

STATE OF VERMONT
WASHINGTON COUNTY

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In re: Appeal of
THE CONNOR GROUP, LLP, et al.

Washington Superior Court
Docket No. 22-1-06 Wncv
SUPERIOR COURT
WASHINGTON COUNTY

DECISION

The Connor Group, LLP, et al. (collectively, "Connor") have appealed, pursuant to 19 V.S.A. § 7a(b), from a Determination of a hearing officer of the Agency of Transportation dated November 3, 2005 that Connor is in violation of a condition of a permit issued under 19 V.S.A. § 1111. The permit relates to Connor's development of a property in Berlin formerly known as Harry's Department Store. For the following reasons, the decision of the hearing officer is affirmed in part and reversed in part, and this matter is remanded to the Commissioner for further proceedings consistent with this opinion.

In the course of its development of the former Harry's Department Store property, Connor applied to the Agency for a permit under 19 V.S.A. § 1111 to do work within the highway right of way. The application seeks approval to do the following: "Utility connections, repaving, pavement removal, loaming and seeding, and curbing as per attached site plan by DeWolfe Engineering Assoc.'s dated 10/22/02." The Permit Application was filed November 14, 2002. The Agency approved the application on March 10, 2003 "in accordance with the attached plans and special conditions." The specific reference in the permit is to the "attached plan dated November 22, 2002."

The condition at the center of this controversy states in its entirety: "The intent of the Easterly access (exit only) is to serve truck traffic exiting the loading dock as proposed on the plan. In the event that the loading dock is not included in the final design or is not built, the Agency will not allow the Easterly (exit only) access point and may require its removal."¹ Connor never appealed the permit or challenged the Agency's authority to include the condition prior to this litigation.

In August 2004, less than a week after the Town of Berlin issued a Certificate of Occupancy following Connor's development work on the property, the Agency alleged that the as-built building and lot configuration varied from that proposed and approved in the permit. Specifically, the Agency alleged violation on the grounds that the loading dock had not been constructed. See Letter from Carol Witham to Connor dated Aug. 30, 2004. In a subsequent letter, the Agency reiterated its position and required that the Easterly access be removed by November 15, 2004. See Letter from C. Allan Wright to Connor dated Oct. 5, 2004. The October 5 letter provides notice of a right to an administrative appeal to the Commissioner for an evidentiary hearing and a decision that would serve as "final administrative action" in the matter.

¹ Prior to any involvement of Connor, the property had access to the highway at two points: the "Easterly access" point and a different signalized access point. The controversy in this case arises exclusively out of the "Easterly access"; there is no controversy with regard to the other access point.

Connor goes to some length to try to show that the legislature has specifically indicated its intent that the Agency does not have jurisdiction to impose a condition on access when the condition is related to a specific feature of the property. This argument is predicated primarily on the legislature's recent decision not to adopt a proposed amendment to 19 V.S.A. § 1111, apparently intended by its proponents to provide specific statutory authority to the Agency to regulate certain access issues upon the occurrence of specific changes in the use of the related property. Connor essentially argues that the lack of adoption of the proposed amendment means that the legislature, in adopting the actual provisions of 19 V.S.A. § 1111 years earlier, specifically intended the Agency to have no authority to impose any condition on access that bears any relation to the use of the property, as the condition in this case inherently does.

This argument is unconvincing because, among other things, it finds no meaningful support in the legislative history submitted by Connor regarding the rejection of the proposed amendment. The argument implies that the existing statute should be read to require the Agency to somehow regulate access specifically without considering whether access is, for example, for a small bakery on a small lot, as opposed to a large strip mall on a large lot. Access issues, when appropriately considered, are not easily divorced from the uses of the subject property. Without more specific guidance from the legislature, the court declines to read 19 V.S.A. § 1111 as suggested by Connor. The court similarly rejects Connor's circular argument that an access condition bearing a relation to a use made of the connected property necessarily amounts to regulation of the use of the property (which the Agency does not regulate) rather than regulation of the access to the property (which the Agency may regulate).²

There is no statutory right of appeal from a decision of the Agency regarding a 19 V.S.A. § 1111 permit application. Rule 75 therefore applies. Under Rule 75(c), Connor had 30 days from the date of notice of the permit decision to seek review but did not do so. In the circumstances of this case, Connor's failure to do so rendered the access condition final under Rule 75(c) as well as the doctrine of administrative finality. "Administrative finality is the administrative version of res judicata. It bars challenges to administrative decisions after the time for making a challenge has expired." *UOP v. U.S.*, 99 F.3d 344, 347 (9th Cir. 1996) (citation omitted).

