

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

RE: Barre City School District  
Land Use Permit #5W1160-Reconsideration-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a Motion to Dismiss (the Motion) filed by the Barre City School District (the Appellee) in response to an appeal filed by Marcia E. Kepnes (the Appellant) from Land Use Permit #5W1160-Reconsideration-EB, and supporting Findings of Fact, and Conclusions of Law (the Permit). As is explained below, the Environmental Board grants the Motion.

I. BACKGROUND

On February 25, 1994 the District #7 Environmental Commission (the District Commission) issued the Permit. The Permit authorizes the Appellee to construct a 126,000 square foot, 3-story, K-8th grade school building (the Barre School) and a new, permanent bridge as a replacement for the Parkside Terrace Bridge in the City of Barre, Vermont.

On March 24, 1994 the Appellant filed an appeal with the Environmental Board. The Appellant appeals from the District Commission's decision to deny her party status under Criterion 9(K) (public investment and facilities). The Appellant also seeks party status under Criterion 10 (local and regional plans) for the purpose of appealing the District Commission's decision under Criterion 10.

On April 12, 1994 the Appellee filed the Motion. On May 2, 1994 Board Chair Art Gibb convened a prehearing conference in Barre. At that time, deadlines were set for the submission of legal memoranda and statement of facts.

On May 16, 1994 the Appellant filed a memorandum of law and statement of facts. On May 17, 1994 the Appellee filed a memorandum of law and statement of facts.

On May 25, 1994 the Board convened oral argument on the Motion with the following parties participating:

Barre City School District by John Ponsetto, Esq.  
and Lyman Amsden  
Marcia Kepnes, pro se

On May 26 and 31, 1994 the Appellant filed supplemental memoranda of law. Since these documents were filed after the conclusion of oral argument and without leave of the Board, they were not distributed to the Board members and the Appellee was not permitted to file reply memoranda.

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The Board deliberated regarding the Motion on May 25, 1994 and January 30, 1995. The Board now issues this decision pursuant to Board Rule 18(D).

II. ISSUES

1. Whether the Appellant should be granted party status under Criterion 9(K).

2. Whether the Appellant's interest regarding how non-driving parents will travel to the Barre School is beyond the scope of Criterion 10.

III. FINDINGS OF FACT

1. The Appellant lives in Barre, Vermont. The Appellant is the mother of two daughters who will attend the Barre School. The Appellant is legally blind and is unable to drive an automobile.
2. The Central Vermont Transportation Authority (CVTA) operates public transportation services for the area in which the Appellant lives, but such services are not guaranteed to be in operation on all occasions when the Appellant needs to travel to the Barre School.
3. Since the Appellee first applied for an Act 250 permit for the Barre School, the Appellant's interest has been how will non-driving parents, such as herself, get to and from the new centralized school.
4. The Appellee originally filed application #5W1160 on June 15, 1992, but on September 9, 1992 that application was withdrawn.
5. The Appellee next submitted a revised application #5W1160 on December 1, 1992 (#5W1160-Revised). The District Commission convened six hearings between December 16, 1992 and February 11, 1993 relative to application #5W1160-Revised.
6. The District Commission granted the Appellant party status under Criterion 9(K) (public investments and facilities) in application #5W1160-Revised.
7. On May 7, 1993 the District Commission denied application #5W1160-Revised for reasons unrelated to the Appellant's participation.

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8. After the denial, the Appellee altered the design of the Barre School and applied for reconsideration of its application pursuant to Board Rule 31(B).
9. On December 13, 1993 the District Commission convened a public hearing during which the Appellant renewed her request for party status.
10. On December 21, 1993 the District Commission issued Re: Barre City Schools, #5W1160 (Reconsideration), Recess Order (Dec. 21, 1993). The recess order pertained to matters which arose out of the District Commission's December 13, 1993 hearing. The recess order provided, in part:

In the original proceeding, Marcia Kepnes had been granted party status under Criterion 9(K) Public Facilities pursuant to Board Rule 14(B). However in its decision, the Commission ruled that the issues of providing access to the new school and requiring certain accessibility standards within the school were not within the domain of Act 250. The Environmental Board has ruled that impacts on a public investment, which is the subject of an application, are not within the scope of its review under Criterion 9(K). See Rutland Public Schools, Land Use Permit #1R0038-EB, Findings of Fact at 2 (June 26, 1992). Therefore, Marcia Kepnes' party status under Criterion 9(K) was rendered moot in the original proceeding. During the hearing on reconsideration, Marcia Kepnes renewed her request for party status under Criteria 5 and 9(K), arguing that these issues were relevant. For the above reasons, this request was denied.

