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

Re: In re McDonald's Corporation, Rutland, Vermont
Land Use Permit #1R0477-5-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. Introduction

This proceeding concerns the application of McDonald's Corporation ("Permittee") [1] for a permit amendment retroactively authorizing modification of the exterior of its previously permitted restaurant from a brown color scheme to a red, white and yellow scheme with a red roof ("Project"). The Project is located at the intersection of Woodstock Avenue and Stratton Road in the City of Rutland, Vermont.

In this decision, the Vermont Environmental Board ("Board") finds that the Permittee meets the Sfowe *Club* Highlands standard for review of permit amendment applications and grants the Permittee's application, with conditions.

II. Procedural Summary

During the summer of 1999, Permittee modified the natural brown brick and brown roofed exterior of their restaurant by painting it in a red, white and yellow color scheme with a red roof.

On September 27, 1999, Permittee filed a land use permit amendment application with the District #1 Environmental Commission ("Commission") seeking retroactive authorization for the Project.

On December 27, 1999, the Commission issued Land Use Permit Amendment #1R0477-5 ("Dash 5 Permit"), together with Findings of Fact, Conclusions of Law, and Order ("Decision"). [2] The Dash 5 Permit requires that the red wainscot of the building, red guardrails, red trash corral door, and other red at the facility be painted light gray consistent with the McDonald's on South Main Street, Rutland, and McDonald's restaurants elsewhere in Vermont, and that the roof be changed to a flat (not glossy) red color not substantially different from a nearby Pizza Hut.

On January 26, 2000, Earl and Pauline Richardson ("Appellants" or "Richardsons') filed an appeal from the Dash 5 Permit and Decision with the Board, alleging that the Commission erred in concluding that with the modifications specified in the Dash 5 Permit, the Project will not have an undue adverse aesthetic impact pursuant to 10 V.S.A. § 6086(a)(8)("Criterion 8").

On February 7, 2000, Permittee and Cough, Inc. filed a cross-appeal from the Dash 5 Permit and Decision. The cross appeal contends that the Board lacks Act 250 jurisdiction over the Project; that the building's exterior, as painted, is not aesthetically

Docket 747

adverse; and that the Dash 5 Permits conditions in regard to exterior colors and lighting are unreasonable. The cross appeal also contends that the Richardsons are not proper parties to this appeal.

On March 14, 2000, (later revised in ways not germane to the present matter on March 20, 2000), Board Chair Marcy Harding issued a Prehearing Conference Report and Order ("PHCRO"). Among other things, the PHCRO set forth four Preliminary Issues to be determined by the Board. No objections to the PHCRO were filed.

On April 19, 2000, some Board Members conducted a site visit of the Project.

On May 3, 2000, the Board issued a Memorandum of Decision on Preliminary Issues. [3]

On September 21, 2000, Appellants requested a continuance of the Second Prehearing Conference and the hearing from September 25 and 27, 2000, respectively, to dates in January 2001, dates that were agreeable to both the Appellants and the Permittee. In a September 21, 2000 Preliminary Ruling, the Chair denied the continuance.

On September 27, 2000, Environmental Board Chair Marcy Harding convened a site visit and a hearing before the Board in Rutland, with the following participants:

Permittee by Alan Keyes, Esq.
Appellants by Donald R. Powers, Esq.

On September 27, October 25, November 15, and December 6, 2000 the Board deliberated on this matter. This matter is now ready **for final decision.**

III. Issues

1. Whether, based on the competing policy considerations of flexibility and finality articulated in the *Stowe Club Highlands* test, the Board will consider amendment of Land Use Permit #1R0477 as amended, and proceed to review the Dash 5 Permit Amendment application under Criterion 8.

2. If the answer to Issue 1 is in the affirmative, whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project has and will have an undue adverse effect on the scenic or natural beauty of the area, aesthetics or historic sites.

IV. Findings of Fact [4]

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, 167* Vt. *228, 241-42* (1997); *Petition of Village of Hardwick Electric Department, 143* Vt. *437, 445* (1983).

1. Permittee constructed the McDonald's restaurant at the intersection of Woodstock Avenue and Stratton Road in the City of Rutland, Vermont without an Act 250 permit at the end of 1982.

2. The said restaurant is located in a designated "Gateway" to the City of Rutland.

3. On December 23, 1982, Permittee applied to the Commission for a post-construction permit.

a. *prior permits*

4. On March 16, 1983, the Commission issued Land Use Permit #1 R0477 ("Permit #1 R0477") and Findings of Fact and Conclusions of Law #1 R0477, retroactively authorizing most of the construction subject to a number of conditions, but specifically disapproving certain signage, lighting, parking and traffic-related elements.

5. Among other things, Permit #1 R0477 required replacement or removal of installed McDonald's arch and "Thank you" signs; replacement of the main McDonald's sign with a smaller sign, maintenance of a dense hedge along the northern perimeter of the parking area; non-illumination of roof beam lights, and installation of a door and roof on the trash corral.

6. Condition #1 of Permit #1 R0477 expressly required that the project "be completed as set forth in Findings of Fact and Conclusions of Law #1 R0477 [and] in accordance with the plans and exhibits stamped 'Approved and on file with the District Environmental Commission." It further required that "[n]o changes ... be made in the project without the written approval of the District Environmental Commission."

7. Photographic exhibits filed by the parties in connection with the proceedings on Permit #1 R0477 clearly show that the restaurant as built and permitted was unpainted brown brick with a brown shingled roof.

8. Findings of Fact and Conclusions of Law #1 R0477 indicate that the above-described photographic exhibits above were among those the Commission

relied upon in issuing Permit #1 R0477.

