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

RE: Champlain College Incorporated
Land Use Permit Application #4C0515-6-EB
Docket # 808

MEMORANDUM OF DECISION

This appeal concerns whether adjoining landowners should have been given notice of a decision to process Land Use Permit (LUP) Amendment Application #4C0515-6-EB as a minor permit application, and whether it was proper to process the application as a minor permit application. As set forth below, the Board holds that there are insufficient grounds to waive notice to adjoining landowners, and that the application does not qualify for the minor permit application procedure.

I. PROCEDURAL SUMMARY

On February 11, 2002 Champlain College Incorporated (Applicant) filed LUP Amendment Application #4C0515-6 with the District 4 Environmental Commission (Commission) seeking authorization to construct and operate a three-level, 23,150 square-foot business center, located between South Willard Street and Summit Street at 391 Maple Street, in the City of Burlington, Vermont (Project).

On March 8, 2002, Robert Leidy and Faye Baker filed a request for hearing with the Commission. The request was supplemented on March 18, 2002.

In a March 27, 2002 Memorandum to All Parties (Decision), the Commission denied Robert Leidy and Faye Baker's request for hearing.

On April 5, 2002, the Commission issued LUP #4C0515-6 pursuant to the Minor Application Procedures set forth in Environmental Board Rule (EBR) 51.

On April 23, 2002, Robert Leidy and Faye Baker (Appellants) filed an appeal with the Environmental Board (Board) from the Decision alleging that the Commission erred in its conclusions with respect to notice and erred in denying their request for hearing.

On May 21, 2002, Chair Harding convened a prehearing conference with the following participants:

The Applicant by Mark G. Hall, Esq., with Lawrence Velodota, and Jeff Carlson;
The Burlington City Counsel and Burlington City Planning Commission (City) by Kenneth A. Schatz, Esq.;

Appellants, by Robert Leidy;
Mark Stephenson and Linda E. Jones (Intervenors, together with Appellants, Neighbors) by Mark Stephenson; and
Norman Williams, Esq.

On May 22, 2002, the Chair issued a Prehearing Conference Report and Order (PCRO). Among other things, the PCRO identified the parties, potential parties, and issues on appeal, and set a schedule for filing briefs.

On June 4, 2002, Applicant filed a Motion to Dismiss and Response to Issues Set Forth in the Prehearing Report. Also on June 4, 2002, Neighbors filed a Memorandum of Law, accompanied by a request for party status by Mark Stephenson and Linda E. Jones. On June 10, 2002, Applicant filed a Memorandum of Law responding to Neighbors' Memorandum of Law.

On June 19, 2002, the Board heard oral argument from the parties and deliberated.

II. ISSUES

There are two merits issues on appeal:

1. Whether in processing the LUP Amendment Application, the Commission provided proper notice of its intent to process the LUP Amendment Application pursuant to Act 250's Minor Application Procedures, EBR 51.

2. Whether, pursuant to EBR 51, there is demonstrable likelihood that the Project will not present significant adverse impacts under any of the 10 Criteria of 10 V.S.A. § 6086(a) such that a hearing is unnecessary.

In addition, there are two pending motions, Applicant's Motion to Dismiss and Intervenors' Request for Party Status, at issue.

III. DISCUSSION

A. Intervenors' Request for Party Status

Intervenors have filed a request for party status. As set forth below, Intervenors and Appellants are adjoining property owners, and are able to raise a claim for lack of notice to adjoiners under EBR 10(F), and the party status question simply is not ripe. Party status determinations may be required for any hearing on the merits of a permit application and any appeal from a district commission decision. As the Chair ruled in the PCRO, party status is not at issue in this appeal because any adjoiner, statutory

party, or potential party may request a hearing under EBR 51. No participant in this case filed a timely objection to the PCRO, which has become final. For purposes of this proceeding, Intervenors' request for party status is denied as premature.

B. Applicant's Motion to Dismiss

The Applicant moves to dismiss the appeal, based on Appellants' concession that they received actual notice "by word of mouth" in sufficient time to request a hearing before the Commission. The Applicant argues that Appellants lack standing to challenge lack of personal notice because they suffered no prejudice as a result, and that Appellants' notice claim is moot. However, relevant precedent is clear that failure to adhere to Board rules in processing permit applications is reversible error. *In re White*, 779 A.2d 1264, 1269 (Jun. 10, 2001, motion for reargument den. Jul. 24, 2001)(citing *In re Conway*, 152 Vt. 526 (1989). In *Conway*, the Vermont Supreme Court held that if the Commission failed to follow Board rules in waiving or providing notice, the matter must be remanded so that proper notice can be given. *In re Conway*, 152 Vt. 526 (1989)(constructive notice satisfies constitutional due process requirements, but not environmental board rules).

