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

RE: Vermont Veterans Home
Irving A. Bates, Commissioner
Department of State Bldgs.
Montpelier, Vermont 05602

Findings of Fact, Conclusions of Law and Order
Land Use Permit #8B0318-EB

This decision pertains to an appeal filed on June 7, 1984, with the Environmental Board ("the Board") by the Vermont Department of State Buildings ("the Department") from the Findings of Fact, Conclusions of Law and Land Use Permit #8B0318 issued by the District #8 Environmental Commission ("the Commission") on May 8, 1984.

The Department requested that proceedings on its appeal be stayed until such time as the Commission had an opportunity to review and rule on the Department's May 31, 1984 request for reconsideration. On June 28, the Commission issued its decision denying the reconsideration request. Therefore, on July 11, 1984, the Board notified the parties of its intent to designate its Chairman to act as administrative hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. §811. No objection to the use of a hearing officer was filed with the Board within, the time period identified in its notice. A public hearing was, therefore, convened on August 13, 1984 in Montpelier, Vermont, Chairman Margaret P. Garland presiding.

The following participated as parties in the hearing:

Department of State Buildings by Samuel E. Johnson, Esq.;
Vermont Department of Health ("the DOH") by Harold E. Sargent.

The hearing was recessed on August 13, pending the Department's filing of a memorandum and the submission of certain related "land use permits." The DOH was to comment in writing after the filing of the permits. At the Department's request, a "post-hearing conference" was convened on September 19, in an effort to clarify issues prior to the Department's filing of its memorandum. The Memorandum was filed on September 24, but no "land use permits" have been submitted.

The administrative hearing officer issued a proposal for decision on October 29, and notified the parties of their right to present written and oral argument to the full Board. The Department submitted a written statement on November 9, but no party requested the opportunity to appear before the Board. On November 14, the Board determined the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

I. PRELIMINARY PROCEDURAL ISSUES

A. Use of an Administrative Hearing Officer

At the outset of the hearing, the Department expressed its objection to the Board's use of an administrative hearing officer, suggesting that the Board lacked the authority to delegate its fact-finding function to a single member of the Board. The Department, however, expressed its willingness to proceed with the hearing, reserving any further objection in the event of appeal.

As noted above, our hearing notice afforded all parties ample opportunity to object to the use of a hearing officer. Board Rule 41(B) specifically provides that cases be heard by the full Board should any party object to the use of a hearing officer. The Department failed to object in a timely fashion. Furthermore, at the hearing the Department was again offered the opportunity to proceed before the full Board but declined the offer. Therefore, despite the Department's protestations to the contrary, any objection to use of a hearing officer has been waived.

B. Scope of the Appeal

In its memorandum of law, the Department presents a somewhat convoluted argument concerning the scope of appeal. The Department apparently argues that only Criterion 3 (10 V.S.A. §6086(a)(3)) is at issue./1/

10 V.S.A. §6089(a) provides: "The Board ... shall hold a de novo hearing on all findings requested by any party." Board Rule 40(C) states: "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." Therefore, the starting point for determining what issues are cognizable in this appeal is the Notice of Appeal filed by the Department.

/1/ It is difficult to discern which Criteria the Department believes are open. The first page of its Memorandum states "The only issue raised ... was the sufficiency of the water supply . . . In other words, would the Vermont Veterans Home's Additional use of 5,000 gallons per day create an undue burden on the existing water supply, Section 6086(3) [sic]." This statement would appear to acknowledge that both Criteria 2 and 3 of 10 V.S.A. §6086(a) are open on appeal.

The Department's Notice of Appeal simply stated "the Department hereby appeals permit conditions #7 and #9" on the basis of "unreasonableness and insufficiency."/2/ Conditions #7 and #9 read as follows:

> 7) The project shall not be occupied until the municipal water system has been upgraded by the Town of Bennington to the satisfaction of the Vermont Department of Health.
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> 9) This permit shall expire on October 1, 2016, unless extended by the District Commission.

These conditions cannot be evaluated in a vacuum: because 10 V.S.A. §6086(c) authorizes the imposition of permit conditions only if they are "appropriate with respect to (1) through (10) of subsection (a)", we must in this de novo appeal reevaluate the Criteria identified by the Commission as the basis for the conditions imposed.

It is obvious from both the Commission's May 8, 1984 original decision as well as its June 28, decision on the Department's reconsideration request that Condition #7 was imposed based upon an analysis of the project under both Criteria 2 and 3. As a practical matter, and as will be evident from our findings below, Criteria 2 and 3 as they apply to the Department's proposal are inseparable; the issue addressed by both parties at the hearing was: will the demand placed on the City water system by the project cause an unreasonable burden and is there sufficient water available from that system to serve the project?

