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

Re: Nehemiah Associates, Inc.
Application #1R0672-1-EB (Remand)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a case which was remanded by the Vermont Supreme Court to the Environmental Board. The case concerns the Board's denial of land use permit amendment application #1R0672- 1 ("Application") filed by Nehemiah Associates, Inc ("NAI"). The Board's denial of the Application came after a de novo appeal by NAI of the denial of the Application by the District #1 Environmental Commission ("Commission").

'The Application seeks approval for the subdivision of a 3.38 acre parcel of land into three lots ("Project"). As explained below, the Board denies the Application based on a balancing of the relevant policies.

I. BACKGROUND

A. Pre-Remand

On October 14, 1993, the Commission denied the Application. On November 5, 1993, NAI filed a motion to alter and a motion for reconsideration with the Commission. On November 15, 1993, 'the Commission denied NAI's motion to alter and motion for reconsideration. On December 14, 1993, NAI filed an appeal with the Board.

On March 9 and April 15, 1994, the Board issued Memoranda of Decision relative to the preliminary issues of party status and the use of a hearing panel of the Board under Environmental Board Rule ("EBR") 41. The Board granted Dorothy Perkins and Rodney Drown party status pursuant to EBR 14(A)(3), Douglas Baker party status pursuant to EBR l+(B)(l)(a), and ordered that a hearing panel of the Board would convene a hearing.

On August 3, 1994, a hearing panel of the Board consisting of then Chair Arthur Gibb, and Board members Bill Martin& and Sam Lloyd, convened a hearing 'in this matter pursuant to EBR 4 l with the following parties participating:

NAI by James P.W. Goss, Esq.
Dorothy Perkins by Robert Woolmington, Esq.
Rodney Drown by Richard Pearson, Esq.
Douglas Baker, pro se

After hearing testimony and taking a site visit, the hearing panel recessed this appeal. On August 26, 1994, NAI, Dorothy Perkins, and Rodney Drown each submitted

proposed findings of fact and conclusions of law. The hearing panel deliberated on October 5, 1994.

On October 19, 1994, the hearing panel issued a proposed decision to the parties.

On December 7, 1994, the Board convened oral argument relative to the proposed decision.

The Board deliberated on December 7, 1994, and on June 1, 1995. On June 1, 1995, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the, record complete and adjourned the hearing.

On June 8, 1995, the Board issued Re: Nehemiah Associates, Inc., Application #1R0672-1-EB, Findings of Fact, Conclusions of Law, and Order (June- 8, 1995) which denied the Application based on the doctrine of collateral estoppel.

On July 6, 1995, NAI filed a motion to alter the Board's June 8, 1995 decision. On October 3, 1995, the Board issued Re: Nehemiah Associates, Inc., Application #1R0672-1-EB, Memorandum of Decision (Oct. 3, 1995) which denied NAI's motion.

On October 29, 1995, NAI appealed to the Vermont Supreme Court.,

B. Post-Remand

On December 6, 1996, the Vermont Supreme Court issued In re Nehemiah Associates. No. 95-56 1 (Vt. Dec. 6, 1996), which reversed the Board's June 8, 1995 decision, and "remanded for the Board to balance the policy considerations raised by the parties to determine whether to grant the permit amendment*

On December 11, 1996, NAI filed a letter with the Board which requested that there be a 'direct issuance of a permit based on the prior written record or through brief written submissions with the possibility of'very short oral argument."

On December 11, 1996, a memorandum was issued to the parties which provided, in part, that no action would be taken until the Court ruled on any motion for reargument.

On December 28, 1996, the Court denied the State's motion for reargument.

On January 10, 1997, a memorandum was issued to the parties which, in part, noticed a status conference for January 27, 1997. In part, the memorandum stated:

> At the status conference, all parties should be prepared to discuss what further proceedings, if any, are necessary to comply with the court's remand order. As part of this discussion, parties should be prepared to identify issues in controversy, and-proposed witnesses and exhibits to be presented, if any.

On January 23, 1997, NAI filed a memorandum regarding disposition on remand which, in *part,* opposed *any* further proceedings or evidence beforethe Board, and requested issuance of a permit amendment.

On January 27, 1997, a status conference was convened at the Board's office with the following persons attending:

Nehemiah Associates, Inc. by James P.W. Goss, Esq.
Dorothy Perkins by Robert Woolmington, Esq.

On February 11, 1997, Ms. Perkins filed a memorandum in reply to NAI's memorandum regarding disposition on remand.

On February 18, 1997, NAI filed a counter-reply to Ms. Perkins' February 11, 1997 memorandum.

On February 26, 1997, Ms. Perkins filed a letter in response to NAI's February 18, 1997 counter-reply.,

On February 26, 1997, the Board deliberated on whether to convene an evident&y hearing in this matter.

On February 27, 1997, the Board issued a memorandum informing the parties that an evidentiary hearing would not be convened as part of the Board's compliance with the Court's reversal and remand order.

