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

Re: HS Development, Inc. and Stratfield Associates
Land Use Permit #700002-10B-EB (Fee Waiver)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a request to waive an application fee. As is explained below, the Environmental Board concludes that it should waive and refund 40 percent of the fee based on substantial savings resulting from prior review of impacts in a permit issued in 1985.

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## I. SUMMARY OF PROCEEDINGS

This case involves a ski-area development with a long history. The development is located on an approximately one thousand-acre tract in Wilmington and Dover. The pertinent history of the development is stated in the findings of fact.

On November 18, 1994, HS Development, Inc. and Stratfield Associates (the Applicants) filed the present application, #700002-10B (the Application). The Application seeks amendment of various existing permits to obtain approval of a project to be known as Cedar Creek Village, to be located in Wilmington on the east side of Mann Road approximately 0.5 miles south of Cold Brook Road. Cedar Creek Village is more completely described in the findings of fact.

On December 5, 1994, the Applicants filed a request with the District Commission, pursuant to Environmental Board Rule (EBR) 11(E), to waive the application fee for Cedar Creek Village. On December 21, 1994, Acting District #2 Chair Thomas Spater denied the waiver request.

The Applicants then simultaneously filed a motion for interlocutory appeal with the Environmental Board and a request for reconsideration with the Acting District Chair. The Board took no action pending decision by the Acting District Chair on reconsideration. On January 10, 1995, the Acting District Chair issued a decision denying reconsideration and staying the Application until the fee was paid,

On January 18, 1995, then Board Chair Arthur Gibb sent a memorandum to parties concerning the interlocutory appeal. In relevant part, the January 18 memorandum stated that, in a prior case, the Board had ruled that a motion for interlocutory appeal regarding fee waiver could not be accepted under EBR 43, and that the Applicants may wish to pay under protest and file an appeal regarding the fee after the District Commission issued its final decision on the Application.

On February 6, 1995, the Applicants withdrew their interlocutory appeal. They paid, under protest, a fee of $26,662.50, and the Application proceeded.

On May 1, 1995, the District Commission issued Land Use Permit #700002-10B-EB, approving the Cedar Creek project. On May 29, the Applicants filed an appeal solely concerning the fee, attaching 13 exhibits.

On June 26, 1995, Chair John T. Ewing convened a prehearing conference. On August 11, the Chair issued a prehearing conference report and order, which is incorporated by reference.

On September 14, 1995, the Chair, acting as hearing officer, convened a hearing in Montpelier with the following party participating:

The Applicants by Donald Tarinelli and Deborah Purvin

On September 26, 1995, the Chair issued a memorandum stating that the matter is in recess pursuant to EBR 13(B). This memorandum is incorporated by reference.

A proposed decision was sent to the parties on October 24, 1995, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On November 6, 1995, the Applicants requested oral argument. On December 6, 1995, after the granting of a continuance which they had requested, the Applicants submitted a response to the proposed decision. The Board convened a public hearing in Montpelier on December 20, 1995, with the Applicants participating.

The Board deliberated concerning this matter on January 24 and February 28, 1996. On February 28, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

## II. ISSUES

The issues before the Board are:

a. Whether, under EBR 11(E), to waive all or part of the fee for the Application.

b. Whether the Applicants have a vested right not to pay the fee required by EBR 11 as it existed on the date of the Application.

c. Whether "equitable estoppel" bars requiring a fee for the Application greater than $25.

## III. FINDINGS OF FACT

1. On October 6, 1970, the District #2 Commission issued Land Use Permit #700002 (the 1970 Permit) to Haystack Corporation, authorizing creation of 2004 units, of which 909 were individual building lots and 1095 were condominium units in 28 clusters of multi-family dwellings. This permit also authorized 700 hotel units, and recreational facilities. The application included a master plan showing the proposed improvements. Haystack Corporation paid a fee of $5,685 with the application. No part of this fee included an assessment based on construction costs for condominium units. Instead, the only part of the fee related to condominium units was $140, which was based on $5 for each of the 28 clusters of condominium units. The only part related to construction costs was $1,000 for some commercial facilities in the master plan.

2. The fee for the 1970 Permit was paid under the interim rules and regulations of the Environmental Board, effective June 1, 1970, which provided at then-EBR 7(a):

> Each application for a permit for a development except a subdivision, shall be accompanied by a ten dollar fee plus a one dollar fee for each $1,000 of estimated cost of the development in excess of $10,000 as stated in the application. Each application for a permit for a subdivision shall be accompanied by a fee equal to five dollars per lot for the subdivision as it appears on the recorded plan or if the plan is not recorded, equal to five dollars per lot for the number of lots contemplated by the owner at the time of filing his application.

3. One part of the project approved in the 1970 Permit was "Mountain View Village," to be located in Wilmington. Mountain View Village was to consist of 88 condominium units in six clusters. The clusters were to be arranged as follows: (a) units 1 through 15, (b) units 16 through 24, (c) units 25 through 44, (d) units 45 through 55, (e) units 56 through 73, and (f) units 74 through 88. Mountain View Village was to contain only one internal project road, running in from a town road to serve the clusters containing units 1 through 44. Two short driveways were to lead off this internal road to parking areas to serve clusters (a) and (b), and the road was to end in the middle of the property at a parking area to serve cluster

(c). The remaining clusters, located closer to a town road, each had accesses from the town road leading to parking areas for each cluster.

4. Given that Mountain View Village contained six clusters of condominium units, the total fee attributable to the Mountain View Village condominium units in connection with the 1970 Permit was $30.

5. On July 23, 1973, the District Commission issued Land Use Permit #700033 (the 1973 Permit) to Haystack Corporation, authorizing the construction of a new ski lift, installation of a power line, and new ski trails. The fee paid was $170.

