties participating:

The Applicants by Douglas Cohn, Esq. and Richard Unger, Esq.
The Appellants by Glen Torres

After hearing the testimony, the Panel recessed the hearing and visited the site with the parties. After the site visit, the Panel reconvened the hearing and heard testimony from additional witnesses. Upon completion of the testimony, the Panel recessed the hearing pending the preparation of a proposed decision of the Panel. A proposed decision was sent to the parties on May 29, 1991. The Applicants filed a written request for clarification of the proposed decision on June 10, 1991. The Appellants filed written objections to the proposed decision on June 19, 1991, and requested oral argument before the full Board. On June 28, 1991, the Board convened a public hearing and heard oral argument from the parties. On that date, the Board reviewed the evidence, determined the record complete, adjourned the hearing and deliberated. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.',

I. BACKGROUND

Land Use Permit #5W1025, issued on January 30, 1991, authorized the completed construction by the Applicants of an auto body repair facility on a tract of land owned by them. The Appellants claim that the District Commission erred in making positive findings on Criteria 1 (air), l(B) (waste

disposal), l(E) (streams), 8 (aesthetics, scenic beauty, historic sites), and 10 (local plan). The Appellants were granted party status on these criteria as adjoining landowners.

II. ISSUES

1. Whether the project will result in undue water or air pollution pursuant to 10 V.S.A. § 6086(a)(l) (air), (l)(B) (waste disposal) and (l)(E) (streams).

2. Whether the project will have an undue adverse impact on the scenic or natural beauty of the area, aesthetics, or historic sites pursuant to 10 V.S.A. § 6086(a)(8).

3. Whether the project is in conformance with a duly adopted local plan pursuant to 10 V.S.A. § 6086(a)(10).

III. FINDINGS OF FACT

1. In 1987, the Applicants constructed a 40' x 50' commercial auto body repair garage (the garage). The garage is single story with a natural rough spruce siding, a brown metal roof, and two white overhead doors.

2. The project site is a five-acre parcel on the west side of Vermont Route 100. The five-acre tract is partly open and partly steep, wooded bank. The site also contains the Applicants' residence, a detached residential two-car garage and a small storage building.

3. The Applicants do auto body repair and paint vehicles in the commercial garage. Spray painting is done in the center of the garage. The garage contains a 20-inch exhaust fan with a dual particle filter which takes out excess solids before exhausting outdoors. Since the date of the District Commission decision, the Applicants have installed an air intake above the existing entry door on the north side of the building so that it is no longer necessary to open any doors during painting.

4. The Applicants use, on average, not more than three quarts of paint-per week. The spray paints are mixed with a thinner. Waste thinner is picked up by Safety Kleen every one to one and one-half months. Not more than fifteen gallons are generated per month. Speedi Dri is used to soak up minor spills.

5. The paints used by the Applicants contain materials with toxic properties, such as lead, chromium, and toluene. Emissions to the air from the painting of automobiles are either in the form of dust (fine particles and solids suspended in air) or vapors. Emissions in the particle form include lead and chromium. Most of these solids remain in the paint or on the car. A portion of the solids settles in the shop or adheres to the walls. What remains suspended *in* the air is further reduced, but not eliminated, as it is vented through the exhaust fan and filter system prior to discharge to the outside air. The vapors from the paint are emitted directly to the atmosphere.

6. Occasionally, the Appellants smell paint fumes on their property from the Applicants' operation. They have experienced a settling of paint fumes on their property when fumes are no longer detectable closer to the project.

7. The Air Pollution Control Division does not require small spray paint operations to obtain an air pollution control permit. Although no permit is required, the Applicants* operation is subject to Sections 5-241 (Prohibition of Nuisance and Odor) and 5-261 (Control of Hazardous Air Contaminants) of the Air Pollution Control Regulations issued by the Air Pollution Control Division. Board Exhibit 2, the memorandum of Philip L. Etter which concerned the project's compliance status, states only that no violations of § 5-241 were determined during his inspection and with respect to § 5-261 concludes that compliance status was "undetermined." No evidence was submitted to demonstrate compliance with these regulations.

a. Evidence submitted concerning.the recommendations of the Air Pollution Control Division with respect to the exhaust fan was conflicting. There was testimony that the applicants' exhaust fan and filter system was consistent with the Air Pollution Control Division's recommendations. There was also a written memorandum submitted into evidence (Board Exhibit #16) which stated that the Air Pollution Control Division recommends that exhaust be discharged above the roof line.