On March 26 and April 1, -1997, the Board deliberated regarding this appeal. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUES

A. Court's Remand Order

The issue on remand& controlled by the Court's decision. The Court states at page three:

> The open lands paragraph is a condition of the original permit to which Nehemiah seeks an amendment. Because the Board denied the amendment solely on the ground that Nehemiah failed to include the open land paragraph in the deeds, we reverse.
>
> Reversed and remanded for the Board to balance the policy considerations raised by the parties to determine whether to grant the permit amendment.

(Emphasis in the original.)

The Board denies NAI's January 23, 1997 request that the Board only consider the Project under Criterion 8 and issue a permit. Rather, the Court's remand order requires the Board to engage in a balancing of policy considerations.

Accordingly, the first issue is whether, based on the balancing of the policy con&rations raised by the parties, the Application should be granted a permit amendment. Only if the balancing of policy considerations is in NAI's favor will the Board reach the merits of the Application under Criterion 8.

B. 10 V.S.A. § 6086(a)(8)

The Board's June 8, 1995 decision denied the Application based on collateral estoppel without reaching the merits of 10 V.S.A. § 6086(a)(8). Accordingly, the second issue is whether, pursuant to 10 V.S.A. § 6086(a)(S), the Project will have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

III. FINDINGS OF FACT

1. NAI is a Vermont corporation formed in 1988. Mr. Robert Zins is the president of NAI.

2 . In 1989; NAI purchased 12 *acres* of land on the west side of Vermont Route 3 in the Town of Pittsford ('Property"). Due to the number of lots that NAI had previously subdivided within the jurisdictional area of the Commission, NAI applied for an Act 250 permit for the subdivision of the Property.

3. On December 29, 1989, the Commission issued Land Use Permit #1R0672 (" 1989 Permit"), and supporting Findings of Fact, Conclusions of Law, and Order (" 1989 Findings"). The 1989 Permit authorized NAI to subdivide the Property into 1 1 lots: 10 residential lots; numbered Lot #1 through Lot #10, each varying in size between .69 and .8 acres, and a single 3.38 acre lot ("Subdivision").

4. The 1989 Findings under Criterion 8 state:

> Criterion cenic Beauty, Historic Sites, and Natural Areas. The Commission finds that the [Subdivision] 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:
>
> 1) The [Property] presently consists of approximately six acres of open field and six acres of mixed hardwood and conifer woods.
>
> 2) 'The [Subdivision] roadway will cross the open field and enter the wooded area Homes on lots #1, 2, and 10 will be located in the open *field area,* while remaining homes will be located in the wooded area.
>
> 3) The front 3.38 acre referenced below under criterion 9B, will provide a visual buffer for travellers on Route 3, by helping to maintain the rural character of the area.
>
> 4) The [Subdivision] *has* a similar density to the existing residential use adjacent to the south of the [Property].
>
> 5) Adjacent residential development to the north is also a similar density.
>
> 6) [NAI] proposes no signage, landscaping, or street lighting.
>
> 7) Due to the size of the lots, extensive tree cutting will be necessary for placement of driveways, houses, lawns, and septic

systems. To ensure the rural field/wooded character of the area is not replaced by a clearcut dotted with houses, the Commission will require that:

> Lots #3, 4, 5, 6, 7, 8, and 9 shah not be clear cut of their existing trees, and furthermore, shall retain a majority of their existing mature trees outside of areas where cutting is necessary for driveway, house, septic system, and lawn between the house and [Subdivision] roadway. The intent of this condition is to retain essentially a wooded appearance from Route 3 as now exists.

8) No designated historic sites are associated with the [Property].

9) Although the [Property] contains no wetlands, an adjacent two acre wetland to the north and northwest contains wooded and open areas with significant wildlife diversity addressed below in criterion 8A.

5. Under Criterion 9(B) of the 1989 Findings, the Commission found, in part:

> 2) Of the approximate& six acres of prime agricultural soils, the applicant proposes to preserve undevelopedthe 3.38 acres closest to Route 3.
>
> * * *
>
> 4) The applicant has proposed covenants to maintain this 3.38 acres as open land and furthermore, has proposed "right to farm" covenants to protect the fanning viability of this parcel in the future. The Commission accepts these as minimizing the reduction of the agricultural potential of these lands. The Commission will require same by condition:
>
> > The permittee shall, by deed covenant to all lots, include the following restriction:
> >
> > By acceptance of this deed, Grantees, their

> heirs and assigns, hereby acknowledge that other lands of Grantor, consisting of 3.38 acres immediately adjoining Route 3 as shown on the above described site plan, are retained and made available to third parties for agricultural and related farming purposes. By acceptance of a deed to the parcel herein conveyed, Grantees, for themselves, their heirs and assigns, hereby knowingly, voluntarily and irrevocably waive any cause or causes of action against Grantor or any person utilizing the said retained lands for'agricultural purposes, arising out of or pertaining to odors, runoff, or noise associated with any agricultural operation on said retained lands.
>
> Furthermore, the permittee or subsequent landowners association shall maintain the 3.38 acre agricultural reserve lands as open, cleared, uncluttered, and unencumbered land.

