

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

Re: Ronald L., Sr., and Marylou Saldi
Land Use Permit Application #5R089 1 -16-EB
Docket #737

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This appeal concerns Land Use Permit Application #5R0891- 16 (“Dash 16 Application”), a proposal by Ronald L. and Marylou Saldi, Sr. (“Applicants”) to amend Land Use Permit #5R0891-6 (“Dash 6 Permit”) which previously authorized a mixed-use, commercial subdivision in the Town of Williamstown, Vermont. The Dash 16 Application seeks to convert to residential use Lots 1, 2, and 3, previously approved for commercial development, and the placement of “single family trailers” on these three lots (“Dash 16 Project”).

A preliminary issue in this appeal is 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 Dash 16 Application. As explained in more detail below, the Board concludes that the policies of finality outweigh those of flexibility in this matter, and the Board will not review the merits of the Dash 16 Application.

I. BACKGROUND

On February 10, 1998, the Applicants filed the Dash 16 Application with the District #5 Environmental Commission (“Commission”) pursuant to 10 V.S.A. §§ 6001-6092 (“Act 250”). The Project requires an Act 250 permit because it is both a substantial and a material change to a permitted project. Environmental Board Rule (“EBR”) 34.

On June 8, 1999, the Commission issued Findings of Fact, Conclusions of Law, and Order (“Dash 16 Decision”) denying the Dash 16 Application.

On July 7, 1999, the Applicants through counsel Stephen J. Craddock., Esq., filed a Notice of Appeal with the Board, alleging that the Commission had erred in its conclusions concerning 10 V.S.A. §§ 6086(a)(6), (8) (aesthetics), (9)(A), and (10) (town plan) (“Criteria 6, 8, 9(A), and 10”) and the Dash 16 Project’s lack of compliance with prior permit conditions in the Dash 6 Permit. Specifically, the Applicants claimed that the Commission erred in its conclusion that the Applicants had failed to demonstrate why Condition #1 of the Dash 6 Permit should now be amended, applying the flexibility/finality test in Stowe Club Highlands to the Dash 16 Application.

[#737].

On July 22, 1999, an Act 250 Notice of Appeal and Prehearing Conference was issued. At the request of the Applicants, the prehearing conference was rescheduled from August 5 to August 19, 1999, and an Act 250 Notice of Cancellation and Rescheduled Prehearing Conference was issued on July 30, 1999.

On August 18, 1999, Gerald R. Tarrant, Esq., of Tarrant, Marks & Gillies, entered his appearance in opposition to the Dash 16 Application for the Town of Williamstown Select board ("Town"), Williamstown Planning Commission ("Planning Commission"), and Williamstown School Board ("Town School Board"). The Town School Board also filed a Petition for Party Status, pursuant to EBR 14(B)(1) and (2).

On August 19, 1999, Board Chair Marcy Harding convened a prehearing conference with the Applicants represented by attorney Craddock and the Town, Planning Commission, and Town School Board by attorney Tarrant and Robert Chappelle, Chair of the Planning Commission.

On August 20, 1999, Chair Harding issued a Prehearing Conference Report and Order, granting party status to the Applicants pursuant to EBR 14(A)(1), the Town and Planning Commission pursuant to EBR 14(A)(3), and the Town School Board pursuant to EBR 14(B)(1).

In September through early November 1999, the parties filed direct and rebuttal prefiled testimony and exhibits.

On November 3, 1999, the Applicants and the Town, Planning Commission, and Town School Board filed proposed findings of fact and conclusions of law and objections to their opponents' proffered evidence.

On November 22, 1999, the Chair convened a second prehearing conference. The Applicants were represented by attorney Craddock, and the Town, Planning Commission, and Town School Board by attorney Tarrant.

At the second prehearing conference, the Chair overruled all of the parties' evidentiary objections to direct and rebuttal prefiled testimony and exhibits and she noted the parties stipulation that the three single-family trailers proposed for Lots 1, 2, and 3, would each add .9 school children to the Williamstown school system. The parties agreed to not seek Board review of the Chair's preliminary evidentiary rulings with respect to prefiled testimony and exhibits.