Moreover, it is undisputed that Intervenors did not get notice until after the deadline for requesting a hearing at the Commission and that they were unable to file a timely request for hearing at the Commission. Intervenors made a timely appearance in this appeal, and there was no objection to their participation. It is worth noting that Board rules do not require intervening parties to file cross-appeals on issues already raised in another party's appeal. *See, Re: Van Sicklen Limited Partnership*, #4C1013R-EB, Memorandum of Decision at 11 (Jun. 8, 2001)(citing *Re: Green Peak Estates, Inc.*, #8B0314-2-EB, Memorandum of Decision at 2 - 3 (Sept. 24, 1986)(party need not file duplicitous cross-appeal of an issue which has been appealed by another), *aff'd ,In re Green Peak Estates*, 154 Vt. 363, 372 (1990); *City of Montpelier and Ellery and Jennifer Packard*, F9711-WFP, Memorandum of Decision at 4 - 9 (Jan. 20, 2000)). The same principle holds true here, even though the Intervenors are not technically "parties" because no party status determinations are necessary. In short, there is no question that Intervenors were prejudiced by lack of personal notice at the Commission level and that they can pursue the notice issue in this appeal. The notice issue is not moot, and the Board has subject-matter jurisdiction to hear this appeal. Accordingly, the Applicant's Motion to Dismiss is denied.

C. Notice

The first merits issue is whether proper notice was given of the Commission's intent to process the amendment application as a minor permit application. EBR 34(C), which authorizes the processing of amendment applications as minors, incorporates the notice requirements set forth in 10 V.S.A. § 6084 and EBR 10(E)-(G). These provisions

include requirements for publication and personal notice. Neighbors claim that they are adjoining landowners entitled to personal notice, so only the relevant notice provisions will be addressed here.

Personal notice must be provided to adjoining landowners unless it is properly waived in accordance with Board rules. EBR 10(F); *In re Conway*, 152 Vt. 526 (1989). Under EBR 10(F), the chair of the district commission may waive notice to adjoining property owners upon a determination that the adjoiners subject to the waiver "reasonably could not be affected by the proposed development" and that service to each adjoiner "would constitute a significant administrative burden without corresponding public benefit." EBR 10(F).

In this case the Commission file does not indicate whether the Commission chair waived notice to adjoining landowners other than the nine adjoiners on the list submitted by the Applicant, or whether the Coordinator, in consultation with the Commission chair, waived the requirement that the Applicant file a complete list of adjoiners. Because this is a *de novo* appeal, however, the Board must conduct its own waiver analysis, and what actually happened below in this regard is not relevant. *See* 10 V.S.A. § 6089(a)(3)(Board hears appeals from district commission determinations *de novo*). "In a *de novo* proceeding, the Board is required to hear the matter as if there had been no prior proceedings in the district commission." *In re Killington, Ltd.*, 159 Vt. 206, 214 (1992)(citing *In re Green Peak Estates,* 154 Vt. 363, 372 (1990)). Thus, the issue before the Board is whether it is proper to waive notice to Neighbors under EBR 10(F).

1. *Adjoining Property Owners*

The threshold question is whether Neighbors are adjoining property owners. An "adjoining property owner" is "a person who owns land in fee simple, if that land: (1) shares a boundary with a tract of land where a proposed or actual development or subdivision is located; or (2) is adjacent to a tract of land where a proposed or actual development or subdivision is located and the two properties are separated only by a river, stream, or public highway." 10 V.S.A. § 6001(23); EBR 2(R). A "tract" is "one or more physically contiguous parcels of land owned or controlled by the same person or persons." EBR 2(U).

Appellants and Intervenors reside on Tower Terrace. Their properties abut Jensen Hall and its parking lot, which are part of the campus owned or controlled by Applicant. There is nothing between Neighbors' property and the Project site except South Willard Street and other parts of the Champlain College campus. *Cf., Southwestern Vermont Health Care Corp.*, #8B0537, Memorandum of Decision at 2-3, (Aug. 10, 2000)(neighboring landowner not an adjoining property owner where separated from project site by land owned by a third party). Since the Neighbors' property actually adjoins the tract of land upon which the development will occur, as

defined in EBR 2(U), they are "adjoining property owners" for purposes of Act 250. *See*, 10 V.S.A. § 6001(23) and EBR 2(R)(defining "adjoining property owner").