6. The 1989 Findings state, in part, as follows at pages 1 l-l 3:

> The District Environmental Commission will also rely upon the following conditions to assure that the [Subdivision] will continue to meet the 10 criteria of Act 250 as found above for the duration of the permit:
>
> > This [Subdivision] shall be completed in accordance with the Findings of Fact, Conclusions of Law, and Order #1R0672, and in accordance with plans and exhibits stamped "Approved" and on file with the District Environmental Commission. In the event of any conflict, the terms and conditions of this permit and the facts relied upon in the Findings of Fact and Conclusions of Law shall supersede the approved plans and exhibits.

* * *

By the acceptance of the conditions of this permit without appeal, the permittee confirms for itself and a&assigns and successors in interest that the conditions of this permit shah run with the land and the land uses herein permitted, and will be binding upon and enforceable against the permittee and all assigns and successors in interest.

* * *

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact made pursuant to 10 V.S.A., Section 6086(a), it is theconclusion of the District Environmental Commission that the [Subdivision] described herein, ifconditioned subsequent to, 10 V.S.A., Section 6086(c) and as set forth in the above findings, will be in conformance with the criteria of 10 V.S.A., Section 6086(a)(1-10) and will not cause or result in any detriment to public health, safety, or general welfare.

7. Condition #9 of the 1989 Permit provides:

The permittee shall, by deed covenant to all lots, include the following restriction:

By acceptance of this deed, Grantees, their heirs and assigns, hereby acknowledge that other lands of Grantor, consisting of 3.38 acres immediately adjoining Route 3 as shown on the above described site plan, are retained and made, available to third parties for agricultural and related fanning purposes., By acceptance of a deed to the parcel herein conveyed, Grantees, for themselves, their heirs and assigns, hereby knowingly, voluntarily and irrevocably waive any cause or causes of action against Grantor or any person utilizing the said retained lands for agricultural purposes, arising out of or pertaining to odors, run-off, or noise associated with any agricultural operation on said retained lands.

> Furthermore, the permittee or subsequent landowners association shall maintain the 3.38 acre agricultural reserve lands as open, cleared, uncluttered, and unencumbered land.

8. Condition #9 of the 1989 Permit was issued pursuant to the 1989 Findings under Criteria 8 and 9(B).

9. In In re Nehemiah Associates, Inc., No. 95-561 (Vt. Dec. 6, 1996), the Court ruled as a matter of law that the first paragraph of condition X9 was a deed covenant, but that the second paragraph of condition #9 was simply a condition of the 1989 Permit.

10. Condition #20 of the 1989 Permit provides:

> Construction shall not commence until the permittee has read this permit and returned a signed copy of the permit to the Commission.

11. Mr. Zins read the 1989 Permit and signed page four of the 1989 Permit as president of NAI. NAI did not request a motion to alter of the 1989 Permit before the Commission, and nor did it appeal the 1989 Permit to the Board.

12. Condition #21 of the 1989 Permit provides:

> Each prospective purchaser of any lot shall be shown a copy of the approved plot plan, the Subdivision Permit, the Land Use Permit, and the Findings of Fact and Conclusions of Law before any written contract of sale is entered into.

13. NAI conveyed Lot #1 of the Subdivision to Ms. Dorothy Perkins. NAI showed Ms. Perkins a copy of the 1989 Permit prior to Ms. Perkins' purchase of Lot #1, and provided her with a proposed warranty deed.

14. As of May 1994, NAI had sold nine of the ten residential lots created pursuant to the 1989 Permit.

15. Mr. Zins did not believe that the Commission had the authority to impose permit conditions which NAI did not propose.

16. Mr. Zins believed that NAI was only bound by what it had submitted to the

Commission in its letter dated August 4, 1989. In this letter, NAI only proposed a "Right to Farm" covenant.

17. NAI's August 4, 1989 letter was in response to the Commission's hearing recess memo of June 27, 1989. The recess memo provided, in part:

> The District Environmental Commission recessed the hearing for application #1R0672 on June 27, 1989, pending the submittal by the applicant of the following information:
>
> 4) "Right to farm" covenants for reserve land (3.38 acre common land);

18. The Commission accepted the proposed covenant in NAI's August 4, 1989 letter and incorporated it into the 1989 Permit as the first paragraph of Condition #9. In addition to the first paragraph, the Commission added what is now the second paragraph of Condition #9.

19. On November 10, 1992 NAI filed the Application for the Project. The 3.38 acres which is the subject of the Application is the same 3.38 acres created pursuant to the 1989 Permit, and is the same 3.38 acres which Was set aside under Condition #9 of the 1989 Permit to mitigate impacts which otherwise might result under Criteria 8 and 9(B).

20. As part of the Application, NAI has proposed to participate in an agricultural soils mitigation program sponsored by the Vermont Department of Agriculture ("Department").

21. Under the program, Act 250 applicants are allowed to mitigate primary agricultural soils' impacts of their projects by paying a fee to the Department calculated according to the acreage of primary agricultural soils impacted. These fees are then deposited in a fund used to preserve agricultural lands throughout Vermont.

