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

Re: Richard Bouffard
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P.O. Box 986
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Land Use Permit
#4C0647-6-EB

FINDINGS OF FACT, **CONCLUSIONS OF LAW, AND ORDER**

This proceeding concerns an appeal by Richard Bouffard ("Permittee") from a decision by the District 4 Environmental Commission ("Commission") in which the Commission denied the Permittee's permit amendment application to construct a residential dwelling on Lot 18 of the Permittee's subdivision, based upon the application of *In Re* Stowe *Club Highlands, 166* Vt. *33 (1996).*

For the reasons stated below, the Vermont Environmental Board ("Board") also denies the said permit amendment application.

I. Procedural Summary

On February 10, 1986, the Commission issued Land Use Permit #4C0647 ("Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Decision"), authorizing Frederick and Joan Solomon to subdivide 89 acres of land on Depot Road and Arbor Lane in the Town of Colchester, Vermont into 18 lots. The Solomons later sold the subdivision to the Permittee.

On March 1, 2000, the Commission issued Land Use Permit #4C0647-6 ("Dash 6 Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Dash 6 Decision") to the Permittee. The Dash 6 Permit specifically authorizes the Permittee to modify the subdivision with the construction of an on-site wastewater disposal system and associated force main within a 20-foot wide easement on Lot 18 to serve a four-bedroom, single-family dwelling on Lot 12.

In the Dash 6 Decision, however, the Commission, applying *Stowe* Club *Highlands,* denied the Permittee's request to amend Condition 22 of the Permit to allow the construction of a residential dwelling on Lot 18 (the "Project").

On March 29, 2000, Permittee filed an appeal with the Board from the Dash 6 Decision alleging that the Commission erred in its application of Stowe *Club Highlands* to the Permittee's request.

[DOCKET #755]

On May *4,* 2000, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

Permittee by Richard Spokes, Esq.
Town of Colchester Planning Commission by Sheldon Laidman
Raymond McCarthy

Colette Kaiser, the owner of Lot 3 in the subdivision and the President of the subdivision's Homeowners' Association ("HA"), was not able to attend the Prehearing Conference, but indicated her desire in writing to participate in this matter individually and as President of the HA.

In the Prehearing Conference Report and Order issued by Board Chair Marcy Harding following the Prehearing Conference, the Chair noted that the Permittee and the Town of Colchester Planning Commission are statutory parties. 10 V.S.A. §6085(c)(1), referring to §6084(a); Environmental Board Rules ("EBR") 14(A)(l) and (3). The Chair's Prehearing Order further granted party status to Kaiser, McCarthy, and the HA as adjoining landowners, 10 V.S.A. §6085(c)(1) and EBR 14(A)(5), on Criteria 1(B)(waste disposal) and 8 (aesthetics). 10 V.S.A. §6086(a)(1)(B) and (8).

A hearing on this matter was held on August 2, 2000 in Colchester before a Hearing Panel of the Board.

At the hearing, the Chair informed the parties that the Panel intended to take official notice of the Solomon's application and the exhibits which were incorporated in the Permit. No party objected to the Panel's taking such notice.

Following the hearing, the Panel deliberated on August 2 and 31, 2000.

Based upon a thorough review of the record and related argument, the Panel issued a proposed decision on August 31, 2000, which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before September 20, 2000. No party filed written objections or requested oral argument.

On October, 18, 2000, the Board convened a deliberation concerning this matter. Following a review of the Panel's proposed decision and the evidence and arguments presented, the Board declared the record complete and adjourned. This matter is now ready for final decision.

II. Issues

The issues in this matter are:

1. Whether In *re Stowe Club Highlands, 166* Vt. *33* (1996) is applicable to the Permittee's application to amend Condition #22 of Land Use Permit #4C0467 to allow the construction of a residential dwelling on Lot #18.

2. If the answer to Issue 1 is in the affirmative, whether *In re Stowe Club Highlands* prohibits such application.

III. Findings Of Fact

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation, 167* Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department, 143* Vt. 437,445 (1983).

1. On October 25, 1985, Frederick Solomon submitted Land Use Permit Application #4C0647 to the Commission. The first page of the application describes the project as a "proposed 17-lot single family residential subdivision with 16 building lots and one lot to remain undeveloped and retained by owner."

