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

Re: Rockwell Park Associates and Bruce J. Levinsky
Application #5 W0772-5-EB

INITIAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER: AUTHORITY TO IMPOSE PERMIT CONDITIONS

This decision pertains to an appeal of a permit issued for a master plan application to create an industrial park. The decision specifically pertains to whether it is appropriate to issue permit conditions concerning land not involved in the first phase of the plan. As is explained below, the Environmental Board concludes that imposition of such conditions is appropriate under 10 V.S.A. Chapter 151 (Act 250) and the Board Rules. The Board also concludes that jurisdictional objections raised by the Applicants to such imposition are barred by the doctrine of collateral estoppel unless the Applicants can make a sufficient demonstration that circumstances have changed such that applying collateral estoppel is unfair. The Board further concludes that, even if the jurisdictional objections are not barred, they are not meritorious.

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(Docket #509)

I. SUMMARY OF PROCEEDINGS

On December 24, 1990, the District #5 Commission issued Land Use Permit Amendment #5W0772-5 (Amendment 5), authorizing "ongoing master plan development and subdivision" of an approximately 470-acre tract owned by Mr. Levinsky; the conveyance of 67 acres of the tract from Mr. Levinsky to Rockwell Park Associates; and the conveyance from Mr. Levinsky to the Town of Berlin of a private sewer line approved in Land Use Permit #5W0772 (the Permit). Amendment 5 also authorizes the construction of infrastructure and the sale of lots within Phase I of the master plan, consisting of a 25-lot office park in two blocks involving the aforementioned 67-acre portion of the tract. The tract is located on Airport Road in Berlin, Vermont.

On January 22, 1991, the Applicants filed an appeal of Conditions 6, 7, and 8 of the District Commission's permit, contending that the District Commission exceeded its jurisdiction in imposing those conditions and requesting a de novo hearing. The District Commission's conditions relate to an approximately 413-acre lot on the tract that is not part of Phase I and concern the protection of historic sites and necessary wildlife habitat under 10 V.S.A. § 6086(a)(8) and (8)(A).

The Board initially scheduled a prehearing conference for February 1991 but this was continued at the request of the Applicants and the appeal was put on hold. Following a request by the Applicants, the Board re-activated the matter and Chair Elizabeth Courtney held a prehearing conference on July 16, 1991. During the prehearing conference, the Applicants stated that resolution of this matter was not urgent and may be done at the Board's convenience.

On September 3, 1991, the Chair issued a prehearing conference report and order, setting out two issues in this matter that would be decided in sequence:

1. Whether it is appropriate to impose conditions for a future master plan phase at this time when no development is proposed.

2. If the Board answers the first question in the affirmative, whether the site contains historic sites or necessary wildlife habitat which warrant protection.

With respect to the first issue, the prehearing order set out an October 1991 deadline for the filing of a stipulation and legal briefs and a December 1991 date for oral argument.

On October 31, 1991, the Applicants and the State Agency of Natural Resources and Division for Historic Preservation (the State) filed a stipulation for

continuance of the schedule in the prehearing order. On January 31, 1992, the parties filed briefs concerning the first issue but no stipulation. On February 5, 1992, the Chair issued a memorandum stating that, within a specified time, parties must file a stipulation of facts or a request for an evidentiary hearing, or the Board will deem stipulated those facts contained in referenced sections of the parties' briefs. On February 25, 1992, the State and the Applicants each filed letters stating that they agreed to having facts deemed stipulated per the Chair's February 5 memorandum.

The Board convened oral argument on April 8, 1992, with the following parties participating:

The State by Kurt Janson, Esq.
The Applicants by Martin K. Miller, Esq.

After hearing argument from the parties, the Board recessed the matter and held a deliberative session.

Subsequent to the argument, the Chair determined that, due to the Board's heavy docket and the Applicants' statement that this matter was not urgent, decision on the first issue was to be given low priority.

The Board deliberated again concerning this matter on July 28, 1993. This matter is now ready for decision. The following findings of fact are based on the facts to which parties have stipulated and on documents noticed by the Board as discussed below. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUE

Whether it is appropriate at this time to issue permit conditions pertaining to the 413-acre lot not involved with Phase I.

III. NOTICE OF DOCUMENTS

As stated in the prehearing conference report issued concerning this matter, parties were to submit a stipulation concerning the facts necessary to decide this issue. However, parties did not do so. Instead, they filed legal memoranda and agreed, after prompting by the Chair, that the facts stated in specified sections of their memoranda could be deemed stipulated.

The Board finds this stipulation inadequate to decide the issues raised by the parties. Upon investigation pursuant to Rule 20(B), the Board takes notice pursuant to 3 V.S.A. § 810 of the following:

1. Re: Bruce J. Levinsky, Declaratory Ruling #157 (Aug. 19, 1984).

2. Land Use Permit #5W0772 (Oct. 1, 1984) and supporting findings of fact and conclusions of law (Oct. 9, 1984).

3. "Stipulation of the Parties for Application #5W0772," Exhibit 5 to that application, stamped "Approved" Oct. 1, 1984.

4. Status Conference Report, Application #5W0772-4 (Oct. 31, 1989).

5. Status Conference Report Review by Commission Panel, Application #5W0772-4 (Dec. 19, 1989).

6. Application #5W0772-5 (July 26, 1990) and all documents filed by the Applicants with the District Commission in connection with that application, including a document entitled "Project Summary Rockwell Park."

The Board may take notice of judicially cognizable facts at any stage of the proceedings. In re Handy, 144 Vt. 610, 612-613 (1984).

It is appropriate to take notice of these documents because they either constitute public records and prior decisions concerning development and subdivision of the relevant tract or are admissions by the Applicants. The documents are relevant to issues raised by the parties regarding jurisdiction, collateral estoppel and Mr. Levinsky's plans for the relevant tract.

IV. FINDINGS OF FACT

Declaratory Ruling #157

1. On August 9, 1984, the Environmental Board issued Re: Bruce J. Levinsky, Declaratory Ruling #157 (the Ruling). The Ruling concerns the completeness of an application by Mr. Levinsky for an Act 250 permit. . The Ruling references application #5W0772.

