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

Re:	*Dr. Anthony Lapinsky and Dr. Colleen Smith*	Land Use Permit Applications #5L1018-4/#5L0426-9-EB

Findings of Fact, Conclusions of Law, and Order

This proceeding involves an appeal to the Vermont Environmental Board (Board) by Dr. Anthony Lapinsky and Dr. Colleen Smith (Applicants) from the dismissal (Decision) of Land Use Permit Applications #5L1018-4/#5L0426-9-EB (Applications) by the District 5 Environmental Commission (Commission).

In this decision, the Board concludes that the *Stowe Club Highlands* doctrine, as codified in Environmental Board Rule (EBR) 34(E), does not prohibit the Applicants from seeking to amend Land Use Permit #5L1018-1 (Reconsideration) (Little River Farm Permit).

I. History

On March 12, 2002, the Applicants filed the Applications with the Commission seeking the amendment of Condition 14 in the Little River Farm Permit in order to obtain approval of the construction and use of a connecting road between parcels of land which they own in two adjacent subdivisions in Stowe, Vermont (Project).

On January 27, 2003, the Commission dismissed the Applications on the grounds that they did not meet the requirements stated by the Board in its decision in *In re Stowe Club Highlands*, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order (Jun. 20, 1995), *aff'd*, *In Re Stowe Club Highlands*, 166 Vt. 33 (1996) (*Stowe Club Highlands*).

On February 26, 2003, the Applicants filed an appeal with the Board from the Decision alleging that the Commission erred in its *Stowe Club Highlands* analysis.

On April 11, 2003, certain neighbors to the Applicants filed a Motion to Dismiss the appeal.

On May 29, 2003, the Board issued a Memorandum of Decision concerning the party status of certain parties.

Hearing was held on this matter on July 30, 2003. Edward B. French, Jr., Esq. and Jennifer Colin Dall, Esq. represented the Applicants. George E. H. Gay, Esq.

represented Ed and Evelyn Frey, and Leo and Suzanne Clark (collectively, the Neighbors).[1] Steven and Marilyn Mayhall also appeared.

Reply briefs addressing the Neighbors' Motion to Dismiss were filed after the hearing.

The Board held deliberations on this matter on July 30, August 27 and September 24, 2003. This matter is now ready for final decision.

II. Issue

The Issue in this matter is:

> Whether *Stowe Club Highlands,* as codified in Environmental Board Rule (EBR) 34(E), prohibits or permits the Applicants' application to amend Condition #14 of Land Use Permit #5L1018-1 (Reconsideration) and, to the extent necessary, Land Use Permit #5L0426.

III. Findings of Fact[2]

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

1. There are two subdivisions at play in this case, the Lower Leriche subdivision and the Little River Farm subdivision.

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[1] At the hearing, George and Patricia von Trapp, who were granted EBR 14(A)(5) party status by the Commission, informed the Board that they have sold their home in the Lower Leriche subdivision and no longer retain any rights or interests in such property. The Board therefore holds that the von Trapps no longer retain party status, but the Board has admitted their testimony insofar as they appear as witnesses for the Neighbors.

[2] The testimony of two witnesses who were not in Vermont at the time of the hearing (one witness for the Applicants, the other for the Neighbors) occurred during the hearing by telephone. The Applicants and the Neighbors both waived any procedural defects as to the Board's authority to swear in or take testimony from these witnesses.

The Applicants' Little River Farm and Lower Leriche lots

2. The Applicants own a tract of land in Stowe consisting of Lots 14 and 15 (seven acres) in the Little River Farm subdivision and Lots 17 (four acres) and G (10.3 acres) in the Lower Leriche subdivision.

3. The Applicants bought Lot 17 on July 9, 1999; Lots 14 and 15 on July 12, 1999; and Lot G on July 21, 1999.

4. The Applicants consolidated Lots 14 and 15, and they built their home on the resulting lot; they have not built anything on Lot 17 or Lot G.

5. The Little River Farm Permit allows a house to be built on Lot 14 and a house on Lot 15; the Land Use Permit for the Lower Leriche subdivision allows a house on Lot 17 and a house on Lot G.

6. Were four houses to be built on the Applicants' lots, traffic through both the Little River Farm and the Lower Leriche subdivisions would increase over present levels.

Condition 14 of the Little River Farm Permit

7. The Little River Farm subdivision is subject to the Little River Farm Permit.

8. Condition 14 of Little River Farm Permit states:

> There shall be no access provided for adjacent "Lot G" owned by T. Barnett, from this road.

9. The Applicants were aware of Condition 14 as early as June 1999, as a result of a letter from the Commission Coordinator.

10. One of the purposes of Condition 14 was to protect deer habitat on Lot G of the Lower Leriche subdivision.

11. Another purpose of Condition 14 was to limit the traffic between the Little River Farm and Lower Leriche subdivisions.

The Little River Farm Homeowners Association

12. The Little River Farm Homeowners Association (LRFHA) is a domestic Vermont non-profit corporation.

13. The LFRHA holds the rights and responsibilities of the developer of the Little River Farm subdivision, including road maintenance.

14. All homeowners in the Little River Farm subdivision are members of the LRFHA.

The Applicants' knowledge and understanding of Condition 14

15. Condition 18 of the Little River Farm Permit requires that it be shown to prospective purchasers of lots at the Little River Farm subdivision.

16. At the time Edward Frey closed on his Little River Farm property, he received a copy of the LRFHA bylaws and the Declaration of Covenants; he believes that other buyers also received these documents.

17. The Applicants were aware of Condition 14 at the time they bought their Little River Farm and Lower Leriche lots; they understood its restrictions to apply to public access between the Little River Farm subdivision and Lot G of the Lower Leriche subdivision.

Land Use Permit #5L0426-7 (for the Lower Leriche subdivision)

18. The Lower Leriche subdivision is subject to Land Use Permit #5L0426, as amended.

19. The seventh amendment to the permit for the Lower Leriche subdivision, Land Use Permit #5L0426-7, states in its introductory paragraph that "[Lot G] shall have access from Lower Leriche Road."

