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

RE: Lawrence W. and Barbara Young
Land Use Permit #6F0518-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns the application of Lawrence W. and Barbara Young ("Permittee") for an "as built" permit authorizing the conversion of a single-family residence to a duplex, construction of a contractor shop with a small office, installation of connections to municipal water and sewer services, construction of a paved driveway and parking area, and operation of an excavating and contracting business from the site ("Project"). The Project is located on 2.75 acres of land in Fairfax, Vermont.

In this decision, the Board incorporates a settlement proposal filed by the parties to modify Land Use Permit #6F0518 (the "Permit") by deleting four of the conditions in the Permit, modifying two conditions, and terminating the Project as of May 1, 2001.

I. Procedural Summary

On October 28, 1999, Permittees filed a land use permit application for the Project pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On February 25, 2000, the District #6 Environmental Commission ("Commission") issued the Permit, together with supporting Findings of Fact, Conclusions of Law, and Order ("Decision").

On March 24, 2000, Colleen Steen ("Steen") filed an appeal with the Vermont Environmental Board ("Board") contending that the Commission erred by finding that the Project complies with 10 V.S.A. § 6086(a)(l), (5), (8) and (10) ("Criteria 1, 5, 8 and 10") and denying her party status under Criterion 10.

On April 3, 2000, Permittees filed a cross-appeal seeking to modify Conditions 7 and 9 of the Permit.

Following a Prehearing Conference on April 17, 2000, Board Chair Marcy Harding issued a Prehearing Conference Report and Order on April 24, 2000.

On June 6, 2000, the Board granted in part and denied in part a motion for a stay of certain conditions filed by the Permittees; in the same Memorandum of Decision, the Board granted Steen's Petition for party status.

During the summer months of 2000, the parties worked together to resolve this matter. The Chair issued orders on June 14, June 27 and July 21, 2000 continuing this case to allow the parties to pursue settlement negotiations.

On August 22, 2000, in an attempt to settle this appeal, the parties filed Proposed Stipulated Findings of Fact, Conclusions of Law, and Order, an Executed Land Use Agreement, a Declaration of Covenants, and a Proposed Land Use Permit.

The Board deliberated on this case on September 20, 2000. On September 24, 2000, the Board issued a Memorandum of Decision which invited the parties to file evidence concerning the proposed increase in truck trips relative to the requirements of Criterion 5, 10 V.S.A. §6086(a)(5), and which provided one week after the filing of such evidence for responses.

On October 23, 2000, the Permittees filed evidence concerning traffic information to address a proposed increase in the number of daily truck trips at the Project. This evidence had been faxed to the Board on October 17, 2000 at the Board's request.

The Board deliberated on this case on October 18, 2000.

No responses to the traffic evidence were filed by October 30, 2000.

III. Discussion

A. Settlement agreements and the Board's obligations

Act 250 and the Board favor the non-adversarial resolution of issues by parties, see 10 V.S.A. §6085(e) and EBR 16(D). Public policy also "strongly favors settlement of disputed claims without litigation." Dutch *Hill Inn., Inc. v. Patten, 131* Vt. 187, 192 (1973). However, the Board has the obligation to review any settlement reached between the parties. *Cersosimo Lumber Co.,* Land Use Permit #2W0957-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Nov. 29, 1995). This review must determine whether an affirmative finding can be made under all criteria on appeal, and the Board need not accept a settlement agreement if the necessary affirmative findings cannot be made, *Faucett Builders, Inc.,* Land Use Permit #4C0763-2-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Aug. 6, 1996), or if the agreement contravenes any of the Act 250 criteria. *Pico Peak Ski Resort, Inc.,* Land Use Permit #1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Nov. 22, 1995). *Accord, Andrew and Peggy Rogstad*, Land Use Permit #2S1011-EB, Findings of Fact, Conclusions of Law, and Order at 4 (December 12, 1996).

B. The parties' proposed agreement

In their settlement documents, the parties stipulate that the Board can issue a Land Use Permit with the following provisions:

1. that the Permit governs except as modified by the Board;

2. that the Permittees shall cease their business operations at the Project site on or before May 1, 2001;

3. that Condition 7 of the Permit shall be modified to extend hours of operation until 5:30 p.m. until December 1, 2000 on two weekdays per week and that employees may remain on the site for up to one-half hour following the ending time of operations;

4. that Condition 9 of the Permit shall be modified to allow up to 22 truck trips (a "trip" being defined as "a single incidence of ingress or egress from the Project site") per day until December 1, 2000, after which date the maximum number of truck trips shall be 10 per day, the level permitted under present Condition 9; and

5. that Conditions 6 (prohibiting and limiting the storing, transporting and processing of earth resources at the site), 12 (paving the driveway), 14 (planting evergreens) and 19 (installing and maintaining landscaping) in the Permit shall be deleted, with the provisos that (a) no processing (e.g. screening or crushing) of earth resource materials may take place at the site and (b) all stockpiles of earth resource materials shall be removed on or before May 1, 2001.

