

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. §§ 6001-6092

RE: Developer's Diversified Realty Corporation (Berlin Mall Wal\*Mart)  
Declaratory Ruling Request #364

MEMORANDUM OF DECISION

On September 8 and 22, 1998, the Vermont Environmental Board ("Board") convened deliberations on Developer's Diversified Realty Corporation's ("Developer's Diversified") request to decide the first steps of the substantial and material change analyses without a hearing. Additionally, the Board considered a series of preliminary issues raised by the Concerned Physicians ("Petitioner") and Citizens for Vital Communities ("CVC") in documents filed with the Board on August 28, 1998. As set forth in more detail below, the Board denies Developer's Diversified's request to decide the first steps of the substantial and material change analyses without a hearing. Additionally, the Board denies the requests set forth by the Petitioner and CVC in their August 28, 1998 filings.

I. BACKGROUND

On May 14, 1998, the District #5 Environmental Commission Coordinator ("Coordinator") issued Jurisdictional Opinion #5-98-8 ("Jurisdictional Opinion") in which he determined that the leasing of vacant space in the Berlin Mall (previously occupied by Rich's) to Wal\*Mart ("Alteration") does not require a permit amendment application pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). Additionally, the Jurisdictional Opinion states that the District #5 Environmental Commission should convene a hearing to determine whether Berlin Associates, Ltd. has complied with Condition 28 of Land Use Permit #5W0584-2-EB, issued on January 23, 1985.

On June 12, 1998, the Concerned Physicians ("Petitioner") filed a Petition for Declaratory Ruling ("Petition") with the Board, appealing the Jurisdictional Opinion pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule ("EBR") 3. The Petitioner contends that the Alteration requires an Act 250 permit. Additionally, the Petitioner contends that the Coordinator erred by deferring the question of compliance with Condition 28 to the District Commission.

On July 6, 1998, Richard Brock, Esq. filed a Petition for Party Status on behalf of Central Vermont Hospital ("CVH").

On July 20, 1998, Charles F. Yeiser, Jr., Esq. filed a Petition for Party Status on behalf of CVC.

On July 22, 1998, Robert Halpert, Esq. entered his appearance on behalf of the Town of Berlin ("Town").

On July 23, 1998, Board Chair Harding convened a prehearing conference in this matter.

On July 23, 1998, Developer's Diversified tiled a Prehearing Conference Memorandum.

On July 23, 1998, the Petitioner tiled a Petition fo- Standing.

On July 24, 1998, Chair Harding issued the Prehearing Order, granting party status to CVH and the Town and setting forth a schedule for filings regarding other preliminary issues.

On July 31, 1998, Developer's Diversified tiled a Motion to Dismiss Concerned Physicians' Petition for Declaratory Ruling and Memorandum in Support Thereof ("Motion to Dismiss").

On July 31, 1998, CVC filed a Supplemental Party Status Request.

On August 10, 1998, Developer's Diversified filed a Response to the Prehearing Order.

On August 11, 1998, CVC filed a Response to the Petition for Rulemaking.

On August 11, 1998, the Petitioner filed the second Affidavit of Duane Natvig and a Response to the Board's Prehearing Order.

On August 14, 1998, Developer's Diversified filed an Objection to the Admission of the Second Affidavit of Duane Natvig.

On August 18, 1998, the Petitioner filed a Response to Developer's Diversified's Objection to Admission of the Second Affidavit of Duane Natvig.

On August 27, 1998, the District Coordinator issued a Project Review Sheet ("PR Sheet") which states that an Act 250 permit is not required for "phased repair of access to Berlin Mail from VT Route 62 and parking lot."

On August 28, 1998, CVC filed a letter requesting the opportunity to submit a supplemental memorandum and requesting postponement of Board deliberations until submittal of such memorandum.

On August 28, 1998, the Physicians tiled a Motion to Allow Supplemental Memorandum, Additional Time, and Stay. Also on August 28, 1998, the Physicians filed an Affidavit of Duane Natvig and a Supplemental Response to the Board's Prehearing Conference Report and Order.

On August 31, 1998, Developer's Diversified filed a letter stating that there is no need to postpone the Board's deliberations on the preliminary issues.

On September 8, 1998, the Petitioner filed a second Petition for Declaratory Ruling ("Second Declaratory Ruling") with the Board, appealing the PR Sheet pursuant to 10 V.S.A. § 6007(c) and EBR 3. The Petitioner contends that the phased repair of the Berlin Mall parking lot and access requires an Act 250 permit because it is part of the Alteration. Additionally, the Petitioner tiled a motion to consolidate the Second Declaratory Ruling with this proceeding.