Little River Farm Road

20. The Little River Farm Road serves the Little River Farm subdivision; it runs from Stagecoach Road into the Little River Farm subdivision, winding through the subdivision until it ends on Lot 12.

21. The LRFHA maintains the Little River Farm Road.

22. There are a number of signs on the Little River Farm Road that indicate that it is private; one sign reads "Private Road, No Outlet."

23. The Applicants have access to their house on Little River Farm Lots 14/15 from a private driveway which extends from the Little River Farm Road's terminus on Lot 12; the Applicants own and maintain the private driveway.

Lower Leriche Road

24. The Lower Leriche Road is a public road which connects to West Hill Road.

25. The Lower Leriche Road and Parker Lane, a private roadway right-of-way leading from Lower Leriche Road across the Clark and former von Trapp properties, provide access to Lot 17 from West Hill Road.

26. The Applicants own a private driveway that extends across Lot 17 into Lot G.

The connector "road" between Lots 14/15 of the Little River Farm subdivision and Lots 17 and G of the Lower Leriche subdivision

27. A rough, 90' long, country "road" (connector) connects Lot G in the Lower Leriche subdivision with Lot 15 in the Little River Farm subdivision.

28. This connector links the Lower Leriche subdivision road with the Little River Farm subdivision road through the Applicants' property.

29. The Applicants presently do not use the connector, having been told by the Town in December 2001 that its use should cease pending resolution of issues surrounding its use.

The use of the connector

30. Use of the connector would reduce travel for the Applicants, allow the Applicants to have full access to their lands from either subdivision, allow Applicants access to their Little River Farm lots through the Lower Leriche subdivision in case the Little River Farm Road is rendered inaccessible, and be a convenience to the Applicants.

31. The inability to use the connector has been frustrating and inconvenient to the Applicants.

32. Use of the connector could decrease the Applicants' traffic on Lower Leriche Road and the Little River Farm Road, as, should they wish to travel from their Little River Farm lots to their Lower Leriche lots, the Applicants will not need to travel down the Little River Farm Road, around the hill, and then up the Lower Leriche Road.

33. Use of the connector would have a positive effect on the Little River Farm Road, as the Applicants will not always have to use the Little River Farm Road to access their Little River Farm property.

Restricting public access to the connector

34. All of the roads and drives on the Applicants' property, including the connector, are private; no one but the Applicants and their invitees have permission to use their 1400' driveway and the connector.

35. The Applicants have posted "No Trespassing" and "Posted" signs on their land to prevent unauthorized trespass on their property and unauthorized use of their roads.

36. The Applicants have constructed three gates; one gate is at the bottom of the Applicants' driveway on Lot 17 of the Lower Leriche subdivision; a second gate bars access to Lots 14/15 from the Little River Farm Road; a third gate is near the property line between Lower Leriche Lots 17 and G.

37. The gate on Lot 17 of the Lower Leriche subdivision has been locked in an open position.

38. Locking and unlocking their gates would not be an inconvenience to the Applicants; the Applicants lock at least one gate when they are away from their property on vacation.

39. The Applicants agree that if their Little River Farm Lots 14/15 do not remain in common ownership with their Lower Leriche Lots G and 17, there should be no connecting access between the lots in the two subdivisions.

40. The Applicants do not want the public to travel on their private drives and would not want the public to use the connector.

41. A private, restricted and controlled use of the connector by the Applicants will have no effect on the Little River Farm Road or the Lower Leriche Road as dead-end roads.

Wildlife habitat on the subject lots

42. Portions of Lot G are "Critical Wildlife Habitat" as mapped by the Vermont Department of Fish and Wildlife. There is a 300-foot buffer surrounding the Critical Deer Wintering area, extending onto portions of Lots 14, 15, 17 and G.

43. The area to the north of the Applicants' home is heavily used by deer as a wintering area; the area to the south of the connector is also used by deer.

44. The Applicants have taken steps to protect the deeryard on their land.

45. Deer do not like to cross wide plowed roads in the winter.

46. The Applicants' proposed, private use of the connector would not have a positive impact on the deer habitat; there is, however, no evidence in this record that the use would have a negative impact.

47. The connector is within the buffer to the deer habitat.

Reliance on Condition 14 by those who bought lots in the Little River Farm subdivision

48. Edward Frey owns property (with his wife, Evelyn) in the Little River Farm subdivision. He bought this property based on representations that the Little River Farm Road terminated at Lot 14; he would not have bought into the Little River Farm subdivision had he known that the Little River Farm Road would connect to the Lower Leriche subdivision.

49. At the time that the Freys bought their Little River Farm lot, a brochure showed the Little River Farm Road ending on Lot 15; they wanted to live on a no-outlet private road.

50. The real estate agent selling lots in the Little River Farm subdivision represented that the Little River Farm Road was a no-outlet private road.

51. These representations were material in Evelyn Frey's decision to purchase her Little River Farm home.

52. At the time that Evelyn Frey bought her lot in the Little River Farm subdivision, she believed that Condition 2 of the Little River Farm Permit made Condition 14 final concerning access to the Little River Farm subdivision.

53. Judy Foregger, a real estate agent, showed the Freys Lot 5 of the Little River Farm subdivision. She showed them the entire Little River Farm Road before the Freys bought Lot 5. She was aware of Condition 14's restriction on access to the Lower Leriche subdivision from Little River Farm Road. She gave the Freys a copy of the Little River Farm Permit before they purchased Lot 5. Other buyers to the Little River Farm subdivision were given copies of the Little River Farm Permit at their closings.

54. Steven and Marilyn Mayhall purchased Lot H-4 in the Lower Leriche subdivision, formerly owned by Donna and Warren Higgons. Their understanding of the existing Act 250 permits was that the Little River Farm Road could not be connected to Parker Lane.

55. At the time that lots were sold in the Lower Leriche subdivision, the developer, Ted Barnett represented to buyers that the access road to Lot 17 and Lot G in the Lower Leriche subdivision would not be a through road into the Little River Farm subdivision.

