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STATE OF VERMONT  
ENVIRONMENTAL BOARD  
10 V.S.A., Chapter 151

RE: Bruce J. Levinsky by Findings of Fact, Conclusions  
John M. Kilmurry, Esq. of Law and Order  
P.O. Box 189 Declaratory Ruling #157  
Montpelier, VT 05602

This decision pertains to a Petition for Declaratory Ruling. filed on July 27, 1984 by Bruce J. Levinsky concerning the completeness of a land use permit application filed by Mr. Levinsky pursuant to 10 V.S.A., Chapter 151 (Act 250).

Environmental Board ("the Board") Chairman Margaret P. Garland held a prehearing conference in this matter on July 13, 1984 in Montpelier, Vermont. The full Board convened a public hearing on July 18, 1984 in Barre, Vermont. The following participated a&parties at the hearing:

Petitioner Bruce J. Levinsky by Jonathan Brownell, Esq.;  
State Agency of Environmental Conservation and Department  
of Agriculture by Dana Cole-Levesque, Esq.;  
Central Vermont Regional Planning Commission by  
Susan Sinclair.

The hearing was recessed on July 18, 1984 pending the filing of a memorandum of law by the State Agencies, a review of the record, and deliberation. The Agencies' memorandum was filed on July 20, and on August 8, the Board determined the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

I. PROCEDURAL HISTORY AND ISSUES RAISED BY THE PETITION

At the request of the State Agencies, the Coordinator for the District #5 Environmental Commission issued an advisory opinion on June 8, 1984, pursuant to Board Rule 3, concluding that Petitioner's land use permit application to construct a sewer line (application #5W0772) was sufficiently complete to initiate review by the Commission pursuant to Act 250. On June 14, the Agencies appealed the Coordinator's decision by requesting an advisory opinion from the Board's Executive Officer, and on that date the Commission stayed further proceedings concerning application #5W0772 pending disposition of the Agencies' appeal. On June 19, the Executive Officer issued an opinion concluding that because the sewer line was part of a larger undertaking involving intensive development of a 425 acre parcel owned by Mr. Levinsky, additional information was required to render the application sufficiently complete to allow a proper review of the proposal under the ten criteria of Act 250.

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The Petition was filed appealing the Executive Officer's decision. Mr. Levinsky contends that while the proposed sewer line may serve a future residential and commercial subdivision of his land, that subdivision has not yet reached final design. He further contends that the sewer line is an economically viable project standing alone, whether or not any future development of his remaining lands occurs. Any concerns about incomplete or fragmented review under Act 250 are satisfied, Petitioner argues, by the Applicant's agreement that his entire 425 acre parcel will remain subject to Act 250 jurisdiction and that all future connections to the line will be approved in advance by the Commission.

The State Agencies and the Central Vermont Regional Planning Commission (CVRPC) argue that the Petitioner has clearly revealed an intent to intensively develop the 425 acre tract, that the proposed sewer line will have substantial excess capacity available to serve future development of the Levinsky lands, and that important natural resource implications must be evaluated before the infrastructure phase of the Petitioner's development is completed. i

## II. FINDINGS OF FACT

1. On November 2, 1983, the Petitioner applied to the Commission for authorization to construct 5,086 feet of sanitary sewer line ("Phase I") roughly parallel to Airport Road in Eerlin, Vermont. Phase I would begin at the existing municipal sewer line adjacent to Vermont Route 62 near the Central Vermont Hospital and run generally southerly through one parcel owned by the Petitioner, then through lands of co-applicant Henry A. LaGue, and ending in the northwest corner of a second 425 acre parcel (the "Rockwell tract") owned by the Petitioner. A land use permit (#5W0760) was issued by the Commission for Phase I on July 19, 1984, after recess of the Board's hearing.
2. On May 4, 1984, the Petitioner filed land use permit application #5W0772 with the Commission requesting authorization to construct Phase II of the sewer line, a 4,616 foot extension of the Phase I line. Phase II would start at the southerly terminus of Phase I, run through the 425 acre Rockwell tract for approximately 1800 feet, then proceed within the Airport Road right-of-way to a terminus at the Edward F. Knapp State Airport. Exhibit #1.
3. In response to inquiries by the Commission during review of the Phase I application, Petitioner submitted a "sketch plan" labeled "Rockwell Subdivision, Berlin, Vermont." Exhibit #5. That plan

