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

Re: Derby Plaza Associates Limited Partnership,
Nelson Farms, Inc., Omer Choquette, and Carl, Norma, and Earl Hackett
Application #7R0886-EB

MEMORANDUM OF DECISION

This decision pertains to an appeal of a permit issued for a retail shopping center. As is explained below, the Environmental Board grants the Applicants' motion to deny the petition to intervene of Ames Department Store and Shop & Save, Inc. (the Appellants) and to strike the appeal.

BACKGROUND

On December 7, 1993, the District #7 Commission issued Land Use Permit #7R0886, authorizing the Applicants to construct and operate a retail shopping center in the Village of Derby Center to be known as the Derby Plaza.

On January 4, 1994, the Appellants filed an appeal and petition to intervene with the Board with respect to 10 V.S.A. § 6086(a)(7) (local governmental services), 8 (aesthetics), and 9(A) (impact of growth).

On January 7, 1994, the Applicants filed a motion seeking denial of the petition to intervene and the striking of the appeal. In the motion, the Applicant requested expedited consideration so that they would know whether they could go forward with construction.

On January 11, 1994, Board Counsel Aaron Adler sent a memorandum to parties stating that Board Chair Elizabeth Courtney had determined that the Applicant's motion should be scheduled for oral argument by the Board as soon as possible. The memorandum enclosed a notice of oral argument (to occur on January 26, 1994) and offered parties an opportunity to file written comments concerning the Applicant's motion.

On January 13, 1994, the Town of Derby Planning Commission and the Village of Derby Center each filed written comments.

On January 19, 1994, the Vermont Senate voted to reject the appointment by Governor Howard Dean of Chair Courtney and members Ferdinand Bongartz and Terry Ehrich. On January 20, the remaining members deliberated by conference call and decided not to go forward with hearings. On January 21, Counsel sent a memorandum to parties informing them of the Board's January 20 decision and of the reasons for that decision, postponing the oral argument, and enclosing minutes of the Board's January 20 deliberation. Counsel's January 21

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memorandum and the minutes of the January 20 deliberation are incorporated by reference, as is Counsel's subsequent memorandum to parties of January 27, 1994.

By memorandum of January 31, 1994, Counsel informed parties that oral argument would occur in this matter on February 11, 1994, Chair Courtney and members Bongartz and Ehrich having been re-appointed by the Governor. A notice was enclosed.

On January 31 and February 2, 1994, the Applicants filed letters concerning the constitution of the Board for the February 11 oral argument and requesting that the Board reach and announce a decision on their motion on February 11.

On February 9, 1994, Chair Courtney issued a memorandum to parties stating that she and member Bongartz would participate in the oral argument. The memorandum enclosed a copy of an opinion of the Attorney General's office dated January 28, 1994 concerning such participation.

On February 10, 1994, the Appellants filed a memorandum expressing concern about the fairness of the hearing scheduled for February 11.

The Board convened oral argument in St. Johnsbury, with the following parties participating:

The Applicants by Douglas K. Riley, Esq.
The Appellants by Richard Saudek, Esq.
The Village of Derby Center by Jeanine Young
The Town of Derby Planning Commission by William Nash

Alternate member Robert Opel chaired the argument, having been assigned Acting Chair by Chair Courtney who was unexpectedly unavailable. After hearing argument from the parties, the Board recessed and deliberated. The Board then reconvened. Acting Chair Opel stated that the Board would not announce its decision on February 11 and that the Board would issue a written decision within two weeks.

DECISION

The Applicants argue that the Appellants may not bring this appeal because they did not have party status before the District Commission. The Applicants acknowledge that a person may appeal a denial of party status to the

Board, but contend that the Appellants did not request such status before the District Commission.

The Appellants concede that they neither requested nor obtained party status before the District Commission. They argue that they supplied information to the District Commission through an organization that did seek party status, the City of Newport Downtown Merchants Association. The Appellants acknowledge that they are not members of that association and that the association did not appeal. The Appellants argue that a substantial injustice will occur if they are not allowed to appeal this matter because the proposed project will have a significant adverse impact on them, on local merchants, and on the surrounding area. The Appellants further argue that, for these reasons, the Board should grant them party status and allow their appeal to go forward.

The Board concludes that the Appellants may not bring this appeal. 10 V.S.A. § 6089(a), the provision that authorizes appeals to the Board, states:

> An appeal from the district commission shall be to the board and shall be accompanied by a fee prescribed by rule of the board which shall be reasonably related to the costs associated with hearing the appeal. The board shall hold a de novo hearing on all findings requested by any *party* [emphasis added]. ...

Similarly, Rule 40(A) states:

> Any *party* aggrieved by an adverse determination by a district commission may appeal to the board and will be given a de novo hearing on findings, conclusions and permit conditions issued by the district commission.

(Emphasis added.) Rule 40(A) was ratified by the General Assembly in 1985 and therefore has the force and effect of a legislative enactment. 1985 Vt. Laws No. 52 § 5; In re Spencer, 152 Vt. 330, 336 (1989).

