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

RE: State of Vermont
Agency of Transportation
133 State Street
Montpelier, Vermont 05602

Memorandum of Decision and Proposed Dismissal Order
Land Use Permit #7C0558-2-Reconsideration-EB

This decision pertains to issues raised on appeal by the State of Vermont, Agency of Transportation (the State) and Harold and Catherine Beattie. As is explained below, the Board: (1) has determined that the District #7 Commission has authority to issue permit conditions concerning the size of a cattle underpass and the configuration and placement of traffic control measures, (2) has granted the Beatties party status, (3) has determined not to hold a hearing on the facts underlying the conditions, and (4) is proposing to dismiss the appeal.

I. BACKGROUND

On April 28, 1989, the District #7 Commission issued Land Use Permit #7C0558-2-Reconsideration, which authorizes the reconstruction of a portion of Route 2 in Danville, Vermont. Part of this portion of Route 2 bisects land owned by Harold and Catherine Beattie. As part of the project, some of the Beatties' land will be taken in order to widen and straighten the road. The Beatties use the land for farming purposes.

Pursuant to 10 V.S.A. § 6086(a)(5) (Criterion 5 - traffic safety and congestion), the District Commission found that installation of a culvert 12 feet wide by 13 feet high was necessary in order to avoid traffic safety problems. Specifically, the District Commission found that the Beatties need to cross Route 2 over a thousand times a year with cattle or farm equipment, and that without a culvert of that size, farm equipment would have to cross a widened Route 2, posing a traffic safety hazard. The District Commission therefore included Condition 6 in the permit, requiring installation of a 12-foot wide and 13-foot high underpass. The District Commission also included Condition 11, retaining jurisdiction over the State's placement of traffic warning signs, speed-limit signs, and traffic control program.

The State filed this appeal on May 26, 1989. The State contests both permit conditions on legal grounds. On June 8, 1989, former Chairman Leonard U. Wilson convened a prehearing conference in Danville, Vermont, at which the State stated it sought time to bring about a settlement of this matter. The State also stated that it sought a

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determination on the legal issues it was raising. The Beatties stated that they believe the State's notice of appeal limits the Board's review to whether the permit conditions were authorized, and that the Board cannot consider Criterion 5 de novo in this case.

At the State's request, this matter was continued pending settlement negotiations until July 31, 1989. At the request of the State, a number of extensions of time were issued, the last ending on October 13, 1989.

On October 6, 1989, the State notified the Board that settlement did not appear possible and asked the Board to make a determination on the legal issues it was raising. On November 2, 1989, the Board issued a memorandum inviting briefs on the legal issues raised in this matter and petitions for party status.

On November 8, 1989, the Beatties filed a letter regarding the issue of whether the Board may hear Criterion 5 de novo in this matter. On November 26, 1989, the State filed a memorandum on jurisdictional issues related to permit Conditions 6 and 11. On November 27, 1989, the Beatties filed a letter concerning the de novo issue and a petition for party status. On December 1, 1989, the Agency filed a response to the Beatties' letters and petition. The Board deliberated on December 6, 1989 in Quechee, Vermont, on April 30, 1990 by conference call, and on May 9, 1990 in Rutland, Vermont. This matter is now ready for decision.

II. ISSUES

The issues before the Board are:

1. Whether the District Commission has authority to issue Permit Conditions 6 and 11.

2. Whether Harold and Catherine Beattie should be granted party status.

3. Whether the Board's consideration of this matter is limited to the legal issues raised regarding permit Conditions 6 and 11.

III. DISCUSSION

A. Authority to Issue Permit Conditions 6 and 11

The State argues that the District Commission lacks authority to issue Permit Conditions 6 and 11. The State

advances separate arguments with regard to each permit condition. The Board considers each in turn.