conceptually depicts a subdivision of the 425 acre parcel consisting of .66 industrial lots on 179 acres, 361 residential units on 293 acres, 23,900 feet of interior roadway, ponds, recreational lands and sewer lines to be connected to the Phase II sewer extension. The plan shows a sewer extension terminating at the Southeast corner of Petitioner's property.

4. The Phase II permit application was accompanied by sewer line plans, the first sheet of which is a reproduction of the Rockwell Subdivision conceptual plan altered to depict the four segments of sewer line comprising the Phase II proposal. Exhibit #2. The first sheet of those plans further depicts six segments (labeled B-1 through B-6) of what is apparently a future third collector sewer phase.
5. While the Phase II line would be available to transport waste, discharged by land uses to be developed in the future by Mr. Levinsky on the Rockwell tract; the Petitioner currently intends that line to serve only two existing commercial enterprises and the State Airport, all of which are experiencing waste disposal problems. The Petitioner believes the Phase II project to be economically viable based upon user fees paid by the existing enterprises, independent of any future use of the line through development of the Rockwell lands. However, insufficient evidence was submitted for this Board to reach a similar conclusion.
6. The sewer line would be 8" in diameter with a maximum carrying capacity of 460,000 gallons per day. The existing enterprises would discharge an estimated 8,500 gallons of waste each day, leaving sufficient reserve capacity to serve a development of the size conceptualized in the Rockwell Subdivision Sketch Plan. The Levinsky line would discharge to an existing municipal line carrying waste to the City of Montpelier sewage treatment plant. Montpelier has agreed to receive and treat up to 500,000 gallons of waste each day from the Town of Berlin.
7. Petitioner intends to develop the Rockwell tract and the Phase I and II lines will provide sewer service for that development. Existing -limitations on the Rockwell lands for the subsurface disposal of waste will be remedied by the availability of the sewer line. The next (third) phase of Petitioner's development will be a specific proposal for subdivision of a portion of the Rockwell lands. That proposal will be based upon the substantial project design activity which has already taken place as well

as the three years of discussions which the Petitioner has had with the Berlin Planning Commission concerning development of the Rockwell lands.

8. Primary agricultural soils are located on the Rockwell tract as is a deer wintering area. The Petitioner does not believe construction of the Phase II line will directly affect either of those two resources. The Rockwell tract is within an area designated "rural-agriculture, fair to good suitability" by the CVRPC's Regional Land Use Plan. Exhibit #8. The availability of the sewer line will make the surrounding area more attractive to potential developers. Exhibit #4, Narrative page 3.
9. In respect to the Phase I application, the Petitioner agreed to the imposition of a condition barring future hook-ups to the line until after Commission review of "all natural resource implications" of any proposed project. Exhibit #7. Petitioner has proposed a stipulation in respect to these proceedings which would allow consideration of the "costs and effects" of the Phase II project in the course of Act 250 review of any development or subdivision on the Rockwell tract. Exhibit #6.

### III. CONCLUSIONS OF LAW

#### A. Completeness of the Application

10 V.S.A. §6083(a) provides, in pertinent part, as follows:

An application for a permit shall be filed with the district commission as prescribed by the rules of the board and shall contain at least the following documents and information:

- (2) \*Five copies of a plan of the proposed development or subdivision showing the intended use of the land, the proposed improvements, the details of the project, and any other information required by this chapter, or the rules promulgated thereunder.