Pursuant to 3 V.S.A. § 810(4), without objection by the parties, the Chair also took official notice of the following decisions, permits, and supporting exhibits: Dash 6 Permit and

supporting exhibits in the Dash 6 Application; Land Use Permit #5R0891-13 (“Dash 13 Permit”) and supporting exhibits in Land Use Permit Application #5R0891-13 (“Dash 13 Application”); and Re: Herndon and Deborah Foster, Application #5R0891-8B-EB, Findings of Fact Conclusions of Law and Order (June 2, 1997) and supporting exhibits. The Chair noted that no decisions could be found in the Commission’s files in support of the issuance of the Dash 6 and Dash 13 Permits.

At the second prehearing conference, the Applicants filed a Motion to Allow Supplemental Prefiled Testimony of Ronald L. Saldi, Sr. (“Motion to Supplement”). The Chair allowed counsel for the Town, Planning Commission, and Town School Board to file a written response to the Motion to Supplement and referred the matter to the Board for its deliberation on November 24, 1999.

‘On November 23, 1999, the Town, Planning Commission, and Town School Board filed written objections to the Motion to Supplement.

On November 24, 1999, the Board convened a hearing in this matter in Williamstown, Vermont. The following individuals and entities participated: the Applicants by attorney Craddock and the Town, Planning Commission, and Town School Board by attorney Tarrant.

The Board conducted a site visit during which it placed its observations on the record. a preliminary matter, the Board deliberated concerning the Applicants’ Motion to Supplement and objections thereto, and it granted the Motion to Supplement and allowed additional cross-examination by attorney Tarrant for his clients. The Board accepted documentary and oral evidence into the record and heard opening and closing statements.

The Board deliberated on November 24, 1999, and January 12, 2000. 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 hearing on January 12, 2000. This matter is now ready for final decision.

II. ISSUES

1. Whether, after weighing the competing policy considerations of flexibility and finality as articulated in the Stowe Club Highlands test, the Board will amend the Conditions of Land Use Permit #5R0891-6 to allow the Dash 16 Project.
 2. If the answer to 1., above, is in the affirmative, whether, pursuant to 10 V.S.A
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- § 6086(a)(6), the Dash 16 Project will cause an unreasonable burden on the ability of a municipality to provide educational services. (Criterion 6)
3. If the answer to 1., above, is in the affirmative, whether, pursuant to 10 V. S.A. § 6086(a)(8), the Dash 16 Project will have an undue adverse effect on aesthetics. (Criterion 8)
 4. If the answer to 1., above, is in the affirmative, whether, pursuant to 10 V.S.A. § 6086(a)(9)(A), the Dash 16 Project will significantly affect the Town of Williamstown's and the region's existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the Project if approved. (Criterion 9(A))
 5. If the answer to 1., above, is in the affirmative, whether, pursuant to 10 V.S.A. § 6086(a)(10), the Dash 16 Project is in conformance with the Williamstown Town Plan. (Criterion 10 (Town Plan))

III. FINDINGS OF FACT

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).

1. In 1989, the Commission granted the Dash 6 Permit to Ronald L. Saldi, Sr., and co-permittee Lawrence Hebert ("Saldi" and "Hebert"). The Dash 6 Permit authorized the creation of the Williamstown Business Center, a 15-lot commercial subdivision involving 42 +/- acres ("Project Parcel"), the construction of 750 feet of new roadway, and the installation of extensions to municipal water and sewer lines ("Dash 6 Project"). The Dash 6 Permit amended Land Use Permit #5R0891, allowing the re-subdivision of one of five lots created from the 300 +/- acre Carpenter Farm, located off Route 14 just south of the Village of Williamstown.
 2. The Williamstown Planning Commission and the Williamstown School District were parties to the Dash 6 Permit proceeding.
 3. In the project narrative of the Dash 6 Application, Saldi and Hebert represented that the
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subdivision was “for mixed uses, such as offices, retail businesses, and apartment complexes.” They specifically represented that Lots 1, 2, 3, 9, 10, and 12 would be used for “[m]iscellaneous commercial/retail/office use,” while other lots would be devoted to rental apartments and proposed and existing businesses. Furthermore, Saldi and Hebert represented that the Williamstown Business Center would attract the following types of tenants: “Insurance Brokers, Doctors Office, Bank, Real Estate Brokers, etc.”

