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

RE: Clarence & Norma Hurteau by John B. Kassel, Esq.
Miller, Eggleston & Rosenberg, Ltd.
P.O. Box 1489
Burlington, VT 05402-1489

Memorandum of Decision
Land Use Permit #6F0369-EB

On December 8, 1987, Clarence and Norma Hurteau filed an appeal with the Environmental Board from Land Use Permit #6F0369 issued by the District #6 Environmental Commission on November 10, 1987. The permit authorizes the Hurteaus to create an 84-lot residential subdivision in the Town of Georgia, Vermont. They appealed Condition #13 of the permit that imposes a school impact fee for each house constructed.

In their appeal, the Permittees challenged the authority of the Board to impose impact fees. At a prehearing conference held in St. Albans on January 4, 1988, the parties requested that the Board decide whether it has such authority before addressing the issue of whether the Permittees should be required to pay school impact fees and, if so, determining the appropriate amount. Legal memoranda were filed by the Applicant on January 25, 1988, and by the Georgia School Board and the Agency of Natural Resources on February 8. On February 17 the Applicants filed a reply memorandum.

On February 24, 1988, the Board convened a public hearing in Mendon, Vermont. The following parties participated in the hearing:

Clarence and Norma Hurteau by John B. Kassel, Esq.
Town of Georgia School Board (School Board) by Joseph F. Cahill, Jr., Esq.
Agency of Natural Resources (Agency) by Frederic Emigh, Esq.

I. ISSUES IN THE APPEAL

Land Use Permit #6F0369, which authorizes the Permittees to create an 84-lot single family Planned Residential Development, including on-site water and sewer services and 9200 feet of roadway, over a lo-year period, contains the following condition:

> 13. The Permittee shall construct dwelling units in accordance with the local phasing plan detailed in Exhibit #21 and shall, also, contribute a school impact fee in the amount of $645.00 for each home constructed during the fiscal year of

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1988. This fee shall be deposited in an interest bearing escrow account to be established by the Georgia Board of School Directors and these funds shall be used to offset future capital expenditures within the School District. The permittees shall continue to pay school impact fees per unit in an amount to be determined each fiscal year by the School Directors.

The Permittees' position is that the authority to impose impact fees is not contained anywhere in Act 250. They argue that 10 V.S.A. § 6086(c), which provides that the Board may impose permit conditions "within the proper exercise of the police power," is an unconstitutional delegation of power because it grants to the Board the general authority of the legislature. Furthermore, the Applicants contend, because § 6086(c) refers to several sections in Chapter 117 of Title 24 of the Vermont Statutes Annotated relating to municipal planning, the Board's authority is the same as that of municipalities, which does not include the authority to impose impact fees except that 24 V.S.A. § 4417 authorizes the payment of an impact fee in the following situation: "Where a development composed of one or more plats will accommodate a total of more than one hundred dwellings, the planning commission may also require the designation of necessary public school sites or a payment in lieu thereof."

The School Board believes that the Board's authority to impose conditions in permits includes the authority to impose impact fees. The School Board argues that Act 250 contains sufficient standards to guide the Board in its exercise of the police power so that the delegation is constitutional.

The Agency believes that the authority for the Board to require developers to pay an'impact fee to alleviate the burden on a school district created by the development is contained in Act 250. The Agency argues that the imposition of impact fees is a proper exercise of the police power by the Board.

II. DECISION

The Board believes that its authority to impose a condition requiring a developer to pay a fee to the school district to offset expenses caused by the additional children generated by a development derives from 10 V.S.A. § 6086(c). That section provides:

> [A] permit may contain such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to (1) through (10) of subsection (a), including but not limited to those set forth in sections 4407(4), (8) and (9), 4411(a) (2), 4415, 4416 and 4417 of Title 24, the dedication of lands for public use, and the filing of bonds to insure compliance ....

The language in § 6086(c), which authorizes the imposition of appropriate permit conditions with respect to the ten criteria of Act 250, is the very heart of Act 250. without the ability to impose conditions, the Board would have only the discretion either to deny a permit or to grant a permit for whatever a developer proposes. The Board, however, is mandated by § 6086(a) to make positive findings on all ten criteria before granting a permit. Permit conditions typically allow the Board to be able to make positive findings; that is, positive findings and issuance of a permit are contingent upon compliance with the conditions of the permit. Without the ability to impose conditions, the Board would be able to conclude only in rare cases that a development, as proposed, complies with the ten criteria.

