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

Re: MBL Associates, LLC
Land Use Permit Application #4C0948-3-EB
Docket [redacted]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns a proposal to amend Condition #16 of Land Use Permit #4C0948-EB (Altered) issued August 14, 1997 ("Original Permit"). Condition #16 pertains to the "perpetual affordability" of 60 multi-family units that are part of the 221 unit planned residential development known as Dorset Farms ("Project"). The Project is located on 202 acres of land off Dorset Street in the City of South Burlington, Vermont.

This appeal includes the preliminary issue of whether, after weighing the competing policy considerations of flexibility and finality as articulated in In re Stowe Club Highlands, 166 Vt. 33 (1996), the Vermont Environmental Board ("Board") Will proceed to consider the merits of the application to amend Condition #16 of the Original Permit. As explained in more detail below, the Board concludes that the policies of finality outweigh those of flexibility in this matter. Accordingly, the Board will not review the merits of the amendment application.

I. BACKGROUND

On October 14, 1998, MBL Associates, LLC ("MBL") filed an amendment application with the District #4 Environmental Commission ("District Commission") seeking to amend Condition # 16 of the Original Permit pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On April 13, 1999, the District Commission issued Findings of Fact, Conclusions of Law, and Order #4C0948-3 ("Dash 3 Decision") denying MBL's application to amend Condition #16 of the Original Permit.

On May 11, 1999, MBL filed an appeal with the Vermont Environmental Board ("Board") from the Dash 3 Decision alleging that the District Commission erred by denying the amendment application pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules ("EBRs") 6 and 40.

On June 17, 1999, Board Chair Marcy Harding convened a prehearing conference with the following entities participating:

MBL by Robert Rushford, Esq. and Gerald Milot
Agency of Commerce and Community Development ("ACCD")
by John Kessler, Esq.

Town of Shelburne ("Shelburne") by Joseph Obuchowski, Esq.

On June 18, 1999, Chair Harding issued a Prehearing Conference Report and Order ("Prehearing Order").

On June 28, 1999, MBL filed objections to the Prehearing Order.

On July 14, 1999, the Board deliberated concerning MBL's objections to the Prehearing Order. The Board issued a Memorandum of Decision on July 28, 1999.

In June and August, 1999, the parties filed prefiled testimony and exhibits. In June and July, 1999, Chair Harding issued revised scheduling orders.

On September 9, 1999, the parties filed proposed findings of fact and conclusions of law. MBL also filed its Objection and Motion to Strike ACCD's prefiled evidence ("Motion to Strike"). On September 15, 1999, ACCD filed its opposition to the Motion to Strike.

On September 22, 1999, the Board deliberated concerning the Motion to Strike. On September 24, 1999, the Board issued a Memorandum of Decision.

On September 27, 1999, Chair Harding convened a second prehearing conference with the following entities participating:

MBL by Robert Rushford, Esq. (by telephone)
ACCD by John Kessler, Esq.
Shelburne by Joseph Obuchowski, Esq. (by telephone)

On September 29, 1999, the Board convened a hearing in the City of Montpelier, Vermont with the following entities participating:

MBL by Robert Rushford, Esq.
ACCD by John Kessler, Esq.
Shelbume by Joseph Obuchowski, Esq.

The parties had previously decided that no site visit was necessary in this appeal. The Board accepted documentary and oral evidence into the record and heard opening and closing statements. After recessing the hearing, the Board deliberated on September 29, 1999 and October 20, 1999.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

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

II. ISSUES

1. Whether MBL's permit amendment application for the modification of Condition #16 of the Permit should be considered without resort to the analysis set forth in In re Stowe Club Highlands, 164 Vt. 272 (1996).

2. If MBL's permit amendment application for the modification of Condition #16 of the Permit must be reviewed under the Stowe Club Highlands analysis, whether, pursuant 'to the policy considerations articulated in Stowe Club Highlands or other policy considerations, Condition #16 of the Permit should be modified.

3. If the Board determines Condition #16 of the Permit may be modified, whether it is appropriate for the Board to consider whether such modification will conform with the Chittenden County Regional Plan pursuant to 10 V.S.A. §6086(a)(10) or whether the Board must remand the matter to the District Commission.

