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

Re: Bernard Carrier
Land Use Permit Application #7R0639-1-EB
[redacted]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns a proposal to amend a previously permitted three lot residential subdivision ("Lots 7-9") by subdividing an undeveloped remaining fourth tract into five additional residential lots and a sixth lot devoted to "common use" ("Lots l-6") located on 10.58 acres of land on Lake Memphremagog in the City of Newport, Vermont ("Project").

This appeal concerns the preliminary issue of whether, after weighing the competing policy considerations of flexibility and finality as articulated in In re Stowe Club Highlands, 166 Vt. 33 (1996), the Vermont Environmental Board ("Board") will proceed to consider the merits of an application seeking to amend Land Use Permit #7R0639-EB (Reconsideration) issued August 14, 1997 ("Permit"). As explained in more detail below, the Board concludes that the policies of finality outweigh those of flexibility in this matter and the Board will not review the merits of the amendment application.

I. BACKGROUND

In August 1998, Bernard Carrier ("Carrier") filed an amendment application ("Amendment Application") with the District #7 Environmental Commission ("District Commission") for the Project pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") seeking to amend the Permit.

On February 22, 1999, the District Commission issued Land Use Permit #7R0639-1 ("Dash 1 Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Commission Decision") to Carrier authorizing the Project.

On March 24, 1999, Bluffside Farms, Inc., Richard Scott, and Daniel Scott (collectively the "Appellants") filed an appeal with the Vermont Environmental Board ("Board") from the Dash 1 Permit and Commission Decision raising numerous jurisdictional and due process issues and alleging that the District Commission erred in its conclusions concerning 10 V.S.A. §§ 6086(a)(l)(B), (l)(F), (4), and (8), the In re Stowe Clubs Highlands / flexibility versus finality analysis, and the Project's compliance with the Permit.

On April 22, 1999, the Agency of Natural Resources ("ANR") filed a notice of appearance.

On April 27, 1999, Board Chair Marcy Harding convened a prehearing conference with the following individuals and entities participating:

Carrier by David A. Lawes and Bernard Carrier, pro se
Appellants by Duncan Frey Kilmartin, Esq. and Mark Fabrizio

On April 30, 1999, Chair Harding issued a Prehearing Conference Report and Order.

On May 10, 1999 and May 11, 1999, Carrier and Appellants filed objections to the Prehearing Conference Report and Order. In this Order, the Chair ruled that Appellants did not have standing to appeal Criteria l(B) and 4 and, therefore, these criteria would not be at issue in the appeal. No timely objection was tiled concerning this aspect of the Prehearing Order.

On May 19, 1999 and May 25, 1999, the Board deliberated concerning the parties' objections to the Prehearing Conference Report and Order. The Board issued a Memorandum of Decision on May 26, 1999.

In June 1999, the parties filed direct and rebuttal prefiled testimony and exhibits.

On July 13, 1999, the parties filed proposed findings of fact and conclusions of law and objections to their opponent's proffered evidence. In addition, Appellants filed a Motion to Deny the Application Without a Site Visit or Hearing.

On July 23, 1999, Carrier filed the 1985 deposition of Stephen Guyette which, as Chair Harding stated on the record at the July 28, 1999 public hearing, the Board did not accept into the record.

On July 26, 1999, the Chair convened a second prehearing conference by telephone. The following individuals and entities participated:

Carrier by David A. Lawes and Bernard Carrier, pro se
Appellants by Duncan Frey Kilmartin, Esq.

On July 28, 1999, Appellants submitted a document entitled the Corrected Rebuttal Testimony of Alan Flint which, as Chair Harding stated on the record at the July 28, 1999 public hearing, the Board did not accept into the record.

On July 28, 1999, the Board convened a hearing in the City of Newport, Vermont.

The following individuals and entities participated:

Carrier by David A. Lawes
Appellants by Duncan Frey Kilmartin, Esq.

