State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Vermont Agency of Transportation (Shelbume Road Reconstruction)
133 State Street
Montpelier, Vermont 05653

City of South Burlington
575 Dorset Street
South Burlington, Vermont 05403

Town of Shelbume
P.O. Box 88
Shelbume, Vermont 05482

Land Use Application #4C1010-EB

This Memorandum of Decision pertains to the Vermont Agency of Transportation's ("AOT") "Objection to the Prehearing Conference Report and Order." As explained more fully below, the Envirom-nental Board ("Board") does not have jurisdiction to address the AOT's requests for clarification and determination of finality of the Commission's decision as it pertains to landscaping. Accordingly, AOT's objections are *denied* and all matters pertaining to Land Use Application #4C1010-EB (Shelburne Road Reconstruction), including appeals related to Criteria 4, 5, and 8 and the issue of the LaPlatte River Bridge construction, are hereby *dismissed without prejudice and remanded* to the District Commission for further hearing.

MEMORANDUM OF DECISION

I. Background

This appeal is from the District #4 Commission's ("Commission") Partial Findings of Fact and Decision ("Partial Decision") regarding the upgrade of Route 7 from the LaPlatte River Bridge in Shelburne to Imperial Drive in South Burlington ("Project"). The Project is divided into three construction segments: 1.) Executive Drive in Shelburne north to Imperial Drive in South Burlington; 2.) just north of the LaPlatte River Bridge to Executive Drive; and 3.) the LaPlatte River Bridge in Shelbume.

On February 18, 1998, Paul and Catherine Handy ("Handys") filed an appeal with the Board contending that the Commission erred with respect to Criterion 5 (Traffic).

On February 20, 1998, The Perry Restaurant Group, David and Janice Duchaine, Gene Cartularo, John Ondovchik, Michael Serrano, Richard Matheson, Bob Kelly and Eve Dubois (for Densmore Stone Company) filed an appeal with the Board. These appellants believe the Commission erred with respect to 10 V.S.A. §§ 6086 (a)(4)(Erosion), (5)(Traffic), and (@(Aesthetics).

On March 23, 1998, AOT, pursuant to Environmental Board Rule ("EBR") 18(D), filed a "Motion for Partial Remand with Respect to the LaPlatte River Bridge" and a letter providing information pertaining to witnesses, exhibits and scheduling of the hearing.

On March 26, 1998, Board Chair Marcy Harding convened a prehearing conference. The focus of the conference was the preliminary issue of whether the Board had jurisdiction to review the issues on appeal. While EBR 21(D) and 10 V.S.A. § 6086 (b) allow appeals of partial decisions by the applicant or a party, the right of appeal granted under § 6086 (b) applies only to the criteria and sub-criteria on which the Commission has completed its review and issued affirmative findings or a denial. The Chair indicated that because the Commission could not reach affirmative findings under Criteria 5 and 8, for appellate purposes its decision was not final in regard to issues related to those criteria.

As the issues under Criteria 5 and 8 were not ripe for appeal, the only appellate issue properly before the Board was Mr. Cartularo's appeal on Criterion 4 (Erosion). Erosion control issues are closely related to landscaping issues and, as the landscaping plans have yet to be finalized, it was considered imprudent and premature to proceed with consideration of erosion issues until after the related landscaping issues have been determined. Furthermore, as Mr. Cartularo's appeal was also based on issues under other criteria not yet ripe for appellate review, it would be more cost and time efficient for him to wait until he is able to proceed on all of his issues at the same time. Under the circumstances, the best approach would be to remand the entire case back to the Commission for further proceedings.

For the most part, all parties agreed that this was the appropriate course. The Handys' attorney, Douglas Riley, expressed concern about the increasing difficulty to challenge this Project as it moves forward and gains momentum, but he indicated, along with everyone else present at the preheating conference, that they did not intend to object to the Chair's proposed ruling to remand to the Commission for further hearing and findings.

The parties had until Tuesday, April 14 to file objections to the Preheating

Conference Report and Order ("Order"). In the absence of objections, the Order would become final. None of the Parties have objected to the remand provision of the Order, therefor it is final.

