

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

RE: Larry & Diane Brown by
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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 motions filed by the parties. As explained below, the Environmental Board (a) will rule on the **Permittees'** partial motion to dismiss in conjunction with its decision on the merits of the appeal brought by the appellants Mr. Duhamel and Mr. Donnelly; (b) denies Mr. **Duhamel's** request for an extension to file prefiled testimony; and (c) denies Mr. **Duhamel's** request that the Permittees be compelled to submit more information relative to the project on appeal.

I. BACKGROUND

On November 5, 1993, the District #5 Environmental Commission (the District Commission) issued Land Use Permit #5W1175-1-EB (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 Permit includes, as part of the Project, 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.

On December 3, 1993, Peter Noel Duhamel, also an **adjoiner** to the Project, appealed from the District Commission's issuance of the Permit.

On July 28, 1994, the Permittees filed a Motion to Dismiss in Part pursuant to Board Rule 18(D). As part of their motion, the Permittees voluntarily relinquished their right to construct the Project as authorized by the Permit.

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The Permittees have not relinquished their right to construct the roadway and sign as authorized by the Permit.

On August 3, 1994 Peter Noel Duhamel filed a request for an extension of time in which to file prefiled testimony. Mr. Duhamel did not file prefiled direct testimony. Prefiled direct testimony was to be filed on or before August 3, 1994 as provided for in the Acting Chair's memorandum to parties dated May 2, 1994.

On August 11, 1994, the Permittees filed a memorandum in opposition to Mr. Duhamel's request for an extension.

On August 19, 1994 Acting Chair Wright issued a memorandum to the parties which denied Mr. Duhamel's request for an extension of time in which to file prefiled testimony, but indicated that Mr. Duhamel still had the opportunity to file prefiled rebuttal testimony relative to the issues in this appeal.

Prefiled rebuttal testimony from the parties was due to be filed on or before August 31, 1994.

On August 31, 1994 Mr. Duhamel filed a "Motion for a Ruling by the Board on Permittees' Motion to Dismiss" and a "Motion to Compel the Permittees to Make a More Definite Statement." Mr. Duhamel did not file prefiled rebuttal testimony.

On September 2, 1994 the Permittees filed a response to Mr. Duhamel's August 31, 1994 motions. On September 9, 1994 Mr. Duhamel filed a reply to the Permittees' September 2, 1994 response.

II. DECISION

A. Permittees' Motion to Dismiss

Motions to Dismiss are governed by Board Rule 18(D). Under Board Rule 18(D), the Board may, on its own motion, entertain oral argument prior to considering any such dismissal. Prior to convening an oral argument, notice must be given to the parties unless dismissal is considered at a regularly convened hearing on the matter. The Board hereby so motions that an oral argument relative to the Permittees' Motion to Dismiss be held. The Board intends to convene an oral argument on the Motion to Dismiss on Wednesday, September 28, 1994 during the regularly convened hearing in this matter.

B. Motions by Mr. Duhamel

1. August 3, 1994 Motion for Extension of Time.

In response to the **Permittees'** Motion to Dismiss, Mr. Duhamel filed a request for an extension of time in which to file prefiled testimony. In a memo to the parties, Acting Chair Wright denied Mr. Duhamel's request for an extension, but did point out that Mr. Duhamel could address his concerns as stated in his extension request in his prefiled rebuttal testimony. Mr. Duhamel has not filed prefiled rebuttal testimony.

The deadlines for the submission of prefiled direct and rebuttal testimony are set pursuant to Board Rule 16. Deadlines established must be complied with except as otherwise allowed by Board Rule 16.

Mr. Duhamel had until August 3, 1994 to prefile direct testimony relative to the Project. The Board concludes that if, on August 3, 1994, Mr. Duhamel was prepared to submit prefiled testimony on the Project authorized by the Permit, it was reasonable to assume his prefiled direct testimony would have included evidence regarding the road and sign, that is, the portion of the Project which the Permittees have not voluntarily relinquished. Further, Mr. Duhamel still had the opportunity until August 31 to file prefiled rebuttal testimony to address the concerns which he asserted **as** the grounds for his direct prefiled testimony extension request. Mr. Duhamel has filed no prefiled rebuttal testimony.

Therefore, after reviewing all of the parties' submissions filed through September 9, 1994, the Board concludes that no cause has been shown, and nor does fairness require, that the deadlines established for the submission of prefiled testimony be altered.

