

STATE OF VERMONT  
ENVIRONMENTAL COURT

In re: Appeals of  
Lisa Miserendino, et al.

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Docket Nos. 85-5-99 Vtec and 191-10-99 Vtec

DECISION and ORDER

Appellants Lisa Miserendino, Alice Cheney, Marcella Gratton, Raymond Gratton and Patricia Sue Carter appealed from decisions of the Development Review Board of the Town of Warren granting conditional use approval and site plan approval to Appellee-Applicant Hiram, Inc. (doing business as the Pitcher Inn) to move the service bar from the kitchen to the downstairs “Tracks” room and to install a bar counter and barstool seating for six customers.

Appellants are represented by Stephanie J. Kaplan, Esq.; Appellee-Applicant is represented by F. Brian Joslin, Esq.; the Town of Warren is represented by Glenn C. Howland, Esq. An evidentiary hearing was held in this matter before Merideth Wright, Environmental Judge, who also took a site visit with the parties. The parties were given the opportunity to submit written requests for findings and memoranda of law. Upon consideration of the evidence, the site visit, and the written memoranda and proposed findings, the Court finds and concludes as follows.

Motion to Dismiss

Appellants have moved to dismiss the present application, arguing that it covers the very issues litigated and resolved in the final order in the prior litigation, and that it is therefore an impermissible successive application. As the Court ruled in the summary judgment motion in Docket No. 85-5-99 Vtec in August of 1999, only an identical application would be barred as an impermissible successive application. The application before the Court is for a bar counter and six barstools in the Tracks Room, not a 33-seat tavern as in the 1995 applications. Moreover, the 1995 Settlement Order contemplated

later applications beyond what was permitted in that order. Accordingly, Appellants' Motion to Dismiss is DENIED.

### Merits

It was difficult for the Court and the parties to determine at trial exactly what Appellee-Applicant was applying for, as the testimony of the Appellee-Applicant's principals and managers at trial referred to possible changes in operation not requested in the written application which had been considered by the DRB. The written application proposes to "move the service bar from the kitchen to the Tracks Room," to allow patrons to "sit and wait for their parties to arrive or for their table to be ready." (Exhibit B1 - Narrative from 1999 Permit Application). The service bar now located in the kitchen consists of an approximately twelve-foot-long working counter along a wall, with a refrigeration unit below and storage above for bottles, glassware and other items associated with the service of liquor. Other than the request to build the bar counter and to add six barstools for customer seating, Appellee-Applicants did not apply to change any of the other terms or conditions of the 1995 Settlement Order. Specifically, the application did not propose to increase the dinner capacity of the restaurant, or to change the hours of service, or to serve patrons other than those waiting to be seated for dinner. It is that application, and only that application, that is before the court in the present case.

Further, it was difficult for the Court and the parties to determine exactly what site plan had been approved at the conclusion of the settlement order in 1995, as no site plan incorporating the terms and conditions of that approval had been prepared or filed with the DRB after the settlement order.

The Pitcher Inn had been located on the .75-acre property in Warren Village at issue in these appeals since before the adoption of zoning in Warren. It had had 17 guest rooms, a 33-seat restaurant, and a one-bedroom manager's apartment. The former inn building had burned down in 1993. The former inn building was nonconforming as to density (number of rooms per acre) and as to front and side setbacks. It held a state public buildings permit for a wastewater disposal system with a capacity of 2,580 gallons per day serving the 18 bedrooms and the 33-seat restaurant limited to no more than two meals per

day.

Appellee-Applicant Hiram, Inc.'s predecessors Maggie and Winthrop Smith (who remain principals of the corporation) acquired the property and a continuation of the wastewater permit in 1994. In 1995 they had obtained site plan approval and conditional use approval of their plans to construct an Inn building, a Retail building and renovate the Barn building on the site. Appellants had appealed both the site plan approval and conditional use approval to this Court in 1995; those appeals resulted in a settlement order entered in Docket Nos. E95-042 and E95-043 ("the 1995 Settlement Order").