2. The Ruling contains findings of fact and conclusions of law. Among the findings of fact are the following:

1. On November 2, 1983, the Petitioner [Mr. Levinsky] applied to the [District #5] Commission for authorization to construct 5,086 feet of sanitary sewer line ("Phase I") roughly parallel to Airport Road in Berlin, Vermont. Phase I would begin at the existing municipal sewer line adjacent to Vermont Route 62 near the Central Vermont Hospital and run generally southerly through one parcel owned by the Petitioner, then through the lands of co-applicant Henry A. LaGue, and ending in the northwest corner of a second 425 acre parcel (the "Rockwell tract") owned by the Petitioner. A land use permit (#5W0760) was issued by the Commission for Phase I on July 19, 1984 ....

2. On May 4, 1984, the Petitioner filed land use permit application #5 W0772 with the Commission requesting authorization to construct Phase II of the sewer line, a 4,616 foot extension of the Phase I line. Phase II would start at the southerly terminus of Phase I, run through the 425 acre Rockwell tract for approximately 1800 feet, then proceed within the Airport Road right-of-way to a terminus ....

3. In response to inquiries by the Commission during review of the Phase I application, Petitioner submitted a "sketch plan" labeled "Rockwell Subdivision, Berlin, Vermont." [Exhibit citation]. That plan conceptually depicts a subdivision of the 425 acre parcel consisting of 66 industrial lots on 179 acres, 361 residential units on 293 acres, 23,900 feet of interior roadway, ponds, recreational lands and sewer lines to be connected to the Phase II sewer extension. The plan shows a sewer extension terminating at the Southeast corner of Petitioner's property.

* * *

7. Petitioner intends to develop the Rockwell tract and the Phase I and II lines will provide sewer service for that development. Existing limitations on the Rockwell land:; for the subsurface disposal of waste will be remedied by the availability of the sewer line. The next (third) phase of Petitioner's development will be a specific proposal for

> subdivision of a portion of the Rockwell lands. That proposal will be based upon the substantial project design activity which has already taken place as well as the three years of discussion which the Petitioner has had with the Berlin Planning Commission concerning development of the Rockwell lands.

3. In the Ruling's conclusions of law, the Board concluded that the application was incomplete. The Board stated:

> We conclude that the project proposed by the Petitioner is not the Phase II sewer line standing alone. Rather, Petitioner clearly intends to intensively develop his 425 acre tract as a residential and/or commercial subdivision and the Phase II line will serve only as one constituent support service for a larger undertaking. Therefore, applying [10 V.S.A.] § 6083(a) to the Petitioner, the term "land" refers to Mr. Levinsky's entire 425 acre tract ....

4. The Board also concluded that Mr. Levinsky was advocating a fragmented approach to project review which would undermine evaluation of his proposed project under the Act 250 criteria found at 10 V.S.A. § 6086(a). The Board stated:

> Furthermore, Board Rule 10(B) pertaining to permit applications provides, in part: "The board or a commission may require such additional information or supplementary information as the board or commission deems necessary to fairly and properly review the proposal." In determining what additional information may be required to "fairly and properly" evaluate a proposal, we must turn to Act 250 itself. The Board and the District Commissions are directed by 10 V.S.A. § 6086(a) to make several affirmative findings which would be rendered difficult if we subscribed to Petitioner's fragmented approach to project review.
>
> For example, Criterion 9(B) relating to primary agricultural soils, which Petitioner concedes would be at issue in permit proceedings for development or

subdivision of his lands, requires a finding that "the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential." Obviously, the fair market value of Mr. Levinsky's land is likely to change after the installation of a sewer line because on-site sewage disposal is presently an impediment to intensive development of the Rockwell tract. See Finding #7. Therefore, Petitioner's ability to secure a reasonable return on the value of the Rockwell tract and, ultimately, the question of whether prime agricultural soils will be converted to an alternate use may be dramatically affected by the installation of the Phase II line. Such an outcome is neither fair nor proper: a permit applicant should not reap the benefit of artificially changing to his advantage, by completing the second phase of a multi-phase subdivision project, the basic conditions which we are called upon to evaluate under Criterion 9(B). Similar difficulty is encountered when Criteria 9(A), 9(H), 9(K), and 9(L) are reviewed.

Furthermore, the segmented review approach advanced by the Petitioner could prevent a comprehensive review of total project impacts under each criteria [sic]. For example, the impact of individual project phases on a deer habitat may be de minimis when considered in a vacuum. However, the cumulative impact of all phases considered as a whole could rise to the level of "significant imperilment" requiring evaluation under the three sub-criteria of Criterion 8(A). This difficulty is also repeated in reviewing other Criteria.

* * *

In short, the review methodology proposed by the Petitioner would perpetuate, rather than abate, the problems which spurred the enactment of Act 250:

> . . . the unplanned, uncoordinated and uncontrolled use of the lands and the

> environment of the state of Vermont has resulted in usages of the lands and the environment which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont. Act No. 250 of 1969 (Adj. Sess.), § 1.

We, therefore, conclude that an application which does little more than address the Phase II sewer line without providing a further description of the project to be served by the sewer line does not comply with the requirements of 10 V.S.A. § 6083(a) and does not provide sufficient information to fairly and properly review the project under the ten criteria of 10 V.S.A. § 6086(a).

5. The Board further concluded that Mr. Levinsky must identify the components of the development or subdivision to be served by the Phase II sewer line, including, among other things, the uses to which his entire tract is to be put. The Board stated:

> While we have concluded that Petitioner's application in #5W0772 is not complete for its failure to address associated subdivision of the Rockwell tract, we do not conclude that Petitioner must prepare final project plans for a comprehensive proposal. Should Petitioner be prepared to submit such a master development plan for the Rockwell land, application for final commission approval is an available option. However, other interim alternatives are available to the applicant.
>
> At a minimum, prior to further development associated with future use of the tract, Petitioner must identify the components of the development or subdivision to be served by the Phase II sewer line. This identification need not include final architectural design or final engineering design of support services. The plan must, however, identify the uses to which the 425 acres is to be put, the location of various uses on

the tract, and the intensity of those uses (i.e. number of dwelling units, length of utility lines and roadways, extent of commercial space, estimated water demand, estimated sewage discharge, estimated vehicle trips to be generated, and similar information). Petitioner may then pursue two alternatives, both of which are available under and encouraged by Board Rule 21:

1) review of a master plan under all criteria of 10 V.S.A § 6086(a); or

2) partial review of the project under selected criteria in a sequence determined by Petitioner, with the approval of the Commission, as most practicable, taking into consideration the natural resource concerns most salient to his proposal and the availability of information to support affirmative findings under each criterion.