1. Condition 6: Cattle Underpass

Condition 6 requires the State to install a 12-foot wide by 13-foot high cattle and farm equipment underpass. The State argues that 19 V.S.A. § 507(b) vests sole jurisdiction over cattle underpasses in the Superior Court. The State bases this argument on rules of statutory construction, asserting that the Legislature, by giving the Superior Court such jurisdiction, necessarily limited the authority of the Board and district commissions to review cattle underpasses for conformance with Criterion 5. The State also argues, in the alternative, that if the Board concludes jurisdiction exists, the Board must require property owners to pay their proportionate shares for the underpass as required under 19 V.S.A. § 507(b). The State further argues that the doctrine of res iudicata prohibits the raising of the cattle underpass issue before the Board and District Commission because the Caledonia County Superior Court already ruled on the matter in a necessity proceeding. See Petition of State Transnortation Board v. Vance Tree Contractor, et al., Docket No. S-85-87CAC, slip op. (October 1, 1987). The Beatties have not argued this issue.

The Board has concluded that the State's arguments are not meritorious. Title 19, Chapter 5 of the Vermont Statutes concerns the hearing procedure with respect to the necessity of the State's taking land for transportation purposes. Specifically, 19 V.S.A. § 507(b) provides:

> By its order, the court may also direct the agency of transportation to install passes under the highway as specified in this chapter for the benefit of the large modern farm properties, the fee title of which is owned by any party to the proceedings, where a reasonable need is shown by the owner. The court may consider evidence relative to present and anticipated future highway traffic volume, future land development in the area, and the amount and type of acreage separated by the highway in determining the need for an underpass of larger dimensions than a standard cattle-pass of reinforced concrete, metal or other suitable material which provides usable dimensions five feet wide by six feet three inches high. Where a herd of greater than fifty milking cows is consistently maintained on the property, the court may direct that the dimensions of the larger underpass shall be eight feet in width and six feet three inches in height to be constructed of

> reinforced concrete, and the owner of the farm property shall pay one-fourth of the difference in overall cost between the standard cattle-pass and the larger underpass. ...

The section further provides for even larger underpasses to be constructed, requiring that "the total additional costs over the dimensions specified shall be paid by the owner."

In the 1987 necessity decision cited above, the Court stated:

> The purpose of a necessity proceeding such as this is to determine whether particular parcels of land are required under the survey and to determine whether the plan or project is necessary at all. . ..
>
> Public safety is the critical element in determining whether reasonable necessity exists with regard to a proposed highway improvement.

Petition of State Transportation Board, supra at 4, citing Asency of Transnortation v. Wall Management, 144 Vt. 640, 645 (1984).

10 V.S.A. Chapter 151 (Act 250) governs review and issuance of land use permits, requiring that developments and subdivisions meet ten environmental criteria. 10 V.S.A. § 6086(a) provides:

> Before granting a permit, the board or district commission shall find that the subdivision or development. ..
>
> (5) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

Act 250 also authorizes the Board and district commissions to issue permit conditions with respect to the ten criteria, and specifically provides concerning Criterion 5 that reasonable conditions and requirements may be attached to alleviate burdens created under that criterion. 10 V.S.A. §§ 6086(c), 6087(b).

The Vermont Supreme Court has stated that:

> Act 250 sets up concurrent jurisdiction between the various state Environmental Agencies and the Environmental Board. See 10 V.S.A. § 6082.

In re Hawk Mountain Corp., 149 Vt. 179, 185 (1989). In Hawk Mountain, the Court found that the Board had authority to review water discharge issues independently despite the redundancy of this authority with that of another state agency.

The Board does not believe that the law commits jurisdiction over cattle underpasses exclusively to the Superior Court or to the Environmental Board. Instead, jurisdiction over takings of land for transportation purposes is committed to the Superior Court and jurisdiction over issuance of land use permits is committed to the Environmental Board and district commissions. Because both areas may involve public safety questions which give rise to cattle underpass issues, there is some redundancy in the issues which may be heard under the grants of jurisdiction. But as the Hawk Mountain decision indicates, redundancy in issues alone does not divest one entity or the other of jurisdiction.

