

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

RE: William and Maryjean Kalanges

Land Use Permit #4C0593-6-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns an appeal of Land Use Permit #4C0593-6 (Permit) issued by the District #4 Environmental Commission (Commission) to William and Maryjean Kalanges (Permittees). The Permit authorizes construction of 7 single-family residences and modification of Conditions #11 and #12 of Land Use Permit #4C0593-4 (Project). The Project is on Hubbell's Falls Drive in the Village of Essex Junction, Vermont.

I. Procedural History

On March 4, 2004, the Commission issued the Permit and accompanying Findings of Fact, Conclusions of Law and Order (Decision) to Permittees.

On April 5, 2004, Denise Noble, Chris Wasser, Gail Connors, Martha Trendle, Ken Mitchell, Suzanne Braunegg, Deanna Dahlgren and Sean Jordan filed an appeal with the Environmental Board (Board) with respect to 10 V.S.A. §6086(a) Criteria 5, 8, and 9(K) and on whether the Stowe Club Highlands analysis is warranted on the amendment of Condition #11.

On May 10, 2004 Denise Noble, Chris Wasser, Gail Connors, Suzanne Braunegg, Sean Jordan, Catherine Farrell-Gray and David Gray (Appellants) filed petitions for party status. With the exception of the request by some of the Appellants for party status under Criterion 9(K), the determinations on party status are in the Prehearing Conference Report and Order (PCRO) issued on May 19, 2004.

On May 20, 2004, the Board issued a stay prohibiting construction pursuant to the Permit.

On October 20, 2004, the Board conducted a site visit and held a hearing.

On December 15, 2004, and February 23, 2004, the Board deliberated.

II. Preliminary Issue

Stowe Club Highlands

The PCRO set forth 3 preliminary issues. Preliminary issue 1 was addressed in a Memorandum of Decision dated June 25, 2004. Preliminary Issues 2 and 3 read as follows:

- 2 Whether pursuant to Environmental Board Rule (EBR) 34(E), Condition 11 of Land Use Permit #4C0593-4-EB (Dash 4 Permit) was critical to the issuance of the Dash 4 Permit.
3. If the answer to Preliminary Issue 2 is in the affirmative, whether pursuant to EBR 34(E) the Board should allow Condition 11 of the Dash 4 Permit to be amended.

In determining whether to consider amending a permit, the Board has historically balanced the competing policy considerations of flexibility and finality articulated in *Re: Stowe Club Highlands*, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order (Jun. 20, 1995), *aff'd*, *In re Stowe Club Highlands*, 166 Vt. 33 (1996). However, the Board has recently adopted EBR 34(E) which alters the *Stowe Club Highlands* test and sets forth a threshold determination before it is even applicable.

EBR 34(E) only “governs applications to amend permit conditions which were included to resolve issues critical to the district commission's or the board's issuance of prior permit(s) pursuant to the criteria of 10 V.S.A. Section 6086(a). Applications to amend other permit conditions are not subject to the requirements of this section but must still satisfy the criteria of 10 V.S.A. Section 6086(a) and other applicable provisions of these rules.” EBR 34(E).

EBR 34(E)(2) and (3) instructs the Board on how to weigh the competing demands of flexibility versus finality.

- (2) In reviewing an application for amendment, the district commission or the board should consider whether the permittee is merely seeking to relitigate the permit condition or to undermine its purpose and intent. It must also determine whether the need for flexibility arising from changes or policy considerations outweighs the need for finality in the permitting process.
- (3) In balancing flexibility and finality, the district commission or the board should consider the following, among other relevant factors:
 - (a) changes in facts, law or regulations beyond the permittee's control;
 - (b) changes in technology, construction, or operations which drive the need for the amendment;
 - (c) other factors including innovative or alternative design which provide for a more efficient or effective means to mitigate the impact addressed by the permit condition;
 - (d) other important policy considerations, including the proposed amendment's furtherance of the goals and objectives of duly adopted municipal plans;

- (e) manifest error on the part of the district commission or the board in the issuance of the permit condition;
- (f) the degree of reliance by the district commission, the board, or parties on prior permit conditions or material representations of the applicant in prior proceeding(s).