6. On March 28, 1974, the District Commission issued Land Use Permit #2W0204 (the 1974 Permit) to Haystack Corporation and W.T. Cullen, authorizing a sewage disposal system.

7. The 1970, 1973, and 1974 Permits all pertained to the same Haystack ski resort development located in the Towns of Wilmington and Dover. The original developer, Haystack Corporation, did not complete the development and went bankrupt. Subsequently a successor-in-interest, Haystack Group, Inc., acquired title and sought to complete the project.

8. On April 25, 1985, the District Commission issued a memorandum of decision regarding the 1970, 1973, and 1974 Permits. With respect to the 1970 and 1973 Permits, the District Commission concluded that these permits contained "construction completion dates" which had not been met and that an application must be submitted to extend the construction completion dates for those permits. The District Commission concluded that such application would be treated as a "substantial change" under EBR 34(B), and that review under all Act 250 criteria would be required unless the Applicants could demonstrate, "with respect to a specific criterion, or sub-criterion, that there has been no change in circumstances since the issuance of the original permit."

9. In the April 25, 1985 memorandum of decision, the District Commission also concluded separately that the 1970 and 1973 permits did not contain proper expiration dates, that an application to renew those permits needed to be filed in order to set such dates, and that such renewal application would be treated as a minor under **EBR 51.**

10. No appeal of the April 25, 1985 memorandum of decision was filed.

11. On July 2, 1985, the District Commission issued one land use permit (the 1985 Permit) for the entire Haystack project. The 1985 Permit was numbered 700002-3, 700033-2, 2W0204-2, and 2W0531-2.[1] The fee paid was $1,240. This amount did not include an assessment based on construction costs for any condominium units.

12. The 1985 Permit gave "umbrella status" to the 1970, 1973, and 1974 Permits, as well as to Land Use Permit #2W0531, which had been issued on December 24, 1981 to James McGovern (the 1981 Permit) authorizing the addition of seven bedrooms and a gift shop to a pre-existing inn and restaurant in the Haystack resort area.

13. The 1985 Permit states that the meaning of giving umbrella status to the prior permits is that:

> [F]or future amendments applicants will not need to present evidence under the following Criteria: 1A Headwaters, 1D Floodways (Haystack property)[,] 6 Educational Services, 8 Wildlife, Natural Areas and Historic Sites, 9B & C Agricultural and Forestry Soils, 9D & E Earth Resources, 9H Costs of Scattered Development, 9L Rural Growth Areas, 10 Conformance with the Local Plan (Wilmington) and conformance with the Regional Plan.

The 1985 Permit also states that all future amendments will be reviewed under the remaining criteria under 10 V.S.A. § 6086(a) not listed above, as well as under Criterion l(D) for some future amendments and under Criterion 10 with respect to the Dover town plan.

14. The 1985 Permit also extended the expiration dates for the 1970, 1973, 1974, and 1981 Permits to December 6, 2006. It further authorized various improvements associated with increasing snowmaking capacity, chair lifts, and a golf course maintenance building. The 1985 Permit set construction completion dates for the specifically authorized improvements and stated that, for future phases of the Haystack project, construction completion dates would be set as permit amendments were issued.

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[1] *The application for the 1985 Permit originally was numbered 2W0635 and was changed by the District Commission to refer back to prior permits.*

15. The findings of fact and conclusions of law supporting the 1985 Permit contain findings and conclusions as to all criteria and sub-criteria of 10 V.S.A. § 6086(a). They contain no findings or conclusions that the Applicants met the burden of proof imposed by the April 25, 1985 memorandum of decision to show no changes in circumstances with respect to specific criteria or sub-criteria.

16. As it existed on the date the application for the 1985 Permit was filed, EBR 11, as amended September 1, 1984, provided in relevant part:

a. In Section (A), that Act 250 application fees were calculated as follows -

(1) For projects involving construction, $1.00 for each $1,000 of construction costs, and

(2) For projects involving the creation of lots, $5.00 for each lot ....

Notwithstanding the above, there shall be a minimum fee of $25 in addition to publication and recording costs.

b. In Section (D), that an Act 250 application fee may be waived as follows -

In the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the chairman of the district commission to waive all or part of the application fee. The chairman may waive all or part of the fee if he finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, and that there will be substantial savings in the review process due to the scope of review of the previous application.

17. Following the 1985 permit, many amendments to these "umbrella permits" were issued. The District Commission did not charge a full fee under EBR 11(A) for any of these amendments, charging only a minimum fee for

permit amendment applications of $25 as set out at the end of EBR 11(A).

18. One post-1985 amendment was Land Use Permit #700002-10, issued to Haystack Group, Inc. on September 20, 1988 (the 1988 Permit). The 1988 Permit authorized the construction of 13 condominium units and associated utilities on Mann Road in Wilmington.

19. On October 25, 1988, the District Commission issued findings of fact and conclusions of law in support of the 1988 Permit. These findings state that the application for the 1988 Permit was for the construction of 88 condominium units with roads, parking and utilities; a 17,000 square foot sports and recreation center with 64 parking spaces, and six additional tennis courts. In the findings, the District Commission states that the applicant had not provided sufficient evidence to approve more than 13 units and that additional evidence in the form of a Water Supply and Wastewater Disposal Permit was to be filed within two years.

20. The application for the 1988 Permit was for a project to be known as "Mountain Meadows Village." The project was to be located on the same land as Mountain View Village would have been. The name Mountain Meadows Village was chosen because the local fire chief requested that Mountain View Village not be used.

