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

RE: McDonald's Corporation and Gerald & Patricia McCue
Land Use Permit Application #1R0477-5-EB
Docket #747

MEMORANDUM OF DECISION ON PRELIMINARY ISSUES

This proceeding concerns the application of McDonald's Corporation and Gerald and Patricia McCue ("Permittees") 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 Board rules on four Preliminary Issues set forth in the Prehearing Conference Report and Order dated March 14, 2000, and on a Petition for Party Status filed by Ruth Jones on that same date. For reasons detailed below, the Board concludes that 1.) Act 250 jurisdiction exists over the Project even though the City of Rutland has adopted permanent zoning and subdivision bylaws; 2.) Permittees' modifications to the exterior of the restaurant constitute a substantial or material change; 3.) Earl and Pauline Richardson ("the Richardsons") and Ruth Jones may participate as parties in this appeal; and 4.) the *Stowe* Club Highlands test applies to this application.

PROCEDURAL SUMMARY

During the summer of 1999, Permittees 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, Permittees 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"). 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 South Main Street McDonald's 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, the Richardsons filed an appeal from the Dash 5 Permit and Decision with the Environmental Board ("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"). The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules ("EBR") 6 and 40.

On February 7, 2000, Permittee McDonald's Corporation and Cough, Inc. filed a cross appeal from the Dash 5 Permit and Decision. [1] The cross appeal contends that the Board lacks Act 250 jurisdiction over the Project; that the building's exterior, as painted, is not aesthetically adverse; and that the Dash 5 Permit's 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 3, 2000, Board Chair Marcy Harding ("the Chair") convened a prehearing conference with the following participants:

Allan R. Keyes, Esq., representing McDonald's Corp., Cough, Inc., and Gerald and Patricia McCue
Donald (Tad) Powers, Esq., representing the Richardsons
Earl and Pauline Richardson
Ed Beeler

On March 14, 2000, the Chair issued a Prehearing Conference Report and Order ("PHCRO"). She issued an order revising the PCHRO in ways not germane to the present matter on March 20, 2000.

Among other things, the PHCRO set forth four Preliminary Issues to be determined by the Board. No objections to the PHCRO were filed.

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[1] Cough, Inc., the franchise holder, was not a co-applicant below and has not requested party status before the Board. Gerald and Patricia McCue, the landowners, were co-applicants below but did not join in the filing of the appeal. As landowners, the McCues are parties of right pursuant to EBR 14(A)(2). Because of the close relationship between Cough, Inc., and Permittees McDonalds and McCue, the Board regards Cough, Inc., as if it were a party by permission pursuant to EBR 14(B).

Also on March 14, 2000, Ruth Jones filed a Petition seeking party status in regard to Criterion 8.

On March 15, 2000, the Richardsons filed a petition seeking party status in regard to Criterion 8, along with a brief captioned Appellee's (sic) Pre-Hearing Brief. They filed Appellants' Supplemental Memorandum on March 31, 2000.

Permittees filed Applicants' Preliminary Memorandum on March 20, 2000. They filed Applicants' Memorandum Concerning *Stowe* Club Highlands and Applicants' Opposition to Petition for Party Status on March 31, 2000.

On April 9, 2000, the Board conducted a site visit of the Project, then deliberated on the Preliminary Issues and Ruth Jones' petition for party status.

PRELIMINARY ISSUES

The Preliminary Issues, as set forth in the PHCRO, are:

1. 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 #1 R0477. as amended.

2. If the answer to Preliminary Issue 1 is in the affirmative, whether 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.

3. If the answer to Preliminary Issue 2 is in the affirmative, whether the Richardsons may have party status in this appeal.

4. If the answer to Preliminary Issue 2 is in the affirmative, whether the *Stowe Club Highlands* test should apply to McDonald's permit amendment application.

The issue of Ruth Jones' party status is also a Preliminary Issue, and is addressed below under Preliminary Issue 3.

FINDINGS OF FACT

1. Permittees constructed the McDonald's restaurant at the intersection of Woodstock Avenue and Stratton Road without an Act 250 permit at the end of 1982.

