

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

Re: Fred and Laura Viens

Land Use Permit Application #5W1410-EB

Memorandum of Decision

This matter is an appeal by Thomas and Kathleen Tafuto (Tafutos) to the Environmental Board (Board) from certain aspects of Land Use Permit #5W1410 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision), issued by the District 5 Environmental Commission (Commission) to Fred and Laura Viens (Viens), authorizing the construction and operation of an auto body repair shop located on a 16.69 acre tract off North Fayston Road in the Town of Fayston, Vermont (Project).

I. History

The history of this matter through May 22, 2003 may be found in the Prehearing Order of that date.

On June 18, 2003, the Viens filed a motion, requesting the Board to determine which Town Plan applies to the present case - the 1999 Fayston Town Plan or the 2002 Fayston Town Plan - and whether such plan(s) is ambiguous such that the Board should refer to the Fayston Zoning Regulations for guidance in interpreting the plan.

As a result of the Viens' motion, on June 23, 2003, the Chair of the Board issued a Chair's Preliminary Ruling, which continued certain filing dates in the Prehearing Order and established dates for parties to file responses to the motion.

The Viens and Tafutos have filed memoranda concerning the issues raised in the Viens' motion.

The Board deliberated on the Viens' Motion on July 16 and August 6 and 27, 2003. The Motion is now ready for decision.

II. Facts ¹

1. The Project is located within the Rural Residential District (RRD) of the Town of Fayston.
2. On August 10, 1999, the Viens received a permit from the Fayston Zoning Board of Adjustment for the Project as a "home occupation" under the 1999 Fayston Zoning Bylaws.
3. Fayston adopted new Zoning Bylaws on March 5, 2002.
4. In all respects pertinent to this matter, the 1999 Fayston Zoning Bylaws are identical to the 2002 Fayston Zoning Bylaws.
5. On May 19, 2002, the Viens filed an Act 250 application for the Project, which was deemed complete on June 27, 2002.
6. The Town Plan in effect at the time of the Viens' Act 250 application was the 1999 Fayston Town Plan.
7. Fayston adopted a new Town Plan on July 15, 2002.
8. On January 17, 2003, the Commission granted a permit to the Viens; the Commission affirmed this grant (with minor modifications) on March 27, 2002.
9. In granting the permit, the Commission applied the 1999 Fayston Town Plan.
10. The Tafutos' April 23, 2003 Notice of Appeal raises the specific issue: "Whether pursuant to 10 V.S.A. §6086(a)(10), the Project is in conformance with the 1999 Fayston Town Plan."
11. The Viens did not file a cross-appeal.
12. The 2002 Fayston Town Plan (Town Plan) includes the following language:

¹ These facts are gleaned from an examination of the Commission's Permit and Decision in this matter, the Board's file in this matter, and from the 2002 Fayston Town Plan, which has been cited by both the Viens and the Tafutos, and the 1999 and 2002 Fayston Zoning Ordinances. The Board takes official notice of these documents, pursuant to 3 V.S.A. §810(4). For purposes of this decision, none of these facts appear to be in reasonable dispute.

Goal 5.2

Objective 1, Implementation Strategies

a. Through zoning and enforcement, continue to encourage the location of home occupations throughout Town, while ensuring that home occupations do not adversely affect neighborhood character or the Town's rural character.

Town Plan at 9

§6.2.3 Development Regulations

Zoning Districts Permitted, conditional and prohibited uses for each Zoning District can be found in the Town of Fayston Zoning Ordinances.

Town Plan at 52.

§6.3.4 Rural Residential

Planning Considerations An increase in home occupations indicates that Fayston should continue to revise ordinances to allow suitable businesses, while maintaining the residential character of the district.

Town Plan at 56.

13. The Town Plan states in §5.4.3, *Commuting Patterns: Where We Work*, that Fayston is a "center for home-based employment" and is "increasingly a location for home-based business enterprises." Town Plan at 42.