21. Like Mountain View Village, Mountain Meadows Village would have consisted of 88 condominium units. However, many of the features of Mountain Meadows Village were different, including but not limited to the following:

    a. Inclusion of tennis courts and a "sports building." Such courts and building were not included in the Mountain View Village proposal.

    b. Clustering and location of condominium units. Mountain Meadows Village involved much revision from the Mountain View Village proposal in terms of the clustering and location of condominium units. This revision included, but was not limited to, moving many units toward the south end of the parcel to accommodate the tennis courts and sports building, regrouping and relocating other units at the far southern end of the parcel, and regrouping and relocating the units along the internal road. Because of the relocations, more of the units would be served by the internal road than with the Mountain View proposal.

c. Internal road. Unlike Mountain View Village, the main internal road for Mountain Meadows Village did not end in the middle of the property, but curved around back to the town road, thereby requiring two curbcuts; and also included seven, rather than three, parking areas. All of these parking areas were to be off the internal road, with at least two of them looping back to the internal road.

d. Other curbcuts along town road. In addition to the internal road, Mountain Meadows Village included three other curbcuts along the town road leading to parking areas not far from the road. One of these curbcuts would serve the tennis courts and sports building. These curbcuts and parking areas were revised, relocated, and expanded from the Mountain View proposal.

22. The Applicants built only 13 of the 88 Mountain Meadows condominium units. These 13 units were those proposed for the far southern end of the parcel.

23. On November 18, 1994, the Applicants filed the present Application, which seeks amendment of the existing "umbrella permits" and the 1988 Permit. The Application describes the 1988 Permit as approving a condominium project known as Mountain Meadows Village. The Application describes the 1985 Permit as being "Umbrella Permits" and as having "umbrella St&US."

24. The Application seeks approval of a project to be known as Cedar Creek Village, to be located in Wilmington on the east side of Mann Road approximately 0.5 miles south of Cold Brook Road. Cedar Creek Village is to consist of 80 units in 10 buildings totaling 95,000 square feet; a 14,000 square foot community center with an indoor and outdoor pool; two paddle tennis courts and one tennis court; and related infrastructure.

25. The Application also seeks approval to divide land associated with the Mountain Meadows Village project into two parcels, with the proposal being to have the Mountain Meadows parcel consist of three acres containing 13 condominium units and to build the Cedar Creek project "on the remaining 19 acre parcel."

26. Cedar Creek Village would be located on much of the same land previously slated for the Mountain View Village and Mountain Meadows Village proposals. Cedar Creek Village contains less condominium units

than either of the other proposals.

27. There is no credible evidence concerning the reason for the name change from Mountain Meadows Village to Cedar Creek Village. In this regard, the Applicants contend that such change occurred at the request of the local fire chief. However, the Board is persuaded only that the fire chief requested a change from Mountain View Village to Mountain Meadows Village.

28. Cedar Creek Village will include a main internal road similar to the Mountain Meadows Village proposal subject to the 1988 Permit and, like Mountain Meadows Village, would have common facilities such as the above-mentioned community center and tennis courts. However, unlike the Mountain Meadows Village proposal:

a. Cedar Creek Village will include a second internal road not present in the Mountain Meadows proposal. This road will connect from the main internal road to the town road.

b. The community center and tennis courts are in different locations from the proposed location of the sports building and tennis courts as proposed for Mountain Meadows.

c. The parking areas are designed differently and placed in different locations.

d. Condominium units for Cedar Creek Village would be constructed in a different number of buildings in different locations.

29. Unlike the Mountain View Village proposal approved in the 1970 permit, Cedar Creek Village would have a greater number and footage of internal roads, would place the condominium units in different clusters and locations, and would include common facilities such as the above-referenced community center and tennis courts.

30. Neither Mountain Meadows Village nor Cedar Creek Village, per se, was among the projects reviewed and approved as part of the 1970 or 1985 permits, or any other permit or permit amendment previously issued. Neither Mountain Meadows Village nor Cedar Creek Village, per se, was shown on the master plan presented in the application for the 1970 Permit.

31. As it existed on the date the Application was filed, EBR 11, as amended July 16, 1991, provided in relevant part:

a. In Section (A), that Act 250 application fees are calculated as follows -

(1) For projects involving construction, $4.25 for each $1,000 of the first $15,000,000 of construction costs, and $2.00 for each $1,000 of construction costs above $15,000,000; and

(2) For projects involving the creation of lots, $50.00 for each lot; and ...

(5) For projects involving the review of a master plan as provided in Rule 21, a fee equivalent to $.10 per $1,000 of total estimated construction cost in current dollars in addition to the fee established in subparagraph (A)(l) for any portion of the project seeking construction approval.

b. In Section (E), that an application fee may be waived as follows:

In the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the chairman of the district commission to waive all or part of the application fee. The chairman may waive all or part of the fee if he or she finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, and that there will be substantial savings in the review process due to the scope of review of the previous application.

32. Calculated in accordance with EBR 11(A)(l), the fee for the Application is $26,662.50. No fee paid for any prior Haystack application reflected an assessment based on the construction costs of any Cedar Creek Village improvements.

33. The District Commission did not treat the Application as a minor under

EBR 51. During the Application proceedings, the District Commission held a contested case hearing and a site visit (both on December 15, 1994), after which it recessed pending submission of additional information and deliberation.

