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

Re: St. Albans Group and Wal*Mart Stores, Inc.
Application #6F0471-EB

MEMORANDUM OF DECISION

This decision pertains to appeals of a land use permit issued for a proposed retail store to be located in the Town of St. Albans. The decision relates specifically to motions for reconsideration and requests for clarification and preliminary rulings filed with respect to a decision issued by the Environmental Board on April 15, 1994. As is explained below, the Board denies all but one of the motions for reconsideration; is unable to reach a decision on the remaining motion, which therefore fails; and grants some but not all of the requested clarifications and rulings.

I. BACKGROUND

On April 15, 1994, the Board issued a memorandum of decision concerning various preliminary issues raised by the parties. The April 15 decision is incorporated by reference. On April 22, the Applicants and the Town of St. Albans filed motions to reconsider portions of that decision, The Applicants' motion also includes various requests for clarification and preliminary rulings.

On April 29, 1994, the Franklin/Grand Isle Citizens for Downtown Preservation (the Citizens) filed a response to the motions of the Applicants and the Town, and filed a motion for reconsideration of their own. On April 29, the Applicants filed a letter requesting that the Board ask other agencies to produce witnesses to testify at the upcoming hearings. On May 2, the Vermont Natural Resources Council (VNRC) filed a response to the motions of the Applicants and the Town, which included a statement that VNRC joins in the Citizens' motion for reconsideration. On that date, the Applicants filed a reply to the Citizens' April 29 filing.

II. DISCUSSION

The Board will first discuss the motions to reconsider filed by the parties and then the Applicants' requests for clarification.

A. Motions to Reconsider

With respect to motions to reconsider, the Board's practice is to first decide whether-to reconsider. If it so decides, the Board then moves on to reconsidering the substantive question.

5/11/94

[DOCKET #598M2]

1. Applicability of Criterion 9(H) (Scattered Development)

The Boards April 15 decision includes a ruling on a request by the Applicants that the Board take notice of various other permits and decisions issued by the Board or the District #6 Commission, and on this basis conclude that 10 V.S.A. § 6086(a)(9)(H) (scattered development) is not applicable. In the decision, the Board concludes that such a determination is not appropriate at this time, stating that the Applicants may introduce the prior rulings, "as well as other relevant testimony, into evidence, and the Board will make a factual judgment under Criterion 9(H)."

The Applicants request that the Board reconsider this decision, arguing that before Criterion 9(H) can be considered in this proceeding, the Board must find that the site in question is not contiguous with an existing settlement. The Applicants contend that the site is contiguous with an existing settlement, and make various factual assertions in support of that argument. In the alternative, the Applicants ask that the Board require testimony on Criterion 9(H) to be bifurcated as follows: (a) testimony on whether the project area constitutes an existing settlement, and (b) testimony on the relevant costs associated with the proposed project.

The Town also asks that the Board reconsider its decision on Criterion 9(H) (scattered development). The Town argues that the Board should take judicial notice that the area in which the proposed project is to be located is an "existing settlement." In support of its argument, the Town makes various factual assertions, including that the area's being a settlement is 'what everyone who lives in St. Albans Town has known as a fact for over thirty years." The Town further states that "[i]n order for the Board to determine that the proposed Wal*Mart site is 'not physically contiguous to an existing settlement,' it had to completely ignore the physical evidence on the ground ..."

Both the Citizens and VNRC dispute the factual assertion by the Applicants and the Town that the project area constitutes an existing settlement within the meaning of Criterion 9(H).

The Board denies the requests to reconsider its preliminary ruling concerning Criterion 9(H) because it believes that the ruling is sound. However, the Board will offer additional explanation because it is concerned that the ruling is not properly understood. The purpose of this explanation is solely to make the basis of the Board's decision clear.

At the outset, it must be emphasized that the Board did not rule that the project area is not an existing settlement. In this case, the Board has not decided the question of whether the project area is such a settlement. The Board has decided only that the question is one of fact that must be evaluated on the basis of testimony. The Board has not ignored any evidence because it does not have any evidence before it.