11. On December 30, 1993 the Appellant filed an interlocutory appeal with the Board. The Board issued a Memorandum of Decision on February 17, 1994 which denied the Appellant's request for interlocutory appeal, and instead, instructed her to appeal the District Commission's denial of party status after the District Commission completed its reconsideration of application #5W1160-Revised.

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12. On February 25, 1994 the District Commission issued the Permit. On March 24, 1994 the Appellant appealed the issuance of the Permit to the Board.
13. In its May 7, 1993 denial of application #5W1160-Revised, the District Commission made a positive finding under Criterion 10 which stated:

The Commission finds that this project is in conformance with the local and regional plans. This finding is based on and supported by the following:

1. The regional plan's goals include a regional approach to the planning of educational facilities and efficient utilization of public facilities.
  2. The City of Barre Municipal Plan states that the community has a "firm belief that excellence accompanies the small, manageable units" associated with neighborhood schools and that these schools instill a sense of community. However, one of the plan's educational objectives is to "allow for adequate maintenance and/or new construction or tuition and transportation costs of any alternative selected." Exhibit 117, pp 34-5.
  3. The Barre City Planning Commission has approved the project. Exhibit HH.
14. With regard to what modifications the Appellee made to application #5W1160-Revised, in its February 25, 1994 decision the District Commission stated, in part:

As originally planned, the School District would have located the project (construction of a 126,000 square foot K-8 elementary school with parking area and athletic fields) on 13.8 acre and 9.1 acre parcels of land owned by NSB [Northfield Savings Bank]. The 13.8 acre parcel includes an approximately

two acre area that was the site of a construction and demolition debris dump. (Throughout these Findings of Fact the Commission refers to this two acre areas as the Construction Debris Area or CDA.) Construction of the Project would have resulted in the excavation and relocation of construction and demolition debris. The District Commission concluded that excavation and relocation of the waste failed to comply with Department of Environmental Conservation Solid Waste Management Regulations and the application was denied.

Applicants now plan to locate the Project approximately 400' south of its former site. The Project, as modified, involves portions of a 13 acre parcel now owned by Gordon Booth, a 0.60 acre parcel now owned by Norman and Madeline Booth, and the adjacent NSB 13.8 acre parcel. Gordon Booth's land is in the Town of Barre. The NSB 9.1 acre parcel will not be conveyed to the School District and is not considered land involved in the Project. Construction of the Project as modified, was designed to avoid disturbance of the construction and demolition debris on the NSB 13.8 acre parcel. The CDA is not proposed for any use by the School District and will be covered with a minimum of two feet of clean fill.

Applicants originally planned to access the Project site during construction over a railroad right-of-way that intersects Bridge Street in Barre Town. Applicants now plan to build a 24' wide temporary road which will extend to the Project site from Allen Street in Barre Town.

The District Commission previously ruled that the City of Barre's replacement of the Parkside Terrace Bridge, which is located on the primary access to the new

school must be considered jointly with the school Project.

Originally, a temporary bridge was planned. The present application is for construction of a permanent bridge. Pedestrian access to the City recreation area during replacement of the bridge will be over Mill Street with implementation of additional traffic controls. Under this proposal, if the bridge is not complete when the Project is ready for occupancy, the Allen Street construction road would provide temporary access to the Project.

(Emphasis in original.)

15. In its February 25, 1994 decision the District Commission's findings of fact under Criterion 10 stated:

The Commission finds that this project is in conformance with the local and regional plans. This finding is based on and supported by the following:

1. The regional plan's goals include a regional approach to the planning of educational facilities and efficient utilization of public facilities.
2. The City of Barre Municipal Plan states that the community has a "firm belief that excellence accompanies the small, manageable units" associated with neighborhood schools and that these schools instill a sense of community. However, one of the plan's educational objectives is to "allow for adequate maintenance and/or new construction or tuition and transportation costs of any alternative selected." (Exhibit 117, pp 34-5)
3. The Barre City Planning Commission has approved the project. (Exhibit

HH) (See also R-11)

4. The City of Barre has a duly adopted Capital Budgeting Program for fiscal years 1993 through 1998. This capital budget specifically allocates funds for the reconstruction of the Parkside Terrace Bridge for 1993-94. (See Exhibit PTB-30/Capital Budgeting Program for the City of Barre)

(Emphasis in original.)