The first alternative has been a matter of practice for several years in respect to industrial and commercial parks. See C & K Brattleboro Associates, #2W0434-EB, 1/2/80; Paul E. Blair Family Trust, #4C0388-EB, 6/16/80. This procedure involves application for approval of preliminary plans under each of the criteria, based upon the applicant's representations concerning impacts on values addressed in the criteria.

6. The Ruling was not appealed to the Vermont Supreme Court.

Permit #5W0772

7. On October **1, 1984,** the District #5 Commission (the District Commission), issued Land Use Permit #5W0772 (the Permit) to Mr. Levinsky, authorizing him "to construct 4,616 feet of sewer line" in the vicinity of the Airport Road in Berlin, Vermont. The Permit states that it "applies to the lands identified in Book 43, Page 360 of the land records of Berlin, Vermont as the subject of a deed to Bruce J. Levinsky . . . ." The Permit contains several conditions, including the following:

1. The project shall be completed as set forth in Findings of Fact and Conclusions of Law 5W0772, in accordance with the plans and exhibits stamped "Approved" and on file with the District Environmental Commission, and in accordance with the conditions of this permit. ...

2. By acceptance of the conditions of this permit without appeal, the permittee confirms and agrees for himself and all assigns and successors in interest that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the permittee and all assigns and successors in interest. ...

6. No further subdivision of any parcels of land approved herein shall be permitted without the written approval of the District Environmental Commission. ...

8. Each sewer line user project shall be reviewed for cumulative impacts on the original project tracts under Criteria 8(A) for wildlife habitat and 9(B) for primary agricultural soils as discussed in our Findings of Fact. In evaluating all future user projects on this tract under the criteria, the permittee and parties have agreed to proceed according to the terms of the joint stipulation presented to this Commission and identified as Exhibit 5 in our Findings of Fact.

8. On October 9, 1984, the District Commission issued findings of fact and conclusions of law in support of the Permit. Finding of Fact #8 states:

> As discussed in the extensive jurisdictional pleadings and in the overall planning documents and plans for the 425 acre tract, a necessary wildlife habitat in the form of a deer wintering yard is present in the vicinity of the proposed sewer line. Without doubt, it may be surmised that eventual and ill-designed development on the tract could adversely impact this habitat over the long term. In order to mitigate against such impacts, the applicant, the State and the Regional Planning Commission have entered into a stipulation which establishes certain factual understandings and

parameters for the evaluation of any future incremental growth on this tract. (Exhibit 5). The Commission will evaluate any future applications in light of this stipulation and also independently under this subcriterion for cumulative impacts on this habitat.

Finding of Fact #9(B) states:

Primary Agricultural Soils:

A substantial portion of the 425 acre tract appears to contain primary agricultural soils under this subcriterion. No negative direct effects will result on such soils from the actual construction of this sewer line. However, as noticed above under subcriterion [sic] 8(A) and 9(A), the sewer line is an infrastructure which could result in impacts without adequate planning considerations. Preservation of the potential of these agricultural soils is key under this subcriterion. The applicant and parties have entered in a stipulation relative to these soils and this stipulation establishes certain factual understandings and parameters for the evaluation of future incremental growth on this tract. (Exhibit 5). The Commission will evaluate any future applications in light of this stipulation and also independently under this subcriterion for cumulative impacts on these primary agricultural soils.

9. Exhibit #5, referenced in the Permit and in the above-quoted findings, is entitled Stipulation of the Parties for Application #5W0772. It is stamped approved by the District Commission. The approval stamp is dated October 1, 1984. The stipulation states:

1. Land Involved

The 425 (+ /-) acre tract of land owned by Bruce J. Levinsky generally within Airport Road, the Coos Trail, and lands of Perrin, Dodge and Cyr is in the Town of Berlin, Vermont and is referred to specifically in documents for land use

permit applications #5W0760 and #5W0772. Within this tract are lands designated by the State of Vermont as primary agricultural soils and deer wintering areas. These lands are identified on Exhibits 1 and 2 and are incorporated in this Stipulation by reference.

2. Land Preserved

* * *

c. Exhibit #1 also identifies approximately 199 acres of the tract as deer wintering range, which qualifies as necessary wildlife habitat under the definitions of Act 250.

d. The parties agree that approximately 25 acres of deer habitat which is colored in blue and identified on Exhibit #2 in the southerly portion of the tract has less value for deer as wintering habitat than the remaining 174 acres and may, therefore, be developed without significantly destroying or interfering with the necessary wildlife habitat found on the remaining lands.

3. Restrictions Imposed

a. The parties agree that no additional encroachment on the deer winter habitat will occur for at least 15 years. After 15 years, the applicant may reapply to the District Environmental Commission for approval to develop lands within the deer wintering areas if:

(1) Berlin adopts a PUD zoning ordinance which will allow the developer to designate additional lands that could become available for necessary wildlife habitat; and/or

(2) A study of lands lying beyond the entire 425 acre tract demonstrates that deer winter habitat is generally

increasing in the surrounding area in the region, or that a sufficient public benefit exists as determined by the Regional Planning Commission and the State of Vermont to warrant development of this land.

The stipulation carries the following signatures: John M. Kilmurry, Esq., for Mr. Levinsky; Dana J. Cole-Levesque, Esq., for the State of Vermont Agency of Environmental Conservation; and Susan Sinclair for the Central Vermont Regional Planning Commission.

10. The Permit was not appealed to the Board.

Application #5W0772-4

11. On May 19, 1987, Mr. Levinsky filed Application #5W0772-4, requesting approval for Phase I of the commercial development of the tract. In a July 6, 1989 Status Conference Report issued by the District Commission Chair, the Chair made a preliminary ruling pursuant to Rule 16(B). The preliminary ruling included the following:

1 - Richard Hutchins has entered into a joint venture with Bruce Levinsky for the development on, and subdivision of, a portion of the tract. The Hutchins' proposal has been conceptually defined as a 23 lot commercial subdivision. (See Johnson Company "Master Plan" revised May 22, 1989.)

2 - Mr. Hutchins proposes to submit a "Master Plan" for the 23 lot subdivision and that application will include an "Overall Plan" for the entire tract, which may involve a total of 350 lots. (See Charles T. Shea letter dated May 31, 1989.) With respect to the 23 lot proposal, Mr. Hutchins intends to proceed in a manner consistent with the Environmental Board's "umbrella permit" process. (Environmental Board Rule 21).