The Board conducted a site visit during which it placed its observations on the record. The Board deliberated concerning the evidentiary objections and other preliminary matters and stated its determinations fcr the record. The Board accepted documentary and oral evidence into the record and heard opening and closing statements. After recessing the hearing, the Board deliberated on July 28, 1999 and August 18, 1999.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Secretary. Agency of Natural Resources v. Upper Valley Regional Landfill Corp., Docket No. 96-369, slip op. at 13 (Vt. Nov. 7, 1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUES

1. Whether, after weighing the competing policy considerations of flexibility and finality in connection with Criteria 1 (F) and 8 as articulated in the In re Stowe Club Highlands, 166 Vt. 33 (1996), analysis and applied to the Permit, the Board will proceed to consider the merits of the Amendment Application.

2. If Issue #1 above is answered in the affirmative, then pursuant to 10 V.S.A. § 6086(a)(l)(F), whether the Project must of necessity be located on a shoreline in order to fulfill the Project's purpose, and whether the Project will, insofar as possible and reasonable in light of its purpose: (i) retain the shoreline and the waters in their natural condition, (ii) allow continued access to the waters and the recreational opportunities provided by the waters, (iii) retain or provide vegetation which will screen the Project from the waters, and (iv) stabilize the bank from erosion, as necessary, with vegetation cover.

3. If Issue #1 above is answered in the affirmative, whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will "have an undue adverse effect on the scenic or natural beauty of the area [and] aesthetics" of the area.

III. FINDINGS OF FACT

1. The Project involves a 10.58 acre tract of land ("Tract") located on a bluff along the eastern shore of Lake Memphremagog in the City of Newport, Vermont. Approximately 875 feet of shoreline form the western property line, of which approximately 400 feet are designated as wetland. Access to the Project is via Bigelow Bluff Road, an existing municipal road that ends at the Tract.

2. Appellants' property is located to the east and south of the Tract and contains large areas of forested land that adjoin the Tract. A number of residences and other structures are located in a wooded area to the north of the Tract. These structures are largely screened from the lake.

3. Until 1985, the Tract was forested with a plantation of red and white pine and oak trees. In preparation for development of the Tract but prior to applying for an Act 250 permit, Carrier' cleared the Tract of trees and sold the lumber, buried the stumps on the Tract, stripped the topsoil, excavated 17,000 cubic yards of earth that was used as fill for the stump burial area, regraded the Tract into terraces for house sites, and excavated a road into the subdivision.

4. In the mid-l 980s, Carrier sought a land use permit for a project ("First Proposal") on the Tract consisting of nine residential lots, the construction of improvements on approximately 1,100 feet of Bigelow Bluff Road, and the development of a 700 foot access road from the end of Bigelow Bluff Road to Lots l-7. Lots 8 and 9 were to be served by driveways entering directly onto Bigelow Bluff Road. The First Proposal also included the construction of a stairway from Lots 1, 2, and 3 down a steep bluff to provide access to the lake.

5. By decision issued October 5, 1990, the Board denied Carrier a land use perrnit for the First Proposal because the Board was unable to reach affirmative conclusions as to Criteria l(F), 4, 8, and 9(B). In connection with its review of the First Proposal, the Board stated:

> The Board determines that this application must be reviewed for

[1] The Tract was originally owned by Bernard and Suzanne Carrier. At some point prior to the initiation of the instant appeal, title transferred to Bernard Carrier individually. For ease of reference, the Board will refer to "Carrier" throughout these findings even in those instances when the property was owned by both Bernard and Suzanne Carrier.

compliance with the criteria as the site existed prior to the clearing and excavation that took place. Act 250 requires that a permit must be obtained before commencing construction on a subdivision or development. 10 V.S.A. § 60819(a). If the Board were to review this application for compliance with the site as it existed after it was cleared and terraced, some developers would be encouraged to commence development without filing an application for an Act 250 permit, thereby reaping an economic advantage by getting a head start on construction, We are therefore reviewing this application for compliance with the criteria based upon the site as it existed before construction commenced.