4. In the project narrative of the Dash 6 Application with respect to Criterion 6, Saldi and Hebert represented that:

The occupants which are currently known for this subdivision and additional anticipated occupants will be derived from the surrounding area. Existing businesses such as L.H. Construction will be locating in the Business Center. Individuals in Williamstown will most likely make up the large portion of business owners at the Center. ... Therefore this subdivision is unlikely to generate the location of “new” business owners to Williamstown. It follows then that no new burdens will be placed on the educational services currently existing within the Town.

5. The Dash 6 Application called for the construction of 32 two-bedroom units of rental apartments on Lots 5 and 6. However, during the course of the Dash 6 proceeding, Hebert negotiated an agreement with the Williamstown School District that reduced the number of proposed apartment units to 16, with 4 single-bedroom and 12 two-bedroom units in the first phase of development. This agreement was described in Exhibit 29, Dash 6 Application, submitted by Saldi and Hebert.
6. In the project narrative of the Dash 6 Application with respect to Criterion 8, Saldi and Hebert represented that landscape planting had been incorporated into the design in order to minimize visual impacts, although specific plans were being provided at that time only for lots with known occupants. They represented that amendment applications would be filed for individual lots as occupants became available. The narrative further provided that: “The exterior colors of all buildings will be earth tone unless brick or white clapboard siding is used.”
7. In the project narrative of the Dash 6 Application with respect to Criterion 9(A), Saldi and Hebert represented:

This project will draw on existing business in the area and new businesses are

anticipated to be formulated by local entrepreneurs utilizing employees from the surrounding work force. ... The Town officials have expressed support for the project and are welcoming the increased tax base which will be generated by the project.

8. Exhibit 23, Dash 6 Application, submitted by Saldi and Hebert, estimated that the Williamstown Business Center would generate a total of \$75,556 in property taxes. In a table included in this exhibit, dated September 26, 1989, the estimated land and building values and tax revenues for Lots 1, 2, and 3, using the then current tax rate of \$2.772, were listed as follows:

<u>Lot #</u>	<u>Land</u>	<u>Buildings</u>	<u>Total</u>	<u>Taxes</u>
1	8,000	150,000	158,000	4,379.00
2	6,800	150,000	156,800	4,346.00
3	6,800	150,000	156,800	4,346.00

9. In the project narrative of the Dash 6 Application with respect to Criterion 10, Saldi and Hebert represented that the proposed project had been reviewed and given final approval by the Williamstown Planning Commission and the Dash 6 Project was in conformance with the Town Plan.
10. The Town of Williamstown has no permanent zoning regulations. In order, however, to facilitate the creation of the Williamstown Business Center and attract business to Williamstown, the Planning Commission had changed the land use designation of the Carpenter Farm from Agricultural District to Village Open District in the mid-1980s. The Planning Commission agreed to convert the agricultural land at the Carpenter Farm to commercial and light industrial development because the Town wished to attract business and the Carpenter Farm property was near downtown Williamstown where there was little land to expand the Town's tax base. The Village Open District was incorporated into the 1986 Williamstown Municipal Plan.
11. Exhibit 15, Dash 6 Application, submitted by the applicants, consisted of relevant portions of the 1986 Williamstown Municipal Plan. The Town Plan included the following description of this district:

A Village Open District is established within the Village Growth District, south of the Town along Route 14 (see map). This new District is characterized by open, flat land within reach of municipal water and sewer services. This area was

formerly designated an Agricultural District.

A mixture of village-type buildings (e.g. residences, churches), as well as commercial and light industrial enterprises may be constructed provided they are compatible with the aesthetic and architectural character of surrounding properties. Furthermore, at least 50 percent of the property must be actively maintained as open space and location of individual buildings must allow for unobstructed views of contiguous open areas.

Commercial or light industrial enterprises within this District shall:

- (1) employ no more than an average of 20 on premise employees per lot;
- (2) manufacture or repair products or provide services within the confines of the buildings;
- (3) screen stored materials and non-customer vehicles from view;
- (4) dispose of no waste, including septage, on the premises; and
- (5) cause no undue air, noise or water pollution.