* * *

The posture of this application still requires resolution of a long-standing dispute as to whether the Stipulation among the permittee and several parties, as memorialized in Land Use Permit 5W0772, remains binding and the preferred means of framing criteria 8(A) and 9(B) issues. To date, the permittee has not clarified whether a revised Stipulation will be offered. At the July 6, 1989 Conference, the applicant's representatives suggested that off-site mitigation could well be pursued to result in possible mitigation under criterion 9(B). Resolution of criteria S(A) and 9(B) issues for the entire tract remain the paramount natural resources issues to be addressed in a meaningful review of the tract under the Board's mandate. The entire tract must be reviewed under these two criteria before any phased development on, or subdivision of, portions of the tract can be permitted. In this analysis, the proposal to proceed with a review of Mr. Hutchins' 23 lot subdivision is not acceptable.

The Chair finds that the Board's Declaratory Ruling remains controlling with respect to the scope of review of development on, and subdivision of, this tract. While Rule 21 has always been "intended to minimize costs and inconvenience to applicants and shall be applied liberally," nevertheless, the applicant bears the burden of addressing impacts on the tract's finite natural resources and in establishing the capacity of infrastructure - both on and off site - to support development of the magnitude contemplated by the applicant. A "master plan" must be provided for the entire tract and the proposed "overall plan" for the entire tract is inconsistent with the Declaratory Ruling.

12. The Applicants protested the Chair's preliminary ruling to the full District Commission. On December 19, 1989, the District Commission issued a decision on their protest. That decision included the following:

1 - Bruce Levinsky and Richard Hutchins have formed a joint venture for the development of the project tract and have registered under the Tradename "Rockwell Park Associates" with the Vermont Secretary of State. The venture was formed on April 22, 1989 and acknowledged by the Secretary of State on June 5, 1989. (Testimony of Shea)

2 - The proposal advanced by Mr. Hutchins involves the subdivision of a portion of the overall tract into a 25 lot commercial subdivision, not 23 lots as was represented at the July 6, 1989 Conference. (Testimony of Shea)

* * *

The Commission finds it is reasonable to accept Mr. Hutchins' proposal that the entire tract be reviewed from a master plan perspective for impacts on all natural resources present on the tract. The Commission believes that the natural resources to be included under such a review are those specified under the following criteria: 8 (the scenic or natural beauty of the area and its aesthetics; the rare and irreplaceable natural areas in the form of the tract's wetlands); 8(A) (necessary wildlife habitat); 9(B) (primary agricultural soils); and 9(C) (forest and secondary agricultural soils). The Commission notes the stipulation entered into in 1984 by permittee Levinsky, Agency of Natural Resources and Central Vermont Regional Planning Commission with regard to some of the natural resources and also notes the interests of the permittee and the Agency of Natural Resources in modifying and otherwise altering the terms of the stipulation. The District Commission prefers to hear evidence under all subsections of the affected natural resources criteria in order to properly evaluate the proffered master plan submittal. Following the receipt of such evidence, the

Commission will be willing to consider any proposed stipulation under the tests of these criteria and within parameters established by Environmental Board decisions. The Commission would then issue partial Findings of Fact under these criteria in a manner consistent with the provisions of Rule 21(A).

In order to ensure an orderly review of the proposal as advanced by Messrs Levinsky and Hutchins, the Commission will require the withdrawal of application 5W0772-4 and the filing of a new amendment application, with related plans and supporting documentation, which accurately reflect the master plan submission discussed above. The Commission will also require that Messrs Levinsky and Hutchins be explicit co-applicants.

RULINGS

1 - Application 5W0772-4 will be withdrawn prior to the submittal of an amendment application which will initiate review by the District Commission of the master plan and the 2.5 lot commercial development and subdivision as discussed above in the Commission's decision.

2 - Messrs. Levinsky and Hutchins will be co-applicants in the new amendment application proceeding.

13. The District Commission's decision of December 19, 1989 was not appealed to the Environmental Board.

Application #5W0772-5

14. On July 26, 1990, Rockwell Park Associates, a joint venture between Richard Hutchins and Mr. Levinsky, filed application #5W0772-5 (the Application). The Application states that the landowner is "Rockwell Park Associates, record title in the name of Bruce Levinsky." The Application describes the project thus:

> Construction of a 25 lot subdivision industrial park on 67 acres of the tract. These lots will have access to Berlin State Highway at two points as shown on the attached site plan. Seven tenths of a mile of roadway will be constructed within the industrial park. A so called "Umbrella Permit" is being requested for this project, Phase One of the tract, which is referred to as Rockwell Park.

(Emphasis added.) The Application states that the "total acres owned or controlled by applicant and landowner at project site" is "470" and that "67.1" acres are committed to the project. The Application is signed by Mr. Hutchins for Rockwell Park Associates and for Mr. Levinsky.

15. The Applicants filed a Project Summary and Schedule B with the Application. The Project Summary states:

> Rockwell Park involves the subdivision of a portion of an overall 470 acre tract of land (hereinafter the "Tract"), into a 25 lot commercial and light industrial subdivision and its related infrastructure on 67 acres of the Tract (hereinafter "Phase One"). The Tract is bounded on the north by the Coos Trail, on the east by the Barre Town line, and on the south and west by Airport Road and the properties of Capital City Press, Fecteau Construction, and Everett H. Prescott (Exhibit 1). The purpose of this Application for Amendment of Land Use Permit 5W0772 is to obtain approval of the Phase One development and review of the Tract from a master plan perspective for impacts on all natural resources Dresent on the Tract under Criteria 8. 9, and 10 of Act 250. Rockwell Park Associates (Applicant) is seeking: a so-called Umbrella Permit for this sub-division. Simultaneously with the submittal of this application, Application 5 W0772-4 is withdrawn.
>
> Bruce Levinsky and Richard Hutchins have formed a joint venture for the development of the Tract and have registered under the Tradename "Rockwell Park Associates" with the Vermont Secretary of State (Exhibit 2). Mr. Levinsky has given full authority to Mr. Hutchins to take all necessary steps to obtain

> regulatory approvals for the development of the entire tract, and Mr. Hutchins is authorized to make representations under all ten criteria of Act 250 toward the advancement of the land use permit application process for the development and subdivision of Phase One of the Levinsky tract. All such representations, and any subsequent permit conditions, by Mr. Hutchins will be binding on Mr. Levinsky. Ownership of the Tract, including Phase One remains in the name of Bruce Levinsky.