Because the access condition is generally within the Agency's authority under 19 V.S.A. § 1111 and became final when Connor did not seek judicial review of its imposition, Connor may not now challenge its imposition.

Challenge to the Finding of a Violation of the Condition

The hearing officer ruled on summary judgment that Connor had violated the condition. Finding the material facts undisputed, the hearing officer described the permit condition as "clear and unambiguous." Decision at 5. The hearing officer also found no dispute regarding Connor's

² While these arguments do not assist Connor's attempt to collaterally attack the imposition of the objectionable permit condition, to the extent that they probe the definition of the Agency's regulatory interests, they may shed light on the proper interpretation of the access condition. That is, they may help to explain what the Agency was trying to accomplish by imposing the condition and, consequently, what sort of deviation from the terms of the condition would amount to a material violation. See *infra* discussion of interpretation of condition language.

failure to construct the loading dock referred to in the condition.

The Agency's argument that the court should affirm the hearing officer's "findings of fact" because Connor cannot show that they are wholly unsupported by the evidence misconstrues the summary judgment standard. See Agency's Memorandum in Opposition filed July 31, 2006. There is no finder of fact involved in summary judgment procedure and the hearing officer did not purport to act in such a manner in issuing the summary judgment decision. The material facts supporting a summary judgment decision must be undisputed, not "found." That is, an undisputed fact becomes established by virtue of the lack of genuine evidentiary dispute about that fact, not by the weighing of the evidence by a finder of fact.

Here, the statements of fact and memos show that significant facts are disputed. On this record, the court cannot conclude, as the hearing officer did, that the condition is clear on its face, or that Connor has violated the condition.

The permit condition provides that the Agency may require the removal of the Easterly access if Connor does not build "the loading dock as proposed on the plan." The alleged violation is based on the claim that Connor did not build "the loading dock as proposed on the plan." This presents several mixed questions of law and fact, including at least the following: 1) what Connor 'proposed on the plan'; 2) what the condition required Connor to build; 3) what Connor in fact built; and 4) whether what was built meaningfully conflicts with what was required to be built. The facts material to the resolution of these issues are disputed.

In the original permit application, in the "[d]escription of work to be performed" section, Connor did not describe any work related to the Easterly access except for a reference to "curbing as per proposed site plan by DeWolfe Engineering Assoc.'s dated 10/22/02." The application is dated by Connor on November 14, 2002. The 10/22/02 proposed site plan does not show the Easterly access as an "exit only" access point. There appears to be no dispute, however, that after the original submission of the application, the proposed site plan was revised. Revisions after 10/22/02 show the Easterly access generally as a right turn, exit only access point. There is a significant problem, however. The permit referenced an "attached plan dated November 22, 2002." The record does not include any plan with a final date of November 22, 2002. It includes two different plans dated November 22, 2002, with the further notation: "11/26/02: Southeast Exit Revisions."

Each of these plans is different, although they are not inconsistent. Both show the Easterly access generally as a right turn access point. One is labeled "Proposed Site Plan, C-1." It has an arrow pointing to an area near the southeast corner of the building with the label, "Proposed loading area." There is nothing labeled a "loading dock" (the permit language). No type of structure, such as a raised platform, or overhang, or set of doors, is depicted at this location. The other is labeled "Traffic Flow Plan, C-2." It depicts two large trucks at what appears to be a loading/unloading structure on the western side of the building (the opposite side from the southeast corner involved in this dispute), and a large truck near the southeast corner of the building, backed up to the area that is marked on C-1 as "proposed loading area." It has arrows showing traffic flow, with an arrow at the Easterly access that indicates that the access point is "exit only."

It is undisputed that there was communication between Connor and its agents and the Agency, both at a November 25, 2002 "site meeting" and otherwise, some of which took place between November 22nd and November 26th. As the affidavits and other record evidence reveal, the parties present dramatically different versions of the content of those communications. Connor's version of the facts tends to support its view that the amendment of the design of the Easterly access was intended as a complete cure to any general traffic safety concerns that the Agency had. The Agency's version of the facts tends to support its view that the amendment of the design of the Easterly access was intended for the limited purpose of serving truck traffic exiting from a specific proposed loading area on the plan, and otherwise the Agency would have prohibited the Easterly access altogether.