On September 10, 1998, the Board issued a Memorandum of Decision which concluded that the Petitioner has standing to bring this declaratory ruling and that CVC has party status in this declaratory ruling, among other preliminary issues.

On September 14, 1998, CVC appealed the PR Sheet which is the subject of the Second Declaratory Ruling. Additionally, CVC filed a motion to consolidate the Second Declaratory Ruling with this proceeding.

On August 19, 1998 and September 8 and 22, 1998, the Board deliberated on several preliminary issues.

## **II. PRELIMINARY ISSUES**

- A. Should the Board decide whether the Alteration is either a "cognizable physical change" or a "change in use" (based on affidavits, legal memoranda, and oral argument) before holding a hearing to decide whether the change may impact criteria or permit findings, conclusions, and conditions?
- B. Whether the Board should waive its August 11, 1998 deadline and allow CVC and the Physicians to file supplemental memoranda in response to the Preheating Conference Report and Order.
- C. Whether the Board should stay the District Coordinator's Project Review Sheet, issued on August 27, 1998, which states that an Act 250 permit is

not required for phased repair of the Berlin Mall parking lot and the access to the Berlin Mall from Route 62.

- D. Whether the Board should consolidate the District Coordinator's Project Review Sheet with this proceeding.
- E. Whether the Board should direct Developer's Diversified to file its engineering plans dated June 11, 1998 with the Board or take official notice of the plans.

### III. DECISION

#### A. Request to Bifurcate the Issues

In its Prehearing Conference Memorandum tiled July 23, 1998, Developer's Diversified requests the Board to decide whether the Alteration is either a "cognizable physical change" or a "change in use" (based on affidavits, legal memoranda, and oral argument) before holding a hearing to decide whether the change may impact criteria or permit findings, conclusions, and conditions. Developer's Diversified repeated this request in its Response to the Prehearing Order, filed on August 10, 1998. The Physicians object to such an approach in their Response to the Prehearing Order, tiled on August 11, 1998.

In order to put Developer's Diversified's request in context, a brief explanation of the tests for substantial and material change follows.

"Substantial change" is defined as "any change in a development which may result in significant impact with respect to any of the criteria specified in" Act 250. EBR 2(G). Finding substantial change involves a two step process. First, there must be a "cognizable" (i.e. physical) change to the permitted project See, e.g., Sugarbush Resort Holdings, Inc., Declaratory Ruling #328, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1997); Re: David Enman (St. George Property), Declaratory Ruling #326 (Dec. 23, 1996); Re: Village of Ludlow, Declaratory Ruling #212, Findings of Fact, Conclusions of Law and Order (Dec. 29, 1989). Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. Id.; EBR 2(G).

"Material change" is defined as "any alteration to the project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act." EBR 2(P).

Finding a material change involves a two step process. First, the Board must decide whether a physical change or a change in use has occurred or will occur. See, e.g., Sugarbush Resort Holdings, Inc., Declaratory Ruling #328, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1997); Re: David Enman (St. George Property) Declaratory Ruling #326 (Dec. 23, 1996); Re: Mount Mansfield Co., Inc., Declaratory Ruling #269 (July 22, 1992). Second, if there is a change, the Board must determine whether the alteration has a significant impact on any finding, conclusion, term, or condition of the Permit and whether the alteration affects one or more of the values protected by Act 250. Id.; EBR 2(P).

Developer's Diversified requests the Board to decide the first steps of the substantial and material change analyses without a hearing and opportunity for cross-examination. The Board denies Developer's Diversified's request because making such decisions without providing for a hearing would violate the Administrative Procedures Act. 3 V.S.A. §§801-849. In a contested case, all parties must be given an opportunity for hearing after reasonable notice. 3 V.S.A. § 809(a). Additionally, all parties must be given an opportunity to respond and present evidence and argument on all issues involved. 3 V.S.A. §809(c). Historically, the Board has held one hearing in cases involving issues of substantial and material change at which the parties have presented evidence on the two steps of the substantial change analysis and the two steps of the material change analysis. Accordingly, the Board will approach this case consistently with its previous cases and deny Developer's Diversified's request for bifurcated review.

#### **B. Request to File Supplemental Memoranda**

The Petitioner and CVC request waiver of the August 11, 1998 deadline in order to file supplemental memoranda regarding the repairs to the Berlin Mall parking lot and access which were the subject of the PR Sheet. Subsequent to requesting waiver of the August 11, 1998 deadline, the Petitioner and CVC filed the Second Declaratory Ruling, appealing the PR Sheet. Because the issues that the Petitioner and CVC wish to address in supplemental memoranda in this proceeding can be addressed in the Second Declaratory Ruling, the Board denies their request to waive the tiling deadlines in this proceeding. The issues that the Petitioner and CVC wish to address in supplemental memoranda may also be relevant to the Board's decision on the Petitioner's and CVC's motions to consolidate the Second Declaratory Ruling with this proceeding.