16. The City of Barre Comprehensive Master Plan, dated November 13, 1985 (the 1985 City Plan), provides, in part:

#### VIII. EDUCATIONAL FACILITIES

EXISTING CHARACTERISTICS - The educational network within the City of Barre is shaped, to a great extent, by a tradition of neighborhood schools. A firm belief, that excellence accompanies the small, manageable, units and that a sense of community is thereby instilled in our students, seems to underlie this choice. Unavoidably, however, students in some special education programs are bussed to Barre Town daily and currently some of the youngest children within the City are bussed across town for kindergarten and pre-first grade programs.

Other academic programs and sports activities require classrooms, practice space or playing fields not available in close proximity to particular schools and so, again, Barre Town facilities or the facilities of other City schools are used. Students from Washington, Orange, and Barre Town also travel to the City for special education programs.

A major obstacle to the neighborhood school system lies in the difficulty of maintaining or upgrading

school buildings, to achieve safety and/or energy efficiency.

\* \* \*

PREMISE - If the neighborhood school structure is to be retained, it will become increasingly important that a capital budgeting system be put in place for maintainance (sic) and improvement of structures currently utilized. To continue with no savings toward an eventual major repair or replacement, courts the demise of the system.

GOAL - To achieve excellence in education at an affordable cost.

POLICY - Through open communication with the residents of Barre City, the school board should gain support for budgetary expenditures required to meet the new education standards.

OBJECTIVE - To determine long-term costs relative to maintaining the existing school facilities, along with costs of the various alternatives, and thereafter to prepare a capital budget which will allow for adequate maintainance and/or new construction or tuition and transportation costs of any alternative selected.

17. The City of Barre Municipal Plan adopted on November 17, 1992 (the 1992 City Plan), provides in part:

#### VII. EDUCATIONAL FACILITIES

The City of Barre had been served by seven elementary schools (Spaulding Graded, Lincoln, Mathewson, North Barre, Ward 5, Ayer Street and Brook Street) until the early 1980's when the Ayer Street School was closed. The remaining six elementary schools and Spaulding High School have served the community's educational needs since that time.



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However, the six elementary schools, which were built between 1891 and 1914, now all need substantial renovations in order to comply with accessibility requirements, health and safety codes and Public School Approval Standards. In addition, the buildings are difficult to heat and costly to maintain.

After years of study and discussion, the voters of Barre City recently voted (on two separate occasions) overwhelmingly in favor of constructing a new elementary/middle school. This new facility will house all students (kindergarten through eighth grade []) in three separate schools under one roof near the Municipal Swimming Pool off of Parkside Terrace. The new school will allow the City school district to provide a complete and varied educational program in an efficient manner.

There are already indications that people with young families are more interested in remaining in and moving into Barre City now that the new school is about to become a reality. This improvement in education opportunity will help the future growth potential of the community.

\* \* \*

Bus Transport: C.V.T.A. Wheels provides bus service between Barre and Montpelier as well as from Barre to the Central Vermont Hospital. (C.V.T.A. Wheels also coordinates volunteer drivers and ride sharing opportunities for people that don't have their own transportation[.]) Coordination between C.V.T.A. Wheels and the City in regard to the potential need/location of bus stops is important in order to ensure that these locations are safe and accessible.

\* \* \*

The construction of the new elementary school may also provide additional opportunities for the coordination of bus transportation between C.V.T.A. Wheels and the City school district.

18. The Central Vermont Regional Planning Commission Regional Land Use Plan, adopted June 13, 1989 (the 1989 Regional Plan), provides, in part:

**REGIONAL FACILITIES AND SERVICES**

Rationale

The distribution and provision of facilities and services in the Region stimulates and guides growth to specific locations and can have a powerful effect on the density, timing, and amount of new development. Improved coordination and planning among local officials, organizations, boards, and citizens will insure economies of operation and quality of service.

The Region's facilities include . . . schools. The goal of the Region is to achieve maximum coordination and efficiency of distribution in the provision of these facilities and services.

**Policies**

\* \* \*

- Through improved coordination among planning commissions, school boards and the State Department of Education, a regional approach to planning for the placement and timing of construction of educational facilities is encouraged.