4. If it is appropriate for the Board to consider conformance of the modification of Condition #16 with the Chittenden County Regional Plan, whether such modification will conform with the Chittenden County Regional Plan pursuant to 10 V.S.A. §6086(a)(10).

III. FINDINGS OF FACT

1. **The** Project has been defined above as the development of Dorset Farms, a planned residential development consisting of 161 single family homes and 60 multi-family condominium units located on 202 acres of land off Dorset Street in the City of South Burlington, Vermont.

2. MBL purchased the Project site in 1988. MBL began to seek permits for the Project in 1993.

3. The District Commission refused to grant a land use permit for the Project in April, 1994. MBL appealed the District Commission's denial to the Board. The Board approved the Project under Land Use Permit #4C0948-EB issued June 20, 1995. Upon consideration of Motions to Alter tiled by Shelbume and ACCD, the Board issued the Original Permit and supporting Findings of Fact. Conclusions of Law, and Order ("Board Decision") on January 30, 1996.

4. Permit Condition # 16 of the Original Permit states:

> In perpetuity, the price for each sale or rental of each Multi-Family Unit shall comply with the following definition of "affordable housing":
>
> > Housing is affordable when households with incomes below Chittenden County's median income pay no more than 30 percent of their income on housing costs. Such costs for renters are: rent and utilities (including heat, hot water, trash, and electric). Such costs for homeowners are principal, interest, property taxes, and property insurance.
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> Such price shall be measured in accordance with the median income, as determined by the Chittenden County Regional Planning Commission, at the time of sale or rental. Such sale price shall be measured in accordance with a standard, 30-year mortgage available at the time of sale.

5. The findings of fact in the Board Decision discuss the desirability of affordable housing under the pertinent City and Regional Plans. The findings quote specific provisions of those plans addressing the affordability issue. An introductory statement to the findings of fact asserts that headings are provided for the convenience of the reader and are not intended to limit the relevance of any finding to the particular topic heading under which it falls.

6. Finding of fact #61 of the Board Decision discusses the imposition of a condition regarding the affordability of the single family homes.

7. Finding of fact #87 of the Board Decision discusses the imposition of a condition regarding the affordability of the multi-family units:

> The Applicant [MBL] proposes to sell each of the 60 multi-family units at a price which will allow a household below median income as measured in Chittenden County to purchase a unit without spending more then [sic] 30

> percent of income. The Applicant has accepted a permit condition requiring that the 60 multi-family units will comply with the definition of "affordable housing" contained at page 75 of the Regional Plan. *At oral argument before the Board on November 8, 1995, the Applicant offered that such condition be in perpetuity.*

(emphasis added).

8. The Board Decision states at Section VI.G., *Criterion 10 (Local and Regional Plans):* "In light of the foregoing findings of fact and the discussion below, the Board concludes that, with conditions, the Project will conform to the City and Regional Plans."

9. Subsection 1 of Section VI.G., *City Plan,* states: "With respect to its conclusion regarding the City Plan, the Board stresses that the Plan encourages housing in the [South East Quadrant] which is affordable to moderate income households and the Project is designed to be so affordable."

10. Subsection 2c. of Section VI.G., *The Regional Plan,* addresses conformance with the public good exception to the Regional Plan, which the Board concluded was met by the Project's provision of affordable housing.

11. Subsubsection 3 of Section VI.G., "Permit Condition under Criterion 10," discusses the agreed-upon conditions regarding affordable housing as a prerequisite to an affirmative conclusion under Criterion 10, City and Regional Plans.

12. Shelbume and the Shelburne Planning Commission appealed the Original Permit and the Board Decision to the Vermont Supreme Court regarding Criterion 10, Regional Plan. Specifically, they argued that the Board Decision erred by concluding (i) that none of the provisions in the Regional Plan calling for development of "growth centers" were specific enough to deny a permit to MBL and (ii) that the Project complies with the Regional Plan's "greater public good" exception.

13. MBL did not file an appeal or cross-appeal regarding any of the terms or conditions of the Original Permit or the Board Decision, nor did it challenge the accuracy of the Board's findings in *any* way.