14. The Town Plan states in §5.5.2, *Home-Based Employment*, that the "most significant 'growth industry' in Fayston's economy may be home-based businesses..." Town Plan at 43.

III. Discussion

The Viens' Motion asks the Board to apply the 2002 Fayston Town Plan to this appeal, as they believe that it is more favorable to their case. They further request the Board to find that the 2002 Fayston Town Plan is not ambiguous.

1. *Issue on appeal*

The Tafutos' Notice of Appeal raises the specific issue: "Whether pursuant to 10 V.S.A. §6086(a)(10), the Project is in conformance with the 1999 Fayston Town Plan." There was no cross-appeal.

Case law from the Vermont Supreme Court holds that once an Act 250 criterion is noticed for appeal, issues generally within the scope of the criterion are properly before the Board. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590-91 (1993), *In re Killington, Ltd.*, 159 Vt. 206 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372-73 (1990) (where one party appeals a criterion, other parties may seek review of such criterion without need for cross-appeal; to hold otherwise would encourage the filing of duplicitious appeals); and see *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, Memorandum of Decision at 9 (Sept. 9, 1999); *Re: Landmark Development Corporation*, #4C0667-EB (Jul. 9, 1987).

Here, the Tafutos' Notice of Appeal was specific in limiting the Criterion 10 issue on appeal to the question of the Project's compliance with the 1999 Town Plan. However, in keeping with *Green Peak Estates* and its progeny, the Chair's Prehearing Conference Report and Order framed the issue more broadly than compliance with the 1999 Town Plan, stating the issue as "Whether the Project satisfies 10 V.S.A. §6086(a)(10) (Fayston Town Plan)." The Prehearing Order allowed parties until June 4, 2003 to object to any provision of the Order, and; no party objected.

Prehearing Orders often reframe issues differently than those framed by an appellant's Notice of Appeal. The fact that the Prehearing Order in this case may have framed the issue more broadly than the Tafutos framed it is of no import. It is the issue as framed by the Prehearing Order that is the issue in this case, not the issue as framed by the Tafutos. Thus, the Viens may raise the issue of which town plan applies at this time.

2. *Whether the 1999 or the 2002 Fayston Town Plan governs the Viens' application*

Within the Act 250 context, the Court has held that an applicant obtains vested rights to have his project judged in accordance with the town plan in effect at the time a complete Act 250 application is filed. *In re Ross*, 151 Vt. 54 (1989). However, Board precedent allows Town Plan amendments which occur after the application date and which favor an applicant to be applied at the applicant's request:

Generally, the law which is in effect on the date a proceeding before the Board is commenced is the law of the case for purposes of Act 250 proceedings. However, the Board has in the past applied changes in

the law which occur during pendency of a case where the change benefits the applicant or has the effect of making the application of Act 250 to a particular applicant or project less onerous or restrictive.

Re: *Swedish Ski Club of Vermont Land Trust*, Declaratory Ruling #411, Findings of Fact, Conclusions of Law, and Order at 7 (Jan. 16, 2003) (citations omitted).

a. *The Town's position and the Molgano decision*

The Town (which apparently supports the Viens) takes a position opposite to the Viens as to which Town Plan applies. The Town contends the Court's decision in *In re Molgano*, 163 Vt. 25 (1994), holds that the Town Plan that was in effect at the time that the Viens commenced the local permitting process – the 1999 Fayston Town Plan – governs this case. It is important, however, to read *Molgano* in its context and with attention to its holding.

There were two holdings in *Molgano*. First, noting that the Manchester Town Plan was ambiguous, the Court ruled that the zoning regulations were essential to the plan's interpretation and should have been considered by the Board. *Molgano*, 163 Vt. at 30 (emphasis in original). Second, the Court concluded that Molgano had a vested right to have his project reviewed with reference to the zoning regulations which were in effect at the time that he applied for his local zoning permits: "[W]here, as here, a developer diligently pursues a proposal through the local and state permitting processes before seeking an Act 250 permit, conformance with a town plan under §6086(a)(10) is to be measured with regard to zoning laws in effect at the time of a proper zoning permit application." *Id.* at 33.

