

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

RE: Green Peak Estates, Inc. MEMORANDUM OF DECISION
Michael Bickford, President Land Use Permit #8B0314-2-EB
P.O. Box 727
Dorset, VT 05251

I. Procedural Background

On November 25, 1985, the Applicant Green Peak Estates, Inc. ("GPE"), through its attorney Matthew Birmingham, appealed from the November 1, 1985 decision of the District #8 Environmental Commission ("Commission") denying approval for Phases II and III of a residential subdivision proposed for Dorset, Vermont. The appeal specifically related to the Commission's findings under Criteria 1(A), 1(B), 1(C), 2, 3, 4, 5, 8(a), and 10. Subsequently, a number of statutory parties filed appearances based upon concerns they had with the project, and several interested parties sought and received party status under Rule 14(B). Parties intending to participate under any of the criteria at issue were directed to enter their appearances. However, only those parties interested in and admitted under Criterion 10 participated in the hearings held by the Board.

Parties to this appeal are:

Applicant/Appellant GPE by A. Jay Kenlan, Esq. and Peter Hall, Esq.

The Town of Dorset and Dorset Planning Commission (hereafter collectively "the Town") by Joseph O'Dea, Esq.

The Bennington County Regional Commission ("BCRC") by Harvey Carter, Esq. and Robert Weinberg, Esq.

Agency of Environmental Conservation ('AEC') by Gordon Gebauer, Esq.

The Bennington County Natural Resources Conservation District ("BCNRCD") by Robert Graf

J.B. Elliot and the Green Peak Orchard Association by Reed Colgrove, Esq.

Joan and Pierre Ledoux

Scout Proft

The Nature Conservancy by Mark DesMeules.

At the prehearing conference held on January 16, 1986, the parties agreed, pursuant to 10 V.S.A. § 6086(b), that the Board should consider and issue findings on Criterion 10 before proceeding to the other criteria at issue (see Prehearing Conference Order dated January 21, 1986). The Board conducted several days of hearings on Criterion 10 and issued its decision on July 22, 1986. The Board denied a permit to the Applicant based upon its conclusion that the project does not satisfy Criterion 10 because it does not conform with either the Dorset town plan or the Bennington County regional plan.

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On August 5, 1986, the Applicant filed with the Board a Motion to Modify Findings of Fact, Conclusions of Law and Order and on August 14, 1986 the Applicant filed with the Board a Restatement of Motion to Withdraw Issues Raised on Appeal. Through these motions the Applicant (1) seeks to withdraw its appeal on Criteria 1(A), 1(B), 1(C), 2, 3, 4, 5, and 8(a); and (2) requests the Board to rule on whether the Board's decision of July 22 is a final order for purposes of appealing to the Supreme Court. The BCRC, BCNRCD, and Scott Proft have objected to withdrawal of the appeal on the remaining criteria. The questions raised by the Applicant are addressed below.

II. Decision

1. Under Rule 41(a)(1) of the Vermont Rules of Civil Procedure, a plaintiff has the right to dismiss an action if (1) the notice of dismissal is filed before an opposing party serves an answer or motion for summary judgment, or (2) all parties who have appeared in the action sign a stipulation of dismissal. V.R.C.P. 41(a)(2) provides that an action cannot be dismissed by the plaintiff except as provided in V.R.C.P. 41(a)(1) or upon order of the court.

Rule 42(a) of the Vermont Rules of Appellate Procedure provides that an appellant has a unilateral right to withdraw its appeal only before the case has been docketed. Once an appeal has been docketed, it can be dismissed only upon agreement of all the parties.

The Board received objections to the Applicant's withdrawing its appeal from the BCRC, BCNRCD, and Scout Proft. The parties are obviously not willing to stipulate to a dismissal of this action.

Once an appeal has been filed with the Board, there is no requirement that other parties file a cross-appeal in order to have party status. Any people who were given full or partial party status in the District Commission proceedings will automatically retain that status before the Board unless the decision to grant party status to them was also appealed. See In re George F. Adams & Co., 134 Vt. 172 (1976). These people are entitled to participate in the appeal on those issues in which they have party status whether or not they have filed a cross-appeal/1/.