14. In March 1997, the Vermont Supreme Court issued a decision affirming the Board

Decision as to the Regional Plan. In re MBL Associates, 166 Vt. 606 (1997). Because the Court determined that none of the Regional Plan provisions calling for the development of growth centers clearly prohibited the Project, it specifically noted that it did not need to address the appellants' challenge to the Boards conclusion that the Project complies with the "greater public good" exception to the Regional Plan.

15. On January 22, 1998, MBL applied to the District Commission for a permit amendment to allow phasing of the Project ("Dash 1 Application").

16. On April 9, 1998, MBL applied to the District Commission for a permit amendment to allow the 60 multi-family units to be built as 30 duplex units rather than as 15 quadpiex units ("Dash 2 Application"). MBL requested this amendment because a change in the interpretation of handicap-accessibility rules by the Department of Labor and Industry would require the installation of an elevator in each quadplex. Although construction of duplex units is more expensive than construction of quadplex units, construction of duplex units would be less costly than construction of quadplex units with elevators installed.

17. The District Commission approved the Dash 2 Application in Land Use Permit Amendment #4C0948-2 ("Dash 2 Permit") and its incorporated Findings of Fact and Conclusions of Law and Order ("Dash 2 Decision"), both issued June 18, 1998.

18. The Dash 2 Decision states at finding of fact #9:

> The increased cost of constructing duplex units, as compared to the cost of constructing four-plex units, will not prevent the Applicant from meeting the affordability requirements of [C]ondition 16 of Land Use Permit #4C0948-EB (Altered) [the Original Permit]. Testimony of Applicant.

19. MBL did not file a Motion to Alter the Dash 2 Permit or Dash 2 Decision with the District Commission. MBL did not appeal the Dash 2 Permit or Dash 2 Decision to the Board or in any other way timely challenge the terms, conditions, findings, or conclusions found therein.

20. The District Commission issued Land Use Permit Amendment #4C0948-1 ("Dash 1 Permit") and its incorporated Findings of Fact and Conclusions of Law and Order ("Dash 1 Decision") on July 29, 1998 which approved the Dash 1

Application to complete the Project in phases. On August 14, 1998, MBL filed a Motion to Alter the Dash 1 Permit seeking to replace the "in perpetuity" requirement of affordability found in Condition # 16 of the Original Permit **with a** requirement that only the initial sale must meet the affordability standards. The District Commission denied the Motion to Alter on September 11, 1998.

21. On October 14, 1998, MBL filed an application to amend Condition #16 of the Original Permit by replacing the perpetual affordability requirement with a requirement that only the initial sale of the multi-family units must meet the affordability standards ("Dash 3 Application"). The District Commission denied the Dash 3 Application on April 13, 1999. MBL then filed the instant appeal to the Board.

22. In March, 1994, the Vermont Housing Finance Agency ("VHFA") issued a draft letter of intent (" 1994 Draft Letter of Intent") to MBL regarding the exploration of the creation of a non-profit joint venture with MBL that would acquire the Project with financing provided by VHFA. The non-profit entity would construct and market the Project as affordable housing. VHFA would provide financing for purchase of individual units. Lake Champlain Housing Corp. ("LCHC") was involved in the negotiations that led to the 1994 Draft Letter of Intent.

23. The 1994 Draft Letter of Intent contains the following statement:

> "The undersigned ... on behalf of himself insofar as action is required of him personally to consummate the transactions described above, hereby acknowledges receipt of the foregoing letter and agrees to proceed in good faith toward satisfaction of the conditions thereof.
>
> Date:_____ _____
> GERALD C. MILOT

24. VHFA typically issues a draft letter of intent to a developer indicating its interest in participating in a project. If the developer wishes to work with VHFA, then VHFA issues a final letter of intent. The developer must sign the final letter of intent for the deal to move forward. If the deal proceeds, then VHFA issues a letter of commitment.

25. ACCD submitted pages 1 and 3 of the 1994 Draft Letter of Intent into the record of the instant Board appeal. ACCD was unable to locate page 2. MBL did not offer any portion of this document into the record.

26. No party offered into the record a draft or a final letter of intent that was signed by VHFA or acknowledged by Mr. Milot.

27. Neither the 1994 Draft Letter of Intent nor any final letter of intent was part of the record in the Board proceedings that led to the issuance of the Original Permit and Board Decision in 1996.