**C. Request to Stay Project Review Sheet**

The Petitioner requests the Board to stay "any action by the district coordinator." On August 27, 1998, the District Coordinator issued the PR Sheet regarding repairs to the Berlin Mall parking lot and the access to the mall from Route 62. EBR 42 states, in part:

No decision of the board or a district commission s automatically stayed by the tiling of an appeal. Any party aggrieved by a final order of the board or a district commission may request a stay by written motion tiled with the board identifying the order or portion thereof for which a stay is sought and stating in detail the grounds for the request.

EBR 42. While a project review sheet is a formal jurisdictional opinion concerning whether there is Act 250 jurisdiction, it is not a Board or district commission decision or final order. It is a district coordinator decision. Therefore, the Board does not have authority to stay the PR Sheet. See Re: KO/Wong Subdivision, Declaratory Ruling #287. Prehearing Conference Report and Order and Memorandum of Decision at 3 (Sept. 9, 1993) (denying petitioner's request for a stay of an advisory opinion since opinion was neither a decision nor an order which could be stayed under EBR 42). Based on the above, the Board denies the Petitioner's request to stay the PR Sheet.'

**D. Request to Consolidate Project Review Sheet with this Proceeding**

Prior to filing the Second Declaratory Ruling, the Petitioner requested the Board to consolidate the PR Sheet with this declaratory ruling proceeding. Subsequently, the Petitioner and CVC filed the Second Declaratory Ruling and motions to consolidate the Second Declaratory Ruling with this declaratory ruling proceeding. The Petitioner's request to consolidate the PR Sheet with this declaratory ruling proceeding is, therefore, moot. Accordingly, the Board denies the Petitioner's request to consolidate the PR Sheet with this declaratory ruling proceeding.\*

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'The Board notes that the PR Sheet is now the subject of the Second Declaratory Ruling before the Board. If Developer's Diversified proceeds with the changes to the Berlin Mall parking lot and access which are the subject of the Second Declaratory Ruling, it does so at its own risk.

\*Even if the Petitioner and CVC had not filed the Second Declaratory Ruling, the Board would have denied the Petitioner's request to consolidate the PR Sheet with this

(continued...)

Pursuant to EBR 12(F), responses to the Petitioner's and CVC's motions to consolidate the Second Declaratory Ruling with this declaratory ruling proceeding shall be filed within fifteen days of service of such motions. After the fifteen day periods have passed, the Board Chair will issue a preliminary ruling or the Board will issue a final ruling regarding whether to consolidate the Second Declaratory Ruling with this declaratory ruling proceeding. If the Chair issues a preliminary ruling regarding consolidation, any party may object to the Chair's preliminary ruling pursuant to EBR 16. Any such objections will be reviewed by the full Board.

**E. Request to Take Official Notice of Engineering Plans**

The Petitioner requested the Board to direct Developer's Diversified to file its engineering plans dated June 11, 1998 with the Board or take official notice of such plans. The plans at issue involve the changes to the Berlin Mall parking lot and access which are the subject of the Second Declaratory Ruling. Developer's Diversified will have the opportunity to file prefiled evidence in this proceeding and in the Second Declaratory Ruling proceeding and it may file voluntarily its engineering plans dated June 11, 1998. If Developer's Diversified does not file its engineering plans dated June 11, 1998, the parties may request the Board to revisit this issue. Therefore, the Board denies the Petitioner's request to direct Developer's Diversified to file its engineering plans dated June 11, 1998 with the Board or take official notice of such plans.

**V. ORDER**

1. Developer's Diversified's request to decide the first steps of the substantial and material change analyses without a hearing is denied.
2. The Petitioner's and CVC's requests to waive the August 11, 1998 deadline in order to file supplemental memoranda are denied.
3. The Petitioner's request to stay the PR Sheet is denied.
4. The Petitioner's request to consolidate the PR Sheet with this declaratory ruling proceeding is denied.
5. The Petitioner's request to direct Developer's Diversified to file its

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<sup>2</sup>(...continued)  
proceeding because the Board would not have had jurisdiction over the PR Sheet.

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engineering plans dated June 11, 1998 with the Board or take official notice of such plans is denied.

Dated at Montpelier, Vermont this 24th day of September, 1998.

ENVIRONMENTAL BOARD



Marcy Harding, Chair

Arthur Gibb

George Holland

Samuel Lloyd

Rebecca M. Nawrath

Gregory Rainville, Alternate

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