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

Re: Faucett Builders, Inc.
Land Use Permit #4C0763-2-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In this decision, the Environmental Board ("Board") accepts a settlement agreement to which the parties consent, determines that residential construction on a portion of Lots 4 and 5 ("Project"), as conditioned, will not have an undue adverse effect on historic sites pursuant to 10 V.S.A. § 6086(a) (8) and issues a permit amendment pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

I. BACKGROUND

On August 30, 1989, the District #4 Environmental Commission ("District Commission") issued Land Use Permit #4C0763 ("Original Permit") to the predecessor in title of Faucett Builders, Inc. ("Faucett"). The Original Permit authorized the subdivision of a 50 acre parcel of land into 27 residential lots and one retained lot ("Subdivision"). Due to the presence of an archaeological site at the Subdivision, condition 14 of the Original Permit provided: "The Permittees shall report to the District Commission semi-annually (starting with the issuance date of the permit) regarding the progress on the archeological investigation."

On July 17, 1992, the District Commission issued Land Use Permit Amendment #4C0763-1 which extended the construction completion date to September 1, 1995 for Lots 1 through 27 (excepting Lot 15) and two development roadways.

On September 1, 1995, Faucett Builders, Inc. ("Faucett") filed Application #4C0763-2 ("Application") for a permit amendment to eliminate certain requirements regarding archeological investigation on Lots 4 and 5 imposed by condition 14 of the Original Permit.

On November 1, 1995, the District Commission issued Findings of Fact, Conclusions of Law and Order #4C0763-2 ("Decision") in which it denied the Application.

On November 22, 1995, Faucett filed an appeal from the Decision with the Environmental Board, contending that the District Commission erred with respect to 10 V.S.A. § 6086(a) (8) (historic sites).

On December 28, 1995, Board Chair John T. Ewing convened a prehearing conference. On January 3, 1996, Chair Ewing issued a Prehearing Conference Report and Order which is incorporated herein by reference.

DOCKET #646

On February 13, 1996, Chair Ewing issued a Memorandum to Parties, continuing this matter at the parties' request until July 3, 1996 in order to allow time for a Phase II archeological evaluation of Lots 4 and 5.

On July 3, 1996, Chair Ewing conducted a telephone conference with Faucett and the Division for Historic Preservation ("Division") participating.

On July 8, 1996, Chair Ewing issued a Scheduling Order allowing Faucett and- the Division until July 23, 1996 to file a stipulation regarding Lots 4 and 5.

On July 23, 1996, Faucett and the Division filed a joint Stipulated Findings of Fact, Conclusions of Law and Permit Conditions ("Stipulation").

On July 31, 1996, the Board deliberated on the Stipulation. This matter is now ready for decision.

II. ISSUE

Whether residential construction on a portion of Lots 4 and 5 will have an undue adverse effect on historic sites pursuant to 10 V.S.A. § 6086(a)(8).

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. 3 V.S.A. § 810(1) states that "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases. Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Handy, 144 Vt. 610, 613 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

Pursuant to 3 V.S.A. § 810(4), the Board takes official notice of the following items:

1. Application #4C0763 including the application

face sheet and all schedules, attachments and exhibits thereto.

2. The Original Permit and associated Findings of Fact, Conclusions of Law and Order.

3. Land Use Permit #4C0763-1, issued on July 17, 1992.

4. Proposed Scope-of-Work, budget, and contract for Phase II archaeological evaluation of VT-CH-14 within Lots 4 and 5 in the Bay Colony Estates Development, Shelburne, Vermont, filed with the Board on February 9, 1996.

5. Phase II Archaeological Site Evaluation of VT-CH-14 within Lots 4 and 5 of the Bay Colony Estates Development, Shelburne, Vermont, by Douglas Frink, Principle Investigating Archaeologist, filed with the Board on July 3, 1996.

IV. FINDINGS OF FACT

1. The District-Commission issued the Original Permit on August 30, 1989. The Original Permit authorized the subdivision of a 50 acre parcel into 27 residential lots and one retained lot.

2. The Subdivision is located in the LaPlatte River watershed, within 300 meters (984 feet) of Shelburne Bay, in Shelburne, Vermont.

3. Lots 4 and 5 are located in the southwestern portion of the Subdivision. Spinnaker Lane (formerly Schooner Lane) borders Lots 4 and 5 to the east.

4. Archaeological site VT-CH-14 is located on portions of Lots 4 and 5.

5. Condition 14 of the Original Permit states: "The Permittees shall report to the District Commission semi-annually (starting with the issuance date of this permit) regarding the progress on the archaeological investigation."

6. Consulting Archaeology Program ("CAP") conducted a combined Phase I site identification study and limited Phase II site evaluation study ("Study") of the Subdivision between 1989 and 1990.