9. Through 1998, four amendments to Permit #1 R0477 were issued, none of which supersede Permit #1 R0477 in regard to the restaurant's exterior color scheme.

b. modifications to the permitted project

10. As a result of the modifications made during the summer of 1999, the Project's exterior color scheme is now white-painted brick walls with a yellow-painted stripe at the top and red-painted wainscot panels along the base of the windows and lower walls. Red-painted guardrails are positioned along the building.

11. Before the painting, the restaurant'was brown and generally consistent with other buildings in the area.

12. The reason that the Permittee elected to change the restaurants colors is that, due to the passage of time, the appearance of the restaurant has become dated.

13. The painting (red roof, white walls with red and yellow trim) is intended as a national corporate initiative to identify a new "theme" for McDonald's, in order to stay current and contemporary because of changing market conditions, to identify the restaurants as McDonald's, and to create consistency in the image of the restaurant chain to the public. The repainting is also intended to improve McDonald's recognition and competitiveness with other businesses.

14. Neither the colors of other businesses surrounding the restaurant on Route 4 nor the setting of the restaurant (the meadow to the north or the hillsides) were considerations utilized in choosing the colors used for the Project.

15. Approximately twelve of thirty-five Vermont McDonald's restaurants were painted with the new color scheme; about eighty were painted in upstate New York.

16. Local franchisees/operators were given the option of changing to the new color scheme. Some opted to adopt all or part of the new scheme, but others in Vermont – for example, restaurants in Stowe, Randolph, Windsor and Manchester – chose to stay with their present colors, either because the new colors would not "fit" in the community, or because there are clearly written design standards in those areas, or because there were no other buildings in those areas which would be similar or compatible to the new McDonald's color scheme. These factors played no part in McDonald's decision to repaint its Route 4 Rutland restaurant.

C. the area of the Project

17. The context of the area is the Route 4 corridor in Rutland, running from the intersection of Routes 4 and 7 east to the area around the Sugar Shack on Route 4.

18. Along Route 4 from its intersection, there are a number of residential and commercial buildings, many with signs, including the Pizza Hut and a Texaco station, both with red accents or roofs.

19. The surroundings within the viewshed of the restaurant are a mix of primarily earth-toned commercial, residential and educational uses, and the Project is visible from certain homes in a residential neighborhood and large open meadow.

20. The McDonald's restaurant has a bright red roof, white accent roof beams, white brick walls with a 8" to 12" wide yellow stripe around the eave area at the top of the walls, and a 3' wide red-painted brick stripe along the bottom of the walls. There are red guardrails around the restaurant, there is a garage with a red door and red accents at the site, and there are red and yellow pylons around the building.

21. There are no white roof beams on the north side of the restaurant. The only lighting on the restaurant's north side is recessed lighting under the restaurant's eaves.

22. A typical 4' x 6' "Golden Arches" McDonald's sign (red background with white letters reading "McDonald's") stands near the entrance of the restaurant on Route 4. Yellow Golden Arches are painted on the restaurant's windows.

23. Landscaping around the restaurant consists of bushes, flowers and lawns; flags fly on a flagpole in front of the restaurant.

24. To the east of the McDonald's restaurant is a green gambrel-roof house, with off-white trim which appears to be residential but may be commercial. Other buildings along the north side of Route 4 have earth-tone roofs with white walls.

25. In the far distance to the east appear to be some storage buildings.

26. Directly to the east of the restaurant, there appears to be an area with wetland vegetation.

27. Further to the east, the majority of the establishments are earth-tone colored; there are exceptions, including Applebee's, a Taco Bell, an Exxon station,

and the Vermont Craft's Center, all of which have red (and other) accent colors.

28. To the southeast of the restaurant is the earth-toned Rutland High School complex with a dark reddish-brown accent striping around the roofline and building. There are lights for the athletic fields for the school; to one side of the fields is a red sports booth.

29. Wooded hillsides are in the distance to the east and southeast of the restaurant.

30. To the south of the restaurant is a brown brick Stewarts restaurant with a brown shingled roof; a white canopy covers the gas pumps; the general colors are earth-tone.

31. West of Stewarts is a gray carwash with white trim and red letters and a white sign with red letters.

32. West of the carwash is a dark brown Merriam Graves building, with a red and yellow sign; the general colors of the building are earth-tone.

33. Looking further to the west, there is a mix of earth-tone colored commercial buildings which appear to have been residences at one time; most, if not all, have signs; the colors of the signs are blue, white, red, orange, brown, and yellow.

34. Directly to the west on the north side of Route 4, vegetation blocks most of the view; there is a building which looks to be residential. Behind this building is an white church.

35. Further to the west are some commercial and residential buildings which are earth-toned; exceptions include some commercial establishments (such as the Pizza Hut) with red and other accent colors.

36. To the northwest of the restaurant is a white residence with a gray shingle roof.

37. Directly north of the McDonald's parking lot is a forested area, a mowed meadow, and an arboretum behind a 12' semi-solid buckthorn hedge which runs along the northern edge of the restaurant site. While most of the trees in this hedge are healthy, some appear to be dead. A cedar hedge also serves as a partial screen.

38. Foliage obscures views of the Richardson and Jones residences from the restaurant.

39. There are other red-roofed buildings along Route 4 and Route 7, south of the city.

40. At the corner of Hillside Road and Church Hill Road, the McDonald's restaurant and the Pizza Hut beyond the Lutheran Church are partially visible. Possibly because of the angle of the sun at the Board's mid-morning September site visit, the color of the Pizza Hut's roof appeared brighter than the color of the McDonald's roof. Comparing Exhibits M9 (picture of McDonald's restaurant) and MI0 (picture of Pizza Hut), the colors of their respective roofs are not appreciably different.

41. From the Hillside Road/Church Hill Road intersection, most of what is seen to the southeast is the wooded hillside beyond a near meadow.

