

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

RE: Poquette & Bruley, Inc. by Findings of Fact and
Robert P. Cronin, Esq. Conclusions of Law
Kissane, Yarnell & Cronin and Order
2 North Main St. Land Use Permit #6F0372-1-EB
St. Albans, VT 05478-1668

This decision pertains to an appeal regarding Land Use Permit Amendment #6F0372-1 filed by Poquette & Bruley, Inc. on October 18, 1988. This permit amendment was issued to the Applicant on September 21, 1988, authorizing the subdivision of 32 residential lots in Swanton Village. The original permit was granted in 1987 for the subdivision of 5 lots. None of the lots has been developed. The Applicant is appealing Condition 15 of the permit which requires that not more than 7 houses be occupied "per school year in any given year."

Environmental Board Chairman Leonard U. Wilson convened a prehearing conference on November 14, 1988. On February 2, 1988, Chairman Wilson, acting as administrative hearing officer, convened a hearing in St. Albans Bay. The parties attending the hearing were the Permittee by Robert P. Cronin, Esq. and the Town of Swanton School Board by Joseph F. Cahill, Jr., Esq. Chairman Wilson ruled that the School Board could participate pursuant to Board Rule 14(B) (2). After hearing testimony, the Chairman recessed the hearing pending preparation of a proposed decision.

A proposed decision was sent to the parties on April 13, 1989, and the parties were provided an opportunity to file written objections and to present oral argument before the full Board. On April 25, 1989, the Applicant requested oral argument. Written responses were filed by the Applicant on May 12 and the Swanton School Board on May 16. Also on May 16, the Applicant filed a withdrawal of its request for oral argument and asked the Board simply to make a clarifying change to the proposed decision. The Board deliberated in Berlin on May 17, and on that date, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing.

I. ISSUES IN THE APPEAL

Pursuant to 10 V.S.A. § 6086(a)(6), the issue before the Board is whether an unreasonable **burden** will be created on Swanton's ability to provide educational services if the Permittee were allowed to build up to seven houses per year on a cumulative basis.

II. FINDINGS OF FACT

1. On November 6, 1987, the District #6 Environmental Commission issued Land Use Permit #6F0372-1, authorizing the Permittee to perform Phase I (5 lots) of a 37-lot residential subdivision in **Swanton**. In Condition 15 of that permit, the Commission reserved the right to impose measures to mitigate potential school impacts from the subdivision.
2. On September 11, 1988, the District Commission issued Land Use Permit Amendment #6F0372-1-EB, authorizing the Permittees to subdivide the remaining 32 lots. In this permit amendment, the District Commission imposed Condition 7, which requires that "[t]he Permittee and all assigns and successors in interest shall not occupy more than 7 houses per school year in any given year."
3. Although the phrase "in any given year" is not defined, Condition 7 of the permit amendment appears to require phased occupancy of the subdivision on a noncumulative basis at the rate of 7 houses per school year. The District Commission found, pursuant to Criterion 6 of 10 V.S.A. § 6086(a), that the proposed subdivision would not create an unreasonable burden on the ability of **Swanton** to provide educational services if this condition were followed.
4. The **Swanton** school system is currently operating beyond capacity with regard to students in kindergarten through sixth grade (K-6). As of October 1988, 672 K-6 students were enrolled in the system. Due to lack of space, the system has had to set up classrooms outside of its regular school facilities in the National Guard Armory and the Methodist Church in **Swanton**.
5. If all houses in the proposed subdivision were built and occupied at once, approximately 22 students would be **added** to the **Swanton** school system.
6. The addition of 22 students at one time would strain the **Swanton** school system. Because the system is already operating beyond capacity, it would be unable

to handle the influx of students. Accordingly, such an influx would create an unreasonable burden on the ability of **Swanton** to provide educational services.

7. An appropriate remedy to this burden would be to phase the occupancy of the homes in the proposed subdivision. If only seven additional houses were occupied per year, approximately four students per year would be added to the **Swanton** school system. This would be a burden to the system which it should be able to absorb. Therefore, the burden would not be unreasonable.
8. **Swanton** can and must include in its educational planning provision for full occupancy of all approved subdivisions in the Town according to the manner in which occupancy of those subdivisions is approved. In other words, if **Swanton** knows that at the end of a five-year period approximately twenty-two students will be generated by a subdivision, it can and must plan to have the capacity for those students regardless of whether each house in the subdivision actually is occupied and producing students. Accordingly, allowance of phasing on a cumulative basis would not burden **Swanton** because it must assume that houses will be occupied if they are allowed to be occupied.
9. This decision is being issued in spring 1989. Construction of the subdivision homes would therefore probably occur in summer 1989, and occupancy might begin in fall 1989, which is the beginning of the 1989-1990 school year. Consequently, if cumulative phasing were allowed retroactively, occupancy would be allowed based on three school years (1987-1988, 1988-1989, and 1989-1990). Based on the original permit's allowance of five homes in 1987 and seven homes each in 1988 and 1989, retroactive cumulative phasing could result in occupancy of 19 homes in 1989-1990. Such occupancy would generate approximately 11 students at once. The **Swanton** school system, because it already is operating beyond capacity, would not be able to absorb these students and therefore retroactive cumulative phasing would create an unreasonable burden on the ability of **Swanton** to provide municipal services.

III. CONCLUSIONS OF LAW

During review of an application for a land use permit, Act 250 requires that the Environmental Board and District Commissions determine whether a proposed project would

create an unreasonable burden on the ability of a municipality to provide educational services. 10 V.S.A. § 6086(a)(6) (Criterion 6). If such a burden is found, the Board and District Commissions are given authority to impose permit conditions. 10 V.S.A. § 6086(c).

In this case, the Board finds that the proposed subdivision would create an unreasonable burden on Swanton's ability to provide educational services. The subdivision will generate approximately twenty-two students, an influx too great for the school system to absorb at once. Accordingly, it is necessary to provide for phased occupancy of the subdivision so that the school system can absorb children from the subdivision.

This issue has not been seriously contested by the parties to this appeal. What they have contested is the District Commission's requirement that the phasing be non-cumulative. This requirement means, for example, that if the Permittee does not achieve occupancy of two out of seven units in a given school year, the Permittee cannot carry those two units over to the next school year and seek to have nine units occupied by prospective purchasers. It is argued that to allow such cumulative phasing would defeat the purpose of having phased occupancy.

The Board is not persuaded that cumulative phasing contradicts the purpose of phasing. A major purpose of phased occupancy is to allow a school board time in which to create the capacity needed to absorb projected additional students. Indeed, at the end of a projected phase-in period, the **Swanton** school board (and all other school boards) has to expect to absorb the total projected number of additional students. To plan otherwise would be to invite a situation in which students need education but the school system does not have capacity for them. Accordingly, the Board will revise Condition'7 to allow cumulative phasing. However, this cumulative phasing will only be allowed for occupancy following issuance of this decision and not retroactively. To allow retroactive accumulation would mean an influx of students too great for **Swanton** to manage, imposing an unreasonable burden on Swanton's ability to provide municipal services.

III. ORDER

Land Use Permit Amendment #6F0372-1-EB is hereby issued. Jurisdiction over this matter is returned to the District #6 Environmental Commission.

Dated at Montpelier, Vermont this 24thday of May, 1989.

ENVIRONMENTAL BOARD



Leonard U. Wilson, Chairman
Samuel Lloyd
W. Philip Wagner
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Arthur Gibb
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Ferdinand Bongartz

FF 6F0372-1-EB (20)