7. As a result of the Study, CAP determined that 25 of the 27 lots contained no significant archaeological deposits. However, Lots 4 and 5 contained dense cultural deposits (100 quartzite flakes, 8 chert flakes, 2 quartz flakes and one broken biface tool). Therefore, CAP determined that further evaluation must be completed prior to construction activities on Lots 4 and 5.

8. On February 12, 1996, Chair Ewing convened a prehearing conference by telephone during which the parties agreed that a Phase II archaeological investigation would be conducted on Lots 4 and 5 of the subdivision.

9. Douglas S. Frink of Archaelogy Consulting Team, Inc., Principle Investigating Archeologist, conducted the Phase II investigation on the portions of Lots 4 and 5 which would be disturbed by construction. The results of the Phase II investigation are indicated on a map ("Map") identified as "Figure 3: Project Area Showing Phase I and Phase II STP Locations," a copy of which is attached to the Stipulation filed with the Board on July 23, 1996 by Faucett and the Division.

10. Based on the results of the Phase II investigation, Faucett and the Division have submitted the Stipulation to the Board in which they have agreed that Condition 14 of the Original Permit shall be superseded by the following:

a. The building envelope on each of Lots 4 and 5 ("Building Envelope") consists of the portion of the "Disturbed" area shown on the Map as a strip of land approximately 28 meters wide and 85 meters long (92 X 279 feet) adjacent to Spinnaker Lane.

b. Further Phase II investigation shall be required for construction on any additional portions of Lots 4 and 5, up to an additional 30 feet (a total of 122 feet) in depth from Spinnaker Lane, if Faucett or its successors in interest wish to extend the Building Envelope for either or both lots.

c. The same procedure shall be followed for any such further Phase II investigation as was followed in the present case: the Division shall approve the proposed scope of work and shall evaluate the report provided by the archeologist. Based on its evaluation, the Division may recommend that the District Commission or Board authorize the extension of the Building Envelope to an additional depth not to exceed 30 feet (a total of 122 feet) from

Spinnaker Lane, and may require additional evaluation and/or resource recovery as a condition of the relocation.

d. The remainder of Lots 4 and 5 outside of the Building Envelope consists of protected land ("Protected Land") which, according to the results of Phase I and Phase II investigations and the Division's Predictive Model, has a probability of containing significant archeological resources ("Archeological- Resource").

e. The Archeological Resource can be protected from disturbance during construction by the erection of a construction barrier consisting of snowfencing, flagging, or other appropriate physical barrier on the boundary of the Building Envelope and the Protected Land. Faucett shall erect or be responsible for the erection of the construction barrier.

f. The Archeological Resource can be protected from future disturbance in perpetuity by a covenant running with the land. By August 15, 1996, Faucett shall execute a covenant, in form and substance satisfactory to the Division, which binds Faucett, all of its contractors and subcontractors, and all subsequent owners of the lots, to ensure that the Protected Land portion of each of Lots 4 and 5 shall not be disturbed and that the Archaeological Resource shall be protected both during the construction of homes on the lots and thereafter in perpetuity. The covenant shall specify that topsoil removal, grading, scraping, cutting, filling, stockpiling, logging or any other type of ground disturbance is prohibited within the Protected Land without the prior approval of the District Commission and the Division.

g. Topsoil removal, grading scraping, cutting, filling, stockpiling, logging or any other type of ground disturbance on the Protected Land is prohibited without prior written approval of the District Commission, or the Environmental Board, and the Division.

11. In the Stipulation, Faucett and the Division agreed that, in all other respects, the Original Permit shall remain unchanged.

III. CONCLUSIONS OF LAW

The Board is obligated to review any settlement agreement reached by the parties and the Board may not accept such an agreement if the agreement prevents the Board from making all necessary affirmative findings under the 10 Act 250 criteria. Cerscsimo Lumber Co., Inc., Findings of Fact, Conclusions of Law and Order #2W0957-EB at 3 (Nov. 29, 1995); Pico Peak Ski Resort, Inc., Findings of Fact, Conclusions of Law and Order #1R0265-12-EB at 4 (Nov. 22, 1995).

Criterion 8 (historic sites) is the only issue in this case. Pursuant to criterion 8, the Board must find that the proposed project "[w]ill not have an undue adverse effect on . . . historic sites" before issuing a permit.

Based-upon the foregoing findings of fact, the Board concludes that the Project, if completed and maintained in conformance with the above findings of fact, the Stipulation, the map attached to the Stipulation entitled "Figure 3: Project Area Showing Phase I and Phase II STP Locations," and all of the terms and conditions of Land Use Permit #4C0763-2-EB, will conform with the requirements of Criterion 8 (historic sites) and will not cause or result in any detriment to public health, safety-or general welfare.

IV. ORDER

The Board hereby issues Land Use Permit #4C0763-2-EB. Jurisdiction is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 6th day of August, 1996.

ENVIRONMENTAL BOARD

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