VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Taft Corners Associates, Inc.
Application #4C0696-11-EB (Remand)

MEMORANDUM OF DECISION

This decision pertains to a motion to alter filed by the Town of Williston (the Town) and a "Motion to Alter or Reconsider" filed by Taft Corners Associates, Inc. (the Applicant) with regard to a permit issued for the construction of two buildings and associated improvements to be used for retail and warehouse sales. The decision also pertains to a "motion to intervene and remand" filed by Judge Companies (Judge). The proposed project will be located within the Taft Corners Commercial and Industrial Park in the Town of Williston (the Park), for which a so-called Umbrella Permit has previously been issued.

In its motion, the Applicant requests approval not to fulfill representations made jointly by the Applicant, the Town, the State of Vermont (the State), and the Chittenden County Regional Planning Commission (the CCRPC) concerning traffic improvements made in order to obtain the Umbrella Permit for the Park. As is explained below, the Environmental Board continues to decline to allow the Applicant to obtain the benefits of the Umbrella Permit unless a sufficient number of the representations made to obtain the Permit are fulfilled.

The Town's motion does not seek approval to renege on representations. Rather, the Town's motion argues that a distinction may be made between representations to make improvements *to* area intersections and representations to make improvements between those intersections. The Town contends that some of the improvements between intersections should not be required. As is explained below, the Board grants most of the Town's motion because some of the improvements are not required to accommodate the traffic impacts of the proposed project.

The Board denies Judge's motion to intervene because it is an untimely petition for party status which does not comply with Environmental Board Rule (EBR) 14.

I. BACKGROUND

On July 29, 1994, the Environmental Board issued Land Use Permit Amendment #4C0696-11-EB, and supporting findings of fact and conclusions of law (the Permit Amendment). This decision states the background of this case. The decision is incorporated by reference.

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[DOCKET #532R2M2]

A. Reauirement to Comply with Representations

The Permit Amendment arises out of a remand order to the Board by the Vermont Supreme Court of April 30, 1993. The Court's remand order requires, in relevant part, that the Board determine whether the proposed project complies with the conditions of the Umbrella Permit on Criterion 5 (traffic safety and congestion).

As part of the Board's inquiry the Permit Amendment addresses the compliance of the proposed project with stipulations which formed the basis for issuing the Umbrella Permit for the Park in 1987, as amended in 1988. These stipulations were signed by the Applicant, the Town, the State, and the CCRPC.

The stipulations were cited by the District #4 Commission in its positive findings under 10 V.S.A. § 6086(a)(5) (traffic safety and congestion). In a condition of the Umbrella Permit, the District Commission required compliance with the findings under Criterion 5 (traffic safety and congestion).

The stipulations contain representations that a significant number of traffic improvements would be made to intersections and roads in the area of the Park. These improvements are contained in an exhibit to one of the stipulations, known as "Exhibit B."

In the Permit Amendment, the Board found that the District Commission both based and conditioned the Umbrella Permit on the representations that a -sufficient number of the so-called "Exhibit B" improvements would be in place as needed to accommodate the traffic impacts of the Park as it is built out.

The Board also found that, contrary to the representations made to obtain the Umbrella Permit, almost none of the Exhibit B improvements has been constructed.

The Board further found that many of the intersections near the Park designated for improvement in Exhibit B are currently experiencing unsafe conditions-or unreasonable congestion, and that the proposed project, by generating as many as 1,400 vehicle trips during the afternoon peak hour, will significantly exacerbate these conditions and congestion.

The Board therefore concluded that the proposed project does not comply with the conditions of the Umbrella Permit

under Criterion 5 (traffic safety and congestion).

Accordingly, the Board conditioned its approval of the proposed project, requiring that the Applicant wait to construct until the representations made to obtain the Umbrella Permit are fulfilled. The Board specifically issued Condition #2, which provides in part:

> Prior to commencement of construction of the proposed project, the following shall be installed, constructed, and operating: the "first stage," "second stage," and two of the "third stage" improvements listed in the so-called "Exhibit B" to the traffic stipulation dated May 6, 1987, which stipulation was Exhibit #109 to Land Use Permit #4C0696. A copy of "Exhibit B" is attached hereto and incorporated by reference. The requirement regarding prior construction of "Exhibit B" improvements includes, and is limited to: all improvements described in Exhibit B as "first stage" and "second stage"; and, of the improvements described as "third stage," the widening to four lanes of Vermont 2A from U.S. Route 2 to the Industrial Avenue and Mountain View Road Intersection, and the widening of Vermont 2A at Exit #12 of I-89 to provide exclusive left turn lanes and two through lanes, northbound and southbound.