(Emphasis added.) With respect to historic sites, subsection (c) of the Schedule B section concerning Criterion 8 states:

> The Division of Historic Preservation has reviewed the Tract and has not identified any historic or archaeologically significant areas within the Phase One development area (Exhibit 33). The Coos Trail which bounds the parcel on the north has historic significance and the Division has indicated that there is potential for historic sites along this old roadway. The bulk of the land adjacent to Coos Trail is within the area which will not be developed because it is deeryard. ...
>
> The wooded eastern portion of the Tract does support a winter deeryard which has been identified as critical wildlife habitat. The deeryard area is delineated on Exhibit 1. Wetlands on the site have been identified and wetland boundaries delineated for Phase One as previously discussed under Criterion 1G. The project site is not listed as critical habitat for endangered species in the Vermont Natural Heritage Program database (Exhibit 34). ...
>
> The 175 acre deeryard area is protected by a stipulation between Bruce Levinsky and the Agency of Natural Resources (Exhibit 35). The Phase One development has been reviewed by the Department of Fish and Wildlife and it does not encroach on the deeryard. Deeryard boundaries are shown on Exhibit 1.

No stipulation concerning the deer-yard was in fact submitted with the Application.

16. In Schedule B, the Applicants refer to the future occupants of the proposed lots as "Phase One lot owners."

17. With the Application, the Applicants submitted a fifteen sheet site plan. The Johnson Company, Inc. prepared the plan. The title of the plan is "Development Plans, Rockwell Park - Phase 1."

18. Sheet 1 of the plan is labelled Exhibit 1. It is entitled "Overall Plan, Rockwell Park, Phase 1, Berlin, Vermont." It is dated February 2, 1990, last revised June 14, 1990.

19. Exhibit 1 depicts Mr. Levinsky's tract as being divided into three large areas. The two smaller areas are further divided into lots for Phase 1. The northern smaller area consists of 14 lots. The southern smaller area consists of 11 lots. All of these 25 lots are to be "light industrial." The remainder of the tract forms one large lot.

20. Exhibit 1 depicts roads to be constructed leading from Dodge Road into the smaller areas being used for Phase 1. The exhibit also shows potential additional roads leading from the ending points of the Phase 1 roads into the remainder of the tract. This potential additional road construction is shown as going all the way to the other side of the tract.

21. With the Application, the Applicants submitted Exhibit #39 to the District Commission for the purpose of showing utility easements. Exhibit 39 was prepared by the Johnson Company and is dated January 2, 1989, last revised May 22, 1989. It is entitled "Master Plan, Rockwell Park, Berlin, Vermont."

22. Like Exhibit 1, Exhibit 39 depicts Mr. Levinsky's tract as being divided into three large areas. The two smaller areas are further divided into lots. On Exhibit 39, the smaller areas are located in approximately the same place as on Exhibit 1. The northern smaller area on Exhibit 39 consists of 12 lots. The southern smaller area consists of 11 lots. All 23 of these lots are to be "light industrial" and are to be part of "Phase 1." The remainder of the tract forms one large lot. Notations on the remainder indicate that 10 additional light industrial and 305 residential lots were to be created in the future.

23. Exhibit 39 shows construction of roads that would run throughout the tract, including the larger portion slated for future development. The location and layout of the roads on the tract is substantially the same on Exhibit 39 as on Exhibit 1, except that two stretches of road that appear on Exhibit 39 do not appear on Exhibit 1. Most of the road construction shown on Exhibit 39 appears on Exhibit 1.

24. Development in accordance with Exhibit 1 would be consistent with a long-term plan to develop in accordance with Exhibit 39. The only difference would be that the northern area of Phase' 1 would have 14 lots instead of 12.

25. As proposed in the Application, the 25 Phase I lots will have a total acreage of 67. Mr. Levinsky's attorney, Martin K. Miller, Esq., represents that Mr. Levinsky presently has no plans for developing the remaining approximately 413 acres of the tract because of an economic downturn. The remaining acreage is the same as the larger portion slated for future development on Exhibit 39 and discussed in the findings immediately above.

26. On December 24, 1990, the District #Commission issued Land Use Permit Amendment #5W0772-5 (Amendment 5), authorizing "ongoing master plan development and subdivision" of an approximately 470-acre tract owned by Mr. Levinsky; the conveyance of 67 acres of the tract from Mr. Levinsky to Rockwell Park Associates; and the conveyance from Mr. Levinsky to the Town of Berlin of a private sewer line approved in the Permit. Amendment 5 also authorizes the construction of infrastructure and the sale of lots within Phase I of the master plan, consisting of a 25-lot office park in two blocks involving the aforementioned 67-acre portion of the tract. The tract is located on Airport Road in Berlin, Vermont.

27. Amendment 5 contains Conditions 6, 7, and 8. In summary, Condition 6 requires that "future phases of residential development and subdivision areas" be designed to keep a buffer zone around a necessary wildlife habitat area, that there be controls on dogs, and that subdivision of, or development within, the habitat is prohibited. In summary, Condition 7 requires that the Applicants prepare a forest management plan for approval prior "to any harvests in the necessary wildlife habitat" and establish a process for restricting recreational use within the habitat. In summary, Condition 8 requires the Applicants to conduct a study of historic

> and archeological sites on the tract, to be submitted with amendment applications for later phases of master plan development and subdivision; prohibits impacts on "significant sites" until mitigation measures have been fully implemented; states that significant sites will be designated as "not-to-be disturbed" open space if those sites are identified for "avoidance and in-place preservation"; and requires the Applicants to develop proposed mitigation measures.

V. CONCLUSIONS OF LAW

At issue is the scope of review of this master plan application. The Applicants contend that this scope is limited because the Board and District Commission lack jurisdiction to issue permit conditions concerning the approximately 413-acre lot not involved with Phase 1. The Board will examine this contention by reviewing three areas: (a) the provisions of Rule 21(A) regarding master plan review, (b) prior decisions regarding master plan review issued with respect to the Permit and subsequent amendment applications, and (c) jurisdictional objections made by the Applicants under the cases In re Agency of Administration, 141 Vt. 68 (1982) and In re Vermont Gas Systems, 150 Vt. 34 (1988).

A. Rule 21(A): Master Plans

Application proceedings typically consist of reviewing specific projects for compliance with all ten Act 250 criteria. 10 V.S.A. §§ 6083(a), 6086(a). 10 V.S.A. § 6025(b) authorizes the Board to promulgate rules under which applications for permits may be:

> [C]lassified in terms of complexity and significance of impact under the standards of section 6086(a) of this chapter. In accordance with that classification the rules may:
>
> **(1)** provide for simplified or less stringent procedures than are otherwise required under sections 6083, 6084 and 6085 of this chapter ....

