

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., CHAPTER 151

RE: Allenbrook Associates
c/o Richard Farnham
Box 149
Hinesburg, Vermont 05461

Findings of Fact and
Conclusions of Law
Land Use Permit Amendment
#4C0466-2-EB

An appeal was filed with the Environmental Board (the "Board") on January 4, 1982, by Allenbrook Associates, Inc. ("Allenbrook") from District #4 Environmental Commission's ruling dated December 15, 1981. Allenbrook challenges Condition #5 of Land Use Permit Amendment #4C0466-1, dated November 12, 1981, which prohibits construction of the "Colonial" Style two-story dwelling on Lots #18 through #26. The permit specifically authorizes permittees to construct a 14 acre, 26-lot single-family subdivision, with a common recreational area and other common lands, all located off North Williston Road in Williston, Vermont.

A pre-hearing conference on this appeal was held on January 25, 1982, at South Burlington City Hall, South Burlington, Vermont, Chairman Leonard U. Wilson presiding. The Board opened and immediately recessed a public hearing at the parties' request on February 9, 1982, in Morrisville, Vermont. The hearing was reconvened on March 4, 1982, at the Sheraton Inn in South Burlington, Vermont. Parties present at the hearing were the following:

Appellant/Permittee, Allenbrook Associates, Inc. by
Richard Farnham and Jeffrey Feussner;
Appellant, Sterling Construction, Inc. by Bart Frisbie
and Roger McCormick;
Adjoining Property Owners, Frank Gibney, Richard Jordan,
and Nanette Nuebel; and
Interested Parties, Helen Oustinoff and Maxine Griffith.

At the hearing held on March 4, 1982, Frank Gibney, Richard Jordan and Nanette Nuebel were identified as adjoining property owners and granted party status. Helen Oustinoff and Maxine Griffith requested party status pursuant to Board Rule 12(C) [now Rule 14(B)]. Both requests were granted on the grounds that the proposed project changes might adversely affect their interests and that the parties might materially assist the Board.

The Board would like to emphasize that the only criterion before the Board in this de novo appeal is Criterion 8. The Board, in its reviewing authority, is limited to those criteria that were raised at the District Commission level. See, In re Juster, 136 Vt. 577, 396 A.2d 1382 (1978). In Allenbrook's amendment application before District #4 Commission, the permittee, the adjoining landowners and interested parties, appellees here, raised only Criteria 1(B) and 8. The issues raised by Criterion 1(B) were apparently resolved at the

commission level and were not the subject of this appeal. Consequently, the only criterion that the Board can address in this appeal is Criterion 8.

The Board heard testimony and oral argument on the issues outlined below. Our Findings of Fact and Conclusions of Law are based on the record developed at the hearing.

I. ISSUES IN THE APPEAL

Appellants raised the following procedural and substantive issues:

A. Procedural Issues:

1. Does the District Environmental Commission ("DEC") have the authority pursuant to 10 V.S.A., Chapter 151 (Act 250) to approve or disapprove the proposed building types and/or dimensions of homes to be constructed within a single-family subdivision?
2. Does the DEC have the authority pursuant to Act 250 to approve or disapprove proposed building types and/or dimensions of homes to be constructed on specified lots within a single-family subdivision?
3. Does the DEC have the authority pursuant to Act 250 to bind a subsequent purchaser of a lot, within an Act 250 approved subdivision, to the Conditions contained in the Land Use Permit issued by the DEC?

B. Substantive Issue:

Appellants objected to the substantive issue as stated in the Pre-Hearing Conference Report, dated February 11, 1982, and requested that the issue be re-phrased to include "mass". The issue, as re-phrased, is: whether the height and mass of appellants' proposed two-story dwellings meet the aesthetic requirements of Criterion 8 under 10 V.S.A. §6086(a), contrary to the DEC's prohibition contained in Condition #5 of Land Use Permit Amendment #4C0466-1.

II. FINDINGS OF FACT

1. On September 18, 1981, Allenbrook submitted an application to amend Land Use Permit #4C0466 to the District #4 Environmental Commission. The amendment application requested permission, inter alia, to authorize the construction of two additional styles of single-family dwellings in the approved single family subdivision, styles labeled "Colonial" (two-story) and "Farmhouse" (one-story). The District

Commission approved both styles of houses but restricted the "Colonial" style's construction to specified lots in the subdivision. The "Colonial" style was approved for Lots #1 through #17 but was prohibited on Lots #18 through #26.