A review of the applicable law may be instructive. To begin with, the purpose of Criterion 9(H) is to protect state and local governments from the costs of serving scattered development. Criterion 9(H) thus requires that the Board first determine whether a proposed project will not be contiguous to an existing settlement. If the project will not be so contiguous, then the Board must review whether various public costs outweigh tax revenues and other public benefits from the proposed project. Criterion 9(H) provides:

> **Costs of scattered development. The** district commission or board will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement whenever it is demonstrated that, in addition to all other applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.

Accordingly, under Criterion 9(H), if the Board concludes that a proposed project is contiguous to an existing settlement, it does not go on to weigh costs and benefits.

The question of whether a project is contiguous to an existing settlement is a question of fact. In this case, the parties dispute the fact of whether the Applicants' project is contiguous to an existing settlement.

To determine what the facts are, the Board is required by law to hold a de novo hearing. 10 V.S.A. § 6089(a); Board Rule 40(A). The term "de novo" requires the Board to consider the matter afresh, as if no hearings had occurred before. In re Poole, 136 Vt. 242, 245 (1978).

By law, the Board's hearing in this matter is governed by the Administrative Procedure Act (APA). 10 V.S.A. §§ 6002, 6089(a). The APA requires that, before the Board reaches a decision, parties be given an opportunity to present evidence and to cross-examine the witnesses of other parties. 3 V.S.A. §§ 809(c), 810. The APA also requires that the Board issue findings of fact and conclusions that are based on the evidence introduced into the record. 3 V.S.A. §§ 809(g), 812.

The Board has not yet held any hearings in this matter and therefore would not be in compliance with the APA if it were now to make a judgment on a disputed assertion of fact. In this regard, the Board notes that the Applicants and the Town ask the Board to take judicial notice that the area is an existing settlement. But under 3 V.S.A. § 810(4), the Board may take such notice only of judicially cognizable facts. The existence or non-existence of a "settlement" is not such a fact, particularly where such existence is disputed. The existence of a "settlement" must be determined based on evidence concerning the size, use, and impact of a given cluster of buildings. As the Chittenden County Superior Court has stated:

> The purpose of [Criterion 9(H)] is to weigh the additional costs of public services and facilities caused by a non-contiguous or isolated development against the tax revenues and other public benefits brought by the development. This purpose would not be served if "settlement" were narrowly defined to include any grouping of residential, commercial or industrial buildings regardless of the size and use of the settlement buildings as compared to the size and use of the proposed development buildings. This is because the level of existing public services and facilities is directly related to the size and use of the buildings in a given area.

In re Pyramid Company of Burlington, No. S59-78CnM, slip op. at 6-7 (Oct. 14, 1980).

Accordingly, during the hearings scheduled in this matter for June 29 and 30, and July 13, 1994, the Board will take evidence related to whether the project area consitutes an existing settlement within the meaning of Criterion 9(H) and also on the relevant costs and benefits that will need to be weighed if the Board determines that the area is not such a settlement. Following the hearings, the Board will carefully review all of the evidence presented. If the Board concludes that the project area is an existing settlement, it will not go on to weigh costs and benefits under Criterion 9(H).

With respect to the scheduled hearings, the Board declines the Applicants' request that the Criterion 9(H) testimony be bifurcated. It is the Board's usual practice to take all potentially relevant testimony during the hearings, and then, following the hearings, to give parties an opportunity to file proposed findings of 'fact and conclusions of law. Once these are filed, the Board deliberates and makes decisions. In its deliberations in this matter, the Board will decide, as stated above, whether the project area constitutes an existing settlement, and will only go further under Criterion 9(H) if it decides that the area is not such a settlement.

2. Party Status of VNRC

The A.pplicants move that the Board reconsider its grant of party status to VNRC.

During its May 4 deliberation, the Board discussed whether to reconsider VNRC's party status. Member Arthur Gibb moved that the Board reconsider, seconded by member Anthony Thompson. The following members favored the motion: Gibb, Thompson, Lixi Fortna, and William Martinez. The following members were against the motion: Acting Chair Steve E. Wright, Rebecca Day, and Robert Opel.