Pursuant to this authority, the Board has adopted Rule **21(A)** concerning issuance of findings of fact regarding fewer than all ten criteria and containing a simplified "master plan" process for industrial parks and other large projects. In relevant part, Rule 21(A) provides:

> A permit shall not be granted under this section until the applicant has fully complied with all criteria and all affirmative findings have been made by the district commission or board as required by the Act. If a master plan has been presented and reviewed for an industrial park or other large project, the district commission or the board may issue an umbrella permit to the extent that the district commission or the board has made affirmative findings and has imposed conditions as required by 10 V.S.A. Chapter 151.

permit, Rule

accomplishes

it does not serves another statutory goal, and the purpose of Act 250, which is the protection of the resources enumerated in the Act 250 criteria. 10 V.S.A. § 6086(a); 1969 Vt. Laws No. 250

adequate

§§ 6086(a)(8)(A) (necessary wi
provide examples of why such broad review of mast
413-acre lot not

involved with Phase 1, failure to plan for protection of those resources now will substantially increase the likelihood that applications for subsequent phases will

not be simple or easy to process because no steps will have been taken at the initial stage to eliminate or adequately mitigate impacts on the resources. Further, based on our knowledge gained through past experience under Criteria 8 and 8(A), review of impacts on those resources on a phase-by-phase basis would increase complexity rather than promote simplicity and significantly increase the possibility that those resources will be degraded. This is because identifying and mitigating impacts on historic sites and necessary wildlife habitat can be difficult when only pieces of the sites and habitats are reviewed and is usually much easier and more effective when reviewing an entire historic site or set of such sites or an entire necessary wildlife habitat.

10 V.S.A. § 6086(c) authorizes issuance of permit conditions appropriate to the Act 250 criteria. Rule 21(A) states that permit conditions may be issued in a permit approving a master plan. If, as sought by the Applicants, an umbrella permit is to be issued approving a master plan, then the Board and district commissions may issue permit conditions for future phases designed to promote simplification of review and protection of the public health and environment. Accordingly, it is appropriate to issue permit conditions regarding land not involved in Phase 1.

The Applicants appear to want to have it both ways. They have applied for master plan review and a simplified amendment process for this tract of land yet do not want to have any conditions imposed on that portion of the tract available for future phases. The Board believes that the Applicants must bear the burdens if they want to receive the benefits of the future simplification allowed by master plan review.

B. Past Decisions and Collateral Estoppel

The issue of scope of review is not new to this project. As shown in the Findings of Fact, above, substantial litigation has occurred regarding the very issue now before the Board and decisions concerning it have already been made.

In Declaratory Ruling #157 issued in 1984 (the Ruling), the Board concluded that the original application for this project, #5W0772, was incomplete because Mr. Levinsky had plans to develop and subdivide his entire tract but was applying only for a sewer line. The Board concluded that review of the sewer line without review of the development and subdivision to be served by the line would result in fragmented review of the proposed project that would make it difficult to make proper determinations under the criteria and would be contrary to the purposes of Act 250. The Board ordered Mr. Levinsky to submit a plan

identifying, among other things, the components of the project and the uses to which the entire tract will be put. The Board stated that, upon submission of such a plan, Mr. Levinsky would have a choice under Rule 21. He could either seek master plan review under all ten Act 250 criteria or partial review of the project under selected criteria in a sequence determined by him with the District Commission's approval.

Mr. Levinsky did not appeal the Ruling to the Supreme Court within 30 days as he could have done under 10 V.S.A. § 6089(a).

In 1984, subsequent to issuance of the Ruling, the District Commission issued Land Use Permit #5W0772 (the Permit). The Permit, the findings of fact supporting it, and an incorporated stipulation signed by Mr. Levinsky all indicate that Mr. Levinsky's entire tract is subject to the Permit. Moreover, in the incorporated stipulation, Mr. Levinsky agreed to restrictions concerning deer wintering habitat located on the very portion of the parcel the Applicants now argue cannot have restrictions imposed on it.

In 1987, the Applicants filed amendment application #5W0772-4 with the District #5 Commission, seeking approval for Phase 1 of commercial development of Mr. Levinsky's tract. In 1989, the Chair of that Commission issued a preliminary ruling regarding the application that was affirmed by the whole Commission following protest by the Applicants. The Chair and later the District Commission found that the Applicants were proposing to submit a master plan application and concluded that, as part of such an application, Mr. Levinsky's entire tract would have to be reviewed. In this decision, the District Commission stated that it found reasonable the Annlicants' proposal that the entire tract be reviewed from a master plan perspective for impacts on all natural resources present on the tract. The District Commission ruled that application #5W0772-4 must be withdrawn prior to submittal of another amendment application for master plan review "as discussed above in the Commission's decision."

The Applicants did not appeal the District Commission's decision to the Board as they could have done within 30 days under 10 V.S.A. § 6089(a). Instead, they filed the current application for master plan approval, #5W0772-5. In their application, they state that they seek review of the entire tract under certain criteria from a master plan perspective and issuance of an umbrella permit.

Accordingly, the Applicants have accepted the choice given to them by the Board in the Ruling and the option given to them by the District Commission in

its 1989 decision. They have chosen to submit a master plan application for the entire tract in accordance with those decisions.

Those decisions clearly spell out that the limited review now advocated by the Applicants is not available as part of a master plan application for this project. The Ruling states that such fragmented review is contrary to the purposes of Act 250 and that all proposed uses of Mr. Levinsky's entire tract must be identified and, if a master plan application is chosen, review under all ten criteria must occur. The District Commission's 1989 decision states that the entire tract will be reviewed for protection of the natural resources located there. In addition, the Permit the Applicants seek here to amend clearly applies to the entire tract. It is a necessary corollary of issuing an umbrella permit approving a master plan for the entire tract that permit conditions pertaining to the entire tract might be issued. 10 V.S.A. § 6086(c); Rule 21(A).

The past decisions bind the Applicants under the doctrine of collateral estoppel. Under that doctrine, a party may be barred from relitigating those issues "necessarily and essentially determined" in a prior action. Berisha v. Hardy, 144 Vt. 136, 138 (1984). The issue raised in this proceeding, whether there is authority to impose permit conditions on portions of the tract not involved in Phase 1, was necessarily decided as part of the past decisions barring fragmented review of the tract, determining that the entire tract is subject to Act 250, and requiring review of the entire tract under the Act 250 criteria as part of a master plan submittal.

