

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001- 6092

Re: Woodford Packers, Inc.
d/b/a WPI
334 ½ Pleasant Street
Bennington, Vermont 05201

Land Use Permit Application
8B0542-EB

MEMORANDUM OF DECISION ON MOTION TO ALTER

Woodford Packers, Inc., d/b/a WPI (WPI) has filed a Motion to Alter the Findings of Fact, Conclusions of Law and Order issued by the Vermont Environmental Board (Board) in this case on October 5, 2001 (Board Decision). As set forth below, the Board denies the motion.

I. PROCEDURAL SUMMARY

On October 2, 2000 the District # 8 Environmental Commission (Commission) issued Land Use Permit #8B0542 (Permit), and supporting Findings of Fact, Conclusions of Law, and Order (Decision), to WPI. On November 13, 2000 the Commission issued a Memorandum of Decision denying a Motion to Alter filed by the Vermont Agency of Natural Resources (ANR). The Permit authorizes the construction of a 30-unit retirement village located on 12.5 acres of land between Route 9 and the Roaring Branch River in the Town of Bennington, Vermont (Project).

On December 13, 2000, ANR filed an appeal with the Board from the Permit and Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A. §6086(a)(1)(D), (1)(F), (4) and (9)(K) (Criteria 1(D), 1(F), 4 and 9(K)). The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules (EBR) 6 and 40.

In its appeal, ANR requested an order allowing ANR access to the Project site "to conduct the necessary investigations, tests and site evaluations needed to make findings and conclusions."

On December 29, 2000, WPI filed a Motion to Dismiss the appeal.

On January 22, 2001, Board Chair Marcy Harding convened a Prehearing Conference.

On January 23, 2001, Chair Harding issued a Prehearing Conference Report and Order (PHCRO). Among other things, the PHCRO identified certain preliminary issues and set forth the prehearing and hearing schedule in this matter.

On February 20, 2001, the Town of Bennington filed a Notice of Appearance.

On February 21, 2001, the Board heard oral argument and commenced deliberations on the preliminary issues identified in the PHCRO.

On February 22, 2001, Board Chair Marcy Harding issued a Revised Scheduling Order setting this matter for hearing on March 28, 2001.

On February 27, 2001, the Board issued a Memorandum of Decision on preliminary issues which, among other things, denied WPI's Motion to Dismiss and deferred decision on ANR's request for site access.

On February 27, 2001, ANR filed an Objection to the Revised Scheduling Order in which it requested that the hearing be delayed until late April or early May 2001.

On February 28, 2001, WPI and the Town of Bennington submitted comments on the Revised Scheduling Order. The Board deliberated on February 28, 2001, after reviewing the parties' submissions.

On March 1, 2001, the Board issued a Second Revised Scheduling Order, delaying the hearing for one week, to April 4, 2001.

On April 4, 2001, the Board convened a public hearing in this matter. The Board heard evidence from WPI and the Town of Bennington, and conducted a site visit. The hearing was adjourned to another date.

On April 19, 2001, the Board issued a Hearing Recess Order setting the continued hearing for May 3, 2001, and requesting that WPI make its principal, Jim Davis, available to testify, and that ANR make the following persons available to testify: Karl Jurentkuff and a person authorized to speak on behalf of the Secretary with respect to the substantive and procedural aspects of the Secretary's determinations under Criterion 1(D)(floodway and floodway fringe).

On May 3, 2001, the Board reconvened the hearing in this matter. At the beginning of the second day of hearing the Board recessed to deliberate on whether to admit the testimony of Dr. Paul Bierman, and related exhibits, that had been filed by WPI after the filing deadline. The Chair announced the Board's decision to admit the testimony and exhibits. Board member John Drake recused himself to avoid any appearance of impropriety due to his working relationship with Dr. Bierman at the University of Vermont Department of Geology.

The Board heard evidence from WPI and ANR on the second day of hearing, and also from witnesses present at the Board's request. During the

hearing, WPI again moved to dismiss ANR's appeal, and also moved to strike certain evidence from the record. The Town of Bennington supported and renewed the motion to dismiss. The Board took these motions under advisement. Also during the hearing, ANR withdrew its request for site access. After recessing the hearing, the Board deliberated on June 6, June 13, July 18, August 15, September 19, and October 3, 2001.