Although four members favored the motion, as opposed to three who were against it, under current law the motion failed, and therefore the Board did not move on to reconsider the grant of party status to VNRC. By law, the Board consists of nine members. 10 V.S.A. § 6021(a). Under 1 V.S.A. § 172, when authority is given to a body of three or more, the concurrence of a majority of "such number" is required for action; Under the Supreme Court's precedent, Section 172 requires the concurrence of a majority of the full legal membership of a body, and not just a majority of those members assembled to decide. In re Application

VNRC's

'Only seven members participated in the April 15 decision because the other appointed members either have conflicts of interest or were unavailable, and because presently the Board has three vacancies which the Governor has not yet filled. It is up to the seven members who made the April 15 decision to decide whether to

3. Applicability of Criterion 9(K) (Public Investments and Facilities\

In the April 15 decision, the Board concludes that Criterion 9(K) (public investments and facilities) is applicable in this matter. The Applicants seek reconsideration of this decision. The Applicants argue that Criterion 9(K) does not apply to private facilities, that their opponents' case under 9(K) concerns private facilities, and that therefore Criterion 9(K) is not applicable. In the alternative, the Applicants request that the Board require the Citizens and VNRC to identify the specific public investments and facilities they claim will be adversely affected.

In response, VNRC states that it will specifically identify, in its prefiled testimony due later this month, the public investments and facilities it believes will be adversely affected.

The Board declines to reconsider its April 15 ruling regarding Criterion 9(K). However, the Board agrees that the Citizens and VNRC should be required to specify, in their prefiled testimony, those public investments and facilities which they believe will be affected, and will so order. Further, the Board will review the evidence carefully to determine whether any alleged public investments or facilities in fact qualify as such within the meaning of Criterion 9(K). The Applicants may, by the deadline which has been set for filing evidentiary objections, object to specific items if they believe the items are irrelevant under Criterion 9(K).

4. Applicability of Criterion 8 (Historic Sites)

In the April 15 decision, the Board denied party status to the Citizens and VNRC on Criterion 8 (historic sites) on the basis that their contentions with respect to that criterion were too speculative. The Citizens and VNRC both ask the Board to reconsider.

The Board declines to reconsider its decision because it believes the decision is sound for the reasons stated therein.

B. Applicants' Reauests for Clarification

1. Application of Criterion 1(B) (waste disposal). The Applicant requests that the Board make a preliminary ruling that the issues under Criterion l(B) are limited to stormwater runoff and wastewater disposal.

The Board denies this request. Criterion l(B) applies to waste disposal generally and is not limited to stormwater runoff and wastewater disposal. 10 V.S.A. § 6086(a)(l)(B) provides:

> A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

In addition, the Supreme Court has ruled that, once a criterion has been noticed for appeal, parties may raise any issues relevant to the criterion. In re Taft Corners Associates, Inc., No. 92-215, slip op. at 8 (April 30, 1993). Therefore, parties may raise issues with respect to Criterion l(B) other than stormwater runoff and wastewater disposal.

2. Economic Analyses. The Applicants request that the Board require all economic analyses under Criteria 7 (local governmental services), 9(H) (costs of scattered development), and 9(K) (public investments and facilities) to be presented as one package.

Each of these criteria relates to economic impacts on government and therefore there will be overlap in the evidence presented on the criteria. However, differences exist among these criteria. See 10 V.S.A. § 6086 (a)(7), (9)(H), and (9)(K). Therefore the Board will require that evidence relating to them be presented as one package to the extent reasonable and feasible under the language of the criteria. The Board notes that Criterion 9(A) (impact of growth) is under appeal. Since this criterion also can relate to economic issues, the Board will include Criterion 9(A) in this requirement.

3. Clarification of the Criterion 8 (Historic Sites) Ruling. As stated above, in the April 15 decision, the Board ruled that the Citizens' and VNRC's contentions under Criterion 8 (historic sites) were too remote and speculative to be within the legislative intent of that criterion. The Applicants ask that the Board clarify that historic sites cannot be raised under other criteria.

The Board declines to make the requested clarification. The Board is not persuaded that historic sites are irrelevant under the criteria on which appeal is to go forward. The Board believes that economic impact on an historic site may be

considered under several of the other appealed criteria, provided that the requirements set by the language of those criteria are met. For example, if an historic site also qualifies as a public investment or public facility, it may be considered under Criterion 9(K). Thus, to the extent historic sites are relevant to the language of other criteria, they can be addressed in this proceeding. The Board again notes that the Applicants may later file evidentiary objections to specific prefiled testimony.

4. Identification of Persons that the Citizens Represent. The Applicants request that the Board require the Citizens to produce the names and addresses of its members. The Applicants contend that such is required by "Rule 14B(2)(b)(3)."