Moreover, the plain language of the statutes does not support the State's contention. Nowhere in Title 19 is it stated that exclusive jurisdiction over cattle underpasses rests with the Superior Court. Further, Act 250 contains a clear grant of authority to the Board and district commissions to consider traffic safety effects of development and to impose conditions which alleviate those effects.

The rules of statutory construction cited by the State likewise do not support its argument. The State argues that two rules which the courts apply in construing conflicting statutes divest the Board and district commissions of jurisdiction: (1) that specific statutes are given effect over general statutes and (2) that later statutes are given effect over earlier statutes.

These rules do not apply here. Such rules only apply in construing two statutes which are part of the same statutory scheme, or "in pari materia." State v. Jarvis, 146 Vt. 636, 637-638 (1986). Statutes are not in pari materia where they are enacted for different purposes and are parts of different statutory systems. Cook v. Dept. of Employment and Training, 143 Vt. 495, 497 (1983). In Cook, the Court found in part that the Vermont tax code and unemployment statutes were not in pari materia. Similarly, Act 250, which concerns issuance of land use permits and environmental review of permit applications, is not in pari materia with the statutes regarding the taking of land for transportation purposes.

The Board also believes that the statutory construction rules only apply where statutes are in conflict. The Supreme Court has stated that where "the provisions of . . . two enactments can stand together, each section will be given full force and effect." Black River Association, Inc. v. Koehler & Dion, 126 Vt. 394, 398 (1967). In this case, the statutes are not in conflict: 19 V.S.A. Chapter 5 gives necessity jurisdiction to the Superior Court, and Act 250 gives land use permit jurisdiction to the Board and district commissions.

Further, the Supreme Court has stated that the rule concerning specific and general statutes is as follows:

> When two statutory provisions deal with the same subject matter, and one is general, and the other specific, the more specific provision "must be given effect according to its terms."

State v. Jarvis, 146 Vt. at 638, citing State v. Teachout, 142 Vt. 69, 73 (1982). The issue in this matter is not whether 19 V.S.A. Chapter 5, which the State alleges is more specific, should be given effect. As the Caledonia County Superior Court decision indicates, that statute has been given effect: a necessity hearing has been held, and a court decision issued. The issue rather is whether this somehow divests the Board and district commissions of jurisdiction over cattle underpasses.

Similarly, the rule regarding earlier and later enacted statutes does not support the State's argument. The Legislature originally enacted the provision concerning consideration of cattle farm underpasses during necessity hearings in 1961, which was codified at 19 V.S.A. § 227(b). 1961 Vt. Laws No. 276. Act 250 was enacted in 1969. 1969 Vt. Laws No. 250 (Adj. Sess.). The Legislature recodified 19 V.S.A. § 227(b) to 19 V.S.A. § 507(b) in 1985 without substantive change. 1985 Vt. Laws No. 269 (Adj. Sess.). Thus, the Legislature did not, as the State appears to contend, abrogate the authority of the Board and district commissions by subsequently enacting the necessity hearing provision. That provision was enacted in 1961, and the Legislature must be presumed to have had it in mind in 1969 when it promulgated Act 250.

The Board also does not believe that the District Commission is required to make the Beatties pay for additional costs resulting from the size of the cattle underpass. Act 250 allows for conditions to be imposed on permittees but gives no authority to issue permit conditions which require parties to an Act 250 proceeding to pay for

improvements. In addition, the provision in 19 V.S.A. Chapter 5 concerning payment of the State's additional costs does not authorize the Board and district commissions to require such payment; instead, that authority is given to the Superior Court.

