

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

RE: David and Joyce Gonyon PREHEARING CONFERENCE REPORT
RD #2, Box 1610 AND ORDER
Waterbury, Vermont 05676 Land Use Permit #5W1025-EB

On March 15, 1991, a prehearing conference was convened by Environmental Board Chair Elizabeth Courtney in Montpelier with the following persons participating:

Glen and Lisa Torres by Glen Torres
David and Joyce Gonyon by Richard Unger, Esq.
David Gonyon

I. BACKGROUND

On January 30, 1991, District Environmental Commission #5 issued Land Use Permit #5W1025 to David and Joyce Gonyon (the Applicants). The permit authorizes the completed construction of a 2,000 square foot auto body repair facility on Route 100 in Duxbury. The project tract is five acres in size. The Gonyon residence and a two car garage are also located on the tract. The auto body repair facility was constructed in 1987 without an Act 250 permit. The applicants filed an application for an Act 250 permit in response to a letter from the Assistant Coordinator dated August 5, 1988. The permit was opposed at the District Commission proceeding by Glen and Lisa Torres, adjoining landowners, who live across Route 100 from the project site.

An appeal from the District Commission decision was filed on February 5, 1991 by Glen and Lisa Torres (the Appellants). They claim that the District Commission erred in its conclusions with respect to Criterion 1 (water and air pollution), Criterion 1(B) (waste disposal), Criterion 1(E) (streams), Criterion 8 (aesthetics, scenic beauty, historic sites), and Criterion 10 (conformance with local plan). Along with their appeal, the Appellants filed a Motion for Stay of Decision. The Board deliberated on the Motion for Stay on March 6, 1991 and denied the stay request.

II. ISSUES

A. Scope of Appeal.

Criterion 1

The Applicants argue that, pursuant to Rule 40, the scope of the appeal must be strictly limited to those issues specifically addressed in the Notice of Appeal. They contend that while Mr. Torres raised the issue of odors and fumes from

the auto body repair facility adversely affecting his property at the prehearing, the notice of appeal does not mention odors and fumes under Criterion 1 but rather only discusses the Commissions findings regarding an air filter.

The Board has applied the requirements of Rule 40 liberally in past decisions. See Durwood and Lorraine Starr, Findings of Fact, Conclusions of Law and Order #7R0594-1-EB (April 30, 1986). Pursuant to Rule 16, the Chair finds that the Notice of Appeal filed by the Appellants is adequate to place at issue each of the criteria identified in the Notice of Appeal as further delineated by Mr. Torres at the **prehearing conference**. The Appellants will not be restricted to presenting evidence concerning only the air filter under Criterion 1.

Economic Impact

At the prehearing conference, Mr. Torres raised the issue of the economic impact of the project on his property. The economic value of privately owned real estate is not one of the values sought to be protected by Act 250. Accordingly, the Appellants will not be allowed to present evidence on this issue. Mr. Torres claims that the town plan seeks to preserve property values and that this project is not in conformance with the town plan because, among other reasons, it diminishes the value of his property. He may present evidence on the economic impact of the project on his property only to the extent that he first is able to establish that protection of property values is one of the goals of the town plan.

Local Zoning Permit

On July 9, 1990, the Duxbury Zoning Board of Adjustment granted to the Applicants a conditional use permit for welding and light metal fabrication. On July 10, 1990, the Appellants appealed that decision to the Washington Superior Court. The Appellants argue that because they have appealed the issuance of the zoning permit the project does not have a local zoning permit as required in the land use section of the town plan and that, therefore, it does not conform to the town plan. The Applicants contend that although the permit has been appealed by the Appellants, it is still a valid permit.

The issue of conformance with the town plan and whether a valid zoning permit exists are not connected for purposes of Criterion 10. Even if there were not a valid permit the project may still conform with the town plan. The Appellants

will not be permitted to argue that the project does not conform to the town plan on the basis that it does not have a valid zoning permit.

The Appellants also claim that while the local zoning permit is for welding and light metal fabrication the Act 250 permit is for auto body repair, including heavy automobile work. The local Zoning permit is not relevant to this Act 250 proceeding. There is no requirement that the local zoning permit and the Act 250 permit authorize consistent uses. The Appellant will not be permitted to present evidence or argument concerning this inconsistency.

Impact on Septic System

At the prehearing conference, Mr. Torres raised as an issue the impact of the run-off from the project on the septic system that serves the Gonyon residence. The Applicants argue that the project does not include the residence. The project is the auto body repair facility. Criterion 1 only requires that the Applicants demonstrate that the project will not create undue water pollution. They are not required to demonstrate that the project will not affect the septic system to the residence. The Appellants will not be allowed to raise this issue.

B. Criteria

Criterion 1 - Air pollution

The Appellants argue that the operation of the auto body repair facility creates odors and fumes that adversely affect values protected by Act 250. The Applicants contend that the facility is not in violation of any air pollution regulations and will present testimony by individuals with the Air Pollution Control Division of the Agency of Natural Resources in support of this position. The Appellants do not allege that the facility is in violation of air pollution regulations but claim that their property is nevertheless adversely affected by fumes and odors from the facility.