6. On August 14, 1997, the Board issued the Permit and supporting Findings of Fact, Conclusions of Law, and Order ("1997 Decision") to Carrier, authorizing what Carrier identified as Phase I of a revised project application ("Revised Proposal"). Although the Revised Proposal referenced two phases of development activity, it described only Phase I which consisted of development of the upland portion of the Tract into Lots 7-9. Potential development of the remainder of the Tract was not considered by the Board in connection with the Permit. No timely appeal was made from the Permit and 1997 Decision.

7. The Permit authorized the creation of "a 3-lot subdivision with the balance of the Tract to be retained as an undeveloped remainder parcel; [the construction of] single family homes on the 3 approved lots and related utilities to serve those 3 lots; and [the construction of] approximately 1,100' of improvements to Bigelow Bluff Road and ... 700' of internal access road and cul-de-sac. The 3 lots approved under [the Permit were] Lots 7, 8, and 9 of an original 9-lot subdivision proposed" as the First Proposal.

8. The Permit was issued subject to the following conditions:

   1. Condition 1 of Land Use Permit #7R0639-Reconsideration [(the District Commission permit authorizing Phase I)] is amended to read:

      The project shall be completed, operated and maintained in accordance with: (a) the terms and conditions of Land Use Permit #7R0639-Reconsideration, except as amended hereby; (b) the plans, exhibits, and testimony submitted by the Permittees to the Environmental Board; (c) the Findings of Fact, Conclusions of Law, and Order in #7R0639-EB **(Reconsideration) issued August 14, 1997 [(previously defined as the 1997 Decision)]**; and (d) the conditions of this permit. No substantial or

material changes shall be made in the project without the prior issuance of a permit amendment.

2. Condition 3 of Land Use Permit #7R0639-Reconsideration is amended to read:

The District Commission maintains continuing jurisdiction during the lifetime of this permit and may periodically require that the permit holder file an affidavit certifying that the project is being completed in accordance with the terms of the permit. Further subdivision or development of the so-called "remainder" parcel (Lots l-6) is expressly prohibited, except as provided herein, unless a permit amendment is obtained prior to the commencement of such subdivision or development. In the event that the Permittees elect to file a permit amendment application for Phase II of the Revised Project or any permit amendment application with respect to subdivision or development of the so-called "remainder" parcel (Lots 1-6), not only will such development be reviewed under the ten Act 250 criteria but as a preliminary matter it will be reviewed in accordance with the analysis set forth in the Vermont Supreme Court's decision in In re Stowe Club Hi&lands, No. 95-341, slip op. at 5 (Vt. Nov. 8, 1996), and, if applicable, any Board rule which may be adopted to implement the holding in that case.

3. Condition 9 of Land Use Permit #7R0639-Reconsideration is amended to read as follows:

A 50 foot minimum buffer shall be established by the Applicants and maintained by them and their assigns and successors in interest between the wetland's delineated edge and any path, easement, or right-of-way to the proposed common shore access area. No future development may occur within this buffer zone, including improvements to the common shore access, unless a permit amendment is obtained prior to the commencement of such development or a jurisdictional opinion is obtained that such development is not material or substantial.

4. Condition 12 of Land Use Permit #7R0639-Reconsideration is amended to read as follows:

Prior to the sale of the first lot, the Permittees shall submit a revegetation plan for the entire Tract, prepared with the assistance of the District Coordinator and County Forester, for approval by the District

Commission. This plan shall achieve the following performance standards:

(a) The Tract shall be planted with essentially the same evergreen and deciduous species as were removed from the Tract in 1985;
(b) Existing vegetation shall be supplemented with the planting of trees and shrubs at a density so as to return the shoreline to its natural condition and achieve the requisite screening of any proposed houses and related amenities from the Lake; and
(c) The selection and placement of individual trees and shrubs shall be done so as to achieve compatibility with the vegetative cover on surrounding parcels.

Prior to the sale of the first lot, the Permittees shall plant the trees and shrubs specified in the approved revegetation plan.