B. Substantial Chanse

The Court's remand orderalso required, in relevant part, that'the Board determine whether this amendment application "proposes a significant impact on Criterion 10." This portion of the Court's order arose out of contentions that the proposed project constitutes a "substantial change" to the Park, thereby necessitating a new application under EBR 34. Under EBR 2(G), "substantial change" is defined as a change with the potential for significant impact on one or more of the Act 250 criteria.

In the Permit Amendment, the Board also concluded, pursuant to EBR 34, that the proposed project will constitute a "substantial change" to the Park as permitted if the project is built without the prior construction of a sufficient number of Exhibit B improvements. The Board stated specifically:

> [In incorporating the 1987 and 1988 Stipulations, the District Commission intended that sufficient

Exhibit B improvements be in place to ensure that amendment applications for projects in the Park do not cause unsafe traffic conditions or unreasonable congestion. Since an insufficient number of those improvements has been constructed to enable the area roads to accommodate the traffic impacts of the proposed project, then the construction of the proposed project must be considered a cognizable change to the Park as permitted.

The Board also concluded that this change had the potential for significant impact on the applicable Town Plan because that plan called for careful traffic review of proposed developments and because the only careful review of traffic impacts which occurred "in connection with the Park was one which encompassed major improvements to area roads."

The Board concluded that the proposal of a project of this size and magnitude, without sufficient improvements to area roads in place, does not conform to the Town Plan.

The Board concluded similarly with respect to the applicable Regional Plan.

The Board stated that, under EBR 34(B), a conclusion of substantial change ordinarily means that a proposed project must be handled as a new application, reviewed under all ten Act 250 criteria. Remand to the District Commission therefore would be required.

However, with Condition #2 discussed above, the Board concluded that the potential for significant impact is removed. Therefore, the Board did not order a remand. The Board stated that it would order a remand in the absence of Condition #2.

c. Motions to Alter or Reconsider

On August 29, 1994, the Applicant filed its "Motion to Alter or Reconsider." The Applicant's motion attached an affidavit of Jerrrey L Davis. On the same date, the Town filed its motion. The motions are more fully described in the Discussion section, below.

On September 27, 1994, party Williston Citizens for Responsible Growth (WCRG) filed a response to the motions, attaching an affidavit of Robert L. Morris.

The Board convened oral argument on October 5, 1994, with the following parties participating:

The Applicant by Stewart H. McConaughy, Esq.
The Town by Richard A. Spokes, Esq.
WCRG by Gerald R. Tarrant, Esq.

After hearing oral argument, the Board conducted a deliberative session.

During January 1995, Acting Chair Robert H. Opel, following consultation with members and staff, determined that further deliberation was needed. On January 23, 1995, the Acting Chair issued a memorandum to parties offering an opportunity to comment on the applicability, if any, to this matter of In re Frank A. Molsano, Jr., __ Vt. __, #93-17, slip op. (Nov. 10, 1994). The Acting Chair's January 23 memorandum, which set a response deadline of February 14, 1995, is incorporated by reference.

On February 8, 1995, Judge filed a motion to intervene and remand. On February 14, the Applicant, the Town, and WCRG each filed memoranda with respect to the Molsano decision. Also on February 14, Judge filed an addendum to its motion. Other documents were filed after February 14.

The Board deliberated again on February 22, 1995. Among other items, the Board decided not to consider any documents filed after February 14.

On February 23, 1995, the Applicant filed a letter inquiring as to whether the Board was considering documents filed after February 14. On March 14, 1995, the Acting Chair issued a memorandum to parties stating that the Board was not considering such documents. The March 14 memorandum is incorporated by reference.

The Board deliberated further on April 26, 1995.

