

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

RE: Larry & Diane Brown by
Frederick G. Cleveland, Esq.
McKee, Giuliani & Cleveland
94 Main Street
P.O. Box F
Montpelier, VT 05602

Land Use Permit
#5W1175-1-EB

MEMORANDUM OF DECISION

This memorandum of decision pertains to three preliminary issues. As explained below, the Environmental Board (1) acknowledges for the record that Mr. Duhamel has withdrawn his request for party status under Criterion 9(B) (primary agricultural soils); (2) denies Mr. Donnelly's request for party status under Criterion 5 (traffic); and (3) rules that the involved land of the project authorized by Land Use Permit #5W1175-1-EB (the Permit) is 32.2 acres.

I. BACKGROUND

On November 5, 1993, the District #5 Environmental Commission issued the Permit to Larry and Diane Brown (the Permittees) for the construction of a one story commercial building, 74' by 160' in size, on a 19.3 acre tract of land located on Route 14 in East Montpelier, Vermont, for use in the Permittees' printing business (the Project).

The Project includes the construction of an access road from Route 14 and a connecting road between the proposed new building and an existing, permitted commercial building on an adjacent 12.9 acre tract. The existing permitted commercial building on the adjacent 12.9 acre tract is authorized pursuant to Land Use Permit #5W1175.

On December 3, 1993, Donald H. Donnelly, an **adjoiner** to the Project, appealed from the District Commission's issuance of the Permit with respect to Criteria 5 (traffic), 8 (aesthetics), and 10 (conformance with the East Montpelier Town Plan). Mr. Donnelly has party status on Criteria 8 and 10.

On December 3, 1993, Peter Noel Duhamel, also an **adjoiner** to the Project, appealed from the District Commission's issuance of **the Permit** with respect to Criteria 8 (aesthetics), 9(B) (primary agricultural soils), and 10 (conformance with the East Montpelier Town Plan). Mr. Duhamel has party status on Criteria 8 and 10.

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On January 11, 1994, Environmental Board Chair Courtney convened a prehearing conference. Three preliminary issues were identified:

1. Whether to grant Mr. Duhamel's request for party status under Criterion 9(B).
2. Whether to grant Mr. Donnelly's request for party status under Criterion 5.
3. Whether the involved land of the Project is 19.3 or 32.2 acres of land.

Chair Courtney set deadlines for the submission of memoranda on the three preliminary issues.

On February 4 and 18, and on March 2, 1994, the Permittees filed memoranda on the preliminary issues.

On February 4 and 18, 1994, Mr. Duhamel filed memoranda on the preliminary issues.

On February 7 and 18, 1994, Mr. Donnelly filed memoranda on the preliminary issues.

On February 16, 1994, Chair Courtney appointed Board member Steve E. Wright Acting Chair in this appeal.

On March 2, 1994, the Board deliberated on the preliminary issues addressed herein.

II. DECISION ON PRELIMINARY ISSUES

1. Whether to grant Mr. Duhamel's request for party status under Criterion 9(B) (primary agricultural soils).

Following the Prehearing Conference, Mr. Duhamel withdrew his request for party status under Criterion 9(B). Therefore, his party status in this appeal is limited to Criteria 8 (aesthetics) and 10 (conformance with the East Montpelier Town Plan).

2. Whether to grant Mr. Donnelly's request for party status under Criterion 5 (traffic).

Mr. Donnelly requests party status under Criterion 5 in order to appeal Criterion 5. Mr. Donnelly did not request party status under Criterion 5 before the District Commission. The Permittees object to Mr. Donnelly's request for party status under Criterion 5. No other party has appealed

Criterion 5. To be granted party status, Mr. Donnelly must:

- a. address the requirements of Board Rule 14(A)(3) with regard to his request for party status under Criterion 5; and
- b. demonstrate that substantial inequity or injustice would result unless the Board expands the scope of the appeal to include Criterion 5. This may require a showing that Mr. Donnelly had good cause for not seeking party status at the District Commission proceeding.

See 10 V.S.A. § 6085(c); Re: Okemo Mountain, Inc., #2S0351-10B-EB, Memorandum of Decision at 3 (Jan. 15, 1993); Re: L&S Associates, #2W0434-8-EB, Memorandum of Decision at 2 (Nov. 24, 1992).

Mr. Donnelly contends that substantial inequity or injustice would result unless his party status is expanded to include Criterion 5 so that he can appeal the District Commission's affirmative finding under Criterion 5 on behalf of the traveling public. Further, Mr. Donnelly states that he did not seek party status on Criterion 5 at the District Commission proceeding because he thought the District Commission's role was to protect his interests relative to Criterion 5.

