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

Re: *Real J. Audet and Joe Audet Auto and Truck Sales, Inc.* Declaratory Ruling #409

Memorandum of Decision

This decision addresses a Motion to Alter (and a Motion to Dismiss such Motion) filed by John and Dorothy Mitchell (the Mitchells) from the Environmental Board's (Board) December 5, 2002 Findings of Fact, Conclusions of Law, and Order (Decision).

I. Background

The history of this matter through December 5, 2002 appears in the Decision.

On January 6, 2002, the Mitchell's filed a Motion to Alter the Decision. Real J. Audet and Joe Audet Auto and Truck Sales, Inc. (Audet) filed a response to the Mitchell's Motion on January 21, 2002; a part of this response includes a Motion to Dismiss the Mitchell's Motion.

The Board deliberated on the pending motions on February 19, 2003.

II. Discussion

A. Audet's Motion to Dismiss

Audet moves to dismiss the Mitchell's Motion to Alter on the grounds that, on January 3, 2003, prior to the filing of the Motion, the Mitchell's filed a Notice of Appeal, appealing the Board's Decision to the Vermont Supreme Court. Citing, the Supreme Court decision of *Kotz v. Kotz*, 134 Vt. 35 (1975), Audet asserts that the timely filing of the Notice of Appeal transferred jurisdiction over the instant matter to the Court, thereby prohibiting further action by the Board in this case.

Ordinarily, jurisdiction does transfer upon the filing of a Notice of Appeal. There is, however, an exception to the *Kotz* doctrine, which the Court itself recognizes in its Rules of Appellate Procedure (V.R.A.P.) which allows the Board to hear the Mitchells' Motion to Alter, even though it was filed *after* they filed their Notice of Appeal.

Pursuant to V.R.A.P. 4, an appeal to the Vermont Supreme Court is placed on hold while a timely motion to alter is pending: "A notice of appeal filed before the making or disposition of [a list of enumerated] motions shall have no effect when filed. It shall be effective when the motion is decided unless thereafter withdrawn." *See, Reporter's*

Notes – 1985 Amendment. The Board has itself applied the V.R.A.P. 4 exception to appeals filed to the Board from District Commission decisions. *Re: Wright/Morrissey Realty Corp*., #4C1070-EB and #4C1071-EB, Dismissal Order at 2 (Oct. 18, 2001) (Appeal becomes ineffective upon the timely filing of a motion to alter with Commission, but it is revived when the motion is decided.)

V.R.A.P. 4 provides, therefore, an exception to the general rule which *Kotz* espouses and which Audet correctly states -- that the filing of an appeal removes jurisdiction from the lower tribunal. The Board will therefore hear the Mitchells' Motion to Alter.

B. Mitchell's Motion to Alter

The Board has reviewed the claims of error raised by the Mitchells to the Board's Decision and finds them to be without merit.

The Mitchells confuse matters when they argue that the Board has adopted a "spite" *de minimis* exception. The Board's Decision is primarily based on a conclusion that a business use of Parcel 3 was not established. Its conclusion that any use of Parcel 3 was motivated by Audet's desire to annoy the Mitchell's, not for business purposes, remained only a secondary consideration. Decision at 8 – 9..

The Mitchells' argument that past Board precedent holds that there is no such thing as a *de minimis* exception relates to the issue of construction of improvements; in *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Dec.18, 1997), the Board held that there is no *de minimis* exception to "construction of improvements." In other words, any construction is sufficient to trigger jurisdiction. The question here is whether the Board must follow a similar path when deciding the question of how much business use is necessary to trigger jurisdiction. Is *any* business use enough to bring a parcel within the ambit of "involved land," or does it have to rise to some level before jurisdiction is triggered?

While the Mitchells argue that the evidence does point to at least some business use of Parcel 3 by Audet, the Board is entitled to accept or reject any or all of the evidence that is submitted to it. Here, while there may have been some vehicle storage on Parcel 3 the Board concluded that it was, "at most, only temporary, intermittent, incidental and peripheral to Audet's Worcester village business enterprise." It thus did not rise to the level that caused the Board to find that jurisdiction has attached. The Board declines to alter its conclusions in this regard.

Contrary to the Mitchell's arguments, the case of *CLF v. Burke,* 162 Vt. 115 (1993), is not controlling. In *CLF*, ANR had set maximums for air pollution contaminants in its rules; when ANR later increased those maximums in a particular case, the court

prohibited ANR from bending its rules. The present case is different; there is no Environmental Board rule that similarly establishes an absolute test for what constitutes a "business use" for "involved land" purposes. Rather, each case is fact specific and thus decisions cannot necessarily follow a standardized rule.

The Board does not agree with the Mitchells' claim that the Board can only establish a *de minimis* "business use" test by rule and that, therefore, its decision violates the Administrative procedures Act, 3 V.S.A. Ch. 25. This same argument was recently rejected by the Board in *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority* Declaratory Ruling #406, Findings of Fact, Conclusions of Law, and Order at 12 n. 5. (Dec. 31, 2002)

Lastly, the Mitchell's constitutional claims are of questionable merit. The case of *In re Handy*, 171 Vt. 336 (2000), held that the legislature may not delegate authority to decide zoning cases in a standardless vacuum. It does not hold that the Board cannot decide, based on the particular facts that it finds in each case, whether a person has made a business use of his property.

III. Order

1. Audet's Motion to Dismiss is denied.

2. The Mitchell's Motion to Alter is denied.

Dated at Montpelier, Vermont this 25th day of February 2003.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
* Marcy Harding, Chair
* John Drake
Bernie Henault
George Holland
Samuel Lloyd
A. Gregory Rainville
Donald Sargent

* Chair Harding and Member Drake dissent from this decision and would grant the Mitchell's Motion to Alter for the reasons stated in their dissent to the Board's Decision.