The Permittees argue that § 6086(c) is unconstitutional because it grants the Board authority that the Legislature may not delegate to an administrative agency. The Permittees fail to acknowledge the limitations imposed by the.qualifying language in § 6086(c) that allows imposition of permit conditions only "with respect to the ten criteria of Act 250." The Board can only impose conditions that mitigate or eliminate an undue adverse impact or unreasonable burden that would result from a development with respect to the values protected by and articulated in the ten criteria. The Board believes that the standards contained in § 6086(c) and the ten criteria are sufficient to constitute a proper delegation of legislative authority.

Furthermore, 10 V.S.A. § 6087(b), which provides that a permit may not be denied for noncompliance with Criteria 5, 6 and 7, also states: "However, reasonable conditions and requirements allowable in section 6086(c) of this title may be attached to alleviate the burdens created." The authority of the Board to impose conditions that relate to these criteria is clear.

If the Board is able to make a positive finding only if the development is modified or other steps are taken to mitigate the undue adverse impact or unreasonable burden, it

may impose appropriate conditions. "Impact fees" are simply one form of mitigation, regardless of the words used to characterize the mitigation. For instance, if the Board cannot find that a development will not cause an unreasonable burden on the ability of a municipality to provide educational services under Criterion 6, it must impose conditions to alleviate that burden, since it cannot deny the permit. Its choices of mitigation in such a situation are limited to requiring the developer to contribute to the financial burden on the school caused by the development or requiring that the development be constructed only as the school can accommodate the additional children.

The Applicants also argue that the Board is limited to imposing the types of conditions specified in 10 V.S.A. § 6086(c) that are contained in 24 V.S.A. §§ 4407(4),(8) and (9), 4411(a)(2), 4415, 4416 and 4417./1/ However, the Applicants overlook the language in that section that precedes the reference to Title 24, that a permit may contain conditions "including but not limited to ..." the conditions in Title 24. The Board believes that language clearly indicates that other conditions may be imposed.

The Board concludes that based upon the arguments presented it believes that it has the authority to impose impact fees. A hearing will be held on the issue of whether this development would create an unreasonable burden on the ability of the Georgia school district to provide educational services; and, if so, whether the Applicants should be required to make a financial contribution to the school to alleviate the burden; and, if so, what amount of money is appropriate to alleviate the unreasonable burden. After the evidence on these issues is presented, the Applicants may wish to argue that such a financial contribution is not appropriate under the specific facts of this case.

III. ORDER

1. The Applicants' request to strike the school impact fee from paragraph 13 of Land Use Permit #6F0369 is hereby denied.

/1/ As §§ 4413(a) 1975 these sections and were renumbered in Title 24 (2), 4417, 4418, 4419.

2. A hearing will be held on the following issues:

a) Whether the Applicants can demonstrate compliance with Criterion 6.

b) Whether the Applicants should be required to make a financial contribution to the school to alleviate the burden it may cause.

c) The amount of money appropriate to alleviate the burden, and the conditions that should govern the allocation and use of this money.

Although parties opposing the Applicants have the burden of proof, the Applicants must provide sufficient evidence for the Board to be able to make a positive finding. Once the Applicants present their evidence, the burden shifts to other parties to prove that the project will cause an unreasonable burden on the ability of a municipality to provide educational services and to justify the need for a financial contribution in a specific amount or amounts.

The Board will take evidence on b) and c) at the same time that evidence on a) is presented so that a second hearing will not have to be held.

3. On or before April 15, all parties shall submit a list of witnesses and exhibits they intend to present at the hearing to all the parties listed on the attached Certificate of Service, with a copy to the Board.

4. A notice of the date and location of the hearing will be sent to all parties. At that time, a deadline for filing prefiled testimony will be established.

Dated at Montpelier, Vermont this 25th day of March, 1988.

ENVIRONMENTAL BOARD

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