The Permittees shall take all necessary measures to ensure that all vegetation, existing or proposed to be planted under the approved revegetation plan, shall be maintained by them and their assigns and successors in interest. In order to assure that such vegetation shall thrive, the revegetation plan may require the Permittees to: (1) replace stripped topsoil; (2) ensure that new plantings are regularly watered, fertilized and mulched; and (3) prune, remove and replace dead or diseased plants as necessary.

9. In the 1997 Decision, the Board reviewed the Revised Proposal against the Tract as it appeared prior to the clear-cut while taking into "consideration the state of the Tract as it appear[ed in 1997] as a result of the regeneration of native plant species and the planting of trees and grass by [Carrier] during the intervening twelve years."

10. In the 1997 Decision, the Board also made the following determination regarding the scope of its review of the Revised Proposal:

> [A] Phase II development plan has not been submitted to the Board. Nevertheless, the Applicants seek guidance in this proceeding on how they might develop the lots nearest the shoreline and wetland, Lots 1-6, in preparation for the design and submission of a Phase II development plan.
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> The Board does not design projects for applicants nor does it provide advisory opinions on what hypothetical elements of design would

receive the Boards approval. ... Thus, to the extent that the Applicants have asked the Board in this proceeding to consider Lots l-6 as an undeveloped parcel in determining that Lots 7, 8, and 9 satisfy criteria 1(F) and 8, the Board advises the Applicants that they may have severely limited their opportunities to request a subsequent amendment to authorize Phase II development of Lots 1-6. See In re Stowe Club Highlands, No. 95-341, slip op. at 5 (Vt. Nov. 8, 1996).

11. In its 1997 Decision, the Board made the following Findings of Facts regarding the Revised Proposal:

> 9. . . . The Applicants further propose to establish a minimum building setback of 500 feet from the Lake shoreline, but plan to provide Lots 7, 8, and 9 with access to the Lake via a right-of-way between Lots 4 and 5, in lieu of the stairways proposed in the Project Application. The Applicants will establish a SO-foot buffer zone around the wetland located on Lots 5 and 6. . . .
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> Criterion 1 (F) (shorelines)
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> 14. No construction of housing is proposed on Lots l-6 in Phase I of the Revised Project. The proposed house sites for Lots 7, 8, and 9 are on the upland portion of the Tract, located a minimum of 500 feet from the shoreline.
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> Criterion 8 (aesthetics and scenic and natural beauty)
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> 29. A 500-foot set back from the Lake shall apply to the siting of buildings on Lots 7, 8, and 9.
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> 34. The Applicant planted some trees on the Tract following the clearing in 1985. Additional plantings of native species of trees on Lots 1-6 would continue to restore the Tract to a more natural setting and one more compatible with adjoining properties. Conditions imposed to require replanting of these lots with particular attention to that area closest to the lakeshore will effectively serve to mitigate the adverse effect created by the proposed subdivision, provided that there is no unauthorized cutting on Lots l-6, now and in the future.

