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February 13, 2014

Re: EPE Realty Corporation and Fergessen Management, Ltd.

Land Use Permit #3W0865-EB

Findings of Fact, Conclusions of Law, and Order

This matter involves an appeal by the Town of Sharon Selectboard and Planning Commission (collectively, Sharon) to the Environmental Board (Board) from Land Use Permit #3W0865 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision) issued by the District 3 Environmental Commission (Commission) to EPE Realty Corporation and Fergessen Management, Ltd. (collectively, EPE). The Permit authorizes the construction of four buildings totaling 18,000 square feet with up to 100 self-storage units, located on a 16-acre tract on River Road in Sharon, Vermont (Project).

I. History

On August 21, 2003, the Commission issued the Permit and Decision. On October 7, 2003, the Commission issued a Memorandum of Decision on a Motion to Alter which had been filed by EPE. On November 5, 2003, Sharon filed an appeal with the Board from the Permit and Decision, alleging error with respect to 10 V.S.A. §§6086(a)(1)(F), 4, 8 (aesthetics), 8(A), 9(K)(White River), 9(L) and 10 (Town and Regional Plans).

Criterion 9(L): Rural Growth Area

Criterion 9(L) of 10 V.S.A. § 6086(a) provides as follows:

A permit will be granted for the development or subdivision of rural growth areas when it is demonstrated by the applicant that in addition to all other applicable criteria provision will be made in accordance with subdivisions (9)(A) ‘impact of growth.’ (G) ‘private utility service,’ (H) ‘cost of scattered development’ and (J) ‘public utility services’ of subsection (a) of this section for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage. 10 V.S.A. §6086(a)(9)(L)

A “rural growth area” is defined in terms of what it is not. “‘Rural growth areas’ means lands which are not natural resources referred to in section 6086(a)(1)(A) through (F), section 6086(a)(8)(A) and section 6086(a)(9)(B), (C), (D), (E) and (K) of this title.” 10 V.S.A. §6001(16) (emphasis added). Thus, to be a rural growth area, the area must be predominately rural in character and be an area in which resources referenced in §6001(16) are absent. Re: Horizon Development Corp., #4C0841, Findings of Fact, Conclusions of Law, and Order at 26

(Aug. 21, 1992); Re: New England Ventures, #6F0433-EB, Memorandum of Decision at 3 (Dec. 6, 1991).

One commentator has described the definition of “rural growth areas” as “curious.” Brooks, *Toward Community Sustainability: Vermont’s Act 250*, Vol. I, Criterion 9(L) at 1(1996). The Board agrees; it seems illogical to provide special protection to lands which appear not to warrant such protection because they lack important environmental resources. Board precedent, however, resolves this apparent paradox and provides guidance as to the purpose of Criterion 9(L). In *New England Ventures*, for example, the Board wrote:

The Board concludes that Criterion 9(L) requires clustering of all projects in rural growth areas. The language of the criterion is clearly mandatory. Further, the General Assembly established Act 250 to promote well-planned land use and to protect natural resources

Accordingly, the General Assembly required that developments and subdivisions be reviewed for compliance with ten criteria which seek to ensure that natural resources are protected and that sound planning principles are applied in designing projects. See 10 V.S.A. § 6086(a).

Viewed in this light, the Board concludes that the purpose of Criterion 9(L) is to promote orderly and well-planned growth in rural growth areas. The legislature defined rural growth areas as places where most of the resources protected by Act 250 are absent. 10 V.S.A. §6001(16). Since, by definition, most of those resources are not present in rural growth areas, it is reasonable to infer that the General Assembly intended them as places where growth should occur.

The legislature also emphasized that developments in rural growth areas provide for reasonable population densities and rates of growth and for use of cluster planning and new community planning. Thus, the Board infers that the General Assembly intended that growth in these areas be orderly and make use of all of the planning techniques enumerated in Criterion 9(L).

Similar to other resources protected by Act 250, rural growth areas are resources to be protected. However, unlike those other resources, the Board believes that the rural growth areas are to be protected so that future development may be concentrated in them. Projects in such areas must use all the planning techniques in Criterion 9(L) in a way which does not use up all available land in the growth areas and allows room for orderly future growth. Accordingly, all projects in rural growth areas must cluster. The level of clustering may vary depending on the nature of the rural growth area and of the project.

For example, clustering may be different for an industrial [rather] than for a residential subdivision. Reasonable provision for clustering, however, must be demonstrated. The Board's resolution of the issues raised by the Applicant means that a hearing is needed to take evidence on whether the application complies with Criterion 9(L) as interpreted by this decision. Re: *New England Ventures*, supra, at 4 – 6 (emphasis added). In Re: *Stratton Corporation*, #2W0519-10-

EB, Findings of Fact, Conclusions of Law, and Order at 33 - 34 (May 8, 2001), the Board further explained the philosophy behind Criterion 9(L):

The correct inquiry is first to delineate the area on which the proposed development will occur. Second, determine whether that area is one or more of the referenced natural resources. Third, if so, determine whether such land is of sufficient acreage that it is possible to carve out a meaningful and usable rural growth area. We believe this interpretation affords lands the protection the legislature intended when it adopted Criterion 9(L). Criterion 9(L) recognizes that lands that are the referenced natural resources already have protection under the other Criteria. Conversely, lands which are not the referenced natural resources do not have the benefit of protection from the other Criteria and will be under greater development pressure. As a result, Criterion 9(L) provides an alternative kind of protection that is not focused on specific resources but on preventing carte blanche development by requiring clustered development, reasonable rates of growth, reasonable population densities, and new community planning. This economizes the use of these lands and ultimately lessens development pressure on adjacent natural resources. Thus, an environmentally sensitive development that proposes developing in a rural growth area still needs to engage in the required planning to meet the complementary protection afforded rural growth areas.

Seen in this light, Criterion 9(L)'s apparently paradoxical language and intent become clear and logical. The Town contends that the Project is not within a "rural growth area." Town's September 30, 2004 Memorandum at 7 and 33. If the Board were to agree with the Town, then the Project need not meet or address Criterion 9(L) and this criterion would not stand in the way of the Project's construction. However, because the Project is in an area which is predominately rural in character and in which resources referenced in 10 V.S.A. §6001(16) are absent, the Project is in a rural growth area. The question, then, is whether the Project meets the elements of the criterion.

The Project is clustered. Approximately 14 of the 16.4 acres of the Project Tract will be left undeveloped. The nature of the Project is such that it does not implicate population densities or rates of growth; it will also require very little, if anything, in terms of municipal services and would not impose a financial burden on local or regional governmental entities. The Project therefore meets Criterion 9(L).