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

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

MEMORANDUM OF DECISION ON MOTIONS TO ALTER

This decision pertains to motions to alter a December 23, 1994 decision denying a land use permit application for a proposed retail store known as a "Wal*Mart" to be located in the Town of St. Albans (the Town). As is explained below, the Environmental Board makes several alterations to the decision but in the main denies the motions. Prior to issuing the December decision, the Board conducted five deliberative sessions in which the evidence and legal issues were thoroughly discussed, The Board believes its findings and conclusions to be sound and supported by, the law and the evidence.

I. SUMMARY OF PROCEEDINGS

Acting on appeals by the Franklin/Grand Isle County Citizens for Downtown Preservation (the Citizens) and the Vermont Natural Resources Council (VNRC) of a permit issued by the District #6 Environmental Commission, on December 23, 1994 the Environmental Board issued Findings of Fact, Conclusions of Law and Order #6F0471 (the Order). The permit approved an application to construct a 126,090 square foot retail store off Route 7 in the Town, to be served by municipal water and wastewater services (the Project). The Order denies the application and voids the District Commission's permit based negative conclusions under 10 V.S.A. § 6086(a)(9)(A) (impact of growth) and (H) (scattered development). The Order also concludes that the St. Albans Group and Wal*Mart Stores, Inc. (the Applicants) did not meet their burden of production under Criteria 6 (impact on schools) and 7 (local governmental services). The Order is incorporated by reference.

On January 23, 1995, the Applicants and the Town each filed a motion to alter pursuant to 'Environmental Board Rule (EBR) 31(A). The Applicants requested a hearing on their motion. On February 1, Acting Chair Arthur Gibb issued a memorandum stating that responses to the motions were due on February 22 and that oral argument on the motions would be held on March 22.

On February 22, 1995, the Citizens and VNRC filed a joint response to the motions. On February 23, the Town filed a supplemental memorandum in support of motion to alter.

On March 3, 1995, the Applicants requested a continuance of the oral argument scheduled for March 22. On March 8, acting on behalf, and at the direction of, the Acting Chair, Board Counsel issued a reply to the Applicants'

request for continuance, stating that the argument would be continued to April 19, subject to the availability of the Board members serving on the case.

On March 8 and 17, 1995, respectively, the Applicants and the Town each filed a reply to the Citizens and VNRC.

On April 5, 1995, the Acting Chair issued a memorandum to parties stating that oral argument will occur on May 24 because not all members serving are available on April 19.

The Board convened oral argument on May 24, 1995 with the following parties participating:

The Applicants by Peter M. Collins, Esq.
The Town by David A. Barra, Esq.
The Citizens by Francis X. Murray, Esq.
VNRC by William E. Roper, Esq.

Following the argument, the Board recessed and conducted a deliberative session. Any specific requests in the motions to alter which are not discussed below are denied.

II. ISSUES

1. Whether, under EBR 31(A), the requests in the motions to alter are appropriate.

2. Whether to reconsider any items appropriately raised in the motions, and if so, whether to alter the Order.

III. DISCUSSION

The Board will examine the issues listed above under EBR 31(A), which provides:

> Motions to alter decisions. A party may file within 30 days from the date of a decision of the board or district commission such motions to alter as may be appropriate with respect to the decision. The board or district commission shall act upon motions to alter promptly. The running of any applicable time in which to appeal to the board or supreme court shall be terminated by a timely motion

filed under this rule. The full time for appeal shall commence to run and is to be computed from issuance of a decision on said motion. It is entirely within the discretion of the board or district commission whether or not to hold a hearing on any motion.

A. **Appropriate**

As stated above, EBR 31(A) authorizes such motions as may be "appropriate." In prior decisions, the Board has clarified what is appropriate in a motion to alter: The motion must seek reconsideration based on the existing record. New evidence is not allowed. New arguments are not authorized, except for objections to permit conditions or use of procedures about which the movant reasonably could not have known prior to the decision. See Re: Taft Corners Associates, Inc, #4C0696-11-EB (Remand), Memorandum of Decision at 6-7 (May 5, 1995), discussing these standards and prior Board precedent.