42. McDonald's new color scheme is bright and out of context with the area, including the other commercial/industrial/school buildings and the mountains in the background.

43. The Rutland Municipal Plan has a section entitled "City Gateways." The section reads, in pertinent part:

> The purpose for designating the gateways as design review districts is to improve the visual effect of the approaches to the City and the downtown, (and) . . . to accentuate the historic features . . ..
>
> General Goals of the Design Control Districts
>
> 1. Maintenance and improvement of economic viability
>
> a. To promote the design of buildings and spaces in a manner that strengthens the districts' economic base while enhancing their attractiveness... .
>
> 2. Preservation and enhancement of visual qualities
>
> a. To achieve visual compatibility with the existing character of the downtown and its gateways.
>
> b. To maintain important open spaces and views that reinforce the visual quality of the district.
>
> 3. Protection of historical, architectural and cultural heritage
>
> a. To assure that the renovation and alteration of

existing structures, as well as the construction of new buildings commercial uses, is done in a manner to maintain and enhance the character of the districts... .

b. To maintain those qualities in the districts that bring value to the community, including a sense of place and an identifiable focal point for commercial and social activities.

c. To promote community awareness of historical and design issues.

d. impacts of the Project on the Appellants

44. The Richardsons and Ruth Jones live in a residential neighborhood northeast of the Project. Their homes are approximately 1,000 feet from the northeast side of the restaurant, separated by meadow, woods and some hedges.

45. The Richardsons and Ms. Jones have participated as parties in various Commission and/or Vermont Superior and Supreme Court proceedings concerning Permittee's restaurant since the time it was built. Their participation has included the submission of testimony, evidence and arguments on which the Commission has relied.

46. The southwestern boundary of the Jones property adjoins the Permittee's property.

47. From Ms. Jones' yard, the Project's red roof, and red, white and yellow walls are seen to the southeast, screened somewhat by deciduous vegetation on her land and the buckthorn hedge along the northeast side of the restaurant and by a hedge and wooded area to the south of her home. From inside her home, the view of the Project is partially obscured by three evergreen trees in her yard, but the Project's red roof is still quite visible, when there are no leaves on the trees.

48. From some parts of the Richardsons' yard, when there are no leaves on the trees, the restaurant's red roof is visible over the top of the buckthorn hedge near the restaurant; its walls are partially visible through breaks in the vegetation on the Richardson's property and the buckthorn hedge. From most locations in the Richardson's back yard the restaurant is not visible.

49. From a second floor porch attached to the living area of the Richardsons' home, and from the kitchen window when viewed at an angle, the Project's roof is also visible, though partially obscured by a trimmed hedge on the Richardson's property

and by the buckthorn hedge near the restaurant.

50. Ms. Jones and the Richardsons have their living areas on the **second** floors of their homes.

V. Conclusions of Law

A. The Preliminary Issues decided by the Board's May 3 *Memorandum of Decision*

Two of the issues which the Board decided - whether Act 250 jurisdiction over the Project exists even though the City of Rutland adopted permanent zoning and subdivision bylaws subsequent to the issuance of Land Use Permit #1R0477, as amended; and whether the Richardsons have party status in this appeal – are not germane to the questions presently before the Board.

The other two issues, however, are germane, and the Board's May 3 decision is controlling and the "law of the case" insofar as those issues arise in the consideration of the issues presently before the Board. The Board's May 3 decision determined that:

> 7. *McDonald's modifications to the exterior of its restaurant constitute a substantial or material change and therefore require a permit amendment pursuant to EBR 34*

The Board has held that a permittee must apply for a permit amendment for any "substantial" change or "material" change in a permitted project. EBR 34(A). Here, the Permittee contended that the changes made to the restaurant's roof and exterior paint scheme are neither substantial nor material and therefore did not and do not require a permit amendment.

The Board concluded that the changes to the paint scheme were "substantial changes" because they were cognizable changes to the permitted project which have the potential to impact significantly on one or more of the Act 250 criteria, namely Criterion 8. In making the first determination - that cognizable changes had occurred - the Board wrote:

> Findings of fact, conclusions of law and approved plans and exhibits may become permit conditions by their incorporation into a land use permit. *In re Denio*, *158* Vt. 230, 241 (1992); see a/so *Re: J.P. Carrara & Sons, Inc.,* Land Use Permit #1R0589-EB (Revocation),

Findings of Fact, Conclusions of Law, and Order at 12 (May 13, 1992). That is precisely what occurred here.

> Permit #1 R0477 was an "as built" permit. Unlike most permit application proceedings, which occur before construction, all of the project's features were ascertainable to a certainty before the Commission reviewed it. Although no reference to the restaurant's color scheme appears on the face of Permit #1 R0477, the photographic exhibits filed by the parties in regard to the permit clearly depict an unpainted brown brick McDonald's restaurant with a brown roof. The Findings of Fact and Conclusions of Law that accompanied Permit #1 R0477 indicate that the Commission relied on these photographic exhibits in issuing the permit, and Condition #1 incorporates the photo-depicted color scheme by expressly requiring that the project "be completed as set forth in Findings of Fact and Conclusions of Law #1 R0477 [and] in accordance with the plans and exhibits stamped 'Approved' and on file with the District Environmental Commission..." *In Re: McDonald's Corporation, #1 R0477,* Findings of Fact and Conclusions of Law at 1 (Mar. 16, 1983).

Memorandum of Decision at 7 – 9.

The Board also concluded that the painting constituted a "material change" under EBR 2(P) a physical change to the Project as authorized in Permit #1 R0477 had occurred and those changes have a significant impact on that permit's findings, conclusions, terms and conditions. *Id.* at 9 – 10.

