

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

RE: Frank W. Whitcomb Construction Corporation  
Alan J. Lavoie, Compliance Officer  
P.O. Box 429  
Bellows Falls, VT 05101-0429

Findings of Fact and  
Conclusions of Law  
and Order  
Declaratory Ruling  
#159

This decision pertains to a Petition for Declaratory Ruling filed with the Environmental Board ("the Board") on June 26, 1984 by the City of Winooski seeking a determination that the Frank W. Whitcomb Construction Corporation must secure local planning and zoning permits prior to the issuance of an Act 250 permit for the construction of an asphalt batch plant in Colchester, Vermont.

A prehearing conference was held pursuant to Board Rule 16 on September 4, 1984 in Essex Junction, Vermont, following the Petitioner's objection to proceeding with an administrative hearing officer pursuant to Board Rule 41. A public hearing was held by the full Board on September 12, 1984 in South Burlington, Vermont, Chairman Margaret P. Garland presiding. The following participated as interested parties at the hearing:

Petitioner City of Winooski, by William Wargo, City Attorney

Frank W. Whitcomb Construction Corporation ("Whitcomb") by Gregg H. Wilson, Esq.

Winooski School District by William M. O'Brien, Esq.

Winooski Planning Commission by Randen Barlow, City Planner.

Colchester Planning Commission by Alan Benjamin, Development Administrator.

The hearing was recessed on September 12th, pending preparation of this decision.

9/26/84  
DR# 159 *[Signature]*

I. ISSUES RAISED BY THE PETITION

**Whitcomb** has applied to the District #4 Environmental Commission ("**the Commission**") pursuant to 10 V.S.A. §6083 for a land use permit to authorize the installation and operation of an asphalt batch plant within an existing quarry owned by **Whitcomb**. The batch plant site consists of approximately four acres which are a portion of a larger **200** acre tract owned by **Whitcomb**. While substantial portions of this larger tract abut the Winooski City line, all but approximately two acres lie within the Town of Colchester. Colchester has indicated that all local approvals required by that town have been issued for the project.

Winooski contends that, if City of Winooski planning or zoning approvals are required for the project, they must be secured prior to the issuance of a land use **permit** by the Commission. The City seeks a directive that the Commission not issue a permit until local approvals are secured or, in the alternative, if a permit is issued, that it include a condition requiring the applicant to secure necessary local approvals.

II. MOTION TO DISMISS

On September 10, 1984, **Whitcomb** filed a Motion to Dismiss the Petition. At its September 12th hearing, the Board heard oral argument from the parties and then issued an oral decision dismissing the Petition. This decision confirms the order issued at the hearing.

Winooski requests that we direct the Commission's substantive and procedural decision-making while a land use permit application is still pending before that **Commission.**<sup>/1/</sup> We do not believe such action is permissible except within the narrow circumstances of an "interlocutory" appeal and this proceeding does not comply with the requirements of Board Rule 43.

Furthermore, we conclude that **Winooski's** Petition is an impermissible collateral proceeding. Winooski must first direct its request concerning local permits to the Commission. Decisions concerning permit applications must first be made by District Commissions. See In re Juster Associates, 136 Vt. 577, 581 (1978) ("Initial consideration of a land use proposal is a function assigned by the

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<sup>/1/</sup>The Commission hearing on the **Whitcomb** application is now in recess.

Legislature to the District Commission.") We **also** believe that the principles of In re State Aid Highway No. 1, Peru, Vermont, 133 Vt. 4 (1974) apply to this case, even though we are not here dealing with a collateral attack on a final Commission decision. Were we to entertain Petitioner's request while the **Whitcomb** application is pending before the Commission we would be circumventing statutory application and review mechanisms in a manner foreclosed by the Peru decision.

III. ORDER

The Petition is dismissed without prejudice to **Winooski's** right to apply to the Commission for the relief it sought from the Board.

Dated at Montpelier, Vermont, this 26th day of September, 1984.

VERMONT ENVIRONMENTAL BOARD

BY   
Margaret F. Garland  
Chairman

Members participating  
in this decision:

Margaret P. Garland  
Ferdinand Bongartz  
Dwight E. **Burnham**, Sr.  
Warren Cone  
Donald B. Sargent- -