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

RE: Poquette & Bruley, Inc. by
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Kissane, Yarnell & Cronin
2 North Main Street
St. Albans, VT 05478-1668

Findings of Fact,
Conclusions of Law
and Order
Declaratory Ruling #233

. This decision pertains to a petition for declaratory ruling concerning the interpretation of Condition 7 of Land Use Permit Amendment #6F0372-1-EB (the amendment), which authorized the completion of a 37-lot subdivision. The first portion of the subdivision, consisting of five lots, previously was authorized by Land Use Permit #6F0372 (the permit). The amendment authorized the addition of 32 lots. As is explained below, the Board has concluded that Condition 7 applies to the entire subdivision including the initial five lots.

I. SUMMARY OF PROCEEDINGS

On May 24, 1989, the Environmental Board issued the amendment and supporting findings of fact and conclusions of law. On November 15, Poquette & Bruley, Inc. (the Petitioner) wrote to the Board's Assistant Executive Officer concerning Condition 7 of the amendment, asking whether that condition applied to the entire subdivision. On December 15, the Assistant Executive Officer wrote to the Petitioner, stating his interpretation that the condition did so apply.

On April 12, 1990, the Petitioner wrote to the Board's Executive Officer, requesting an advisory opinion concerning the applicability of Condition 7 to the entire subdivision. On May 18, the Executive Officer issued an advisory opinion concurring with the interpretation of the Assistant Executive Officer.

On June 5, 1990, the Petitioner filed a petition for a declaratory ruling with the Board. On July 6, the Chairman of the Board issued a memorandum setting procedure for the case. On August 2, the Petitioner filed a brief in support of its petition. The Board deliberated on September 5.

II. ISSUE

The issue before the Board is whether it is correct to interpret Condition 7 of the amendment to apply only to the additional 32 lots approved in the amendment.

III. FINDINGS OF FACT

1. On August 3, 1987, the Petitioner filed an application with the District #6 Environmental Commission for the creation of.37 single family residential lots on 21

acres of land on the eastern side of Spring Street in Swanton Village. At that time, only five of the lots had been approved by the Division of Protection, Department of Environmental Conservation, Agency of Natural Resources pursuant to the Vermont Environmental. Protection Rules.

2. On November 6, 1987, the District Commission issued Land Use Permit #6F0372 to the Petitioner. The permit "applies to lands identified at Book 87, Page 151 of the land records of Swanton Village . . .." The permit authorizes "Phase I, the creation of 5 single family lots of a proposed 37 lot residential subdivision ...." Condition 1 of the permit states that "[t]he project shall be completed as set forth in Findings of Fact and Conclusions of Law #6F0372...." Condition 12 of the permit provides that "[n]o further subdivision of any parcels of land approved herein shall be permitted without the written approval of the District Environmental Commission." Condition 15 of the permit further provides:

> The District Commission reserves the right to impose mitigative measures with respect to potential school impacts under Criterion 6 based upon a full presentation of evidence from all pertinent parties.

3. In the findings of fact and conclusions of law supporting the permit, the District Commission stated pursuant to 10 V.S.A. § 6086 (Criterion 6 - educational services):

> The Commission has not received adequate information regarding school impacts for the total buildout of this project. We can make a positive finding only to the effect that the five approved lots should not pose an undue adverse impact on the local school system. However, since local school officials have indicated that any new students will have a negative impact to the Swanton school system (Exhibit #8), the Commission will reserve the right to impose mitigative measures for all phases of this project. All future

> decisions in this regard will be based on a full wresentation of evidence from all wertinent parties....
>
> The applicants are proposing a phasing plan which will allow for the construction of seven (7) homes per year. However, before we can make a positive finding for the entire wroiect, we will need to receive revised letters from school officials .... The applicants must accurately estimate the number of school age children to be generated from this project and seek direct impact [sic] from the appropriate school officials.

(Emphasis added.)

4. On September 21, 1988, the District Commission issued Land Use Permit Amendment #6F0732-1 to the Petitioner, which "applies to the lands identified in Book 87, Page 151 of the land records of Swanton, Vermont ...," and which authorizes "the subdivision of 32 residential lots . ..." Condition 1 of that permit amendment states that "[a]ll conditions of Land Use Permit #6F0372 are in full force and effect, except as amended herein." Condition 2 of amendment #6F0372-1 provides that the project "shall be completed, operated and maintained as set forth [in the] Findings of Fact and Conclusions of Law ...." Amendment #6F0372-1 further provides:

> Condition #15 of #6F0372 is hereby amended to read as follows:
>
> 7. The Permittee and all assigns and successors in interest shall not occupy more than 7 houses per school year in any given year ....