12. In its 1997 Decision, the Board made the following Conclusions of Law regarding Criterion 1 (F):

> [In its 1990 Decision, the Board] found that because most of the trees had been removed from the Tract, the subdivision did not retain existing vegetation or provide new plantings which would result in adequate screening from the waters. The Board determined that neither the Applicants' planting plan nor a requirement in proposed covenants for lot owners to plant $2,000 worth of vegetation would result in the necessary reforestation of the site to provide for such screening let alone return the Tract to its natural condition. Indeed, the Board concluded that the Tract was almost totally open to view from the lake and that it would take 15 to 25 years for the trees recently planted and proposed to be planted in accordance with the Applicants' planting plan to grow tall enough to provide any significant screening. Therefore, the Board concluded that the Applicants had not demonstrated that, insofar as possible and reasonable in light of its purpose, the subdivision would retain the waters in their natural condition (subcriterion i) or retain or provide vegetation which would screen the subdivision from the waters (subcriterion iii).
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> ***The Applicants have proposed to address the above-noted deficiencies by not undertaking development of Lots 1-6 under Phase I of the Revised Project. They also propose a minimum 500-foot setback for the proposed houses, and a fifty-foot buffer around the shoreline wetland to assure its protection.*** In the twelve years since the clearing of the Tract, natural regeneration and growth of planted vegetation have occurred thereby addressing in large measure the Board's shoreline protection and aesthetic concerns under criteria l(F) and 8.
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> Nevertheless, the Board concludes, as it did in 1990, that the cutting of trees along the shoreline and indeed throughout the Tract went well beyond what would have been permitted under Act 250. Although some of the trees planted by the Applicants, most notably in the area of the shoreline "remainder" parcel, have grown to roughly twelve feet in height, others have simply died. Indeed, the general character of Lots l-6 remains open, grassed terraces with some immature white pine and other tree species planted in the vicinity of the lot lines. In the Board's opinion, the planting of additional trees and shrubs is required. These should be of essentially the same evergreen and deciduous species as were removed from the Tract in 1985, and they must be planted in sufficient density so as

> to return the shoreline to its natural condition and achieve the requisite screening of any proposed houses and related amenities from the Lake under criterion 1 (F). Additionally, as noted later in this decision, reforestation should be undertaken with a view toward achieving vegetative cover that is compatible with that existing on the surrounding parcels in satisfaction of the requirements of Criterion 8.
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> Consequently, in order to reach a positive finding that the Applicants have addressed the deficiencies with respect to vegetative cover noted by the Board in its 1990 decision under criteria 1 (F) and 8, the Board must fashion conditions, based on the evidence in the record, that will assure that reforestation of the Tract will occur in accordance with certain performance standards prior to the sale of the first lot. To this end, the Board has supplemented Condition 12 imposed by the District Condition in the Reconsideration Permit with its own condition requiring that planting of the Tract occur before the sale of the first lot.

1997 Decision at 14-15 (emphasis supplied and citations omitted).

13. In its 1997 Decision, the Board made the following Conclusions of Law regarding Criterion 8:

> In its Revised Project Application, the Applicants have argued that they have addressed the deficiencies identified by the Board in 1990. They point to their plans to develop only the three upland lots which are set back farther from the shoreline than most house sites on adjoining properties. They also note the planned 500-foot setback. But most importantly, they direct the Board's attention to the fact that in the intervening twelve years since the clearing of the site, the remaining trees have grown. On Lots 1-4, the Applicants claim the planted trees are now 10 to 12 feet in height and provide some screening between lots, but they concede that these trees provide screening to a much lesser degree from the Lake. The Applicants have not presented a planting plan for these or any of the other lots within the subdivision, arguing that landscaping/ screening plans should be submitted for each specific house. Finally, the Applicants have withdrawn their offer to require lot owners to pay $2,000 for the replanting of mature trees to hide their homes, based on the Board's purported lack of confidence in this approach to mitigation.

> In considering Phase I of the Applicants' Revised [Proposal], the Board now concludes that the Applicants have remedied the deficiencies identified in the 1990 decision. By *electing to develop only the three upland lots (Lots 7, 8 and 9), and by establishing a minimum 500-foot setback, the Applicants have addressed the specific aesthetic objections raised by the proposed development of housesites close to the shoreline under the original proposal. Furthermore, the Board is persuaded that the growth ofplanted trees on the shoreline lots (Lots 1-4), and the generally healthy condition of the bank vegetation, now provide a level of screening which when supplemented with additional plantings will assure that the Revised [Proposal] is in character with its surroundings.* Therefore, with respect to Phase I of the Revised [Proposal], the Board is satisfied that the objections its raised in 1990 have been addressed in the specific following ways: a reduction in the number of proposed housing units, a significant increase in their setbacks, and the regeneration of natural vegetation and the planting of new trees have (1) dramatically reduced the visual impact of the Project from the Lake, and (2) reduced visual incompatibility with neighboring properties.
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> *In reaching its affirmative conclusion under criterion 8, as well as under criterion I(F), the Board is relying on the Applicants' representation that* to correct the deficiencies in the 1990 decision, *the Applicants are not requesting approval for development of Lots 1-6. If the Applicants had requested approval for development of those lots, on the evidence presently before the Board, a permit would have to be denied.* This does not mean that the Applicants are precluded from later seeking approval by permit amendment of construction on Lots l-6. However, any subsequent Phase II proposal shall first be evaluated in light of Stowe Club Highlands and, if applicable, any Board rule which may be adopted to implement the holding in that case.