9. A drainage ditch that collects run-off from the road and the ledge behind the garage runs behind the garage to a point beyond the Applicants' residence. An intermittent stream along the northern property line of the tract flows easterly through a culvert under Route 100 onto property on the other side of Route 100.

10. The Applicants, during the summer months, wash one to two cars per week in the parking area in front of the shop. This is the only waste water which the shop produces.

11. The Agency of Natural Resources has issued two waste water permits to the Applicants. Waste Water Permit #WW-5-0072 approves the commercial facility as a home occupancy and provides that there shall be no employees other than immediate family members and no toilet facilities available to the public. Waste Water Permit #WW-5-0072-l permits the installation of a cornposting toilet at the site to serve up to two employees. The Applicants have not installed a cornposting toilet on the premises. There are no persons working on the premises other than the Applicants and Mr. Gonyon's brother.

12. The Appellants* property is across Route 100 from the project site. The Appellants' driveway is directly across from the driveway and parking area in front of the garage. The Applicants relocated the driveway to its present location prior to construction of the garage, in part, for safety considerations. The original driveway was 30 feet to the north of the location of the existing driveway.

13. The garage is set back approximately 65 feet from the edge of Vermont Route 100 and is served by an existing gravel drive and parking area. A slatted chain link fence between the garage and the detached residential two-car garage forms a screened storage area where the Applicants store vehicles and vehicle parts. The site is visible to vehicular traffic on Route 100 and from the Appellants' driveway. The Appellants' residence is located approximately 300 feet from the garage. The garage is not visible from the Appellants' residence, except from the second floor deck.

14. The Applicants sometimes park damaged vehicles in front of the shop, damaged parts are sometimes stored in the parking area and the doors to the garage are sometimes left open.

15. A row of white pine trees has been planted between the garage parking area and Vermont Route 100. These white pines were planted prior to the issuance of the District Commission decision which accepted a landscape plan submitted by the Applicants. The pine trees do not provide adequate screening of the project. They are widely spaced, a number of them have died, and all have lost branches up to approximately

six feet from the ground due to natural growth patterns and damage from road salt. White pine and other coniferous species are subject to damage from road salt.

16. The Applicants employed Wheeler Engineering in August, 1989 for the purpose of drawing up a site plan and evaluating drainage and landscaping.- The District Commission adopted the proposed landscaping plan submitted by the Applicants as a condition of Land Use Permit #5W1025. The tree plantings and other components of that plan were to be installed by the Applicants no later than June 1, 1991. The Applicants have not commenced implementation of the approved landscaping plan because of this pending appeal. The plan proposed by the Applicants will not provide adequate screening of the project because of the likelihood that road salt and natural growth patterns will cause the white pines to lose their lower branches.

17. The residence on the site is a 1½ story frame house constructed around 1850. It is significant as an example of a vernacular, mid-19th century house and is listed on the State Register of Historic Places.

18. The project has been granted a conditional use permit from the Duxbury Zoning Board of Adjustment. Other commercial establishments along Route 100 in Duxbury include a country store and campground and a miniature golf facility.

19. The site is located in an area designated in the Duxbury Town Plan (Board Exhibit #10), adopted June 2, 1986, as Rural-Agricultural District I. With respect to this district, the Plan provides at page 8: "Commercial and light industrial uses may be conditionally permitted in this district providing the development conforms to the scenic aspects of the surrounding land, as outlined in Aesthetics in the Basic Policy section of this Plan."

20. Route 100 has been designated in the Town Plan as a scenic 'road. The section in the Town Plan relating to scenic roads provides at page 16:

> In order to protect roads of exceptional scenic and natural value from development which might jeopardize scenic vistas and the intrinsic natural beauty of such roads, the Town should designate selected roads as "scenic roads". Any development along or visible from such roads should take the

following **measures** to insure its visual compatibility with the lower landscape:

1. deep setbacks
2. placement of utility lines so as not to obstruct scenic vistas
3. right of way cutting techniques which encourage.visual blend of utility lines **with** surroundings
4. minimum removal of trees within 50 feet of road edge, consistent with highway safety
5. adequate distance between curb cuts
6. landscaping and screening requirements for new structures
7. aesthetically pleasing placement of buildings on lots, wherever possible on edges of fields and within wooded portions so as to leave the open land open
8. preservation of primary agricultural soils
9. seeding of banks along roadsides.

21. The **preface to** the Town Plan incorporates as general goals **of** the Town Plan the protection of public health by reduction of noise, air pollution, water pollution and other obnoxious **physical influences,** and appropriate architectural design.