The Settlement Order provided that the project "may be completed according to the state and local approvals, but subject to the conditions and provisions in this stipulation" and that "any changes in the development" were to "require a new application and review." The 1995 site plan and conditional use approvals (which incorporate by reference the original applications), as modified by the 1995 Settlement Order, will be referred to in this order collectively as "the 1995 Permit." Because Appellee-Applicant did not prepare and submit to the DRB a site plan reflecting the terms and features of the 1995 Permit, it continues to be difficult for the Court and the parties to determine exactly what was allowed by that permit and to compare it to what has been constructed. Preparation of a site plan reflecting the 1995 Permit's site plan approval and conditions is a piece of unfinished business from the 1995 proceedings, and must be completed and accepted by the DRB before this Court could consider any approval or ratification of the site plan as a whole. The site plan prepared for this litigation cannot substitute for it as it has not been reviewed by the DRB against the terms and conditions of the 1995 Permit. Accordingly, the present application for amendment of the site plan to allow the service bar and a bar counter and barstools in the Tracks Room will be considered according to the site plan criteria, but any approval of all or part of that application will not be considered to ratify the site plan under the 1995 Permit.

Appellee-Applicant completed the construction and has been operating the inn and high-quality restaurant since December of 1997 under the 1995 Permit. The Pitcher Inn is one of a very limited number of American inns or hotels which has qualified for the prestigious "Relais et Chateaux" listing.

Appellee-Applicant's application for the 1995 approvals originally proposed to place a hotel and a restaurant/bar in the new Inn building, with a 43-seat dining room and a 33-seat tavern. The 1985 sewage allocation of 2,580 gallons per day (serving 18 bedrooms and a 33-seat restaurant serving no more than two meals per day) was reallocated to serve the proposed 15 bedrooms and limited the dining room to forty seats serving no more than two meals per day. The 1995 Permit also independently required that the restaurant "shall have no more than forty (40) seats to be occupied by patrons at any one time."

The 1995 Permit was based on the proposal to serve breakfast from 7:30 to 9:30 a.m., and to serve dinner beginning at 5:30 p.m. The 1995 Settlement Order provided for alcohol "to be served only at tables, in a restaurant setting" and that alcohol not be served after midnight on Fridays and Saturdays, nor after 10:30 p.m. Sunday through Thursday. It is Appellee-Applicant's practice to serve food and its associated alcohol in the dining room, and also occasionally in a downstairs wine room, in the Tracks Room, on a back porch outside the dining room, and outdoors during special events.

We must note that the question of whether Appellant-Applicant has complied with the 1995 Permit is not before the Court in the present proceeding, as it is not an enforcement proceeding. See 24 V.S.A. §§4444, 4445 and 4470(c). The question of whether or to what extent the outdoor service of food or alcohol is within the scope of the 1995 Permit is not before the Court. Nor is the question of whether the proposed site plan accurately reflects all the approval conditions of the 1995 approval, for example, whether the parking spaces are as large as the permit requires, or whether landscaping has been placed contrary to those requirements. Rather, the only question before the Court is whether the proposed change to move the service bar to the Tracks Room, and to add a bar counter and barstool seating, meets the criteria in the ordinance for conditional use approval and site plan approval.

In the present written application Appellee-Applicant does not propose to change the hours of service or the forty seat limit, but does propose that alcohol may be served at the bar rather than at tables. The proposal in the written application and as presented to the DRB proposed to serve at the bar only patrons awaiting restaurant seating, and proposed to count the six barstools within the forty seat limit. However, it appeared from testimony at

trial that Appellee-Applicant may plan or intend changes in some of the other terms and conditions, including serving lunch and serving more than 40 diners at any time if the sewage capacity is changed, and, more importantly, serving liquor to inn guests who are not eating dinner in the restaurant, serving liquor to public customers who may come for a drink rather than for dinner, and serving liquor in hours that the restaurant is not open. We must stress that none of these changes is properly before the court in the current application, as they were not presented in the application to the DRB, and the Court is limited to those issues warned before the local board. In re Maple Tree Place, 156 Vt. 494, 500 (1991)

Ten bedrooms were proposed for the Inn building, two 2-bedroom suites were proposed for the Barn building, and a small retail store and one bedroom were proposed for a third building (“the Retail building”) which was eliminated from the plans by the 1995 Settlement Order. The 1995 Permit allows a total of 15 bedrooms; the number actually constructed is 13: nine in the Inn building and four in the Barn building. The 1995 Permit required that the required number of parking spaces be calculated according to the formula of one space for each bedroom at the inn, plus one space per three restaurant seats, of which twenty seats are excluded on the assumption that they are occupied by persons occupying bedrooms at the Inn (and hence already counted). Thus, the total parking required is 19.66 spaces, rounded to 20 spaces. The 1995 Permit required that at least 14 spaces for the overnight guests were to be provided either on site or on other private property (that is, neither along the streets nor in the municipal lot). The 1995 Permit required diners (who were not overnight guests of the inn) to use off-site parking. The parking provisions of the 1995 Permit were based on the premise that the restaurant’s peak time occurs in the evening after some retail and municipal uses are closed, that the capacity of the restaurant is limited, that the turnover is relatively slow, and that inn guests already parked at the inn would account for twenty of the restaurant seats at peak times.

