

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

DEC 15 1992

ENVIRONMENTAL BOARD

RE: Frank A. Molgano, Jr.
Application #8B0468-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal from the decision of District-P8 Environmental Commission, which concluded that the proposed construction of two professional office buildings in the Town of Manchester does not conform to either the Manchester Town Plan (the Town Plan) or the Regional Plan of Bennington County, Vermont (the Regional Plan). The Board concludes that the proposed construction does not conform to either the Town Plan or the Regional Plan and, therefore, fails to meet the requirements of 10 V.S.A. § 6086(10).

I. BACKGROUND

On October 29, 1991, Frank A. Molgano, Jr. (the Applicant) filed an application for an Act 250 Land Use Permit for the construction of two professional office buildings on approximately 2.6 acres of land located on the east side of Route 7A North in the Town of Manchester. The Applicant and the Town requested that, pursuant to 10 V.S.A. § 6086(10)(b), the Commission rule on Criterion 10 relating to conformance with the Town Plan and Regional Plan before reviewing the other Act 250 criteria. The Commission limited its review to Criterion 10 and, in a Memorandum of Decision dated January 10, 1992, concluded that the proposed project does not conform to either the Town Plan or the Regional Plan and denied the application.

On February 5, 1992, the Applicant filed an appeal from the District Commission decision with the Board. On February 20, 1992, a prehearing conference was convened.

DeWitt and Susan Copp and Phillip Pabst have party status as adjoining landowners. The Route 7A North Property Owners' Association has party status pursuant to Rule 14(B)(1)(b).

One of the preliminary issues identified in the Pre-hearing Conference Report and Order dated March 10, 1992, was whether the Manchester Town zoning bylaws are relevant to this Board's determination of conformance with the Town Plan. Pursuant to the Applicant's assertion that the bylaws are relevant and his request that the bylaws be admitted into evidence, in a Memorandum of Decision dated March 31, 1992, the Board decided to allow the Manchester zoning bylaws to be admitted into the record. However, the Board made no determination concerning the relevancy of the bylaws in that decision.

A hearing before the Board was held on June 17, 1992 with the following parties participating:

The Applicant by John M. Ruggiero, Esq.
Manchester Town Planning Commission (MTPC) by Seth
Bongartz, Esq.
Bennington County Regional Planning Commission (BCRPC) by
Gregory Burke, Executive Director
DeWitt and Susan Copp by DeWitt Copp
Philip Pabst
Route 7A North Property Owners' Association by Richard
Bartholomae

The parties submitted proposed findings on July 8, 1992. The Board deliberated concerning this matter on September 23, 1992. On that date, following review of the evidence, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether the project conforms to the Manchester Town Plan with respect to land use classification and designated uses.
2. Whether the project conforms to the Bennington County Regional Plan with respect to land use classification and uses deemed appropriate in the Rural Roadside Commercial district.
3. Whether the Manchester Town zoning bylaws are relevant to the Board's determination of conformance with the Town Plan.

III. FINDINGS OF FACT

The Project

1. On October 1, 1991, the Applicant submitted an application for an Act 250 permit to the District #8 Environmental Commission for the construction of two commercial office buildings on a 2.6-acre parcel of land (the site) located off of Route 7A North¹ in Manchester.

¹Prior to the construction of a new Route 7, what is now designated Route 7A had been designated as Route 7.

2. The proposed buildings have footprints of 40 feet by 75 feet and 36 feet by 70 feet, respectively, and will have a total square footage of approximately 11,000 square feet. Each building will be two stories high. The proposed project **also** includes 43 designated parking spaces, on-site wastewater disposal, and an access driveway from Route 7A.
3. The Applicant anticipates that the buildings will provide office space for doctors, lawyers, architects, insurance or real estate brokers, or other professional office uses.
4. The site is on the east side of Route 7A North, approximately one-quarter mile south of the Manchester/Dorset town line, and approximately one mile north of North Road.
5. The existing **commercial** uses along Route 74 North from the Manchester/Dorset town line to North Road are: Smith Construction, a home occupation; Mahoney Landscaping; Enchanted Doll House; 1812 House Antiques; Carriage Trade Antiques; Breen's, an artist's studio; four motel complexes; and a golf course.
6. There are no office buildings of comparable size or type in the vicinity of the proposed office buildings. The nearest comparable office building is the Town Office complex, which is located more than one mile south of the proposed project.
7. Manchester does not have permanent zoning and subdivision bylaws.'