> 2. *that the Stowe Club Highlands test should apply to McDonald's permit amendment application.*

Having determined that the Board has jurisdiction over this Project and that the modifications to the exterior of the restaurant require a permit amendment, the Board's May 3 Memorandum of Decision then decided that *In Re Sfowe Club Highlands, 166* Vt. 33 (1996), applies to this case:

> The Board has previously concluded that it will reach the merits of a permit amendment application under any Act 250 criterion under appeal only after applying the balancing test set forth in *In Re Stowe Club Highlands, 166* Vt. *33* (1996). [Citations omitted] Under the *Stowe Club Highlands* analysis, the Board and Commissions conduct a balancing test to determine whether the facts favoring permit flexibility outweigh facts favoring the policy of finality. [Citations omitted]

> The Commission in this matter did not apply the *Stowe Club Highlands* test before considering the merits of McDonald's amendment application and issuing the Dash 5 Permit. However, nothing in either *Stowe Club Highlands* or cases that have followed it suggest that the *Stowe* Club analysis should not be applied to this or any other case in which a Permittee seeks a permit amendment. [Citations omitted]
>
> The *Stowe Club* flexibility/finality test applies. At the hearing on the merits the Board will consider whether, based on the competing considerations of flexibility and finality articulated in *Stowe Club Highlands,* the Board will consider amendment of Permit 1 R0477, as amended.

Id. at 12.

B. Implications of the Board's May 3 Memorandum of Decision

The "law of the case" doctrine holds that, where a court has made a determination of the law to be applied in a case, or the facts of a case, those law or facts are settled and will apply to further proceedings in the case. The Vermont Supreme Court has stated the doctrine as follows:

> "It is a rule of general application that a decision in a case . . . of last resort is the law of that case on the points presented throughout all subsequent proceedings therein, and no question necessarily involved and decided will be reconsidered by the Court in the same case on a **state of facts not different in legal effect."** ... [T]he result [of reversing former decisions in the same case] would be mischievous because **if all questions are to be regarded as still** open for discussion and revision in the same cause, there would be no end to the litigation until the ability of the parties or the ingenuity of their counsel were exhausted.

Coty v. *Ramsey Associates, Inc., 154* Vt. 168, 171 (1990) (other citations omitted). The "law of the case" policy "is also applicable to fact questions where there has been no new evidence." *Id. See Haynes v. Golub Corp.,* 166 Vt. 228, 235 (1997); *Caledonia Sand & Grave/ Co v. Bass Co, 122* Vt. 315, 317-l 8 (1961). Note, however, that in *State* v. *Cain,* 126 Vt. 463, 469-70 (1969), the Supreme Court gave itself and the trial courts some discretion and ability to escape from the doctrine:

> But the phrase "law of the case" is essentially a rule of practice. The doctrine is not that of *stare decisis*, nor yet that of *res judicata*, although akin to each. It rests for its absolute integrity upon sound public policy which does not permit the parties to go again and again to the Supreme

> Court upon the same question. But the power of the Court to depart from the rule, in a proper case, clearly exists. (Citations omitted)

The Board sees no reason to depart from the analysis in its May 3 Memorandum of Decision and therefore declines to depart from the "law of the case" doctrine in this matter. Thus, the Permittee's claims that there is no permit condition that governs the color of its restaurant has already been decided by the Board against the Permittee, and the painting therefore constitutes a substantial change and a material change. Further, the *Stowe Club Highlands* test applies to the instant permit amendment application.

C. *The Stowe Club Highlands analysis*

The Board has consistently concluded that it will only reach the merits of a permit amendment application under any of the Act 250 criteria under appeal after applying the balancing test in *Stowe Club Highlands. See, Richard Bouffard,* #4C0647-6-EB, Findings of Fact, Conclusions of Law, and Order at 7 – 9 (Oct. 23, 2000); *Donald and Diane Weston,* #4C0635-4-EB, Findings of Fact, Conclusions of Law, and Order at 18 (March 2, 2000); *Ronald L. Sr., and Marylou Saldi,* #5R0891-16-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Jan. 13, 2000); *MBL* Associates, LLC, #4C0948-3-EB, Findings of Fact, Conclusions of Law, and Order at 12 – 14 (Oct. 20, 1999); *Bernard Carrier,* Land Use Permit Application #7R0639-1-EB, Findings of Fact, Conclusions of Law, and Order (August 24, 1999); Town *of* Hinesburg and *Stuart* and Martha Martin, #4C0681-8-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Sept. 23, 1998); *Re: The* Straffon Corporation, #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Jan. 15, 1998); *Re: Nehemiah Associates, Inc.,* #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order at 4 (Apr. 11, 1997), *aff'd,* 168 Vt. 288 (1998).

In *in re Stowe Club Highlands,* the Vermont Supreme Court affirmed the Board's denial of a permit amendment application for a project which would have developed a lot previously set aside by permit condition under Criteria 8 and 9(B). *In re Stowe Club Highlands,* Land Use Permit Application #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order (June 20, 1995). While the Court overruled the Board's use of collateral estoppel as the analytical framework, the Court concluded that "the Board addressed certain policy considerations that it considered relevant in deciding whether to grant the permit amendment." *Id.* at 38. The Court stated:

> The Board framed its discussion as weighing the competing values of flexibility and finality in the permitting process. If existing permit conditions are no longer the most useful or cost-effective way to lessen the impact of development, the permitting process should be flexible enough to respond to the changed conditions. The Board

> recognized three kinds of changes that would justify altering a permit condition:
>
> (a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology.

Id. Ultimately, the Court concluded that the Board was "justified in denying" the permit amendment application based upon the balancing of the policies of finality and flexibility. *Id.* at 40.