2. The District Commission prohibited the "Colonial" style on Lots #18 through #26 because of its undue adverse aesthetic impact on the surrounding area under Criterion 8 of 10 V.S.A. §6086(a).
3. Approved houses on Lots #18 through #22 are already constructed and occupied. The remaining lots on which the "Colonial" style house is prohibited are Lots #23 through #26.
4. Sterling Construction, Inc. ("Sterling") purchased five lots from Allenbrook: Lots #1, #3, #22, #23, and #25. Sterling and Allenbrook object to the prohibition of the "Colonial" style house on Lots #23, #24, #25, and #26.
5. The four lots are located in the southern portion of the subdivision, the rear of the lots facing U.S. Route 2. The lots are on a highly visible piece of land with the rear portion of the lots sloping down to Frank Gibney's property which borders most of the southern boundary of the subdivision. Richard Jordan's property is adjacent to an approximately 75 foot wide strip of land owned by Allenbrook, which runs from the subdivision south to U.S. Route 2. Nanette Nuebel's property is located to the west of Lot #1. (Exhibits #2 and #3.)
6. Landscaping plans include planting a cedar hedgerow along the southernmost border of Lots #18 through #26 as required by Condition #7 contained in Land Use Permit #4C0466. The height of this fencerow will be a minimum of 48" to 56". (Exhibit #3.) Landscaping requirements generally include that each lot be seeded and have a minimum of two trees. Additional tree plantings will also be made within the road right-of-way and the common area. (Exhibit #3.)
7. Lots #23, #24, and #25 are 60 feet by 100 feet. Lot #26 is slightly smaller. The distance between each house must be a minimum of 20 feet. The mass (projected face area) and height of the three building types are as follows:

<u>Building Type</u>	<u>Mass</u> (sq. feet)	<u>Height</u>	<u>(ridgeline to foundation)</u>
"Cape" (1½ story)	608	19'	
"Farmhouse" (1½ story)	504	21'	
"Colonial" (2 story)	611	23½'	

8. The rear face of the "Colonial" style home has five windows and a glass sliding door. A garage may be added at the home purchaser's option.
9. We find no substantial difference among the mass or projected face area and the height of the three different building types.
10. The Village of Williston is listed in the National Register of Historic Sites as an historic district. Allenbrook Meadow, however, is not located within the Historic District. The Board also observed during a March 4, 1982, site visit that there are non-conforming buildings within the Historic District itself.
11. During the site visit, the Board noted that the exterior of the houses already constructed were in earth tones and other subdued colors. Although no covenants or conditions currently restrict the use of certain colors, the Board requires that the exterior of any two-story "Colonial" style building constructed on the lots in question be restricted to earth tones or other subdued colors.

III. CONCLUSIONS OF LAW

A. Procedural Issues:

1. Under 10 V.S.A. 56086(a), the Board or District Commission must find that the subdivision meets the requirements of the 10 criteria under §6086(a) before it can grant a permit. An amendment to a permit must also meet these requirements. The District #4 Environmental Commission found that the proposed building type of single-family home ("Colonial" style) in the permittee's amendment application did not meet the requirements of Criterion 8. We conclude that the District Commission acted within its authority under 10 V.S.A. §6086(a) in disapproving the construction of a proposed building type in the subdivision.
2. Pursuant to its authority vested in §6086(c), the District Environmental Commission can condition a permit with respect to Criteria 1 through 10. The District Commission conditioned the permittee's amendment to reflect its findings and conclusions regarding the proposed building type "Colonial". The condition restricted the location of this building type within the subdivision in order to meet the requirements of Criterion 8. We conclude that,

the District Environmental Commission acted within its authority under §6086(c) in restricting the construction of the proposed building type, "Colonial", on specified lots in the subdivision.

3. We conclude that the District Commission has the authority to bind a subsequent purchaser to the conditions contained in a land use permit. The purpose of 10 V.S.A., Chapter 151 (Act 250) is to regulate the state's land use and development. Under 10 V.S.A. §6090(a), a permit is granted for a specified period, determined by the Board, and pursuant to its duly promulgated rules. If the conditions on the permit are violated, the permit may be revoked under 10 V.S.A. §6090(b). Permits, of course, run with the land. See Board Rule 32(D). If this were not the case, the conditions of a land use permit could be violated by a purchaser from the original permittee rendering 10 V.S.A. §§6002, 6004 and 6090(b) ineffective. If a subsequent purchaser of a subdivision lot or lots did not have to comply with the terms and conditions of permits, the purpose of the Act would be clearly frustrated.

B. Substantive Issue

Based upon the foregoing Findings of Fact, the Board concludes that the "Colonial" style building will "not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas" if the exterior of such houses are restricted to earth tones or other subdued colors. 10 V.S.A. §6086(a)(8).

Under 10 V.S.A. §6088(b), the burden of proof is on the party opposing the applicant with respect to Criterion 8. The appellees, therefore, have the burden of showing that the two-story "Colonial" style home will have an undue adverse effect under Criterion 8 on the surrounding area. Based on the testimony and evidence submitted by the appellees, the Board concludes that the appellees have not carried their burden. Therefore, the Board concludes that the "Colonial" style house should not be prohibited on Lots #22 through #26.

Jurisdiction over this permit shall be returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 19th day of April, 1982.

ENVIRONMENTAL BOARD

By Jan S. Eastman
Jan S. Eastman
Executive Officer

Members participating
in this decision:

Leonard U. Wilson
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Melvin H. Carter
Warren M. Cone
Roger N. Miller
Donald B. Sargent
Priscilla N. Smith