We conclude that the project proposed by the Petitioner is not the Phase II sewer line standing alone. Rather, Petitioner clearly intends to intensively develop his 425 acre tract as a residential and/or commercial subdivision and the Phase II line will serve only as one constituent support service for a larger undertaking. Therefore, applying §6083(a) to the Petitioner,

the term "land" refers to Mr. Levinsky's entire 425 -acre tract, the intended use of that land is residential/commercial subdivision, the "proposed improvements" are not limited to the Phase II line but instead include all construction necessary to accomplish the land subdivision, and the "details of the project" include a description of all uses proposed for the land./1/

Furthermore, Board Rule 10(B) pertaining to permit applications provides, in part: "The board or a commission may require such additional information or supplementary information as the board or commission deems necessary to fairly and 'properly review the proposal." In determining what additional information may be required to "fairly and properly" evaluate a proposal, we must turn to Act 250 itself. The Board and the District Commissions are directed by 10 V.S.A. §6086(a) to make several affirmative findings which would be rendered difficult if we subscribed to Petitioner's fragmented approach to project review.

For example, Criterion 9(B) relating to primary agricultural soils, which Petitioner concedes would be at issue in permit proceedings for development or subdivision of his lands, requires a finding that "the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential." Obviously, the fair market value of Mr. Levinsky's land is likely to change after the installation of a sewer line because on-site sewage disposal is presently an impediment to intensive development of the Rockwell tract. See Finding #7. Therefore, Petitioner's ability to secure a reasonable return on the value of the Rockwell tract and, ultimately, the question of whether prime agricultural soils will be converted to an alternate use may be dramatically affected by the installation of the Phase II line. Such an outcome is neither fair nor proper: a permit applicant should not reap the benefit of-artificially changing to his advantage, by completing the second phase of a multi-phase subdivision project, the basic conditions which we are called upon to evaluate under Criterion 9(B). Similar difficulty is encountered when Criteria 9(A), 9(H), 9(K), and 9(L) are reviewed.

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/1/ We note that the Rockwell Subdivision Sketch Plan would constitute a document "sufficiently firm and detailed to give the notice [the permit process] contemplates and which is constitutionally required, and which is also essential to effect its purposes." In re Agency of Administration, 141 Vt. 68, 82 (1982). Furthermore, we do not regard the fact that the plan may be altered over time as an impediment to our decision. Id. 141 Vt. 68, 91.

Furthermore, the segmented review approach advanced by the Petitioner could prevent a comprehensive review of total project impacts under each criteria. For example, the impact of individual project phases on a deer habitat may be de minimis when considered in a vacuum. However, the cumulative impact of all phases considered as a whole could rise to the level of "significant imperilment" requiring evaluation under the three sub-criteria of Criterion 8(A). This difficulty is also repeated in reviewing other Criteria./2/

Finally, should land use of the intensity anticipated by the Petitioner not prove appropriate under the ten criteria on the Rockwell tract, rendering the sewer line unnecessary to future development of that land, the justification for that line under the ten criteria may change substantially. While the ancillary purpose of serving existing enterprises would presumably remain, justification for use of a corridor outside the Airport Road right-of-way may not exist and construction of a private sewer line with a capacity of 460,000 GPD may not survive scrutiny under the ten criteria.

In short, the review methodology proposed by the Petitioner would perpetuate, rather than abate, the problems which spurred the enactment of Act 250:

. . . the unplanned, uncoordinated and uncontrolled use of the lands and the environment of the state of Vermont has resulted in usages of the lands and the environment which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont. Act No. 250 of 1969 (Adj. Sess.), §1.

We, therefore, conclude that an application which does little more than address the Phase II sewer line without providing a further description of the project to be served by the sewer line does not comply with the requirements of 10 V.S.A. §6083(a) and does not provide sufficient information to fairly and properly review the project under the ten criteria of 10 V.S.A. 56086(a).

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/2/ The stipulations proffered by the Petitioner do little to address this problem. The stipulations simply acknowledge current practice concerning permit amendments: proposed changes to permitted projects are evaluated for their impacts on the ten criteria as well as their impacts on findings and conclusions issued in approving the original project.