22. The agricultural soils mitigation program did not exist at the time NAI applied for and obtained the 1989 Permit.

23. In connection with its Application, NAI has committed to pay the required program fee necessary to mitigate the loss of any primary agricultural soils located on the 3.38 acres.

24. Based upon NAI's participation in this program, the Commission made an affirmative finding under Criterion 9(B) with respect to the Application.

25,. NAI's participation in the agricultural soils mitigation program has no bearing upon the aesthetic effects which the Commission determined would be mitigated by the retention of the 3.38 acres as a visual buffer, and as a means for maintaining the rural character of the area.

26. The lots proposed by the Application adjoin Route 3. The area surrounding the 3.38 acres is characterized by residential development of comparable density and type to that proposed in the Project..

27. For example, immediately to the north of the Subdivision is an unrelated S-lot subdivision, and there has been additional residential development immediately to the west and south. If the Project were constructed, then the three houses to be built thereon would be surrounded by at least 23 other single-family residences.

28. Residential construction and subdivision has occurred in the area surrounding the Subdivision since the Commission issued the' 1989 Permit. NAI does not own the land where this residential construction and subdivision activity has occurred.

29. The Pittsford Town Plan identifies the area within which the Subdivision is located as a location for residential growth in Pittsford. The Town Plan provides that approved uses in this area include high density residential uses.

30. When NAI applied for the 1989 Permit, it contemplated the possible development of the 3.38 acre parcel at some future time.

31. The principal agent of NAI, Mr. Zins, told each lot purchaser that NAI was forbidden to build homes on the 3.38 acres because there were primary agricultural restrictions imposed upon the Subdivision as part of the 1989 Permit and, therefore, NAI could not build on the 3.38 acres.

32. Mr. Zii told lot purchasers at the time they purchased their lots that there were no plans to subdivide the 3.38 acres, despite Mr. Zins' belief that such development was not precluded in the future. Mr. Zins regarded future development as a "reserved right" which would be disclosed to any person who examined the application for the 1989 Permit.

33. Ms. Perkins purchased her lot from NAI, in part, because of the spacious feeling

from the front of her house created by the 3.38 acre lot. Because of the 3.38 acre lot, the view from her house is of an open field to the mountains which creates a very rural look, in keeping with the valley surroundings.

34. Ms. Perkins relied on the open lands paragraph of condition #9 of the 1989 Permit as part of her purchase of lot #1 from NAI. Ms. Perkins' reliance on condition #9 was for the preservation of open space, and the rural setting of the Subdivision and surrounding valley.

35. Ms. Perkins' reliance on condition #9 as it pertains to the 3.38 acre lot also included its functioning as a setback from Route 3 which provides distance from the rush and hurry of the highway.

36. Ms. Perkins' reliance on condition #9 also included the pleasing aesthetic effect created by the combination of open space required by condition #9, the preservation of trees required by condition #7, and the new plantings required by condition #8. Based on these conditions, Ms. Perkins bought her lot because the plan of development required by these permit conditions assured that the aesthetic qualities of open space and &al setting would be preserved..

37. Because of the conditions in the 1989 Permit, Ms. Perkins invested her money in her lot. Ms. Perkins relied on the 1989 Permit as setting rules for the Subdivision. The 1989 Permit conditions about open space, agricultural use, and trees defined the aesthetic qualities of the Subdivision. Ms. Perkins valued these qualities, and relied on the 1989 Permit and its conditions as essential tools by which to preserve the rural quality of life.

38. If the Project were built, then the separation from the road would be lost. This would result in a loss of privacy and a buffer for noise. The views of the mountains and valley would be significantly altered. The density of the Subdivision in relationship to the road would be changed. The Subdivision would appear less rural and more suburban by bringing a house right up to Route 3.

39. Mr. Douglas Baker and Mrs. Tamie Baker own lot #9 in the Subdivision. Mr. and Mrs. Baker purchased their lot based on their understanding that the 3.3 8 acres would be left undeveloped as a natural boundary from Route 3. If the Project is constructed, Mr. and Mrs. Baker will suffer a loss of the natural privacy boundary and rural character created by the 3.38 acres. NAI represented to Mr. and Mrs. Baker that there were no future plans to develop the 3.38 acres.

40. Mr. James Holden owns lot #5 in the Subdivision. It was Mr. Holden's understanding at the time of his purchase of his home that the 3.38 acres would remain undeveloped. If the Project is constructed, then Mr. Holden would suffer the loss of the visual buffer along Route 3 which is created by the 3.38 acres as open, undeveloped land, as well as the Subdivision losing its separation or setback from Route 3.

