

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

RE: P.F. Partnership by Findings of Fact,
Peter M. **Doremus**, Esq. Conclusions of Law
Doremus Associates and Order,
112 Lake Street Application
Burlington, VT 05401 #9A0169-EB
and
Harlan and Jean Bodette
RFD
Ferrisburgh, VT 05456

This decision pertains to an appeal filed by the City of Vergennes concerning the above-referenced application. As is explained below, the Environmental Board concludes that the application satisfies Criteria 9(A) (impact of growth), 9(J) (public utility services) and 10 (conformance with local or regional plans).

I. SUMMARY OF PROCEEDINGS

On November 14, 1988, the District #9 Environmental Commission issued Partial Findings of Fact #9A0169 pursuant to Board Rule 21. Those findings pertain to an application for a 40,450 square foot shopping center in Ferrisburgh, Vermont filed by the Applicant P.F. Partnership, with Harlan and Jean Bodette, the landowners, as co-applicants. In response to motions to alter and reconsider the partial findings filed by the Applicant and the City of Vergennes, the District Commission issued a Memorandum of Decision denying the motions on December 23, 1988. On January 20, 1989, the City of Vergennes filed an appeal with the Environmental Board under Rule 21 with respect to the District Commission's findings pursuant to Criteria 9(A) (impact of growth), 9(J) (public utility services), and 10 (conformance with local and regional plans) of 10 V.S.A. § 6086(a).

Former Board Chairman Leonard U. Wilson convened a prehearing~ conference on February 23, 1989 in Vergennes. At the prehearing, the Applicant challenged the validity of the City's appeal on the ground that final findings of fact had not been made on all criteria. The Chairman made a preliminary ruling that the City has authority under Rule 21 to bring this appeal. The Board issued a prehearing conference report and order on March 8. On March 20, the City filed a memorandum in support of the preliminary ruling and on March 23, the Applicant filed a memorandum in opposition. On May 12, 1989, the Board issued a memorandum of decision affirming the Chairman's ruling.

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The parties filed prefiled direct testimony on June 6 and prefiled rebuttal testimony on July 26. With its June 6 submission, the Applicant included a memorandum in support of positive findings under Criteria 9(J) and 10. An administrative hearing panel convened a hearing in Vergennes on August 3, 1989. At the hearing, the Applicant was allowed to introduce a memorandum of law concerning the authority of the Vergennes-Panton Water District to provide water to the proposed project (Exhibit 32), on condition

1. Whether, pursuant to 10 V.S.A.
(Criterion
Cityarden on the

§.6026(9)(J) (Criterion 9(J)) respecting public

3. Whether, pursuant to 10 V.S. 6086(a)(10)
(Criterion 10),

the Addison County Regional Plan with regard to density, water service, and strip development.

4. Whether, pursuant to Criterion 10, the Board is permitted to consider the proposed project's consistency with the Vergennes city Plan, and if so, whether the project is consistent with the Vergennes plan.

5. Whether the Board should extend the time period during which the District Commission's partial findings of fact remain effective, and for how long the Board's and District Commission's findings of fact should remain effective.

III. FINDINGS OF FACT

1. The Applicant proposes to construct a shopping center on approximately nineteen acres of land near the intersection of Route 7 and **Monkton** Road. Sixteen of the acres are located in the Town of Ferrisburgh, with the rest being in the City of Vergennes. The improvements proposed to the land will use approximately five acres, which are wholly within Ferrisburgh.
2. The Applicant's proposal includes a 40,450 square foot shopping complex, a 2000 square foot freestanding bank, and related parking, to be served by municipal water and off-site sewage disposal systems. There will be one vehicular access to the project to be located on **Monkton** Road. No curb-cuts will be made on Route 7 for purposes of project access.
3. The approximately nineteen-acre tract of land on which the proposed project will be located is currently owned by Harlan and Jean Bodette. Mr. and Mrs. Bodette currently use most of the tract as a hay field. At the northern end of the tract they have a livestock sales business. The proposed project will use the northern end of the tract, leaving the balance as an open field.
4. Surrounding land uses are a mixture of commercial and residential uses. To the north of the project are a real estate office, residences, a bakery and a bank. Across **Monkton** Road is an existing shopping center. Nest of the project along **Monkton** Road is a high school. These land uses generally are located close to the intersection of **Monkton** Road and Route 7.