1997 Decision at 19 (emphasis supplied).

14. Carrier now seeks to amend the Permit according to the plans proposed by the Project. The Project includes the subdivision of that portion of the Tract identified in the Permit as the "remainder parcel" into five additional, single-family residential lots (Lots 1-4 and 6) and a sixth "Conservation and Recreation Parcel" (Lot 5). The Conservation and Recreation Parcel is devoted to the common use of the owners of the other eight lots. The Project also includes the reduction of the previously approved access road by approximately 100' and the relocation of the cul-de-sac, the reconfiguration of the previously approved Lot 7

property line (with no change in house location), and the modification of the northerly wetland/footpath buffer. Carrier also seeks conceptual approval for the optional construction of "Viewing Gazebos" and approval to submit site specific landscape and screening plans for District Commission approval on a lot by lot basis within the "landscape/development envelope," as shown on his plan.

15. Lots 7-9 (approved by the Permit) and proposed residential Lot 4 are located on the eastern side of the Tract. Lots 1, 2, 3, 5, and 6 are located on the western side of the Tract, adjoining Lake Memphremagog.

16. Property to the north and south of the Tract is forested with mature red pine and deciduous trees. Lot 9 and a portion of Lot 8 are similarly forested. Lot 7 and the remainder of Lot 8 are covered with what appears to be newer growth consisting of less mature trees and other vegetation.

17. Proposed residential Lots 1, 2, 3, and 6 contain a significant amount of mowed meadow areas interspersed with trees. These trees, a mix of evergreen and deciduous, are less mature than the trees to the north and south of the Tract. While some appear to have been planted in short rows or clusters, others appear to be natural growth.

18. Proposed residential Lots 1, 2, and 3 are roughly terraced, with the highest elevation on the northern-most Lot 1. The terracing does not represent the current proposed lot lines. Rather, the terracing corresponds to the lot lines for the narrower Lots l-4 envisioned in the First Proposal.

19. Lots 1, 2, and 3 have steep shoreline slopes, approximately 25-35' high, that are currently vegetated with trees and brush. The vegetation mostly covers the slope. There is some evidence of erosion. Lots 5 and 6 do not have steep slopes.

20. A line of evergreen and deciduous trees are located at the top of the shoreline slope on Lot 1, Lot 2, and a small portion of Lot 3. While the trees on Lot 1 provide fairly solid screening during at least the summer months, a lakeside viewer would have a clearer view of Lot 2. Much of Lot 3 is entirely unscreened by vegetation.

21. House sites on Lots 1, 2, and 3 are proposed at 120', 80', and 240' from the top of the shoreline slopes.

22. If the Board were to issue a permit, it would require the installation of a buffer zone fence positioned at the top of the bank to be erected during house

construction and maintained on a permanent basis. As proposed in the Project, in contrast to the First Proposal, owners of Lots 1, 2, and 3 would not be permitted to construct individual shoreline stair access or footpaths.

23. Proposed residential Lot 4 is located entirely in the upland portion of the Tract and does not border the lake. It is covered with what appears to be a new growth forest of mixed evergreen and deciduous trees.

24. A stand of deciduous and evergreen trees forms a barrier between the lake's edge and the mown portion of proposed residential Lot 6. The barrier is approximately 150' deep.

25. The western portion of the proposed Conservation and Recreation Parcel (Lot 5) is covered with wetland vegetation. The eastern portion of Lot 5, where a parking area is proposed, is located in an upland area of the Tract and is a mowed meadow. The Project proposes a footpath on the northern edge of Lot 5 to provide individual lot owners with common access to the lake.