2. *Waiver*

As set forth above, notice to adjoining landowners may be waived only if:

1. The adjoining landowners who would not get notice "reasonably could not be affected by the proposed development"; and
2. Serving notice to each adjoining landowner "would constitute a significant administrative burden without corresponding public benefit."

EBR 10(F).

a. *Whether Neighbors Reasonably Could Not be Affected*

Neighbors claim that the proposed Project, a three-level, 23,150 square-foot business center, located between South Willard Street and Summit Street, at 391 Maple Street, in the City of Burlington, Vermont, has the potential for "serious impacts" under Criteria 5, 8, and 10. Specifically, Neighbors claim that the Project may cause substantial adverse impacts on their properties in terms of traffic, parking, noise, and the integrity of their historic neighborhood. According to the Neighbors, on-street parking from the college currently clogs their neighborhood streets, that the demand for parking increases traffic congestion and reduces traffic and pedestrian safety in their neighborhood, and that the Project "clearly has the potential to exacerbate an already-bad situation." (Neighbors' Memo, at 10). The key issue is whether the Project will bring any new people to the Champlain College campus, adding to existing faculty, staff or students and increasing demand for parking.

The Applicant contends that there will be no new employees, faculty or staff, and that the Project will merely house existing programs. Specifically, the Applicant argues that the Project will involve "[n]o additional vehicle trip ends or changes in student or employee population," that the Project will require no additional parking spaces, that the existing campus and city sidewalk system adequately addresses pedestrian safety, and that the Project will merely serve the existing student population. (LUP application, Schedule B, pages 13-14; Applicant's Memorandum of Law at 1-2.)

Schedule B of the application clearly shows that, in addition to offices, classrooms, and other space for existing programs, the Project will include new conference space. (See, LUP application, Schedule B). The Applicant also indicated in the application, in answers to questions 1(B) (waste disposal), and 2 and 3 (water supply), that there will be 100 conference room participants using the completed Project, each generating 5 gallons per day (gpd) of additional wastewater and also

requiring the generation of 5 gpd/person of additional water. It would appear that there will be new users of the Project, in addition to existing students, faculty and staff.

The Applicant concedes that there will be some use of the Project by new conference attendees, but only during the summer vacation and on weekends, when most of the existing students, faculty and staff are not using the campus. The Applicant also concedes that the Project will bring in two or three additional cleaning staff at night to clean the business center. This indicates that the Project will not exacerbate existing peak traffic and crowding conditions on campus, but does not necessarily mean that the Neighbors reasonably could not be affected by the proposed development.

According to the Applicant's Joint Institution Parking Plan, dated April 30, 2002, there are approximately 948 parking spaces available for campus use, including off-street satellite parking areas, off-street campus parking, and on-street parking spaces within 1200 feet of the center of campus. The application indicates that there are at least 1450 full-time students enrolled at Champlain College. This figure does not include part-time students, or faculty or staff. The application indicates, therefore, that demand for parking now and as a result of the proposed Project may well exceed the available parking spaces.

The Project will not add any new parking areas, on- or off-street, to those already available, and none of this existing parking will be reserved for users of the new 23,000+ square-foot business center. It is possible that users of the new building could add to the demand for parking at the campus and that Neighbors on Tower Terrace could feel the effects of this increased demand. Even assuming that present campus parking is filled to capacity during class hours, the Applicant's concession that the Project will be used for conferences during summer vacation and on weekends indicates that there could be some increase in traffic and demand for parking in the area.

The intersection of South Willard and Maple Streets is near the core of the Champlain College campus. The Project site is on the south side of Maple Street, to the southeast of the intersection. Neighbors reside on Tower Terrace, which enters South Willard Street from the west. Tower Terrace is to the south and west of the Project site. Neighbors use South Willard Street to come and go from their homes, and use the neighborhood streets and sidewalks. There is metered on-street public parking on South Willard and Maple Streets, in addition to the other on- and off-street parking for the Champlain College campus. There is also an off-street Champlain College parking lot adjacent to Neighbors' homes. It is conceivable that new users of the Project would park or try to park on South Willard and Maple Streets, and exacerbate traffic congestion and safety concerns in the neighborhood. This is not a case in which a group of adjoining property owners is so far removed from potential impacts of a

proposed project that they could not reasonably be affected. Waiver of personal notice, therefore, is inappropriate.

To be clear, the Board does not conclude that there will be an impact on the Neighbors in this case. EBR 10(F) does not require a determination that there will be an impact on adjoiners before personal notice is required. Rather, EBR 10(F) requires personal notice unless it appears from the application and related information that the adjoiners "reasonably could not be affected by the proposed project." There is no formal opportunity for potentially affected adjoiners to be heard during the waiver determination process regarding potential effects of a project on their interests, so it is sensible to give such adjoiners the benefit of any reasonable doubt in reviewing the application to determine whether waiver is appropriate.

