

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

Re: James E. Hand and John R. Hand, d/b/a Hand Motors
and East Dorset Partnership
Application #8B0444-6-EB

MEMORANDUM OF DECISION ON MOTIONS TO ALTER AND ORDER

For the reasons stated below, the Vermont Environmental Board (Board) hereby reopens the evidence in the above referenced proceeding, relative to the landscaping plan and night lighting conditions required by Land Use Permit #8B0444-6-EB (Permit), and issues the following Order.

I. BACKGROUND

On October 17, 1995, the Board issued the Permit and supporting Findings of Fact, Conclusions of Law and Order (Decision). The Decision pertains to an appeal of Land Use Permit Amendment #8B0444-6 approving an application for the construction of a new 23,000 square foot automobile sales/service facility (Project) on a 6.94 acre tract of land (Project Tract) in the Dorset Business Park on Route 7A in East Dorset, Vermont.

The Permit authorized James E. Hand and John R. Hand d/b/a Hand Motors (Hand) and East Dorset Partnership to construct an automobile dealership on Route 7A in Dorset, Vermont, subject to compliance with the conditions of the Permit.

The Permit contains additional conditions relative to the issues arising under criterion 8 (aesthetics).

On November 15, 1995, Hand Motors filed a Motion to Alter the Permit and the Decision pursuant to Board Rule (EBR) 31(A).

On November 15, 1995, the Bennington County Regional Commission (BCRC) filed a Motion to Alter the Decision pursuant to EBR 31(A).

On November 16, 1995, Lorraine D. Eckert and Mildred O'Neal (Eckert/O'Neal) filed a Motion to Alter the Permit and the Decision pursuant to EBR 31(A).

On December 11, 1995, Eckert/O'Neal filed a response in opposition to Hand's motion.

On December 11, 1995, the Chair issued a Preliminary Ruling requiring, among other things, that (i) on or before January 4, 1996, the parties file any responses to the motions and any requests for oral argument; and (ii) the Board will

deliberate on the motions on January 24, and February 28, 1996.

Oral argument was not requested.

On January 23, 1996, the Board received, by fax, a letter dated January 17, 1996 from the Dorset Selectmen relative to the motions and requesting that, as a statutory party, their position on the Decision be heard.

On January 24, and February 28, 1996, the Board deliberated on the motions and decided the following.

II. ISSUE

Whether the Board should reconsider and/or alter the Permit and Decision relative to aesthetics under 10 V.S.A. § 6086(a)(8) (criterion 8).

III. DISCUSSION AND DECISION

Both the Hand and Eckert/O'Neal motions claim that the Board erred in its consideration of criterion 8 in the Permit and Decision.

Hand seeks to alter condition 2 of the Permit, which states:

The Permittees shall turn off the Project's exterior lighting each night no later than 9:00 p.m. and shall keep it off each night until dawn. Prior to the commencement of construction, the Permittees shall obtain the Board's approval of a revised lighting plan for the Project Tract relative to motion detector lighting and silent surveillance devices.

Hand and Eckert/O'Neal seek to alter condition 3 of the Permit, which states:

Prior to the commencement of construction, the Permittees shall obtain the Board's approval of a revised landscaping plan for the Project Tract. The Board reserves the right to impose additional conditions relative to landscaping based on the revised landscaping plan submitted. The revised landscaping plan may include the items listed in Findings of Fact and Conclusions of Law #8B0444-6-EB. All landscaping shall be maintained as approved by the Board with the replacement of any dead or diseased trees occurring as soon as seasonably possible.

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Eckert/O'Neal argue that (i) the evidence does not support positive findings relative to criterion 8 and issuance of the Permit; and (ii) under 3 V.S.A. §809(c), the Administrative Procedure Act requires that they are provided an opportunity to respond and cross-examine witnesses on all issues, including the landscaping plan required by Condition 3.