> The principle of finality is derived from the consequences of a permit being issued without any subsequent appeal. Once a permit has been issued and the applicable appeal period has expired, the findings, conclusions, and permit are final and are not subject to attack in a subsequent application proceeding... "To hold otherwise would severely undermine the orderly governance of development and would upset reasonable reliance on the process." *In re Taft Corners Associates, 160* Vt. 583, 593 (1993). . .
>
> [In contrast, t]he principle of flexibility is derived from the consequences of the development process. "[O]nce a permit has been issued it is reasonable to expect the permittee to conform to those representations unless circumstances or some intervening factor justify an amendment." *Re: Department of Forests and Parks Knight Point State Park,* Declaratory Ruling #77 at 3 (Sept. 6, 2976). ... In a permit amendment application proceeding, the central question is "not whether to give effect to the original permit conditions, but under what circumstances those permit conditions may be modified." *In re Stowe Club Highlands ....*

Re M. B.L. Associates, supra, at *15* (Oct. 20, 1999), *citing, Re: Nehemiah Associates, Inc., (Remand), supra,* at 21-22.

Generally, the party seeking to change the status quo has the burden of proof. *Bernard Carrier, supra,* at 17; *and see Re: W. Joseph Gagnon*, Declaratory Ruling #173, Memorandum of Decision at 5 (Nov. 22, 1987), *citing* McCormick, *Evidence 949. The* burden of proof includes both the burdens of production and persuasion.

Specifically, as to the question of who bears the burden of proof in cases involving the application of the *Stowe Club Highlands* test, the Board has written:

> The Sfowe *Club* Highlands analysis "requires a permittee to present *facts*. For the very reasons Carrier so eloquently explained that an applicant carries the burden under the ten criteria, an applicant/permittee also bears the burden of demonstrating a factual change justifying an alteration of a permit condition" under at least one of the three factors articulated above. [Citation omitted] The burden of proof includes the burden of persuasion. This does not mean, however, that the Board abdicates its statutory responsibility to evaluate the facts of the case under the appropriate analytical framework. In other words, if an applicant presented sufficient facts for the Board to reach a conclusion that favored flexibility, the Board would not deny the applicant the opportunity to pursue the amendment simply because he had not analyzed those facts in the appropriate manner. Therefore, the Board reaffirms its previous conclusions that it is appropriate that an applicant, as the party most familiar with the facts of a proposed amendment application, bears the burden of producing sufficient evidence for the Board to determine which policy -- flexibility or finality -- is the weightier consideration.

Bernard Carrier, supra, at 18 (emphasis in original). Accordingly, the Permittee has the burden of proof on the Stowe Club *Highlands* issue.

1. flexibility considerations under Stowe Club Highlands

The Board concludes that there have been neither changes in factual or regulatory circumstances beyond the control of the Permittee nor changes in technology. The Board also concludes, however, that there have been changes in the construction or operation of the Permittee's restaurant which were not reasonably foreseeable at the time Land Use Permit #1R0477 was issued.

As the Supreme Court and the Board have recognized, "permits are not final and unalterable," Stowe *Club Highlands,* 166 Vt. at 37, and it is inconceivable to the Board that the physical appearance of a permitted project must always remain as it was initially permitted, frozen in time under the procedural restrictions imposed by Sfowe Club *Highlands.* Times change, styles change. To use Justice Underwood's elegant phraseology in *Lemnah v. American Breeders Service, Inc. et al,* 144 Vt. 568, 577 (1984), "[t]he world ... has turned many times" since the Rutland McDonald's was built in 1982.

Here, Permittee seeks to make cosmetic alterations to its restaurants in order to update its corporate image. The Board concludes that, under the

particular circumstances of this case, this constitutes a change in Permittee's construction or operation of its restaurant. [5]

The Board further determines that the long time interval between the restaurant's original construction and December 2000 leads to the conclusion that that the cosmetic changes sought by Permittee were not reasonably foreseeable at the time Land Use Permit #1 R0477 was issued. Had this been an instance where the Permittee had sought an amendment soon after its initial permit had been issued, the Board's analysis of the "foreseeability" element may well have been different.

The Board is aware of its precedential language in *Nehemiah Associates, supra,* Findings of Fact, Conclusions of Law, and Order at 23, which noted that "It would be absurd to permit what may have otherwise have caused an undue adverse effect on aesthetics simply because the aesthetics of the surrounding area has changed.' *Citing In re Pilgrim Partnership, 153* Vt. 594, 695 *(1990). Nehemiah,* however, addressed a permittee's claim that physical changes to the area surrounding his project justified a finding that *finality* considerations should not weigh heavily in the Board's *Stowe Club Highlands* analysis.

Here, the distinction, though perhaps slight, is nonetheless significant. The analysis in this decision concerns the flexibility side of the scales; further, it does not address changes which have occurred within the immediate physical environs of a project; instead' it is based upon a recognition by the Board that permittees may periodically wish to make cosmetic changes to their projects.

2. ***finality considerations under Sto we Club Highlands***

As the Board has concluded that changes in favor of flexibility exist, such changes must still be balanced against facts weighing in favor of finality. In considering the policy of finality, the Board must determine whether the Commission or other parties reasonably relied upon. the color of the original restaurant and, further, whether the Permittee has benefited from such reliance. *Stratton Corporation, supra,* at 18.

Under 10 V.S.A. § 6086(c), a permit may contain such requirements and conditions as are allowable within the police power and are appropriate with respect to the Act 250 criteria. "The purpose of permit conditions is to alleviate adverse effects that would otherwise be caused by a project. Those adverse effects would require a conclusion that a project does not comply with the criterion at issue unless the condition is followed." *Re: Stowe Club Highlands, supra,* Findings of Fact, Conclusions of Law, and Order at 10.