28. VHFA and LCHC were not listed as joint-applicants for the Project.

29. During the 1994 negotiations with VHFA and LCHC, MBL determined that the then-current cost basis for the Project was approximately $119,000 for each multi-family unit. MBL testified that this amount was within VHFA's lending parameters and LCHC's rental criteria. MBL provided no documentary evidence supporting its contention.

30. LCHC only participates in projects with rental units. LCHC currently requires that the rent for its units not exceed $900 per month. This maximum rental rate rises periodically to reflect changes in the rental market.

31. By approximately September 30, 199'7, MBL secured and closed on construction financing and began construction of infrastructure for the single family homes and for some small part of the infrastructure related to the multi-family units. In 1998 it secured and closed on construction financing related to the multi-family units.

32. MBL testified in the instant Board appeal that, in late 1997, LCHC determined that it could not work with MBL to develop affordable housing in connection with the Project because the rent would need to exceed $900/month if it were to reflect MBL's stated costs. No documentation was entered into the record reflecting LCHC's inability to participate in the Project.

33. MBL testified in the instant Board appeal that VHFA verbally indicated to MBL that it would not be able to participate in the Project. MBL's sole witness could not recall when this verbal indication was made. No documentation was entered into the record reflecting VHFA's inability to participate in the Project.

34. MBL has allocated $45,000 per multi-family unit and $65,000 per single family home for the cost of the Project's infrastructure.

35. MBL testified that the rise in the following expenses has caused the Project costs to escalate beyond a point where non-profit organizations can participate:

(i) MBL states that the three years that elapsed between the 1994 Draft Letter of Intent and the Supreme Court's March 1997 affirmation of the Original Permit affected the overall cost of the Project both directly, in terms of additional permitting costs, consulting fees, and appellate costs (which MBL states are $1,100 per unit), and indirectly, in terms of additional carrying costs for the undeveloped land such as taxes (which MBL states are $3 19 per unit), insurance (which MBL states are $217 per unit), and principal and interest on the bank financing for the land (which MBL states are $4,878 per unit).

(ii) MBL states that, during the three year period between March 1994 and March 1997, its labor and construction costs increased approximately $800,000, resulting in an additional cost of $13,000 per unit.

36. MBL testified that during the three year period between March 1994 and March 1997, the Department of Labor and Industry began to interpret an existing regulation more strictly, requiring that elevators be installed in quadplex units, thereby increasing the cost per unit by $7,000. This net increase cost was reduced to $3,200 per unit by constructing duplex structures instead of more economical quadplex units, which change was authorized by the Dash 2 Permit.

37. MBL testified that a March 1998 ruling by the City of South Burlington determined that the Project would be subject to the City's 1995 impact fee ordinance, thereby increasing the Project costs by another $867 per unit.

38. Based upon the additional costs set forth above, MBL testified that the fully-allocated, multi-family per-unit cost is now almost $143,000, reflecting a $24,000 per unit increase over the $119,000 cost per unit contemplated in 1994.

39. MBL testified that even if the cost of the multi-family units could be reduced to $135,000 per unit, the necessary monthly rental fee would not comply with the income limitations of Condition #16 unless the units were rented at a significant loss. The necessary rental fee would exceed LCHC's program guidelines of $900 per month.

40. MBL testified that it met with several organizations in an effort to deliver lower cost housing in accordance with Condition #16, including ACCD, LCHC, and the

Burlington Community Land Trust. MBL testified that it has been unable to find any housing group that is willing or able to participate in the Project and comply with the perpetual aspect of Condition #16 at the Project's current cost structure.

41. Mortgage rates are lower today than they were in 1994. During the last 12-18 months interest rates have been the lowest that they have been in the last 15-20 years. Mortgage rates are beginning to rise again. VHFA can offer mortgage loans at 7.1%. This is not a rate available to a developer.

42. MBL has developed approximately thirty other projects in Chittenden County. In addition, the three principal partners of MBL have independently developed approximately 15-20 other projects each. MBL and/or Gerald C. Milot, one of the partners, have developed approximately 2,000-2,500 residential units and several office buildings in Chittenden County. Most of the projects developed by MBL and/or Mr. Milot have been involved in the Act 250 permitting process. MBL and/or Mr. Milot have been involved in the development of federally subsidized "Section 8" affordable housing projects. Approximately 20 years ago MBL and/or Mr. Milot developed housing which has continued to be affordable despite the lack of involvement by a non-profit entity.

