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

RE: Pizzaaalli Pronerties and Town of Colchester
[redacted]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. SUMMARY OF DECISION

In this decision, the Environmental Board ("Board") concludes that two curb cuts to a permitted town road in connection with a project that is not subject to the jurisdiction of 10 V.S.A. §§ 6001-6092 ("Act 250") do not require an Act 250 permit amendment.

II. BACKGROUND

On May 26, 1987, the District #4 Environmental Commission ("District Commission") issued Land Use Permit #4C0676R and accompanying Findings of Fact and Conclusions of Law and Order (collectively, the "Permit") to the predecessors in interest of Pizzagalli Properties ("Pizzagalli") and to Mountaha Handy. The Permit authorized the construction of Phase I of a business park and 2,710 feet of roadway (now known as South Park Drive) located off Routes 2 and 7 in Colchester. Vermont ("Permit Site").

On September 8, 1992, Mountaha Handy transferred her interest in South Park Drive to the Town of Colchester.

On November 13, 1992, San Remo Realty Company (predecessor in interest to Pizzagalli) transferred its interest in South Park Drive to the Town of Colchester.

On October 10, 1997, the District Commission Coordinator ("Coordinator") issued a Project Review Sheet ("PRS") concluding that the construction of a Burger King Restaurant on the north side of South Park Drive in the Town of Colchester required an amendment to the Permit. Pizzagalli did not formally receive a copy of the PRS until April 14, 1998.

On April 20, 1998, Pizzagalli filed a Petition for Declaratory Ruling with the Board, alleging that the PRS is in error.

On June 8, 1998, Chair Harding issued a Chair's Preliminary Ruling ("Preliminary Ruling"), concluding that there is no Act 250 jurisdiction over the construction of a Burger King Restaurant on the north side of South Park Drive in the Town of Colchester. Re: Pizzagalli Properties (Burger King.), Declaratory Ruling #361, Chair's Preliminary Ruling at 7 (June 8, 1998). Additionally, the Preliminary Ruling concluded that Restaurants of Northern Vermont, Inc. ("RNV") is not required to obtain an amendment to the Permit. Id. Because South Park Drive is subject to the Permit, the Preliminary Ruling left open the question of whether the Town of Colchester and /or Pizzagalli are required to seek an

amendment to the Permit (e.g. for an increase in authorized traffic, additional curb cuts, etc.). Id. The Preliminary Ruling stated that it was binding on all interested parties unless a written objection to the Preliminary Ruling was filed on or before June 12, 1998. No objections to the Preliminary Ruling were filed.

On September 14, 1998, the Coordinator issued Jurisdictional Opinion #4-140 ("Jurisdictional Opinion") in which he determined that two new curb cuts onto South Park Drive associated with the construction of a Burger King restaurant on the north side of South Park Drive at the intersection of Routes 2 and 7 ("Project") require an amendment to the Permit.

On October 9, 1998, the Town of Colchester ("Petitioner") requested the Coordinator to reconsider the Jurisdictional Opinion.

On October 19, 1998, the Coordinator denied the Petitioner's request for reconsideration.

On November 18, 1998, the Petitioner tiled a petition for declaratory ruling with the Board, appealing the Jurisdictional Opinion. The Petitioner contends that the Project does not require an amendment to the Permit.

On December 7, 1998, W2L2, a business located at 30 South Park Drive, filed a request for party status.

On December 18, 1998, RNV submitted a letter outlining its concerns regarding the issues in this declaratory ruling; RNV did not seek party status in this proceeding.

On December 24, 1998, W2L2 submitted a statement regarding the issues in this proceeding and stating that Findings of Fact #5 and #6 in the Preliminary Ruling are incorrect.

On December 28, 1998, the Petitioner submitted a statement regarding the issues in this proceeding and stating that Finding of Fact #6 in Re: Pizzagalli Pronerties (Burger King), Declaratory Ruling #361, Chair's Preliminary Ruling at 5 (June 8, 1998) is incorrect,

On January 4, 1999, Chair Harding issued a Prehearing Conference Report and Order ("Prehearing Order") in this matter which is incorporated herein by reference. The Prehearing Order stated that it would become final unless an objection to it was received on or before January 11, 1999.

On January 11, 1999, RNV filed an Objection to the Prehearing Order's Statement of the Issues on Appeal.

On January 12, 1999, RNV filed a Petition to Intervene and for Party Status.

