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

RE: Otter Creek Development, LLC — Land Use Permit
Docket #803 — Application #1R0535-3-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns an appeal of a decision to extend the construction completion deadline on three previously approved but not constructed apartment buildings involving a total of 58 apartment units (Project). The Project is located in the City of Rutland, Vermont.

I. PROCEDURAL SUMMARY

On December 14, 2000, Otter Creek Development, LLC (Permittee) filed Land Use Permit Application #1R0535-3 with the District # 1 Environmental Commission (Commission) seeking to extend the construction completion deadline for the Project.

On December 10, 2001, the Commission issued Land Use Permit #1R0535-3 (Dash 3 Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Decision) granting the extension.

On January 9, 2002, Barry Beauchamp (Appellant) filed an appeal with the Environmental Board (Board) from the Dash 3 Permit and Decision alleging that the Commission erred in its conclusions with respect 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 Rule (EBR) 6 and 40.

On February 7, 2002, Board Chair Marcy Harding convened a prehearing conference and on February 8, 2002 she issued a Prehearing Conference Report and Order (PCRO).

On February 27, 2002 the parties submitted a settlement agreement.

Based on a thorough review of the record and the parties' Settlement Agreement, the hearing officer issued a proposed decision on April 3, 2002 which was sent to the parties. The parties were allowed to file written objections and request oral argument by April 18, 2002. No party filed written objections or requested oral argument.

On April 17, 2002, the Board deliberated concerning this matter. Following a thorough review of the proposed decision and the record, on the condition that no party files written objections or requests oral argument, the

Board declared the record complete and adjourned. The matter is now ready for a final decision.

II. ISSUE ON APPEAL

Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on aesthetics.

III. DISCUSSION OF SETTLEMENT AGREEMENTS AND THE HEARING OFFICER

Act 250 and the Board favor the non-adversarial resolution of issues by parties, *see* 10 V.S.A. §6085(e) and EBR 16(D). Public policy also "strongly favors settlement of disputed claims without litigation." *Dutch Hill Inn., Inc. v. Patten,* 131 Vt. 187, 192 (1973). However, the Board has the obligation to review any settlement reached between the parties. *Cersosimo Lumber Co.,* Land Use Permit #2W0957-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Nov. 29, 1995). This review must determine whether an affirmative finding can be made under all criteria on appeal, and the Board need not accept a settlement agreement if the necessary affirmative findings cannot be made, *Faucett Builders, Inc.,* Land Use Permit #4C0763-2-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Aug. 6, 1996), or if the agreement contravenes any of the Act 250 criteria. *Pico Peak Ski Resort, Inc.,* Land Use Permit #1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Nov. 22, 1995). *Accord, Andrew and Peggy Rogstad*, Land Use Permit #2S1011-EB, Findings of Fact, Conclusions of Law, and Order at 4 (December 12, 1996).

The parties originally requested that the matter be heard by a three member panel of the Board. In the PCRO, the Chair granted the parties' request. In light of the parties' Settlement Agreement, the Chair decided this matter as a hearing officer and issued a proposed decision for the Board's review.

IV. OFFICIAL NOTICE

Under 3 V.S.A. §810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, and with limited exceptions, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases before administrative bodies. *Id*., §810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is … capable of accurate and ready determination by resort to sources whose

accuracy cannot reasonably be questioned." V.R.E. 201(b); *see In re Handy*, 144 Vt. 610, 612 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. §810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. *See* V.R.E. 201(e). Findings of Fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

Because the settlement documents that have been filed by the parties to the Board do not include some pertinent facts, the Board will take official notice, pursuant to 3 V.S.A. §810(4), of the Decision and the Dash 3 Permit issued by the Commission on December 10, 2001. Official notice is expressly *not* taken of any evidence, testimony or exhibits which underlie the Decision. *Cf., In re White,* 12 Vt. L.W. 121, 124 (June 1, 2001) (Board took official notice of entire District Commission file, including all exhibits).

V. FINDINGS OF FACT

Generally, a settlement agreement will present the Board with proposed findings of fact and conclusions of law on which the Board can base its Findings of Fact and make positive Conclusions of Law on the Criteria. *See, Cersosimo Lumber Co., supra; Faucett Builders, Inc., supra; Andrew and Peggy Rogstad, supra.* The parties' Settlement Agreement did not contain proposed findings of fact or conclusions of law.[1] Therefore, as discussed above, the Board took official notice of the Commission's Decision to supplement the parties' filings before the Board.

1. The Project was first approved in the 1980's. The Project consists of

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[1] Except as modified herein, the Board incorporates the parties' Settlement Agreement into the Findings of Fact, Conclusions of Law, and Order in furtherance of the provisions of Act 250, the Board Rules, and Vermont case law, all of which favor negotiated non-adversarial resolution to disputed matters. Had it held an evidentiary hearing and heard argument from the parties as to the application of the evidence to the Findings of Fact and the application of the Findings of Fact to the Conclusions of Law, however, the Board may well have reached conclusions in this case different from the resolution proposed by the parties. Thus, any precedential value of this decision is qualified by the fact that it incorporates and is based upon the parties' Settlement Agreement.

three previously approved but not constructed apartment buildings involving a total of 58 apartment units. Two apartment buildings have already been constructed at the site.

2. In the intervening years between first approval of the original permit application and the present application, a new residential development called Stone Ridge (Stone Ridge) with about ten single family residences was developed on the northern boundary of the Project site.