41. There is no evidence of any changes in technology which would be relevant in this appeal.

IV. CONCLUSIONS OF LAW

A . Open Land Paragraph as Permit Condition

The 1989 Permit authorized NAI to subdivide twelve acres into 10 residential lots, and to retain a 3.38 acre lot. Condition #9 of the 1989 Permit provides:

> The permittee shall, by deed covenant to all lots, include the following restriction:
>
> By acceptance of this deed, Grantees, their heirs and assigns, hereby acknowledge that other lands of Grantor, consisting of 3.38 acres immediately adjoining Route 3 as shown on the above described site plan, are retained and made available to third parties for agricultural and related farming purposes. By acceptance of a deed to the parcel herein conveyed, Grantees, for themselves, their heirs and assigns, hereby knowingly, voluntarily and irrevocably waive any cause or causes of action against Grantor or any person utilizing the said retained lands for agricultural purposes, arising out of or pertaining to odors, runoff, or noise associated with any agricultural operation on said retained lands.
>
> Furthermore, the permittee or subsequent landowners association shall maintain the 3.38 acre agricultural reserve lands as open, cleared, uncluttered, and unencumbered land.

When NAI conveyed lots in the Subdivision, it included the first paragraph as a

covenant in the lot owners' deeds. NAI omitted the second "open land" paragraph from the lot owners' deeds.

In the Board's June 8, 1995 decision, the Board concluded that the open land paragraph was also required to be included in the lot owners' deeds as a covenant. Accordingly, when the Board balanced the policy considerations of flexibility and finality, it did so based on the conclusion that the open land paragraph was indeed required to be part of the deed covenant, and that NAI had failed to properly include it in the lot owners' deeds.

However, fundamental to the reversal of the Board's June 8, 1995 decision was the Court's conclusion that the open land paragraph was pot required to be part of the deed covenant. The Court held that the Board's construction of condition #9 was inconsistent with the language associated with deed covenants. The open land paragraph was not written as a covenant since it refers to NAI as the "permittee" not as "grantor." NAI had reasonably construed condition #9 to only require the first paragraph, that is, the agricultural nuisance covenant, in the deeds. Therefore, the Court concluded that NAI had complied with condition #9 of the 1989 Permit because NAI had included the agricultural nuisance covenant in the lot owners' deeds. In re Nehemiah Associates, Inc, No. 95-561, slip op. at 2 (Vt. Dec. 6, 1996).

The Court reversed the Board's June 8, 1995 decision because the Board's balancing of flexibility and finality was. based on the erroneous conclusion that the open land paragraph was also a required deed covenant, and that NAI had failed to comply with condition #9. However, the Court's decision does not eliminate the open land paragraph from the 1989 Permit. Rather, the Court concluded that the open land paragraph was a condition of the 1989 Permit to which NAI now seeks an amendment.

The Board's June 8, 1995 decision did not balance flexibility and finality based on the open land paragraph as a substantive requirement of condition #9 of the 1989 Permit. Accordingly, in this remand proceeding, the Board will once again balance the policies of flexibility and finality, but in so doing will consider the open laud paragraph consistent with the Court's conclusion that the open land paragraph was and is a substantive requirement of condition #9 of the 1989 Permit.

B. In re Stowe Club Highlands

The central issue in In re Stowe Club Highlands, No. 95-34 1 (Vt. Nov. 8, 1996) was the Board's analysis of the competing policies of flexibility and finality. In Stowe Club, the Court affirmed the Board's denial of a permit amendment application.

In this case, as in Stowe Club, the Board denied 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). While the Court in Stowe Club 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 pen-nit amendment." Id at 5. The Court continued:

> The Board's analysis of these issues was appropriate and, in the context of this case sufficient to support the denial of the permit amendment. The Board framed its discussion as weighing the competing values of flexibility and finality in the permitting process. If existing permit conditions are no ionger 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 at 6.

Ultimately, the Courtconcluded that the Board was "justified in denying" the permit amendment application based upon the balancing of the policies of finality and flexibility. Id at 9.

In this remand proceeding, the Board has been ordered to balance the policy considerations raised by the parties to determine whether to grant the permit amendment. The Board will do so consistent with the analysis approved by the Court in Stowe Club.

C. Flexibility

i. Changes in factual or regulatory circumstances beyond the control of a permittee

[1] As the Court's Nehemiah decision states, the Board has already found both regulatory and factual changes in circumstances since 1989 beyond the control of NAI. NAI has "committed to pay the preservation fund fee necessary to mitigate the loss of

3.38 acres of primary agricultural soils. Moreover, the surrounding area has been developed for residential use since the [issuance of the 1989 Permit]." In re Nehemiah Associates. No. 95-561, slip op. at 2 (Vt. Dec. 6, 1996).[1]

The preservation fund fee, however, is only relevant to Criterion 9(B). The 3.3 8 acres was set aside under Condition #9 of the 1989 Permit to mitigate impacts which otherwise might result under both Criteria 8 and 9(B). NAI's participation in the agricultural soils mitigation program has no, bearing on the requirement that the 3.38 acres be kept as open, cleared, uncluttered, and unencumbered land as a condition under Criterion 8.