2. Supplemental application information states "[t]his project is to subdivide an existing 89 acre parcel of land into 18 lots with construction of appurtenant roadway, water supply and wastewater disposal facilities. The 18 lots will include a 2.4 acre lot on which is an existing single-family residence (Lot 17), 16 proposed building lots (Lots 1-16) and one lot which will be retained by the applicant and remain undeveloped (Lot 18)."

3. The Permit application also included a Site and Utilities Plan, which includes a notation, that, "Lot 18 is not for development. Deferred permit requested. Lot 18 will be served by an individual on-site wastewater disposal system (to be designed)." This Plan is stamped "Approved" and states "Approval subject to terms and conditions of Findings of Fact and Conclusions of Law and Land Use Permit #4C0647."

4. On February 10, 1986 the Commission issued Land Use Permit #4C0647, authorizing the subdivision of 89 acres to create an 18-lot residential subdivision consisting of 16 new residential lots, one existing farm house on lot 17, and lot 18, an open space 53-acre lot. As part of the Solomon Subdivision, on-site community sewage disposal systems located on lot 18 were approved to serve several residences on some of the 16 lots within the approved subdivision.

5. Permit Condition 1 states:

> The project shall be completed as set forth in Findings of Fact and Conclusions of Law #4C0647, in accordance with the plans and exhibits stamped "Approved" and on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission.

6. Permit Condition 22 states:

> The Permittee, and all assigns and successors in interest, shall maintain Lot #18 as open land. No further subdivision of any parcels of land approved herein shall be permitted without the written approval of the District Environmental Commission.

7. The Findings of Fact note that lot 18 is "being retained by the applicant." See Decision, p. 2, ¶2 and Finding of Fact 7. In the first paragraph of the Permit, lot 18 is referred to as a "common land lot of approximately 53 acres."

8. In its analysis of Criterion 8(A) in its Decision, the Commission states:

> The Commission finds that the subdivision, as conditioned, 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. This finding depends on and is supported by the following: ....

9. Finding of Fact 33, within the Commission's Criterion 8(A) analysis, reads, in pertinent part:

> The proposed road is to be constructed over the low lying wetland area and into a sloped and wooded area of the property to access 8 lots within the wooded area. The Commission finds that this development will not create an undue intrusion upon the landscape if the fill area of the roadbed is landscaped with indigenous species and if exterior lighting is kept to a minimum because the hillsides will not be intensively developed and because Lot #18 (approximately 53 acres) which surrounds this area will not be developed.

10. In its analysis of Criterion 9(C) (Forest and Secondary Agricultural Soils) in its Decision, the Commission states:

> The Commission finds that this subdivision will not result in a significant reduction to any forestry soils because 53 acres of this 89 acre tract will be retained as undeveloped land and the Commission will incorporate this into a permit condition.

11. The Permit was not appealed by the Solomons, nor did they seek to alter the Permit as provided under EBR 31. [1]

12. In 1987, the Permittee purchased the so-called "Solomon Subdivision" as an undeveloped, permitted project from the Solomons.

13. The Permittee is an experienced residential developer and builder, having developed several major residential subdivisions in Chittenden County.

14. Prior to his purchase of the Solomon Subdivision, the Permittee conducted a thorough due diligence investigation including reviewing the subdivision's permits and application materials, consulting with the sellers' engineering firm and conducting site inspections. [2]

15. At the time of his due diligence investigation the Permittee contemplated building a house on lot 18 in the Solomon Subdivision for his own use.

16. The Permittee concluded lot 18 was suitable for a single family dwelling, and that the open land restriction of Condition 22 could be modified to allow construction by an amendment to the Permit.

17. The Permittee's conclusion is based in part on the Solomon Subdivision being a standard grid-type subdivision with lots conforming to zoning minimum lot size requirements, rather than a planned residential development or cluster development characterized by substandard sized lots and common open space lands.

18. The Permittee was also persuaded by the second sentence of Condition 22, which he believed sanctioned amendment requests to develop lot 18.

19. Other factors influencing the Permittee were the fact that lot 18 was to be retained by the developer, and was not required by the Permit to be deeded to a homeowners association or other organization to assure the lands would remain open. The Permittee believed there would be no purpose for retained ownership unless future development of the lot was feasible.

20. At the time that he was negotiating the sale of lots, the Permittee advised some prospective purchasers, either orally or by including a statement in his Purchase and Sale Contracts for the lots, that he intended to seek approval to construct a residence on lot 18 of the Solomon Subdivision.