IV. CONCLUSIONS OF LAW

Criterion 1 - Air Pollution

The Applicants claim that, pursuant to Rule 19(E), they are entitled to **a** presumption that the project does not cause undue air pollution. Their claim is based on written memoranda from the Air Pollution Control Division which state that small operations of **the type** conducted by the Applicants do not require a permit from the Air Pollution Control Division.

Rule 19(H) states that the term **"permit" as** used in Rule 19(E) refers to **a** written document "attesting to a project's compliance **with the** regulations or statutes listed in Section E of this **rule."** At the hearing, the Panel concluded that Board Exhibits 1 through 4, consisting of memoranda from the

Air Pollution Control Division and the Hazardous Materials Management Division, do not attest to the project's compliance with the applicable sections of the Air Pollution Control Division's regulations.

Subsequent to the decision that the Applicants were not entitled to a presumption in their favor with respect to undue air pollution, testimony was provided by Brian Fitzgerald, Permit Section Chief for the Air Pollution Control Division. Mr. Fitzgerald did not provide any testimony concerning the Applicants' compliance with the Air Pollution Control Division's regulations. Therefore, the Board continues to believe that the Applicants are not entitled to a presumption under Rule 19(E).

The Appellants argue that the Applicants have not complied with recommendations and regulations issued by the Air Pollution Control Division and that a permit should, therefore, be denied. Prior to issuing a permit, the Board must find that a project will not cause undue air pollution. However, it is not required to determine that recommendations and regulations of the Air Pollution Control Division have been complied with in order to conclude that there is no undue air pollution.

The operation involves the use of paints and thinners with toxic properties that create emissions to the air of either vapors or particles. The Board concludes that the operation does create air pollution. However, the small volumes of paints and thinners used by the Applicants, the use of a filtered exhaust system, their stated intention to operate only with the garage doors closed, and the distance between the garage and the Appellants' residence and the lack of other residences nearby, leads the Board to conclude that the air pollution created by this operation is not undue.

Criteria 1(B) Waste Disposal and 1(E) Streams

Waste Water Permits #WW-5-0072 and #WW-5-0072-1 create a presumption of compliance with Criteria l(B) and l(E). The Appellants did not rebut this presumption. The Board, therefore, concludes that the project will not result in undue water pollution under either Criterion l(B) or l(E).

Criterion 8 Aesthetics, Scenic Beauty, Historic Sites

In Re: Ouechee Lakes Corp., Findings of Fact, Conclusions of Law, and Order, #3W0411-A-EB and 3W0439-EB (Nov. 4, 1985),

the Board set forth a number of objective criteria it will apply to a considerationof a project's compliance with Criterion 8. The first step involves the determination of whether the project will have an adverse impact upon the scenic or natural beauty of the area or upon aesthetics. The Board evaluates the nature of the project's surrounding, the project's compatibility with its surroundings, the suitability of the.colors and materials selected for the project, the visibility of the project, and the project's impact on open space in the area.

The Board concludes that the garage, as constructed, is not out of context with its surroundings. The garage is in keeping with the existing land uses and structures in the area. The Board also finds that the colors and materials selected for the project are suitable to its surroundings. The project does not affect open space.

The Board does conclude, however, that the visibility of the project, in light of the operations which are carried on at the project site, creates an adverse impact on scenic beauty and aesthetics. The nature of the operation on this site is such that it is likely that wrecked vehicles, parts, and parked vehicles will at times be visible both to the Appellants and to traffic on Route 100; this visibility creates an adverse impact on aesthetics and scenic beauty.

Having concluded that the project does have an adverse impact, the next step is to determine whether the adverse impact is undue. The Board must conclude that an adverse impact is undue and, therefore, violates Criterion 8, if it reaches a positive conclusion with regard to any one of the following:

1. Whether the project violates a clear, written community standard intended to preserve the aesthetic or scenic, natural beauty of the area.

2. Whether the project offends the sensibilities of the average'.person.

3. Whether the Applicants have failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings.

The Appellants allege that the project is in violation of a community standard, specifically, the Town Plan. The Duxbury Town Plan is discussed in greater detail in the discussion of Criterion 10, below. For the purposes of determining whether or not a community standard is violated, the Board concludes that the designation of this area as one in which light industrial uses are permitted and the suggested measures for ensuring visual compatability of development on scenic roads contained in the Town Plan are the clearest written community standards available. The Board concludes that these standards are met, as more fully described in the discussion of Criterion 10, below.