The purpose of the standards concerning motions to alter is to preserve the integrity of the appeal process by ensuring that arguments and evidence are introduced prior to final decision and to prevent the use of motions to alter to convert Board decisions into "proposed" decisions to which parties can later respond, thereby elongating the process. Id.

The Board concludes that the motions largely are appropriate under EBR 31(A) because, ***in the main,*** they seek reconsideration of findings of fact and conclusions of law based on the existing record and do not raise new arguments. Arguably, references in the Applicants' motion to Schedule B and the Guide for Applying for a Land Use Permit are new arguments based on new evidence. However, those documents are application documents generated by Act 250 program staff and the arguments made relate to the issue of interpreting Criterion 9(A), which is not a new issue.

The Board notes a few specific items in the motions and other documents filed regarding the motions which are not appropriate under the above standards and therefore are not properly before the Board:

a. Requests for additional hearings to take evidence.

b. The Town's February 23, 1995 supplemental memorandum in support of its motion to alter, which consists primarily of new evidence in relation to Criterion 6.

c. The Applicants' reference on page 18 of the motion, and elsewhere in their pleadings, to an unsubmitted document, not in the record of this appeal, known as the Act 250 Handbook for Local Officials, published in 1985. This is not an application document and constitutes new evidence.'

d. The Applicants' statement on page 29 of their motion that one of their expert witnesses has informed them that a study of secondary growth under Criterion 9(A) would have "serious methodological problems"; this is new evidence.

e. VNRC's statement on page 14 of its memorandum filed February 22 with respect to a recalculation of a school impact figure; this is new evidence.

The enumeration of the above items is not intended to be exhaustive with regard to new evidence. Any new evidence contained in the motions to alter or the pleadings concerning them is not appropriate under EBR 31(A).

B. **Reconsideration and Alteration**

The motions to alter filed by the Applicants and the Town, although not exactly the same, seek largely overlapping and similar relief. The essence of each motion is that the Board should reconsider under Criteria 6, 7, 9(A), and 9(H) and make affirmative findings under each of these criteria. Under these criteria, the Applicants seek extensive reconsideration of the Order's findings and conclusions. In contrast, the Town's arguments on these criteria concentrate primarily on the conclusions of law, although the Town also seeks reconsideration of findings related to the Project's school impacts.

The Applicants' motion also seeks reconsideration of findings and conclusions with respect to a permit condition discussed in the Order under Criterion 5 (traffic) and of various findings made under Criterion l(B) (waste disposal), concerning which the Board found for the Applicants.

In general, the Board disfavors reconsideration under EBR 31(A) because it causes appeals to take longer and ties up resources which are then not available for later-filed appeals. The Board therefore believes that reconsideration under EBR 31(A) should not be liberally granted.

'*Even if the document were appropriately in the record of this case, its title suggests that it was not designed for applicants to rely upon.*

The Boards decisions are discussed immediately below for each criterion under which reconsideration and alteration is sought. The criteria are listed below in the same order in which they were discussed in the Order.

1. Criterion 1(B) (Waste Disposal). The Board declines to reconsider, believing its decision to be based on the evidence and to be sound for the reasons stated therein.

2. Criteria 9(A) (Impact of Growth) and 9(H) (Scattered Development).

a. Leeislative Findings. The Applicants and the Town argue that the Board erred when, in interpreting Criteria 9(A) and 9(H), the Board referred to legislative findings adopted contemporaneously with these criteria. This argument is based a statutory provision which states concerning those findings: "[T]he legislative findings of sections 7(a)(l) through 7(a)(19) of this act shall not be used as criteria in the consideration of applications by a district commission or the environmental board." 10 V.S.A. § 6086(a)(9).