Without the addition of a bar counter and barstool seating, the proposal to move the service bar to the Tracks Room and to serve alcoholic drinks in the Tracks Room only to dinner patrons waiting to be seated in the dining room would not adversely affect any of the conditional use criteria or site plan criteria, so long as the restrictions of the 1995 Permit

remain in place, as neither the number or behavior of patrons nor their expected time and length of time of parking would change from the project as approved in the 1995 Permit. That is, the service of drinks to patrons with dinner reservations, while they are waiting for the rest of their party or waiting for their table to be ready, constitutes service “to patrons in a restaurant setting.”

However, it was apparent from the testimony of the Appellee-Applicant’s witnesses that the addition of the bar counter and barstool seating would result in service of liquor at the bar to inn guests who are not eating dinner in the restaurant, and to public customers who may come for a drink rather than for dinner. Appellee-Applicant’s manager John Carino specifically stated that the service of alcohol would not be limited to people waiting for dinner, that while the closing hours would be the same as the restaurant, the bar “may have different opening hours,” and that, unlike the restaurant, reservations would not be taken for the Tracks Room. Despite Appellee-Applicant’s assertion in the application and before the DRB that the proposed bar counter and barstool seating would be restricted to patrons waiting to be seated for dinner, Appellee-Applicant now seeks essentially to change at least the condition of the 1995 Settlement Order restricting the service of alcohol to patrons in a restaurant setting, and possibly also seek to change the hours of operation of the food and alcohol service. Those requests were not before the DRB and therefore should not be considered by this Court.

Even if those requests had been presented to the DRB, and were hence before this Court, we could not approve them, either for site plan approval or for conditional use approval. This expansion of use has not been shown to meet the site plan approval criteria for traffic generation, access from the street to the site, on-site circulation, or adequacy of parking, because it would fall into the traffic analysis category of “Drinking Place,” which generates more traffic than does the present “Quality Restaurant” category of use. (It would not fall within the category of “Resort Hotel” as it is not in an outlying location or a larger site than a conventional hotel, and provides no on-site recreational facilities.) This expansion of use has not been shown to meet the conditional use criteria that it will not adversely affect the character of the area or traffic on the road. The character of Warren Village is that of a primarily residential village area with compatible commercial and

community facilities that are closed at night, with the exception of the Pitcher Inn. Addition of a bar counter and barstools for patrons other than those already eating at the restaurant would adversely affect this character by increasing traffic, parking demand and noise.

Based on the foregoing, it is hereby ORDERED and ADJUDGED that Appellee-Applicant's application to install a bar counter and barstool seating is DENIED, but that otherwise Appellee-Applicant's application to move the service bar functions downstairs to the Tracks Room against the east wall of that room<sup>1</sup> is GRANTED. This approval specifically does not otherwise amend any of the terms and conditions of the 1995 Permit. In particular, it does not amend the hours of operation of the restaurant or its limitation to breakfast and dinner service. It does not address the provision of special events services to guests at the Inn. It does not amend the present requirement that liquor may only be served to patrons of the restaurant in a restaurant setting, that is, while waiting for service in the restaurant or while seated in the restaurant, and thereby limited to the hours during which the restaurant is in operation.

Further, this approval specifically does not ratify the site plan submitted in evidence, as to any of the features or conditions proposed for or imposed by the 1995 Permit. With respect to the 1995 Permit, as required in the 1995 Settlement Order, Appellee-Applicant shall submit to the DRB a site plan which accurately reflects all features as approved in the 1995 Permit, including all conditions imposed by the DRB in its approval as modified by the 1995 Settlement Order. If the parking, landscaping, driveway width or turning radius, or any other feature, has been constructed so that there is a discrepancy between the site plan approval and the project as built, the parties may consider whether to file any further application for approval as built, or to file any further court proceeding to enforce the terms of the approvals. Any such filing would commence a new case before this Court, or would relate to the 1995 cases, and would not be a continuation of the present cases.

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<sup>1</sup> Appellee-Applicant may apply for a minor amendment to this approval to install a bar sink and/or ice machine (requiring plumbing) against the north wall of the Tracks Room adjacent to the installation approved by this Order, as the bar sink and "ice sink" were proposed to be installed behind the bar counter denied by this Order.

Dated at Barre, Vermont, this 13<sup>th</sup> day of January, 2000.

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Merideth Wright  
Environmental Judge