The doctrine of collateral estoppel applies to zoning proceedings. In re Application of Carrier, 155 Vt. 152, 158 (1990). The Board has previously held that this doctrine and the related doctrine of res judicata apply in Act 250 proceedings. Re: John A. Russell Corp., #1R0257-2A-EB, Memorandum of Decision at 4-6 (Oct. 22, 1992); Re: Rome Family Corn., #1R0410-3-EB, Memorandum of Decision at 3-5 (May 2, 1989). Cf. Town of Springfield, Vermont v. Environmental Board, 521 F. Supp. 243 (1981) (res judicata applies to administrative proceedings).

The Supreme Court set forth the elements of collateral estoppel in the case of Trenanier v. Getting. Organized, Inc., 155 Vt. 259, 265 (1990). The Board has examined those elements and concluded that they apply to the present case. First, the doctrine must be asserted against one who was a party or in privity with a party in the earlier action; the Applicants are such parties. Second, the issue must have been reached by a final judgment on the merits of the issue; the scope of review for this project was finally resolved by the Ruling, Permit #5W0772 and

supporting findings, and the District Commission's last decision on application #5W0772-4. Third, the issue must be the same as the one raised in the earlier action; we have stated above that the issue was necessarily decided by the prior decisions in this matter. Fourth, there was a full and fair opportunity to litigate the issue. In fact, there were several such opportunities (the Ruling, application #5W0772, and application #5W0772-4).

The Board is mindful that application of collateral estoppel must be fair and must not be done inflexibly. Trepanier, 155 Vt. at 265; In re Carrier, 155 Vt. at 157. The burden to demonstrate that collateral estoppel is unfair is on the Applicants. Trepanier at 266.

The Applicants offer two arguments against the application of collateral estoppel. First, they contend that the Board and District Commission do not have jurisdiction to apply conditions to the approximately 413-acre lot and that subject matter jurisdiction may be raised at any time. However, challenges to subject matter jurisdiction may be barred by res iudicata and collateral estoppel. Ins. Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 701, 702, n.9 (1982).

Second, the Applicants contend that circumstances have changed because Mr. Levinsky no longer intends to develop the approximately 413 acres not involved in Phase 1. However, it is clear that Mr. Levinsky's proposals to develop and subdivide his entire Berlin tract go back to at least 1981. (See Finding 2, above, setting out the text of Finding 7 of the Ruling.) As late as 1989, the Applicants continued to demonstrate an intent to develop the entire tract. (See Findings 21 and 22, above.) Moreover, the Applicants' current plan for the 67-acre portion is consistent with their previous plans for the entire tract. (See Finding 24, above); Finally, the proffered reason for the change of plans, an economic downturn, is a condition that will change at some point. Thus, the Board cannot simply accept a bare assertion by the Applicants that Mr. Levinsky's plans have changed. Rather, the Board believes that this assertion must be subject to proof and cross-examination at hearing accordance with 3 V.S.A. § 810.

Accordingly, the Board will offer the Applicants the opportunity to present such proof. Unless the Applicants are able to persuade the Board that Mr. Levinsky's plans have changed sufficiently to demonstrate that applying collateral estoppel is unfair, the Board will conclude that the Applicants' objection to the imposition of permit conditions with respect to the 413-acre lot is barred.

C. Aeencv of Administration and Vermont Gas

Even if the Board were to conclude that the Applicants were not barred from objecting to the jurisdiction of the Board and district commissions in this matter, the Board would also conclude that the Applicants' objections are not meritorious.

In this regard, the Board focuses primarily on the Applicants' objections based on two Vermont Supreme Court cases involving Act 250. The thrust of the Applicants' objections is best illustrated by the following quote from one of those decisions (citing the other):

> Under the Act, jurisdiction does not attach until construction is about to commence. See 10 V.S.A. §§ 6001(3), 6081(a); In re Agency of Administration, 141 Vt. 68, 78, 444 A.2d 1349, 1354 (1982). . . .
>
> This Court has previously observed that jurisdiction under Act 250 is triggered "only when the activity was about to impinge on the land" and attaches only to "activity which has achieved such finality of design that construction can be said to be ready to commence." Id. at 78-79, 444 A.2d at 1354.

Vermont Gas, 150 Vt. at 38-39. The Applicants argue that no construction is about to impinge on the 413-acre lot and therefore the Board and District Commission lack jurisdiction to issue conditions regarding that lot.

The Board does not believe that these cases bar issuance of master plan permit conditions concerning the 413-acre lot for two separate reasons: (1) the tract is a subdivision and (2) the tract is a development.

1. Subdivision

The Vermont Gas case is based on Aeencv of Administration. Both cases construe the term "development" as it is used in Act 250. 150 Vt. at 38; 141 Vt. at 75-79. Both cases hold that jurisdiction does not attach until plans are sufficiently concrete that construction is about ready to commence. 150 Vt. at 39; 141 Vt. at 79. The statutory basis for these holdings is 10 V.S.A. § 6081(a), which prohibits commencement of construction on a development without a permit. 150 Vt. at 38; 141 Vt. at 75.

The full text of 10 V.S.A. § 6081(a) is as follows:

> No person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or commence development without a permit.

As this quote demonstrates, 10 V.S.A. § 6081(a) prohibits unpermitted commencement of construction on both developments and subdivisions. Act 250 also prohibits unpermitted activities with respect to subdivisions that it does not prohibit with respect to developments: The sale or offer for sale of interests in subdivisions.

These subdivision activities can, and typically do, occur at a point before construction is about ready to commence. Specifically, people often sell subdivision lots to others who then build structures on them. Thus, if the General Assembly had intended that Act 250 jurisdiction over subdivisions attach only just prior to commencement of construction, it would not have required Act 250 review of subdivisions prior to the potentially earlier events of sale or offer for sale. Accordingly, the Agency of Administration and Vermont Gas cases are not applicable in the context of a subdivision.

Act 250 necessarily contemplates that subdivisions will be reviewed for compliance with the criteria, and potentially become subject to permit conditions, regardless of whether construction is ready to commence. 10 V.S.A. § 6086(a) requires that, "before granting a permit, the board or district commission shall find that the subdivision or development" meets the Act 2.50 criteria. 10 V.S.A. § 6086(c) grants authority to include conditions in all permits, not just permits issued for developments. If subdivisions can be created and sold without complete construction plans, if an Act 250 permit is required prior to such sale, and if such a permit can contain conditions, then it necessarily follows that permit conditions may be appropriate for a subdivision even when construction is not planned.