II. JUDGE'S MOTION TO INTERVENE AND REMAND

In relevant part, Judge's motion seeks to participate in this proceeding. The Board therefore deems the motion to be a petition for party status. EBR 14(B)(2)(c) provides that a petition for party status:

> [M]ust be made to the board or district commission on or before the first hearing day if a prehearing conference is not held and to the board or district commission on or before the day of the

> prehearing conference, if one is held, unless the board or district commission finds that the petitioner has demonstrated good cause for failure to appear on time, and that its late appearance will not unfairly delay the proceedings or place an unfair burden on the applicant or other parties.

As indicated in the Board's first decision in this matter issued March 31, 1992 and in the Permit Amendment, the dates of the prehearing conference and first hearing day are long past. Judge's motion is therefore untimely. It must therefore show good cause for failure to appear on time and that its late appearance will not cause unfair delay or burden. Judge's motion to intervene does neither alleges nor demonstrates these requirements and is therefore denied. The Board thus does not reach Judge's request to remand.

III. THE MOTIONS TO ALTER OR RECONSIDER

A. EBR 31

The Applicant and the Town file their motions pursuant to EBR 31, which is entitled "Reconsideration of Decisions." The rule has two sections. The first section concerns motions to alter decisions. The second section concerns applications for reconsideration of permit denials. The Board will discuss each section in turn.

1. EBR 31(A): Motions to Alter

EBR 31(A) authorizes parties to file, within 30 days of the date of a decision, such motions to alter as may be "appropriate." The rule provides:

> (A) Motions to alter decisions. A party may file within 30 days from the date of a decision of the board or district commission such motions to alter as may be appropriate with respect to the decision.
>
> The board or district commission shall act upon motions to alter promptly. The running of any applicable time in which to appeal to the board or supreme court shall be terminated by a timely motion filed under this rule. The full time for appeal shall commence to run and is to be computed from issuance of a decision on said motion. It is entirely within the discretion of the board or district commission whether or not to hold a

> hearing on any motion.
>
> The board or district commission may on its own motion, within 30 days from the date of a decision, issue an altered decision or permit. Alterations by board or district commission motion shall be limited to instances of manifest error, mistakes, and typographical errors and omissions.

The Board has issued several decisions which set out the nature of what is appropriate under EBR 31(A). In general, these decisions indicate that a motion to alter is in the nature of reconsideration and the Board should not be asked to "reconsider" matters it was not asked to consider in the first place. Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision (Jan. 16, 1991). A motion to alter also is to be based on the existing record. Re: Swain Development Corn., #3W0445-2-EB, Memorandum of Decision at 3-4 (Nov. 8, 1990). New hearings are not held and new evidence is not taken. Id. at 4; Re: Berlin Associates, #5W0584-9-EB, Memorandum of Decision at 7 (April 23, 1990).

In addition, new arguments are not acceptable, with the exception of arguing that a permit condition is unnecessary or that improper procedures were used. Finard-Zamias, supra at 2; Berlin Associates, supra at 5. The purpose of the exception is to allow parties to present argument about matters they could not reasonably have known about before. Thus, if parties were or should have been aware of possible conditions or use of procedures before final decision, they should not wait until after decision to object through a motion to alter.

One reason for these limits on the use of EBR 31(A) is that parties should not be encouraged to use motions to alter to convert Board decisions into "proposed" decisions to which they can later respond. Evidence and argument should be given to the Board before decision so that it is fully informed and can make the best decision, and so that the process is not unnecessarily elongated by motions to alter. As the Board has previously stated:

> [The Board's] interpretation is based on the need to maintain the integrity of the Board's appeal process by ensuring that arguments and evidence are introduced prior to final decision.

Finard-Zamias, sunra at 2.

2. EBR 31(B)

As the Board has stated often, EBR 31(B) is based on 10 V.S.A. § 6087(c). See, e.g., Re: Sherman Hollow, #4C0422-5R-1-EB, Findings of Fact, Conclusions of Law and Order at 18 (Revised) (June 19, 1992); affirmed In re Sherman Hollow, #92-363 (Vt. June 22, 1993).

10 V.S.A. § 6087(c) authorizes applicants who have received a denial the opportunity, within six months, to correct the deficiencies in the application and return to the appropriate district commission to further seek a permit. The statute states in relevant part:

> A denial of a permit shall contain the specific reasons for denial. A person may, within 6 months, apply for reconsideration of his permit which application shall include an affidavit to the district commission and all parties of record that the deficiencies have been corrected.