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

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

4. Among other things, Permit #1R0477 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.

5. Condition #1 of Permit #1R0477 expressly required that the project "be completed as set forth in Findings of Fact and Conclusions of Law #1R0477 [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 ."

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

7. Findings of Fact and Conclusions of Law #1R0477 indicate that the above-described photographic exhibits above were among those the Commission relied upon in issuing Permit #1R0477.

8. Through 1998, four amendments to Permit #1R0477 were issued, none of which supercede Permit #1R0477 in regard to the restaurant's exterior color scheme. These are #1R0477-1, #1R0477-2, #1R0477-3, #1R0477-4.

9. The Chair has taken official notice of the Commission files in regard to these four amendments, as well as Permit #1R0477 and the Dash 5 Permit. The noticed files include but are not limited to findings, conclusions and exhibits contained therein. No objections to the taking of official notice were filed.

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 decorative yellow-painted strip at the top and red-painted wainscot panels two to two and a half feet wide along the base of the windows and lower walls. Red-painted guardrails are positioned along the edge of the parking lot.

11. **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.

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

13. The southwestern boundary of the Jones property adjoins the Permittees' property.

14. From Ms. Jones' yard, the Project's red roof, and red, white and yellow walls are easily seen to the southwest, screened somewhat by a 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 the yard, but the Project's red roof is still quite visible.

15. From the Richardsons' yard, the Project's red roof is visible, and its walls are partially visible through the buckthorn hedge near the restaurant. 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.

16. 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 a purely residential neighborhood and large open meadow.

DISCUSSION

Issue 1: *Whether Act 250 jurisdiction over the Project exists even though the City of Rut/and adopted permanent zoning and subdivision bylaws subsequent to the issuance of Land Use Permit #1R0477, as amended.*

Permittees contend in their cross-appeal that the Board lacks jurisdiction over the Project because the City of Rutland's adoption of permanent zoning and subdivision bylaws subsequent to the issuance of the original permit, as amended, eliminates Act 250 jurisdiction.

The established law is to the contrary. *In re Wildcat Construction Co., Inc., 160* Vt. 631 (1993) is the leading case. In *Wildcat,* the Vermont Supreme Court affirmed the Board's conclusion that Act 250 jurisdiction is not divested when a city or town adopts permanent zoning and subdivision bylaws. *Id.* at *632-33.* This decision is consistent with many other Board and Vermont Supreme Court decisions that hold that when Act 250 jurisdiction is triggered, subsequent events do not remove jurisdiction. See, e.g., *Re: John Rusin,* #8B0393-EB, Findings of Fact, Conclusions of Law, and Order (June 10, 1993), *aff'd In re John Rusin, 162* Vt. 185 (1994); *Re: Black River Valley Rod and Gun* Club, *Inc.,* #2S1019-EB, Memorandum of Decision at 5 (July 15, 1996); *Re: Bernard and Suzanne Carrier,* Declaratory Ruling #246, Findings of Fact, Conclusions of Law, and Order at 27 (December 7, 1995); *Re: Char/es and Barbara Bickford*, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 25 (May 22, 1995); *Re: City of Barre Sludge Management Program,* Declaratory Ruling #284, Findings of Fact, Conclusions of Law and Order at 13 (October 11, 1994); *Re: Richard Farnham,* Declaratory Ruling #250, Findings of Fact, Conclusions of Law and Order (July 17, 1992); *Re: Stevens and Gyles*, Declaratory Ruling #240, Findings of Fact, Conclusions of Law and Order (May 8, 1992); *Re: Jeffrey and Nancy Houghton,* #2W0659-EB (Revocation), Chair's Preliminary Ruling (February 18, 1999).