## B. Supplementation of the Application

While we have concluded that Petitioner's application in #5W0772 is not complete for its failure to address associated subdivision of the Rockwell tract, we do not conclude that Petitioner must prepare final project plans for a comprehensive proposal. Should Petitioner be prepared to submit such a master development plan for the Rockwell land, application for final commission approval is an available option. However, other interim alternatives are available to the applicant.

At a minimum, prior to further development associated with future use of the tract, Petitioner must identify the components of the development or subdivision to be served by the Phase II sewer line. This identification need not include final architectural design or final engineering design of support services. The plan must, however, identify the uses to which the 425 acres is to be put, the location of various uses on the tract, and the intensity of those uses (i.e. number of dwelling units, length of utility lines and roadways, extent of commercial space, estimated water demand, estimated sewage discharge, estimated vehicle trips to be generated, and similar information). Petitioner may then pursue two alternatives, both of which are available under and encouraged by Board Rule 21:/3/

- 1) review of a master plan under all criteria of 10 V.S.A. §6086(a); or
- 2) partial review of the project under selected criteria in a sequence determined by Petitioner, with the approval of the Commission, as most practicable, taking into consideration the natural resource concerns most salient to his proposal and the availability of information to support affirmative findings under each criterion.

The first alternative has been a matter of practice for several years in respect to industrial and commercial parks. See C & K Brattleboro Associates, #2W0434-EB, 1/2/80; Paul E. Blair Family Trust, #4C0388-EB, 6/16/80. This procedure involves application for approval of preliminary plans under each of the criteria, based upon the applicant's representations concerning impacts on values addressed in the criteria. Following

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<sup>/3/</sup> Authority for partial review under Criteria 9 and 10 is also found in 10 V.S.A. §6086(b).

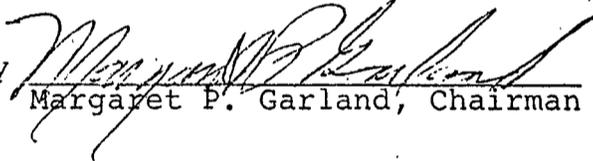
preliminary approval: final plans for constituent phases may be submitted as applications for amendment of the preliminary approval. Findings and conclusions accompanying the preliminary approval remain applicable to all amendments for a reasonable period fixed by the Commission in its decision. Issues requiring final review after receipt of detailed plans are identified in the Commission decision. Amendment reviews are limited to determining conformance with the parameters of the preliminary approval and final review of detailed plans under applicable criteria (a sewage disposal system's conformance with Department of Water Resources Regulations concerning waste disposal, for example);

The second alternative allows an applicant to first secure Commission review under those Criteria which an applicant believes are most likely to determine the success of the project. In Petitioner's circumstances, for example, the parties have identified issues under Criteria 8, 9, and 10 which could be presented for Commission review prior to Petitioner's incurring substantial expense in final architectural and engineering design. Following this partial review, final design of constituent phases could then be submitted for approval in a sequence determined appropriate by Petitioner with some assurance that fundamental obstacles to completion of the development are less likely to arise.

We believe the alternatives available to the Petitioner under Rule 21 provide all potential parties with a reasonable opportunity to evaluate the project, allow the Commission to conduct the inquiry mandated by 10 V.S.A. §6086, and allow the Petitioner to proceed expeditiously while preserving his resources and securing a degree of stability while pursuing a multi-phased project. We remind the Commission of its responsibility under Rule 21(B) to apply that Rule's procedures liberally in an effort to minimize costs and inconvenience to applicants.

Dated at Montpelier, Vermont this 8th day of August, 1984.

ENVIRONMENTAL BOARD

By   
Margaret P. Garland, Chairman

Members participating  
in this decision:  
Margaret P. Garland  
Ferdinand Bongartz  
Lawrence H. Bruce, Jr.  
Dwight E. Burnham, Sr.  
Melvin H. Carter  
Warren M. Cone  
Roger N. Miller  
Priscilla N. Smith