The Order does not use the legislative findings as criteria. Instead, the Order looks to the findings for assistance in determining the meaning of the existing criteria. For example, under Criterion 9(H), the findings help illuminate the meaning of the term "existing settlement," a term which is not defined by statute and which is capable of more then one meaning. As stated on page 27 of the Order,[2] "the Board properly may look to these findings as a source of legislative intent in determining the meaning of the criteria. Cf. Viskup v. Viskup, 150 Vt. 208, 210 (1988) (the primary purpose of construing statutes is to effect the intent of the legislature)."

Accordingly, the Board did not err in referring to the legislative findings in construing the Act 250 criteria, and will not reconsider its use of those findings.

b. Criterion 9(A) (Impact of Growth). In the Order, the Board concluded that, for two separate and independent reasons, the Applicants have not met their burden of proof to demonstrate compliance with Criterion 9(A). First, the Board concluded that the credible evidence is that the anticipated public costs of the Project, when calculated without regard to so-called "secondary

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[2] *Page references are to the Order as issued December 23, 1994. The Board is today issuing an altered version and the page references may not correspond.*

growth" impacts, will exceed the public benefits. Second, the Board concluded that Criterion 9(A) requires, for a project such as this one which is likely to encourage and attract substantial "secondary growth," that the Applicants study and provide information concerning the total, and rate of, secondary growth which the Project will cause, and the associated public costs and benefits. By secondary growth, the Order referred to other highway-oriented development likely to grow up around the Project in the Town.

The Applicants seek reconsideration of many findings relevant to Criterion 9(A), contending that the Board has sufficient information to evaluate compliance with Criterion 9(A) as the Board construes it. In addition, both the Applicants and the Town contend that Criterion 9(A) is limited to consideration of population growth, and therefore that the Board erred because the Order construes 9(A) to apply to other forms of growth.

The Board declines to reconsider the findings of fact relevant to Criterion 9(A). The Board held five deliberative sessions in this matter in which the evidence was thoroughly reviewed. The Board believes its findings to be based on the evidence and to be sound.[3]

The Board has reconsidered the legal question of whether Criterion 9(A) is limited to population growth. The Board concludes that Criterion 9(A) is not so limited and that, even if it were, the term "population" under that criterion must include those whom a municipality or region must accommodate as result of a development or subdivision. Therefore, for a development such as the Project with a demonstrated potential to cause substantial secondary growth, the term "population" includes the various businesses which are likely to spring up around it. The Board will alter its conclusions of law accordingly.

The Board otherwise declines to reconsider its conclusions of law under Criterion 9(A), believing its decision to be sound for the reasons stated therein. With two exceptions, the Board declines to respond specifically to all of the arguments raised by the Applicants and the Town in support of reconsideration on the 9(A) conclusions. The two exceptions are discussed immediately below.

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[3] *Below, **under Criterion 6 (impact on schools), the Board concludes that it should modify a finding with respect to an operating loss to the relevant educational system caused by the expected addition of six students. while this finding is also relevant to Criterion 9(A), the modification does not change the Board's conclusions under 9(A).***

First, the Town contends that the Order sets a precedent with regard to Criterion 9(A) which favors large developers, who it claims can afford the expertise needed to analyze secondary growth impacts, and disfavors small developers, who it claims cannot afford such expertise.

The Town misunderstands the Order. The requirement to study and provide information concerning secondary growth is predicated on the Board's findings and conclusions that the Project has a demonstrated potential to cause substantial secondary growth. The Order does not set a precedent that a development or subdivision which lacks such potential needs to provide information on secondary growth. Moreover, smaller developments or subdivisions clearly are unlikely to carry a potential to cause a substantial amount of such growth. The Board will alter the Order to ensure that the predicate for the secondary growth study is clear.

Second, the Applicants argue that the Board cannot go beyond population growth because of documents associated with the application for a land use permit. The documents are "Schedule B" of the application and the accompanying Guide for Applying for a Land Use Permit Under Act 250. The last revisions to both of these documents are dated January 1992, which is prior to the date on which the application for the Project was filed (September 1, 1993). In describing Criterion 9(A), these documents mention population growth and do not discuss going beyond population growth.