56. Barnett did not intend that his representations would mean that, were Little River Farm Lots 14/15 and Lower Leriche Lot G commonly owned, such owner would not be able to access Lot G from Lots 14/15.

57. Leo and Suzanne Clark own a home on Parker Lane, which they bought in 1985. When the Little River Farm Permit Application was filed, Leo Clark made a point to confirm that there would be no road over the hill connecting the Lower Leriche subdivision and the Little River Farm subdivision. The Clarks have always relied on the Act 250 process to protect them from a connecting road built through their land.

58. Other, former owners of lots in the Lower Leriche subdivision (the von Trapps) also bought their lot with the understanding that there would be no through road into the Little River Farm subdivision; this understanding was material to their decisions to purchase their lot.

Impact on the Little River Farm Road from a public use of the connector

59. Increased public traffic on the Little River Farm Road would increase erosion and increase maintenance costs to the LRFHA.

60. Increased public traffic on the Little River Farm Road would increase potential safety problems.

61. Increased public traffic would increase impacts on the deer in the deeryard on the Little River Farm subdivision land.

IV. Conclusions of Law

A. The Neighbors' Motion to Dismiss

Ed and Evelyn Frey and Leo and Suzanne Clark have filed a Motion to Dismiss[3] which raises three claims.

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[3] George and Patricia von Trapp initially joined in this Motion, but, as noted above, they are no longer parties to this case. See note 1, *supra.*

1. *that the Applicants do not have standing to seek an amendment to Condition 14 of Land Use Permit #5L1018-1 (Reconsideration) (Permit).*

The Neighbors argue that the Permit was issued to Robert Foley, who conveyed all his rights under the Permit to the LRFHA in February 2001. Thus, the Neighbors claim, the LRFHA is the permittee, not the Applicants, who are only shareholders in the LRFHA, and only the LRFHA has standing to seek a Permit amendment. And, as the Applicants do not have standing to seek this amendment, the Neighbors contend, the Board has no jurisdiction to hear this case.

For two reasons, the Board does not agree. First, the Applicants, as individual lot owners within the Little River Farm subdivision, are "permittees" of the Little River Farm Permit. The Little River Farm Permit runs with the land, *In re Estate of Swinington*, 169 Vt. 583, 585 (1999)(mem.), and successor owners, as successors in interest, are bound by the conditions of this permit. *In re Quechee Lakes Corporation*, 154 Vt. 543, 550 n.5 (1990). The Board has specifically held that purchasers of lots created from tract subject to Act 250 jurisdiction must obtain permits before sale or offer for sale of an interest in, or commencement of construction on, their lots. *John W. Stevens and Bruce W. Gyles*, Declaratory Ruling #240, Findings of Fact, Conclusions of Law, and Order at 16 (May 8, 1992); *accord, Charles Christolini*, Declaratory Ruling #208 (Mar. 19, 1990) (because petitioner's lot is one of the original five lots subject to jurisdiction, he is bound by requirements of previous permit; alteration without a permit amendment is a violation); *Allenbrook Associates*, #4C0466-1-EB (Apr. 19, 1982) (subsequent purchasers are bound by conditions of permits because such permits and their conditions run with the land). If subsequent purchasers are bound by the conditions of permits that control their land, it follows that they must have standing to seek to amend such conditions.

Second, to the extent that the claim that the Neighbors raise is one that is brought pursuant to the Applicants' obligations under the Little River Farm Declaration of Protective Covenants and Conditions, it is in the nature of a private civil action concerning the property rights of the Little River Farm lot owners under that Declaration. The Vermont Supreme Court has held that "[T]he Board's jurisdiction is limited to construction and application of Act 250 and Environmental Board rules. Adjudication of property rights arising from contract or secured by trademark or corporate law is not within the purview of the Board." *In re Estate of Swinington*, 169 Vt. at 586. Thus, the Neighbors' claim that the Covenants restrict what the Applicants may or may not do with respect to seeking an amendment to the Permit is more properly brought in superior court; it cannot be brought before the Board.

2. that the LRFHA is a necessary co-applicant to the Applicants' permit amendment application under EBR 10(A), and the application can only proceed with LRFHA's consent

EBR 10(A) reads, in pertinent part:

> (A) An application shall be signed by the applicant and any co-applicant, or an officer or duly-appointed agent thereof. The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement. … The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ownership or control and shall describe the extent of their interests. The district commission or board may, upon its own motion or upon the motion of a party, find that the property interest of any such person is of such significance that the application cannot be accepted or the review cannot be completed without their participation as co-applicants.

It has long been established in Vermont that a party who wishes to bring an action in his or her own name must have a legal interest in the matter or controversy. *Parker v. Town of Milton,* 169 Vt. 74 (1998); *Murty v. Allen* , 71 Vt. 377 (1899). See also, *Davenport v. North Eastern Mutual Life Association*, 47 Vt. 528, 532 (1875) ("[T]he suit should be brought by the party having the legal interest in the contract...."); *Heald v. Warren*, 22 Vt. 409, 413 (1850) ("It is well settled that the person having the legal interest has at law the right of action.")

The Vermont Supreme Court "has adopted the constitutional and prudential components of the standing doctrine enunciated by the United States Supreme Court." *Schievella v. Department of Taxes*, 171 Vt. 591, 592 (2000), citing *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 341 (1997). Included with the first prudential elements is "the general prohibition on a litigant's raising another person's legal rights." *Hinesburg,* 166 Vt. at 341.

The Motion to Dismiss was filed by the Neighbors, but any rights to co-applicancy belong to the LRFHA. The Neighbors do not have standing to raise claims that can only be asserted by another.

Even if the Board had jurisdiction to reach the merits, EBR 10 does not require that all persons having any property or contractual interest in, or relationship to, a proposed project must be parties to the permit application. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 3 (Oct 26, 2000) citing*, Hawk Mountain Corporation*, #3W0299-EB, Findings of Fact, Conclusions

of Law, and Order at 5 (Nov. 29, 1979). Rather, the purpose of the co-applicancy rule is to ensure the enforceability of permit conditions by requiring the record owners of involved land to be co-applicants to any Act 250 application. *Id.*

It is important to note that, even though the construction and use of the connector could cause an increase in traffic on the Little River Farm Road, the physical changes that would result from an amendment to Condition 14 would occur only on the Applicants' land, not on the land commonly held by the LRFHA. Here, if the amendment application is allowed to proceed, and if Condition 14 is amended to approve the connector, any permit conditions that may be attached (such as limitations to the connector's use) will be enforceable against the Applicants alone. The LRFHA thus need not be a co-applicant for that purpose.