On April 10, 1998, AOT filed "Objection to the Prehearing Conference Report and Order." Although termed as an objection, this filing in substance is more of a request for a determination that the Commission's decision was final as it pertains to landscaping plans and a request for clarification of a statement in the Order regarding segmentation of the Project. AOT did not object to the remand order.

On April 29, 1998. the Board deliberated on AOT's objections. This matter is now ready for decision.

II. AOT's Objections

A. Finality of Landscaping Plan and Footnote 1

In its Partial Decision the Commission made statements about the landscaping plan in relation to its conclusions regarding Criterion 8. Specifically, the Commission found that the "Project will have an adverse impact on aesthetics as it relates to the landscaping component of the review but that the adverse impact is not undue." Partial Decision at 35. The Commission then continued on to state:

> The final landscaping plan is obviously a key component of the Commission conclusion. The final landscaping plans will be submitted as an amendment to any approval issued for the Route 7 improvements and the Commission reserves the right to schedule additional hearings and impose reasonable conditions to further mitigate the adverse impact created from the loss of so many existing trees along the corridor.

Partial Decision at 36.

The Commission's language indicates it has reached affirmative findings on the aesthetics of the landscaping component, but makes its affirmative findings contingent on future conditions that are not yet known. Conditioning a permit on future approval of future submissions constitutes a condition subsequent which is prohibited by Act 250. Re: Pierce K. And Judith M Crompton, Application #3W0749-EB, Preliminary Ruling at 5 (Dec. 18, 1997)[EB #692M1].

As a permit has not issued in the present case, the condition of submission of the final landscaping plans is not yet a condition subsequent. However, in order to alert the Commission and the parties to potential future problems that could result from the Commission's reliance on a condition subsequent as the basis for an affirmative finding under Criterion 8, footnote 1 was included in the Prehearing Conference Report and Order primarily for an advisory purpose. The footnote states:

> The Commission concludes that the loss of many large existing trees along the corridor is an adverse impact, but that AOT has taken all reasonable mitigating steps to minimize the impact. It notes that the landscaping plan is a key component of this conclusion even though the plan is not yet submitted and will be submitted as a subsequent amendment. Decision at 36 (emphasis added). It is important to note that if, as a result of a final decision, the provision requiring future submission of a landscaping plan is incorporated as a permit condition, it would be regarded as a "condition subsequent" which is prohibited under Act 250. Re: Pierce K. And Judith M. Crompton, Application # 3 W0749-EB, Preliminary Ruling at 5 (Dec. 18. 1997)[EB #692M1].

Order at 4.

AOT requests that the Board "acknowledge that the Commission's Decision is final with regard to AOT's landscaping concepts, or preliminary landscaping plans, and not require the Commission to make final findings and conclusions on the final landscaping plans until AOT applies for its construction permit(s)." The AOT is asking the Board to reach a conclusion which procedurally it is not in a position to make and, even if the question was properly before the Board, based on the limited information known on the issue, the substantive result of AOT's request appears to be contrary to Board precedent.

(i) Procedural Impediment to Ruling on AOT's request

As explained more fully in the Prehearing Conference Report and Order, the Board has never had jurisdiction over the issue of the landscaping plans and Criterion 8 in this case. It is the lack of finality in regard to Criterion 8 that deprives the Board of jurisdiction over the current appeal and mandates remand to the Commission. The Board cannot remand the application on the basis of a lack of jurisdiction and then, as the AOT requests, proceed to make a finding that the Commission's statement regarding the landscaping plans is final.

A condition subsequent exists if the Commission reaches final affirmative

findings on the Criterion, but bases those findings on the future fulfillment of a condition which is not yet reviewable. Because the Order in this case concludes that the Commission's decision is not final to Criterion 8, the proposed condition is not yet a condition subsequent and any issue as to its appropriateness was and is not ripe for consideration.

(ii) Substantive Aspect of AOT's request

AOT notes that the Commission's approach is consistent with the October 12, 1982 Memorandum of Understanding ("MOU") between AOT and the Board. The section of the MOU on which the Commission relied states:

> It is the purpose of this Memorandum of Understanding to establish procedures for phased review of Agency of Transportation ("Agency") highway projects under the criteria of Act 250. This review will identify issues as early as possible in the design of highways. and findings of fact and interim decisions can be issued which will be binding upon the Environmental Board ("Board"), the District Environmental Commissions ("Commissions"), and all parties unless significant project revisions are made as more detailed design is completed. The purpose of these procedures is to ensure that the design of highway projects will reflect and incorporate the objectives of Act 250 without the difficulties which can occur when permit applications are made only after final highway design is completed.