EBR 31(B) implements and interprets this statute. The rule provides:

> (B) Application for reconsideration of permit denial.
>
> (1) Procedure. An applicant for a permit which has been denied by the board or district commission may, within six months of the date of that decision, apply to the district commission for reconsideration of his application. The applicant for reconsideration shall certify by affidavit in the application that he has forwarded notice and copies of the application to all parties of record, and that he has corrected the deficiencies in the application which were the basis of the permit denial. The district commission shall hold a new hearing upon 25 days' notice to the parties. The hearing shall be held **within 40 days of receipt of the request for** reconsideration.
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> (2) Scope of review. The district commission may, but need not necessarily, limit its scope of review to those aspects of the project or application which have been modified to correct deficiencies noted in the prior permit decision. The findings of the board or district commission in the original permit proceeding shall be entitled to a presumption of validity in the

> reconsideration proceeding, insofar as those findings are not affected by proposed modifications in the project. However, those presumptions may be rebutted by the district commission or by any party upon a showing that the circumstances of the application have changed, or upon a review of evidence not previously presented.

The purpose of 10 V.S.A. § 6087(c) and EBR 31(B), which is explained in the Sherman Hollow decision, is to allow an applicant who has received a denial to go back to the district commission with changes to a project to correct the deficiencies found in the denial. EBR 31(B) involves accepting the denial and finding a way to meet its terms. For example, if a project is denied under 10 V.S.A. § 6086(a)(l)(G) because it will destroy a significant wetland, then the applicant may redesign the project to avoid the wetland and return to the district commission within six months with a reconfigured proposal. However, the applicant may not use EBR 31(B) to challenge the finding that the wetland will be destroyed. Neither Section 6087(c) nor EBR 31(B) are avenues for changing a decision or for relitigation. See Sherman Hollow, supra, Findings of Fact, Conclusions of Law and Order at 17-19.

B. The Town's Motion

The Town moves to alter Condition #2 pursuant to EBR 31(A). The Town agrees with the Board's findings and conclusions that sufficient Exhibit B improvements must be in place. However, the Town argues that some of the Exhibit B improvements 'required by Condition #2 are not needed and are not supported by the evidence, and therefore should be removed from Condition #2.

The Town specifically contests required Exhibit B improvements which involve widening various area roads. The Town contends that the Board has found unsafe and unreasonably congested conditions only at various intersections, and that no finding addresses "traffic conditions on the road links between the intersections." The Town's motion contains a specific list of Exhibit B improvements which the Town contends-are not needed.

The Town's motion is appropriate under EBR 31(A) because it asks the Board to reconsider Condition #2 on the basis of the existing record and does not raise new arguments.

On reconsideration, the Board concludes that completion of the traffic improvements listed in the Town's motion should not be required. However, the Board makes one exception to this conclusion. In its motion, the Town seeks to remove from the Permit Amendment an Exhibit B improvement involving widening Vermont Route 2A to provide exclusive left turn lanes at I-89's Exit 12. As shown in the findings supporting the Permit Amendment, traffic safety and congestion problems exist in this location and will be exacerbated by the proposed project. Accordingly, the requirement to provide left turn lanes on Route 2A in this location will not be deleted from the Permit Amendment.

The Board will alter the Permit Amendment in accordance with the foregoing.

C. The Applicant's Motion

The Applicant's motion is divided into three parts: (a) it seeks the Board to "alter" Condition #2, (b) it seeks alteration or clarification of various Findings of Fact, and (c) if the Board declines to "alter," it asks the Board to "reconsider" the condition "under EBR 31(B)."

The Board will analyze in turn each of the three parts of the Applicant's motion. This analysis will be made in light of the discussion of EBR 31(A) and (B), above.

1. "Altering" Condition #2

The Applicant requests that the Board "alter" Condition #2 to allow it "to construct its project upon a showing, after notice and a hearing, that sufficient Exhibit B improvements will be in place to avoid unreasonable congestion and unsafe traffic conditions caused by the Wal-Mart/Sam's project."

By using the word "alter," presumably the Applicant makes this request pursuant to EBR 31(A).

The Applicant's request is not appropriate under EBR 31(A) because it seeks to allow the presentation of further evidence. As stated above and in previous decisions, the purpose of EBR 31(A) is to provide a vehicle for reconsideration based on the existing record. New evidence is not taken.