Applying these principles of law, the Board concludes that, in 1982, the Commission authorized the post-construction permit based upon its knowledge, understanding and reliance on the color of the building as constructed. This conclusion is reinforced by the fact that the Commission did not merely rubber stamp the completed construction but instead required replacement or removal of installed McDonald's arch and "Thank you" signs; replacement of the main McDonald's sign with a smaller sign, maintenance of a dense hedge along the northern perimeter of the parking area; non-illumination of roof beam lights, and installation of a door and roof on the trash corral. However, it is evident from the history of this case that the Commission itself does not place great reliance on its permit, as it has allowed, with mitigative measures, some of the modifications to the restaurant sought by the Permittee.

The Board also concludes that the Permittee directly benefited from the Commission's reliance on the "as-built" colors of its building, in that it received a permit for its building as it has operated at its present location for the past 18 years.

The Richardsons and Ms. Jones have presented a history of their involvement in the Permittee's restaurant, having participated as parties in various Commission and/or Vermont Superior and Supreme Court proceedings concerning the restaurant since the time it was built. Their participation has included the submission of testimony, evidence and arguments on which the Commission has relied.

Board precedent states, however, that application of Criterion 8 does not guarantee that views of a landscape will not change:

> Criterion 8 was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from his or her property will remain the same forever. Change must and will come, and criterion #8 will not be an impediment. Criterion #8 was intended to insure that as development does occur, reasonable consideration will be given to the visual impacts on neighboring landowners, the **local** community, and on the specific scenic resources of Vermont.

Re: Okemo Mountain Inc., #2W5051-8-EB, Findings of Fact, Conclusions of Law and Order at 9 (Dec. 18, 1986); and see Case//a Waste *Management, Inc., and E.* C. *Crosby &* Sons, *Inc.,* #8B0301-7-WFP, Findings of Fact, Conclusions of Law, and Order at 33 (May 16, 2000); *Re: Horizon Development Corporation,* #4C0841-EB Findings of Fact, Conclusions of Law and Order at 20 (Aug. 21, 1992).

Thus, the Richardsons' and Ms. Jones' reliance is tempered somewhat by a realization that, at least insofar as the cosmetic, aesthetic considerations at issue here are concerned, circumstances may change over time.

3. ***balancing flexibility vs. finality***

The final stage of the *Stowe Club Highlands* analysis is the balancing of the policies of finality and flexibility.

Giving due consideration to the reliance of both the Commission and the Appellants, the Board concludes that flexibility outweighs finality in this case. The desire, and perhaps even the need, of a business to change its corporate image cannot be treated lightly, and given the fact that the proposed changes are limited to those of a cosmetic nature (albeit somewhat removed from the colors allowed under the original permit), the Board will not close the door to this permit amendment application.

D. Criterion 8

Since the Board concludes that the Permittee has met its burden under *Stowe Club Highlands,* the Board turns to an analysis of whether the Project satisfies Criterion 8, 10 V.S.A. §6086(a)(8).

Under Criterion 8, before issuing a permit, the Board must find the proposed Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare or irreplaceable natural areas. 10 V.S.A. @086(a)(8). The controversy in this case centers on aesthetics.

The burden of proof under Criterion 8 is on the person opposing the project, 10 V.S.A. §6088(b), but, as with Criterion 5, the applicant for the permit must provide sufficient information for the Board to make affirmative findings. See, e.g., *Re: Black* River Valley *Rod & Gun Club, Inc.,* #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997) and cases cited therein. Thus, even when there is no opposing party or evidence in opposition with respect to Criterion 8, an applicant will not automatically prevail in the aesthetics issue. See, e.g., *Re: Herndon and Deborah Foster,* #5R0891-8B-EB, Findings of Fact, Conclusions of Law, and Order at 12 (June 2, 1997).

1. Adverse Effect

The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. First, it determines whether the proposed project will have an adverse effect under Criterion 8; second, if an adverse effect is found, the Board then

determines if that effect is "undue." *Re: James E. /-/and and John R. Hand, d/b/a/ Hand Motors and East Dorset Partnership,* #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996); *Re: Quechee Lakes Corp.,* #3W041 I-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17 -19 (Nov. 4, 1985). As to the question of whether an adverse effect exists, the Board has written:

> [T]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

Hand, supra at 25; *Quechee, supra,* at 18.

The Board concludes that, given the nature of the colors used, the Project has an adverse effect on the context of the area -- the Route 4 corridor in Rutland, running from the intersection of Routes 4 and 7 east to the area around the Sugar Shack on Route 4. Although there are a number of other red buildings and signs in the vicinity of the Project, the overall context of the area is one dominated by present or former residences, some of which have been converted to commercial use, which are predominantly earth-toned in colors.

In the permit which initially authorized the construction of a McDonald's restaurant in the Town of Morristown almost twelve years ago, the Board, faced with a request to allow a 25-foot tall free standing "Golden Arches" sign along Route 15, wrote:

> To determine whether an effect is adverse, the Board evaluates whether a proposed project would be in harmony with its surroundings. In this case, the Board concludes that the proposed sign would not be in harmony with its surroundings. The Board has found that the area surrounding the proposed sign is becoming a commercial strip development, that strip development encourages competition regarding commercial signs which results in escalating sign visibility and obtrusiveness, and that the proposed road sign is a direct result of such competition. Although other signs exist in the area, the proposed road sign would represent an escalation in the competition for visibility because it is designed to be visible from a

> long distance away. The Board has determined that such an escalation would encourage further sign competition, leading to even more obtrusive commercial signs. Therefore, the proposed road sign would have an adverse effect on the scenic beauty.

McDonald's Corporation and Murphy Realty Company, Inc., #100012-2-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Feb. 10. 1989).