12. The Dash 6 Permit was issued by the Commission on November 9, 1989. It authorized the construction of a 16-unit apartment complex on Lot 5, an office and garage facility on Lot 7, and a convenience store with two retail rental units and fuel pumps on Lot 8. Lot 15 was approved for a single family residence. Condition 14 of the Dash 16 Permit required that an amendment application be filed for an existing sales/body shop project which Saldi had commenced on Lot 11 without prior Act 250 approval. Condition 21 required amendment applications and Commission approval prior to development of Lots 1, 2, 3, 9, 10, and 12 under any Act 250 criteria deemed necessary under EBR 2(G) and 2(P).
13. Condition 1 of the Dash 6 Permit stated:

The project shall be completed, maintained and operated as set forth in Findings of Fact and Conclusions of Law #5R0891-6, in accordance with the plans and exhibits on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission.

14. Findings of Fact, Conclusions of Law and Order were not issued in the Dash 6 proceeding. A memorandum dated November 9, 1989, from the District #5 Coordinator to the parties, 'and accompanying the Dash 6 Permit, stated, in relevant part:

. . . . Consistent with Environmental Board policy for cases without contested issues, and subject to the District Commission's discretionary power, this permit is being issued without accompanying findings of fact. This action was requested by the applicants so that certain site work could be completed prior to the seasonal close of the regional asphalt plants on or about November 12, 1989. The Commission's findings of fact, which are affirmative under all ten criteria will be issued as soon as possible in light of administrative backlogs. . .

There is no evidence in the record of the Dash 6 Permit proceeding that the Commission ever issued Findings of Fact, Conclusions of Law, and an Order.

15. Neither Saldi nor **Hebert** appealed any of the terms or conditions of the Dash 6 Permit.
16. In 1990, the Commission issued Land Use Permit #5R0891-8 to Saldi and Ronald Saldi, Jr., authorizing auto body repair and sales on Lot 11. Also in 1990, Saldi received Land Use Permit #5R0891-9 for development of a restaurant/lounge on Lot 10.
17. In 1993, the Commission issued Land Use Permit #5R0891-11 to Saldi for construction of an office building on Lot 12.
18. In 1994, **Hebert** applied for and received the Dash 13 Permit to create a 6-unit mobile home park on Lot 6.
19. Lot 1 is immediately adjacent to Route 14, just north of the access drive to the Williamstown Business Center, and adjacent to the convenience store on Lot 8. Lot 2 is immediately east of Lot 1, just north of the Center's access drive, and adjacent to Lot 8. Lot 3 is immediately east of Lot 2, just north of the Center's access drive, and adjacent to Lot 9. Lots 1, 2, 3 are bounded on the north by Lot 14, which is primarily wetland and undevelopable open space.
20. The Project Parcel, as a whole, is highly visible from Route 14 whether one is traveling from the south or from the north. Lots 1, 2, and 3 are particularly visible given their proximity to Route 14 and open space Lot 14. The surrounding uses are commercial, commercial residential, office, and retail sales, located in pre-existing converted residential structures or structures built since the 1980s in conformance with Act 250 permits.
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Similar uses could be sited on Lots 1, 2, and 3 consistent with the standards for the Village Open District under the 1993 Williamstown Municipal Plan.