Rule 10(A) allows the Commission or the Board to waive the requirement that record owners of involved land be made applicants or co-applicants for good cause shown, *In re Quechee Lakes Corporation*, 154 Vt. 543, 548 (1990); *Josiah E. Lupton, supra*, at 3, and a determination of whether to waive the requirement that a landowner needs to be a co-applicant depends on the nature of the landowner's interest. *Richard Madowitz and Douglas Kohl d/b/a The Woods Partnership Amherst Realty, LLC,* #1R0522-9-EB, Memorandum of Decision at 7 (Aug. 15, 2001). Good cause exists to waive the co-applicancy requirements where a co-applicant's consent is not needed to comply with any of the permit conditions and where, as here, the Board does not want to be drawn into a dispute between the parties. *Larry and Diane Brown*, #5W1175-1-EB & #5W1175-1-EB (Jun. 19, 1995). While this factor was not mentioned in the *Madowitz* decision, the Board had some concerns that, allowing the homeowner's association in that case to be a co-applicant would, as here, result in a *de facto* veto of the application.

Thus, even if LRFHA were to be considered to be a necessary co-applicant, the Board would waive co-applicancy in this case.

3. That EBR 34 permit amendment applications should be denied when there has been a violation; that EBR 34 prohibits after-the-fact permit amendments.

The Neighbors cite language in *Town and Country Honda and Robert M. Aughey, Jr.,* #5W0773-2-EB, Findings of Fact, Conclusions of Law, and Order at 22 n.5 (Feb. 15, 2001), in which the Board noted its displeasure at being asked to retroactively approve actions taken in clear disregard of a permit condition:

> The Board also notes that it has previously held that the amendment procedures provided by [EBR] 34 "are not intended to be used where original permit conditions have been ignored by the applicant, construction on a project has been completed, and a permit

> amendment application has been filed retroactively to authorize the development activities found to be in noncompliance with Act 250." *Re: The Stratton Corporation,* #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Nov. 20, 1997); *see also In re Quechee Lakes Corp.*, 154 Vt. 543 (1990).

This language, in *Town and Country Honda*, while indicative of the Board's concerns, is clearly dicta, which the Board may choose not to follow in this case. Further, it also appears that any violations that may have occurred in this matter – and the Board specifically did not focus on this in its hearing – do not rise to the level of those which occurred in *Town and Country Honda.*.

Lastly, the Neighbors' contend that to allow this matter to proceed will encourage violations of permits which will only be subject to retroactive cures. But the Board retains its power to commence an enforcement action under 10 V.S.A. Ch. 201 when the circumstances require. Allowing this matter to proceed does not prevent such enforcement. In addition, the Board has not hesitated to require that construction commenced or completed contrary to permit terms be rebuilt in order to achieve compliance. *See, Starwood Ceruzzi Williston, LLC*, *d/b/a Maple Tree Place,* #4C0775-EB (Revocation), Settlement Agreement (Aug. 12, 2002)

The Board denies the Neighbors' request for a hearing on their Motion.

B. *Stowe Club Highlands* and EBR 34(E)

The question presented in this case is whether Condition 14 may be amended to allow the Applicants to use the connector.

1. Stowe Club Highlands

The Board's decision in *Re: Stowe Club Highlands,* #5L0822-12-EB*,* Findings of Fact, Conclusions of Law and Order (June 20, 1995)*, aff'd*, *In re Stowe Club Highlands*, 166 Vt. 33 (1996), stands for the proposition that, once a permit has been issued and used, amendments to that permit should not be granted as a matter of course, but rather only after the person who seeks the amendment can show that there are reasons why the *status quo* should be altered and the permit amended. The case therefore provides some level of assurance to the neighbors to a project (who may have opposed the original permit or who may have relied upon the terms and conditions in the original permit) that a permittee will not be allowed to accept a permit, use it, and then seek to expand it beyond its original restrictions, merely because he wishes to do so. As the Supreme Court wrote, the initial permitting process should not be “merely a prologue to continued applications for permit amendments." *Stowe Club Highlands*. 166 Vt. at 39.

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). 10 V.S.A. §6086(a)(8) and (9)(B). While the Court did not sanction the Board's use of collateral estoppel as the analytical framework, the Court concluded that "the Board addressed certain policy considerations that it considered relevant in deciding whether to grant the permit amendment." *Stowe Club Highlands*, 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.

Id. at 40. Ultimately, the Court concluded that the Board was justified in denying the permit amendment application based upon the balancing of the policies of finality and flexibility. *Id.*

The Board's decision in *Re: M.B.L. Associates, LLC*, #4C0948-3-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 20, 1999), summarizes the competing finality and flexibility policies as follows:

> The principal of finality is derived from the consequences of a permit being issued without any subsequent appeal. Once a permit is issued and the applicable appeal period has expired, the findings, conclusions and permit are final and are not subject to attack in a subsequent application proceeding . . . "To hold otherwise would severely undermine the orderly governance of development and would upset reasonable reliance on the process." *In Re Taft Corners Associates*, 160 Vt. 583, 593 (1993).
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> [In contrast, t]he principle of flexibility is derived from the consequences of the development process... . "[O]nce a permit is 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.*

Id. at 15, *citing* the Board's decision in *Nehemiah Associates, Inc., supra,* at 21-22.

Under *Stowe Club Highlands*, three kinds of changes were noted which could justify the alteration of a permit condition. These were:

> (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.

Stowe Club Highlands, supra, 166 Vt. at 38.