2. August 31, 1994 Motion for a Ruling by the Board on **Permittees'** Motion to Dismiss and Motion to Compel the Permittees to Make a More Definitive Statement.

Mr. Duhamel contends that he has been prejudiced by the **Permittees'** pending Motion to Dismiss such that the record before the Board is in a "confusing state." Mr. Duhamel contends that the **Permittees'** voluntary relinquishment of their right to construct the building as authorized by the Permit has deprived him of his constitutional rights to procedural due process and substantive due process, **as** well as being contrary to the "Guide for Applying for a Land Use

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Permit Under Act 250." Specifically, Mr. Duhamel contends that he has been deprived of a meaningful opportunity to focus on what aspects of the Project remain in light of the **Permittees'** Motion to Dismiss. Furthermore, Mr. Duhamel contends that his rights have also been prejudiced because the Board has not issued a ruling on the **Permittees'** Motion to Dismiss.

Mr. Duhamel requests that the Board issue a decision on the **Permittees'** Motion to Dismiss forthwith and (a) if the motion is granted, order the Permittees to file for a permit amendment, or (b) if the motion is denied, to dismiss the Permit due to the failure of the Permittees to establish a prima facie case.

Proceedings before the Board are contested cases under Vermont's Administrative Procedure Act (the APA). 10 V.S.A. § 6089(a) and 3 V.S.A. Chapter 25.

Under Section 809 of the APA, all parties shall be given an opportunity for hearing after reasonable notice. However, the adequacy of an original notice is not the limit of what parties before the Board are entitled to. Basic principles of fairness require that the parties be given an adequate opportunity to prepare and respond to the issues raised in the proceeding. In re Vermont Health Service Corp., 155 Vt. 457, 461 (1990).

Mr. Duhamel has had an adequate opportunity to prepare and respond to the issues raised in this appeal.

The issues in this appeal were identified in the January 14, 1994 Prehearing Conference Report and Order, and confirmed in the Board's March 17, 1994 Memorandum of Decision. Deadlines for the submission of prefiled testimony were included therein.

On April 19, 1994 the Permittees requested an extension of time to file prefiled testimony. In making the request, the Permittees represented that such request was made with the knowledge and consent of Mr. Duhamel (and Mr. Donnelly). Accordingly, the dates for the submission of prefiled direct and rebuttal testimony were extended by agreement of all of the parties, Mr. Duhamel included, as provided in Acting Chair Wright's May 2, 1994 memorandum to parties.

On July 28, 1994 the Permittees filed their Motion to Dismiss. There is nothing in Board Rule 18(D) suggesting that a deadline for the submission of prefiled testimony is tolled

by the filing of a motion to dismiss. At the very least, Mr. Duhamel could have filed his direct testimony on August 3, 1994 and thereafter requested permission to supplement it after further considering the ramifications of the Permittees' Motion to Dismiss.

Mr. Duhamel had another opportunity to address those concerns of his which arose out of the Permittees' Motion to Dismiss with the submission of prefiled rebuttal testimony, and Acting Chair Wright's August 19, 1994 memorandum reminded Mr. Duhamel of this fact. Mr. Duhamel filed no rebuttal testimony.

Finally, there is nothing in Board Rule 18(D) suggesting that the Board is obligated to render a decision on a motion to dismiss prior to convening a hearing. Specifically, Board Rule 18(D) allows the Board to convene oral argument on its own motion without notice to the parties if oral argument takes place at a regularly convened hearing on the matter. Thus, the Board can wait until such hearing is over before it begins to consider the merits of a motion to dismiss.

The Board concludes that it has complied with the basic principles of fairness required under the APA. The parties have long known the issues in this appeal, and the deadlines for the submission of prefiled direct and rebuttal testimony.

Under Act 250 itself, before an appeal may be made to the Board, an application for a permit must be made to a district commission. The district commission must then comply with a system of notice and hearings, give full consideration to the proposed project, and issue a decision which either denies or grants a permit. In re Juster Associates, 136 Vt. 577, 581 (1978). The Board has no jurisdiction to decide issues regarding criteria that were not before the district commission and not ruled upon by it. In re Taft Corners Associates, Inc., No. 92-215, slip op. at 9 (Vt. Sct. Apr. 30, 1993); In re Vermont Gas Systems, 150 Vt. 34, 40 (1988).