21. The Applicants own Lots 1, 2, and 3 in the Williamstown Business Center in fee simple. The Applicants acknowledge that, under the Dash 6 Permit, Lots 1, 2, and 3 in the Williamstown Business Center are approved for commercial development only. Lots 1, 2, and 3 are three of the last four undeveloped commercial lots in the Williamstown Business Center.
 22. The Applicants filed the Dash 16 Application in 1998 requesting conversion of Lots 1, 2, and 3 from commercial use to residential use. The Dash 16 Application requests approval for single-family trailers on each of these three lots. The Dash 16 Project involves 1.5 +/- acres, with each of the three lots containing approximately 0.5 acre.
 23. Exhibit A-2 filed by the Applicants in support of the Dash 16 Project is a site plan showing on each lot a 28' x 65' manufactured home and some landscaping. The Applicants have represented that if the Dash 16 Application were granted, they would be authorized to develop or sell for development, the lots for residential use. Residential use could consist of the installation of single-family trailers, manufactured homes, or so-called "stick-built houses," or a combination thereof. The Applicants, however, have not provided sufficient construction details and contextual information to evaluate how the Dash 16 Project would aesthetically relate to the surrounding development and impact vistas of adjacent open spaces.
 24. The Applicants filed the Dash 16 Application because they had tried unsuccessfully to market Lots 1, 2, and 3 as commercial lots, off-and-on over a period of five years. These lots were offered for sale, as undeveloped commercial lots, at prices ranging from \$32,000 to \$49,000 apiece. The Applicants attempted to sell one or more of the three lots for a bank branch office and the new Williamstown Fire Station, however, they did not offer as evidence any advertisements, listing agreements, purchase and sale agreements, or other indicia of how, when, and for what prices or with what terms they had offered Lots 1, 2, and 3 for sale.
 25. Saldi has sold only one undeveloped, commercial lot in the Williamstown Business Center. Other commercial lots were developed by the Applicants and their partners prior to sale. The Applicants, however, did not offer evidence concerning the how, when, and for what prices or with what terms they had sold these developed and undeveloped lots.
 26. In 1992, when he was in need of cash, Saldi offered to sell two of the three lots (Lots 1, 2,
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and 3), along with other developed lots within and outside the Williamstown Business Center, at public auction. No bids were received for the lots.

27. Saldi is an experienced developer, aware of market factor changes and various state permitting requirements. Since the 1980s, he has sold both developed and undeveloped commercial and residential lots in various locations in Williamstown. In addition to the lots in the Williamstown Business Center, he has developed and sold commercial and industrial lots in the Williamstown Commercial Center, and residential lots in the Amanicki subdivision.
 28. In October 1999, Saldi entered into a purchase and sale agreement with Progressive Plastics to sell Lot 3 in the Williamstown Commercial Center and submitted to the Commission an Act 250 application for the commercial development of Lots 2 and 3 in the Williamstown Commercial Center. These transactions were not referred to in the Applicants' prefiled evidence concerning the current market for commercial properties in Williamstown since they have not been concluded. Nevertheless, the purchase and sale agreement with Progressive Plastics is some evidence that commercial property is currently marketable in Williamstown.
 29. The Applicants' expert witness in the Dash 16 proceeding is Charles Clark ("Clark"), a realtor who had previously represented Saldi in various real estate transactions, including the 1992 public auction. Clark, however, has not represented the Applicants in any recent sales of commercial property in the Williamstown Business Center or Williamstown Commercial Center and he is unfamiliar with current trends in commercial development in Williamstown. Clark did not provide any listing agreements or other documentation to support his testimony concerning commercial real estate sales in Williamstown during the past ten years. Indeed, Clark was unfamiliar with the prefiled testimony that had been submitted to the Board by the Applicants on his behalf.
 30. Saldi believes that, if there were a market for commercial lots in Williamstown, he could sell Lots 1, 2, and 3 as undeveloped commercial lots for up to \$50,000 apiece. He has not listed the lots for several months, and he provided the Board with no listing agreements or advertisements to verify his most recent asking prices for these lots. Moreover, the Applicants did not offer evidence concerning recent sales prices for comparable undeveloped commercial properties in Williamstown or other towns in the region.
 31. Saldi believes that, if Lots 1, 2, and 3 were approved for residential use, he could sell them for \$28,000 to \$30,000 apiece, without trailers or other residential structures. The Applicants are prepared to sell the lots either undeveloped or with trailers or other
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residential structures.