IV. **Findings of Fact**

Generally, a settlement agreement will present the Board with proposals on which the Board can base Findings of Fact, which can then, in turn, form the basis for the Board to make positive Conclusions of Law on the Criteria. See, *Cersosimo Lumber Co., supra; Faucett Builders, Inc., supra; Andrew and Peggy Rogstad, supra.* The parties have not directly presented such proposed findings in this case, but have agreed, for the purposes of their agreement, that the Board may adopt the Findings of Fact and Conclusions of Law which accompany the Commission's Permit. [I] The Board therefore adopts those Findings and Conclusions, except as modified herein, and they lay the groundwork for the Board's analysis of the proposed settlement. **[2]**

In a Memorandum of Decision issued by the Board on September 29, 2000,

the Board allowed the parties to present evidence for Board's consideration in order to allow the Board to make Findings of Fact and reach Conclusions of Law that an increase (albeit temporary) will not cause unreasonable congestion or unsafe conditions on Route 104 under Criterion 5. The Permittees have submitted a report from Cross Consulting Engineers; based upon this information, the Board makes the following additional Findings of Fact:

1. At the Project driveway, site distances of +/- 1000 feet in either direction on Route 104 exceed the Vermont Agency of Transportation's ("VAOT") minimum requirements.

2. VAOT has granted curbcut approval for the Project.

3. The average annual daily traffic on Route 104 at the Project's location is 6018 trips/day and 510 vehicle trips during the peak P.M. hour.

4. It is estimated that 20 trips/day will be generated by employee non-truck traffic, and it is estimated that the residential duplex (which shares the Project's driveway) will generate 18 trips/day.

5. Adding the 10 truck trip&day presently permitted by the Permit to the above figures, the total daily impact on Route 104 is

48 trips/day / 6018 trips/day = .8%

6. Adjusting the above figures for the 22 truck trips/day agreed upon by the parties, the total daily impact on Route 104 will be

60 trips/day / 6018 trips/day = 1%

7. With the additional 12 truck trips/day agreed upon by the parties, the peak hour trips will not change substantially from the original analysis of 4 peak hour trips from the contractor's shop and 5 peak hour trips from the residential duplex.

V. **Conclusions of** Law

Permit *Condition* **6**

The parties agree that Condition 6 (prohibiting and limiting the storing, transporting and processing of earth resources at the site) may be deleted, with the provisos that (a) no processing (e.g. screening or crushing) of earth resource materials may take place at the site and (b) all stockpiles of earth resource materials shall be removed on or before May 1, 2001.

Finding of Fact 14 in the Decision states that "The storage, processing or sale of any earth resource is prohibited on the site, except for the storage and use of sand/salt for the Applicant's winter snowplowing business." Under the parties' proposal, the only change from the Commission's Condition 6 is that sand and other earth resource materials (beyond sand and salt) may remain at the site until May 1, 2001. Since Condition 6 was apparently imposed as a mitigation measure under Criterion 8 for Steen's benefit, and Steen indicates that she will accept the storage piles until May 1, 2001 in return for the assurance that the operations will also close as of that date, the Board accepts the parties' settlement in this regard and modifies Condition 6 accordingly.

Permit Condition 7

The parties propose only a very minor change to Condition 7 of the Permit; in effect, their agreement extends, until December 1, 2000, the Project's hours of operation on two days each week and makes a concomitant extension of the time that employees may therefore remain on the site.

There are some Findings of Fact which relate to the Project's operation hours (Findings 2 – 6) within the Commission's discussion of air pollution, but, as with Condition 6, Condition 7's operating hour limitation appears to have been established as mitigation elements under Criterion 8. Again, as this condition was imposed for Steen's benefit, and she has agreed to the temporary (until December 1, 2000) extension of operating hours in trade for the May 1, 2001 closure date, the Board accepts the parties' settlement in this regard and modifies Condition 7 accordingly.

Permit Condition 9

The parties propose to amend Condition 9 of the Permit to allow up to 22 truck trips per day until December 1, 2000, after which date the maximum number of truck trips reverts to 10 per day, the level permitted under present Condition 9.