The Applicant should have presented the evidence it now seeks to present during the five days of hearings held by the Board in this matter. In this regard, the Applicant

claims that it did not know that the Board would require a sufficient number of Exhibit B improvements to be in place. However, this claim is contradicted by the record. Specifically:

a. The Board has found, based on a thorough review of the evidence, that such was the intent of the parties, including the Applicant, in executing the stipulations to the Umbrella Permit in 1987 and 1988.

b. The Board has found this to be a condition of the Umbrella Permit under Criterion 5.

c. In a 1989 letter, the Applicant admitted that the essence of the stipulations and its Umbrella Permit is that projects should not be built more rapidly than the required improvements to the highways can be made. The Applicant specifically mentioned the improvements to be made by the State and the Town.

d. The appellant in this matter, WCRG, and party City of Burlington made it clear, well in advance of the hearings, that compliance with Exhibit B was an issue.

e. The Board, in a memorandum of decision issued on December 20, 1993 - prior to submission of evidence - stated that it would hear the issue of compliance with the stipulations to the Umbrella Permit.

f. The stipulations were incorporated into the Umbrella Permit under Criterion 5, and under 10 V.S.A. § 6087(b) the solution to non-compliance with that criterion is the issuance of permit conditions.

Despite all of this, the Applicant presented almost no evidence concerning the traffic impacts of the proposed project or the construction or non-construction of Exhibit B improvements. In contrast, WCRG presented evidence on both points.

The Applicant had the opportunity to present the evidence to the Board but chose not to do so. In Goshy v. Morey, 149 Vt. 93 (1987), the Supreme Court stated that parties are bound by the tactical choices they make. Id. at 97. While the Goshy decision concerns motions for relief from judgment under Vermont Rule of Civil Procedure 60(b), the logic of this particular statement in Goshy applies to the Applicant's motion.

A number of specific points raised by the Applicant deserve response. First, the Applicant argues in favor of its suggested alteration on the basis of Re: L&S Associates, #2W0434-8-EB, Revised Findings of Fact, Conclusions of Law and Order (Sep. 22, 1993), in which the Board, after issuing a final decision, received motions to alter, and held a hearing to take further evidence on permit conditions.

L&S Associates is the only case the Board is aware of in which it took further evidence following a motion to alter. The case forms the exception rather than the rule; it was based on permit conditions which no party reasonably could have anticipated. Since, as stated above, the Applicant here had ample notice, the Board sees no reason to extend L&S Associates to the present case.

Second, the Applicant contends that the Permit Amendment is internally inconsistent because it requires "full" completion of the specified Exhibit B improvements but the Board found that "sufficient" Exhibit B improvements are what is required. This is not an inconsistency. The issue is whether a sufficient number of the improvements listed in Exhibit B has been completed. As stated on page 48, the Board concluded that "an insufficient number of the Exhibit B improvements have been constructed ...." Thus, the use of the word "sufficient" has nothing to do with "full" or "partial" completion of items on the list.

Third, the Applicant contends that Exhibit B is not workable because it is not sufficiently specific concerning the listed improvements. The Board does not agree that Exhibit B is not workable. Plans can easily be drawn up to fulfill any of its more general provisions. ***But, importantly, the Applicant signed the stipulations incorporating Exhibit B in 1987 and 1988. If Exhibit B is unworkable now, it was unworkable then, but the Applicant nonetheless submitted it to the District Commission to obtain an Umbrella Permit.***

Fourth, the Applicant contends that Condition #2 is improper because it requires the Applicant to wait to construct the proposed project until after the improvements are made and such a requirement is not supported by the evidence. The Applicant requests that the Board take evidence on what measures are needed prior to construction and what measures may proceed concurrently with construction based.on "reasonable assurances" that they will be timely done.

However, the Board's requirement is supported by the following:

a. The findings clearly indicate that, during the six years since the stipulations were submitted to the District Commission to obtain the Umbrella Permit, very few of the Exhibit B improvements have been constructed, despite the passage of the time scheduled for construction. Thus, the Board has no basis to believe that construction on the project can go forward under "reasonable assurances" that the Exhibit B improvements will be timely constructed.

b. The findings and conclusions clearly reflect that existing conditions on area roads are presently unsafe and unreasonably congested, and that the proposed project will significantly exacerbate these conditions by adding as many as 1,400 trips to the area roads.[1] It is therefore reasonable to prevent this exacerbation by requiring the Applicant to wait to construct until the representations concerning improvements to the area roads, made to obtain the Umbrella Permit, are fulfilled.