Molgano does *not* hold that a project is governed by the *town plan* that was in effect at the time the local zoning process was initiated. The case simply states that, when a town plan is ambiguous and the Board considers a municipality's zoning regulations to assist in its interpretation, the *zoning regulations* in effect when the local process began must govern, not regulations adopted at a later date.

The question of whether the Board must apply a *town plan* in existence at the time that a local process is commenced was neither presented nor answered by *Molgano*.

In any event, *Molgano* is a case involving vested rights; it allows an applicant to demand that a town's zoning regulations - those in effect at the time of its application for a local zoning permit – be used to interpret an ambiguous town plan. But the Viens do not seek to avail themselves of this right; rather, they have chosen to waive a vested rights claim and have a later Town Plan - the 2002 Fayston Town Plan - apply to their application. Under relevant Board precedent, they may do so, and *Molgano* does not require an alternative result.

3. Whether the 2002 Town Plan is ambiguous

a. Whether "home occupations" are allowed in the RRD

As noted, the Project is the construction and operation of an auto body repair shop located on a 16.69-acre tract in Fayston's RRD.

The Viens contend that their Project is a "home occupation" and that under the language of the 2002 Fayston Town Plan, home occupations are specifically allowed in the district in which the Viens live. Further, they argue, whether their Project falls within the definition of a "home occupation" is not an issue which the Board needs to decide; it is enough that home occupations are allowed in their area.

The question is whether the 2002 Town Plan allows home occupations in Fayston's RRD.

At several places, the 2002 Town Plan recognizes the existence of home occupations within the Town of Fayston. Specifically, the *Planning Considerations* portion of §6.3.4 *Rural Residential* reads: "An increase in home occupations indicates that Fayston should continue to revise ordinances to allow suitable businesses, while maintaining the residential character of the district." While there are also sections of the Town Plan that speak to the need to preserve the Town's rural character, nowhere in those provisions is there a prohibition on home occupations, and, specifically, there is no prohibition of such occupations within the RRD. The Board therefore concludes that the relevant portions of the Town Plan allow – subject to regulation under the Zoning Bylaws – within the RRD.² There is no ambiguity as to this point.³

² The Tafutos argue that the 2002 Town Plan "contains specific language prohibiting the development of an auto body shop in Fayston's rural residential district." Tafuto *Memorandum* at 14. But they do not point to any such language. Rather, they note a certain passages in the 2002 Plan which they believe, when read together, prohibit the Project in the RRD. *Id.* at 10 – 15. The Board does not agree.

³ Even if the Board were to determine that the 2002 Town Plan is ambiguous as to whether home occupations are allowed in the RRD, the Fayston Zoning Bylaws, to which the Board would look for guidance, 10 V.S.A. §6086(a)(10), would resolve that ambiguity in the Viens' favor. Under either §5.2 of the 1999 Zoning Bylaws which were in effect at the time that the Viens began the local process (and which therefore apply under the *Molgano* decision) or §5.2 of the 2002 Zoning Bylaws that were in effect at the time that the Viens' applied for their Act 250 permit, "home occupations" are allowed as a conditional use in the RRD.

b. *Whether the Project is a "home occupation"*

Although the 2002 Fayston Town Plan allows home occupations in the RRD, the Plan does not define what a "home occupation" is.

i. *Deference to the Fayston Zoning Board decision*

The Board is the forum that decides whether a project complies with Criterion 10. *Manchester Commons Associates*, #8B0500-EB (Sept. 29, 1995) (the only municipal entity charged with determining town plan conformance is development review board; otherwise, Board and Commissions determine a project's conformance with town plan); *J. Philip Gerbode*, #6F0396R-EB-1 (Jan. 19, 1992) (approval by a planning commission or zoning board does not necessarily mean that a project conforms with the town plan); *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (Jun. 10, 1985) (Board is not bound by superior court order with regard to project's conformance with zoning ordinance).