Finally, Condition 6 is not barred by the doctrine of res iudicata. That doctrine bars claims in one proceeding where the claim has been litigated in another proceeding, and, in the two proceedings, the parties, subject matter, and cause of action are substantially identical. Berisha v. Hardv, 144 Vt. 136, 138 (1984). The Board has previously recognized that the doctrine is relevant to Act 250 proceedings, but has stated that it does not apply where it is outweighed by policy considerations. Rome Family Cornoration, Application #1R0410-3-EB, Memorandum of Decision at 4 (May 2, 1989); see Town of Snrinafield. Vermont v. Environmental Board, 521 F. Supp. 243 (1981).

In this case, the doctrine of res iudicata is inapplicable on its own terms and therefore the Board need not address whether i.ts application would be outweighed by policy considerations. The subject matter and causes of action are not identical or even substantially similar. In the necessity hearing, the question is whether the taking of land is necessary for public safety purposes. The Court is allowed to require a cattle underpass if it finds one needed after considering a variety of factors, including traffic volume (but not overall traffic safety). A cattle underpass of greater than standard dimensions can only be ordered if a farmer pays a share of the extra cost, regardless of the traffic safety implications which may arise if the farmer is unable to pay. In contrast, the issue in an Act 250 proceeding is whether a land use permit should be granted. With respect to Criterion 5, the issue specifically is whether the project creates unsafe traffic conditions or unreasonable congestion. The Board and district commissions may require that an underpass be installed of sufficient dimension to provide traffic safety whether or not a farmer can pay a part of the cost of the underpass. Thus, while the Court's and District Commission's inquiries concerning the cattle underpass may overlap, these inquiries arise in proceedings which are not substantially similar.

2. Condition 11: Jurisdiction over Traffic Control

In Condition 11, the District Commission retains jurisdiction over the State's placement of traffic warning signs, speed-limit signs, and traffic control program.

The State argues that the District Commission lacks jurisdiction to issue Condition 11. It argues that such jurisdiction is exclusively committed to other state entities pursuant to 19 V.S.A. § 10 and 23 V.S.A. §§ 1003 and 1025. In the alternative, the State argues that, if the District Commission has such jurisdiction, it must exercise it in conformance with the federal Manual on Uniform Traffic Control Devices, as required by 23 V.S.A. § 1025. The State further argues that Condition 11 is not supported by findings of fact and is therefore invalid.

The State's arguments concerning the District Commission's (and, by implication, this Board's) jurisdiction are unpersuasive. None of the cited statutory provisions contains exclusive grants of jurisdiction over traffic control to other entities. 19 V.S.A. § 10 consists of a set of authorities granted to the Agency of Transportation. These authorities include the "exercise" of "general supervision of all transportation functions ..." (19 V.S.A. § 10(3)) and erection and maintenance of traffic control devices on state highways (19 V.S.A § 10(7)). None of them states that the Board or district commissions, or any other entity, are thereby divested of jurisdiction. Similarly, 23 V.S.A. § 1003 grants authority to a State traffic committee to adjust speed limits as needed to protect safety, and 23 V.S.A. § 1025 states that the federal Manual on Uniform Traffic Control "shall be the standard ... for all traffic control signs, signals and markings within the state." Neither of these provisions states that other entities are divested of jurisdiction. For these reasons and the reasons stated above with respect to the jurisdiction to issue Condition 6, the District Commission has authority to issue Condition 11.

The State's argument that the District Commission is required to comply with the standards in the Manual on Uniform Traffic Control is not ripe. The District Commission has not issued any specific requirements regarding traffic control devices for the proposed project. Should the District Commission seek to exercise its authority over traffic control with respect to this project, the State may seek compliance with the manual at that time.

The assertion that the District Commission's condition is unsupported by findings of fact is not appropriate to a de novo appeals process. 10 V.S.A. § 6089(a).