We therefore conclude that the Hearing Officer did not "expand" the scope of the appeal as alleged by the Department. Rather, the issues addressed during the hearing were confined to those matters raised by the Appellant's Notice of Appeal. We need not, therefore, consider the several elaborate arguments presented in the Department's Memorandum.

/2/ By memorandum dated July 10, 1984, the Chairman requested all parties to prepare a statement briefly describing each party's position and the reasons for that position. The Health Department filed such a statement on August 8, but the Department of State Buildings failed to do so. Furthermore, Board Rule 40(A) requires that a notice of appeal include,. "reasons assigned why the appellant believes the commission was in error, and issues the appellant claims are relevant shall be stated in the appeal.'* Tested against this standard, the Department's Notice is threadbare. The Department must, therefore, assume responsibility for any lack of clarity concerning the scope of this appeal.

II. PERMIT EXPIRATION

Condition #9 of Land Use Permit #8B0318 imposed an expiration date of October 1, 2016. 10 V.S.A. §6090(a) provides:

> Any permit granted under this chapter shall be for a specified period determined by the board in accordance with the rules adopted under this chapter as a reasonable projection of the time during which the land will remain suitable for use if developed or subdivided as contemplated in the application, and with due regard for the economic considerations attending the proposed development or subdivision.

The Department argues that Commissions have no authority to impose any expiration date until such time as the Board has promulgated rules as required by §6090(a). Board Rule 32(A) provides, in pertinent part:

> The duration of permits shall not be for a shorter period of time than that over which the permittee or successor may by reason of conditions in a permit be responsible and accountable for compliance with such conditions, including proper and timely completion of a project and the operation and maintenance of services such as water, sewage disposal and property maintenance.
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> In determining the duration of permits, a commission or the board shall give due regard for the economic consideration attending the proposed development or subdivision such as the type and terms of financing, the cost of development or subdivision, and the period of time over which the development or subdivision will take place.

In reviewing Board Rule 32(A), the Department concludes that the Board has not "put a reasonably prudent person of ordinary intelligence on notice of the standard that will be applied by the Board in each permit." The Department argues that the Rule does not, therefore, fulfill the directives of 10 V.S.A. §6090(a) and as a result, the Board lacks the authority to place Condition #9 in the Department's permit.

§6090(a) itself indicates that durational limits must be based upon a subjective analysis of the circumstances of each

case. We do not believe it reasonable to impose inflexible formulas for deciding permit duration (i.e. 10 years for fast food restaurants, 15 years for highway projects, 20 years for industrial parks, etc.). Rather, we drafted Rule 32 to include flexible guidelines for the Commissions' case-by-case analysis of appropriate expiration terms. However, the Rule does include two specific standards, each of which includes separate sub-standards:

1) The durational limit must reflect the time over which the permittee or a successor will remain accountable for performance of conditions. This criterion is further amplified by the Rule's reference to specific examples of performance: "proper and timely completion of the project" and "operation and maintenance of services such as water, sewage disposal and property maintenance."

2) The expiration date must also reflect the economic considerations attending the project. This criterion is clarified by reference to examples: "the type and terms of financing, the cost of development or subdivision, and the period of time over which the development or subdivision will take place."

We believe our Rule establishes standards understandable to the average Act 250 participant and consistent with the directives of 10 V.S.A. $6090. A "cookbook" formulation of expiration dates would compromise the Legislature's intent that duration be fixed on a case-by-case basis in response to the peculiar circumstances of each application. The expiration date will, therefore, remain a condition of the permit./3/

III. FINDINGS OF FACT

1. The Vermont Veterans Home is located in Bennington, Vermont and has provided long term care for disabled Veterans for more than 100 years. The current facility

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/3/ The Department has only challenged the validity of Board Rule 30(A) and has not argued that the expiration date selected by the Commission is unreasonable. The Department provided no evidence concerning an appropriate expiration date for the Veterans Home expansion. Therefore, we have no basis to fix an alternate expiration date.

uses approximately 5,000 gallons per day ("GPD") from the Town of Bennington water system./4/

2. The Department proposes to construct an addition to house 50 patient beds and a snack bar. The project also includes renovation of a kitchen, laundry facilities, administrative space, and physical and occupational therapy areas. The Department estimates that an additional 5,000 GPD of water will be required from the Town water supply upon completion and occupancy of the expanded facility. Exhibit #1.

3. The peak demand on the Town water supply in 1982 and 1983 was three million GPD. In 1984, the peak demand was slightly more than three million. The Town's primary water source is Bolles Brook in Woodford, Vermont. However, in 1980, 1982, and 1983, the primary source was not sufficient to meet demand.