Further, the Board notes that the Applicant's request to present further evidence is not appropriate under EBR 31(A).

2. Altering or Clarifying the Findinss of Fact

The Applicant moves that the Board alter or clarify various findings. In general, this motion is appropriate under EBR 31(A) to the extent it requests alteration based on the existing record (see below). With one exception, the Board declines to alter any Findings of Fact in the Permit Amendment.

The Board disagrees with the arguments raised by the Applicant in regard to altering or clarifying the findings. The Board addresses a number of these arguments below.

The Applicant contends that Finding 118, with regard to generation of as many as 1,400 trips during the peak hour, is not supported by the evidence. However, the Applicant's

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[1] In reviewing this matter, the Board has noted that Finding 117, regarding the use of area roads by traffic from the proposed project, does not contain a full description of the roads which are likely to be used. The Board will alter this finding.

witness Jeffrey L. Davis testified during the hearing on February 23, 1994 that the CCRPC had estimated that the proposed project will generate approximately 1,400 trips during the peak hour. While witness Davis appeared to disagree with the CCRPC's estimate, the Board finds the estimate credible.[2]

The Applicant also asks the Board to alter various Findings based on an affidavit of Mr. Davis submitted with the motion to alter. Such testimony should have been introduced at hearing. The submission of the affidavit is not appropriate.[3]

The Applicant further claims that Finding 105 implies that it is obligated to make the Exhibit B improvements if others do not. This is not correct.

The Applicant additionally requests that the Board alter Finding of Fact 89c, in which the Board found that Exhibit B included "widening Route 2A at Exit #12 (I-89) to provide exclusive left turn lanes and two through lanes for both north- and south-bound traffic."

The Applicant argues that, in making this finding, the Board has misread Exhibit B because, in the Applicant's view, Exhibit B does not state that there should be *two* through lanes.

The Applicant further contends that, because of Finding 89c, the Board's decision is "tantamount to a permit denial" because the decision allegedly cannot be fulfilled without constructing a entirely new bridge at the I-89 intersection. Specifically, the Applicant argues that the cost of building a new bridge is prohibitively expensive and that the State of Vermont has no plans to build a new bridge.

The Applicant's contentions regarding cost and intent of the State are based on newspaper articles and the affidavit of Mr. Davis which is attached to the motion.

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[2]Other figures were placed into evidence by the parties. Aside from the CCRPC's estimate, the next most credible estimate is that of witness Robert Morris. This estimate is 1,104 trips during the peak hour.

[3]The Board notes that WCRG also submitted an affidavit of Mr. Morris with its response to the Applicant's motion. Such submission likewise is not appropriate.

This is not appropriate. A motion to alter is not a vehicle for introducing new evidence. Moreover, the Board's decision must be based on the record. 3 V.S.A. § 809(e), (g). The newspaper articles and the affidavit are not in the record developed at the hearings. Accordingly, the Applicant's claim that the cost is prohibitive and the State will not build a bridge fail. Thus, the Applicant's claim of "de facto" permit denial also fails.

However, the Applicant's request to alter Finding 89c is also based on references to the existing record. On re-examination, the Board is persuaded that Finding 89c should be altered in the manner requested by the Applicant.

3. "Reconsidering" Condition #2

The Applicant asks that the Board "reconsider" Condition #2 under EBR 31(B). The Applicant asserts three errors made by the Board: (a) that the Board is wrong in concluding that the Umbrella Permit, as issued in 1987 and amended in 1988, required compliance with the stipulations; (b) that the Board's "substantial change" conclusion is legally erroneous; and (c) that Condition #2 is improper because it violates 10 V.S.A. § 6087(b).

The Applicant's request is improper under EBR 31(B). As discussed above, that rule allows applicants to modify projects to correct deficiencies in permit denials and return to the appropriate district commission to continue to seek a permit. The Applicant has not received a denial. Rather, the Board has required the Applicant to honor and abide by its own representations.

Moreover, the Applicant has not changed the proposed project to correct deficiencies and has not filed with the District #4 Commission.