B. Party Status

10 V.S.A. § 6085(c) requires that the Board grant party status to adjoining landowners to the extent that a proposed

project will have a direct effect on their property under the ten criteria of 10 V.S.A. § 6086(a). See also Board Rule 14(A)(3). Harold and Catherine Beattie own a farm which is bisected by Route 2. The project will widen the portion of Route 2 which goes through their farm. Their cattle and farm equipment will have to use the proposed underpass or go across the widened Route 2. Accordingly, the Beatties are granted party status on Criterion 5 as adjoining landowners.

C. Scope of the Appeal

The Beatties argue that the Board is limited in this appeal to a review of the legal issues raised by the State. They assert that the State has challenged no District Commission findings in its notice of appeal, and therefore the Board should not hold a de novo hearing on the proposed project's compliance with Criterion 5.

Board Rule 40(C) provides:

> The scope of the appeal hearing shall be limited to those reasons assigned by the appellant why the commission was in error unless substantial inequity or injustice would result from such limitation.

The State's appeal raises only legal issues with respect to the District Commission's issuance of Conditions 6 and 11, which the Board has answered above. No findings under Criterion 5 are challenged in the notice of appeal. The Board sees, and the State has alleged, no substantial injustice or inequity resulting from limiting the State to these legal issues. Accordingly, since the Board has answered the issues raised in the notice, the Board has determined not to hold a de novo hearing on Criterion 5, and to dismiss this appeal subject to written objection by the parties.

IV. ORDER

1. The District #7 Environmental Commission has authority to issue Conditions 6 and 11.

2. Harold and Catherine Beattie are granted party status on Criterion 5 as adjoining landowners.

3. This matter is dismissed effective May 31, 1990 unless a written objection to dismissal is filed by a party prior to that date.

4. Once dismissal becomes effective, jurisdiction over this matter is returned to the District #7 Environmental Commission.

Dated at Montpelier, Vermont, this 18th day of May, 1990.

ENVIRONMENTAL BOARD

Charles Storrow
Ferdinand Bongartz
Elizabeth Courtney
Rebecca Day
Samuel Lloyd
W. Philip Wagner

a:trans2.mem (rd4)

Opinion of Stephen Reynes, Chairman, dissenting in part and concurring in part, joined by Board Member Arthur Gibb:

Given the circumstances of this case, including the very specific provisions of 19 V.S.A. § 507(b) regarding the size of cattle underpasses, I respectfully dissent from that portion of the Board's decision which upholds the district commission's imposition of a condition ordering the State to design, and presumably install, a larger cattle underpass than had been granted by final order of the Caledonia Superior Court. I believe that the issue of the size of the cattle underpass is precluded under the doctrine of res judicata.

Res iudicata is a Latin phrase meaning a "thing decided." It is a judicial doctrine which has been described as follows:

> Res judicata ensures the finality of decisions. Under res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." ... Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. . . . Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. (Citations omitted.)

Fitzgerald v. Fitzgerald, 144 Vt. 549, 552 (1984), quoting Brown v. Felsen, 442 U.S. 127, 131 (1979).

Res iudicata bars a subsequent trial "only if the parties, subject matter and causes of action are identical or substantially identical." Berisha v. Hardy, 144 Vt. 136, 138 (1984). I believe these requirements are met here.

The highway condemnation Petition, including its proposal for a certain cattle underpass, was filed with the Caledonia Superior Court in the name of the Transportation Board, rather than by the Agency of Transportation (AOT), which is the Act 250 applicant. AOT, however, acted on behalf of the Transportation Board on the Petition and it is apparent that AOT is intimately involved throughout the process under Chapter 5 of Title 19; e.g., the burden of proof at the necessity hearing is on AOT, 19 V.S.A. § 587(a); see also § 502(a) (Board requests AOT to take land); § 502(c) (AOT holds public hearing and must consider all objections, suggestions and recommendations made by any

interested person, and agency prepares the road plans); § 503 (AOT surveys the land it desires to acquire); see also Gilmour v. State, 141 Vt. 640 (1982), upholding a dismissal based upon res judicata, arising from an action under the same statutory Chapter as involved here, where the State was regarded as having assumed all of the Town's duties. Id. at 642-643.