In *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith #5L1018-4/#5L0426-9-EB* Findings of Fact, Conclusions of Law, and Order at 15 (Oct 3, 2003) the Board interpreted EBR 34(E) and broke it down to three inquiries.

While not altering the fundamental principles behind the *Stowe Club Highlands* decision, Rule 34(E) modifies the *Stowe Club Highlands* process, by establishing three sequential stages of analysis, which ask:

1. Was the permit condition, which is the subject of the amendment request, included to resolve issues critical to the Commission's or the Board's issuance of the prior permit pursuant to the criteria of 10 V.S.A. §6086(a)?
Re: Central Vermont Public Service Corp. and Verizon New England, #2W1146-EB and #2S0301-1-EB, Memorandum of Decision at 3 (Feb. 28, 2003) (under new EBR 34(E), *Stowe Club Highlands* test does not apply where challenged condition was not included to resolve an issue critical to the issuance of the permit).
2. Is the permittee merely seeking to relitigate the permit condition or to undermine its purpose and intent?
3. Does the need for flexibility arising from changes or policy considerations outweigh the need for finality in the permitting process? Under this third stage, the five flexibility factors set out in EBR 34(E)(3)(a) - (e) and the one finality factor (which appears in EBR 34(E)(3)(f)) are considered at the same time. It is no longer necessary for an applicant for the amendment to prove that one of the flexibility factors exists before the Board will consider finality element of reliance.

Id. at 15-6.

Thus, the first question is whether Condition 11 of the Dash 4 Permit was included because it was critical to the Commission's issuance of the Dash 4 Permit. Condition 11 of the Dash 4 Permit reads as follows:

11. The limit of disturbance shall not exceed the area noted as "proposed treeline" and "silt fence" as shown on Sheet 1 (Exhibit #24).

The Appellants argue that Condition 11 was critical because it is “inconceivable” how the Commission could have issued the Permit without it. The Appellants point out that the limits of clearing are referred to throughout the Dash 4 Permit and relate to 6 different Criteria. For example, in some cases the Commission concluded that a Criterion was met because there was an adequate buffer between the Dash 4 Project clearing and a resource such as wetlands or streams.

The Permittee responds that the Dash 4 Permit was for the construction of a single residence. Accordingly, the limits of disturbance was the area immediately surrounding the proposed house and driveway. The Permittee argues that there is no indication that the limit of disturbance was critical to the issuance of the Dash 4 Permit. The Permittee questions the logic of implying that a limit of disturbance for a particular project implies a condition that the remainder of the site remain forever undeveloped. Permittee contrasts the instant case with *Stowe Club Highlands* where a permit condition that retained a 40-acre meadow for agricultural use was explicitly critical to the issuance of the permit. Permittee also points out that condition 24 of the Dash 4 Permit anticipates further development on the site because it requires written approval from the Commission for any further subdivision.

In the instant case, there is no indication that the limits of disturbance of Condition 11 were drawn in any special manner except to encapsulate the house and driveway. There was nothing in the Dash 4 Permit that indicated that Condition 11 was critical to the issuance of the Dash 4 Permit. Just because a Criterion is met because a resource is outside the limit of disturbance does not lead to the conclusion that the permit would not have been issued otherwise. Therefore, since Permit Condition 11 was necessary but not critical to the issuance of the Dash 4 Permit, the Board can consider the amendment application because it is not subject to the requirements of EBR 34(E).

III. ISSUES

1. Whether the Project complies with Criterion 5.
2. Whether the Project complies with Criterion 8 (aesthetics).
3. Whether the Project complies with Criterion 9(K).

IV. Findings of Fact

To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983). Topic headings are for organizational purposes only. Facts stated and terms defined in the procedural summary are incorporated herein.

Project tract

1. The Project is located on a 13.8 acre tract of land off Hubbell's Falls Drive and Beech Street in the Village of Essex Junction, Vermont.
2. There is one house already constructed on the Project tract. A driveway leads off of Hubbell's Falls Drive to the house.
3. The Project tract is wooded with light underbrush and wooded wetlands. Steep ravines traverse the site and discharge into Indian Brook.

Project Description

4. Permittee proposes building seven homes on the Project tract. Phase 1 will involve the construction of four homes which will have access from Hubbell's Falls Drive from the existing driveway.
5. Phase 2 will involve the construction of three homes which will have access from a driveway off of Beech Street. The Beech Street driveway will replace a pedestrian access to the Countryside Homeowners Association (CHA) recreation area. The pedestrian access to the CHA recreation area is a narrow road that is closed to cars by a chain.