5. In the findings of fact and conclusions of law supporting amendment #6F0372-1, the District Commission stated pursuant to Criterion 6:

> The Applicant has proposed a phasing program consisting of no more than 7 houses per year for seven years. The

> Commission finds, using the Applicants [sic] estimate of 0.57 children per lot, that this would not create an unreasonable burden on the **Village's** ability to provide educational services and provides the Village with an opportunity to plan for future expansion. Therefore, the Commission will require no more than 7 houses per year regardless of how many the developer constructed the previous year., To do otherwise, is to clearly defeat the intent of phasing which is to prevent an explosion of school age children from entering the school system at any given year.

6. The District Commission also found pursuant to 10 V.S.A. § 6086(a)(9)(A) (Criterion 9(A) - impact of growth):

> The Commission finds that the Applicants [sic] Phasing Plan of no more than 7 houses per year, except for Phase 1 which approved 5 houses, will provide adequate time and revenues to the Village to accommodate the total growth and rate of growth of this subdivision.

7. On October 18, 1988, the Petitioner filed an appeal of Amendment #6F0372-1 with the Environmental Board. On May 24, 1989, the Board issued Land Use Permit Amendment #6F0372-1-EB to the petitioner, which applies to the lands identified in Book 87, Page 151 of the Swanton land records and which revises "the conditions of Land Use Permit Amendment #6F0372-1 which authorizes the creation of a 32-lot residential subdivision in the Town of Swanton." The amendment provides:

> The Permittees, and their successors and assigns, are obliged by this Permit Amendment to complete and maintain the project only as approved by the District #6 Environmental Commission in accordance with the terms and conditions of Land Use Permit #6F0372, except as amended herein ... and Findings of Fact and Conclusions of Law #6F0372-1-EB.

Condition A of the amendment provides:

> Condition 7 is deleted from Permit Amendment #6F0372-1 and new Condition 7 is added to read:
>
> 7. Occupancy of the subdivision is limited to no more than seven houses per school year . . .. The Permittee may build and occupy up to seven houses during the 1988-1989 school year. Starting with houses not occupied during the 1989-1990 school year, the Permittee may add the number of houses not occupied in a given year to the number of houses allowed to be occupied in the following year. The Permittee may so accumulate the number of houses allowed to be occupied in a given year until all approved lots in the subdivision are occupied.

8. The findings of fact and conclusions of law supporting the amendment state that they relate to Criterion 6. No other criteria were at issue before the Board in the appeal. In the findings of fact supporting the amendment, the Board stated:

> 9. This decision is being issued in spring 1989. Construction of the' subdivision homes would therefore probably occur in summer 1989, and occupancy might begin in fall 1989, which is the beginning of the 1989-1990 school year. Consequently, if cumulative phasing were allowed retroactively, occupancy would be allowed based on three school years (1987-1988, 1988-1989, and 1989-1990). Based on the oriainal permit's allowance of five homes in 1987, and seven homes each in 1988 and 1989, retroactive cumulative phasing could result in occunancv of 19 homes in 1989-1990. Such occunancv would aenerate aooroximatelv 11 students at once.

> The Swanton school system, because it already is operating beyond capacity, would not be able to absorb these students and therefore retroactive cumulative phasing would create an unreasonable burden on the ability of Swanton to provide municipal services.

(Emphasis added.)

9. In the conclusions of law supporting the amendment, the Board concluded pursuant to Criterion 6:

> [The parties have] contested ... the District Commission's requirement that phasing be non-cumulative. This requirement means, for example, that if the Permittee does not achieve occupancy of two out of seven units in a given school year, the Permittee cannot carry those two units over to the next school year and seek to have nine units occupied by prospective purchasers. It is argued that to allow such cumulative phasing would defeat the purpose of having phased occupancy.
>
> The Board is not persuaded that cumulative phasing contradicts the purpose of phasing. . . . Accordingly, the Board will revise Condition 7 to allow cumulative phasing. However, this cumulative phasing will only be allowed for occupancy following issuance of this decision and not retroactively. To allow retroactive accumulation would mean an influx of students too great for Swanton to manage, imposing an unreasonable burden ....

(Emphasis added.) Following the conclusions of law supporting the amendment, there is an order which states that "Land Use Permit Amendment #6F0372-1-EB is hereby issued."

10. Subsequent to the issuance of the amendment, the Petitioner did not file a motion for reconsideration with the Board or appeal the Board's amendment to the Vermont Supreme Court./1/

IV. CONCLUSIONS OF LAW

The Petitioner seeks a declaration from the Board that Condition 7 of the amendment applies only to the additional 32 lots at its subdivision which the amendment approved. Condition 7 of the amendment requires the Petitioner to limit occupancy of houses at its subdivision to no more than seven per school year. The condition allows the Permittee, starting with the 1989-1990 school year, to add the number of houses not occupied in a given year to the number of houses to be occupied in the following year.

At issue are the first five lots at the subdivision which were approved in the original permit. The Petitioner contends that Condition 7 of the amendment does not apply to those five lots. The Petitioner's concern here is the phasing of the project. In any given year, the Petitioner seeks to be able to allow occupancy of up to seven homes at the subdivision in addition to the five homes originally approved.