The Board Rules do not contain a Rule 14B(2)(b)(3). They do contain a Rule 14(B)(2)(b), which has no sub-parts. Rule 14(B)(2)(b) concerns the content of petitions for party status filed by organizations, and provides that a petition for party status "must, in the case of a petition by an organization, describe the organization, its membership and its purposes ...." In the documents they have filed, the Citizens have described their organization, its membership, and purposes. There is no requirement that they go further and produce the names and addresses of the members.

5. Joint Presentation. In the April 15 decision, the Board granted party status to VNRC on the condition that VNRC "work with the Citizens to present a joint case." In doing so, the Board cited concern about the potential for redundancy caused by the party status of VNRC and the Citizens on various criteria. The Board also cited the fact that its grant of party status to VNRC is discretionary. The Applicants now request that the Board issue guidelines for the joint presentation of their case by VNRC and the Citizens.

The Board is willing to issue some relevant guidelines to minimize redundancy and overlap. In doing so, the Board reminds parties that, under Vermont Rule of Evidence 403, relevant evidence may be excluded if it is cumulative or will cause undue delay. However, the Board also is aware of 3 V.S.A. §§ 809(c) and 810, which state that in contested cases parties have the right to present testimony and to cross-examine witnesses. Bearing these competing considerations in mind, the Board will require that, for each of VNRC's witnesses who also will be a witness for the Citizens, there be only one document setting forth the prefiled testimony of the witness and only one

document setting forth the rebuttal testimony of that witness? The Board also will hold VNRC to its offer, contained in its recent reply memorandum, not to cross-examine the Citizens' witnesses. Further, the Board will expect that other cross-examination will not be redundant.

6. Reauest for Agency Witnesses. The Applicants request that the Board ask the Agency of Natural Resources (ANR) and the Agency of Transportation (AOT) to produce witnesses to testify at the upcoming hearings.

The Board declines to grant this request at this time. The Board directs the Applicants to submit, with their prefiled testimony, a further written request for ANR and AOT personnel. The Applicants shall include in that request: (a) a specific identification of which parts of their prefiled testimony or exhibits require ANR or AOT witnesses, (b) a statement of why such witnesses are needed, and (c) copies of the Applicants' requests to ANR and AOT for witnesses and copies of those agencies' responses.[3]

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[2] *This is not meant to exclude the presentation of relevant exhibits attached to the prefiled testimony. Rather, it means that there should only be one document containing the witness's entire prefiled testimony, and one set of exhibits for that VNRC.s, and that the witness be presented jointly by the Citizens and similar procedure should be followed for rebuttal testimony.*

[3] *After the Board's May 4 deliberation, the State Land Use Attorney filed a letter*

III. ORDER

1. The motions to reconsider filed by the Applicants and the Town are denied with respect to Criterion 9(H).

2. The Board declines to bifurcate the presentation of evidence on Criterion 9(H) during the hearings scheduled for June 29 and 30 and July 13, 1994.

3. The Applicants' motion to reconsider VNRC's party status fails for lack of five votes in favor of reconsideration.

4. The Applicants' motion to reconsider is denied with respect to Criterion 9(K).

5. The Citizens' and VNRC's motions to reconsider are denied with respect to Criterion 8 (historic sites).

6. The Applicants' request for a preliminary ruling with respect to Criterion l(B) is denied.

7. To the extent reasonable and feasible under the language of the relevant criteria, the presentation of evidence by each party under Criteria 7, 9(A), 9(H), and 9(K) shall be in one package.

8.

9.

1.1. The Applicants shall comply with the directives set forth above regarding the production of witnesses by the Agency of Natural Resources and the Agency of Transportation.

Dated at Montpelier, Vermont this 11th day of May, 1994.

ENVIRONMENTAL BOARD

Steve E. Wright, Acting Chair
Rebecca Day
Lixi Fortna
Arthur Gibb
William Martinez*
Robert Opel * *
Anthony Thompson

*Member Martinez dissents with respect to the ruling on Criterion 9(H). He otherwise concurs with this decision.

**Member Opel was not present for the entire deliberation on May 4, 1994 because he had to leave for a work-related matter which could not be rescheduled. However, he has reviewed this decision and concurs with it.

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