In addition, McDonald's, using the same counsel as it has retained in the instant matter, unsuccessfully litigated this exact question in an appeal from a decision of the District #1 Environmental Commission brought by the Richardsons in the Rutland Superior Court in 1989. See *In re McDonald's Corporation,* Rutland Superior Court Docket #S28-83Rm, Order (September 5, 1989). As that case involved the same parties, subject matter and cause of action, it is *res judicata* in regard to the current matter. See *Unifirst Corporation,* Declaratory Ruling #348, Findings of Fact, Conclusions of Law and Order at IO-I 1 (January 30, 1998).

The City of Rutland's adoption of permanent zoning and subdivision bylaws subsequent to the issuance of Permit #1R0477, as amended, does not divest Act 250 jurisdiction over the Project.

Issue 2: *If the answer to Preliminary Issue I is in the affirmative, whether 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.*

Because the Board has determined Preliminary Issue 1 in the affirmative, it must determine the additional jurisdictional question posed in Preliminary Issue 2. The answer to this Preliminary Issue also is in the affirmative.

A permittee must apply for a permit amendment for any "substantial" change or "material" change in a permitted project. EBR 34(A). Permittees contend that the changes made to the restaurants roof and exterior paint scheme are neither substantial nor material and therefore did not and do not require a permit amendment.

1. Substantial Change

'Substantial change" is defined as "any change in a development ... which may result in significant impact with respect to any of the criteria specified in" Act 250. EBR 2(G). Finding substantial change involves a two step process. First, there must be a "cognizable" (i.e. physical) change to the permitted project. See, e.g., *Developer's Diversified Realty Corporation,* Declaratory Rulings #364, #371, and #375 (consolidated), Findings of Fact, Conclusions of Law, and Order at 15-l 6 (Mar. 25, 1999); *Sugarbush Resort /-/o/dings, Inc.,* Declaratory Ruling #328, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1997); *Re: David Enman (St. George Property),* Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order (Dec. 23, 1996); *Re: Vi//age of Ludlow,* Declaratory Ruling #212, Findings of Fact, Conclusions of Law and Order (Dec. 29, 1989).

Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. EBR 2(G); *Developer's Diversified, supra.* In considering the issue of substantial change, the Board has stated that:

> In deciding whether Act 250 jurisdiction applies ..., the appropriate consideration is whether the potential for significant impact is raised. This consideration does not require an in-depth review of possible impacts, but simply a determination that significant impacts may occur.

Village of Ludlow, supra, at 9, quoting *Re: City* of *Montpelier,* Declaratory Ruling #190, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 6, 1988). See *also In re Barlow, 160* Vt. 513, 521-22 (1993) (upholding validity of EBR 2(G) by finding that an impact can be potential as long as it is significant); *Re: Taft Corners Associates, Inc.,* #4C0696-1 I-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995) [EB #532R2] (substantial change found where increase in size of project involving retail and warehouse buildings would, without certain improvements to existing roads, have a potential for significant impact on Criterion 10 (town/regional plan); *Re: Vi//age of Ludlow, supra* (substantial change to an existing sewage treatment plant found where new parts were added and others were replaced with parts that were physically different because additional traffic and noise impacted Criteria 1 (air), 5 (traffic), and 8 (aesthetics)).

a. Cognizable Change

Based on the Findings of Fact made herein, the Board concludes that painting the restaurant's exterior in the red, white and yellow color scheme, with a red roof, is a cognizable physical change to the project authorized by Permit # 1 R0477.

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).

Accordingly, the painting of the restaurant's exterior in the red, white and yellow color scheme, with a red roof, constitutes a cognizable change. See *Re:* Developer's Diversified Realty Corporation, Declaratory Rulings #364, #371, and #375 (consolidated), Findings of Fact, Conclusions of Law, and Order (Mar. 25, 1999) (exterior changes to department store were cognizable changes); *Re: Vermont Institute of Natural Science,* Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 29 (Feb. 11, 1999) (installing an underground water line, constructing an outdoor classroom, and creating an outdoor recreation area were physical changes); *Re: David Enman (St. George Property)*, Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order (Dec. 23, 1996) (driveway 1,000 feet in length was cognizable change to two existing subdivision permits).

b. Potential for Significant Impact

The Board also concludes that the change to the restaurant's exterior has the potential to impact significantly on one or more of the ten Act 250 criteria, in particular Criterion 8 (aesthetics). 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 a purely residential neighborhood and large open meadow. Accordingly, the modifications to the building's exterior have the potential for a significant impact on the aesthetics of the area under Criterion 8.