The Manchester Town Plan

8. The Town Plan was adopted in August 1987. The portions of the Town Plan that are relevant to the proposed project are Chapter III, which is entitled "Goals for Growth and Development" and Chapter IV, which is entitled "Land Use Plan."

² Pursuant to 10 V.S.A. § 6001(3), an Act 250 permit is required for the construction of improvements for commercial purposes on more than one acre of land in towns that do not have permanent zoning and subdivision bylaws. Pursuant to 3 V.S.A. §810, the Board takes official notice of the fact that Manchester does not have permanent zoning and subdivision bylaw. If any party objects to the Board's taking official notice of this fact, such party should file a Motion to Alter Decision, pursuant to Rule 31A.

9. Section 4.2 establishes different land use districts, such as commercial districts, industrial districts, and different types of residential districts. This section also sets forth developmental goals and policies for each district.
10. The site is located in an area designated in the Town Plan as a Farming and Rural Residential (FRR) district with a Transient Commercial Overlay (TC Overlay) district.
11. Section 4.2(4) describes the FRR district as follows:

A large portion of the valley land outside Manchester Center lies within the Farming and Rural Residential District and supports low density residential uses and farming. Scattered development in this district should be avoided due to the potential economic and environmental costs associated with such development patterns. Site planning should provide for preservation of open space and conservation of natural resources, while minimizing municipal costs. The two acre per dwelling unit requirement should be maintained in those areas of the FRR zone closest to the town center, and consideration should be given to increasing the minimum lot size requirements for the FRR zone in those areas of the existing FRR zone most distant from the town center.

Manchester Town Plan at 21.

12. Section 4.2(4) sets forth the following policies pertaining to the FRR district:

Policy 1 The FRR District should support the lowest density residential development of any residential or commercial district in Manchester, as referenced in the Zoning Ordinance.

Policy 2: Land development shall be consistent with land capability to prevent any negative environmental impacts, and to ensure that public water and sewer will not be needed in this--district;--

Policy 3: On tracts of ten acres or more, site planning should utilize clustering, or other suitable techniques, to promote efficient site use, retention of open space, and protection of special resources and fragile environmental areas.

Id. at 22.

13. Section 4.2(2) of the Town Plan describes the TC Overlay district as follows:

A significant portion of Manchester's economy is based on the tourism industry. The Transient Commercial zones accommodate certain uses related to the tourism industry (e.g. motels, inns, restaurants), but care must be taken to prevent such problems as traffic congestion and the loss of scenic open space which could occur if an excessive number of these businesses-are permitted. Consideration should be given to increasing restrictions on permitted [sic] uses in the TC zone on Route 7 (north) and to provide for a restricted TC zone from the Sunderland Town line to the Manchester Village line. Consideration should also be given to providing mechanisms for minimizing any negative impacts of commercial development in the TC zones and to providing innovative zoning techniques to facilitate efficient site utilization. Zoning dimensional requirements should encourage a relatively low density of development while promoting open space preservation along the highways.

Id. at 20.

14. Section 4.2(2) sets forth the following policies pertaining to the TC Overlay district:

Policy 1: Restaurants and motels that generate significant numbers of traffic-turning movements should not be permitted along those sections of highway with low sufficiency ratings.

Policy 2: Adjacent transient commercial businesses should provide, when practical, a single access road to avoid a proliferation of curb cuts which may adversely affect traffic efficiency and safety.

Policy 3: Entrances to commercial uses should be at least 700 feet from the entrance/exit ramp of the new Route 7 and 11/30 interchange.

Id.