Here, the Board notes that the painting of the restaurants in reds, whites and yellows was performed, in part, as a national corporate initiative in order to identify the restaurants as McDonald's, to improve McDonald's recognition and competitiveness with other businesses, and to create consistency in the image of the restaurant chain to the public. The building has, in effect, taken on the attributes of a sign. For many years, a Howard Johnson's could be identified from far away solely because of the color of its roof. In much the same way as a child may recognize the Golden Arches as a place that serves Happy Meals, even before he or she can read, so will the new red roof and brightly colored walls clearly advertise a distant establishment as a McDonald's.

The alterations in the restaurant's color scheme have an adverse effect on the scenic beauty of the area.

2. Undue Adverse Effect

If the Board concludes that the Project has an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is "undue." The Board will conclude that an adverse effect is "undue" if it reaches a positive finding with respect to any one of the following factors:

> 1. Does the Project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
>
> 2. Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?
>
> 3. Does the Project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

See, e.g., *Black River, supra,* at 19-20; *Hand, supra,* at 25-29; *Quechee Lakes, supfa,* at 19-20.

a. *Written Community Aesthetic Standard*

Under this first factor, the Board must determine whether the restaurant's new color scheme violates a clear, written community standard intended to preserve the aesthetics or scenic beauty applicable to the area in which the Project would be located.

In evaluating whether a project violates a clear written community standard, the Board routinely looks to town and regional plans, open land studies, and other municipal-generated documents to discern whether a clear, written community standard exists and should be applied in the review of the aesthetic impacts of a project. See *Re: Herbert and* Patricia Clark, Application #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 35-37 (Apr. 3, 1997); *Re: Thomas W. Bryant and John P. Skinner d/b/a J. 0. T. 0. Associates,* #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 22 (June 26, 1991).

The Board explained the intent of the clear, written community standard in the *Re: Town* of **Barre,** #5W1167-EB, Findings of Fact, Conclusions of Law, and Order (June 2, 1994):

> In adopting the first standard in the Quechee analysis, the Board intended to encourage towns to identify scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road, for example. These designations would assist the district commissions and the board in determining the scenic value of specific resources to a town, and would guide applicants as they design their projects.

Id. at *21.*

At issue **in** *Barre* was the following portion of a town plan discussing scenic resources:

> In the 1989 planning survey dealing with future growth, preservation of visual beauty was the highest priority of the residents polled. Eighty-nine percent of those responding said that planning to retain visual beauty was necessary. ... Barre Town's visual beauty is an asset which the Town has to offer to any prospective resident or employer who is considering relocating to the community. ...[T]he Town of Barre's policy regarding aesthetics is one of encouraging enhancement and preservation of natural areas, views, and vistas.

Id. at *13-14.*

In *Barre,* the Board ruled that the above quoted language did not rise to the level of a clear, written community standard; such a standard a specific reference to a particular scenic resource in the area of the project under review. A broad statement of policy that applies generally to the community at large is not a clear written community standard.

In contrast to *Barre* was the town plan provision at issue in *Re: Taft Corners Associates,* #4C0696-1 l-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995). The Board found that the town plan identified as "significant" the views of the mountains to the east and west and foreground views from I-89 of "the high ground at the water tower and other open spaces ...." *Id.* at 19. The Board quoted the town plan:

> Taft Comers should feature quality design, compatible with its setting. Buildings should be architecturally compatible and should be enduring, not transient. Their siting should enhance the setting, and particularly the east-west views. The placement of buildings should define public spaces, such as the streets, courtyards and greens. The area should be well landscaped, and feature green spaces, open spaces, trails and other opportunities for human interaction.

Id. at 18-l 9. Based on the above language, the Board found a clear, written community standard "which contains provisions regarding aesthetics" that applied to the project. *Id.* at 42. *Accord, Re: Herbert and Patricia Clark, supra* (Brandon Town Plan constituted clear, written community standard where it established and defined three categories of scenic resources, contained an inventory that described 30 scenic areas, and provided recommended policies and implementation measures for protecting the scenic value and resources of the listed areas and where the proposed project was located in one of the scenic areas listed in the inventory); *Re: The Mirkwood Group and Barry Randall,* #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 22-23 (Aug. 19, 1996) (Pittsford zoning ordinance constituted clear, written community standard where a proposed radio tower was located within conservation district and the ordinance contained a clear statement of the community policy against use of conservation district lands for anything other than dwellings, forestry, and agriculture).

In this case, to qualify as a clear written community standard, the *City Gateways* section of the Rutland Municipal Plan must contain a specific policy regarding the visual impact of the Permittee's paint scheme on Route 4. The Board concludes that it does not. The Plan speaks in generalities and lacks particular references; it therefore falls closer on the spectrum to *Barre Town* than it does to *Taft Corners.*

As there is no clear written community standard applicable to the Project, the Board concludes that the adverse aesthetic impacts of the Project are not undue under this Quechee Lakes factor.

b. Mitigation

In judging whether there has been mitigation, the Board looks to the steps that the applicant has taken to reduce the aesthetic impacts of a project on the character of the area where it is proposed; the Board asks whether the applicant has taken generally available mitigating steps to improve the harmony of the project with its surroundings. See *Re:* Thomas *W. Bryant and John P. Skinner, supra,* at 22 (Where an applicant placed height restrictions on homes and trees, proposed plantings to screen the development, proposed covenants to govern future construction and activities on the site, placed limits on exterior house colors, and retained open space, such applicant had taken the generally available mitigating steps to alleviate the adverse effects of the subdivision on the surrounding area.)

There is nothing in the record to suggest that the Permittee has taken any action to mitigate the impacts of its new paint scheme. Indeed, the Permittee has appealed Conditions 2 and 9 of the Dash 5 Permit which require that the red wainscot of the building, red guardrails, red trash corral door, and other red at the facility be painted light gray consistent with the South Main Street (Rutland) McDonald's, and that the roof be changed to a flat (not glossy) red color not substantially different from a nearby Pizza Hut.