If one or more of such changes favoring flexibility were to be found, the Board then considered the finality element of *Stowe Club Highlands* - - the level of reliance by either the Commission or the neighbors that the condition would not be amended. If, however, one of the three changes was not present, the Board did not need to reach the flexibility element. *See*, *Re: Richard Bouffard,* #4C0647-6-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Oct. 23, 2000).

The burden of proving satisfaction of the *Stowe Club Highlands* test has been placed on the applicant for the permit amendment. *In re McDonalds's Corp and Murphy Realty Co., Inc.,* #100012-2B-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Mar. 22, 2001); *Richard Bouffard*, *supra,* at 14 – 15.

2. EBR 34(E)

Responding to concerns that the factors identified in *Stowe Club Highlands* might be too rigidly construed, and could be applied in a manner that inappropriately prevents amendments, the Board clarified and supplemented its *Stowe Club Highlands* case law through the adoption of EBR 34(E) on January 15, 2003. This rule reads:

> (E) Stowe Club Highlands Analysis.
>
> (1) This rule governs applications to amend permit conditions which were included to resolve issues critical to the district commission's or the board's issuance of prior permit(s) pursuant to the criteria of 10 V.S.A. Section 6086(a). Applications to amend other permit conditions are not subject to the requirements of this section but must still satisfy the criteria of 10 V.S.A. § 6086(a) and other applicable provisions of these Rules.
>
> (2) In reviewing an application for amendment, the district commission or the board should consider whether the permittee is merely seeking to relitigate the permit condition or to undermine its purpose and intent. It must also determine whether the need for flexibility arising from changes or policy considerations outweighs the need for finality in the permitting process.

> (3) In balancing flexibility and finality, the district commission or the board should consider the following, among other relevant factors:
>
> (a) changes in facts, law or regulations beyond the permittee's control;
>
> (b) changes in technology, construction, or operations which drive the need for the amendment;
>
> (c) other factors including innovative or alternative design which provide for a more efficient or effective means to mitigate the impact addressed by the permit condition;
>
> (d) other important policy considerations, including the proposed amendment's furtherance of the goals and objectives of duly adopted municipal plans;
>
> (e) manifest error on the part of the district commission or the board in the issuance of the permit condition;
>
> (f) the degree of reliance by the district commission, the board, or parties on prior permit conditions or material representations of the applicant in prior proceeding(s).[4]

EBR 34(E).

While not altering the fundamental principles behind the *Stowe Club Highlands* decision, Rule 34(E) modifies the *Stowe Club Highlands* process, by establishing three sequential stages of analysis, which ask:

1. Was the permit condition, which is the subject of the amendment request, included to resolve issues critical to the Commission's or the Board's issuance of the prior permit pursuant to the criteria of 10 V.S.A. §6086(a)? *Re: Central Vermont Public Service Corp. and Verizon New England*, #2W1146-EB and #2S0301-1-EB, Memorandum of Decision at 3 (Feb. 28, 2003) (under new EBR 34(E), *Stowe Club Highlands* test does not apply where challenged condition was not included to resolve an issue critical to the issuance of the permit).

2. Is the permittee merely seeking to relitigate the permit condition or to undermine its purpose and intent?

3. Does the need for flexibility arising from changes or policy considerations outweigh the need for finality in the permitting process? Under this third stage, the five flexibility factors set out in EBR 34(E)(3)(a) - (e) and the one finality factor (which appears in EBR 34(E)(3)(f)) are considered at the same time. It is no longer necessary

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[4] At the hearing, the Board ruled that the "prior proceeding(s)" referenced in this subsection refer to prior Act 250 proceedings before a Commission or the Board, and not to local town Planning Commission or other proceedings. The Board reaffirms this ruling here.

for an applicant for the amendment to prove that one of the flexibility factors exists before the Board will consider finality element of reliance. *Compare, Re: Richard Bouffard, supra.*

a. Does EBR 34(E) govern this case?

At the time that the Applicants filed their application to amend Condition 14, the *Stowe Club Highlands* case was the governing law. By the time of the Commission's decision, however, EBR 34(E) had been adopted.

> Generally, the law which is in effect on the date a proceeding before the Board is commenced is the law of the case for purposes of Act 250 proceedings. *Barre City School District*, #5W1160-Reconsideration-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Jan. 30, 1995); *Waterbury Shopping Village,* #5W1068-EB, Memorandum of Decision at 2 (June 26, 1990); *Raymond and Lois Ross*, #2W0716-EB, Memorandum of Decision and Order at 2 - 3 (Nov. 2, 1987), *aff'd*, *In re Ross,* 151 Vt. 54 (l989); *see also Re: Crushed Rock, Inc. and Pike Industries, Inc.*, #1R0489-4-EB, Findings of Fact, Conclusions of Law, and Order at 37 - 39 (Feb. 18, 1994) (disapproving *Re: J.P. Carrara & Sons, Inc*., #1R0589-EB, Memorandum of Decision at 1-2 (Sept. 28, 1987). However, the Board has in the past applied changes in the law which occur during pendency of a case where the change benefits the applicant or has the effect of making the application of Act 250 to a particular applicant or project less onerous or restrictive. *Re: Juster Development Company*, #1R0048-8-EB, Findings of Fact, Conclusions of Law, and Order at 27 (Dec. 19, 1988) ("Town plan amendments made after the date of an Act 250 application, and which benefit an applicant, are properly included as part of the town plan for Act 250 purposes"); and see, by analogy, 1 V.S.A. §214(c) (allowing imposition of a reduced penalty or punishment in an amended statute).

Re: Swedish Ski Club of Vermont Land Trust, Declaratory Ruling #411, Findings of Fact, Conclusions of Law, and Order at 7 (Jan. 16, 2003) (changes to the EBRs which occur after the application date and which favor an applicant may be applied at the applicant's request).

