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

RE: Lake Realty, Inc. by Richard A. Spokes, Esq. Spokes, Foley & Peterson P.O. Box 986 Burlington, VT 05402-0986	Findings of Fact, Conclusions of Law and Order Land Use Permit Application #9A0175-EB
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This decision pertains to an appeal of a permit issued by the District #9 Environmental Commission for expansion of an existing shopping center located off **Monkton** Road in Ferrisburgh, Vermont. As is explained below, the Board concludes that: (1) certain development plans of the American Legion Post #14 are not required to be reviewed as part of this application; (2) the proposed expansion of the shopping center does not contravene the town plan of the Town of Ferrisburgh; and (3) withdrawal of part of this appeal pertaining to requiring Ray's Development, Inc. to be a co-applicant is not contrary to the values protected by Act 250. The Board also declines to amend the permit.

I. SUMMARY OF PROCEEDINGS

The Town of Ferrisburgh (the Appellant) filed with the Environmental Board on April 24, 1989 an appeal of Land Use Permit #9A0175 "Corrected," issued by the District #9 Environmental Commission on April 5, 1989. That permit authorizes Lake Realty, Inc. and co-applicant American Legion Post #14 to expand an existing shopping center to include an 18,000 square foot supermarket and 13,000 square feet of retail space, with associated parking and site work, located off **Monkton** Road in Vergennes and Ferrisburgh. The Legion is a co-applicant only because it owns part of the land on which the project is to be located. The April 24 appeal cited four issues to be resolved:

1. Whether the plans of the Legion to develop lands adjacent to the proposed project should be part of this Act 250 review.
2. Whether Ray's Development, Inc. should be a co-permittee because it owns land on which part of the proposed project will be located.
3. Whether the proposed project meets the requirements regarding primary agricultural soils of 10 V.S.A. sec. 6086(a)(9)(B) (Criterion 9(B)).

4. Whether, pursuant to 10 V.S.A. sec. 6086(a)(1) (Criterion **10**), the proposed project contravenes the Ferrisburgh town plan by setting aside as open space land which is zoned commercial.

The April 24 appeal also included a motion to stay the permit's effect.

On May 18, 1989, Chairman Leonard U. Wilson convened a prehearing conference in Vergennes. On that date, the Appellant filed a withdrawal of its appeal with **respect to** Criterion 9(B). At the prehearing, the Appellant stated that it tentatively wished to withdraw a part of its appeal relating to the requirement that **Ray's** Development, Inc. be a co-applicant. The basis for this tentative withdrawal was the Applicant's representation that it was a successor corporation to **Ray's** Development, Inc.

On May 18, the Applicant filed a memorandum opposing the motion to stay. On May 26, the Board issued a prehearing conference report. On May 29, the Appellant filed a written response to the Applicant's memorandum concerning the motion to stay. On June 8, the Appellant filed a memorandum of law on the remaining issues under appeal.

On June 9, **the** parties submitted a stipulation of facts. On that date, the Board issued a memorandum of decision denying the motion to stay and granting the partial withdrawal of appeal regarding Criterion 9(B). On June 20 and 21, the Applicant and the Legion respectively filed memoranda of law on the remaining appeal issues. The Board heard oral argument on June 28 in Berlin, Vermont. The hearing was recessed pending review of the record and preparation of a decision by the Board. On October 2, the Appellant informed Board staff that it no longer wished to continue that part of its appeal concerning **Ray's** Development, Inc. On October 18, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision.

II. ISSUES IN THE APPEAL

The issues before the Board are:

1. Whether, pursuant to 10 V.S.A. sec. **6001(3)** and Board Rule 2(A), plans of the American Legion Post **#14** to develop adjacent lands should have been reviewed by the District Commission because they are part of the same development.

2. Whether, pursuant to 10 V.S.A. sec. **6086(a)(10)** (Criterion **10**), the proposed project contravenes the Ferrisburgh town plan because the project sets aside land as open space which is zoned commercial by Ferrisburgh.
3. Whether the Board should allow withdrawal of that part of the appeal concerning whether Ray's Development, Inc. should be a co-applicant.

III. FINDINGS OF FACT

1. On September 4, 1974, a certificate of merger was filed with the Vermont Secretary of State's office. This certificate showed a merger of **Ray's** Motor Homes, Inc., **Ray's** Development, Inc., and Ray's Mobile Homes, Inc. The merged corporate entity was called Ray's Mobile Homes, Inc.
2. On June 14, 1978, a certificate of amendment was filed with the Secretary of **State's** office changing the corporate name of Ray's Mobile Homes, Inc. to Lake Realty, Inc. (the Applicant).
3. A shopping center which was built prior to June 1, 1970 is located on an approximately twelve-acre tract of land in Ferrisburgh at the intersection of U.S. Route 7 and **Monkton** Road. **Ray's** Development, Inc. was listed in the Ferrisburgh town records as the owner of this land when the Town of Ferrisburgh filed this appeal on April 24, 1989. The Applicant intends to change the town records to show ownership of this tract by the Applicant.
4. American Legion Post #14 owns an approximately twelve-acre tract of land adjacent on the northwest to the tract described in finding 3, above. The Legion's tract is located in both Ferrisburgh and Vergennes.
5. The Legion's tract is bounded on the western side by an-approximately thirteen-acre tract wholly located in Vergennes and owned by the Applicant.
6. Lake Realty, Inc. possesses an unwritten option to purchase the southern portion of the Legion's parcel described in finding 4, above. This portion consists of approximately 4.2 acres and connects the parcel on which the existing shopping center is located to the parcel which is owned by the Applicant described in finding 5, above. The 4.2 acre tract is located partly in Vergennes and partly in Ferrisburgh.