The 413-acre lot is part of an Act 250 subdivision. 10 V.S.A. § 6001(19) provides that "subdivision":

> [M]eans a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot, or within the jurisdictional area of the same district commission, within any continuous period of five years.

In their brief, the Applicants refer to the project as consisting of 25 lots. In fact, as the term "lot" is defined under 10 V.S.A. § 6001(11), the project consists of 26 lots: the 25 lots for Phase 1 and the 413-acre lot. This number is greater than nine. The lots are located on a tract that is being divided for purposes of resale.[1] The tract is owned by a person (Mr. Levinsky) within the meaning of 10 V.S.A. § 6001(14).

10 V.S.A. § 6086(a) requires the Board and District #5 Commission to review "the" subdivision under the criteria. The subdivision is defined to be, in relevant part, the tract divided into 10 or more lots. Accordingly, review of all lots on the tract, including the 413-acre lot, is required, and conditions may be imposed under 10 V.S.A. § 6086(c). As we have previously stated:

> If [the Applicant's] argument were correct, the word "subdivision" in Act 250 would be entirely superfluous. Contrary to [the Applicant's] position, the definition of "subdivision" refers only to dividing land but makes no reference to construction. Thus the Board is required, under § 6086(a), to review a proposal to subdivide land for its effect upon the resources protected by the ten criteria and in this decision judges [the) application accordingly.

Re: New England Associates, Findings of Fact, Conclusions of Law and Order at 19 (Jan. 7, 1992).

2. Development

As stated earlier, 10 V.S.A. § 6081(a), the statutory basis for the Agency of Administration and Vermont Gas holdings, prohibits commencement of construction on a development without a permit. In pertinent part, 10 V.S.A. § 6001(3) provides that development means:

> [T]he construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes.

---

[1] *The Applicants plan to sell Phase One lots to the future occupants of the lots. See Finding of Fact 16, above.*

Pursuant to 10 V.S.A. § 6025(a), the Board has promulgated Rule 2(F) defining "involved land." This rule was ratified by the General Assembly and therefore has the effect of a legislative enactment. 1985 Vt. Laws No. 52, § 5; In re R. Brownson Spencer III, et al., 152 Vt. 330, 336 (1989). The rule defines three types of involved land, including:

> The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs.

Rule 2(F)(1).

In addition, the Supreme Court has upheld a determination by the Board that "tract" includes two contiguous, separately purchased parcels owned by the same person. In re Gerald Costello Garage, No. 91-379, slip op. at 2 (Vt., June 26, 1992).

Under these authorities, the entire 470-acre tract is involved land for purposes of determining jurisdiction. Because this tract is greater than ten acres, and because the Applicants propose construction of improvements for commercial purposes on the tract, the definition of development is met and Act 2.50 jurisdiction exists. It would be anomalous to then say that a portion of the tract is not subject to jurisdiction when the size of the entire tract confers jurisdiction.

Such a result is not compelled by the Agency of Administration and Vermont Gas cases. Rather, those cases only require that, for a project to be a development subject to Act 250, there must be plans for construction that are sufficiently complete such that construction is about ready to commence. The Applicants' Phase 1 plans alone meet this requirement and therefore jurisdiction is conferred over all involved land, namely, the entire 470-acre tract.[2]

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[2] *The Board dotes that the Applicants contend that the nature of the District Commission5 conditions is such that they vitiate the exemptions provided in Act 2.50 for such activities as logging and farming. See 10 V.S.A. § 6001(3). The Board does not believe that this contention is ripe because the Board may decide after de novo review not to impose the same conditions (or any conditions at all).*

VI. ORDER

1. Under 10 V.S.A. §§ 6025(b) and 6086(c), and Rule 21(A) it is appropriate, as part of a master plan application, to impose permit conditions on the 413-acre lot not involved in Phase I.

2. Unless the Applicants are able to persuade the Board through evidence and argument that Mr. Levinsky's plans have changed sufficiently to demonstrate that applying collateral estoppel is unfair, the Board will conclude that the Applicants' objection to the imposition of permit conditions on the 413-acre lot is barred.

3. The Applicants' objection that the Board and District #5 Commission lack jurisdiction to issue conditions regarding the 413-acre lot is not meritorious because the lot is part of a tract that is a subdivision.

4. The Applicants' objection that the Board and District #5 Commission lack jurisdiction to issue conditions regarding the 413-acre lot is not meritorious because the lot is part of a tract that is a development.

5. The Board will hold a de novo hearing concerning: (a) the existence of historic sites and necessary wildlife habitat on the 413-acre lot as those terms are defined at 10 V.S.A. § 6001, (b) what permit conditions, if any, should be issued concerning that lot under 10 V.S.A. §§ 6086(a)(8) and (8)(A), and (c) whether Mr. Levinsky's plans have changed sufficiently to demonstrate that application of collateral estoppel is unfair.

6. On or before January 18, 1994, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present. No later than January 18, parties shall identify whether more than one hearing day will be needed.

7. On or before February 11, 1994, parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.

8. On or before February 23, 1994, parties shall file in writing all objections to the prefiled testimony and exhibits previously identified, or-such objections shall be deemed waived. The term "objections" means objections based on the Vermont Rules of Evidence.

9. On or before March 3, 1994, parties shall file in writing any responses to objections.

10. The Environmental Board will convene a hearing in this matter on March 9, 1994. A subsequent notice will contain the time and location.

11. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents. that constitute substantive testimony must be filed with the prefiled estimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.

12. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

13. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8½ by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than 8% by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

14. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: A for the Applicants, and S for the State of Vermont Agency of Natural Resources. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Applicants will number their exhibits Al, A2, A3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. A2A, A2B, etc. However, each page of a multiple page exhibit need not be labeled. The labels on the exhibits must contain the words ENVIRONMENTAL BOARD, #5W0772-5-EB, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information sought on the stickers prior to the hearing.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

TOWN OF BERLIN
LIST OF EXHIBITS
RE: ROCKWELL PARK, #5W0772-5-EB

Number	Description	Status
T1	Prefiled testimony of John Smith	
T2A-D	Plan dated sheets Al through A4	

The Board (Panel) will use the status column to mark whether the exhibit has been admitted.

15. The hearings will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by January 18, 1994. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

Dated at Montpelier, Vermont this 9th day of August, 1993.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
William Martinez
Steve E. Wright

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