The MOU does not suggest that the Board is agreeing to proceed contrary to its governing statute and own precedent. An MOU cannot provide the basis for circumventing statutes, Board rules or Board precedent. The Board is unable to grant AOT's request on both procedural grounds and substantive grounds. At most, the Board can alert the Commission to the potential risks associated with its current course and advise it to proceed in compliance with the ruling of Re: Pierce K. And Judith M. Crompton, Application #3W0749-EB, Preliminary Ruling at 5 (Dec. 18, 1997)[EB #692M1] and the governing statutes.

B. LaPlatte River Bridge Segment

This objection arises out of AOT's Motion for Partial Remand ("Motion") of the LaPlatte River Bridge segment of the Project. This motion was filed before AOT knew of the Chair's intent to recommend remand of the entire application. AOT cites the final

paragraph of Section III. B. of the Order and requests clarification as to the full meaning of the paragraph. The paragraph reads as follows:

> For the same reasons underlying the decision not to review Criterion 5 and Criterion 8 issues, it is not appropriate to split the LaPlatte River Bridge segment off from the rest of the project for independent review.

AOT states that it assumes that the Board is not expressing an opinion as to whether the Commission, following remand, can decide whether to split-off the bridge should AOT make that request. but seeks clarification for the benefit of both the AOT and the Commission.

The only issue pertaining to the LaPlatte River Bridge segment properly before the Board was whether the LaPlatte River Bridge segment should be remanded separately from the other two segments of the Project that were on appeal. Because the Board is remanding the application on the entire Project. the issue of whether one segment of the Project can be separated from the other two is moot and not before the Board for consideration. As the Board did not rule on the AOT's motion, the paragraph in issue is again advisory and merely dictum, a statement which is not necessary to the decision in the case.

The reason for the advisory paragraph is the fact that the LaPlatte River Bridge is the southern terminus of the proposed Project. The Commission found under Criterion 5, that the scope of the traffic study was inadequate, specifically in regard to the fact that AOT did not provide any evidence of the Project's impact at either end of the Project. Decision at 33-34. While the Bridge segment may have previously been submitted in 1990 as a "stand alone" project, it is now being reviewed as one component of a three segment Project. Traffic considerations of Criterion 5 in one segment may be directly related to those of another segment. Under such circumstances, it is difficult to imagine that separating the bridge segment from the rest of the Project is feasible or sensible. Such an undertaking could result in multiple appeals on the same criterion, a situation to be avoided.

The Board does not have jurisdiction to give proper consideration to the issue of separating the bridge segment from the rest of the Project. Accordingly, any statements in the Prehearing Report and Order or in this Decision pertaining to such action by the Commission are advisory only.

III. ORDER

1. AOT's request for an acknowledgment by the Board that the Commission's Decision is final with regard to AOT's landscaping concepts is final is *denied*. As the Board has never had jurisdiction over Criterion 8, it cannot make a determination as to the finality of the Commission's order in regard to the related issue of the landscaping plans.

2. As to AOT's objection pertaining to the LaPlatte River Bridge segment of the Project, the Board does not have jurisdiction to give proper consideration to the issue of separating the bridge segment from the rest of the Project. Accordingly. any statements in the Preheating Report and Order or in this Decision pertaining to such action by the Commission are advisory only.

3. Consistent with Section V.1. of the March 30, 1998 Prehearing Conference Report and Order in this appeal, all matters pertaining to Land Use Application #4C1010-EB (Shelburne Road Reconstruction). including appeals related to Criteria 4, 5, and 8 and the issue of the LaPlatte River Bridge construction, are hereby *dismissed withoutprejudice and remanded* to the District Commission for further hearing.

Dated at Montpelier, Vermont this 5th day of May, 1998.

VERMONT ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
Arthur Gibb
John T. Ewing
Rebecca Nawrath
Bill Martinez
Bob Opel
George Holland