5. As part of the project, the Applicant proposes to build a sidewalk along its side of **Monkton** Road running from the project site to the Ferrisburgh/Vergennes border. The Applicant was required by Ferrisburgh to build the sidewalk. There is an existing sidewalk running from a driveway near the westerly edge of the high school tract along **Monkton** Road into Vergennes, but there is no sidewalk along **Monkton** Road in front of the high school; thus, a gap will exist between the sidewalk running from the project to the Ferrisburgh/Vergennes border and the sidewalk which begins on the westerly edge of the high school tract. Students at the nearby high school will likely use the Applicant's proposed sidewalk to walk to the proposed project.
6. On September 19, 1988, Vergennes City Manager Melvin Hawley issued a letter concerning a proposal by Lake Realty, Inc. to expand the existing shopping center across **Monkton** Road from the proposed P.F. Partnership project. Mr. Hawley stated that the Vergennes Planning Commission and Zoning Board of Adjustment had approved that proposal with conditions, including:
 - 2) The applicant is required to make an agreement with the Vergennes City Council regarding the construction of a sidewalk from the point where it terminates at the westerly entrance of the Vergennes Union High School hence easterly to the **Vergennes/Ferrisburgh** town line.
7. The majority of employees at the shopping center will likely be hired from the surrounding communities. Typically, commercial retail projects bring in only a few managers from outside the area, with other **employees being** hired from the immediate area. Accordingly, **hiring** of employees will result in minimal population growth. The proposed project does not include residential uses.
8. The Town of Ferrisburgh does not have a duly adopted capital improvement program.
9. Access to the proposed shopping center will be from **Monkton** Road.
10. A traffic signal is currently warranted at the **Monkton** Road/Route 22A intersection but has not yet been built. A signal would cost approximately \$40,000. The Applicant estimates that traffic generated by its project will account for 10% of the total traffic at

the intersection following the commencement of project use.

11. For the fiscal year ending June 30, 1988, the total City of Vergennes general budget equaled \$553,249. For the fiscal year ending June 30, 1990, the total City budget is \$6831689.32. The total budget for the Department of Public Works for the fiscal year ending June 30, 1990 is \$71,000.
12. The Applicant is willing to place \$15,000 in escrow to pay for a portion of the cost of a traffic signal at the intersection of Route 22A and **Monkton** Road.
13. The Municipal Development Plan of the Town of Ferrisburgh, adopted May 25, 1978, states at page 2A:

The objectives of the Development Plan for the Town of Ferrisburgh are to retain the rural-residential character of the town, develop recreation areas and open space for the use by town residents, provide for the preservation of its shoreline and natural areas, restrict the location of commercial and industrial business in order to provide orderly growth and provide a compatible mixture of residential and commercial/industrial properties.

14. On the Municipal Plan and Zoning Map of the Town of Ferrisburgh, the area in which the Applicant's proposed project will be located is marked "**HC-2.**" On page 5A of the Ferrisburgh Municipal Development Plan, the plan provides:

Highway Commercial District (HC-2)

It is primary policy of this district to provide an area to serve highway oriented businesses and highway uses. The size of the commercial uses should be restricted to protect the residential character and traffic access in this and adjoining districts. The commercial use should be subject to site plan and review to protect residential amenities.

The Ferrisburgh plan establishes areas of town in which uses of differing densities are specified.

15. The map appended to the City of Vergennes, Vermont City Plan identifies as "**R-1**" the area in which the Vergennes portion of the proposed project's tract lies. The City plan states that R-1 signifies "Medium Density

Residential District." City of Vergennes, Vermont City Plan at 20 (October 15, 1984). The Vergennes plan states concerning Medium Density Residential Districts that:

The limited uses, low bulk and loose spatial character of the development in this district should be protected as fundamental to its suburban amenity and property value. ... Non-residential uses may be required to have their lot size related to floor area and open space ratios and buffering setbacks and or screens.

Id. at 21-22.

16. The Addison County Regional Plan contains the following pertinent provisions:

LAND USE PLAN GOALS AND OBJECTIVES

1. TO ESTABLISH AREAS WITH DIFFERENT LEVELS OF DENSITY AND PUBLIC SERVICES.
 - A. Designation of "high" densities and intensive uses should be limited to areas with existing public water and/or sewer service, existing settlements with "Development" or "Development/Agricultural" soils, or largely non-farmed areas of extensive "Development" or "Development/Agricultural" soils. ...
 - E. Encourage the use of tax incentives to encourage cluster development rather than strip development along major highways and at urban edges. ...

Addison County Regional Plan (portions last revised in December 1983 and other portions last revised December 1984) at 3.

17. A ten-inch water main on **Monkton** Road within the City of Vergennes will be **used to** provide water to the proposed project. The **Vergennes-Panton** Water District approved an application for water service made by the Applicant for the proposed project.
18. The District Commission issued Partial Findings of Fact #9A0169 on November 14, 1988, stating that the findings "are binding upon the Applicant and all parties for a period of **one** year." The District Commission issued partial findings at the Applicant's request pursuant to

Board Rule 21. The reason for this request was that the Applicant, to meet its burden of proof under 10 V.S.A. § 6086(a)(1)(B), concerning waste disposal, intends to rely on a permit which may be issued by the Agency of Natural Resources regarding the project's sewage disposal system. The District Commission therefore did not issue final findings on sewage disposal. On December 23, 1989, the District Commission denied motions to alter filed by the Applicant and the City of Vergennes.