For several independent reasons, the Board does not believe that Schedule B and the application guide preclude the Board's decision under Criterion 9(A):

(a) The Board interprets Act 250 through its rules and decisions on contested cases. The application forms constitute guidance to assist in filing an application.

(b) Schedule B and the application guide were developed by program staff. They have not been approved by the Board and do not bind it. In re McDonald's, 146 Vt. 380, 386 (1985).

(c) Schedule B and the application guide do not state that the only consideration under Criterion 9(A) is population growth.

(d) The Board considers the secondary growth to be caused by the Project to be "population growth" within the meaning of Criterion 9(A).

c. Criterion 9(H) (Scattered Development). Taken together, the motions seek a general reconsideration of the Order's findings of fact and conclusions of law under Criterion 9(H). The Applicants and the Town raise many arguments in support of reconsideration.

The Board declines to engage in a general reconsideration of the Order's findings and conclusions under 9(H), with one exception discussed below. The Board held five deliberative sessions in this matter in which the evidence was thoroughly reviewed and the meaning of Criterion 9(H) thoroughly discussed. The Board believes its findings and conclusions to be sound.4

The Board also declines, again with one exception discussed below, to respond specifically to each of the arguments raised by the Applicants and the Town with respect to reconsidering 9(H). The Board finds these arguments to be erroneous or otherwise lacking merit, or both.

With respect to reconsideration, the one item which the Board has reconsidered under Criterion 9(H) is the following statement on page 39 of the Order: "The Board further concludes that, to be contiguous to an existing settlement, a proposed project must be within or immediately next to such a settlement and must be compatible with the settlement buildings in terms of size and use."

The element of this statement which the Board has reconsidered is the concept that compatibility of size and use is relevant to determining contiguity. This statement was based on the analysis of the Chittenden County Superior Court in In re Pyramid Company of Burlington, Docket No. S59-78CnM, slip op. at 6-7 (Oct. 14, 1980), which is quoted on page 39 of the Order. Upon reconsideration, the Board concludes that the Superior Court did not state that compatibility is relevant to contiguity. Instead, the Court indicated that compatibility of size and use is relevant to determining whether a particular group of buildings constitutes an existing settlement in relation to a proposed project. The Board will alter its decision accordingly.

The one argument to which the Board will respond specifically is the

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[4] ***Below, under Criterion 6 (impact on schools), the Board concludes that it should modify a finding with respect to an operating loss to the relevant educational system caused by the expected addition of six students. While this finding is also relevant to Criterion 9(H), the modification does not change the Board's conclusions under 9(H).***

Applicants' erroneous contention that the Order reads Criterion 9(H) to state that any project not contiguous to the downtown of a Vermont city is not contiguous to an "existing settlement." Nowhere does the Order make or imply such a statement. Instead, the Order draws conclusions concerning the meaning of existing settlement and applies them to the facts before the Board concerning the Project and the surrounding area. So applied, the Order concludes that the nearest existing settlement to the Project is the downtown City of St. Albans, and that the Project is not contiguous to that settlement.

d. Jurisdiction. The Applicants and the Town both challenge the Order's requirement to study and provide information concerning secondary growth because some of that growth likely will not be subject to Act 250. On this basis, they argue that the Board has exceeded its jurisdiction.

The Board has the power to require the production of evidence. 10 V.S.A. § 6027(a). The growth study requirement arises out of the Boards findings and conclusions under both Criteria 9(A) and 9(H). As stated above, the Board concludes that secondary growth is within the meaning of "growth' and "population" as used in Criterion 9(A). Also, under Criterion 9(H), the Board may review the public costs and benefits caused directly or ***indirectly*** by the Project. Further, and separately, the Order places no conditions or requirements on any person seeking to construct and operate a project not subject to Act 250.

Accordingly, the Board has not exceeded its jurisdiction and reconsideration on this basis is not warranted.