Under 10 V.S.A. §§ 6084(a), (b) and 6085(c), and Board Rules 2(K) and 14, the term "party" includes the so-called "statutory" parties: the landowner if different from the applicant, the town in which the proposed project is located, the town planning commission, the regional planning commission, any adjacent municipality and municipal or regional planning commission if the project land is on a boundary, and any directly affected state agency. Under those statutes and rules, the term "party" also includes the applicant, any adjoining landowner to the

extent directly affected under the Act 250 criteria set forth at 10 V.S.A. § 6086(a), and the so-called "permitted" parties under Rule 14(B).

The Appellants state that they are private businesses that compete with the businesses likely to be placed in the proposed shopping center. Thus, they do not qualify as statutory parties.

Moreover, the Appellants do not claim to own adjoining land and did not obtain party status as "permitted parties" before the District Commission under Rule 14(B).

The Board has previously stated that a person denied party status before a district commission may appeal such denial to the Board and that such a person is deemed to be a party for the purposes of deciding whether the person ought to be granted or denied party status. Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision at 4-7 (July 31, 1989). Under Rule 40(A), such a person is aggrieved by the decision to deny party status. However, the Appellants did not request party status before the District Commission.

Accordingly, the Appellants are not presently a party as that term is defined in Act 250 or the Board Rules, or as construed in prior Board decisions. Thus, under 10 V.S.A. § 6089(a) and Board Rule 40(A), they may not appeal the District Commission's decision on this application, and the appeal should be struck.

The sole legal basis for the Appellants' argument that they be allowed to appeal is the contention that the Board should grant them party status and allow their appeal because disallowing it would work a substantial injustice. The Board concedes that in past decisions it has implied that a person who neither requested nor received party status before the District Commission can appeal if the person can persuade the Board that disallowing appeal would result in a substantial inequity or injustice. See, e.g., Re: Sherman Hollow, Inc., #4C0422-5-EB, Memorandum of Decision (Feb. 3, 1988); Re: Grand Union Co. & Mrs. Ralph Humiston, #1R0733-EB, Memorandum of Decision (Aug. 26, 1992). This implication arose from Rule 40(D), which 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.

Upon re-examination, the Board does not believe that the rule was intended to be construed to allow appeal by a non-party. The language of the rule does not state that the rule is to provide a basis for allowing such an appeal. Rather, the rule is directed at limiting the scope of issues brought before the Board in an otherwise proper appeal filed by a party, with the caveat that the scope of the appeal may be expanded under certain circumstances.

Based on the foregoing, the Board concludes that being a party, or at least requesting party status, is a prerequisite to appealing a district commission decision.[1] Because the Appellants did not obtain or request party status before the District Commission, their appeal must be dismissed.

In closing, the Board wishes to address concerns raised by the Appellants about the fairness of the hearing. The Board understands the basis for the Appellants' concerns to be the fact that the Board expedited the hearing on the Applicants' motion, as requested by the Applicants in their motion.

The Applicants' motion raised a preliminary legal issue about the validity of the appeal. It is the Boards usual practice to decide issues about the validity of an appeal quickly and early in the appeal process. Usually, the Board does so following a prehearing conference held under 10 V.S.A. § 6085(b) and Rule 16 because typically the issues are first raised at a prehearing conference. However, in this case, the Applicants raised the issue prior to the scheduling of a prehearing conference. Because the issue is one of law and did not necessitate an evidentiary hearing (which typically is lengthy), it was feasible and practical for the Board quickly to schedule a brief oral argument on the legal issue, and the Board did so. The Board reminds parties that 10 V.S.A. § 6083(d) requires it to make all practical efforts to process permits in a prompt manner.

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[1] *The* ***Board notes that, under Rule 14(A)(3) and 14(B),*** *adjoining* ***property owners and permitted parties are parties only with respect to the criteria on which they are given party status, and therefore may only appeal such criteria The one exception to this is the rule discussed in Swain cited above.***

The Board further notes that today's decision in no way implies that a person who did not have party status before a district commission cannot participate before the Board on an appeal properly filed by a party. For discussion of such a situation, see Re: L & S Associates, #2W0434-8-EB, Memorandum of Decision (Nov. 24, I992).

ORDER

1. The Applicants' motion to deny the Appellant's petition to intervene and to strike the appeal is hereby granted.

2. The Appellant's petition to intervene is denied.

3. The Appellant's notice of appeal is struck and the appeal is dismissed.

4. Jurisdiction over Land Use Permit #7R0886 resides with the District #7 Commission.

Dated at Montpelier, Vermont this 25th day of February, 1994.

ENVIRONMENTAL BOARD

Robert Opel (by AWP)
Robert Opel, Acting Chair
Rebecca Day
Lixi Fortna
Arthur Gibb
Samuel Lloyd
William Martinez
Steve E. Wright

Ferdinand Bongartz participated in the oral argument and deliberation on February 11, 1994. He is not participating in the final decision because, on February 22, 1994, the Vermont Senate voted not to confirm his re-appointment.

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