The District Commission made findings of fact and conclusions of law under Criterion 5 in the Permit. While Mr. Donnelly may disagree with the District Commission's decision, the Board concludes that the District Commission made an affirmative finding under Criterion 5. The Board concludes that Mr. Donnelly has not demonstrated that substantial inequity or injustice would result unless the Board expands his party status to include Criterion 5.

3. Whether the involved land of the Project is 19.3 or 32.2 acres of land.

The Project is to be built on a 19.3 acre parcel of land. None of the parties dispute that this tract is involved land for purposes of the Project. Rather, the issue is whether the involved land of the Project should include an adjacent 12.9 acre tract of land owned by the Permittees and where the Permittees have constructed their existing, permitted commercial building, as authorized by Land Use Permit #5W1175.

The Permittees contend that the involved land of the Project is 19.3 acres. The Permittees rely upon the Board's decision in Re: Litwhiler and H.A. Manosh, #5L1006-EB, Memorandum of Decision (March 29, 1989) in support of their

contention. In Litwhiler the Board declined to find as involved land two permitted, functionally related, non-contiguous tracts of land.

Mr. Duhamel and Mr. Donnelly contend that the 12.9 acre tract should be considered involved land because it is functionally related and contiguous to the 19.3 acre "project" tract.

Under Board Rule 2(A)(2), a project is a "development" if it is "the construction of improvements for any commercial or industrial purpose, including commercial dwellings, which is located on a tract or tracts of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres."

Board Rule 2(F)(1) defines "involved land" as "the entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs."

In In re Gerald Costello Garaae, 158 Vt. 655 (1992), the appellant asked the Vermont Supreme Court to reverse the Board's conclusion that two contiguous parcels are a "tract" within the meaning of the phrase "tract or tracts of land of more than one acre owned or controlled by a person" under Board Rule 2(A)(2). The Vermont Supreme Court upheld the Board's ruling that two contiguous tracts were a single "tract" within the meaning of the phrase "tract or tracts of land of more than one acre owned or controlled by a person," and that there is no requirement of "involvement" in the sense of a functional relationship between two contiguous parcels of land in common ownership.

A recent application of the Costello decision by the Board to a case before it is Re: Spring Brook Farm Foundation, Inc., Declaratory Ruling Request #290, Prehearing Conference Report and Order and Memorandum of Decision at 3 (Jan. 6, 1994). In Spring Brook, the Board found that two contiguous tracts were involved land as a single tract, notwithstanding that the latter tract had no functional involvement with the development occurring on the former tract.

Accordingly, under the reasoning of the Costello and Spring Brook decisions, the mere fact that the 12.9 acre tract and 19.3 acre tract are owned by a person and are contiguous means that the involved land of the Project is 32.2 acres. Such a conclusion in this case is more compelling because a functional relationship and a connecting road exists between the two contiguous tracts.

The Board concludes that the District Commission erred when it found the involved land of the Project to be only the 19.3 acre tract. The Board rules that the involved land of the Project includes the 12.9 and 19.3 acre tracts, and that for purposes of Act 250 jurisdiction over the Project, there is a single 32.2 acre tract.'

III. ORDER

1. Mr. Duhamel is granted party status on Criteria 8 (aesthetics) and 10 (conformance with the East Montpelier Town Plan), pursuant to 10 V.S.A. § 6085(c) and Board Rule 14(A)(3).

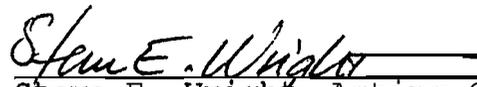
2. Mr. Donnelly's request for party status under Criterion 5 is denied. Mr. Donnelly is granted party status on Criteria 8 (aesthetics) and 10 (conformance with the East Montpelier Town Plan), pursuant to 10 V.S.A. § 6085(c) and Board Rule 14(A)(3).

3. The issues in this appeal shall be the two issues identified in Section III of the Prehearing Conference Report and Order dated January 14, 1994.

4. The involved land of the Project is a single 32.2 acre tract.

Dated at Montpelier, Vermont, this 17th day of March,
1994.

ENVIRONMENTAL BOARD


Steve E. Wright, Acting Chair
Lixi Fortna
Arthur Gibb
Samuel Lloyd
William Martinez
John Ewing

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¹The Board also notes that the Permittees' property is taxed in the 1993 East Montpelier Grand List as a single 31.96 acre tract.