43. MBL decided to "test the market" for non-subsidized perpetually affordable housing by building some of the multi-family units and offering them for sale. MBL has its own sales agency which markets and sells the housing it develops. MBL acts as rental agent for the lease of some of the residential units it develops.

44. MBL has sold approximately 40-45 of the single family homes. The current purchase price of the single family homes is between $160,000 and $180,000. Some people have customized the single family homes and paid in excess of $180,000. Mr. Milot, MBL's sole witness, could not recall the original projected sales prices for the homes and was therefore unable to state whether the single family homes are selling at a price that is higher than those projections.

45. MBL built 16 of the multi-family units authorized by the Original Permit. **MBL** has sold one of those units. MBL testified that it is leasing the 15 remaining units at a loss.

46. MBL testified at the hearing that at $154,000, the multi-family units are within the boundaries required for affordable housing.

47. The current offering price of the multi-family units is in excess of $160,000.

48. The Project's multi-family units are approximately 2,000 square feet. A typical one bedroom or small two-bedroom affordable housing rental unit is approximately 750 square feet.

49. MBL testified at the hearing that the current cost of constructing a multi-family rental unit in South Burlington with no exceptional features is $80 per square foot.

50. To access state subsidies for perpetually affordable housing, multi-family units can be sold only to people whose income does not exceed 85% of median income. The subsidies are passed through a non-profit organization. These projects are typically the result of a partnership between a for-profit developer and a non-profit entity.

51. MBL testified that "a rental program with non-profit involvement is the only way to make perpetual affordability work."

IV. CONCLUSIONS OF LAW

A. Scope of Review and Burden of Proof

When a party appeals from a District Commission determination, the Board provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the de novo review of a District Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the District Commission regarding the criteria and other issues on appeal in this matter. Rather, it must regard the District Commission's Dash 3 Decision as evidence to be offered by the parties.

Generally speaking, the party seeking to change the status quo has the burden of proof. See Re: W. Joseph Gagnon, Declaratory Ruling #173 at 5 (Nov. 22, 1987) citing McCormick, Evidence 949. The burden of proof includes both the burden of production and persuasion. In this proceeding, MBL is the party seeking to change the status quo by requesting an amendment to an existing permit. Accordingly, MBL has the burden of proof on the preliminary issues.

B. Official Notice

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, "[t]he rules of evidence as applied in civil cases. .. shall be

followed" in contested cases before administrative bodies. Id. § 810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Hanley, 144 Vt. 610, 612 (1984). judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 8 1 O(4); V.R.E. 20 1 (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. 20 1 (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 stated at the public hearing in this matter that it would take official notice of the District Commission's Dash 1 Permit, Dash 2 Permit, Dash 1 Decision, Dash 2 Decision, and Dash 3 Decision, together with incorporated exhibits. The Board had previously denied MBL's request that the Board take official notice of these documents. The Board has reconsidered its previous determination, *sua sponte,* and takes official notice as stated above.

C. **Whether MBL's permit amendment application for the modification of Condition #16 of the Permit should be considered without resort to the analysis set forth in In re Stowe Club Highlands.**

MBL argues that the Stowe Club Highlands analysis "is not necessarily a prerequisite to every case invoking EBR Rule 34" and that the proposed amendment should be allowed without reference to that analysis. MBL's Proposed Conclusions of Law at 15. MBL alleges that the Stowe Club Highlands Court rejected the collateral estoppel analysis undertaken by the Board in that case because collateral estoppel created a "stricter, and less flexible standard than was appropriate." Id. at 17. As a result, MBL argues, if a proposal can withstand the "stricter and less flexible standard" of collateral estoppel, then there is no need to turn to the considerations discussed in Stowe Club Highlands.