19. The 1989 Regional Plan expired as of January 1, 1993. The Central Vermont Regional Planning Commission did

not adopt a succeeding regional plan until May 11, 1993 (the 1993 Regional Plan).

20. The Town of Barre Municipal Plan, adopted June 30, 1992 (the 1992 Town Plan), provides in part:

Bus Transportation: Bus transportation for Barre Town Elementary School students is currently provided at Town expense. This service benefits the Town in several ways. It provides a safe and dependable way to pick up and transport children to school; it is more economical than transportation of children by private automobile; and it reduces the amount of traffic congestion and air pollution which would result from private automobile transportation. **This service should be continued, and the feasibility of expanding the service to include high school students attending Spaulding High School in Barre City should be explored.** (Emphasis in original.)

Commercial bus transportation services are provided locally by CVTA (Central Vermont Transportation Authority) and other privately owned bus/van companies. **Although service is available on a limited basis, efforts to expand the service, particularly to the most densely populated areas of the Town, should be encouraged.** (Emphasis in original.)

**Construction of bus turnouts and shelters should be considered at major pickup points in those areas, as that would provide greater safety and convenience, not only for bus patrons, but for motorists as well.** (Emphasis in original.)

#### IV. OFFICIAL NOTICE

The Appellant requested that the Board take official notice of certain documents and a videotape as outlined in the Appellant's Statement of Facts and Memorandum of Law

filed with the Board on May 16, 1994. The Appellee did not object to the Appellant's request. The Board may make findings of fact based on matters officially noticed. See 3 V.S.A. §§ 809(g) and 814 and 10 V.S.A. § 6089(a). The Board may take official notice at any stage of the proceedings. In re Handy, 144 Vt. 610, 613 (1984). As requested by the Appellant, the Board takes official notice of the following:

1. City of Barre Map, provided by CVTA, with additional inking and coloring by the Appellant;
2. Family Transportation Survey Results and Questionnaire, September 1992;
3. Videotape of the District Commission's December 13, 1993 hearing;
4. The 1985 City Plan;
5. The 1989 Regional Plan;
6. The 1992 City Plan;
7. The 1992 Town Plan;
8. The 1993 Regional Plan; and
9. Capital Budgeting Program for the City of Barre, adopted March 1, 1993 (date only).

V. CONCLUSIONS OF LAW

A. Appellant's Criterion 9(K) party status request

The Appellant appeals the District Commission's denial of her request for party status under Criterion 9(K). Criterion 9(K) provides, in part:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to . . . schools . . . when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or

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enjoyment of or access to the facility, service, or lands.

Criterion 9(K) addresses the effect of a proposed development upon the public's investment in public facilities and services and does not speak to the public's investment in the project which is the subject of the application. Re: Rutland Public Schools, #1R0038-4-EB, Memorandum of Decision at 3 (Jan. 29, 1992). Where the public investment is in the project itself, "the governing body of the public entity proposing the project has the discretion to decide whether it is an appropriate public investment and the responsibility for its consequences." Id. The Board concludes that how non-driving parents will travel to the Barre School is beyond the scope of Criterion 9(K). Therefore, the Board denies the Appellant's request for party status under Criterion 9(K).

B. Appellant's Criterion 10 party status request

The Appellant seeks party status under Criterion 10 so that she may appeal the District Commission's decision to issue the Permit. The Appellant contends that how non-driving parents travel to the Barre School is within the scope of Criterion 10.

The Appellee contends that the Appellant's failure to request party status under Criterion 10 before the District Commission bars her from now seeking party status on Criterion 10 before the Board. See Re: Derby Plaza Associates Limited Partnership, #7R0886-EB, Memorandum of Decision (Feb. 25, 1994). Further, the Appellee contends that even if the Appellant is entitled to seek party status, the issue of how non-driving parents travel to the Barre School is beyond the scope of Criterion 10 in that the applicable regional and local plans do not address this issue.

Without deciding whether the Appellant's request for party status is proper under the Derby decision, the Board concludes that the issue of how non-driving parents travel to the Barre School is beyond the scope of Criterion 10 in that the applicable regional and local plans do not address this issue.