34. On May 1, 1995, the District Commission issued Land Use Permit #700002-10B-EB (the 1995 Permit), approving Cedar Creek Village. The findings of fact supporting the permit state:

> [A]ll parties agreed that the applicants through submission of the application material and previous issuance of Land Use Permit #700002-3, #700033-2, #2W0204-2, and #2W0531-2 have met the burden of proof with respect to:
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> | | | | |
> |---|---|---|---|
> | 1 | Air Pollution | 8A | Wildlife |
> | 1A | Headwaters | 9A | Impact of Growth |
> | 1C | Water Conservation | 9B&C | Primary Agriculture Soils |
> | 1D | Floodways | 9D&E | Earth Resources |
> | 1F | Shorelines | 9H | Costs of Scattered Dev. |
> | 6 | Educational Services | 9J | Public Utilities |
> | 8 | Historic Sites | 9K | Public Investments |
> | | | 9L | Rural Growth Areas |
> | | | 10 | Local and Regional Plan |
>
> Parties, therefore, waives [sic] the issuance of written findings concerning these criteria as the application shall serve as the Findings of Fact.
>
> The following written Findings of Fact are limited to Criteria:
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> | | | | |
> |---|---|---|---|
> | 1B | Waste Disposal | 5 | Transportation |
> | 1E | Streams | 7 | Municipal Services |
> | 1G | Wetlands | 8 | Aesthetics |
> | 2&3 | Water Supplies | 9F | Energy Conservation |
> | 4 | Erosion | 9G | Private Utilities |

35. The permit numbers referenced in the quote in Finding 34, immediately above, are the 1985 Permit.

36. With respect to meeting the burden of proof through the Application materials and the 1985 Permit, the findings do not state how much of the burden was satisfied by the Application material and how much by the 1985 Permit.

37. Schedule B, submitted as part of the Application, demonstrates the following with respect to the criteria on which the District Commission stated it was not going to issue written findings:

a. That the Applicants did not rely on the 1985 Permit, and submitted independent evidence, to meet the following criteria or sub-criteria - 1 (air pollution), l(C) (water conservation), l(F) (shorelines), 9(A) (impact of growth), 9(J) (public utility services), and 9(K) (public investments); and

b. That the Applicants did rely on the 1985 Permit to meet the following criteria or sub-criteria - l(A) (headwaters), l(D) (floodways), 6 (educational services), 8 (historic sites), 8(A) (necessary wildlife habitat), 9(B) and (C) (agricultural soils), 9(D) and (E) (earth resources), 9(H) (scattered development), 9(L) (rural growth areas), and 10 (local and regional plans).

38. With respect to Criterion 8, the specific written findings supporting the 1995 Permit state: "There will be no undue adverse effect on aesthetics, scenic beauty or *natural areas*." (Emphasis added.)

39. District #2 Coordinator April Hensel was the staffperson who assisted the District Commission in processing the Application, as well as the 1985 Permit and many other subsequent permit amendments for the Haystack project. At the hearing officer's request, the District Coordinator testified during the evidentiary hearing held in this matter on September 14, 1995. During that hearing, the District Coordinator testified that, in processing the Application, the District Commission reviewed Criterion 8 (natural areas), that such was not typically reviewed in amendment applications under the 1985 Permit, and that this review was due to the potential wetlands impact of Cedar Creek Village.

40. Based on Findings 38 and 39, immediately above, the Board finds that the District Commission, in processing the Application, reviewed and ruled on Criterion 8 (natural areas) due to Cedar Creek Village's potential impacts on wetlands. The District Commission did not review Criterion 8 (natural

areas) in issuing the 1988 Permit.

41. The District Commission did not make findings on the 18 criteria or sub-criteria on which the parties had agreed the burden of proof had been met. The District Commission did issue findings of fact and conclusions of law for 12 Act 250 criteria or sub-criteria.

42. The record does not contain evidence concerning the costs of the District Commission's review process, on the dollar amount of any savings in the Application review process resulting from the 1985 Permit, or on the time and expense of the State of Vermont Agency of Natural Resources (ANR) related to the Application.

43. During the hearing on September 14, 1995, the District Coordinator was made available for examination by the Applicants, and they asked no questions concerning the costs of the District Commission's review process or on the dollar amount of any savings in the Application review process resulting from the 1985 Permit. The Applicants also neither sought nor provided any evidence concerning costs of ANR related to the Application.

44. The Application review process was similar to the typical major review process for projects on land without prior permits. Such similarity includes the hearing, site visit, recess for more information and deliberation, and the lack of findings on criteria or sub-criteria on which parties agreed the burden of proof was met. Where parties reach such agreement, the District Commission often does not make written findings on the agreed-upon criteria or sub-criteria.

45. Neither the Environmental Board nor the District #2 Commission ever completed a written or oral agreement with, or made a written or oral representation to, the Applicants, their predecessors-in-interest, or anyone else stating that only $25 would be charged for post-1985 amendment applications.

46. The Applicants' position on the existence of an agreement has evolved over the course of these proceedings:

    a. With respect to the fee for the Application, neither the original decision of the District #2 Chair nor his decision on reconsideration reflect any allegation made to him by the Applicants that such an agreement existed.

b. In their request that the District Chair reconsider, the Applicants made no such allegation.

c. In an interlocutory appeal filed with the Board on December 29, 1994 concerning the fee for the Application, the Applicants did not allege an agreement existed.

d. The first evidence of such an allegation in the record is contained in the Applicants' appeal filed May 29, 1995.

e. During the evidentiary hearing on September 14, 1995, Applicant witness Donald Tarinelli testified that no agreement existed but that such was implicit in the manner in which the District Commission proceeded following the 1985 Permit.

47. The 1970, 1973, 1974, 1981, and 1985 Permits were not appealed to the Board. The 1988 Permit was appealed on the 34th day following issuance of that Permit and the appeal was dismissed by the Board as untimely. Such dismissal was not appealed.