Although the Applicant's requests are not proper under EBR 31(B), they are proper under EBR 31(A), and the Board addresses them below.

a. Exhibit B as Condition of the Umbrella Permit

The Board declines to reconsider its finding and conclusion regarding the conditioning of the Umbrella Permit and the 1988 Amendment on completion of a sufficient number of Exhibit B improvements. The Board believes that its decision is amply supported for the reasons stated in the Permit Amendment and in the Board's memorandum of decision issued December 20, 1993.

With respect to this issue, the Board notes that the Applicant's motion omits all reference to the language of Condition #6 of the Umbrella Permit, which requires that the Applicant provide evidence of conformance to the Findings under Criterion 5. The positive findings issued under Criterion 5, in the Umbrella Permit and the 1988 Amendment, rely heavily on the stipulations.

The Applicant also contends, concerning this issue, that the District Commission has issued seven previous permit amendments "without requiring the Permittee to construct any of the Exhibit B improvements." Aside from the fact that the Applicant is not required by the Board's Permit Amendment to construct any of the Exhibit B improvements, it must be noted that the Applicant has not introduced any of the seven previous amendments into the record before the Board. The Applicant's claim therefore fails.

b. Substantial Chanse

The Applicant's argument regarding substantial change is that the term is defined in EBR 2(G) as "any change in a development or subdivision which may result in significant impact with respect to any of the criteria ..." The Applicant emphasizes the word "development" in this definition and contends that this word limits the Board from concluding, as it did, that the construction of the proposed project with an insufficient number of Exhibit B improvements is a substantial change.

The Applicant's argument fails because EBR 34 clearly states that a permit amendment is required for substantial. changes to "a *permitted* project or *permit.*" A substantial change in a permitted project or a permit thus may include the construction of a project in a manner which conflicts with the basis on which the permit was issued. Otherwise, the use of "permitted project or permit" in EBR 34 would be superfluous. Moreover, such inclusion ensures that the representations made by an applicant to obtain a permit are carried out or, if not carrying them out has the potential for significant impact, that the relevant project is reviewed to ensure that no undue adverse impacts will occur.

In support of its argument, the Applicant cites the cases of In re Robert and Barbara Barlow, Declaratory Ruling #234 (Sep. 20, 1991), affirmed 4 Vt. Law Week 199 (Aug. 13, 1993) and In re H.A. Manosh, 147 Vt. 367 (1986). While these cases concern substantial change and thus have some relevance, they do not support the Applicant's argument on

this particular point because they concern pre-existing developments alleged to need an Act 250 permit because of substantial changes. As a matter of law, pre-existing developments are exempt from Act 250 unless there is a substantial change to them. 10 V.S.A. § 6081(b). By definition, an exempt development does not already have an Act 250 permit. In contrast, EBR 34 concerns the need for a permit amendment for projects which already have Act 250 permits. It would be unreasonable to ignore the basis of the permit in determining whether an amendment is necessary.

In review of its decision on substantial change, the Board also has considered the impact of the Molgano decision cited above and determined to make brief alterations to the Permit Amendment. These alterations state the Board's conclusion regarding the impact of Molgano and do not change the Board's overall conclusion on substantial change.

c. 10 V.S.A. § 6087(b)

The Applicant's last argument is that "the Board's Decision is wrong because it violates 10 V.S.A. § 6087(b)." 10 V.S.A. § 6087(b) provides:

> A permit may not be denied solely for the reasons set forth in subdivisions (5), (6) and (7) of section 6086(a) of this title. However, reasonable conditions and requirements allowable in section 6086(c) of this title may be attached to alleviate the burdens created.

10 V.S.A. § 6086(c), referred to in Section 6087(b), provides:

> A permit may contain such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to (1) through (10) of subsection (a), including but not limited to those set forth in section 4407(4), (8) and (9), 4411(a) (2), 4415, 4416 and 4417 of Title 24, the dedication of lands for public use, and the filing of bonds to insure compliance. The requirements and conditions incorporated from Title 24 may be applied whether or not a local plan has been adopted. **General requirements and conditions may be established** by **rule.**

At the outset, the Applicant's broad-based claim appears to imply that the Board's entire decision is wrong

because it violates 10 V.S.A. § 6087(b). However, Section 6087(b) pertains to disallowing denials under Criteria 5, 6, and 7 and to permit conditions under those criteria. The Board's decision that the proposed project constitutes a substantial change under Criterion 10 is not governed by Section 6087(b).[4]

The Applicant specifically argues that Condition #2 violates Section 6087(b) because the Board has not found that the condition is "reasonably necessary to alleviate any traffic burdens" to be created by the proposed project. However, Section 6087(b) does not contain any requirement of necessity. Its requirements pertain to reasonableness and alleviation of burden. It also references Section 6086(c). In construing Section 6086(c), the Supreme Court has stated that the issue is reasonableness. In re Denio, 158 Vt. 230, 240 (1992).

