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

Re: Ray G. & Lynda J. Colton — Land Use Permit
Docket #804 — #3W0405-5(Revised)-EB

MEMORANDUM OF DECISION

Ray G. & Lynda J. Colton (Permittees) appeal Land Use Permit Amendment #3W0405-5(Revised) (Permit), accompanying Findings of Fact, Conclusions of Law (Decision), and the Memorandum of Decision on the Permittees' Motion to Alter. This Memorandum of Decision addresses Permittees' objections to the Prehearing Conference Report and Order and the Preliminary Issue.

I. PROCEDURAL SUMMARY

On April 5, 2001, Permittees filed an application for a Land Use Permit Amendment with the District #3 Environmental Commission (Commission) seeking authorization to store up to 1000 cords of logs on-site, reclaim topsoil from the log storage area at least once annually, grind and store wood bark, occasionally chip wood, increase daily truck traffic, replace the existing generator with a 210-kW generator, operate year-round and extract gravel from the Tweed River (Project). The Project is located on 7 acres of land on Route 100 in the Town of Pittsfield, Vermont.

On October 15, 2001, the Commission issued the Permit and Decision.

On January 29, 2002, the Commission issued a Memorandum of Decision on the Permittees' Motion to Alter (MOD).

On February 25, 2002, the Permittees filed an appeal with the Environmental Board (Board) from the Permit, Decision, and MOD alleging that the Commission erred in its conclusions with respect to 10 V.S.A. § 6086(a)(8) (Criterion 8) for Permit Conditions 8 and 14. The appeal was filed pursuant to 10 V.S.A.§ 6089(a) and Environmental Board Rule (EBR) 6 and 40.

On March 6, 2002, Sarah Gray, filed a cross appeal from the Permit, Decision, and MOD on Criterion 10.

On March 26, 2002, Donald Gray filed a letter stating his intention to participate in this proceeding as a party.

On March 26, 2002, Board Chair Marcy Harding convened a prehearing

conference and on March 28, 2002 she issued a Prehearing Conference Report and Order (PCRO).

On May 20, 2002, Permittees filed objections to the PCRO.

On June 3, 2002, cross-appellant Sarah Gray filed a response to the Permittees' objection to the PCRO.

On June 6, 2002, Permittees and Sarah Gray filed memoranda on the preliminary issue in the PCRO.

On June 19, 2002, the Board deliberated.

II. DISCUSSION

The PCRO contained the following preliminary issue:

> Whether the test established by the Board in *Re: Stowe Club Highlands*, #5L0822-12-EB (Jun. 20, 1995), *aff'd* 166 Vt. 33 (1996), should apply to the amendment application.

The Commission did not apply the *Stowe Club Highlands* (SCH) test below and no party raised it in an appeal or cross-appeal. The Chair inserted the preliminary issue concerning the SCH test since this is a permit amendment application and the Permittees are seeking relief from permit conditions which limit hours of operation. The Permittees filed an objection to the PCRO concerning the Board's authority to decide issues that were not a finding, issue, or conclusion incorporated by the Commission or raised in the appeal or cross-appeal.

The preliminary issue and the objection to the PCRO are related but ask slightly different questions. The objection to the PCRO concerns whether the Board can consider an issue not determined by the district commission and not raised in any appeal. The preliminary issue incorporates that question and also asks whether the SCH test should be applied in the instant case.

Therefore, the Board must first determine whether it can apply the SCH test even if the SCH test was not decided by the Commission nor included in any appeal. Second, assuming the Board can *sua sponte* consider the issue, the

Board must then determine whether the SCH test should be applied to the instant amendment application.

Issue 1. Whether the Board can apply the SCH test if it was not considered by the Commission nor raised in any appeal.

The Permittees argue that the Board has no jurisdiction to decide issues that were not first ruled upon by the district commissions and appealed by a party. The Permittees assert that 10 V.S.A. 6089(3) limits the scope of the appeal to "findings requested by any party that files an appeal or cross-appeal according to the rules of the Board." Permittees also rely on EBR 40(A) for additional support which provides that the Board will hold a *de novo* hearing on findings, conclusions, and permit conditions issued by the district commission. The Permittees contend that since the SCH test was not ruled on by the Commission or raised by the Grays in their cross-appeal to the Board, it can not now be considered by the Board.

The Grays argue that even if the SCH test was not raised in their cross-appeal, the Board can still consider it pursuant to EBR 40(E). While EBR 40(A) narrowly sets forth the scope of what the Board can consider on appeal, EBR 40(E) provides an exception that allows the Board to expand the scope of the appeal. EBR 40(E) states that:

> The scope of the appeal hearing shall be limited to the errors and issues assigned by the appellant and any cross-appellant unless substantial inequity or injustice would result from such limitation.