Also on January 12, 1999, W2L2 filed an Objection to the Prehearing Order, objecting to the Board taking official notice of a fact contained in section V of the Prehearing Order.

On January 27, 1999, the Board deliberated on preliminary issues in this matter.

On February 1, 1999, the Board issued a Memorandum of Decision, granting party status to RNV, overruling RNV's objection to the Prehearing Order's statement of the issues on appeal, granting RNV's request to add res judicata and collateral estoppel to the issues on appeal, and sustaining W2L2's objection to the Board taking official notice of a fact contained in section V of the Prehearing Order. The Memorandum of Decision is incorporated herein by reference.

Also on February 1, 1999, Chair Harding issued a Scheduling Order.

On March 3, 1999, RNV submitted an Objection to Act 250 Jurisdiction.

Also on March 3, 1999, the Petitioner submitted a Memorandum Supplemental to Petition for Declaratory Ruling and a related map.

On March 24, 1999, the Board convened oral argument and limited fact finding in the City of Montpelier with the following parties participating: the Petitioner by Richard Whittlesey, Esq. and RNV by Peter Collins, Esq., Roger Dickinson, and James Rameaka.

The Board conducted deliberative sessions on March 24, April 24, and May 19, 1999.

This matter is now ready for final decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation, No. 96-369, slip op. at 13 (Vt. Nov. 7, 1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

III. ISSUES

A. Whether the Project constitutes either a "substantial change" or a "material change" in the permitted project and, therefore, requires an Act 250 permit amendment pursuant to Environmental Board Rule ("EBR") 34(A).

B. If an Act 250 permit amendment is required, what entity(ies) is (are) required to be the applicant and what entity(ies) is (are) required to be the co-applicant?

C. Whether, based on, Re: Pizzagalli Properties (Burner King), Declaratory Ruling #361, Chair's Preliminary Ruling (June 8, 1998), the Board is precluded from taking jurisdiction over the Project at issue in this declaratory ruling under the doctrines of res judicata or collateral estoppel.

IV. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. 3 V.S.A. § 810(1) states that "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases. Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ...(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Handy, 144 Vt. 610,613 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not, and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

The Prehearing Order, incorporated herein by reference, lists a number of officially noticed documents and facts. Additionally, the Board took official notice of the following fact on March 24, 1999: RNV owns the property where the Burger King restaurant is located.

V. FINDINGS OF FACT

1. The District Commission issued the Permit to Pizzagalli's predecessors in interest and Mountaha Handy on May 26, 1987.

2. The Permit authorized the construction of Phase I of a business park and 2,7 10 feet

of roadway (now known as South Park Drive) located off Routes 2 and 7 in Colchester, Vermont (formerly defined as the "Permit Site").

3. The business park is located on the south side of South Park Drive.

4. Neither the Permit nor the application and exhibits associated with the Permit indicate an intent to transfer interest in South Park Drive to the Petitioner.

5. On September 8, 1992, legal interest in and to South Park Drive transferred to the Petitioner. Neither Pizzagalli nor the Petitioner obtained an amendment to the Permit authorizing such transfer.

6. On October 10, 1997, the Coordinator issued the PRS, concluding that the Burger King necessitated an amendment to the Permit.

7. On October 20, 1997, the District Commission issued Land Use Permit #4C0676-R11 to Pizzagalli. Condition 6 of Land Use Permit #4C0676-R11 authorized the business park to increase p.m. peak vehicle trip ends to 466 and average daily vehicle trips to 5,709.

8. On January 21, 1998, RNV submitted an Act 250 amendment application for the Burger King restaurant. RNV proposed to increase the previously authorized p.m. vehicle trip ends from 466 to 550 and average daily vehicle trips from 5,709 to 6,949, an increase of 84 and 1,240 vehicle trips respectively.

9. On June 8, 1998, Chair Harding issued the Preliminary Ruling, stating that Act 250 jurisdiction does not attach to the Burger King Site and that RNV is not required to obtain an amendment to the Permit.

10. Because South Park Drive is subject to the Permit, the Preliminary Ruling left open the question of whether the Petitioner and/or Pizzagalli are required to seek an amendment to the Permit (e.g. for an increase in authorized traffic, additional curb cuts, etc.).

11. The Preliminary Ruling stated that it was binding on all interested parties unless a written objection to the Preliminary Ruling was filed on or before June 12, 1998. No objections to the Preliminary Ruling were filed.

12. Between June, 1998 and March, 1999, RNV built a Burger King restaurant on the north side of South Park Drive ("Burger King Site").