CHA Recreation Area

6. The CHA is comprised of 253 homeowners.
7. The CHA recreation area consists of a swimming pool and tennis court. The recreation area is open all year. The swimming pool is open from approximately Memorial Day through Labor Day. The pool and tennis court were both fenced and locked at the time of the Board's site visit.
8. A sign on the tennis court and swimming pool specifically limits the use of the facilities to CHA members and their invited guests. The sign on the swimming pool also prohibits use of the pool by children under 12 unless accompanied by an adult.

9. There were no other facilities at the CHA recreation area.
10. The CHA recreation area is well used by members. The swimming pool is most crowded during warm summer afternoons. Children sometimes access the recreation area unaccompanied by an adult.
11. There is no parking at the CHA recreation area. CHA members either walk to the recreation facility or park their cars on the street.
12. The CHA has an easement on the Project tract to access the recreation area.
13. The Permittee will provide pedestrian access to the CHA recreation area by a sidewalk parallel to the driveway off of Beech Street. The Permittee proposed building a four-foot high wooden picket fence to separate the driveway from the sidewalk.

Criterion 5

14. There was no evidence submitted concerning high accident locations near the Project. There are no existing unsafe conditions nor unreasonable congestion near the Project site. The speed limit near the Project site is 25 miles per hour.

Hubbell's Falls Driveway

15. The existing driveway off of Hubbell's Falls Drive has sight distances of 420 feet to the west and 480 feet to the east.
16. During the peak a.m. hour the Hubbell's Falls Drive access would generate 13 trip ends. During the peak p.m. hour the Hubbell's Falls Drive access would generate 8 trip ends. On an average day, the homes using the driveway will generate approximately 66 trips.

Beech Street Driveway

17. The driveway off of Beech Street has sight distances of between 300 to 400 feet to the south and greater than 1,000 feet to the north. Cars parked by the entrance to the driveway would decrease the site distances.
18. Prohibiting cars from parking on Beech Street at the two parking spaces adjacent to the driveway would preserve the maximum site distances.

19. During the peak a.m. hour the Beech Street access would generate 12 trip ends. During the peak p.m. hour the Beech Street access would generate 5 trip ends. On an average day, the three homes using the driveway will generate approximately 42 trips.
20. The Permittee proposed constructing a speed bump and installing a stop sign to control the speed of traffic on the Beech Street Driveway.
21. Speed bumps can be jarring to cars and can cause drivers to lose control of the vehicle. Speed humps are less jarring because they are significantly broader than speed bumps. Speed humps can be designed to limit maximum speed to 20 miles per hour.
22. A fence between the driveway and sidewalk is necessary to keep children away from cars.
23. A fence that blocks drivers from seeing the children could pose dangers at the intersection of Beech Street where the driveway and the sidewalk come together.
24. A chain link fence would still separate car traffic from children and not interfere with visibility.

Aesthetics

Context of the Area

25. The Project is surrounded by residential housing developments. Residences line both Beech Street and Hubbell's Falls Drive. Most of the homes are close together. From any home there are many, and often dozens, of homes in view.
26. Apart from the Project tract, there is little open space in the surrounding residential developments.

Project's Fit to Context of the Area

27. There will be seven new homes as part of the Project in addition to the existing home on the 13.8 acre Project tract. The Project will have a significantly lower density than the surrounding neighborhood.
28. Each home can be up to five bedrooms. The mass of the homes will be similar to the surrounding neighborhood.

29. The color and materials will be similar to the already constructed house on the Project tract.
30. The building envelopes will be memorialized with pins prior to construction.
31. There is no landscaping proposed for the Project. The Permittee is relying on the existing vegetation to partially screen the homes. It is likely that Appellants will be able to see a few of the Project homes from their residences.
32. All trees located outside the clearing buffer as designated in Permittee's Exhibit 3d shall be preserved in accordance with generally accepted woodlot management practices. Existing trees shall be preserved provided, however, dead, diseased, dying, and leaning trees or trees severely weakened by age, storm, fire, or other injury may be removed by the homeowners as necessary.
33. There is no exterior community lighting for the Project. Lighting will consist of wall mounted residential lighting.
34. No signs are proposed as part of the Project.