The finding on the number of truck trips (Finding of Fact 21) appears within the Commission's discussion under Criterion 5. While the Commission notes, within its discussion of *Criterion* 8, that Route 104 "serves as the major thoroughfare in southern Franklin County and therefore handles a large volume of traffic, including truck traffic," (Finding of Fact 26), there are no Commission findings as to congestion or safety on Route 104 relating to limiting the number of Project truck trips; nor are there any findings that exceeding the 10 trips presently allowed by the Permit will create or not create concerns under that Criterion.

However, based upon the above additional Findings of Fact relative to Criterion 5, the Board concludes that the increase to 22 truck trips/day will not cause unreasonable congestion or unsafe conditions with respect to the use of Route 104.

Permit Condifions 12, 14 and 19

The parties propose that Conditions 12 (paving the driveway), 14 (planting evergreens) and 19 (installing and maintaining landscaping) be deleted from the Permit. As noted above, findings concerning Condition 12 appear in the Commission's discussion of Criteria 1, 5 and 8, but it is not readily apparent from the findings that dust is a highway congestion or safety concern. Rather, it appears that the Commission considered the dust to be more of an aesthetic concern, and it is one which Steen appears to be willing to waive in return for the May 1, *2001* shutdown.

The only Commission findings relating to Condition 14 appear in the Commission's discussion of Criterion 8 (Finding of Fact 29); a landscaping plan is described as being inadequate within the Commission's discussion of Criterion 8, see Decision at 8, thus leading the Commission to impose the evergreen planting requirements found in Condition 14. Other than that, there is no discussion of the landscaping referred to in Condition 19. One may surmise that the landscaping requirements apply to the landscaping plan as it appears on Exhibit 9 to the Permit and also to the maintenance of the evergreens required by Condition 14.

Again, as the trees and landscaping findings and conclusions appear only within the Commission's discussion of Criterion 8, and while Conditions 14 and 19 arise out of this Criterion for the protection of both Steen and the general public who use Route 104, see Findings of Fact 25 and 26 and the Commission's requirements noted on page 8 of the Decision, Steen is the only opposition party in this appeal before the Board and may therefore be considered to be the one most affected by the absence of the evergreens or other landscaping.

As noted above, the parties have agreed the Board may adopt the Findings of Fact and Conclusions of Law which appear in the Decision. In its conclusions as to Criterion 8, the Commission determined that (a) the Project would have an adverse effect; (b) that there "is no clear written community standard that seeks to protect the scenic or aesthetic qualities of this area;" (c) that the Project "is not offensive or particularly shocking to the average person;" and (d) that there are mitigating steps that could be taken to reduce the Project's impact on the adjoining residential neighborhood. Decision at 7 – 8.

For the limited purpose of furthering the parties' settlement, as noted above, the Board adopts the Commission's findings and conclusions. In accordance with the parties' proposed resolution, however, the Board concludes that some of the mitigating steps required by the Commission may be superseded by the overriding mitigation agreed upon by the parties -- that the Permittees shall cease their business operations at the Project site on or before May 1, 2001. The Board will therefore modify Conditions 12, 14 and 19 accordingly.

VI. **Order**

1. Land Use Permit #6F0518-EB is issued.

2. Jurisdiction is returned to the District 6 Environmental Commission.

Dated at Montpelier, Vermont this 1st day of November 2000.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
William Martinez
Rebecca Nawrath
Alice Olenick
Robert Opel

ENDNOTES

[1] The parties' actual proposed Findings of Fact, Conclusions of Law, and Order are sparse, merely noting that the Permittees own the Project site (with a brief description of the Project); that the parties have reached an agreement, that the purpose of the agreement is for the purpose of allowing the Board to issue a "Temporary Land Use Permit;" that the Board may adopt the Findings of Fact and Conclusions of Law which accompany the Commission's Permit, but that the parties do not waive their rights to contest those Findings and Conclusions if the appeal proceeds on a contested basis; and that the Board may issue a Land Use Permit to the Permittees in accordance with the parties' proposed Land Use Permit.

[2] Except as slightly modified herein, the Board adopts the parties' proposed Findings of Fact and Conclusions of Law in furtherance of the provisions of Act 250, the Board Rules, and Vermont case law, all of which favor negotiated non-adversarial resolution to disputed matters. Had it held an evidentiaty hearing and heard argument from the parties as to the application of the evidence to the Findings of Fact and the application of the Findings of Fact to the Conclusions of Law, however, the Board may well have reached conclusions in this case different from the resolution proposed by the parties. Thus, neither the parties nor others should read such acceptance as establishing precedent as to any of the questions which the Board might have addressed, had this matter been presented to the Board for full review.