48. In January 1990, the Applicants submitted an amendment application for a different part of the Haystack development which was later withdrawn, #700002-13. During the course of that application, District Commission staff sent the Applicants two letters stating, in essence, that the Applicants had to pay a fee for that application based on construction costs. The letters stated that the decision had been made by the District #2 Chair. The Applicants did not pay a fee based on construction costs. They withdrew the application for other reasons.

49. There is no credible evidence in the record to support the following assertion by the Applicants: "Numerous financing, permitting, development and budget decisions have been made by the Permittee in reliance upon the prior practices of the District Commission and its coordinator [in not charging more than a $25 fee for amendments]."

## IV. CONCLUSIONS OF LAW

### A. Fee Waiver

The issue before the District Chair was whether, under EBR 11(E), to

waive all or part of the fee. EBR 11(E), as it existed on the date of the Application, provides:

> In the event that an application involves a project or project impacts that previously have been reviewed, the applicant may petition the chairman of the district commission to waive all or part of the application fee. The chairman may waive all or part of the fee if he or she finds that the impacts of the project have been reviewed in an applicable master permit application, or that the project is not significantly altered from a project previously reviewed, and that there will be substantial savings in the review process due to the scope of review of the previous application.

Based on the language of EBR 11(E), the Board, on de novo appeal under 10 V.S.A. § 6089(a), must make a twofold evaluation: (a) whether the impacts of Cedar Creek Village have been reviewed in an applicable master permit application, or whether Cedar Creek Village is not significantly altered from a previously reviewed project; and (b) whether the prior review resulted in substantial savings in the review process for Cedar Creek Village. A negative conclusion on either one of these items means that fee waiver is not authorized under EBR 11(E).

EBR 11(E) does not specify the burden of proof. Where the burden of proof is not specified, that burden - meaning primarily the burden of persuasion - is on the moving party, or in this case, the Applicants. Nader v. Toldenado, 408 A.2d 31, 48 (D.C. Cir. 1979), cert. denied, 444 U.S. 1078 (1980); cf. In re Ouechee Lakes Corp., 154 Vt. 543, 553-54 (1990) (burden of proof refers to risk of non-persuasion).

1. Prior Review

In the first step of the evaluation under EBR 11(E), the Board must determine whether the impacts of Cedar Creek Village have been reviewed in an applicable master permit application or whether Cedar Creek Village is not significantly altered from a previously reviewed project.

(a) Master Permit Application

Based on the foregoing findings of fact, the Board concludes that at least some impacts of the Cedar Creek Village proposal have been reviewed in applicable master permit application. Specifically, in the District Commission's

decision below on the merits of the Application (which has not been appealed), the District Commission states that it need not make written findings on 18 individual Act 250 criteria or sub-criteria in part because of the 1985 permit and in part because of the Application materials.

The 1985 Permit is, in effect, an umbrella permit for the Haystack development, and therefore qualifies as "an applicable master permit application." While the District Commission did not have the Cedar Creek proposal before it at that time, the language of this part of EBR 11(E) addresses whether "the *impacts* of the project have been reviewed in an applicable master permit application," not whether the project itself has been reviewed. (Emphasis added.) Since the District Commission cited the 1985 permit as part of the reason it need not make written findings on the Application under many criteria or sub-criteria, the Board must consider the District Commission to have reviewed some impacts posed by the Application in the 1985 proceeding.

(b) Previously Reviewed Project

Having concluded that some project impacts were previously reviewed as part of the 1985 Permit, the Board does not have to examine whether the current project "is not significantly altered from a project previously reviewed." However, the Board will do so in the interests of administrative economy and because of the claims raised in, and circumstances of, the present case.

Based on the foregoing findings of fact, the Board concludes that there are two previously-reviewed projects for the tract on which the Cedar Creek Village project is to occur: (a) "Mountain View Village" (1970 Permit) and (b) "Mountain Meadows Village" (1988 Permit).

The Board also concludes that Cedar Creek Village is significantly altered from the Mountain View Village proposal approved in the 1970 Permit. Although the projects pertain to the same land and contain the same number of units, the differences between the projects are substantial. Alterations in the Cedar Creek Village project from the Mountain View proposal include, but are not limited to: the proposal of community structures such as tennis courts and a sports building; regrouping and relocating the units, including moving many of them to different portions of the parcel; and redesigning the internal project road and parking areas.

The Board further is not persuaded that Cedar Creek Village is *not* significantly altered from the Mountain *Meadows* Village proposal approved in the

1988 Permit. While there are many similarities between these two proposals, the Cedar Creek Village involves **a** second internal road not present in the Mountain Meadows application, and reconfigured and relocated condominium buildings, parking areas, and community structures.

Moreover, in reviewing the Cedar Creek proposal, the District Commission found it necessary to review a criterion it did not review in issuing the 1988 Permit for Mountain Meadows: Criterion 8 (natural areas). This was due to potential impact on wetlands. Given these facts, it would appear likely that the Cedar Creek project would constitute a "substantial change" as defined in EBR 2(G): "[A]ny change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(l) through (a)(10)." If a project is likely to be a "substantial change," then it is also likely to be "significantly altered."

2. **Substantial Savings**

**In** the second step of the evaluation under EBR 11(E), the Board must examine whether "there will be substantial savings in the review process due to **the** scope of review of the previous application." Since the Application has been processed, this examination is in the past rather than the future tense.

Performing this examination is difficult on the record of this case. On the one hand, the 1985 Permit clearly resulted in some savings. Specifically, the District Commission's permit for Cedar Creek Village states that written findings were not made on 18 criteria or sub-criteria in part because of the 1985 Permit and in part because of the Application materials. Although that permit does not itemize which of these were eliminated specifically as a result of the 1985 Permit, Schedule B submitted by the Applicants indicates reliance on the 1985 Permit for 12 of the criteria or sub-criteria on which the District Commission did not make written findings, with independent evidence submitted on the other six criteria or sub-criteria. Accordingly, because of the 1985 Permit, savings occurred because the District Commission did not need to make written findings on 12 criteria or sub-criteria.