Criterion 9(K)

35. The CHA is not a municipal governing body. Members of the public are not allowed to use the CHA recreation area unless invited by a CHA member.

V. Conclusions of Law

Criterion 5

Under Criterion 5 before issuing a permit, the Board must find that the Project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to the use of highways" 10 V.S.A. § 6086(a)(5). A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created. *Id.* § 6087(b). The burden of proof is on the opponents under Criterion 5, *id.* § 6088(b), but Permittee must provide sufficient information for the Board to make affirmative findings.

Criterion 5 does not require that proposed development be the principal cause or the original source of traffic problems. Several causes may contribute to a particular effect or result. The Board found [in an application involving access to a warehouse,] that the development

would contribute to [an] existing traffic problem. It would be absurd to permit a hazardous condition to become more hazardous.

One purpose of Act 250 is to insure that "lands and environment are devoted to uses which are not detrimental to the public welfare and interests." Safe travel . . . is in the public interest. Exacerbating [an] existing traffic hazard by allowing additional travel on [a] road would be detrimental to the public interest.

In re Pilgrim Partnership, 153 Vt. 594, 596-97 (1990) (citations omitted) (affirming Board decision that proposed project did not satisfy Criterion 5).

The Project's homes will be accessed by two driveways. The existing driveway off of Hubbell's Falls Drive will serve the four homes proposed as Phase 1 of the Project. The site distances for this driveway are adequate and the additional trip ends for these four homes will be minimal. There are no existing high accident locations near the Hubbell's Falls Drive. In light of the above, the Hubbell's Falls Drive driveway complies with Criterion 5.

Phase 2 of the Project involves the construction of three homes and a driveway off of Beech Street that would replace the existing pedestrian access road that leads to the CHA recreation area. The Permittee proposes a pedestrian sidewalk that would run parallel to the driveway with a four feet high wooden picket fence separating the driveway from the sidewalk.

There are no high accident locations near the Beech Street driveway. The speed limit is 25 miles per hour. Sight distances are also adequate, although cars parked near the intersection could limit the view. In light of that fact, the Board will require Permittee to request permission from the appropriate governing body to install a twenty feet no parking zone along Beech Street on both sides of the driveway. Should permission be granted, Permittee shall install the no parking signs.

The Appellants contend that the intersection near the Beech Street driveway and sidewalk is already a dangerous intersection and will become even more dangerous if the Project is built. The Permittee responds that the existing intersection is safe and that the Project does not generate enough traffic to cause unreasonable congestion or unsafe conditions.

The Board did not find sufficient evidence to conclude that the current intersection of Beech Street and the pedestrian access road to the CHA recreation area is currently a dangerous intersection. There was no evidence of accidents in the area and the design is similar to many other neighborhood recreation facilities.

The Appellants next argue that the four-foot high picket fence will block drivers' ability to see young children which would compound the dangers at the convergence of the driveway, sidewalk, and Beech Street. The Permittees respond that the fence was designed to separate cars from pedestrians while still allowing drivers to see pedestrians and fit in with the neighborhood.

The Board agrees with the Appellants that a significant number of the visitors to the CHA recreation area are young children, many of whom would not be visible behind a four-foot high picket fence. In light of that fact, the Board will require the Permittee to build a six-foot high green vinyl chain link fence instead which should not interfere with the visibility of young children at the intersection.

Finally, the Appellants contend that the design of the driveway and sidewalk is unsafe because it recombines children and cars at a dangerous intersection. The Board concludes that the evidence does not support the Appellants' contention. The Board notes that during a typical weekday, there would be 42 trip ends at the Beech Street driveway. The minimal level of traffic using the driveway will not result in an unsafe condition. The Board's conclusion is further supported by the fact that a significant percentage of this traffic would occur during morning and evening peak travel times when the CHA recreation area usage level is likely at its lowest.

The Permittee also proposes to control the speed of the users of the driveway with a speed bump and stop sign. The Appellants questioned the use of a speed bump and suggested speed humps which are less jarring and can be designed to slow traffic down to 20 miles per hour. The Board agrees that speed humps are more appropriate for this Project. The Board concludes that, given the limited amount of traffic and the Permittee's use of a speed hump and stop sign, no unsafe conditions will result. The Beech Street driveway complies with Criterion 5.