13. RNV owns the Burger King Site, a parcel 2 acres ± in size.

14. RNV's Burger King Site borders the northern-most edge of the right-of-way of South Park Drive.

15. The Burger King Site is not part of the involved land that was the subject of the Permit.

16. The Town of Colchester is a "10 acre town" for purposes of Act 250 jurisdiction.

V. CONCLUSIONS OF LAW

A. Scope of Review and Burden of Proof

A petition for declaratory ruling is conducted de novo to determine the applicability of any statutory provision or of any rule or order of the Board. 10 V.S.A. § 6007(c) and EBR 3(D). Although the petition may come to the Board as an appeal of a jurisdictional opinion or project review sheet, the issue in a declaratory ruling proceeding is not whether the opinion, or any part thereof, is correct. Thus, facts stated or conclusions drawn in the Jurisdictional Opinion are not considered by the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or of any rule or order of the Board over the Project.

The burden of proof to demonstrate an exemption from Act 250 jurisdiction is on the person claiming the exemption -- the Petitioner in this proceeding. Re: Weston Island Ventures, Declaratory Ruling #169, Findings of Fact, Conclusions of Law, and Order at 5 (June 3, 1985) (citing Bluto v. Employment Security, 135 Vt. 205 (1977)). The burden of proof consists of both the burdens of production and persuasion. Re: Pratt's Pronane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-6 (Jan. 27, 1987)[EB #311M].

B. Substantial or Material Change

The Board concludes that the Project does not require an amendment to the Permit.

A permittee must apply for a permit amendment for any "substantial" change or "material" change in a permitted project. EBR 34(A). "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). "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). If the Board had conducted the substantial and material change analyses in this case, the Board would have concluded that the Project is a substantial change and a material change. For the policy reasons set forth below, however, the Board has not conducted such analyses.

Historically, the Board has been reluctant to place administrative burdens on towns to obtain Act 250 permits when improvements are made to town roads to remedy traffic impacts associated with development. See Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 14 (Mar. 25, 1998) [E.B. #700] (Town of Williston not required to be co-applicant for project involving construction of a mixed use development); Re: Steven B. Taneer and Stanley K. Tanger, #3W0125-3-EB, Memorandum of Decision at 2 (Aug. 29, 1989) [E.B. #442] (Town of Hartford not required to be co-applicant for project involving construction of a 35,000 square foot commercial store with related parking). Similarly, the Board is reluctant to place administrative burdens on towns to obtain Act 250 permit amendments when curb cuts associated with projects not subject to Act 250 jurisdiction are constructed on Act 250 permitted town roads. Such administrative burdens would be onerous because towns are restricted from denying curb cuts on public highways by 19 V.S.A. § 1111(b) (Supp. 1998) (stating, in part, that towns "shall in no case deny reasonable entrance and exit to or from property abutting the highways").

In this case, South Park Drive is a public road owned by the Town of Colchester. The Burger King Site abuts South Park Drive. The Project, two curb cuts to South Park Drive, provides access only to the Burger King restaurant, a project that is not subject to Act 250 jurisdiction. For the policy reasons set forth above, the Board will not require the Petitioner to obtain an amendment to the Permit in connection with the Project.[1]

Because the Board concludes that a permit amendment is not required, it does not address the issues of res judicata, collateral estoppel, or co-applicancy.

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[1] The Board understands that businesses located in the business park on the south side of South Park Drive may be concerned that the Project's generation of traffic will affect future traffic allocations to the business park under the Permit. Such concerns were not addressed by the District Commission in the original Permit proceedings because the plans associated with the application indicated that no curb cuts would be constructed on the north side of South Park Drive. Such concerns could have been addressed by the District Commission if the application materials for the Permit had indicated an intent to transfer interest in South Park Drive to the Petitioner. Additionally, such concerns could have been addressed by the District Commission if Pizzagalli had applied for an amendment to the Permit to authorize the transfer of South Park Drive to the Petitioner.

VI. ORDER

1. The Project does not require an Act 250 permit amendment pursuant to EBR 34.

2. Jurisdiction is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 30th day of May, 1999.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
Jack Drake*
George Holland
Samuel Lloyd
William Martinez
Rebecca M. Nawrath
Alice Olenick, Esq.
Robert Opel, Esq.

*Board Member Drake did not participate in the final deliberations in this matter but he reviewed, and concurs with, the decision as issued.

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