On the other hand, two factors weigh against concluding that the savings were "substantial." First, in the review process for the Application, the District Commission conducted all of the typical activities it would in reviewing an

application involving land not subject to prior permits.[2] The similarity of the review process for the Application to that of the typical application suggests at least that the savings were not enough to justify waiver of the entire fee.

Second, the record does not contain specific information relating to the State's costs in reviewing the Application. Despite the Board's making the District Coordinator available at hearing, the Applicants did not seek any information on how much time and expense was involved in the work on the Application by the District Commission and staff. The Applicants also neither sought nor provided any evidence concerning Application-related costs of ANR.[3]

In response to findings in the hearing officer's proposed decision on the lack of specific information, the Applicants contend that the District Commission's ability not to make written findings on many criteria and sub-criteria, standing alone, demonstrates that the savings were "substantial."

On consideration of the factors and argument discussed above, the Board concludes that the 1985 Permit resulted in "substantial" savings in review of the Application because that permit obviated the need to review and make written findings on 12 criteria or sub-criteria However, the Board also concludes that such savings justify a partial rather than a full waiver because the 1985 Permit did not serve to satisfy the remaining 18 criteria or sub-criteria.

Based on the foregoing, the Board concludes that, under EBR 11(E), it should waive, and therefore refund, 40 percent of the fee, or $10,665. This is based on the ratio of the 12 criteria or sub-criteria to the total of 30 criteria or sub-criteria. Although imperfect, under the circumstances of this case this basis is rational. While there may not be an exact relationship between the cost of review and the number of criteria or sub-criteria reviewed, the Board agrees with the Applicants that a relationship exists. Moreover, the present record does not provide a better basis for determining how much to waive. The Board reserves the right to evaluate, in future cases, alternative bases.

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[2] *In objections to the hearing officer's proposed decision, the Applicants claim that the process was not similar to the typical review process but adduce no evidence to support their claim.*

[3] *EBR 11(A) states that the fee is assessed for the purposes of compensating "the state." Under 10 V.S.A. § 6029, a portion of all Act 250 fees funds Act 250-related activities at ANR*

The Board notes that, in their objections to the hearing officer's proposed decision that substantial savings had not occurred, the Applicants contend for the first time that retaining the entire fee would constitute an "unjust enrichment" because "there is a vast disparity between the fee the District Commission wishes to keep and the burden on the permitting process." This claim is without merit for three separate and independent reasons: (a) it is not supported by sufficient, credible evidence; (b) it is not relevant to the language of EBR 11(E); and (c) the Board has concluded, above, that 40 percent of the fee should be waived.

B. **Vested Rights**

In their written response to the hearing officer's proposed decision, the Applicants claim that they and their predecessors-in-title:

> [A]cquired a vested right in the permit and the permit process in connection with issuance of L.U.P. 700002 on October 6, 1970. See Smith v. Winhall Planning Commission, 140 Vt. 178 (1981); 1 V.S.A. § 213. In Smith, supra, the Court held that rights 'vested under the then existing regulations as of the time when proper application is filed.' Smith. supra at p. 181.

The gist of the Applicants' argument is that they paid a fee in conformance with the Board's regulations in effect at the time of the 1970 Permit, that such fee included an amount based on construction costs for condominium units, that the 1970 Permit included Cedar Creek Village, and that therefore they are "vested" in the fee paid in 1970.

In making their vested rights argument, the Applicants state that "the rationale behind [their] position is no different than that applied by the Supreme Court in In re Taft Comers Associates, 160 Vt. 583 (1992)." In that case, the Court stated that the Board has no authority to 'Ye-open" an unappealed umbrella permit because to allow final permit decisions to be re-reviewed " 'would severely undermine the orderly governance of development and would upset reasonable reliance on the process.' " Id. at 593, quoting Levy v. Town of St. Albans Zoning Board of Adjustment, 152 Vt. 139, 143 (1989).

At the outset, the Board notes that the Applicants' claim that the 1970 fee included an amount based on construction costs of condominium units is factually inaccurate. As found above, the 1970 fee did not include such an amount. This is demonstrated by Exhibit A20A, an October 5, 1970 memorandum from Haystack Corporation enclosing and itemizing the 1970 fee.

In addition, the Board discusses below three separate and independent reasons why the Applicant's vested rights argument fails, and then discusses why the Taft Corners rationale is not applicable.

1. **Extension of Vested Rights Doctrine to Bar a Fee Rule Enacted Prior to an Amendment Application**

**The** Applicants' argument attempts to extend the vested rights doctrine of Smith to bar a fee rule which is being applied not retroactively to an original application but prospectively to an amendment application. However, Smith and its progeny deal only with post-application regulations which affect whether a project substantively merits a permit. See, e.g., In re Frank A. Molgano, _ Vt. _, 5 Vt. Law Week 314 (Nov. 10, 1994). The Applicants cite no case in which the Supreme Court has extended the doctrine in the manner suggested. Moreover, the policies which led the Court to adopt the rule in Smith do not justify such an extension. Instead, they work against it.

In Smith, and in an important case cited therein In re Application of Preseault, 132 Vt. 471 (1974), the Court dealt with substantive changes in municipal ordinances or plans, during the pendency of applications, which would have denied the proposed projects. Smith, supra, 140 Vt. at 181; Preseault, supra, 132 Vt. at 473. Based in part on 1 V.S.A. § 213,[4] the Court adopted the rule that rights vest in the regulations in effect on the date of application. Smith, supra, 140 Vt. at 181. As indicated by the language of Smith, the policies behind the Court's adoption of this rule were: (a) clarity, certainty, and avoidance of litigation as to which regulations apply and (b) equity and the prevention of regulations adopted to thwart a specific project. Id. at 181-82.