Criterion 8

Under Criterion 8, before issuing a permit, the Board must find the Project will not have an undue adverse affect on the scenic or natural beauty of the area, aesthetics, historic sites or rare or irreplaceable natural areas. 10 V.S.A. §6086(a)(8). The only Criterion 8 issue in this case is aesthetics (including scenic or natural beauty).

The burden of proof under Criterion 8 is on those who oppose the Project, 10 V.S.A. §6088(b), but the applicant for the permit must provide sufficient information for the Board to make affirmative findings. See, e.g., *Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Jun. 12, 1997). Thus, even when there is no opposing party or evidence

in opposition with respect to Criterion 8, an applicant will not automatically prevail in the aesthetics issue. *See, e.g., Re: Herndon and Deborah Foster, #5R0891-8B-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Jun. 2, 1997).*

The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. First, it determines whether the proposed project will have an adverse affect under Criterion 8. *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996), citing, Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17 -19 (Nov. 4, 1985).* If the Board concludes that the Project has an adverse affect under Criterion 8, the Board must evaluate whether the adverse affect is "undue."

1. Adverse Affect

In *Hand*, the Board set forth a test for determining whether a project would have an adverse affect under Criterion 8.

[T]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

Hand, supra, at 25, *citing, Quechee, supra*, at 18.

In other words, if a project "fits" its context, it will not have an adverse effect. *Re: Talon Hill Gun Club and John Swinington, #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (June 7, 1995).*

a. The context of the Project

To determine whether the Project is adverse in terms of aesthetics - whether it will "fit" context of area where it will be located - the Board first must determine what that context is. *Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 9, 2002); The Van Sicklen Limited Partnership, #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 36 (Mar. 8, 2002).*

Although defining the context of a project is generally a straightforward process, whether the context of the Project is the 13.8 acre Project tract or the neighborhood surrounding the Project tract leads to opposite conclusions.¹ Thus, the Project is either planned for a scenic parcel with a meandering stream or is an in-fill development in the middle of an expansive suburban residential development. In *John J. Flynn Estate and Keystone Development Corp. #4C0790-2-EB* Findings of Fact, Conclusions of Law, and Order at 25 (May 4, 2004) the Board held that the surrounding area defines the context of the Project.

There are two possible ways to consider the context of this Project. The first would be to view the Project within the 40-acre undeveloped parcel for which it is proposed, the second is to consider the Project within the larger framework of Burlington's New North End residential area. The Board concludes that the latter context is the more appropriate one in which to review this Project.

Id.

As in *Flynn*, the context of the Project is the surrounding residential development. In the instant case, the nearby homes are located close together with little open space between the homes. Like *Flynn*, other than the Project site itself, the area is almost exclusively in residential use. Thus, the context of the area in which this Project must be judged is one of substantial residential development.

b. The impact of the Project on its context

Assessing the impacts of a project is a fact-specific determination whether the Project's design fits within the context of the surrounding residential neighborhood. On the one hand, the Board has found that a project would have an adverse impact on aesthetics because size and density of its units would differ from surrounding structures. *Brewster River Land Co., LLC., #5L1348-EB*, Findings of Facts, Conclusions of Law, and Order at 15 (Feb. 22, 2001). On the other hand in *Flynn*, the Board concluded that a large-scale residential development with 30 buildings each containing two to six residential units on a 40 acre tract fit its context because the density, use, and mass was similar to surrounding developments. *Flynn* at 26.

¹The determination of the Project's context is crucial to the Criterion 8 analysis in this case because if the Project "fits" its context, then the Project is not adverse and the Board's inquiry under Criterion 8 ends. *Re: Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB*, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 9, 2002)

In the instant case, the density, use, and mass are all either similar or less intense than the surrounding residential developments. The Board notes that unlike the existing developments that line the streets, the Project homes will be partially screened by existing vegetation. In light of the above factors, the Board concludes that the Project fits its context and does not have an adverse impact.

No further consideration of the Quechee Lakes test is required. The Project complies with Criterion 8 (aesthetics).