On December 1, 1992 the Appellee submitted application #5W1160-Revised for the Barre School. On May 7, 1993 the District Commission denied application #5W1160-Revised. On December 13, 1993 the District Commission began its

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reconsideration of application #5W1160-Revised for the Barre School pursuant to Board Rule 31(B).

Board Rule 31(B) provides, generally, that an applicant may, within six months of the date of the district commission's decision, "apply to the district commission for reconsideration of his application," and that the district commission "may, but need not necessarily, limit its scope of review to those aspects of the project or application which have been modified to correct deficiencies noted in the prior permit decision." Under Board Rule 31(B), reconsideration does not constitute the submission of a new application. See Re: Sherman Hollow, Inc., #4C0422-5R-1-EB, Findings of Fact, Conclusions of Law, and Order (Revised) at 17-19 (June 19, 1992), aff'd 160 Vt. 627 (1993). Rather, proceedings before a district commission pursuant to Board Rule 31(B) constitute the review of the original, albeit modified, application. Therefore, the applicable town and regional plans in a proceeding under Board Rule 31(B) are the same town and regional plans which were applicable when the original application was reviewed by the district commission, and any additional plans which may become applicable due to project modifications. See In re Frank A. Molgano Jr., No. 93-017, slip op. at 7 (Vt.Sct. Nov. 10, 1994); In re Taft Corners Associates, Inc., 160 Vt. 583, 593 (1993); In re Ross, 151 Vt. 54, 58 (1989); In re Preseault, 132 Vt. 471, 474 (1974).

Based on this interpretation of Board Rule 31(B), the applicable town and regional plans in the District Commission's reconsideration proceeding are the 1989 Regional Plan, the 1992 City Plan, and the 1992 Town Plan. These were the regional and local plans which were in effect on December 1, 1992, that is, the day the Appellee originally filed application #5W1160-Revised with the District Commission.

We note that the District Commission's findings of fact under Criterion 10 in both the May 7, 1993 and February 25, 1994 decisions pertain to the 1985 City Plan and not to the 1992 City Plan even though the latter became effective on November 17, 1992. In addition, the findings under Criterion 10 in the February 25, 1994 decision are silent as to the 1992 Town Plan. Therefore, although not compelled to do so, the Board, in this instance, has considered whether the Appellant's request for party status is relevant under the regional and local plans that were used by the District Commission and those that should have been used.

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The 1989 Regional Plan endorses a regional approach to new construction of educational facilities. This endorsement is made without any requirement that before new construction occurs, an assessment be made as to how non-driving parents with school aged children and the at-large non-driving public would travel to a newly constructed regional institution.

The 1985 City Plan describes the educational network within the City of Barre as being shaped by the tradition of "neighborhood schools." The 1985 City Plan goes on to state, however, that a major obstacle to the neighborhood school system lies in the difficulty of maintaining or upgrading school buildings. The issue of how non-driving parents with school aged children and the at-large non-driving public would travel to a centralized school is not addressed in the 1985 City Plan.

The 1992 City Plan specifically endorses the construction of the Barre School. This endorsement is made without any requirement that construction of the Barre School be contingent upon transportation services being provided for non-driving parents with school aged children or the at-large non-driving public.

The 1992 Town Plan is silent on the issue of the Barre School. With regard to transportation for Barre Town elementary school aged students, the 1992 Town Plan endorses the provision of bus transportation at the town's expense. The issue of how non-driving parents with school aged children and the at-large non-driving public would travel to a centralized school is not addressed in the 1992 Town Plan.

The Board concludes that the Appellant's interest relative to non-driving parents is outside the scope of the plans that were or should have been used by the District Commission. Further, because no appeal has been made to the Board by a party with standing on Criterion 10 as to which regional and local plans were or should have been used, the Board will not consider whether grounds exist to remand application #5W1160-Revised to the District Commission for further proceedings under Criterion 10. The Board recognizes the legitimacy of the Appellant's concern. Nevertheless, the Board concludes that the Appellant's concern relative to non-driving parents is beyond the scope of Criterion 10.

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VI. ORDER

1. The motion to dismiss the Appellant's appeal is granted.

2. Jurisdiction is returned to the District #7 Environmental Commission.

Dated at Montpelier, Vermont, this 30th day of January, 1995.

ENVIRONMENTAL BOARD

*Art Gibb (dly)*

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Art Gibb, Chair  
Lixi Fortna  
Samuel Lloyd  
Steve Wright  
Larry Bruce  
Anthony Thompson

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