7. The Applicant proposes to expand the existing shopping center by constructing an 18,000 square foot supermarket and 13,000 square feet of retail space, with associated parking and site work. The proposed building will actually be located wholly within Vergennes on the 4.2 acre tract, but related parking will be constructed in Ferrisburgh, and some of this parking will be on the tract on which the existing shopping center stands.
8. The Legion proposes to create a new meeting building on its twelve-acre tract. The building will be constructed on the portion of the Legion's tract which is not subject to the unwritten option between it and the Applicant. Liquor will be served at the building to Legion members and guests, but not to the general public. The building will be used by the Legion's membership for business meetings and social gatherings. It will also be available at no charge for community activities such as Boy Scouts, Girl scouts, and Rotary Casino Night.
9. The Applicant's proposed shopping center expansion is designed to blend with the existing shopping center to present a unified center of retail stores which are connected visually. The Legion's proposed building will be of a completely different design and orientation.
10. The Applicant's and the Legion's proposed projects will be connected only by an extension of two existing rights-of-way for underground utilities running from Meadow Lane, which is west of the Applicant's proposed project, across the 4.2-acre tract to the Legion's proposed project. A paved access at one time was planned from the Applicant's proposed project to the Legion's, but this access is no longer part of the Applicant's proposal.
11. Vehicular access to the Applicant's proposed project will be from **Monkton** Road. Vehicular access to the Legion's proposed project will be along a right-of-way from Armory Lane across the parcel described in finding 5, above, to the proposed project.
12. Ownership and management of the Legion's and the Applicant's proposed projects are and will remain separate and distinct. There will be no sharing of management responsibilities.

13. The District #9 Environmental Commission issued Land Use Permit #9A0175 "Corrected" on April 5, 1989. This permit includes Condition 21, which reads:

The Permittee shall retain the rectangular area immediately north of the existing shopping center as open space with landscaping as shown in Exhibit #50. Any future development which may be proposed in this area will be considered a material change to the permit and will therefore require an amendment application and full review by the Commission under the 10 criteria.

14. 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 [sic] 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.

15. 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.

16. Ray Pecor, Jr. had a controlling interest in Ray's Development, Inc., and Ray's Mobile Homes, Inc. Mr. Pecor has a controlling interest in Lake Realty, Inc.

IV. CONCLUSIONS OF LAW

A. Concurrent Review of Legion Proposal

The Board concludes that the Applicant's proposed project and the proposed project of the American Legion

Post #14 are not the same development. In In Re Declaratory Rulina #149 Trono Construction Comnanv, 146 Vt. 591 (1986), the Supreme Court upheld this Board's ruling that two construction projects were part of the same development because of their common ownership, common funding, shared facilities, and contiguity in time. 146 Vt. at 592-593. In this case, the Applicant's and the Legion's projects are not commonly owned, managed or funded, nor do they share facilities. Consequently, the reasoning of the Trono case does not apply. The two projects are not one development, and the development plans of the Legion do not have to be reviewed concurrently with those of the Applicant.

B. Criterion 10 (Conformance with Local or Reaional Plan)

Act 250 prohibits the Board from issuing a land use permit unless it finds that the proposed project is in conformance with applicable local or regional plans. 10 V.S.A. sec. **6086(a)(10)**. The only Criterion 10-related issue raised in this matter is whether the Applicant's proposed project conforms to the town plan of Ferrisburgh because of Condition 21 of Land Use Permit #9A0175 **"Corrected,"** which requires that the Applicant set aside land north of the existing shopping center as open space and that the Applicant apply for a permit amendment if the Applicant proposes to develop that land. The Appellant maintains that this condition contravenes the Ferrisburgh town plan because that plan zones the area in which the proposed open space will be located as commercial.

The Board concludes that the required open space set-aside conforms to the Ferrisburgh town plan. For a highway commercial district such as the one in which the Applicant's proposed project is located, the Ferrisburgh plan requires that the size of commercial uses be restricted to protect the residential character of the district. The open space set-aside effects this goal by minimizing the commercial use of the tracts of land on which the existing shopping center and proposed expansion will be-located. Specifically, the set-aside takes approximately 20,000 square feet of the tracts out of commercial use unless a permit amendment is obtained allowing such use.

C. Co-applicancy of Ray's Development, Inc.

The Appellant initially contended on appeal that, pursuant to Board Rule **10(A)**, Ray's Development, Inc. was required to be co-applicant because it was listed as the

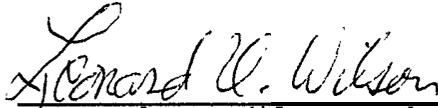
record owner of involved land in this application. Based on evidence filed with the Board indicating that the Applicant is a successor corporation to Ray's Development, Inc., the Appellant no longer wishes to pursue this issue. The Board concludes that withdrawal of this part of the appeal does not contravene the values protected by Act 250 and therefore allows such withdrawal.

V. ORDER

Based on the foregoing, the Board declines to alter Land Use Permit #9A0175 "Corrected." Jurisdiction over this matter is returned to the District #9 Environmental Commission.

Dated at Montpelier, Vermont, this 20th day of October, 1989.

ENVIRONMENTAL BOARD



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