It is also clear from the record that the Beatties were active parties before the Court and the District Commission, and that the cattle underpass was at issue in both proceedings.

Under 19 V.S.A. § 507(b), the Superior Court had jurisdiction to consider the need for, and the dimensions of, a cattle underpass, and the parties, including the Beatties, had the right to present evidence thereto. The Court was not bound to accept whatever AOT presented; see, for example, § 507(b):

> By its order, the court also may direct. the agency of transportation to install passes under the highway for the benefit of the large modern farm properties ... where a reasonable need is shown by the owner. The court may consider evidence. . .in determining the need for an underpass of larger dimensions than a standard cattle-pass. . .

See also State Hiahwav Board v. Loomis, 122 Vt. 125, 132 (1960), decided under a predecessor statute, wherein the Supreme Court stated that "the court is not in the position of having to accept the highway board's petitions in their exact form". It is clear from the decision of the Caledonia Superior Court that the Beatties did participate relative to the underpass and that the Court made findings as to the underpass.

The issue of safety was before the Superior Court. The Vermont Supreme Court has recognized that public safety is "the critical element" in necessity proceedings. Aaencv of Transoortation v. Wall Manaaement, 144 Vt. 640, 645 (1984). It is clear that the Caledonia Superior Court had public safety in mind in its decision, for the Court specifically cited it and the Wall Manaaement case in its opinion. Also, the language of § 507(b) makes it clear that the court, in connection with any issue related to the size of the cattle underpass, could "consider evidence relative to present and anticipated future highway traffic volume."

Whether the Beatties asked the Court to order a larger

underpass is not stated in the Court's findings; that does not affect the applicability of res iudicata, however, because that question could have been pressed by the Beatties in that Court. "Parties to a judgment under the doctrine of res judicata are not only concluded as to the issues litigated but as to the issues which could have been litigated in that action." Gilmour v. State, suvra at 642 (in Gilmour, the Supreme Court upheld judgment for the state on the basis of res iudicata arising from a necessity petition); see also Lerman v. Lerman, 148 Vt. 629 (1987) (" A party who has litigated, or who has had an opportunity to litigate, a matter in a former action in a court of competent jurisdiction should not be permitted to relitigate the issue against the same adversary." Id. at 629).

Under § 507(b), where a farmer has "a herd of greater than 50 milking cows," the court may direct construction of a larger cattle underpass with specific formula of contribution by the farmer regarding the extra cost. The District Commission found in its April 28, 1989 decision that the Beatties maintain a herd of approximately 100 milking cows, so again it is clear that the size of the cattle underpass could have been litigated before the Court.

I am not aware of any decision of the Vermont Supreme Court which has specifically considered whether res iudicata applies to quasi-judicial proceedings. The decision of the United States Court for the District of Vermont in Town of Svrinafield v. State of Vermont Environmental Board and the decision of the Environmental Board in Rome (both cited in the Board's decision) support the proposition that an administrative decision might not be given res iudicata effect if its application is outweighed by policy considerations. This case does not present the question of whether to give res iudicata effect to an administrative decision, however; it presents the question of whether to give res iudicata effect in an administrative proceeding to a decision of a court of competent jurisdiction, where the underpass issue was reviewable under very specific statutory provisions. The Beatties had their day in Court on the underpass issue, from which there was a final Court decision from which no appeal was taken. "Judgments from which timely appeals are not taken are conclusive upon the parties." Miller v. A. N. Derinaer, Inc., 146 Vt 59, 60 (1985).

Accordingly, I believe that the issue of the size of the underpass has been precluded.

I realize that this opinion may open questions in future cases, but this is where my understanding of the law leads me.

I concur with the Board on the other questions that were before it.

I am authorized to state that Board Member Arthur Gibb joins in this opinion.

Stephen Reynes

Stephen Reynes, Chairman
Arthur Gibb