On October 5, 2001, the Board issued its Findings of Fact, Conclusions of Law and Order, denying the permit application for failure to comply with Criteria 1(D), 1(F), and 4.

On November 5, 2001, WPI filed a Motion to Alter. ANR filed a Response on November 20, 2001.

On December 19, 2001, the Board deliberated on WPI's Motion to Alter and ANR's Response.

II. DISCUSSION

WPI requests that certain findings and conclusions in the Board's October 5, 2001 decision be altered, regarding Criteria 1(D)(floodways) and 4 (soil erosion and capacity to hold water). In support of its motion to alter, WPI submits a new exhibit, a Letter of Map Revision issued by the Federal Emergency Management Agency (FEMA) on September 7, 2001. This exhibit is not in evidence.

Motions to alter are governed by EBR 31(A), which provides in relevant part:

- (A) Motions to alter decisions. . . .
 - A. 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.

- B. A motion to alter should number each requested alteration separately. The motion may be accompanied by a supporting memorandum of law which contains numbered sections corresponding to the motion. The supporting memorandum should state why each requested alteration is appropriate and the location in the existing record of the supporting evidence. Any reply memorandum of law should also contain numbered sections corresponding to the motion. Additional requirements concerning motions and memoranda are set out in Rule 12 of these rules.

WPI's Motion to Alter concerns findings and conclusions on Criterion 1(D)(floodways) and Criterion 4(soil erosion and capacity to hold water). The Board considers each in turn.

A. Criterion 1(D)

WPI requests that the Board rule that FEMA delineations govern what constitutes a floodway under Act 250 until ANR formally adopts fluvial geomorphology methodology. To that end, WPI requests admission of a new exhibit, and revision of two findings of fact on the extent of the floodway.

The new exhibit is a Letter of Map Revision (LOMR) issued by FEMA in September 2001, which essentially adopts the floodway lines as redrawn by Heindel & Noyes. Because Act 250 provides that the floodway is as determined by the Secretary of Natural Resources, not FEMA, the FEMA map revision is irrelevant to the Board's analysis under Criterion 1(D).

As set forth in the Board's decision, the statute defining "floodway" states, in part, that the floodway is "as determined by the secretary." 10 V.S.A. § 6001(6). The Secretary has chosen not to rely upon FEMA/NFIP maps in this case, and has determined that the entire site is in the floodway. WPI requests a fundamental change in the Board's analysis under Criterion 1(D), one which would be inconsistent with the plain language of the statute. The Board cannot grant WPI's request.

Also, a motion to alter must be based on the existing record and should not be used to present new evidence. EBR 31(A) provides, in relevant part, that: "All requested alterations must be based on a proposed reconsideration of the existing record." *See also, Re: Van Sicklen Limited Partnership, #4C1013R-EB, Memorandum of Decision, at 2 (July 26, 2001)(citing Re: North Country Animal*

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League, #5L0487-4-EB, Memorandum of Decision at 1 (Apr. 20, 2000) and *Re: Finard-Zamias Associates*, #1R0661-EB, Memorandum of Decision at 2 (Jan. 16, 1991)("This interpretation is based on the need to maintain the integrity of the Board's appeal process by ensuring that arguments and evidence are introduced prior to final decision."); *see also*, *Re: Mill Lane Development Corp.*, #2W0942-2-EB, Memorandum of Decision at 8 (Jan. 27, 2000)(citing *Re: Charles and Barbara Bickford*, #5W1186-EB, Memorandum of Decision at 3 (September 12, 1995); *Re: Nehemiah Associates, Inc.*, #1R0672-1-EB, Memorandum of Decision at 1 (Oct. 3, 1995); *Re: Swain Development Corp.*, #3W0445-2-EB, Memorandum of Decision at 3-4 (Nov. 8, 1990); *Re: Berlin Associates*, #5W0584-9-EB, Memorandum of Decision at 7 (April 23, 1990).

These limits on the use of EBR 31(A) serve to encourage parties to present their best case to the Board, which prevents unnecessary delay:

[P]arties should not be encouraged to use motions to alter to convert Board decisions into "proposed" decisions to which they can later respond. Evidence and argument should be given to the Board before decision so that it is fully informed and can make the best decision, and so that the process is not unnecessarily elongated by motions to alter.