21. The retention of lot 18 by the Permittee had value to the Permittee at the time that he sold lots in the Solomon Subdivision to Kaiser and others, as the Permit stated that lot 18 would remain open and undeveloped. Lots adjacent to such open land have a higher market value.

22. On March 6, 1992, Permittee submitted Land Use Permit Application #4C0647-4 requesting approval to amend Condition 22 to authorize construction of a single-family residence on lot 18. The application was processed as a "minor" under EBR 51, and a draft permit was prepared.

23. At the request of Colette Kaiser, who owns lot 3 (which adjoins lot 18) in the Solomon Subdivision, a hearing was held on the 1992 application; one hearing session was held but the case was not concluded.

24. At the hearing on the 1992 application, Kaiser stated her concerns about the aesthetics of the development of lot 18.

25. At the time she purchased lot 3, Kaiser conducted due diligence in reviewing the permits and site plans for the Solomon Subdivision prior to purchasing her lot.

26. Kaiser relied on the language in Condition 22 that specifically requires lot 18 to remain undeveloped, as the open land provides uncommon privacy and exposure to wildlife within a relatively urban setting.

27. Kaiser's reliance on Condition 22 at the time of her sale is apparent from her 1992 opposition, both before the Commission and the Town of Colchester, to the Permittee's first attempt to modify the Permit to construct a house on lot 18.

28. It was an important consideration to Kaisers purchase that the community wastewater system located on lot 18 would remain unaffected by future development on that lot because this insured that the management and maintenance of the community's system would not be compromised by activities outside the control of the HA.

29. The value of Kaiser's house on lot 3 is enhanced by the woodland views she enjoys from her deck, the quiet, and the wildlife that roams throughout her neighborhood.

30. The Town of Colchester's zoning regulations allow one-acre lots in the area where the subdivision is located. Some of the lots in the subdivision are larger than two acres.

31. The Permittee has not presented any evidence in support of a claim that he satisfies the Sfowe *Club* Highlands test.

IV. Conclusions of Law

A. The *Stowe* Club Highlands analysis

The Board has previously concluded 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 in Stowe Club Highlands. See, e.g., Donald and *Diane Weston,* Land Use Permit Application #4C0635-4-EB, Findings of Fact, Conclusions of Law, and Order at 18 (March 2, 2000); Ronald L. *Sr., and Marylou Saldi*, Land Use Permit Application #5R0891-16-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Jan. 13, 2000); MBL Associates, LLC, Land Use Permit Application #4C0948-3-EB, Findings of Fact, Conclusions of Law, and Order at 12 – 14 (Oct. 20, 1999); Town *of Hinesburg and* Stuart *and* Martha Martin, Land Use Permit #4C0681-8-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Sept. 23, 1998); *Re: The Stratton Corporation,* Land Use

Permit Application #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Nov. 20, 1997); *Re: Nehemiah Associates, Inc.,* Land Use Permit Application #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order at 4 (Apr. 11, 1997), *aff'd*, 168 Vt. 288 (1998).

In *In re Stowe Club Highlands,* the Vermont Supreme Court affirmed the Board's denial of 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). *In re Stowe Club Highlands,* Land Use Permit Application #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order (June 20, 1995). While the Court 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 permit amendment." *Id.* at *38.* The Court stated:

> The Board framed its discussion as weighing the competing values of flexibility and finality in the permitting process. If existing permit conditions are no longer 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. Ultimately, the Court concluded that the Board was "justified in denying" the permit amendment application based upon the balancing of the policies of finality and flexibility. *Id.* at *40.*

> The principle of finality is derived from the consequences of a permit being issued without any subsequent appeal. Once a permit has been 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... "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). . .*

> [In contrast, t]he principle of flexibility is derived from the consequences of the development process. "[O]nce 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).* .. 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* ....

Re M.B.L. Associates, supra, at 15 (Oct. *20,* 1999), *citing, Re: Nehemiah Associates, Inc., (Remand), supra,* at 2 I-22.

B. The Permittee's arguments

The Permittee does not argue that he satisfies the Stowe *Club Highlands* test and should, therefore, be permitted to proceed with his amendment application. Rather, the Permittee contends that Stowe *Club Highlands* is not applicable to his application to amend Condition 22 to allow construction of a residence on lot 18.