While there has been development beyond NAI's control, this development has occurred on land which NAI does not own. The Board concludes that it is hardly unusual that land not owned by NAI will be developed in a manner which is beyond NAI's control.

ii. Changes in the construction or operation of the permit-tee's project, not reasonably foreseeable at the time the permit was issued

[2] The Board's June 8, 1995 decision did not consider whether there were changes in the construction or operation of the Subdivision which were not reasonably foreseeable at the time the Commission issued the 1989 Permit. The foreseeability of changes to a project is relevant to whether a permit amendment application should be granted a permit. In re Stowe Club Highlands, No. 95-341, slip op. at 7 (Vt. Nov. 8, 1996). y , the Board will consider whether the Project was reasonably foreseeable at the time the Commission issued the 1989 Permit.

When NAI applied for the 1989 Permit, it contemplated the possible development of the 3.38 acre parcel at some future time.. Mr. Zins regarded future development as a

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'The Board's June 8, 1995 decision stated at page 13-14: "Withregard to Criterion 8, we conclude that there has been a change in the factual circumstances beyond the control of the Appellant. Residential construction and subdivision activity has occurred in the area surrounding the 1989 Project since the District Commission issued the 1989 Permit. Further, we conclude that since the context of the area surrounding the 1989 Project continues to change from a rural agricultural area to a residential area, the Application is a direct outgrowth of changes in factual circumstances beyond the wntrol of the Appellant."

"reserved right" which would be disclosed to any person who examined the application for the 1989 Permit.

The Board concludes that the Project was reasonably foreseeable at the time the Commission issued the 1989 Permit.

iii. changes in technology

[3] There is no evidence of any changes in technology which would be relevant in this appeal.

D. Finality

[4] The Board's June 8, 1995 decision considered the policy of finality relative to the conclusion that the open land paragraph was required to be included in all lot owners' deeds as a covenant.' Since this was erroneous, the Board will again consider the policy of finality, but this time will do so by considering the open land paragraph as a substantive requirement of condition #9 of the 1989 Permit consistent with the Court's decision.

In considering the policy of finality, the Board is guided by the Court's Stowe Club decision. The Court stated:

> [T]he Board considered the need for finality in the permitting process. The Board recognized that parties and other interested persons rely on permit conditions designed to mitigate the impact of proposed developments. In this case, the Board found that purchasers of adjacent residential lots relied upon the 'permit condition restricting development of the Meadow Lot when they chose to live in the neighborhood. The Board also noted that the District Commission relied upon the representations of [the original developer], using the permit condition as one aspect of a mitigation plan for the over all development.
>
> [The Appellant] maintains that the Board erred by considering any reliance by adjacent landowners, because the permit condition is not a real covenant-and cannot be enforced by the other landowners. This hypertechnical argument obscures the basic concern: whether allowing the permit amendment is appropriate under the circumstances. The

standing of the adjoining landowners to enforce the existing permit is not relevant to whether the Board should grant the permit amendment.

Id at 7-8.

In considering the policy of finality, the Board must determine whether the lot owners, or the Commission, reasonably relied upon the substantive requirement of condition #9 of the 1989 Permit that "the permittee or subsequent landowners association shall maintain the 3.38 acre agricultural reserve lands as open, cleared, uncluttered, and unencumbered land" as a condition required under Criterion 8.

1. lot owners

[5] Ms. Perkins purchased her lot from NAI, in part, because of the spacious feeling from the front of her house created by the 3.38 acre lot. Because of the 3.3 8 acre lot, the view from her house is of an open field to the mountains which creates a very rural look, in keeping with the valley surroundings. Ms. Perkins relied on the open lands paragraph of condition #9 of the 1989 Permit as part of her purchase from NAI.

Ms. Perkins' reliance on condition #9 was for the preservation of open space, and the rural setting of the Project and surrounding valley. Her reliance also included the 3.38 acre lot functioning as a setback from Route 3 thereby providing distance from the rush and hurry of the highway.

Ms. Perkins' reliance on condition #9 also included the pleasing aesthetic effect created by the combination of open space required by condition #9, the preservation of trees required by condition #7 of the 1989 Permit, and the new plantings required by condition #8 of the 1989 Permit. These conditions were all made part of the 1989 Permit pursuant to the Commission's findings of fact under Criterion 8.. Because of these conditions, Ms. Perkins bought her lot because the plan of development, incorporated into the 1989 Permit, assured that the aesthetic qualities of open space and rural setting would be preserved.

Ms. Perkins valued these qualities, and relied on the 1989 Permit and its conditions as essential tools by which to preserve the rural quality of life. If the Project were built, then the separation from the road would be lost This would result in a loss of privacy and a buffer for noise. The views of the mountains and valley would be significantly altered, The density of the Subdivision in relationship to the road would be changed. The Subdivision would appear less rural and more suburban by bringing a house right up to Route 3.