While no specific request has been made to the Board to apply EBR 34(E) instead of the *Stowe Club Highlands* test, there is little doubt that the Applicants would want the rule to be applied to their case. Therefore, it can be applied.

b. Analysis of this case under EBR 34(E)

1. Was Condition 14 included in the Little River Farm Permit to resolve an issue that was critical to the Commission's issuance of that permit? EBR 34(E)(1). [5]

It is useful to examine the history that lead up to the issuance of the Little River Farm Permit in order to understand why Condition 14 exists. [6]

In August 1989, Robert Foley and Ted Barnett filed Act 250 Application #5L1018-1 for a project to create a subdivision on 113.6 acres in Stowe; 103.3 acres (now the site of thee Little River Farm subdivision) were owned by Foley; 10.3 acres (what is now Lot G in the Lower Leriche subdivision) were owned by Barnett.

The Commission denied the application, in part because of concerns about necessary wildlife habitat, 10 V.S.A. §6086(a)(8)(A) (Criterion 8(A)). Foley and Barnett appealed to the Board, which also denied their application on Criterion 8(A) grounds, in part because of concerns surrounding the wildlife habitat on what is now Lot G. *Foley and Barnett,* #5L1018-1/5L0426-6-EB, Findings of Fact, Conclusions of Law, and Order (Jul. 19, 1991). Foley and Barnett went back to the drawing board and then to the Commission with a redesigned project. In its decision which accompanied the present Little River Farm Permit, the Commission noted a salient difference between the earlier application and the project which was presented - - it now involved only Foley's land:

> The re-designed project no longer includes the 10.3 acres owned by Barnett and Barnett is no longer a co-applicant. His parcel will not be served access by the project road or any other of its facilities.

Robert P. Foley, #5L1018-1 (Reconsideration), Findings of Fact, Conclusions of Law, and Order at 1, *Introduction* (Jan. 15, 1993). The Commission's Conclusions as to Criterion 8(A) made it clear that the fact that Lot G was no longer a part of the project was a crucial factor to its decision to grant the permit.

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[5] Neither party directly addresses this element. The Neighbors do not address it because they apply standards established by *Stowe Club Highlands* and its case progeny and not those which appear in EBR 34(E). The Applicants also fail to direct arguments to this first factor.

[6] For purposes of this discussion, the Board takes official notice, pursuant to 3 V.S.A. §810(4), of the earlier proceedings in Land Use Permit series #5L1018.

> The project has been re-designed to correct the deficiencies which were the basis of the previous denials. The redesign consisted primarily of the elimination of Lot G from the project, the relocation of part of the project roadway and several house sites and the elimination of two lots.
>
> The elimination of Lot G removed most of the actual deer wintering area from the project tract itself but did not eliminate the buffer. …

*Id., a*t 12.

Thus, Lot G was not even a part of the newly revised and redrawn Little River Farm project. Indeed, the plans for the new project showed the Little River Farm Road ending on Lot 12, where it does today. The Commission could have left the plans themselves to govern the scope of the permit, but it chose to emphasize the fact – through Condition 14 - that Lot G was not a part of the project. In this instance, therefore, the inclusion of Condition 14 was intended to resolve an issue that was critical to the issuance of the Little River Farm Permit. EBR 34(E)(1).

2. EBR 34(E)(2): relitigation of the original permit condition

Subsection two of EBR 34(E) is designed to codify the Vermont Supreme Court's observation that the initial permitting process should not be "merely a prologue to continued applications for permit amendments." *Stowe Club Highlands*. 166 Vt. at 39. No applicant should accept a permit under a belief that such acceptance need only bind him to the permit's terms and conditions until he chooses to challenge them.

Nonetheless, Act 250 permits are written on paper, not carved in stone, and the relitigation concepts embodied in EBR 34(E)(2) cannot be considered to be unconditionally ironclad, as, in some sense, *every* permit amendment application is a relitigation of an initial permit condition. And, if this provision of Rule 34(E) is read to foreclose all permit amendment applications as a matter of course, then the remainder of the Rule is rendered meaningless; a consideration of the elements listed in subsection 3 would never occur. The Board must examine each amendment application within the context of its particular facts and ask whether a desire merely to relitigate lies at the base of the application, (or the permittee is merely seeking to "undermine [the permit's] purpose and intent), or whether there are "circumstances [under which] … permit conditions may be modified," *In re Stowe Club Highlands.,* and whether some "circumstances or some intervening factor justify an amendment." *Re: Department of Forests and Parks Knight Point State Park.*

Here, the Board finds that the instant application was not filed merely to relitigate Condition 14, and that the Applicants have presented reasonable intervening factors, including, as discussed below, their common ownership of their four Little River Farm and Lower Leriche lots with the construction of only one single-family

residence, which justify a finding that the relitigation language of subsection 2 should not act as a bar to further analysis under EBR 34(E).

3. EBR 34(E)(3): flexibility vs. finality

a. Flexibility claims

The Applicants make a series of arguments in favor of a flexibility finding for their amendment request.

i. Factual changes.

As noted, EBR 34(E)(3)(a) provides that

> (3) In balancing flexibility and finality, the district commission or the board should consider the following, among other relevant factors:
> (a) changes in facts, law or regulations beyond the permittee's control

The Applicants argue that, at the time the permits were issued for the Lower Leriche and Little River Farm subdivisions, there was no common ownership of the lots. Now that the lots are commonly owned, they contend that this is a change in facts.[7]

The Applicants contend that their "acquisition of the four lots in two developments was beyond the control of the Permittees of both developments." This statement evidences a fundamental misunderstanding of Act 250; Act 250 does not consider only the original developers of a subdivision to be the "permittees." Rather, now that they own lots in the subdivisions, the Applicants *are* the permittees. Act 250 Permits "run with the land." *In re Estate of Swinington*, 169 Vt. 583, 585 (1999) (mem.); and see *In re Quechee Lakes Corporation*, 154 Vt. 543, 550 n.5 (1990) (successor owners, as successors in interest, are also bound by the conditions of the permit). The Applicants' common ownership of the lots in the two subdivisions was not beyond their (as "the permittees") control.

Further, an essential element to this factor is that a change in facts must be one that is *relevant and controlling*. Not just any change should weigh in favor of flexibility; rather, it must be a change that makes a difference.