Even if the parties were to agree that the date stated in the permit was a clerical error, and the plan referenced in the permit is the one with the November 26, 2002 revisions (including C-1 and C-2), the dispute over the purpose of the site plan amendment is relevant to interpretation of the controversial condition, which itself is described in terms of its "intent." The condition states: "The intent of the Easterly access (exit only) is to serve truck traffic exiting the loading dock as proposed on the plan." In context, the focus of the condition appears to be on the type of traffic that the Agency thinks has a legitimate need to use the Easterly access, i.e., the sort involved in anticipated commercial loading and unloading activities. To describe that need, the condition refers to a "loading dock as proposed on the plan."

Neither the permit generally, nor the condition itself, nor plans C-1 and C-2, are clear about what is meant by "loading dock as proposed on the plan." There is nothing labeled as a "dock" on any plan in the record. The only structure that looks like a dock on any plan is at the northwest, not the southeast, end of the building and is not the one to which the Agency claims the condition refers. The Agency claims that a separate area labeled "proposed loading area" actually is the "dock" referred to in the condition. The hearing officer determined that there is no dispute about this.

The lack of clarity about the plan that was referenced as well as the confusing use of the term 'dock' in the permit without a corresponding label on the plans show that this was a conclusion of the hearing officer based on weighing alternative arguments, rather than on undisputed "facts." The affidavits reveal contentious disagreement over what was communicated at the November 25, 2002 site meeting with regard to the Easterly access. While the "proposed loading area" as shown on C-1 is nearer the Easterly access than the loading 'dock' where two trucks are shown on C-2 is, the implications of such proximity are unclear on this record, especially where there are at least two loading locations which could generate traffic. Also unclear is the purpose of the condition, especially in view of the fact that the Easterly access could be used by any traffic of any type from the whole property. Use of the Easterly access was not restricted to traffic coming from a certain area, and the record is unclear as to whether truck traffic from the westerly loading dock may have a legitimate need to use the Easterly access.

With the specific meaning of the access condition unclear and the related facts disputed, it simply is not clear from undisputed facts that the access condition required Connor to build

something at a particular location on the property. Furthermore, it cannot be established from undisputed facts what it was that Connor was required to build. No plan shows a specific structure depicted at the southeasterly corner.

Moreover, the statements of fact show a dispute about whether the loading doors that Connor constructed at the southeast corner after the Agency commenced enforcement represent a valid loading area or a "ruse." There is no dispute that Connor did not originally put in a loading area at the spot shown on the November 26 site plan (C-1). There also is no dispute, however, that Connor built "loading doors" near the originally proposed "loading area" after the inception of the enforcement action. Because the purpose of the condition is not fully clear, as described above, it is unclear whether the as-built loading doors function to satisfy the condition. The hearing officer did not explore this issue at all, stating without explanation that "[t]his decision must be based on the state of affairs at the time of the alleged violation, not on subsequent measures taken." Decision at 4. If, however, a subsequent measure cured the noncompliance that provides the basis for the enforcement action, then presumably there would no longer be any "case or controversy" to support the Agency's action at the time of hearing. Nothing in the record or the summary judgment decision explains why the mootness doctrine does not require dismissal of the Agency action, if the purpose of the condition is fulfilled by the remedial action that was taken.

On the issue of the violation of the access condition, the record is not sufficiently undisputed to support summary judgment.

Order

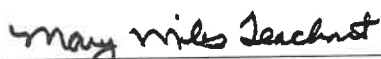
For the foregoing reasons, the decision of the hearing officer is affirmed with regard to the finality of the imposition of the access condition, and reversed with regard to the issue of the violation of the access condition.

The case is remanded to the Commissioner for a hearing to determine whether Connor is in violation of the permit condition. This will require factual findings as to:

- 1) what plan is meant by the language of the permit;
- 2) what the condition required Connor to construct;
- 3) what was actually constructed, before and after the enforcement action began;
- 4) whether what was built (before and after) varies from what was required.

In addition, if the hearing officer determines that the construction as of August 2004 did not fulfill condition requirements, but the remedial work performed in response to the enforcement action and prior to the hearing fulfills condition requirements, then the hearing officer should identify the legal basis for the issuance of an order requiring removal of the Easterly access.

Dated at Montpelier, Vermont this 26th day of January 2007.



Mary Miles Teachout
Superior Court Judge