Because the Board cannot conclude that the Neighbors "reasonably could not be affected" by the Project, personal notice to Neighbors cannot be waived under EBR 10(F).

b. *Whether Service to Each Adjoiner Would Constitute a Significant Administrative Burden without Corresponding Public Benefit*

The waiver argument must fail under the second element, too, because service to each adjoiner does not constitute a significant administrative burden without corresponding public benefit. Because Neighbors could reasonably be affected by the Project, the public benefit to be gained by giving them notice and an opportunity to participate is significant. This clearly would outweigh the administrative burden of sending them personal notice.

While notice to other adjoining property owners is beyond the scope of this appeal, it is worth noting that the Applicant concedes that it maintains a mailing list of approximately 220 neighboring property owners, and sends mailings to these individuals notifying them of various cultural and other events on campus. The adjoining property owners are included on this list. In determining whether to waive notice to other adjoining property owners than those involved in this appeal, the Commission could consider how many on this list are truly adjoiners and whether service to each would constitute a significant administrative burden. As stated above, however, where the adjoining property owners could reasonably be affected by the Project, the waiver balance tips decidedly in favor of notice.

3. *Adjoiners List*

Neighbors argue that notice was improper because they were not included on the list of adjoiners submitted by the Applicant. However, EBR 10(F) is clear that the district coordinator, in consultation with the chair of the district commission, may waive the requirement that a complete list of adjoiners be filed. Under the rule, the chair of the

district commission has authority to waive notice to adjoining landowners, and the coordinator, in consultation with the chair, may waive the requirement that an applicant file a complete list of adjoiners. The coordinator, in consultation with the chair, can allow an applicant to leave adjoiners off the list where the chair has determined that waiver of notice to those adjoiners is appropriate.

This is similar to the argument raised in *In re Conway*, where the Court rejected the claim that failure to list the complaining adjoiners was reversible error, and instead focused on the failure of the district commission staff to follow applicable rules. *In re Conway*, 152 Vt. 526 (1989). Although a prior version of EBR 10(F), which required personal notice unless waived by the district commission, and a complete adjoiners list unless waived by the district coordinator, applied in that case, it is still instructive:

> Rule 10(F) vests discretion in the District Commission over the provision of personal notice to adjoining property owners. Here, however, the Commission did not exercise discretion; it took no action at all. The Assistant District Coordinator merely indicated to the Conways . . . that he would probably deem the application substantially complete whether the Fishes were listed or not. Notice to the landowner was thereby left to the responsibility of the applicant. In the Assistant Coordinator's view, the Commission's practice was to supply notice to adjoiners more or less as a courtesy rather than a legal requirement. On this matter, the official misunderstood his duties. The Commission, not the Coordinator or other individual officers, is vested with sole discretionary authority over the provision of notice to adjoiners.

Conway, 152 Vt. at 530. While EBR 10(F) has been amended to vest sole authority to waive notice to adjoiners in the chair of the district commission, and to vest authority to waive the requirement of a complete adjoiners list in the district coordinator only in consultation with the chair of the district commission, the same principle applies: waiver determinations must be made in accordance with applicable rules. As set forth above, notice must be given to Neighbors because they are adjoining landowners who reasonably could be affected by the Project, and because the administrative burden of providing notice to adjoining property owners does not outweigh the public benefit to be gained by giving those adjoiners notice.

Because the Board concludes that personal notice to Neighbors, as adjoining property owners, should not be waived, this matter must be remanded. Upon remand, the Applicant shall furnish a complete list of adjoining property owners unless the Commission chair determines that notice to adjoining property owners other than Neighbors should be waived pursuant to EBR 10(F) and the Coordinator, in consultation with the Commission chair, waives the requirement of a complete list of adjoining property owners in accordance with the Commission chair's waiver decision.

D. Hearing

The second issue on appeal is whether the Project qualifies for the minor permit application procedure under EBR 51. If a proposed permit amendment amounts only to a material change, it can be processed as a "minor" under EBR 51. EBR 34(C)(2); *see also, Re: Winhall/Stratton Fire District No. 1 and the Stratton Corporation*, #2W0519-6A-EB, Memorandum of Decision at 2 (Aug. 31, 1999). Where an amendment application is eligible for consideration as a minor under EBR 34(C), it still must be reviewed "to determine whether the project qualifies for treatment [as a minor application] under this Rule." EBR 51(B)(referencing factors listed under EBR 51(A)). In other words, even if the Project qualified for review as a minor under EBR 34(C), the factors under EBR 51(A) must be considered to determine whether the Project qualifies for the minor application procedure. Thus, the Board will review the application under EBR 51 to determine whether it qualifies for the minor application process.