Applied to this case, the vested rights doctrine results in a conclusion that the governing fee rule is EBR 11 as it existed on the date of the Application. Extension of the vested rights doctrine to bar a fee rule enacted prior to filing for an amendment is unprecedented and unwarranted. A fee rule is not a substantive regulation. Moreover, rather than easing the administration of the permit process, such extension would render the process more uncertain, unclear, and inequitable. For each amendment application, both the regulator and the

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[4] *1 V.S.A. § 213 provides: "Acts of the general assembly except acts regulating practice in court, relating to the competency of witnesses or to amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage."*

applicant would have to determine the fee rule in effect at the time of the original permit, and assess accordingly. A likely effect would be that two applications for similar projects, filed contemporaneously by separate developers, would be assessed different fee amounts.

Further, the fee rule in question, EBR 11(A), as it existed on the date of the Application, was not designed to thwart the project at issue or any project. EBR 11(A) is neutral both on its face and in its application. In relevant part, the rule provides that the fee is assessed as follows:

> (1) For projects involving construction, $4.25 for each $1,000 of the first $15,000,000 of construction costs, and $2.00 for each $1,000 of construction costs above $15,000,000; and
>
> (2) For projects involving the creation of lots, $50.00 for each lot; and . . .
>
> (5) For projects involving the review of a master plan as provided in Rule 21, a fee equivalent to $.10 per $1,000 of total estimated construction cost in current dollars *in addition to the fee established in subparagraph (A)(l) for any portion of the project seeking construction approval.*

(Emphasis added).

Under this rule, all other applicants subject to "master plan" or "umbrella"-type permits must pay the full fee for amendment applications unless they obtain a waiver under EBR 11(E) (discussed above). Accordingly, upholding the Applicants' argument would result in their being singled out for special treatment, an outcome similar to that the Court sought to avoid in enacting the Smith rule.

2. **1985 Substantial Change Determination**

**The** second reason the Applicants' vesting argument fails relates to the fact that, as the District Commission concluded in an unappealed memorandum of decision dated April 25, 1985, the Haystack project was not completed by the applicable construction completion date and that an application to extend this date would have to be submitted.

The District Commission concluded that an extension of the construction completion date was a "substantial change" requiring full review under the Act 250 criteria. See EBR 34(B). Such review was undertaken. The result was the 1985

Permit, which included new constmction completion and expiration dates and the renewal of the 1970 Permit, subject to new *and different conditions.* These conditions included the submission of amendment applications for future phases of the Haystack project.

Given the failure of the Applicants to complete construction by the applicable date and the District Commission's conclusion that extension of such date was a "substantial change," the Applicants cannot be considered vested in any fee for the 1970 Permit. Instead, their rights and obligations are conditioned by the 1985 Permit, which requires the filing of amendment applications. As EBR 11 provided in 1985 and provides now, all Act 250 applications require a fee based on estimated construction costs, unless waived in accordance with the rule.

3. **Cedar Creek Village Not Part of 1970 Permit**

**The** third reason the Applicants' argument fails is that Cedar Creek Village was not approved as part of the 1970 Permit. It is true that a proposal as Mountain View Village was part of the 1970 approvals and that Mountain View Village was to be constructed on the same land. However, as discussed in more detail above in Section **IV.A.,** the Cedar Creek Village is a proposal which is significantly altered from Mountain View Village,

4. The **Taft Corners Rationale**

**As the** discussion of each of the above reasons implies, the Applicants' reliance on Taft Corners, supra is misplaced. Taft Corners dealt with **the** re-opening of an **unappealed** umbrella permit for substantive review under Act 250 criteria which had been finally ruled upon the umbrella permit. Taft Corners, supra, 160 Vt. at 587. Moreover, under Taft Comers, a permittee is not insulated by a prior permit if a substantial change is proposed. Id. at 592-94.

The rationale of Taft Corners does not apply to the present case. Requiring that this application comply with a current fee rule does not **re-open** the 1970 Permit (or any permit), The status of any prior permit remains the same regardless of the outcome of this fee decision. Thus, assessing fees in conformance with the current rule does not undermine the "orderly governance of development" with which the Taft Corners court was concerned. Instead, as stated above, it promotes such governance.

Further, even if the Taft Comers rationale applied, the District Commission's 1985 determination of "substantial change" means that the rationale

could not be applied to the 1970 Permit standing alone. Rather, the rationale would apply to the 1970 Permit as extended by the unappealed 1985 Permit, subject to a condition requiring the filing of amendment applications for future phases of the Haystack project. Nowhere in the 1985 Permit does it state that only a $25 fee will be assessed for the amendment applications or that any fee rule will be applied to an amendment application but the rule in effect when such application is filed.

C. **Agreement regarding Fee and Estoppel**

In their notice of appeal, the Applicants alleged that they have an agreement with the District Commission that they will only be charged the minimum $25 fee for amendment applications set out in EBR 11(A). During the evidentiary hearing in this matter, the Applicants conceded that no such agreement exists, but contended such agreement was and is implicit in the District Commission's charging only a $25 fee for amendment applications subsequent to the 1985 Permit.

The Board is not persuaded that the District Commission entered into an agreement with the Applicants regarding fees for amendment applications. No such written agreement or representation exists and there is no evidence of any such oral agreement or representation.