32. According to Exhibit A-10 filed by the Applicants in support of the Dash 16 **Application**, the Applicants paid the following property taxes in 1999, based on a tax rate of \$2.192:

<u>#ot</u>	<u>Use</u>	<u>Tax Paid</u>
1	undeveloped	\$241.12
2	undeveloped	\$208.24
3	undeveloped	\$208.24

33. The Applicants estimate that if a house or mobile home were placed on each of the three lots, the property taxes on each lot would increase by over \$1,000.
34. Lots 1, 2, and 3, as approved for commercial use in 1989, were expected to generate an estimated total of \$13,000 in annual tax revenues based on a valuation of no less than \$150,000 apiece (\$450,000 total). **See** Finding 8. According to the Town, the value of three new mobile homes on Lots 1, 2, and 3 would be approximately \$50,000 to \$75,000 for an estimated total tax revenue (1999) of \$3,288 to **\$3,471.75**. Thus, the conversion of Lots 1, 2, and 3 from commercial to residential use would represent a significant decrease in expected property tax revenues to the **Town**.
35. The conversion of Lots 1, 2, and 3 from commercial to residential use for three mobile homes would eliminate expected local employment opportunities and increase the school-aged population by 2.7 children.
36. **While** there has been relatively little new commercial construction in Williamstown during the last ten years other than that done by Saldi and **Hebert**, the town has witnessed an increase in business activity attributable to conversions of residential structures to commercial uses or expansions of existing businesses. New commercial structures have included two sign fabrication shops, a mobile home sales business, several auto body repair shops, and a milking machine repair business. Also, Rock of Ages has expanded its facilities.

IV. CONCLUSIONS OF LAW

EBR 34(A) provides that a permit amendment is required for any material or substantial change in a permitted project. In the Dash 16 Application, the Applicants propose to convert from, commercial to residential use three lots in a previously permitted commercial subdivision.

This represents both material and substantial changes to the approved development pursuant to EBR 2(G), 2(P) and 34. Accordingly, the Board has jurisdiction on appeal to consider whether the Dash 16 Application should be granted or denied.

A. Stowe Club Highlands / Flexibility Versus Finality

The preliminary issue of whether the Board will amend the Dash 6 Permit, based on application of the Stowe Club Highlands analysis, is dispositive of this matter. The Board has previously concluded that it will only reach the merits of a permit amendment application under any of the Act 250 criteria under appeal **after** applying the balancing test in Stowe Club Highlands. Re: The Stratton Corporation, Land Use Permit Application #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Nov. 20, 1997); Re: Nehemiah Associates, Inc., Land Use Permit Application #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order at 4 (Apr. 11, 1997), aff'd, No. 97-223 at 4 (Vt. Sept. 11, 1998). Therefore, as a preliminary matter in this appeal, the Board has reviewed the Dash 16 Application in light of the Dash 6 Permit, applying the competing policy considerations set forth in Stowe Club Highlands. See Prehearing Conference Report and Order at 5-6 (Aug. 20, 1999); see also, Re: MBL Associates LLC, Land Use Permit Application #4C0948-3-EB, Findings of Fact, Conclusions of Law, and Order at 4-18 (Oct. 20, 1999); Re: Bernard and Suzanne Carrier, Land Use Permit Application #7R0639-1-EB, Findings of Fact, Conclusions of Law and Order at 16-22 (Aug. 19, 1999).

In Stowe Club Highlands, the Supreme Court affirmed the Board's denial of a permit amendment application for a project to develop a lot previously set aside as undeveloped land by permit conditions under Criteria 8 and 9(B). While the Supreme Court overruled 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." 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.
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Id. 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., supra; Re: Town of Hinesburg, Land Use Permit Application #4C0681-8-EB, Findings of Fact, Conclusions of Law, and Order (Sept. 23, 1998) [EB #704].

The principal 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, 160 Vt. 583, 593 (1993), citing Levy v. Town of St. Albans Zoning Bd. Of Adjustment, 152 Vt. 583,593 (1989). ...

[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.

Re: MBL Associates LLC, supra, citing Re: Nehemiah Associates, Inc., Land Use Permit Application # 1R0672- 1 -EB (Remand) at 2 1-22.