4. During a period of drought in the summer of 1983, the City intermittently pumped water from City Stream, a water source approved by the DOH for emergency use but not for permanent use. At different times the City pumped approximately 300,000 GPD and all water withdrawn from the stream was treated by chlorination. The Town and DOH will not consider City Stream for use as a primary source because its channel runs through an area populated with septic systems which are prone to failure and because the stream runs adjacent to Route 9 which poses a threat of pollution from surface water runoff and potential roadway accidents.

5. The DOH has preliminarily approved the Town's development of an alternate primary water source, Morgan Springs. That source is not currently approved as a primary source because no chlorination system is in place, there is inadequate separation between the spring source and an adjacent impoundment area (which could potentially cause contamination), and a system to regulate water pressure during pumping of the spring must be established to prevent malfunction of the system.

/4/ The Department provided the Board with only the most sketchy factual background concerning its development proposal. As an example, the Department "stipulated" that the addition would increase current water demand 5,000 GPD but did not explain the basis for this estimate. The DOH testified that applicable Agency of Environmental Conservation regulations suggest a calculation of 125 GPD per bed or 6,250 additional gallons. We do not find the 1,250 GPD discrepancy sufficient to alter our findings.

6. With the assistance of a $30,000 planning advance from the State, the Town is currently evaluating the quantity and quality of water in Morgan Springs and is planning the engineering connection of the spring to the water system. Preliminary testing suggests that Morgan Spring will provide water of adequate quality and quantity to serve as a primary augmentation source. The Town estimates that planning, construction and implementation of the Morgan Spring alternate source will be completed by July 1, 1986. The Town has been pursuing the Morgan Spring alternative at least since 1981 when a consulting engineer identified the spring as a potential source. Exhibit #2.

7. The Department has initiated the bidding process for construction of the addition and expects the project to be completed for occupancy during the Summer of 1986.

IV. CONCLUSIONS OF LAW

A. Criterion 2 - Sufficiency of Water Supply

Criterion 2 of 10 V.S.A. $6086(a) requires the Board to find that the project will "have sufficient water available for the reasonably foreseeable needs of the subdivision or development." We conclude that the word "sufficient" as used in Criterion 2 refers to both quantity and quality: the applicant must identify a supply adequate in respect to water volume and of a quality appropriate to the project's purposes. For example, the Department must here establish that there will be enough potable water to serve the project when occupied. In contrast, were the proposal to involve industrial development, we would not require a potable source for process water.

We conclude that the Department has met its burden under Criterion 2./5/ Occasional water volume deficiencies have been addressed on an interim basis by withdrawals from City Stream. The DOH has approved that source for temporary, emergency use only and the Town does not intend to use City Stream as a primary water source. We heard no evidence that City Stream is not a healthful water source when used in this intermittent fashion.

/5/ But for inquiry conducted by the hearing officer, there would not be sufficient evidence in the record to support an affirmative conclusion concerning Criterion 2.

The Town is working steadily to develop Morgan Springs as a primary augmentation source to be used in lieu of City Stream. The DOH has preliminarily approved the springs for ultimate development as a primary source and the Town expects to have the springs available by July, 1986. The Department does not expect the addition to be completed for occupancy before the Summer of 1986. We, therefore, conclude that the Town will have water of sufficient quantity and quality available to the Department for the reasonably foreseeable needs of the project. We will strike condition #7 as unnecessary in view of this conclusion.

B. Criterion 3 - Burden on Existing Water Supply

Criterion 3 of 10 V.S.A. §6086(a) requires the Board to find that the project "[w]ill not cause an unreasonable burden on an'existing water supply, if one is to be utilized.'* As we have found, the project will draw additional water from the existing Town of Bennington water system. We have found that the increase demand will be in the neighborhood of 5,000 GPD as compared to a 1984 peak demand in excess of three million GPD. We found that Bennington occasionally experiences water shortages during drought periods which require augmentation by sources not approved for permanent use. However, in 1983 the daily augmentation requirements averaged approximately 300,000 GPD.

We therefore conclude that the water demand from the addition is minimal in comparison to the demand on the water system imposed by existing users. Furthermore, the addition will have a negligible impact on the water system during drought periods: the Town will, in all probability, have to resort to an augmentation source whether or not the Veterans Home addition is constructed and occupied. We, therefore, conclude that any burden imposed on the water system will be minimal and certainly not unreasonable.

V. ORDER

Condition #7 of Land Use Permit #8B0318 is deleted. Condition #9 of that permit will be retained. Land Use Permit Anknd ment #8B0318-EB is issued in accordance with this decision.

Dated at Montpelier, Vermont this 14th day of November, 1984.

FOR THE ENVIRONMENTAL BOARD

By: Margaret P. Garland

Margaret P. Garland, Chairman
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Dwight E. Burnham, Sr.
Melvin H. Carter
Warren H. Cone