In 2000, the Vermont Supreme Court held that the Board, in its interpretation of a town plan, must defer to determinations of local bodies. *In re Kisiel*, 172 Vt. 124 (2000). In the following legislative session, however, the 2001 Legislature specifically amended Criterion 10 to supersede *Kisiel*:

In making this finding [whether a project is "in conformance with any duly adopted local or Regional Plan...."], if the board or district commission finds applicable provisions of the town plan to be ambiguous, the board or district commission, for interpretive purposes, shall consider bylaws, but only to the extent that they implement and are consistent with those provisions, *and need not consider any other evidence.*

10 V.S.A. §6086(a)(10) (emphasis added).

Thus, the statute now reinforces the precedent established by *Manchester Commons*, *Gerbode*, and *Gurman*. The statute makes it clear that, while it can choose to do so, the Board need not consider or be bound by interpretations of a town plan, even those of members of the Town Selectboard or Planning Commission.

As noted above, in August 1999, the Fayston Zoning Board of Adjustment granted the Viens a permit for the Project as a "home occupation" under §5.2 of the 1999 Fayston Zoning Bylaws.⁴ And, as further noted above, in all respects pertinent to this matter, the 1999 Fayston Zoning Bylaws are identical to the Fayston Zoning Bylaws, as adopted on March 5, 2002.

⁴ Under both the 1999 and the 2002 versions of the Fayston Zoning Bylaws, "home occupations" are allowed as a conditional use in the RRD. See, §4.3.4(2)(l).

The question, therefore, is whether the Environmental Board should defer to the Fayston Zoning Board's decision that the Project is a "home occupation" under the Fayston zoning regulations, or whether this Board should take evidence and make its own determination as to whether the Project meets the elements of a "home occupation" under §5.2 of the 1999 or 2002 Zoning Bylaws.⁵

Section 5.2 sets out several factors which the Zoning Board, in making its decision as to whether an activity is a "home occupation," is required to consider. Whether or not the Project meets those factors is a decision that the Fayston Zoning Board is certainly empowered to make.

The Board is hesitant, in this case, to revisit or second-guess the Fayston Zoning Board; the place to contest a project's conformance with local zoning regulations is within the local process, and an appeal from the Zoning Board's decision must be made to the Environmental Court, pursuant to 24 V.S.A. §§4471 and 4472, which states that review of zoning board decisions is exclusively before the Environmental Court.⁶ The Act 250 process cannot be substitute for such review.

While the Board might come to a different conclusion from that of Fayston regarding the Project's satisfaction of §5.2 of the Bylaws – and the Board makes no decision in this regard - the Board cannot find that there is anything patently wrong or

⁵ The Board could also refer to 24 V.S.A. §4406(3) in determining whether the Project is a "home occupation." Section 4406(3) states:

Protection of home occupations. No regulation may infringe upon the right of any resident to use a minor portion of a dwelling for an occupation which is customary in residential areas and which does not change the character thereof.

⁶ Section 4472 reads, in pertinent part:

(a) Except as provided in subsection (b) and (c) hereof, the exclusive remedy of an interested person with respect to any decision or act taken, or any failure to act, under this chapter or with respect to any one or more of the provisions of any plan or bylaw shall be the appeal to the board of adjustment or the development review board under section 4464 of this title, *and the appeal to the environmental court from an adverse decision upon such appeal under section 4471 of this title.*

(Emphasis added). Subsections (b) and (c) do not apply to this matter.

absurd in Fayston's decision. This is not a circumstance in which a project which would clearly not fit within §5.2's definition of a "home occupation" has been found to do so.⁷

It is also important to note that the Fayston Zoning Board is *not deciding* whether the Project complies with the Town Plan. Nor is the Environmental Board acceding to an interpretation, by local Fayston authorities, of the Fayston Town Plan relative to Criterion 10 compliance. Here, the Board's acknowledgment that Fayston has the authority to judge the Project's conformity with its own zoning regulations does not represent an abdication by the Board of its obligations to decide Criterion 10. The Board has found that the 2002 Town Plan allows home occupations in the RRD, the district where the Project is located, and this decision is grounded in the Board's own reading of the 2002 Town Plan, not on the basis of an interpretation of that Plan offered by the Fayston Zoning Board.⁸ No deference, in this regard, has been given by the Board to any Town authority.