The Board construes the Applicants' pleadings and evidence concerning the alleged decline in the market for commercial properties in Williamstown during the past ten years and their inability to sell Lots 1, 2, and 3 as commercial lots as **addressing** the first kind of change discussed in Stowe Club Highlands: Whether the Dash 6 Permit should be amended due to factual circumstances beyond the Applicants' control. Alternatively, the changes alleged by the Applicants could be changes in the "operation" of the Dash 6 Project, not reasonably foreseeable at the time Saldi and Hebert applied for the Dash 6 Permit.' The Applicants, however, have not presented argument and evidence demonstrating changes in regulatory circumstances beyond their

¹ The Applicants asserted in their Notice of Appeal at 4 (Jul. 7, 1999) that they would provide evidence: "(e) that circumstances have changed which justify altering the permitted commercial development of these lots including evidence regarding current market conditions and the Applicants' efforts to sell the lots for commercial use." In their Proposed Findings of Fact and Conclusions of Law at 3, Finding 23 (Nov. 3, 1999), the Applicants stated: "[The] lack of growth and lack of commercial development in the nineties was unexpected and unforeseen ten years ago."

control or changes in technology. Because the Applicants seek to change the status quo by requesting amendment of the Dash 6 Permit, they have the burden of proof of demonstrating that the principles of flexibility outweigh finality applying the Stowe Club Highlands test. Prehearing Conference Report and Order at 5, Section III (Aug. 20, 1999); See Re: W. Joseph Gagnon, Declaratory Ruling #173 at 5 (Nov. 22, 1987) citing McCormick, Evidence 949. The burden of proof on this preliminary issue includes both the burden of production and the burden of persuasion. Re: Bernard and Suzanne Carrier, supra at 17.

The Board is now ready to consider the Dash 16 Application in light of the Stowe Club Highlands analysis. It will first consider the factors favoring flexibility. The Applicants allege that Lots 1, 2, and 3 are impossible to sell for commercial use due to the lack of interest in commercial real estate development in Williamstown. The Board, however, is struck by the lack of documentary or credible evidence offered in support of the Applicants' contentions. The Applicants provided limited and inconclusive testimony concerning their attempts to sell the three lots. They provided no copies of listing agreements, advertisements, or other information to document attempted sales. Saldi admitted that the lots had been off-and-on the market and that the sales price for each lot had varied from year to year. The Applicants provided no financial picture for the entire commercial subdivision authorized by the Dash 6 Permit, including profits or losses associated with the sale of the other lots, developed and undeveloped, in the Williamstown Business Center. Indeed, the Applicants provided no information concerning the point at which they had or expected to "break-even" financially on the Dash 6 Permit Project. See Re: MBL Associates LLC, Land Use Permit Application #4C0948-3-EB at 16 (Applicant provided no evidence concerning the point at which the project would "break-even" financially).

If Applicants' argument is that changes in the market for commercial lots have made it impossible for them to sell commercial lots and therefore "operate" the Dash 6 Project as permitted, those changes must not have been reasonably foreseeable at the time Saldi and Hebert applied for the Dash 6 Permit. The Stowe Club Highlands 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." Id.; see also Re: The Stratton Corporation, #2W0519-9R3-EB, Findings of Fact, Conclusions of law, and Order at 16 (Jan. 15, 1998).

The evidence supports the conclusion that Saldi is an experienced developer who is familiar with market factor changes, real estate development, and the Act 250 process. Nevertheless, the Applicants have failed to convince the Board that there is no market for commercial

properties- in Williamstown. Saldi and the Applicants' expert witness, realtor Clark, provided vague and unsupported testimony concerning the lack of commercial real estate activity in Williamstown which was ably **refuted** by the Town and Planning Commission.' Indeed, evidence of past development at the Williamstown Business Center and the current transactions involving Saldi and Progressive Plastics at the Williamstown Commercial Center undermine the Applicants' claims. In the Board's opinion, the Applicants have simply failed to meet their burden of producing credible evidence of factual circumstances beyond their control, or changes in the operation of the Dash 6 Project not reasonably foreseeable in 1989, that would cause the Board to favor flexibility.

In contrast, the facts weigh in favor of finality. In considering the **policy** of finality, the Board must determine whether the Commission and the parties reasonably relied upon the Applicants' representations concerning the Williamstown Business Center proposed in the Dash 6 **Application** proceeding in order to conclude that a permit should issue and, further, whether the Applicants benefitted from such reliance. Re: The Stratton Corporation, supra at 18.

Under 10 V.S.A. § 6086(c), a permit may contain such requirements and conditions as are allowable within the police power and are appropriate with respect to the Act 250 criteria. "The purpose of permit conditions is to alleviate adverse effects that would otherwise be caused by a project, Those adverse effects would require a conclusion that a project does not comply with the criterion at issue unless the condition is followed." Re: Stowe Club Highlands, supra at 10.