19. District Commission Finding of Fact 24, made pursuant to 10 V.S.A. § 6086(a)(5) (Criterion 5 - traffic), states that if a permit for this project is issued, the District Commission will require in that permit that the Applicant establish an escrow agreement **in the** amount of \$15,000 which will be released to the City of Vergennes solely for the **purpose of design, engineering or installation** of a traffic signal at **the Monkton Road/Route 22A** intersection.

IV. CONCLUSIONS OF LAW

1. Criterion 9(A) requires that the Board consider growth-related impacts of proposed projects, including impacts on highway access and maintenance, and requires the Board to impose conditions which prevent undue burden on the town and region in accommodating growth caused by the proposed project. 10 V.S.A. § 6086(a)(9)(A). Criterion 9(A) also provides that the burden of proof is on the opponent except in towns which have a duly-adopted capital improvement program.

The Board concludes that the proposed project will contribute to the burden of growth on the financial capacity of the City of Vergennes by exacerbating an already-recognized need for a traffic light at **the** intersection of Route 22A and **Monkton** Road. The reason for this conclusion is that the proposed project will contribute additional traffic to the intersection, thus increasing the need for a signal. However, the District Commission has determined pursuant to Criterion 5 (traffic) that the Applicant must contribute to the cost of a traffic signal at the intersection, and the Applicant has stated that it is willing to contribute. Accordingly, reasonable conditions have already been imposed to alleviate any undue burden with respect to the signalization of the **Monkton** Road/Route 22A intersection. On this basis, the proposed project complies with Criterion 9(A).

2. Criterion 9(J) provides that:

A permit will be granted for a development or subdivision whenever it is demonstrated that, in addition to all other applicable criteria, necessary supportive governmental and public utility facilities and services are available or will be available when the development is completed under a duly adopted capital improvement program or plan, an excessive or uneconomic demand will not be placed on such facilities and services, and the provision of such facilities and services has been planned on the basis of a projection of reasonable population increase and economic growth.

10 V.S.A. § 6086(a)(9)(J).

As stated in the notice of appeal and set forth in the prehearing conference report, the Board is only considering whether the proposed project fails to meet Criterion 9(J) because the Applicant is not required to pay the entire cost of a traffic signal and because additional sidewalks are alleged to be necessitated by the proposed project. The City contends that an excessive demand is placed on it by having to pay for a portion of the traffic signal's cost and to construct the additional sidewalks which it alleges are necessary.

With respect to the traffic signal, the proposed project complies with Criterion 9(J). Because the Applicant will pay over one-third of the cost of a traffic signal at the **Monkton** Road/Route 22A intersection, the proposed project will not place an excessive or uneconomic demand on the City of Vergennes to pay for the traffic signal.

The Board concludes that the proposed project will create a need for a sidewalk on the southern side of **Monkton** Road between the western end of the high school tract and the proposed project. However, the Applicant plans to construct a portion of this sidewalk, from the proposed project to the **Ferrisburgh/Vergennes** border. Further, there is no evidence in the record showing that the cost of the remaining portion of the sidewalk (from the **Ferrisburgh/Vergennes** border to the western side of the high school tract) will pose a burden on the City.

In addition, pursuant to 3 V.S.A. § 810(4), the Board takes official notice that, in a zoning approval, the City has required **Lake Realty, Inc.** to construct the needed sidewalk. See finding 6, above. The Board may take official notice of judicially cognizable facts at any stage

of the proceedings. In re Handy, 144 Vt. 610, 612-613 (1984). The City's zoning approval of the Lake Realty project is a judicially cognizable matter of public record. Since the needed sidewalk will be constructed by a third party, the project before the Board cannot pose an excessive or uneconomic demand on the City. On this basis, the proposed project complies with Criterion 9(J).

3. Criterion 10 requires that the Board determine whether the proposed project is in conformance with any duly adopted regional plan. 10 V.S.A. § 6086(a)(10). The areas in which the proposed project is alleged not to conform with the Addison County Regional Plan are density of development, water service, and strip development.

The Board concludes that the proposed project is in conformance with the Addison County Regional Plan with regard to density, water service, and strip development. Concerning density of development, the Land Use Plan Goals and Objectives section of the Regional Plan encourages the establishment of areas with different levels of density. The Board believes the Regional Plan is here encouraging towns within the region to establish these areas. The Town of Ferrisburgh has established areas of differing levels of density, and has earmarked the area of the proposed project for highway-oriented commercial uses which are to be sized to protect residential character and traffic access. The Board determines that the Applicant has met this requirement of the Ferrisburgh plan, and therefore meets the density objectives of the Regional Plan.