The Board concludes that the Permittee fails the mitigation element of the Quechee test. However, the Board finds that, because the colors of the McDonald's roof is not appreciably different from the color of the Pizza Hut roof, little would be gained by requiring a repainting of the roof, as the Commission requires. Further, should the Permittee abide by the other requirements imposed by the Commission in the Dash 5 Permit, the Board can reach positive conclusions under Criterion 8, with the additional requirement of increased and adequate vegetative screening on the north side of the restaurant.

The Board notes that the original permit issued to the Permittee for this restaurant, Land Use Permit #1R0477, includes Condition 15, which reads:

> 15. If the buckthorn trees planted along the northern perimeter of the parking area do not spread and join to fill in and form a dense hedge by September 1, 1984, they shall be replaced with or supplemented by evergreens before the end of the fall planting season of 1984. Plans for any necessary revisions of the

> "hedge" must be submitted to the District Environmental Commission for review, possible modification and approval prior to planting.

The Findings of Fact, Conclusions of Law, and Order which accompany Land Use Permit #1 R0477, and which are incorporated into the said permit as Conditions pursuant to Condition 1, [6] indicate that the planting of the hedge was an important part of the Commission's decision to grant the said permit:

> Mr. Coughlin, operator of this and other McDonald's has won awards for landscaping one of his other McDonald's facilities. He plans to add planting annually. He will replace any landscaping which does not survive. The Rutland Zoning Board required the planting of a "hedge." The Commission finds a "hedge" is necessary to *screen the development from nearby properties* and will condition this permit to insure adequate landscaping on the perimeter of the development.

McDonald's Corporation, 1#R0477, Findings of Fact, Conclusions of Law, and Order at 8 (March 16, 1983).

As the Board has found, the restaurant's red roof is visible over the top of the buckthorn hedge near the restaurant; its walls are partially visible through breaks in the vegetation on the Richardson's property and the buckthorn hedge. The hedge, therefore, is only partially carrying out the function for which it was planted. It may well be that, when the roof was its original brown color, this failure was not noticeable. Now that the roof has been repainted red, this failure is apparent. The Board will therefore require that, in order to adequately mitigate the impacts of the red roof, new plantings occur on the north side of the restaurant, which are adequate to fully screen the roof and walls of the restaurant from views from neighboring properties to the north.

C. ***Shocking or offensive***

Under this factor, the Board must determine whether the Permittee's new paint scheme offends the sensibilities of the average person. This includes whether the restaurant's colors would be so out of character with its surroundings or so significantly diminish the scenic qualities of the area as to be offensive or shocking to the average person. Pike *Industries, Inc. and William E. Dailey, Inc.,* #1R0807-EB, Findings of Fact, Conclusions of Law, and Order at 18 - 19 (June 25, 1998).

The Board concludes that, if the repainting and other mitigation measures noted above are taken, the restaurant's new color scheme will not be shocking or offensive.

VI. Order

1. Land Use Permit 1 R0477-5-EB is issued.

2. Jurisdiction is returned to the District 1 Environmental Commission.

Dated at Montpelier, Vermont, this 7th day of December 2000.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
John Drake
*George Holland
Samuel Lloyd
W. William Martinez
Alice Olenick
*Robert H. Opel
"Nancy Waples

* Dissenting Opinion of Board Members Holland and Opel:

We dissent, in part, from the Board's conclusions as to Criterion 8. While we agree that the repainting of the restaurant has an adverse effect under Criterion 8, it is not undue. The new paint scheme is neither shocking nor offensive. Additionally, necessary mitigation is available in the original permit if the planting to the north is property installed.

** Board Member Waples participated only in the Criterion 8 discussion at the Board's December 6 deliberations.

ENDNOTES

[1] When this appeal was taken Gerald and Patricia McCue owned the restaurant; the McCues sold their interest to McDonald's Corporation. As a result, references to the McCues in earlier documents have been removed from this decision, and McDonald's Corooration is the sole Permittee.

[2] Earlier permits issued to Permittee include the original permit which authorized the as-built construction, Land Use Permit #1 R0477, and the following amendments: #1R0477-1 (construction of drive-through window and modifications to trash corral), #R0477-2 (demolition of house and construction of parking lot), #1R0477-3 (extension of construction completion deadline for activities allowed by #1R0477-2) and #1R0477-4 (roof lighting on south and west sides of building). The Board has taken, without objection by the parties, official notice of these permits and the Dash 5 Permit. The noticed files include but are not limited to findings, conclusions and exhibits contained therein. See Prehearing Conference Report and Order at 2 -3 (March 14, 2000).

[3] In this May 3 Memorandum of Decision, the Board determined that Act 250 jurisdiction exists over the Project, that the painting changes to the exterior of the project constitute both a substantial change and a material change, that the Appellants were entitled to party status, and that the flexibility/finality test established by *Stowe Club Highlands, 166* Vt. 33 (1996), applies to this application.

[4] Certain of these Findings of Fact were made in the Board's May 3, 2000 Memorandum of Decision on Preliminary Issues and appear at pages 4-5 of the said Memorandum. All other findings were made following the September 27, 2000 hearing.

[5] There may be future cases in which permittees request amendments to their permits in order to alter or increase the size, scope, use, amenities, or nature of their projects because of a claimed unforeseeable change in operations. This decision does not address such requests. Today's decision allows, at most, only limited permit amendment applications, namely, those which seek cosmetic changes which concern the aesthetic impact of a permitted project.

[6] It is settled law that findings and conclusions which accompany a permit have the force and effect of conditions. *In re Denio, supra,* 158 Vt. at 241.