1. **Issue 1**

The Permittee's argument that Stowe *Club Highlands* does not apply to this application is based on a claim that the language of the Permit itself requires flexibility, allowing his application to go forward. There is no reason to employ the Stowe *Club Highlands* analysis, Permittee argues, because the *Stowe* Club *Highlands* analysis does not recognize that the language of a permit may reflect flexibility, thereby negating the necessity of employing the Stowe *Club Highlands* "finality-flexibility" balancing test.

Citing EBR 32(A) ("All conditions relating to a permit shall be clearly and specifically stated in the permit") and *Judge Development Corporation,* Declaratory Ruling 363, Findings of Fact, Conclusions of Law, and Order at 6 (April 28, 1999) ("[P]ermittees and successors in interest [need to be] put on notice as to the parameters of the permit"), Permittee asserts that Condition 22 of the Permit was not clearly stated and is susceptible to conflicting interpretations.

a. *that the two sentences of Condition 22 imply* that further development of lot 18 is *contemplated*

Permittee notes that the first sentence of Condition 22 states that lot 18 shall be maintained as open space. The second sentence of the Condition states that no further subdivision of any approved parcels of land shall be permitted without the written approval of the Commission.

Permittee claims that, in construing Condition 22, it is necessary to give force and effect to both sentences, since they appear in the same condition. State v. *Severence,* 120 Vt. 268, 274 (1958). Under the statutory construction rule of *ejusdem generis,* when words of a specific nature are followed by words of a general nature, the latter are held to include things similar in character to the preceding specific named item. *Rut/and Cable T.V. v City of Rut/and,* 122 Vt. 1, 4 (1960). Thus, Permittee asserts that the rule should be applied to Condition 22, and that "parcels of land" as used in the second sentence of Condition 22 refers to lot 18 since it is specifically addressed in the first sentence. The condition, the Permittee concludes, therefore left the door open for future amendment applications to subdivide lot 18.

Permittee then reasons that if lot 18 can be subdivided, it only makes sense that this means that Condition 22 also allows the development of lot 18, because there could be no reason to subdivide the 53 acre lot unless it were for development purposes and because subdivision of any of the remaining lots in the development would create undersized, nonconforming lots and undoubtedly would not be allowed under the Town of Colchester's zoning regulations. Thus, argues the Permittee, reading Condition 22 to allow the development of lot 18 is the only construction of that Condition which avoids irrational or absurd consequences. *Braun v. Board of Dental Examiners, 167* Vt. 110, 113 *(1997).*

The Board concludes that the Permittee reads more into Condition 22 than what is really there. Even if the first and second sentences of Condition 22 must be read together under the *ejusdem generis* doctrine, the second sentence speaks specifically of "subdivision," not "development." Thus, lot 18 may be subdivided, which would permit different ownership, but it cannot be developed. Such an interpretation is supported by basic canons of statutory construction, which call for words to be interpreted in their ordinary and common meaning. *Slocum v. Department of Social Welfare, 154* Vt. 474,478 (1990); *In re Spring Brook Farm, 164* Vt. 282,286 (1995).

Second, the fact that the Solomon Subdivision lots, including lot 18, might be further subdivided does not lead to the Permittee's inexorable conclusion that those lots must be developed. Colchester's zoning regulations presently would allow further subdivision of some of the 17 lots that were approved by the Permit, those which are larger than two acres. Further, even if the reference to "subdivision" in Condition 22 is limited to only a consideration of lot 18, the Board can conceive of at least one scenario in which lot 18 might be subdivided without being developed: the Permittee might decide to subdivide those portions of lot 18 on which the community subsurface disposal systems lie from the remainder of the tract, transfer such portions to the HA, and then sell or give the remaining lands to a land conservation organization.

Third, it is also by no means a given that the second sentence, which says that "No further subdivision of any parcels of land approved herein shall be permitted without the written approval of the District Environmental Commission," implies that such written approval will be automatically forthcoming or that the Board's *Stowe Club Highlands* precedent will not be applied to any such requests for Commission approval.

Finally, and perhaps most important, the Permittee's reading of Condition 22 to implicitly allow the development of lot 18 would require the Board to completely ignore the Commission's findings and conclusions as to Criteria 8 and 9(C). The Permit contains the standard language in Condition 1 which incorporates the Findings of Fact and Conclusions of Law into the Permit as permit conditions. Condition 1, read in conjunction with the Vermont Supreme Court's holding that findings and conclusions which accompany a permit constitute permit conditions, *In re Denio, 158* Vt. 230, 241 (1992), means that the findings and conclusions as to Criteria 8 and 9(C) have a weight equal to Condition 22.