15. The TC Overlay district includes all of Route 7 from the Palmer House Motel to the Manchester/Dorset town line. It extends for 500 feet on either side of Route 7.

Regional Plan

16. The Bennington County Regional Plan was adopted on August 19, 1976 and re-adopted on December 4, 1986. The Regional Plan classifies land according to types and intensity of land uses.
17. The site is located in a Rural Roadside Commercial (RRC) district. Section 5.5 of the Regional Plan describes the RRC district as follows:

Tourism and vacation related industries are a significant part of the region's economy and constitute approximately 15% in direct benefits, not to mention the indirect benefits derived when tourist dollars are cycled throughout the economy. Businesses such as lodging, motels, antique and gift shops, natural product sales, and others are economically dependent on the tourist trade. The Regional Plan, therefore, identifies suitable locations along major highways for location of these enterprises. Highway access and safety, scenery, existing land use, and future growth are key considerations for accommodating this use while avoiding scattered commercial roadside uses or extensive ribbon development in rural areas. If these are simply zoned roadside commercial, the rural residential character will gradually be replaced by business. This would not be in the general interest and would be harmful to the quality of ~~the residential and~~ agricultural--character of the community and regional entrances and corridors. For purposes of the Regional Plan, roadside areas are generally outside of the urban centers and village clusters.

Regional Plan at 31.

18. The Regional Plan sets forth policies related to the RRC district as follows:

Policy 1: Encourage low density uses such as restaurants, antiques and gift shops, sale of natural products and other uses in appropriate locations along major roads. Roadside commercial uses should be consistent with the regional development concept which encourages expansion within urban centers and to a lesser degree, within village clusters.

Policy 2: Avoid excessive commercial uses of "strip" type development within areas designated Rural Roadside Commercial on the regional plan map.

. . . .

Policy 3: Restaurants and motels and other major tourism oriented businesses that generate significant traffic and turning movements should be avoided along those sections of highway that have low sufficiency ratings due to visibility, grade, alignment, and to avoid congestions and hazards.

Id. at 31-32.

19. The RRC district includes all of U. S. Route 7A from the Palmer House Motel north to the Manchester/Dorset town line.

20. The Regional Plan establishes an Urban Center land use classification which provides for all types of uses, including high density uses. Offices are identified as an appropriate use for the Urban Center.

21. Policy 5 related to Urban Centers provides:

The retention of low density districts around the urban center fringe is desirable to avoid scattering of intensive and possibly incompatible uses in rural areas.

Id. at 29.

III. CONCLUSIONS OF LAW

Town Plan

The Applicant argues that the Town Plan does not prohibit professional office use in the TC Overlay district. The Board agrees that there is no specific prohibition in the Town Plan against professional offices in either the FRR district or the TC Overlay district. In fact, there is no specific prohibition against any use in these districts. Rather, the Town Plan generally defines the types of uses that are appropriate for the various districts. The provisions of the Town Plan quoted above establish that the goal of the Town Plan is to maintain low-density residential uses in the underlying FRR district while allowing limited commercial uses in the TC Overlay district.

The construction of new office buildings is not consistent with the low-density residential use intended for the underlying FRR district. With respect to the TC Overlay district, the Town Plan lists tourist-related businesses that are intended to be permitted in the TC Overlay; they are motels, inns and restaurants. While this list of tourist-related uses may not be exclusive of other tourist-related uses, the objective is clearly to limit commercial uses in this district to those that are tourist-related. Office buildings do not fall within the category of commercial uses that are appropriate for the TC Overlay district.

The Applicant contends that the tourist-related uses cited in the description of the TC Overlay district are intended to establish a "ceiling" on the intensity of use in the district and that any use should be allowed, provided that it is a less "intense" use than the listed uses. The Board disagrees. The restrictions on use in the TC Overlay district are clearly intended to limit not only density of development, but types of use, as well. The permitted types of uses are those that are tourist-related.

The Board concludes that the proposed office buildings are not consistent with the Town Plan land use classification and designated uses.