The central premise of MBL's argument -- that the Court rejected collateral estoppel because it was too rigid -- is erroneous. The Stowe Club Hi&lands Court did not determine that collateral estoppel was inappropriately *strict,* it determined that it was an inappropriate *standard* to apply when reviewing a permit amendment request. The Court stated:

> We are not persuaded that collateral estoppel provides the correct framework in which to evaluate applications for permit amendments. The

> doctrine of collateral estoppel, or issue preclusion, applies when a party seeks to relitigate a factual or legal issue previously decided in a judicial or administrative proceeding. The effect of collateral estoppel is that resolution of a specific issue . . . is given the same preclusive effect as the final judgment of the court or agency. . . .
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> In a permit amendment case, however, there is no dispute that the applicant is bound by the provisions of the original permit. [T]he original permit, including [the] Condition [at issue], governs the development of the Stowe Club tract unless the permit is modified. By applying collateral estoppel, the Board in effect evaluated whether the original permit conditions have the force or effect of a judgment; *that analysis is unnecessary because the original permit is a prior judgment that without question binds the parties.*
>
> *The central question in this case is not whether to give effect to the original permit conditions, but under what circumstances those permit conditions may be modified.*

Stowe Club Highlands, 166 Vt. at 36-37 (emphasis added; citations omitted). See also In re Nehemiah Associates, Inc., 166 Vt. 593, 594 (1996) ("the elements of collateral estoppel are not appropriate standards to evaluate an application for a permit amendment").

Furthermore, as is clear from the quoted Supreme Court language above, even if the Board were able to evaluate the issue under the doctrine of collateral estoppel, MBL would not be permitted to relitigate the propriety of Permit Condition #16: "the original [P]ermit *is* a prior judgment that *without question* binds the parties." Despite its argument that collateral estoppel is the proper analysis here, MBL does not analyze this matter pursuant to the elements of that doctrine -- and it is clear that MBL's position could not withstand such analysis.

MBL reports that other courts have held that if a judgment is based on the determination of two issues, either of which alone would be sufficient to support the result, then the judgment is not conclusive with respect to either issue standing alone. MBL argues that because the Supreme Court's decision in In re MBL Associates does not discuss the Board's "alternative" conclusion that the Project falls within the "greater public good" exception to the Regional Plan, then neither that "alternative" analysis in the Board's decision nor Condition #16 are conclusive or binding.

In MBL, the Supreme Court did not conclude that the Board's alternative analysis

under the "greater public good" exception was erroneous -- it simply did not reach the question. As a result, when the Court affirmed the Board Decision, the findings and conclusions of the Board Decision *and the conditions of the Original Permit* became "final and are not subject to attack," even if they were not proper in the first place. In re Taft Comers Associates, 160 Vt. 583,593 (1993). If MBL did not want to be bound by requirements of Condition # 16, then it was incumbent upon MBL to file a motion to alter with the Board, to file a cross-appeal with the Supreme Court, and/or to ask the Court, in a motion for reconsideration, to address the alternative issue because it did not wish to be bound by Condition #16. MBL did none of these.

As a result, the Board concludes that Condition #16 is a final condition that can be altered, if at all, solely by review under the flexibility versus finality test outlined by the Supreme Court in Stowe Club Highlands.

D. In re Stowe Club Highlands / Flexibility Versus Finality

MBL alternatively argues that even if its amendment request is analyzed under Stowe Club Highlands, the Board should favor flexibility over finality and review the merits of the Dash 3 Application.

In Stowe Club Highlands, the Supreme Court affirmed the Board's denial of a permit amendment application for a project that proposed to develop a lot previously set aside by permit condition under Criteria 8 and 9(B). While the Supreme Court overruled the Boards 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." 166 Vt. 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 Supreme 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. See also Re: Nehemiah Associates. Inc., Land Use Permit Application #1R0672-1 -EB (Remand), Findings of Fact, Conclusions of Law, and Order (Apr. 11, 1997) [EB #592], aff'd, No. 97-223 at 4 (Vt. Sept. 11, 1998); Re: Town of Hinesburg, Land Use Permit Application #4C068 1-8-EB, Findings of Fact, Conclusions of Law, and Order (Sept. 23, 1998) [EB #704].

> 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 Comers Associates, ...
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> [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 ....

Nehemiah, Land Use Permit Application #1R0672-1 -EB (Remand) at 2 l-22.