A permit applicant's representations may be incorporated into a permit as conditions. Stowe Club Highlands at 8. Indeed, a Commission and the parties have the right to rely on the material information provided by an applicant. Re: The Stratton Cororoation, supra at 18-19; Re: Crushed Rock, Inc., Land Use Permits #1R0489-EB and #1R0489-IEB (Revocation), Findings of Fact, Conclusions of Law, and Order at 10-12 (Oct. 17, 1986), vacated and remanded on other grounds, In re Crushed Rock, Inc., 150 Vt. 613 (1988).

Applying these principles of law, the Board concludes that the Commission authorized the Williamstown Business Center and the commercial development of Lots 1, 2, and 3 based on its conclusion that the Applicants' proposal would affirmatively comply with all Act 250 criteria.

² The Board notes that the Applicants filed grand list data for the Town of Williamstown. The Town, Planning Commission, and Town School Board provided their own data. Unfortunately, the parties' information about tax revenues (anticipated and actual) from commercial versus residential development was difficult to evaluate, because in some instances the figures represented school tax revenues only and in other instances aggregate school/town tax revenues.

The Dash 6 Permit, through Condition #1, incorporated the representations by Saldi and Hebert that the proposed development would generate added tax revenues and new jobs, without overburdening municipal and school services.' Indeed, these were the very types of representations that prompted the Planning Commission to redistrict the Carpenter Farm from agricultural use to commercial and light industrial uses in order to allow creation of a new business center.

In the Dash 6 Application and supporting exhibits, the Applicants identified the specific types of commercial uses for which they sought approval and the expected tax revenues for each lot. Based on their representations, both the Planning Commission and, ultimately, the Town School Board, lent their support to the Dash 6 Application. Saldi and Hebert knowingly limited the scope of the subdivision project to mixed commercial use, including a reduced number of commercial apartments, in order to gain the backing of local officials. Moreover, Saldi and Hebert did not timely request that the permit be changed, corrected, or reconsidered but instead allowed the conditions, including their representations concerning the scope and purpose of the Dash 6 Project, to become final.

Based on the above, the Board concludes that it was reasonable for the Commission and the parties to rely upon the representations of Saldi and Hebert concerning the eventual build-out and benefits of the Williamstown Business Center. Furthermore, the developers, including the present Applicants, have benefitted from the Commission's and parties' reliance on the representations of Saldi and Hebert in the Dash 6 Permit proceeding, because such representations have enabled the developers to secure subsequent permit amendments for the commercial development of the majority lots within the Williamstown Business Center subdivision. The Board, therefore, concludes that the Applicants are bound by the prior representations of Saldi and Hebert.

In conclusion, the considerations supporting finality outweigh any that might warrant a finding in favor of flexibility.

B. Criteria 6, 8 (aesthetics), 9(A), and 10 (Town Plan)

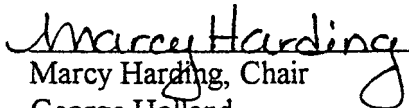
In light of the Board's decision above, it does not address the remaining issues, whether the Dash 16 Project conforms with Criteria 6, 8 (aesthetics), 9(A), and 10 (Town Plan).

V. ORDER

1. Official notice is taken of Land Use Permit #5R089 1-6 and supporting exhibits in the Land Use Permit Application #5R089 1-6; Land Use Permit #5R089 1-1 3 and supporting exhibits in Land Use Permit Application #5R0891-13; and Re: Herndon and Deborah Foster, Application #5R089 1-8B-EB, Findings of Fact, Conclusions of Law and Order (June 2, 1997) and supporting exhibits.
2. Land Use Permit Application #5R0891-16-EB is hereby DENIED under the Stowe Club Highlands analysis.
3. In light of the decision above, the Board does not reach issues 2 through 5.
4. Jurisdiction is returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont, this 13th day of January, 2000.

ENVIRONMENTALBOARD


Marcy Harding, Chair

George Holland

Samuel Lloyd

W. William Martinez

Alice Olenick

Gregory Rainville, Alternate Member