Mr. Douglas Baker and Mrs. Tamie Baker own lot #9 in the Subdivision. Mr. and Mrs. Baker purchased their lot based on their understanding that the 3.38 acres would be left undeveloped as a natural boundary from Route 3. If the Project is constructed, Mr. and Mrs. Baker will suffer a loss of the natural privacy boundary and rural character created by the 3.38 acres. NAI represented to Mr. and Mrs. Baker that there were no future plans to develop the 3.38 acres:

Mr. James Holden owns lot #5 in the Subdivision. It was Mr. Holden's understanding at the time of purchase of his home that the 3.3 8 acres would remain mdeveloped. If the Project is constructed, then Mr. Holden would suffer the loss of the visual buffer along Route 3 which is created by the 3.38 acres as open, undeveloped land, as well as the Subdivision losing its separation or setback from Route 3.

Mr. Zins read the 1989 Permit and signed page four of the 1989 Permit as president of NAI. NAI did not request a motion to alter of the 1989 Permit before the Commission, nor did it appeal the 1989 Permit-to the Board. Therefore, as the 1989 Findings&ate, by the acceptance of the conditions of the 1989 Permit without appeal, NAI confirmed for itself and all assigns and successors in interest that the conditions of the 1989 Permit run with the land, and are binding upon and enforceable against NAI and its assigns and successors in interest. This includes the substantive requirement of condition #9 of the 1989 Permit that "the permittee or subsequent landowners association shall maintain the 3.38 acre agricultural reserve'lands as open, cleared, uncluttered, and unencumbered land" as a-condition under Criterion 8.

NAI's contention that it reserved its right to develop the 3.38 acres, and that this reservation was apparent from the application for the 1989 Permit, 'does -not defeat the lot owners' reasonable reliance on the 1989 Permit and the conditions contained therein. Since NAI did not appeal the 1989 Permit, the lot owners reasonably relied on the 1989 Permit as the final, controlling regulatory permit. See In re Taft Corners Associates, Inc., 160 Vt. 583,593 (1993)(a permit is a final decision unless appealed within thirty days of issuance).

Under the 1989 Permit, development of the 3.38 acres was conditional under both criteria 8 and 9(B) based on the 1989 Findings under criteria 8 and 9(B). While Mr. Zins may not have understood that deveiopment of the 3.38 acres was conditional under Criterion 8, he told each lot purchaser that NAI could not build on the 3.3 8 acres. Mr. Zins' erroneous understanding of the 1989 Permit can not defeat the lot purchasers' reasonable reliance on the 1989 Permit. Rather, it reinforces that the lot purchasers, who all were shown a copy of the 1989 Permit prior to their purchase, reasonably relied on the conditions of the 1989 Permit in their lot purchases.

The Board concludes that Ms. Perkins, Mr. and Mrs. Baker, and Mr. Holden all reasonably relied on the substantive requirement of condition #9 of the 1989 Permit that "the permittee or subsequent landowners association shall maintain the 3.3 8 acre agricultural reserve lands as open, cleared, uncluttered, and unencumbered land" as a condition under Criterion 8. Moreover, the Board concludes that their reasonable reliance on me 1989 Permit was reinforced by Mr. Zins' representation to them that NAI could not build on the 3.38 acres.

ii. Commission

[6] 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, Application #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order at 10 (June 20, 1995), aff'd, In re Stowe Club Highlands, No. 95-341 (Vt. Nov. 8, 1996). Ultimately, permit conditions must be reasonable. In re Denio, i58 Vt. 230,240 (1992).

In addition to the lot owners, the Commission relied upon the substantive requirement of condition #9 of the 1989 Permit that "the permittee or subsequent landowners association shall maintain the 3.38 acre agricultural reserve lands as open, cleared, uncluttered, and unencumbered land" to make its affirmative finding under Criterion 8. The Commission specifically stated under its conclusions of law that, "[b]ased upon the foregoing Findings of Fact made pursuant to 10 V.S.A., Section 6086(a), it is the conclusion of the District Environmental Commission that the project described herein, **if conditioned subsequent to 10 V.S.A., Section 6086(c) and as set forth in the above findings, will be in conformance with the criteria of 10 V.S.A., Section 6086(a)(1-10) and will not cause or result in any detriment to public health, safety, or general welfare."** See 1989 Fmdings at 11-13. (Emphasis added.) Accordingly, the Commission relied on its own condition to issue the 1989 Permit.

Mr. Zii' belief that the Commission lacked any authority to impose permit conditions which NAI did not offer was erroneous. Permit conditions do not solely result from representations made by the applicant. The district commissions and the Board have the authority to impose a permit condition based on the evidence, regardless of whether the condition was proposed by the applicant. The Commission's authority to condition the use of the 3.3 8 acre parcel was not limited to Criterion 9(B). In fact, the Commission did condition the use of the 3.38 acre parcel under Criterion 8, without any

material representation by NAI. Mr. Zins' erroneous belief that the 3.3 8 acres was set aside only under Criterion 9(B) does not defeat the Commission's reasonable reliance on the open land paragraph as a condition under Criterion S--but for this condition under Criterion 8, the Commission would not have even issued the 1989 Permit. See Secretary, Vermont Agency of Natural Resources v. Godnick, No. E92-081 (Vt. Envtl.Ct., Feb. 13, 1995)(environmental court will not second guess district commission landscaping permit condition as necessary to prevent actual impact on public welfare under Criterion 8, aesthetics).