Each of the three kinds of changes that would justify altering a permit condition must be one that was not reasonably foreseeable at the time the permittee applied for the permit it seeks to amend.' The Stowe Club Hi&lands Court observed that "foreseeability is related to the degree of change" and that "while small or moderate changes are expected and even common, extreme changes will likely come as a surprise to all." Stowe Club Highlands, 166 Vt. at 39. Therefore, a permit applicant "should consider foreseeable changes in the project during the permitting process, and not suggest conditions that [it] would consider unacceptable should its project change slightly. Otherwise, the initial permitting process would be merely a prologue to continued applications for permit amendments." See also Re: The Stratton Corooration, #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Jan. 15, 1998) [EB #688].

The Board is now ready to consider the Dash 3 Application in light of the Stowe

Club Highlands analysis. It will first consider the factors favoring flexibility. MBL alleges that the Project is impossible to develop as permitted due to the extreme and unforeseeable loss of a non-profit partner. MBL states that increased costs, which were either wholly unexpected or unexpectedly high, caused the non-profit organizations to withdraw their support. MBL argues that the participation of VHFA and other non-profit and community housing groups such as LCHC is essential for the development and continued sale or rental of perpetually affordable multi-family housing units because (i) it would allow MBL to obtain a more favorable financing for overall project construction thereby lowering Project overhead and the eventual sales price of each multi-family unit, (ii) it would provide governmental subsidies which would be used to offset other development costs to bring the multi-family housing within the non-profit program requirements, and (iii) it would provide meaningful and practical enforcement of any perpetual affordability condition because the non-profit participation would continue after the initial build-out and sale.

The Board is struck by the lack of documentary or other credible evidence offered in support of MBL's contentions. MBL provided no documentation concerning any of the alleged increased costs. In addition, those unsupported and cursory statements that MBL did provide regarding costs related solely to the multi-family units. MBL provided no financial picture of the entire Project including the single family homes. MBL provided no evidence concerning the availability of cross-subsidies from within the Project or from other MBL projects to offset any loss resulting from the sale of some or all of the multi-family units for a price that is lower than the cost of building them. MBL provided no evidence regarding revising the Project to reduce costs by, for example, decreasing square footage of the multi-family units. MBL presented no written evidence supporting its contention that banks are unwilling to participate in the Project because the perpetual affordability poses too great a risk. MBL provided no evidence concerning the point at which the Project would "break-even" financially.

Despite the statement in MBL's Notice of Appeal that it intended to call Alan Hunt from the VHFA as a witness and that it might also present testimony from other non-profit agencies, Mr. Milot was MBL's sole witness. MBL did not submit the 1994 Draft Letter of Intent or any other indication of non-profit participation into the record. It submitted no documentary evidence supporting the contentions that the cost of the units in 1994 was at a level that would have permitted a non-profit agency to participate or that today the cost of the units precludes non-profit participation. It did not submit documentary evidence of VHFA's and LCHC's refusal or inability to participate or of MBL's attempts to obtain the participation of other non-profit organizations. Furthermore, nothing in the Original Permit or Board Decision reflected that the success of the Project depended on the support of non-profit participation and VHFA and LCHC

have not been co-applicants or parties in the application proceedings.

The Board's findings of fact support its conclusion that MBL and its partners are experienced developers who are familiar with non-profit programs and the Act 250 process. The Board also concludes that MBL and its partners are aware that market factors change, that interest rates rise and fall (and are, indeed, today at levels lower that when this Project was first proposed in 1994), and that construction costs fluctuate.

Based upon its findings of fact in this appeal, the Board concludes that MBL has failed its burden to produce credible evidence of extreme, unforeseeable changes that would cause the Board to favor flexibility.

In contrast, the facts weigh heavily in favor of finality. Despite its current contention that Condition # 16 is part of an unnecessary alternative analysis, MBL did not appeal or cross-appeal from the Original Permit and Board Decision, nor did it ask the Supreme Court to reconsider its decision not to address the "greater public good" analysis. Furthermore, finding of fact #9 in the Dash 2 Decision (see finding #18 above) makes it clear that, even as late as June 18, 1998, the District Commission relied upon MBL's representation that the requested change from quadplex to duplex units would not prevent MBL from complying with Criterion # 16.