Van Sicklen, Memorandum of Decision at 4 (quoting *Nehemiah*, Memorandum of Decision at 2 (internal quotations omitted)). EBR 31(A) provides that "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." EBR 31(A). The LOMR was not issued until after the hearing in this matter, however, as set forth above, the exhibit in question would have had no bearing on the Board's analysis under Criterion 1(D), and its admission would contravene the policy goals which underlie the rule.

WPI asks the Board to find that "until new standards are properly adopted by the Agency of Natural Resources, the FEMA standards for determining Floodway and Floodway Fringes must be used for Act 250 proceedings such that [WPI] has met its burden under [Criterion 1(D)]." While framed as a request to alter findings, this is really a request to alter legal conclusions. As stated above, the Board declines to alter its legal conclusions.

To the extent that WPI seeks to challenge procedural errors with respect to ANR's floodway determination methodology, the Board concluded that Act 250 requires no formal rulemaking. Beyond that, the Board lacks jurisdiction to rule on the requirements of the Vermont Administrative Procedure Act as they apply to ANR. Motions to alter are properly used to challenge procedural errors of the

Board, see *Re: Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91); *Finard-Zamias Associates*, Memorandum of Decision at 2; *Swain Development Corp.*, Memorandum of Decision at 3-4; *Berlin Associates*, Memorandum of Decision at 7. However, EBR 31 does not confer authority to review claims of procedural errors which concern other agencies.

The Board declines to alter findings #16 and #28, as WPI requests.
Finding #16 reads:

16. The FEMA/NFIP Flood Insurance Rate Map ("FIRM") for the Project site, dated June 17, 1986, shows that a large part of the site is in the 100-year floodplain, and a smaller portion beyond that is in the 500-year floodplain.

WPI asks that it be altered to read:

16. The vast majority of the project tract lies outside of the Floodway and Floodway Fringe, as determined by FEMA.

As set forth above, however, it is the Secretary of ANR's determination of the floodway which is key to the Board's analysis, and the Secretary has not relied upon the FEMA determination in this case. The original FEMA/NFIP determination, however, is relevant to WPI's fairness argument. WPI does not ask the Board or ANR to accept the original FEMA/NFIP delineation, but rather, the most recent redelineation by WPI's experts.

The other finding that WPI asks the Board to alter, Finding #28, reads:

28. Using the Heindel & Noyes site plan as an overlay on the Parks Associates map, it becomes apparent that a portion of the Project's buildings and fill would be in the "Limits of Floodway" as it was delineated by Parks Associates and approved by ANR in 1998.

WPI asks that it be altered to read:

28. Any and all construction of buildings on the project tract lies outside of both the Floodway and Floodway Fringe, as determined by FEMA.

Again, the new FEMA determination is not relevant to the floodway question, and the Board's finding is relevant to WPI's fairness argument. It is clear that WPI proposed to put buildings and fill in an area that ANR's Karl Jurentkuff had

recommended remain free from fill in 1998. It would have been reasonable for WPI to anticipate that ANR might object.

B. Criterion 4 (soil erosion and capacity to hold water)

WPI asks the Board to alter its conclusion that the Project does not comply with Criterion 4 (soil erosion and capacity to hold water). In support of this request, WPI states that the Board's decision is "devoid of any negative findings whatsoever" on Criterion 4. This assertion, however, is inaccurate. On page 15 of the decision, the Board makes the following findings on Criterion 4:

Flood-Related Erosion

74. Erosion of the streambed and streambanks is exacerbated during a flood.
75. Erosion and corresponding downstream sedimentation are significant sources of damage during a flood.

These findings clearly support the Board's conclusion that the Project does not comply with Criterion 4.

Moreover, the decision contains findings under other Criteria, most notably Criterion 1(D), to the effect that the Project will exacerbate erosion during a flood. The decision clearly states that: "These findings are organized by Criteria. Findings of fact relevant to more than one criterion are not repeated and shall be incorporated into subsequent criteria as necessary to support the Conclusions of Law." Regardless of how the Board's findings are organized, the conclusion that the Project does not comply with Criterion 4 is well supported.

III. ORDER

WPI's Motion to Alter is DENIED.

DATED at Montpelier, Vermont this 20th day of December, 2001.

ENVIRONMENTAL BOARD

/s/Marcy Harding

Marcy Harding, Chair
Rebecca Day
George Holland
Samuel Lloyd
W. William Martinez*
Alice Olenick
Don Sargent

* Board member W. William Martinez did not participate in December 19, 2001 deliberations, but joins in the Board's decision.