Criterion 9(K)

Criterion 9(K) 10 V.S.A. § 6086(a)(9)(K) provides that:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

The burden of proof to show that the proposed development will satisfy Criterion 9(K) is on the Permittee. 10 V.S.A. § 6088(a). A failure to meet that burden may result in a denial of an Act 250 application. 10 V.S.A. §§ 6087.

Under Criterion 9(K), the Board conducts two inquiries concerning public investments in facilities. First, the Board examines whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. In this case, there is no argument that the investment in the public facilities is at issue.

Second, the Board examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency or safety of such facilities, or (b) the public's use or enjoyment of or access to such facilities. *Swain Development Corp.*, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).

The Appellants argue that the Project will impact the CHA recreation area and the intersection of the Project's driveway/sidewalk and Beech Street.

The Appellants' first argument is that the CHA recreation area is a quasi-public facility since it is owned by a homeowners association and members can bring guests. The Appellants contend that the Project would interfere with the safety and the public's use and enjoyment of the facility.

Criterion 9(K) includes a laundry list of protected facilities and the language "including, but not limited to..." means that the list is not exhaustive. However, Criterion 9(K) only protects governmental and public utility facilities, services, and lands, not private facilities.

In *Omya, Inc. And Foster Brothers Farm, Inc.* #9A0107-2-EB Findings of Fact, Conclusions of Law, and Order (May 25, 1999), the Board held that buildings, even in an historic district which have received public funding, are not protected facilities under Criterion 9(K).

The Board also concludes that Brandon's historic district and the privately owned buildings within the district which are historic, do not qualify as "governmental or public utility facilities, services, or lands" within the meaning of Criterion 9(K).

Id. at 45.

Likewise, in *St. Albans Group and Wal*Mart Stores. Inc.*, #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 54 (Jun. 27, 1995) the Board rejected the contention that buildings and structures qualify under Criterion 9(K) because public funds have been invested in them. Rather, the Board stated, that public funds may be invested in many private structures or enterprises. The Board continued:

It is true that Criterion 9(K) includes, in its examples of "governmental or public utility facility, service, or land," potentially private enterprises such as universities or hospitals. Based on the evidence, the Board is not persuaded that the City's historic district is analogous to the examples given in Criterion 9(K).

Id. at 54.

In *Omya* and *St Albans Group* the Board never reached the question whether the public investment in the facilities was endangered because the Board held that those facilities were not protected by Criterion 9(K). The question whether a project

will materially interfere with the safety or the public's use and enjoyment of a facility is also limited in its application to the same governmental and public utility facilities.

The CHA recreation area is a private facility owned by a group of homeowners in a residential development. The fact that CHA members can bring a guest to the CHA recreation area does not somehow create a public investment nor turn what is essentially a private country club into a municipal pool. Thus, the Board does not need to consider the impacts of the Project to the CHA recreation area because it is not a governmental or public utility facility.

The Appellants' second argument under Criterion 9(K) concerns the safety of the public's use of the intersection of the driveway/sidewalk and Beech Street. Public roads are considered facilities protected by Criterion 9(K). *Swain Development Corp. And Philip Mans, #3W0445-2-EB* Findings of fact, Conclusions of Law, and Order at 34 (Oct. 11, 1990). The Board has already made findings of fact and conclusions of law concerning this intersection under Criterion 5. The "material jeopardy or material interference" test under Criterion 9(K) poses a higher threshold than the analysis under Criterion 5. *Swain* at 34.

Under Criterion 5, the Board imposed permit conditions to alleviate the Project's impacts. With these same permit conditions, the Project will not unnecessarily or unreasonably endanger the public investment in the adjacent public roads, and does not materially jeopardize or interfere with the function, efficiency, or safety of the roadways, or the public's use and enjoyment of access to the roadways. Thus, the Project complies with Criterion 9(K).

VI. ORDER

1. The amendment application is not subject to EBR 34(E).
2. The Project complies with Criteria 5, 8, and 9(K).
3. Land Use Permit Application #4C0593-6-EB is granted.
4. The stay prohibiting construction is lifted.
5. Jurisdiction is returned to the District 4 Environmental Commission.

Dated at Montpelier, Vermont this 4th day of March, 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Patricia Nowak
Alice Olenick
Karen Paul
Richard C. Pembroke, Sr.
Jean Richardson