Finding of fact #87 of the Board's Decision states that, at oral argument before the Board on November 8, 1995, MBL offered that Condition #16 be in perpetuity. MBL did not appeal or otherwise challenge this finding. Although MBL now alleges that it was asked to accept the addition of the "perpetual" aspect, finding #87 conclusively establishes the contrary. The Board and the District Commission have since relied upon MBL's representation that the rental units would be perpetually affordable. See Stowe Club Hi&lands, 166 Vt. at 39-40.[1]

[1] The Board also notes that Condition #16 is required for the Project's compliance with the City Plan. Therefore, even if the Supreme Court had overruled the Board's "greater public good" analysis and expressly declared that Condition #16 was unnecessary for, compliance with the Regional Plan (see discussion at 13 supra), the Board concludes that Condition #16 would have been necessary for the Project's compliance with the City Plan. See Nehemiah, Land Use Permit Application # 1 R0672- 1 -EB (Remand) at 2 1 (erroneous belief that reserved parcel was set-aside only under Criterion 9(B) does not defeat Commission's reliance on the condition to find compliance with Criterion 8).

If conditions to mitigate impacts can simply be ignored and not complied

MBL did not appeal the Dash 2 Permit or Dash 2 Decision to the Board or in any other way timely challenge the terms, conditions, findings, or conclusions found therein. In fact, it was not until August 1998 -- more than one year after the Supreme Court's MBL decision and many months after **LCHC** allegedly withdrew its participation -- that MBL first requested that the perpetual aspect of Condition # 16 be eliminated when it filed a motion to alter the Dash 1 Permit.'

Accordingly, the Board concludes that the policy of finality outweighs the policy of flexibility in this appeal. MBL has failed its burden of proof. The Dash 3 Application which seeks to remove the requirement of perpetual affordability from Condition # 16 is denied.

E. If the Board determines Condition #16 of the Permit may be modified, whether it is appropriate for the Board to consider whether such modification will conform with the Chittenden County Regional Plan pursuant to 10 V.S.A. § 6086(a)(10) or whether the Board must remand the matter to the District Commission.

In light of the Board's decision above, it does not address the issue of where jurisdiction over the amendment application resides.

> with, and instead relitigated at a future date, the protection of the public and the environment from the impacts those conditions are designed to remedy is less likely to occur. In such a circumstance, the Act 250 decision-making process will become less one of making decisions which **are** adhered to, and more one of picking the time and composition of [the] Act 250 tribunal most favorable to one's interest.

Re: Stowe Club Highlands, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order at 10 (June 20, 1995) [EB #616], aff'd, In re Stowe Club Highlands, supra (quoting Re: Cabot Creamery Coouerative. Inc, #5W0870-13-EB, Memorandum of Decision at 11 (Dec. 23, 1992)).

[2] MBL did not appeal from the denial of its Motion to Alter the Dash 1 Permit. The doctrine of res judicata arguably now precludes MBL from attempting to amend Condition #16 by means of the Dash 3 Application.

F. If it is appropriate for the Board to consider conformance of the modification of Condition #16 with the Chittenden County Regional Plan, whether such modification will conform with the Chittenden County Regional Plan pursuant to 10 V.S.A. § 6086(a)(10).

In light of the Board's decision above, it does not address the issue of whether the Project, as modified in MBL's current amendment application request, conforms to Criterion 10.

V. ORDER

1. Official notice is taken of the Dash 1 Permit, Dash 2 Permit, Dash 1 Decision, Dash 2 Decision and Dash 3 Decision as set forth in Section IV.B. above.

2. Condition #16 is a final condition which can be altered, if at all, solely by review under the flexibility versus finality test outlined by the Supreme Court in Stowe Club Highlands. It would be inappropriate to review a request for an amendment to Condition # 16 under the doctrine of collateral estoppel.

3. MBL's Dash 3 Application is **DENIED** under the Stowe Club Highlands analysis because the policy of finality outweighs the policy of flexibility.

4. In light of its decision above, the Board does not reach Issues 3 and 4.

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

Dated at Montpelier, Vermont this 20th day of October, 1999.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
George Holland
Samuel Lloyd
W. William Martinez
Rebecca M. Nawrath
Alice Olenick
Robert H. Opel
Donald Sargent, Alternate Member

Board Member John Drake did not participate in this proceeding.

Board Member Robert H. Opel did not participate in the October 20, 1999 deliberations. He participated in the September 29, 1999 hearing and deliberations. He has read, and concurs with, this decision as drafted.