3. Granger Enterprises, Ltd, (Granger) the developer of Stone Ridge, was a party to the permit proceedings that determined the setbacks for each building. The setback for the buildings was altered as a result of concerns raised by Granger.

4. Appellant resides at 50 Stone Ridge Drive in Rutland. The nearest building of the Project would be 120 feet from the Appellant's property line.

5. The Project would have substantially the same exterior paint and roof lines as the existing apartment buildings. The Permittee proposes to construct the Project's three buildings in the exact location as originally permitted.

6. Before the Commission for the Dash 3 Permit, the Permittee proposed a final landscaping plan which included the planting of cedar trees and other screening vegetation to buffer the Appellant and other Stone Ridge residents from potential adverse aesthetic impacts. The Commission required that the cedar trees be a minimum of six feet tall at the time of planting.

7. While the Dash 3 Permit was pending before the Board, the Permittee and the Appellant negotiated a supplemental landscape plan which includes the following measures which the Permittee has agreed will become part of the Project.

(i) The Permittee will plant 16 trees (either Norway Spruce or White Pine, depending on availability) along the north line of the Project site commencing at a point approximately 30 feet from the southeasterly corner of the lot currently owned by the Appellant and continuing approximately 100 feet in a westerly direction. The trees, including all Cedar Trees that the Permittee is required to plant within said 100' zone pursuant to Condition 3 of the Dash 3 Permit, shall be purchased at a height of between 10 and 12 feet and shall be planted 6 feet on center,

according to generally accepted landscaping practices, at the same time that the Permittee undertakes other landscaping obligations imposed in Land Use Permit #1R0535-2 (Dash 2 Permit) and the Dash 3 Permit. The trees described in this condition shall be planted closer to the stone wall (that sits on the common boundary of the Permittee's property and adjacent property owners, including the Appellant) than the Cedar Trees that the Permittee is required to plant pursuant to Condition 3 of the Dash 3 Permit. The Permittee shall replace any trees that die during the life of the Permit. *Provided, however,* that this condition shall be waived in its entirety if the Appellant or his immediate family does not reside at the adjacent residence at the time that the Permittee undertakes the other landscaping obligations imposed in the Dash 2 and Dash 3 Permits.

(ii) The Permittee shall plant up to 12 trees (either Norway Spruce or White Pine, depending on availability) on lands owned by the Appellant at a point to be determined by the Appellant. The trees shall be purchased at a height of approximately 6 feet and shall be planted, according to generally accepted landscaping practices, at the same time that the Permittee undertakes other landscaping obligations imposed in the Dash 2 and Dash 3 Permits. Once planted, the Appellant shall be responsible for maintaining such trees. *Provided, however,* that this condition shall be waived if the Appellant or his immediate family does not reside at the adjacent residence at the time that the Permittee undertakes other landscaping obligations imposed in the Dash 2 and Dash 3 Permits.

(iii) The cost to Permittee for compliance with the preceding two conditions shall not exceed $8,000.00. In the event of a shortfall, then the number of trees to be planted on the Appellant's property shall be decreased as appropriate.

VI. CONCLUSIONS OF LAW

The Appellant appealed the Dash 3 Permit arguing that the Project's building nearest Stone Ridge be eliminated or reduced in size to increase the setback to the northern boundary. The nearest building is 120 feet from Appellant's home. The Appellant argues that the Project will be visible from his residence and diminish his privacy. The Board has interpreted the Appellant's concerns as raising aesthetic issues under Criterion 8.

Under 10 V.S.A. §6086(a)(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. The burden of proof under Criterion 8 is on the Appellant, 10 V.S.A. §6088(b), but the Permittee 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.

The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. *Re: Quechee Lakes Corp*., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17 - 20 (Nov. 4, 1985).

First, it determines whether the proposed project will have an adverse effect under Criterion 8. The 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. *Re: James E. Hand 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 25 (Aug. 19, 1996), *citing, Quechee Lakes, supra*, at 18.

Second, if the Board concludes that the Project has an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is "undue." *See, Quechee Lakes, supra*, at 19-20. *And see, Black River, supra*, at 19-20; *Hand, supra*, at 25-29.

To determine whether the Project will fit the context of the area, the Board first has to determine what the context is. The Project is planned for a large site which was originally approved for the construction of five apartment buildings. Two of the apartment buildings have already been constructed. Ten single family residences abut the northern boundary of the Project.

As a result of the parties Settlement Agreement which supplements landscaping requirements in the Dash 2 and Dash 3 Permits, the Project includes a vegetative buffer which will significantly screen the view of the Project from the Appellant's property. In light of the terms of the parties' settlement which are directly incorporated into the findings of fact in this decision, the Board

concludes that the Project will not have an adverse effect on aesthetics.

The Board notes that the Project's buildings will use substantially the same paint color and roof lines as the two existing buildings. The Board also notes that the setback of the Projects' buildings was altered by the Commission in the Dash 2 Permit as a result of concerns raised by Granger. The Board concludes that these setbacks are adequate, especially as a result of the enhanced vegetative screening. In light of the above, the Board does not need to reach the second part of the test. The Project complies with Criterion 8.

VII. ORDER

1. The Board takes official notice of the Findings of Fact, Conclusions of Law, and Order and Land Use Permit #1R0535-3 issued by the Commission on December 10, 2001.

2. Land Use Permit Amendment #1R0535-3-EB is issued.

3. Jurisdiction is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont this 19th day of April, 2002.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
Marcy Harding, Chair
John Drake
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