To determine whether an application qualifies as a minor, the Board or commission may consider:

1. the extent to which potential parties and the district commission have identified issues cognizable under the 10 Criteria;
2. whether or not other State permits identified in Rule 19 are required and, if so, whether those permits have been obtained or will be obtained in a reasonable period of time;
3. the extent to which the project has been reviewed by a municipality pursuant to a by-law authorized by 24 V.S.A. Chapter 117;
4. the extent to which the district commission is able to draft proposed permit conditions addressing potential areas of concern; and
5. the thoroughness with which the application has addressed each of the 10 criteria.

EBR 51(A)(1)-(5). There is no indication that the Project lacks any required permit, and the municipal approvals were supplied with the application at Attachment C. The central question is whether and to what extent the Project raises issues under Act 250.

The mere fact that potential parties have tried to raise issues and/or request a hearing via EBR 51(B)(3)(c) does not necessarily mean that an application cannot be processed as a minor without a hearing. "A hearing is not held simply because it is requested. Rather, the District Commission has the authority to deny the request for a hearing and issue a decision without convening a hearing if it determines that no substantive issues have been raised." EBR 51(D); *Re: Okemo Mountain, Inc.*, #2S0351-25M (Revised)-EB, Memorandum of Decision and Dismissal Order at 2 (Dec. 24, 1998).

As set forth above, the application and related information indicate that the Project will bring new conference participants to the campus, at least during summer vacation and weekend hours. While demand for campus parking appears to exceed available spaces during regular class hours, the impact from the business center may be the most significant during summer hours, when regular classes are not in session and dormitories are empty, and, to a lesser degree, on weekends, when classes are not in session. The Project will bring at least some conferees onto the campus when the demand for campus parking and use of local roads would otherwise be at a minimum. The application, however, fails to disclose details regarding the numbers of additional conferees and staff to use the business center, hours of use, and where these users will park. The Board also notes that the Project calls for construction of a very large building in a residential campus neighborhood, and it is not clear from the application what aesthetic impact this Project may have on the neighborhood.

It is difficult to gauge, without an evidentiary hearing, just how significant any impact on traffic safety or congestion, or on any other Act 250 criterion might be. Nevertheless, a potential for significant impact exists. As discussed above, the application does not adequately address many of the issues raised by the Neighbors. With respect to traffic, it might be that a permit could be conditioned to prohibit any use of the Project which would increase the demand for parking or use of the local roadways. However, with the numbers of students, faculty and staff, and members of the public, already competing for limited parking in the area, such a condition would be extremely difficult to enforce. Furthermore, the Applicant has indicated in this proceeding that it would object to any permit condition which would limit use of the Project. On the whole, it appears that Neighbors have raised potentially significant issues under Act 250, which are not sufficiently addressed by information in the application, and which cannot adequately be addressed by permit condition.

A review of the factors under EBR 51 indicates that an evidentiary hearing is necessary.

E. *Stowe Club Highlands*

Neighbors argue that the permit amendment application fails to address whether it was appropriate for the Commission to consider the amendment application in the first place, in accordance with the threshold balancing test established in *In re Stowe Club Highlands*, 166 Vt. 33 (1996), and its progeny. The issues on appeal identified in the May 22, 2002 PCRO concern notice and hearing only. No timely objection was filed to the PCRO and it is final. Also, *Stowe Club Highlands* applies only as a test for whether it is appropriate to consider the merits of a permit amendment application, not whether there should be notice to adjoining landowners or whether a project qualifies for the minor application procedure. The *Stowe Club Highlands* issue is beyond the scope of this appeal, and, like the party status request, is simply premature.

III. ORDER

1. Applicant's Motion to Dismiss is DENIED.

2. Intervenors' Request for Party Status is DENIED as premature.

3. There are insufficient grounds to waive notice to adjoining property owners in this case. Issue #1 is answered in the negative. This matter is remanded to the Commission for further proceedings in accordance with this decision.

4. The Project does not qualify for the minor permit application procedure pursuant to EBR 51. Issue #2 is answered in the negative. On remand, the Commission shall hold a hearing and process the amendment application accordingly.

5. Jurisdiction is returned to the District 4 Environmental Commission.

Dated at Montpelier, Vermont this 28th day of June, 2002.

ENVIRONMENTAL BOARD

/s/ Marcy Harding
Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
Alice Olenick
A. Gregory Rainville
Jean Richardson
Nancy Waples