The Board believes its condition meets the statute. Based on the evidence and the findings, the Board has concluded that existing traffic conditions are unsafe and unreasonably congested. Based on the evidence and the findings, the Board has concluded that the proposed project will exacerbate these conditions.

The Board has therefore required the Applicant to wait to construct until the existing conditions on area roads are improved in the manner represented in the stipulations. If those conditions are improved, the burden that the proposed project would create by exacerbating the conditions necessarily will be alleviated.

The Board's condition is reasonable and appropriate in light of the representations made to obtain the Umbrella Permit and the size of the project including the potential for generating as many as 1,400 vehicle trips during peak hour.

The Applicant's contention appears to be that it is never reasonable under Section 6087(b) to require an applicant to wait to construct a project until existing conditions are improved. But the Board is enabled to prevent an adverse condition from becoming worse. In re Pilgrim Partnership, 153 Vt. 594, 596-97 (1990). Thus, the Board does not interpret Section 6087(b) to disable it or

[4] **The Board notes that the only role Condition #2 plays in the substantial change analysis is in the Board's decision not to remand.**

the district commissions from requiring correction of existing conditions prior to the placement of large numbers of vehicles on already unsafe and congested roads, particularly where representations have already been made that the roads will be improved.

IV. CONCLUSION

Based on the foregoing, the Board will make such alterations in its decision as noted above. Otherwise, the motions filed by the Town and the Applicant are denied.

In closing, the Board would stress that the Applicant has made choices in this proceeding and while obtaining the Umbrella Permit. Those choices involved, in this proceeding, presenting minimal evidence on the traffic impacts and, in the Umbrella Permit proceeding, submitting a stipulation which included traffic improvements contingent on action by the Town or the State.

The Applicant now seeks to obtain the benefits of the Umbrella Permit without being held to the choices which it has made. The benefits of the Umbrella Permit include foreclosure of review of the proposed project under many Act 250 criteria. The Board thus finds it reasonable to hold the Applicant to the choices it has made if the Applicant wants the benefits of the Umbrella Permit. This is particularly true in this case because it involves representations made to obtain that permit. Representations by an applicant define what is expected to occur and often provide the basis of approval.

However, as the Board stated in the Permit Amendment - in a statement which has not been contested by any parties - a legal alternative is available to the Applicant. Specifically, the Applicant is not required to go forward under the Umbrella Permit. The Applicant, under 10 V.S.A. §§ 6083-86, may file an application for an independent permit for this project not under the Umbrella Permit. Thus, should the Applicant seek to prove that the improvements called for in the stipulations to the Umbrella Permit are no longer needed, the Applicant should file an application for an independent permit with the District Commission.

V. ORDER

1. Judge's motion to intervene and remand is denied.

2. The Board grants the Town's motion to alter as discussed above.

3. The Board will alter the Permit Amendment in accordance with its decision above.

4. The Board otherwise denies the Applicant's motion to alter or reconsider.

5. Land Use Permit Amendment #4C0696-11-EB **(Revised)** and revised supporting findings of fact and conclusions of law are hereby issued.

Dated at Montpelier, Vermont this 5th day of May, 1995.

ENVIRONMENTAL BOARD

Robert H. Opel, Acting Chair*
Lixi Fortna**
Arthur Gibb
Samuel Lloyd
William Martinez
Anthony Thompson
Steve E. Wright

*John Ewing became Chair of the Board effective February 1, 1995. Mr. Opel continues to serve as Acting Chair on this matter at Chair Ewing's request because Chair Ewing has a conflict and because Mr. Opel chaired the decision under reconsideration.

**Former member Fortna continues to serve on this case pursuant to 3 V.S.A. § 849.

taft.mem(a20)