2. Material Change

"Material change" is defined as "any alteration to the project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act." EBR 2(P).

Determining whether an alteration to a project constitutes a material change involves a two step process similar to that employed in determining whether the alteration constitutes a substantial change. First, the Board must decide whether a physical change or a change in use has occurred or will occur. See, e.g., *Developer's Diversified, supra; Vermont Institute of Natural Science, supra; Sugarbush Resort Holdings, Inc., supra; Re: David Enman (St. George Propetfy), supra; Re: Mount Mansfield Co., Inc.,* Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (July 22, 1992). Second, if there is a change, the Board must determine whether the alteration has a significant impact on any

finding, conclusion, term, or condition of the Permit and whether the alteration affects one or more of the values protected by Act 250. *Id.;* EBR 2(P).

For essentially the same reasons set forth in section 1 above, the Board concludes that the exterior changes to Permittees' restaurant are physical changes to the project as authorized in Permit #1R0477, and that those changes have a significant impact on that permit's findings, conclusions, terms and conditions.

Jurisdiction exists over the Project. A permit amendment was and is required for the modifications to the exterior color scheme because they constitute a substantial and material change to Permit #1R0477, as amended.

Issue 3: *If fhe answer to Preliminary Issue 2 is in the affirmative, whefher the Richardsons and Ruth Jones may have party status in this appeal.*

As the Board has determined that jurisdiction over the Project exists despite Rutland's adoption of permanent zoning and subdivision bylaws, and that the modifications to the exterior of the Project constitute a substantial and material change to Permit #1R0477, it next turns to the issue of party status.

The Richardsons and Ruth Jones have filed petitions for party status in regard to Criterion 8, the Richardsons pursuant to EBR 14(B)(l) and (B)(2), and Ms. Jones pursuant to EBR 14(A)(5). Permittees oppose the Richardsons' petition on the grounds that they have demonstrated neither that the Project may affect their interests under any Act 250 Criterion, nor that their participation will materially assist the Board. See EBR 14(B)(l) and (B)(2). Permittees oppose Ms. Jones' petition on the ground that although she is an adjoiner, she has not demonstrated that the Project may have a direct affect on her property pursuant to EBR 14(A)(5). The Board disagrees.

Pursuant to EBR 14(A)(5), an adjoining property owner may participate in an Act 250 proceeding a matter of right, provided that the adjoiner demonstrates that the proposed project "may have a direct effect on the adjoiner's property" under one or more of the ten criteria set forth at 10 V.S.A. § 6086(a). 10 V.S.A. § 6085(c); EBR 14(A). See *a/so Re: Gary Savoie d/b/a/ WLPL and Eleanor Bemis,* #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Oct. 11, 1995)[EB #632]. Additionally, EBR 14(B)(l) and (B)(2) give the district commissions and Board the discretion to grant party status to any individual or entity that demonstrates that its interests may be affected by the project under one or more of the ten Act 250 criteria or that it can materially assist the commission or Board as to any of those criteria. EBR 14(B)(l); 14(B)(2). *Re: Gary Savoie d/b/a/*

WLPL and Eleanor *Bemis*, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 6-7 (Oct. 11, 1995) [EB #632].

The Board considers the issue of party status de novo. Gary *Savoie, supra* at 7. If the Board denies party status in regard to a criterion, the appeal or cross-appeal is dismissed as to that criterion. *Id.* Conversely, if the Board grants party status, it "will proceed with substantive review on any criteria concerning which it determines that the appellant qualifies for party status." Id.

Ruth Jones is granted party status pursuant to EBR 14(A)(5). She is an adjoiner, and because the Project is visible from several vantage points on her property, it has a direct effect on the aesthetics of her property under Criterion 8.