3. Criterion 6 (Impact on Schools). The Applicants and the Town contend that the Board erred in finding that the public costs of the Project will include both: (a) ,a $25,000 operating loss due to an increase of six in the relevant student population and (b) a $61,000 loss in state aid to education. They argue that including both of these items as costs is double-counting because the $61,000 loss in state aid to education includes the $25,000 in operating costs. Various other arguments are made in support of reconsideration under Criterion 6, including a contention by the Applicants that the Board found that a six-student increase constitutes an "undue impact."

The Applicants misunderstand the Order. Under Criterion 6, the Order concludes that the Applicants have not met their burden of production under Criterion 6 for the following separate and independent reasons:

(a) the Project is expected to add six children to an educational system which

is at capacity, and the Applicants have offered no plan to assist that system in alleviating the adverse impact;

(b) insufficient information has been provided concerning the impact of secondary growth on area governments, and without this information, the Board cannot reach a conclusion concerning how such growth may affect the ability of the area governments to provide educational services; and

(c) competition from the Project is likely to have a negative impact on the tax base of the relevant municipalities, and such an impact may adversely affect the provision of educational services by those municipalities.

Accordingly, the Board declines to engage in a general reconsideration under Criterion 6. However, the Board will specifically reconsider the "double-counting" issue raised by the Applicants and the Town. On reconsideration, the Board concludes that it should alter Finding 54c of the Order, concerning the $25,000 operating loss, to state that such loss is included in Finding 54a, concerning the loss in state aid to education. The Board further concludes that such an alteration does not result in an opposite conclusion under Criterion 6 or any other criterion under appeal but rather necessitates alterations to statements in the conclusions to correct the separate counting of $25,000 operating loss.

4. Criterion 7 (Local Governmental Services). Taken together, the motions ask the Board to engage in a general reconsideration of the Order's findings and conclusions under Criterion 7. The Board declines to reconsider, believing its findings and conclusions to be sound.

5. Criterion 5 (Traffic). In the Order, the Board concluded that the intersections affected by Project traffic should be classified as rural, that a measure of congestion known as level of service (LOS) D is not acceptable at rural intersections, and that if a permit were being issued the Applicants would be required, prior to construction, to provide the Board with a plan adequate to achieve LOS C at all affected intersections. The Applicants ask the Board to reconsider, claiming in relevant part that the "LOS D" intersection is Newton Street and Route 7, which is within the City of St. Albans. They argue that this intersection is an "urban" intersection at which LOS D is acceptable.

The Board has reconsidered under Criterion 5 and concludes that the permit condition should not be changed but that clarification should be made to the Order. Specifically, while the "LOS D" intersection is within the City of St. Albans, it is not located within the City's compact, dense downtown area. LOS D

is not acceptable at an intersection simply because it is within the territorial limits of a city; it is acceptable in the denser areas in which more concentrated traffic must be expected'. The Board will alter the Order the make the necessary clarifications.

IV. ORDER

1. The Board will alter the Order in accordance with the foregoing. The altered Order will supersede the existing Order.

2. The motions to alter filed by the Applicants and the Town are otherwise denied.

3. Jurisdiction over this matter is returned to the District #6 Commission.

Dated at Montpelier, Vermont this 27th day of June, 1995.

ENVIRONMENTAL BOARD

Arthur Gibb, Acting Chair*
Rebecca J. Day
Lixi Fortna**
Samuel Lloyd
William Martinez
Robert H. Opel
Robert G. Page
Steve E. Wright
Anthony Thompson

*John Ewing became Chair of the Board effective February 1, 1995. At Mr. Ewing's request, Mr. Gibb continues to serve as Acting Chair pursuant to 3 V.S.A. § 849 because Mr. Ewing has a conflict of interest and because this decision pertains to motions to alter a final decision in a case which Mr. Gibb chaired.

**Former member Fortna continues to serve on this matter pursuant to 3 V.S.A. § 849.

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