EBR 40(E) has primarily been used to expand the scope of an appeal to hear new evidence from parties attempting to gain party status. See, *Re*: *Okemo Mountain*, *Inc*., # 2S0351-31-EB, (2nd Revision) and #2S0351-31-EB and #2S0351-25R-EB, Memorandum of Decision 7-9 (May 22, 2001); *Re*: *Old Vermonter Wood Products and Richard Atwood*, # 5W1305-EB, Memorandum of Decision at 2 (Feb. 3, 1999); *Swanton Housing Associates*, #6F0482-EB, Findings of Fact, Conclusions of Law, and Order at 10 (April 24, 1997). However, there is nothing in the language of EBR 40(E) or the cases interpreting it that limits its application to party status issues.

As will be discussed below, there is a significant body of Board precedent applying the SCH test for all permit amendment applications that seek relief from permit conditions. There would be substantial injustice and inequity to the Act

250 program if the Board were to be precluded from applying the SCH test as case precedent dictates. The Board hears cases *de novo* and must be able to properly apply important threshold tests, even if not done so below.[1]

Issue 2. Whether the SCH test should apply to this permit amendment application.

In *Re McDonald's Corp*., *Rutland, Vermont*, #1R0477-5-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 7, 2000) the Board stated that it "has consistently held that it will only reach the merits of a permit amendment application under any of the Act 250 criteria under appeal after applying the balancing test first set out in its seminal decision, In re Stowe Club Highlands..." *Id* at 9.

Since the Vermont Supreme Court's decision in *In Re Stowe Club Highlands*, 166 Vt. 33 (1996), the Board has regularly applied the SCH test when determining whether to grant permit amendments. See, In *Re* Stowe Club Highlands, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order (June 20, 1995), aff'd, *In re Stowe Club Highlands*, 166 Vt. 33 (1996); *Town and Country Honda and Robert M. Aughey*, *Jr*., #5W0773-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Feb. 15, 2001); *Re: McDonald's Corp*., *Rutland, Vermont*, #1R0477-5-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 7, 2000); *Re: Richard Bouffard*, #4C0647-6-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Oct. 23, 2000); *Re Donald and Diane Weston*, #4C0635-4-EB, Findings of Fact, Conclusions of Law, and Order at 14 (March 2, 2000); *Re: Ronald L. Sr., and Marylou Saldi*, #5R0891- 16-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 13, 2000); Re: *MBL Associates, LLC*, #4C0948-3-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Oct. 20, 1999) (a case where the applicability of the test was challenged and was held to be mandatory); *Re Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB, Findings of Fact, Conclusions of Law, and Order at 8 (Sept. 23, 1998); *Re*: *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration), Findings of Fact, Conclusions of Law, and Order at 16 - 22 (Aug. 19, 1999); *Re*: *The Stratton Corporation*, #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Nov. 20, 1997); *Re*: *Nehemiah Associates, Inc*., #1R0672-1-EB (Remand), Findings of Fact, Conclusions of

[1] The Board notes that many potential appellants are unaware of the existence of the SCH test and are thus unlikely to raise the SCH test on appeal if a district commission does not consider it.

Law, and Order at 9 (Apr. 11, 1997), *aff'd,* 168 Vt. 288 (1998); *Re*: *Larkin, Tarrant, and Hoehl Partnership and John Larkin,* #4C1057-1-EB, Memorandum of Decision (Jan. 22, 2002)(a case where the Board applied the SCH test even though the district commission did not and it was not appealed to the Board).

Thus, under current Board precedent, the SCH test is required for all permit amendments unless the applicant is not seeking relief from any existing permit condition, finding of fact, conclusion of law, or representation in the application. *Re: Home Depot USA, Inc., Ann Juster and Homer and Ruth Sweet*, 1R0048-12-EB, Memorandum of Decision at 12 (Nov. 30, 2000). In *Home Depot*, the permittees did not need to meet the SCH test since they were not seeking relief from any permit condition, finding of fact, conclusion of law, or representation in the application.

In the instant case, the Permittees are seeking to amend prior findings of fact and expand the operation which will convert it from part-time or seasonal to a year-around operation. Therefore, the Board will only reach the merits of the amendment application if the Permittees satisfy the SCH balancing test. The Board recognizes that applying the SCH test to all applications that seek to amend a permit condition may pose an administrative burden on the district commissions. While the Board may choose to revisit this issue sometime in the future, the current Board precedent is clear that the SCH test applies to the instant case.

III. ORDER

1. Permittees' objections to the PCRO are denied.

2. The test established by the Board in *Re: Stowe Club Highlands*, #5L0822-12-EB (Jun. 20, 1995), *aff'd* 166 Vt. 33 (1996), applies to the amendment application.

Dated at Montpelier, Vermont this 17th day of July, 2002.

ENVIRONMENTAL BOARD

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