Zoning Bylaws

~~The Applicant has argued that consideration~~ Of the Town of Manchester zoning bylaws would aid the Board in its interpretation of the Town Plan. He contends that in order to determine what constitutes "transient commercial **uses**" under the Town and Regional Plan, conditional and permitted **uses** allowed under the zoning bylaws should be examined.

The Applicant is correct that zoning bylaws should implement the Town Plan. However, this is not always the case. Furthermore, this Board is required by statute to determine if a project conforms with the Town Plan, not if it conforms with zoning bylaws that may or may not implement a town plan. In this case, there is no need for the Board to look beyond the provisions of the Town Plan in order to make a determination that the project is not in conformance with the provisions related to land uses in the FRR and TC Overlay districts. The Board therefore concludes that the zoning bylaws are irrelevant to its interpretation of *the Town Plan*.

The Board notes, however, that if it were to determine that the zoning bylaws were relevant, it would likely find that the bylaws prohibit the proposed project. The zoning bylaw breaks the TC Overlay district into four sub-districts. The further the sub-district is from the central business district, the less intense are the permitted Uses. As the Applicant points out, the bylaws do provide for exceptions to the tourist-related requirements set forth in the Town Plan. For example, new office buildings are allowed in the TC #2 zone. However, the site is located in an area zoned TC #4, the most restrictive of the four TC sub-districts. The construction of new office buildings is not permitted in the TC #4 sub-district. Office buildings are permitted in the TC #4 sub-district as a conditional use only in buildings that were in existence at the time the bylaw was amended. Therefore, it is likely that the Board would conclude that the zoning bylaws do not support the Applicant's position.

Regional Plan

The Applicant argues that Section 5.5 of the Regional Plan is not intended to restrict Uses within the RRC district but, rather, is only intended to limit the negative impacts of excessive commercial development. He asserts that inclusion of the phrase "other uses" in Policy 1 suggests that a broad range of commercial uses is intended in the RRC district, provided that the uses are low density.

The Board disagrees. The description of the RRC district contained in the Regional Plan first identifies tourism and vacation-recreation industries as a significant part of the region's economy. It then goes on to list specific types of businesses dependent on the tourist trade. It cautions ~~against zoning the RRC district for roadside commercial use in~~ order to avoid replacing the rural character of the district with businesses. This description clearly establishes an intent to limit commercial uses in the RRC district to those that are economically dependent on the tourist trade and an intent to avoid scattered roadside commercial use.

The proposed buildings are also not in conformance with the policies related to the RRC district and the Urban Center district set forth in the Regional Plan. Policy 1 encourages low density uses. The Board does not believe, **that** two office buildings with 11,000 square feet of space constitute a low-density use consistent with a rural residential character. Policy 1 also encourages expansion within the urban center in order to preserve the rural character of the RRC district. The location of office buildings in the RRC district is not consistent with this policy of encouraging expansion in the urban center. The Board concludes that the proposed use for the site is not consistent with the uses deemed appropriate in the RRC district by the Regional Plan.

Prior District Commission Decisions

The Applicant argues that while the Board must exercise independent judgment in its analysis of the Regional Plan, it should not disregard previous decisions of the District Environmental Commission allowing the construction of professional offices in the RRC district. The Board's decision must be made without regard to previous decisions of the District Commission. Therefore, it is irrelevant to this Board's review of this case whether the District #8 Environmental Commission in issuing a permit for the Northshire Medical facility found that a medical office building conforms to the TC Overlay district category under the Town Plan and to the RRC district under the Regional Plan. It is also irrelevant to this Board's decision whether the BCRPC opposed or supported that project. Nevertheless, the Board notes that the Northshire Medical facility is more than one mile south and closer to the center of Manchester than the proposed building. Consequently, the Board does not believe that either the issuance of a permit for that facility or support of that project by the BCRPC are necessarily inconsistent with denial of a permit for, or opposition by the BCRPC to, this project.

IV. ORDER

Application #8B0468-EB is hereby denied. The construction of two office buildings on the Site is not in conformance with the Manchester Town Plan or the Bennington County Regional Plan as required by Criterion 10.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
Steve Wright

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