Hand argues that (i) the findings are not supported by the evidence; (ii) the findings do not support the conclusions; and (iii) the Permit does not state what is permitted.

Concerning motions to alter, EBR 31(A)(1) states:

All requested alterations must be based on a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or allegedly improper use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to decision. New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence.

In this case, the motions are appropriate under EBR 31(A)(1). The Board concludes that it should reconsider, and in so doing re-opens the evidence for the following reasons.

In reviewing the record, the Board notes that the present case contains extraordinary circumstances. While the parties were prepared to address criterion 8 issues pertaining to the overall Project at hearing, the rearranged sequence of filing deadlines (altered by the unanticipated withdrawal and replacement of a party's attorney) may not have provided the parties with adequate time to fully consider, prepare for, and address all of the nuances of possible aesthetic impacts. Decision at 1 - 2. Under such circumstances, it is apparent that the parties could not have reasonably foreseen the imposition of the conditions which are the subject of the motions.

The Board will limit the re-opened hearing to the lighting and landscaping issues raised under Conditions 2 and 3. The Board will order Hand to provide the Board and the parties with revised lighting and landscaping plans addressing the criterion 8 impacts mentioned in the Decision. Please note that the Board has previously concluded that the revised landscaping plan should include (i) a row of deciduous trees to be planted in front of the first row of displayed cars; (ii) under-plantings

which prevent any part of the Project' from being visible from the southern boundary of the **O'Neal** property northward along Route **7A**; (iii) the row of conifers extended over the entire length of the northern property line; (iv) the installation of a berm that obscures the cars from being visible from the **O'Neal** property and along Route **7A**; and (v) an appropriate planting schedule. In addition, all landscaping shall be maintained with the replacement of any dead or diseased trees occurring as soon as seasonably possible. Decision at 22. At the upcoming hearing, the Board will reconsider these conclusions as well as any other proposal to mitigate undue adverse impacts. The Board will apply the Quechee standards, Decision at 20 - 21, to the revised lighting and landscaping plans.

¹ The Decision required mitigation of the undue adverse effect of the Project's displayed vehicles. The Decision did not contemplate that the Project's building would be "invisible", as some parties argue. The revised plan should focus on concealing the displayed vehicles.

IV. ORDER

For the reasons stated above, the Board hereby reopens the evidence relative to criterion 8 and orders the following:

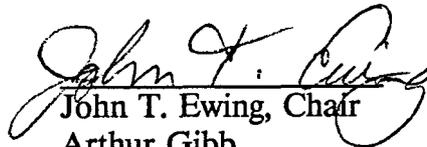
1. On or before March 15, 1996, Hand shall submit a revised landscaping and lighting plan to the Board and all parties. The revised plans shall either incorporate the Board's suggested revisions or otherwise address the criterion 8 issues identified in the Decision. The Board shall issue a further order, in the event that the plans are not filed in accordance with this paragraph.
2. On or before March 22, 1996, the parties shall file with the Board and circulate to the parties, any exhibits, exhibit lists, witness lists, and memoranda of law related to the reopened hearing. Failure to timely file these materials will preclude their use at hearing.
3. On or before March 29, 1996, the parties may file any reply memoranda or evidentiary objections to exhibits.
4. On April 10, 1996, the Board will hold a hearing and site visit on the revised plan. The location and time for the hearing will be noticed at a later date. Prior to the site visit, Hand shall clearly mark the project tract to identify the property line with the Agency of Transportation and the location of the front row of displayed vehicles.
5. The reopened hearing will address only the criterion 8 issues stated above. The Board will deliberate on the other issues raised by the motions to alter following the reopened hearing.

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6. The Board will not address, at this time, the Board of Selectmen letter faxed to the Board on January 23, 1996. As statutory parties, the Selectmen may participate and address the criterion 8 issues in conformance with this Order.

Dated at Montpelier, Vermont this 29th day of February 1996.

ENVIRONMENTAL BOARD



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