Here, the fact that the Applicants own all of the relevant lots does not govern the *Stowe Club Highlands* analysis. Were the lots to be separately owned, the lot

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[7] No argument is made that there has been a change in law or regulations.

owners could agree among themselves to run a connecting road between their lots, in order to provide dual accesses to their respective properties. Thus, that the lots are commonly owned is not a fact which, alone, *necessarily* makes a difference to this case, and were this the only element that weighed in favor of flexibility, it would be, in and of itself, insufficient to carry the day. However, when combined with other considerations, as discussed below, this common ownership does play a significant role in the Board's decision.

ii. Changes in technology

> (3) In balancing flexibility and finality, the district commission or the board should consider the following, among other relevant factors: …
> (b) changes in technology, construction, or operations which drive the need for the amendment ….

EBR 34(E)(3)(b)

The Applicants contend that Condition 14 was drafted to protect the wildlife habitat in the area of their land. Focusing on the deeryard, the Applicants contend that changes in technology militate in favor of their permit amendment.

The Applicants argue that the restrictions that they have put on the access to the new connector (a gate) and restrictions on use by other people for horseback riding, biking and dog-walking protect the deer habitat better than it was protected at the time the permits were issued. The Applicants contend that they have made protection of the deer a priority by not developing their lots beyond their home.

The Applicants also argue that Condition 14 is no longer necessary. The Applicants' wildlife witness, Peter Spear, states that, with the Applicants' yard, driveway and landscaping, there is little to attract deer to the connector area; there is no significant winter deer travel corridor through or near the connector. Spear further states that the connector causes no danger to the habitat value of the core Deer Wintering Area or the 300-foot buffer. *Spear ¶9.* Spear did concede at the hearing, however, that the use of the connector would not *improve* the deer habitat on the site.

While all the above may be relevant when the *merits* of the permit amendment application are ultimately addressed, there is a threshold issue that must be addressed when examining the "change" elements in a *Stowe Club Highlands* / EBR 34(E) analysis:

> There is an oft-overlooked provision in *Stowe Club Highlands* which is pertinent to the arguments presented by the Permittees. Having discussed the three changes (facts, operations and technology) that may

justify the deletion or amendment of a permit Condition, the Board continued:

> In addition, the permittee that seeks to avoid compliance with a permit condition by means of a permit amendment must prove to the Board *that the permit amendment application is a direct outgrowth of the above-referenced changes*. *Cabot Creamery [Cooperative, Inc.,* #5W0870-13-EB*,* Memorandum of Decision] at 11 [(Dec. 23, 1992)].

Stowe Club Highlands at 9 (emphasis added). *Stowe Club Highlands,* therefore, requires that the changes in technology that the Permittees note must be the driving force behind the permit amendments that they presently seek.

The difficulty with the Permittees' argument is that their claims of changed technology are not the driving force behind (and have essentially nothing to do with) the desired amendments to the Conditions in their existing permits.

The Permittees are currently permitted to have a non-illuminated building mounted sign. The fact that better lighting technology now exists has no relevance to the Permittees' desire to illuminate their (presently dark) building sign; indeed, lighting that sign will not result in energy savings, no matter how far advances in technology have come.

The Permittees are also permitted to have an illuminated freestanding sign; they seek after-the-fact approval to move this sign and increase its size and height. While changes in technology may result in some energy savings in the lighting of this new sign, the sought-after amendment arises out of Honda's national program to update its national corporate image, not a desire by the Permittees to preserve energy resources.

That technology has changed to provide more energy efficient lighting systems may indeed be a change, but the Board concludes that illuminating a non-illuminated sign and moving and increasing the height and size of a sign are not a "direct outgrowth" of the fact that technology has given us a better light bulb.

Town and Country Honda and Robert M. Aughey, Jr., #5W0773-2-EB, Findings of Fact, Conclusions of Law, and Order at 16- 17 (Feb. 15, 2001).

Thus, it is not enough that there be a change in technology; rather, such change must *create* the need for the amendment, it cannot merely be a byproduct of it. Here, protection of the deer habitat is neither the reason nor the driving force behind the Applicants' request to use the connector. Rather, the Board finds that the Applicants' true objective is that they wish the convenience of being able to access their home from two directions.[8] While the Board does not dispute that this goal has a commonsense basis, any improvements in deer habitat protection that might result from the connector's use are merely afterthoughts.

iii. Other factors

> (3) In balancing flexibility and finality, the district commission or the board should consider …
>
> (c) other factors including innovative or alternative design which provide for a more efficient or effective means to mitigate the impact addressed by the permit condition…
>
> (d) other important policy considerations …

EBR 34(E)(3)(c) and (d).

Since the neighbors' primary focus has been the erosion, aesthetic and traffic problems that might arise were the connector to be used as a shortcut by the general public, the Board will focus its discussion under EBR 34(E)(3)(c) and (d) on these concerns.[9]

There is no question that the Applicants' common ownership of Lots 14/15 in the Little River Farm subdivision and Lots 17 and G in the Lower Leriche subdivision has changed the dynamic of this situation. Had these lots been sold to different families, then it is likely that there would have been a house on each lot; two families would have driven past the Freys' house in order to access Little River Farm Lots 14 and 15, and two families would have driven past the Clarks' house in order to access Lower Leriche Lots 17 and G. Thus, the Applicants' common ownership of the four lots at the top of the hill and the fact that theirs is the only residence on those lots result in a *decrease* in the amount of traffic that could potentially pass the neighbors' land under the permits' present terms.

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[8] The Applicants concede that convenience is a factor. *Smith* ¶¶ 38, 42; and see Finding of Fact 30.

[9] While the Neighbors also raised concerns about the impact of the connector on the deer habitat, their testimony as to their reliance in this regard was sparse, and the Board therefore does not, within the confines of this decision, address such habitat.

Likewise, if the Applicants, in order to travel from their Little River Farm lots to their Lower Leriche lots, must drive down the Little River Farm Road, around the hill, and then up the Lower Leriche Road - instead of simply using the connector and remaining at all times on their own land - traffic in front of the neighbors' lots will increase. Thus, to the extent that the connector is used only by the Applicants or their invitees, the Applicants' use of the Little River Farm and Lower Leriche Roads is lessened.