/1/ The Board may require the non-appealing parties to state their position with regard to the criteria on appeal, in order to allow the appellant and other parties to discover the extent to which the non-appealing parties concur with the decision of the District Commission and the position of the

In this case, the Applicant appealed the District Commission's findings under Criteria 1(A), 1(B), 1(C), 2, 3, 4, 5, 8(a), and 10. Another party may have appealed one or more of these criteria had the Applicant not done so. While the Applicant has the right to waive its objections to the District Commission's decision as to these criteria, the Board cannot dismiss the appeal without first allowing the other parties an opportunity to object to and be heard on the Commission's findings on these criteria. The Board therefore denies the Applicant's motion to dismiss its appeal of the Commission's findings under Criteria 1(A), 1(B), 1(C), 2, 3, 4, 5, and 8(a).

The Applicant has argued that if it chooses not to present evidence to the Board on the other criteria under appeal, the decision of the District Commission will stand as written. This is not correct. In a de novo appeal, the Board takes evidence and makes findings on those criteria under appeal as though there had not been any review by the district commission. See In re Preseault, 130 Vt. 343, 348 (1972). The applicant has the burden of proof on criteria 1 through 4 and 9 and 10. 10 V.S.A. § 6088. Because the hearing is de novo, in order to issue a permit the Board must be able to make positive findings on each criterion under appeal, based solely upon the evidence in the record. 10 V.S.A. § 6086(a). Regardless of who has the burden of proof, the applicant always has the burden of going forward; that is, the applicant must provide enough information on which the Board can make a positive finding on those criteria under appeal. See Re: Mr. and Mrs. Joseph Gagnon and Kenneth Gagnon, Memorandum of Decision, Declaratory Ruling Request #173 (July 3, 1986) and Re: Imported Cars of Rutland, Inc., Findings of Fact and Conclusions of Law #1R0156-2-EB (October 12, 1982). **Therefore**, contrary to the Applicant's claim, if it were to present no evidence at a hearing on the remaining criteria under appeal, the Board would have to find that the project does not satisfy those criteria and deny the permit on that basis.

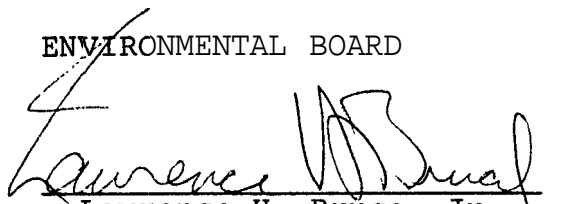
2. The statute states that the Board's decision is final for purposes of appeal to the Supreme Court. 10 V.S.A. § 6086(b) provides that "[i]f the district commission or the board first issues its findings and decision only on [Criterion 10], that decision shall be appealable under section 6089 of this title." Section 6089(b) sets out the procedures for appealing to the Board and to the Supreme Court. Clearly, the Board's July 22 decision to deny the project under Criterion 10 may be appealed to the Supreme Court.

/1/ (continued) appellant. It should be noted that if non-appealing parties wish to raise for the Board's review any additional issues which were not the subject of the original appeal, they must file a cross-appeal within 14 days of the Board's mailing of the notice of appeal or risk waiving those issues. See Board Rule 40.

If the Supreme Court reverses the Board's decision and orders that a positive finding be made on Criterion **10**, the Board will reconvene the hearings to take evidence on Criteria **1(A), 1(B), 1(C), 2, 3, 4, 5, and 8(a)**. In that event, the Board will require the other parties to file a more definite statement of their objections to the District Commission's findings and decision on Criteria **1(A), 1(B), 1(C), 2, 3, 4, 5, and 8(a)**.

Dated at St. Albans, Vermont this 24 day of September, 1986.

ENVIRONMENTAL BOARD



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