The Richardsons are not adjoining property owners. However, based on the Findings of Fact set forth above, the briefs submitted in regard to their petition, and a review of the Commission files of which the Board has taken official notice, the Board grants the Richardsons party status pursuant to both EBR 14(B)(l) and (B)(2). The Project is visible from the Richardsons' property and therefore may affect their interests under Criterion 8. Further, a review of the officially noticed Commission files shows that the Richardsons have provided material assistance in various proceedings concerning this restaurant over almost twenty years. They can be expected to continue to do so in the present proceeding.

Permittees' contention that the Richardsons are barred from participating as parties because the Commission denied them party status in a 1992 permit amendment proceeding is meritless. First, Board precedent holds that the grant of party status in one permit proceeding is not controlling with respect to party status in any subsequent permit or DR proceeding. See *Spring Brook Farm Foundation*, #250985- EB, Memorandum of Decision (July 18, 1995). There is no reason why the same principle should not hold true when party status is denied in an earlier proceeding. Second, the subject of the 1992 proceeding was the addition of a parking lot. It is reasonable to assume that this parking lot, being at ground level, was far less visible from the Richardsons' property than the present Project.

Issue 4: *If fhe answer to Preliminary Issue 2 is in the affirmative, whether the* Stowe Club Highlands test *should apply to McDonald's permit amendment application.*

Having determined in Issues 1 and 2 that the Board has jurisdiction over this Project and that the modifications to the exterior of Permittees' restaurant require a permit amendment, and having granted the Richardsons and Ruth Jones party

status, the Board turns to the question of whether the Vermont Supreme Courts decision in *In Re Sfowe Club Highlands, 166* Vt. *22* (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 Sfowe Club Highlands, 166* Vt. 22 (1996). *Re Sfraffon Corporation,* #2W0519-9R3-EB, Findings of Fact, Conclusions of Law and Order, at 14 (Jan. 15, 1998); *Re Nehemiah Associates, Inc.,* #1R0672-I-EB (Remand), Findings of Fact, Conclusions of Law and Order, at 4 (Apr. 11, 1997), *aff'd,* 168 Vt. 288 (1998), *Re Donald and Diane Wesfon,* #4C0635-4-EB, Findings of Fact, Conclusions of Law and Order, at 19 (Mar. 2, 2000). Under the *Sfowe 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. See *Nehemiah Associates, Inc., supra* at 4; *Sfraffon Corporation, supra* at 4.

The Commission in this matter did not apply the *Sfowe Club Highlands* test before considering the merits of McDonald's amendment application and issuing the Dash 5 Permit. However, nothing in either *Sfowe Club Highlands* or cases that have followed it suggest that the *Sfowe Club* analysis should not be applied to this or any other case in which a Permittee seeks a permit amendment. See *Sfraffon, supra; Wesfon, supra.*

The *Sfowe 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 Sfowe *Club Highlands,* the Board will consider amendment of Permit lR0477, as amended.

BOARD HEARING

During its deliberations on this matter on April 19, 2000, the Board directed that this matter be heard by the full Board. This changes the decision to appoint a hearing panel pursuant to EBR 41, as set forth in the Prehearing Conference Report and Order dated March 14, 2000.

ORDER

1. 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.

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

3. Earl and Pauline Richardson are granted party status pursuant to EBR 14(B)(l) and (B)(2) in regard to Criterion 8. Ruth Jones is granted party status pursuant to EBR 14(A)(5) in regard to Criterion 8.

4. The *Stowe* Club *Highlands* test applies to McDonald's Dash 5 Permit Amendment application.

5. The full Board will hear this case. The parties must file an original and ten collated copies of legal memoranda, exhibits which are 8 1/2 by 11 inches or smaller, and any other documents filed with the Board.

Dated at Montpelier, Vermont, this 3rd day of May, 2000.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair

John Drake
George Holland
W. William Martinez
Rebecca Nawrath
Alice Olenick
Nancy Waples*

*Board member Waples participated in deliberations in regard to the legal issues, but not factual issues.

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