The Board also believes that free access between commonly-owned, adjoining lots is an important public policy consideration. The Board thus finds factors under EBR 34(E)(3)(c) and (d) that favor flexibility.[10]

b. Finality claims

The Neighbors contend that finality should rule. They argue that, in buying their Little River Farm and Lower Leriche lots they relied on Condition 14. They assert, specifically:

i. Those Neighbors who bought property in the Little River Farm subdivision did so based on representations that the Little River Farm Road terminated at Lot 14.

ii. The Neighbors would not have bought into the Little River Farm or Lower Leriche subdivisions had they known that the Little River Farm Road would connect to the Lower Leriche Road.

iii. The connector may be used as a through road between Stagecoach Road and West Hill Road.

The Board has made Findings which support the Neighbors' assertions, *see* Findings of Fact 48 - 55, 57 and 58, and it concludes that the neighbors reasonably relied on Condition 14 to control and limit traffic on Little River Farm and Lower Leriche Roads.

c. Balancing flexibility vs. finality

EBR 34(E)(3) requires that the Board balance the Applicants' interests in the flexibility of the amendment process against the Neighbors' interests that permit conditions be afforded the finality which they deserve. The Board believes that it can do so, to the benefit of both parties in this case.

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[10] Because the Board finds that EBR 34(E)(3)(c) and (d) weigh in the Applicant's favor, the Board does not reach a consideration of EBR 34(E)(3)(e).

Fortunately, the instant situation does not present the ordinary type of dispute that was typified in the *Stowe Club Highlands* or the *Nehemiah* cases. In those two situations, because they both involved a request to develop a lot that had been set aside for aesthetic reasons, it would have been impossible to allow the amendment application process to go forward without causing significant damage to the reliance interests of those who opposed the applications. In looking at the competing interests at stake in this case, however, the Board believes that it can fashion relief that will accommodate the concerns of both sides.

It is in the Neighbors' interests that the Little River Farm Road and the Lower Leriche Road exist as dead-end roads. This can be accomplished by prohibiting the use of the connector. This can also be accomplished by requiring that the Applicants, should they choose to proceed with this amendment application, take steps to ensure that the roads will be *de facto* dead-end roads.

The Board finds that the Applicants have satisfied *Stowe Club Highlands*, as codified in EBR 34(E), subject to the following provisions, which must appear as conditions in any permit that the Commission may issue.

First, the Applicants must take steps to ensure that passage over the connector is prohibited to all but themselves and their invitees.

As the Findings note, the Applicants have installed three gates on their private extensions to the subdivisions' roads; one gate is at the bottom of the Applicants driveway on Lot 17 of the Lower Leriche subdivision; a second gate bars access to Lots 14/15 from the Little River Farm Road; a third gate is near the property line between Lot 17 and Lot G. The Commission may require that one or more of these gates be used to prevent access to the connector; the Applicants may also propose, subject to the Commission's approval, other creative measures to prevent such access.[11]

Second, the fact of the Applicants' common ownership of Little River Farm Lots 14/15 and Lower Leriche Lots 17 and G and the fact that only one house sits on these lots also play a significant role in the Board's conclusion that the use of the connector need not work to the detriment of the Neighbor's reliance interests in this matter. Thus, a condition of any permit issued by the Commission must require that, should the Applicants ever sell their Lower Leriche lots, the use of the connector shall be discontinued.

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[11] The Board encourages the parties, pursuant to EBR 16(D), to negotiate the best resolution to this question.

Third, the Board emphasizes that its decision today rests heavily on the circumstances which presently exist on the Applicants' lots. Thus, if the permit is amended, and, at some future date, should the Applicants construct another residence or any other development on their Little River Farm or Lower Leriche lots, the Commission may reopen the permit amendment to inquire into whether such construction should affect the continued use of the connector.

Lastly, it must also be noted that the Board makes no conclusion as to the *merits* of the Applicants' permit amendment application. The Commission is free to judge such application under the criteria in 10 V.S.A. §6086(a) in order to determine the impacts, if any, of the connector on the deer habitat or on other values which the criteria or Condition 14 seek to protect. The Board simply holds that, in this instance, the competing interests of flexibility and finality can both be satisfied, if a permit is adequately conditioned, and thus the requirements of *Stowe Club Highlands,* as modified by EBR 34(E),[12] have been met.

V. Order

1. The Neighbors' Motion to Dismiss is denied; the Board denies the Neighbors' request for a hearing on the Motion.

2. The Applicants' application to amend Land Use Permits #5L1018-1 (Reconsideration) and #5L0426-7 satisfies EBR 34(E) and *Stowe Club Highlands* and may proceed.

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[12] The Board notes that this decision does not reverse the rationale espoused by the Commission's Decision, as the Commission relied on the language embodied in the *Stowe Club Highlands* decision, whereas the instant analysis is grounded in the new test established by EBR 34(E).

3. Jurisdiction is returned to the District 5 Environmental Commission.

Dated at Montpelier, Vermont this 3rd day of October 2003.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland *** ****
Samuel Lloyd
Donald Marsh
Patricia A. Nowak * ***
Alice Olenick
Richard C. Pembroke, Sr. ** ***
Jean Richardson
Christopher D. Roy ** ***

* Board Member Nowak was not present for the August 27, 2003 deliberations in this matter.

** Board Members Pembroke and Roy were not present for the September 24, 2003 deliberations in this matter, but they have reviewed and concur with this decision, except as noted immediately below.

*** Board Members Holland, Nowak, Pembroke and Roy would not require Lot 17 to be held in common ownership with Lot G and Lot14/15 as a condition to the amendment of the Little River Farm Permit.

**** Board Member Holland, concurring: I concur with the majority's decision in this case that *Stowe Club Highlands* does not prohibit the Applicants from applying for an amendment to Land Use Permit #5L1018-1. However, I believe that the gates, the signs, and the existence of the house, as it is presently located near the connector, are sufficient to prevent unwanted through traffic, and I would therefore not require the Applicants to take any additional steps to prevent the use of the connector. I am authorized to state that Board Members Nowak and Pembroke join this view.