Turning to water service, the Regional Plan's Land Use Goals and Objectives Section encourages limitation of high density uses to areas with existing public water service. The Board concludes that the Regional Plan is met because water service is available in the form of an existing main close to the project. The **Vergennes-Panton** Water District has approved an application for water service by the proposed project and will allow the proposed project to connect up to the existing main. The Appellant argues that the Water District has no authority to approve the project's water service application, but the Board believes that it is not empowered to rule on the question of whether the Water District has such authority.

With respect to strip development, the Land Use Goals and Objectives section of the Regional Plan encourages "cluster development rather than strip development along major highways and urban edges." See finding 15, above. The project is located in an area designated as a highway-oriented commercial area by the Town of Ferrisburgh.

All of the proposed land uses are clustered together in a five-acre portion of the project tract located in Ferrisburgh. No extension of municipal water or sewer lines will be needed for the project. Existing land uses in the area already include commercial uses such as a gas station, a shopping center, a real estate office, a bakery, and a bank. These existing land uses present a clustered configuration near the Route 7 and **Monkton** Road intersection at which the proposed project will be located. Thus, the proposed project conforms to the objective of the Regional Plan to encourage clustering of development.

4. Criterion 10 requires that proposed projects be "**in** conformance with any duly adopted local or regional **plan.**" 10 V.S.A. § 6086 (a)(10). In this case, the tract of land on which the project will be located is partly in Ferrisburgh and partly in Vergennes. Conformance with the Ferrisburgh plan is not on appeal here. The City of Vergennes argues that the proposed project must be in conformance with its plan, and is not. The Applicant disputes this argument on both grounds.

The Board rules that the Vergennes plan must be given effect with respect to the Vergennes portion of the parcel. The Board interprets Criterion 10 to include all **local plans** which apply to the property in question. Because the Vergennes plan applies only within Vergennes, however, it cannot be given effect outside of the City boundaries.

The Board concludes that the proposed project conforms with the City of Vergennes Plan. The Vergennes portion of the project tract is in a Medium Density Residential District, within which the Vergennes Plan seeks to encourage limited uses, loose spatial character, and open space. This objective **is met** because the Vergennes portion of the project tract will be kept as an open field. To ensure that the proposed project remains in compliance with the Vergennes plan, the Board will order the District Commission, if it issues a permit for this project, to include a condition requiring that a permit amendment be obtained prior to use of, or construction on, the Vergennes portion of the project tract for any purpose related to the proposed project.

5. Concerning issuance of partial findings of fact and conclusions of law, Board Rule 21(A) provides:

Such affirmative findings, conclusions of law, and any conditions or limitations shall remain in effect,

pending issuance or denial of a permit under the Act, for a reasonable and proper term as determined by the district commission or board.

Pursuant to Rule 21(A), the District Commission issued partial findings of facts and conclusions of law on November 14, 1988, for a period of one year. The District Commission denied a motion to alter these partial findings on December 23, 1988. On January 20, 1989, the City of Vergennes filed this appeal, which has been pending since that date.

The Board determines that the District Commission's findings should be extended and held to be valid for an additional year following November 14, 1989, or, until November 14, 1990. The Board believes that this extension is reasonable because a number of these findings have been on appeal to the Board since January 20, 1989, and that appeal was filed by the City of Vergennes, a party over whom the Applicant does not exercise control. The Board also determines that it is reasonable that the findings it is issuing today be valid until November 14, 1990.

V. ORDER

1. The proposed project satisfies Criteria 9(A), 9(J), and 10.

2. If the District #9 Environmental Commission issues a permit for the proposed project, it shall incorporate a permit condition concerning the Applicant's contribution to a traffic signal. This condition shall be consistent with the Board's findings of fact and conclusions of law, above.

3. If the District #9 Environmental Commission issues a permit for the proposed project, it shall incorporate a permit condition requiring that a permit amendment be obtained prior to use of, or construction on, the Vergennes portion of the project tract for any purpose related to the proposed project.

4. The period of effectiveness of the District Commission's partial findings of fact issued November 14, 1988 is extended to November 14, 1990. This extension applies to all of the District Commission's findings, except that its findings concerning Criteria 9(A), 9(J) and 10 shall remain effective only to the extent that they are not in conflict with the Board's findings under those three criteria.

5. The Board's findings of fact and conclusions of law with respect to Criteria 9(A), 9(J), and 10 shall be effective until November 14, 1990.

6. Jurisdiction over this matter is returned to the District #9 Environmental Commission.

Dated at Montpelier, Vermont this 1st day of May, 1990.

ENVIRONMENTAL BOARD



Stephen Reynes, Chairman
Ferdinand Bongartz
Rebecca J. Day
Arthur Gibb
Charles Storrow