The burden of proof under Criterion 1 is on the applicant to demonstrate that the project will not result in undue air pollution. Evidence that no permit is required is sufficient to meet that burden and, pursuant to Rule 19(E), creates a presumption that no undue air pollution will result. The Appellants may present evidence to overcome this presumption.

Criterion 1(B) - Waste Disposal

The Appellants argue that the water used at the facility for washing vehicles runs eastward toward a drainage swale, through a culvert, and onto their property. They contend that the District Commission's finding that the overland drainage is away from the Torres' property is incorrect.

The burden of proof is on the Applicants to demonstrate that the project will not cause undue water pollution. The Applicants will present testimony of Agency of Natural Resources personnel concerning the risk of groundwater contamination from the materials used in the auto body repair operation.

The Applicants will present testimony concerning Water Supply and Wastewater Disposal Permit WW-5-0072, which was issued to the Applicants on April 4, 1989 and amended on May 22, 1990 to allow the applicants to install a composting toilet for up to two full-time employees.

Mr. Torres stated that the Wastewater Permit has been appealed. Whether or not that permit has been appealed, the issuance of the permit creates a presumption under Rule 19(E) that waste materials and wastewater can be disposed of through installation of wastewater and waste collection treatment and disposal systems without resulting in undue water pollution. The Appellants may submit evidence to overcome this presumption.

Criterion 1(E) - Streams

The Appellants contend that the District Commission's conclusions regarding the drainage ditch running behind and to the west of the project are inconclusive. They claim that drainage from the roof of the facility and from the parking area flows into a stream and that the stream flows onto the Appellants' property.

The burden of proof is on the Applicants to demonstrate, pursuant to 10 V.S.A. 6086(a)(1)(E), that the project will not endanger the health, safety or welfare of the Appellants. Pursuant to Rule 19(E)(1). The issuance of Wastewater Disposal Permit #WW-5-0072 creates a presumption that waste materials and wastewater can be disposed of without resulting in undue water pollution. The Appellants will need to produce evidence of undue pollution to the stream to overcome that presumption.

Criterion a - Aesthetics. scenic beauty and historic sites.

The Appellants claim that the project **cannot** be adequately screened and creates an undue adverse effect on the aesthetics and scenic beauty of the area as viewed from the Appellants' property and from Route 100.

The Appellants also claim that the Gonyon residence is a historic site and is adversely affected by the project. The Appellants will initiate a formal review of the project with the Division of Historic Preservation and may have a witness from the Division of Historic Preservation testify concerning the impact of the project on the historic site.

The burden of proof is on the Appellants to demonstrate any undue adverse impact under this criterion.

Criterion 10 - Conformance With Local Plan.

The Appellants argue that the project is not in conformance with the town plan in that it violates the community standard with respect to allowed uses. The District Commission found that Route 100 is a designated scenic road under the town plan but that the standards regarding development along scenic roads were too vague for the District Commission to conclude that the project is in not in conformance with those standards. The burden is on the Applicants to demonstrate that the project is in compliance with the town plan.

III. WITNESSES AND EXHIBITS

Applicant:

Criterion 1

Phillip Etter - Agency of Natural Resources, Air Pollution Control Division
Harold Garabedian - Air Pollution Control Division
Mike Nelson - Agency of Natural Resources, Hazardous Material Technician
Patrick Coyne - Environmental Enforcement Officer

Criterion 1(B) - expert witness

Criterion 1(E) - expert witness

Criterion 8 - expert witness

Criterion 10 - Planning Commission member

Appellants:

Criterion 1 - Glen Torres, Lisa Torres

Criterion 1(B) - Glen Torres

Criterion 1(E) - Glen Torres

Criterion 8 - expert witness
Division of Historic Preservation representative

Criterion 10 - Glen Torres

IV. ORDER

1. The scope of the appeal shall be as delineated in the prehearing conference report. Any party who objects to the decisions of the Chair with **respect** to the scope of the appeal shall, on or before April 1, 1991, file a written request for review of the scope of the appeal by the entire Board. The Board will consider any such request on April 4, 1991.

2. On or before April 5, 1991 the parties shall file final witness lists and identify the criteria the **witnesses will** address. **No** individual may be called as a witness if he or she has not been identified in this witness list or in this report.

3. On or before April 15, 1991, the parties shall file **pre-**filed testimony of all witnesses. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.

4. The Board or its delegate may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

5. Parties shall file an original and ten copies of prefiled testimony, legal memoranda and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

6. On or before April 15, 1991, the parties shall file lists identifying those exhibits they intend to present that are not included with the prefiled testimony. The exhibits themselves

need not be filed. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

7. The hearings will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by April 10, 1991. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

a. A hearing on this matter will be held on April 25, 1991, at a time and place to be confirmed by written notice. The hearing will be before an administrative hearing panel of the Board. Any objection to the use of a hearing panel must be filed on or before April 5 or the objection will be deemed waived.

9. Pursuant to Board Rule 16, this order will be binding on all parties who have received notice of the prehearing conference, unless there is a timely objection to the order, or a showing of cause for, or fairness requires, waiver of a requirement of this order.

Dated at Montpelier, Vermont, this 22nd day of March, 1991.

ENVIRONMENTAL BOARD



Elizabeth Courtney Chair

c:gonypr (ccm)