Accordingly, in issuing the 1989 Permit, the Commission reasonably relied upon the substantive requirement of condition #9 of the 1989 Permit that "the perrnittee or subsequent landowners association shall maintain the 3.3 8 acre agricultural reserve lands as open, cleared, uncluttered, and unencumbered land" as a condition under Criterion 8. The scope of the Commission's reliance included that this condition would be followed by NAI.

E. Balancing of Flexibility and Finality

[7] Having identified the competing policies, the Board must now balance them to determine whether to grant the Application a permit amendment.

The principle of finality is derived from the consequences of a permit being issued without any subsequent appeal: Once a permit is 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, whether or not they were properly granted in the first instance. "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) citing to Levy v. Town of St. Albans Zoning Rd. of Adjustment, 152 Vt. 139,143 (1989). Without reasonable reliance on the finality of a permit, there can be no repose, and without repose, there can be no orderly governance of development.

The principle of flexibility is derived from the consequences of the development process. The Board itself has long acknowledged that "once 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, 1976). Although Act 250 does not refer to permit amendments, the Board has adopted EBR 34 establishing procedures for applications for permit amendments. 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, No. 95-341, slip op. at 5 (Vt. Nov. 8, 1996).

> Under the permit amendment process set up by the Board, permits are not final and unalterable. A party subject to a permit may seek to amend the conditions, and presumably, the Board will sometimes grant the amendment . . . [The Board] has explicitly acknowledged in [EBR] 34 that previously litigated permit conditions in some cases may be revisited

Id.

Based on the weighing of the competing policies of finality and flexibility, the Board concludes that the lot purchasers! and Commission's reasonable reliance on the 1989 Permit and its open land condition requires that. the Application be denied.

First, the scope of the restriction imposed by the open land paragraph has not been changed by the Court's Nehemiah decision: regardless of whether it is a permit condition or deed covenant, the "permittee or subsequent landowners association shall maintain the 3.3 8 agricultural reserve lands as open, cleared, uncluttered, and unencumbered land" pursuant to Criterion 8.

Second, the. Court's decision does not alter the fact that the purchasers reasonably relied on the open land paragraph. The Court's Nehemiah decision has only ruled that they relied on a permit condition requirement instead of a deed covenant requirement Lot owners such as Ms. Perkins, Mr. and Mrs. Baker, and Mr. Holden decided to purchase their lots, in part, because of the open land paragraph.' As a result, NAI benefited from this reliance since lot sales were consummated

Third, the Commission reasonably relied on the open land paragraph when it made it a permit condition. While NAI. points out that it only proposed the restriction. to address agricultural issues under Criterion 9(B), the Commission imposed it under both criteria 8 and 9(B). Thus, the open land paragraph functioned as a permit condition which was required under two criteria, and without which the Commission would not have issued the 1989. Permit. NAI's erroneous belief that the Commission could only impose a condition based on its representation to the Commission does not diminish the Commission's reasonable reliance. While an applicant controls the application that is submitted for Act 250 approval, it is the Commission that controls the Act 250 permit that is ultimately issued.

If conditions to mitigate impacts can simply be ignored and not complied

> with, and instead relitigated at a future date, the protection of the public and the environment from the impacts those conditions are designed to remedy is less likely to occur. In such a circumstance, the Act 250 decision-making process will become less one of making decisions which are adhered to, and more one of picking the time and composition of Act 250 tribunal most favorable to one's interest.

In re Stowe Club Highlands, Application #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order at 10 (June 20, 1995), aff'd, In re Stowe Club Highlands, No. 95-341 (Vt. Nov. 8, 1996).

The fact that the area surrounding the Subdivision has undergone additional residential subdivision activity on-land not owned by NAI in no way lessens the necessity for finality. It would be absurd to permit what may otherwise have caused an undue adverse effect on aesthetics simply because the aesthetics of the surrounding area has changed. See In re Pilgrim Partnership, 153 Vt. 594,596 (1990). The open land paragraph as a substantive requirement of 'condition 9 pursuant to Criterion 8 is the most useful way to lessen the Subdivision's impact. Numerous Act 250 permits contain landscaping or open land conditions which mitigate an undue adverse effect on aesthetics. EBR 34's implicit recognition that permitted projects are not static and fixed in time makes it even more imperative that such conditions remain unaltered, notwithstanding the course of normal development in the surrounding area. Such conditions are vital to protecting the environment as well as for allowing development.

Accordingly, the Board concludes that the policy of finality outweighs the policy of flexibility in this appeal. Therefore, the Application is denied. The Board does not reach the issue of whether the Project complies with Criterion 8.

I. ORDER

The Application for the Project is denied based on the policy of finality outweighing the policy of flexibility. Jurisdiction is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont, this 1 lth day of April, 1997.

ENVIRONMENTAL BOARD

John T. Ewing, Chair
Marcy Harding
Samuel Lloyd
William Martinez
Rebecca M. Nawrath
Steve E. Wright

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