The Board recognizes that this decision places the Tafutos in a quandary, as they apparently did not participate in the local zoning appeals process in 1999, perhaps because they had no notice of the Viens' zoning permit application.⁹ Nonetheless, this is a matter which must be resolved within the processes outlined in Title 24 of the Vermont statutes; it is not an issue which the Board can address within the context of the present appeal.

⁷ Were the Fayston Zoning Board's decision wholly incompatible with the requirements of §5.2, the Board would engage in its own determination as to whether the Project were a home occupation allowed by the Town Plan. But this is not the case here.

⁸ Likewise, were the Town Plan to permit "conditional uses as determined under the by the Fayston Zoning Board," the Environmental Board would not engage in an analysis of whether the Project meets the conditional use elements of 24 V.S.A. §4407(2) or the relevant Fayston zoning regulations. Conversely, were the Town Plan to specifically prohibit home occupations within Fayston's RRD, it would not matter to the Board's application of Criterion 10 that the Zoning Board had found the Project to be a "home occupation," nor would it matter that the Zoning Board had found that the Fayston zoning regulations allowed home occupations were within the RRD.

⁹ Vermont law does not presently require that municipalities provide personal notice of pending zoning applications to neighbors. A 2003 bill, as passed by the Vermont Senate, would require written notice to adjoining landowners of zoning permit hearings. See, S.92, §18, adding 24 V.S.A. §4464(a). Had this section existed in 1999, it might have resolved the questions facing the parties today. The Board makes no findings, however, as to what did, or did not, occur within the Fayston zoning process

IV. Order

1. The 2002 Fayston Town Plan governs the present appeal.
2. The 2002 Fayston Town Plan is not ambiguous; home occupations are permitted within the Fayston Rural Residential Zoning District.
3. The Project complies with Criterion 10 (Town Plan).

Dated at Montpelier, Vermont this 3rd day of September 2003.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden
Patricia Moulton Powden, Chair
* George Holland
Samuel Lloyd
W. William Martinez
A. Gregory Rainville
* Jean Richardson

* Board Members Holland and Richardson, concurring:

While we concur in the result in this case, we do so reluctantly, as we have serious questions as to the correctness of the Fayston Zoning Board's decision that this Project constitutes a "home occupation." We note that the statute, 24 V.S.A. §4406(3), indicates the legislature's understanding that "home occupations" should include only those which use a "minor portion of a dwelling for an occupation which is customary in residential areas." This Project is not housed within the Viens' dwelling; rather, the Commission's Decision describes it as operating within a three story barn, to which a sizable addition was added in 2000 and which has seven bays, four of which can accommodate cars.

While we acknowledge that review of the Zoning Board's decision may only be had before the Environmental Court, and not before this Board, 24 V.S.A. §4472, we are troubled that this review is apparently unavailable to the Tafutos, who did not, or were unable to, participate in the Zoning Board proceedings. Their failure or inability to participate, we believe, arose out of the fact that Fayston did not provide them with actual notice of the pendency of the Viens' application, a happenstance that may only be remedied by the passage of the revisions to 24 V.S.A. Ch. 117 now pending before

the legislature. Under these circumstances, we therefore struggle with the notion that the Board should defer to the Fayston Zoning Board's decision that the Project meets the Fayston Bylaws, but we take some comfort in the Board's decision that such deference will not be given in those instances in which a zoning board has clearly overstepped its authority.