As issued by the District Commission, the Permit specifically authorizes a project which includes the construction of an access road from Route 14 to a newly authorized building, and from there, to an existing building, all as depicted on District Commission Exhibit #20, and as offered by the Permittees in their prefiled testimony as exhibit P-13.

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The Board concludes that at this point, it would be premature and a waste of judicial economy to remand this appeal to the District Commission.

The Permittees voluntary relinquishment of their right to all but the roadway and sign do not appear to require the Board to consider potential impacts under the Act 250 criteria which have not first been reviewed by the District Commission. The Board has never required that a change made to a project during the pendency of an appeal mandates automatic remand for the filing of a new permit amendment application. Ree : Sherman Hollow. Inc., #4C0422-5R-1-EB, Findings of Fact, Conclusions of Law, and Order at 5 and 19 (Nov. 19, 1991).

The Permittees' Motion to Dismiss has not altered the issues in this appeal. The issues remain whether or not the Project complies with Criteria 8 and 10. To the extent that the Permittees seek to change the scope of the Project, the Board concludes that Mr. Duhamel has not been prejudiced because the Permittees' stated intent is retain only a portion of the Project authorized by the Permit. While the Board reviews the Project de novo, the fact remains that if Mr. Duhamel was prepared to submit prefiled testimony on August 3 relative to the Project authorized by the Permit, it's reasonable to assume that his prefiled direct testimony would have included evidence regarding the portion of the Project which the Permittees have not voluntarily relinquished.

The Permittees have filed an affidavit and prefiled testimony as to the scope of the Project. In the affidavit, the Permittees state that they have constructed a roadway as authorized by the Permit. While it is clearly the Permittees' responsibility to adequately describe the Project, if Mr. Duhamel is truly confused as to its scope, he need only request of the Permittees that he be allowed onto the premises to view the roadway as constructed. Even if the Permittees were to deny such a request, the Board has ruled in a prior proceeding that the "structure and purposes of Act 250 imply a power to compel an applicant to grant site access to a party to the Act 250 proceeding regarding its application." Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision at 15 (March 28, 1990). As far as the Board knows, Mr. Duhamel has not requested of the Permittees that he be allowed onto the premises to view the Project.

Finally, if any further clarification is required, the parties will have an opportunity to cross-examine the Permittees' witnesses at the hearing on September 28, 1994.

In addition to cross-examination, the Board has the right to ask questions of all witnesses and, in any event, the Board intends to conduct a site visit. Since it is the Board's obligation to make findings on Criteria 8 and 10 in this appeal, it is the **Permittees'** risk as to whether its prefiled testimony describes the Project with sufficient precision. If the Board cannot discern what the Project is, then the Permit will be denied.

Therefore, this appeal shall proceed subject to the Board's convening of a hearing and oral argument on September 28, 1994.¹ The Board will not require that the **Permittees'** file a more definite statement as to the scope of the Project.

III. ORDER

1. The Board hereby so motions that an oral argument **relative to the Permittees' Motion to Dismiss be held.** The Board intends to convene an oral argument on the Motion to Dismiss on Wednesday, September 28, 1994 during the regularly convened hearing in this matter.

2. Since no cause has been shown, and nor does fairness require, Mr. Duhamel's request for an extension of time to file prefiled testimony is denied.

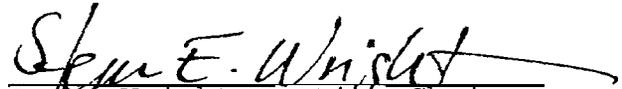
3. This appeal shall proceed subject to the Board's convening of a hearing and oral argument on September 28, 1994. Mr. Duhamel's request that the Board issue a ruling on the **Permittees'** Motion to Dismiss prior to September 28, 1994 is denied. Mr. Duhamel's request that the **Permittees'** be required to file a more definite statement as to the scope of the Project is denied.

¹The fact that the Board is not remanding the appeal at this time does not mean that it cannot do so if, after taking the evidence and holding oral argument, the Board concludes that impacts not reviewed by the District Commission would result if the Permittees' Motion to Dismiss is granted. Nor is the Board obligated to remand if such is the case. Rather, the Permit could be denied (although in such instance the Permittees could avail themselves of Board Rule 31(B)).

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Dated at Montpelier, Vermont, this 15th day of September,
1994.

ENVIRONMENTAL BOARD



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