It would be inconsistent with the Findings and Conclusions which accompany the Permit, and therefore irrational and unreasonable, to interpret the second sentence of Condition 22 to permit the development on Lot 18 which the Findings and Conclusions clearly prohibit. *In re Preseault*, *130* Vt. 343, 346 (1972).

b. that the applicant retained lot 78 and ownership was not transferred to a homeowners' association with covenants

The Permittee next notes that the Permit and Decision indicate in various places that, although the applicant represented lot 18 would remain open, lot 18 was to be retained by the applicant and not conveyed to a homeowners' association or other entity with covenants for preservation purposes. This leads the Permittee to conclude that no purpose would be served by his retaining ownership of 53 acres unless there were the possibility that it could be developed in the future.

There are several responses to this argument. First, the application represented that the lot would remain open, and a permit applicant's representations may be incorporated into a permit as conditions. Stowe Club *Highlands, supra, 166* Vt. at 40. Indeed, a Commission and the parties have the right to rely on the material information provided by an applicant, *Re: The Stratton Corporation, supra* at 18-l 9; *Re: Crushed Rock, Inc.,* Land Use Permits #1R0489-EB and #1R0489-1-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at IO-12 (Oct. 17, 1986), *vacated and remanded on other grounds, In re Crushed Rock, Inc., 150* Vt. *613* (1988). Who owned or owns lot 18 - whether it was to be retained by the applicant or transferred to others - is simply not relevant to the question of what the applicant told the Commission would happen on the lot.

Second, the fact that lot 18 was to be retained by the applicant does not necessarily lead to a conclusion that *Stowe Club Highlands* and its progeny will not apply to any application for a permit amendment to develop the lot. Indeed, in both *Stowe Club Highlands* and *Nehemiah,* the applicants retained ownership of the lots that the developers later sought to develop or subdivide. *Re: Stowe Club Highlands, supra; Re: Nehemiah Associates, Inc. (Remand), supra.*

Third, the retention of lot 18 by the applicant (and subsequently by the Permittee) had a value to the Permittee beyond its potential for development. While the lot may be of limited value to the Permittee at present, it provided value to him at the time he sold lots to Kaiser and others, as lots adjacent to lot 18 had a higher market value by virtue of its status as "open land."

Finally, the fact that there were no covenants protecting the land did not preclude the Supreme Court in *Nehemiah* from finding that what appeared to be covenants were permit conditions subject to the *Stowe Club Highlands* test. *Re: Nehemiah Associates, Inc., supra, 166* Vt. at 594. Thus, the absence of any covenants in this case is not dispositive.

c. that the Site and Utilities Plan submitted with the application indicates development of lot 18

The Permittee argues next that this case is dissimilar from the one presented in *Stowe Club Highlands* because the Site and Utilities Plan submitted with the application stated Lot 18 would be served by an on-site disposal system, yet to be designed.

But successors-in-interest should be wary of placing too much reliance upon statements made by the applicant for the original permit. "While an applicant controls the *application* that is submitted for Act 250 approval, it is the Commission [or Board] that controls the Act 250 permit that is ultimately issued." *Re: Nehemiah Associates, Inc. (Remand), supra,* at 22 (emphasis in original). Applicants are free to say whatever they want in their applications, but it is the permit that controls the project.

Further, while the Site and Utilities Plan includes a notation that states that "Lot 18 will be served by an individual on-site wastewater disposal system (to be designed)," this Commission's stamp on the Plan states "Approval subject to terms and conditions of Findings of Fact and Conclusions of Law and Land Use Permit #4C0647." Those terms and conditions require that the lot remain open and undeveloped.

d. that the Permittee informed his prospective lot purchasers of his intent to seek a permit amendment to construct a residence on Lot 18.

The Permittee's argument drifts into arguing the merits of a Stowe *Club Highlands* analysis, in particular the element of reliance, when he notes that he, unlike the developer in *Stowe Club Highlands,* informed his prospective lot purchasers of his intent to seek a permit amendment to construct a residence on Lot 18. Permittee's Exhibits 8 and 9 are examples of such notification.

While the Permittee's actions may have precluded those lot-owners from contesting his plans to develop lot 18, they do not preclude a consideration of the *Commission's* reliance on Condition 22. See, Stowe *Club Highlands, supra, 166* Vt. at 40. It is also significant that there is no evidence that the Permittee gave a similar notification to Kaiser.

e. *Conclusion as to issue 1*

The Board concludes that *Stowe Club Highlands* applies to the Permittee's amendment application.