Thus, the Petitioner argues that the seven-home per year limit applies only to the second phase of the subdivision, the 32 lots approved in the amendment. In support of this argument, the petitioner cites some of the language of the Board's amendment which states that it revises amendment #6F0372-1 "which authorizes the creation of a 32-lot subdivision ...." The Petitioner also cites a finding made by the District Commission in support of amendment #6F0372-1 pursuant to Criterion 9(A) (impact of growth) (see finding 6, above). The Petitioner further contends that Condition 7 is ambiguous, and that any ambiguity must be resolved in favor of the Petitioner.

In ruling on this matter, the Board is mindful that the Petitioner did not file a motion for reconsideration of the amendment with the Board pursuant to Board Rule 31(A), or appeal the amendment to the Supreme Court pursuant to 10 V.S.A. § 6089(b). Instead, the Petitioner has waited to file a petition for declaratory ruling with the Board pursuant to 3 V.S.A. § 808 and Board Rule 3(C). Those

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[1]The Board takes notice of the facts stated in finding 10 pursuant to 3 V.S.A. § 810(4).

authorities grant the Board the power to construe the applicability of statutes, rules, and orders. Since the Board issued an order under which the amendment was granted, it is appropriate for the Petitioner to seek a declaration concerning the applicability of a condition in the amendment to the original five lots. The question, however, is not whether the condition should have been issued, but whether the construction of that condition advanced by the Petitioner is correct.

The Board concludes that the Petitioner's interpretation is not correct. The Petitioner's interpretation is contradicted by the language of Condition 7, by the findings and conclusions supporting Condition 7, and by the language of amendment #6F0372-1-EB and the permits which it amended.

There is no provision in Condition 7 allowing for occupancy of the original five homes in a given year in addition to the seven homes per year which the condition authorizes. Condition 7 on its face limits occupancy of homes at the subdivision to seven per year. The condition states that the Petitioner may build and occupy up to seven houses during the 1988-1989 school year, and does not authorize any more than seven units to be occupied during that school year. The condition allows more than seven lots to be occupied in a given year only on a restricted basis: Starting with the 1989-1990 school year, the Petitioner may add the number of houses not occupied in a given year to the number of houses allowed to be occupied in the following year. This provision starts with units authorized during the 1989-1990 school year. The original five units were approved in 1987.

Amendment #6F0372-1-EB provides that the Petitioner is bound by the findings and conclusions supporting that amendment. Finding of Fact 9 supporting that amendment concerns the issue of whether, if the Petitioner may carry over into the next year units allowed to be occupied the prior year, that carry-over should apply to units for which occupancy was authorized during years prior to the 1989 issuance of the amendment. Referring to this as "retroactive cumulative phasing," the Board found and concluded that such an accumulation could result in the occupancy of 19 homes during the 1989-1990 school year, and would cause an unreasonable burden on Swanton. In making this decision, the Board expressly referred to the original five homes and included those homes in its calculation that retroactive cumulative phasing would be an unreasonable

burden. Thus, if the Board were to agree with the Petitioner's interpretation, it would be contradicting its own findings and conclusions.

Further, amendment #6F0372-1-EB clearly amends the original permit and applies to the original five lots. The amendment states that it applies to the lands identified at Book 87, Page 151 of the Swanton land records. These are the same lands as to which the original permit states that it applies.

Amendment #6F0372-1-EB also states that it revises the conditions of amendment #6F0372-1 and that it deletes Condition 7 from that amendment and adds a new Condition 7. In turn, Amendment #6F0372-1 provides that Condition 7 'was issued to amend Condition 15 of the oriainal permit, #6F0372.

The original permit was the one authorizing the first five lots at the subdivision, and in Condition 15 of that permit the District Commission reserved the authority to impose additional conditions to mitigate impacts on educational services. Moreover, the original permit <references not an application for five units, but an application for 37 units, and states that the first five units were "Phase I."

The Petitioner also argues that the District Commission's findings pursuant to Criterion 9(A) should inform the Board's decision. However, Condition 7 of the amendment was issued pursuant to Criterion 6, not to findings under Criterion 9(A); Criterion 9(A) was not at 'issue in that proceeding. Moreover, the Board does not read the District Commission's finding to support the proposition asserted by the Petitioners. In any event, the subsequent amendment of Condition 7 by the Board is what is at issue here and what is controlling; as to the question presented, the Board believes that the language and intent are clear as above.

Accordingly, the Board concludes that the terms and requirements of Condition 7 of amendment #6F0372-1-EB apply to the five lots authorized in Land Use Permit #6F0372.

V. O R D E R

The terms and requirements of Condition 7 of Land Use Permit Amendment #6F0372-1-EB apply to the five lots authorized in Land Use Permit #6F0372.

Dated at Montpelier, Vermont this 9th day of January, 1991.

ENVIRONMENTAL BOARD

Stephen Reynes, Chairman
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A:POQUETTE.DEC (P11)