Following the evidentiary hearing, in objections to the hearing officer's proposed decision, the Applicants for the first time claim that the District Commission (and, by implication, the Board) is barred from charging a fee under the doctrine of "equitable estoppel." The party asserting this doctrine has the burden of proof. Fisher v. Poole, 142 Vt. 162, 168 (1982).

As the Applicants acknowledge in their objections, the Court has stated that: 'The doctrine of equitable estoppel precludes a party from asserting rights which otherwise may have existed as against another party who has in good faith changed his position in reliance upon earlier representations." Mv Sister's Place v. Burlington, 139 Vt. 602, 609 (1981).

However, there were no representations. Thus, by the Applicants' own acknowledgement, "equitable estoppel" does not apply.

Moreover, this case meets none of the four elements of equitable estoppel. These elements, as cited in In re McDonald's Corp., 146 Vt. 380, 384 (1985), and the Boards conclusions concerning them, are as follows:

a. **The party to be estopped must know the facts. The** Applicants argue that this element is met because the District Commission has accepted a fee of only $25 for each prior amendment application and must have known the full facts of those applications. However, this argument is not persuasive. No additional fee is being assessed for those prior amendment applications. The estoppel must be established with respect to the facts of the current Application. The District Commission could not have known these facts before the Application was filed, particularly since it concerns a proposal which is significantly altered from that approved in the 1970 Permit as extended by the 1985 Permit.

'b. The **party to be estopped must intend that its conduct shall be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended. The** Applicants have not met their burden of proof on this element. Because they have not, and cannot, prove an agreement or representation regarding fees, they are unable to show the existence of any conduct or act which could give rise to an estoppel.

In this regard, the Applicants' claim is similar to that raised by the appellant in Vermont Structural Steel v. Deoartment of Taxes, 153 Vt. 67 (1989). In that case, the appellant claimed that the Department was "estopped to assess [a] tax retroactively after giving [appellant] the advice on which the latter relied . . . ." Id. at 70. However, the lower court had held that the appellant had not shown that advice was given, but rather showed only "that for a period of time the Tax Department did not enforce the sales tax statute to its full extent ...." Id. at 73. The Court affirmed the lower court's denial of the estoppel claim, stating the appellant had "not demonstrated that the State first established, and later altered, its position ...." Id. at 74.

Similarly, the Applicants have not shown that the Board or District Commission, or any of their agents, have ever established a position or made a statement that only a $25 fee will be required for all amendment applications. At best, the Applicants have shown only that, for a period of time, the District Commission did not enforce the fee rule to its full extent.

Further, and separately, there is no credible evidence to support a conclusion that the District Commission conveyed an intent never to charge the full fee for an amendment application, or gave rise to a right to believe that such was intended. In fact, the evidence is to the contrary, since the District Commission indicated that it intended to charge the full fee in 1990 during the processing of a subsequently-withdrawn application for a different part of the Haystack development.

c. The **party asserting the estoppel must be ignorant of the true facts. The** Applicants again have not met their burden of proof. The Applicants clearly were and are aware of the Application. Knowledge also must be imputed to them of the duly adopted EBR 11, and therefore they must be held to have known that the rule requires payment of a fee based on construction costs. They argue that they could not have known that the District Commission would "suddenly" assert a different position, but any person asserting estoppel could make this claim. Thus, adopting the Applicant's argument would render this element a nullity. Moreover, and separately, the Applicants have been aware of the issue at least since 1990, when the District Commission raised it with them directly.

d. The **party asserting estoppel must rely to its injury on the conduct of the party to be estopped. The** Applicants have not met their burden of proof. They claim that "[n]umerous financing, permitting, development and budget decisions have been made by the Permittee in reliance upon the prior practices of the District Commission and its coordinator." They cite no evidence in support of their claim, and there is no credible evidence in the record.

Finally, to establish estoppel against the State, the Applicants bear an additional burden which they have not met: They must prove that "the injustice which would result from a failure to uphold an estoppel is of sufficient dimensions to justify any effect upon public interest or policy which would result from the raising of an estoppel." McDonald's, supra, 146 Vt. at 383.

With respect to this issue, the Applicants have not established that payment of the fee in accordance with EBR 11 causes them significant harm or that any harm to them is of sufficient dimension to justify treating them differently from other applicants.

Instead, what is established is that the Applicants have benefitted from the forbearance of District #2 in not previously charging the full fee for the various amendment applications. As EBR 11(A) states, the $25 fee for amendment applications is a *minimum*. The full fee for the amendment applications should have been - and for the current Application is - based largely on construction costs. EBR 11(A)(5) makes clear that the full "construction cost" fee must be paid for amendment applications for developments which undergo "master plan" review of the type which occurred for the Haystack development. EBR 11(E) sets out the basis on which that fee can be waived.

These rules, like all rules, are of general applicability, and all other applicants subject to "master plan" or "umbrella" permits must pay the full fee for

amendment applications unless they obtain an 11(E) waiver.

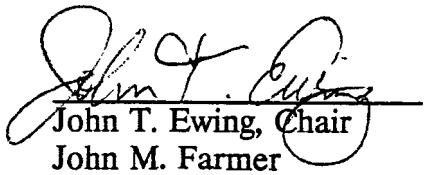
The Board does not believe that the District Commission's past forbearance gives the Applicants an entitlement to pay only the minimum $25 fee for the Application or future amendment applications. Such an entitlement would be contrary to the published rules of the Board and would grant these Applicants special treatment. The public interest in fairness demands that the fee rule be applied in the same manner to all applicants.

## V. ORDER

Based on the foregoing, 40 percent of the Application fee is waived. The Applicants shall receive a refund of $10,665.

Dated at Montpelier, Vermont this 1st day of March, 1996.

ENVIRONMENTAL BOARD



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