The proposed project is not shocking or offensive to the average person because it is not out of character with its surroundings and does not significantly diminish the scenic qualities of the area.

The Board, however, does believe that a reasonable person would take steps to mitigate the adverse effects of the proposed project beyond those proposed by the Applicants and adopted by the District Commission as a condition of Land Use Permit #5W1025. Given the likelihood that wrecked vehicles and parts will at times continue to be in view of the Appellants and of traffic on Route 100, and the likelihood that white pines planted along Route 100 will not provide adequate screening because of natural growth patterns and damage by road salt, the Board finds that additional mitigating factors beyond those contained in the Wheeler Engineering landscape plan are called for.

At oral argument the Applicant requested that the Board require the installation of a stockade fence rather than the planting of cedar trees because of the potential salt damage to a cedar hedge. The Board believes that while a stockade fence might adequately screen the project, the fence itself would create an adverse aesthetic impact. The Board is concerned that the proposed planting of cedar trees may not' provide adequate screening because of the susceptibility of coniferous species to damage from road salt. It therefore concludes that a deciduous hedge of lilac shrubs should be planted rather than the proposed cedar trees.

The Board concludes that the planting of white pines to replace dead pines as proposed by the Applicants, if supplemented by the installation of a row of lilac shrubs 50 feet in length between the edge of the parking area and the row of existing pines to the south of the driveway, will

provide adequate screening of the project. Additionally, a row of lilac shrubs should be planted on the northern side of the driveway. The first shrub shall be placed as close as possible to the edge of the driveway and extend north to the extent possible in light of the existing ledge.

The Board will impose these landscaping requirements in addition to the requirements of the Wheeler Engineering plan as proposed by the Applicants and adopted by the District Commission. All other conditions of the Wheeler Engineering plan shall remain a condition of the land use permit.

The Board concludes that the project, with the proposed mitigating factors agreed to by the Applicants and with the additional mitigating factors of the lilac hedge on both sides of the driveway, does not create an undue adverse impact on aesthetics and scenic and natural beauty.

With respect to the residence, which is listed on the State Register of Historic Sites, the Board concludes that the project does not have an adverse impact on the residence because any potential adverse effect will be sufficiently mitigated by the landscaping and other conditions of the permit.

Criterion 10 - Conformance with Town Plan

The Appellants argue that the garage is not in conformance with the provisions of the Town Plan concerning scenic roads because it does not have a deep set-back from Route 100 and because the property is not screened from Route 100 or from the Appellants' property. The Appellants also claim that the project does not conform with general guidelines discussed in the preface of the Town Plan concerning the protection of public health by reduction of air and water pollution and concerning appropriate architectural design.

With respect to the Appellants' argument that the project does not conform to the measures set forth in the Town Plan designed to ensure visual compatibility of development on scenic roads, the Board concludes that the Applicants have implemented the measures listed in the Town Plan to the extent possible and reasonable.

The Town Plan calls for deep set-backs. The garage is set back 65 feet from Route 100; this is as deep a set-back as is possible at this site because of the steep ledge which is

behind the garage. Other applicable measures include landscaping and screening. for new structures and aesthetically pleasing placement of buildings on lots. As discussed above, landscaping and screening of the site is a condition for the permit which is being issued to the Applicants. No evidence was presented that the garage could be placed on the lot in a way that would make it more aesthetically pleasing than its present location. The Appellants have suggested that the driveway which is presently located in front of the garage should be moved to its original location in order to allow for more adequate screening of the garage and project area. The driveway was moved to its present location in part for safety considerations. Moving the driveway as proposed by the Appellants would lessen the visibility of the project site from the Appellants' driveway, but would have little impact on the visibility of the project from Route 100. It is not necessary that the driveway be moved in order for the project to conform with the Town Plan and its relocation would not provide sufficient additional screening of the project from Route 100 to be warranted.

The Board does *not* believe that the project violates the general guidelines of the Town Plan concerning public health and agricultural design. The more specific provisions of the Town Plan, which permit light industrial use in the area and set standards for development on scenic roads, provide greater guidance to what is contemplated by the Town Plan than these general goals. The Board has found that the project is in conformance with these more specific guidelines.

V. ORDER

Land Use Permit #5W1025-EB is hereby issued. Jurisdiction is returned to the District $5 Environmental Commission.

Dated at Montpelier, Vermont, this 17th day of July, 1991.

ENVIRONMENTAL BOARD

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