B. Issue *2*

Because the Board concludes that Stowe Club *Highlands* does apply to the Permittee's amendment application, it now turns to a consideration of Issue 2.

The Permittee has not presented any evidence in support of a claim that he satisfies the *Stowe Club Highlands* test.

Generally, the party seeking to change the status quo has the burden of proof. *Bernard Carrier,* Land Use Permit Application #7R0639-1-EB, Findings of Fact, Conclusions of Law, and Order at *17* (August 24, 1999); *and see Re: W. Joseph Gagnon*, Declaratory Ruling #173, Memorandum of Decision at 5 (Nov. 22, 1987), *citing* McCormick, *Evidence 949.* The burden of proof includes both the burdens of production and persuasion.

Specifically, as to the question of who bears the burden of proof in cases involving the application of the *Stowe Club Highlands* test, the Board has written:

> The *Stowe Club Highlands* analysis "requires a permittee to present facts. For the very reasons Carrier so eloquently explained that an applicant carries the burden under the ten criteria, an applicanffpermittee also bears the burden of demonstrating a factual change justifying an alteration of a permit condition" under at least one of the three factors articulated above. [Citation omitted] The burden of proof includes the burden of persuasion. This does not mean, however, that the Board abdicates its statutory responsibility to evaluate the facts of the case under the appropriate analytical framework. In other words, if an applicant presented sufficient facts for the Board to reach a conclusion that favored flexibility, the Board would not deny the applicant the opportunity to pursue the amendment simply because he had not analyzed those facts in the appropriate manner. Therefore, the Board reaffirms its previous conclusions that it is appropriate that an applicant, as the party most familiar with the facts of a proposed amendment application, bears the burden of producing sufficient

> evidence for the Board to determine which policy -- flexibility or finality -- is the weightier consideration.

Bernard Carrier, *supra,* at 18 (emphasis in original). Accordingly, the Permittee has the burden of proof on Issue 2.

As noted above, when the Board engages in a Stowe Club *Highlands* analysis, it weighs flexibility against finality. In order to make a case that principles of flexibility should allow a permit amendment application to proceed to its merits, an applicant must first demonstrate that at least one of the three "change" grounds enumerated in Stowe Club *Highlands* is present. If the applicant cannot or does not make such a demonstration, then the Sfowe *Club Highlands* inquiry must close at this point. The Permittee has the burden of proof, and he has not made even a *prima facie* case in support of any further analysis under the Stowe- Club *Highlands* test, much less in support of allowing his application to proceed beyond the Stowe Club *Highlands* stage. See *LaVallee v. Vermont Motor Inns, Inc. et a/., 153* Vt. *80, 84 (1989)* (directed verdict may be entered against party which has burden of proof but fails to present prima facie case).

Since the Permittee has not presented any evidence to support his claim that any changes are present or have occurred and he thus satisfies the Stowe *Club Highlands* test, [3] the Board concludes that he has failed to meet his burden and the inquiry into Issue 2 ends here.

V. **Order**

1. Official notice is taken of the Application #4C0647 and the exhibits which were incorporated in the Permit.

2. Application #4C0647-6 is denied.

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

Dated at Montpelier, Vermont this 23rd day of October, 2000.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
W. William Martinez
Rebecca M. Nawrath
Alice Olenick
Nancy Waples

ENDNOTES

1. Subsequent amendments to Land Use Permit have occurred. Land Use Permit #4C0647-1, -2, -3 and -5 were issued the Solomons and to the Permittee, the first three of which authorized an extension of the construction completion date for the subdivision, and the last which incorporated ANR Wastewater Management Division Subdivision Permit EC-4-l 831. None of these amendments are relevant to the issues presented by this matter.

2. At the hearing, the Permittee's attorney argued that the fact that the Permittee was a successor to the original applicants (the Solomons) distinguished this case from *Stowe Club* Highlands. The Board notes, however, that the applicant for the permit amendment in Stowe Club Highlands was a person several times removed from the original applicant. See Stowe ***Club Highlands, supra, 166*** Vt. at ***34 – 35.***

3. The Board notes that, in his closing statement, the Permittee's attorney conceded that the Permittee does not suggest that any of the three "changes" enumerated in the Stowe *Club Highlands* test had occurred.

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