26. The First Proposal proposed a fire protection system fed by lake water drawn through an insulated intake pipe. The current Project dispenses with the lake withdrawal system and replaces it with internal sprinkler systems to be installed at the time each house is constructed.

27. By relocating Lot 4 to the upland area, the average width of shoreline lots increased over those proposed in the First Proposal.

28. Land use on the land surrounding Lake Memphremagog ranges from a marina, to multi-unit condominiums, to large, year-round homes, to a mixture of small seasonal cottages and moderate year-round homes. Some of the structures are on cleared acreage, while others are more nestled into forested areas. Existing homes have setbacks greater than, equal to, and less than those proposed by the Project. The view across the lake from the Tract is of a mix of woods and open space, homes and undeveloped areas.

29. Because the house plans will vary, Carrier states that it is impossible to prepare a vegetative buffer plan for houses on Lots l-3. Instead, he proposes that the owners of Lots 1-3 be required to submit a site specific landscaping plan with an amendment application seeking approval for the construction of their homes. Carrier states that he would accept a permit condition that no construction could occur on Lots l-3 without prior District Commission approval of individual landscaping plans.

30. Proposed deed restrictions for lots within the Project provide that homes be located within the building and landscaping envelopes designated on the Project plan, that final individual landscape plans for the envelope area be submitted for District Commission approval prior to the construction of any home on the lot, and that lot owners conform to the following development restrictions:

    a. No homes shall be placed on, erected, or utilized as temporary or permanent residence on the subdivision.
    b. The "footprint" area of all residences (excluding garages) shall be no less than 1200 square feet nor larger than 3000 square feet.
    c. The proposed architecture, and color of new structures shall be approved by the Owners Association in accordance with the rules and regulations adopted by the members.

31. No proposed by-laws of the homeowners association were submitted into the record.

32. Carrier submitted a "Re-vegetative Plan" in connection with his request for approval of Lots l-6. The Plan was also submitted as a response to the requirement imposed by Condition 4 of the Permit (which approved Lots 7-9). The plan proposes the addition of 3 1 new trees on Lots l-3 with a minimum 1 1/2" caliper. The trees would be a mix of red oak, white pine, and white birch. Three of the 3 1 proposed trees would be evergreen and 28 would be deciduous. The majority of trees would be planted on Lot 3.

33. On February 22, 1999, the District Commission issued the Dash 1 Permit and Decision to Carrier authorizing the Project.

34. At the hearing in this matter, Carrier's sole witness and representative acknowledged that setting aside Lots l-6 was "key" in addressing the deficiencies of the First Proposal in order to obtain the Permit in 1997 approving Lots 7-9. (7/28/99 public hearing cassette tape #3, side A).

35. At the hearing in this matter, Carrier's sole witness and representative stated that none of the pre-filed testimony or exhibits offered into the record provided evidence concerning the three criteria under the Stowe Club Highlands. He confirmed that it was not his intention to file evidence that there have been (a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology. (7/28/99 public hearing cassette tape #2, side A).

36. At the hearing in this matter, Carrier's sole witness and representative stated that Carrier determined that Stowe Club Highlands did not apply to the consideration of the Project and that there was "no way" that the Project would withstand scrutiny under the three criteria of the Stowe Club Highlands analysis. (7/28/99 public hearing cassette tape #3, side A).

IV. CONCLUSIONS OF LAW

A. Jurisdiction and Scope of Review

The Project constitutes a substantial and material change to the Permit pursuant to Environmental Board Rule ("EBR") 2(G) and (P) and is therefore subject to Act 250 jurisdiction. EBR 34.

When a party appeals from a District Commission determination, the Board provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the de novo review of a District Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the District Commission regarding the criteria and other issues on appeal in this matter. Rather, it must regard the Permit as evidence to be offered by the parties.

As stated more fully in its Memorandum of Decision issued on May 26, 1999, the Board concludes that if it reaches an affirmative conclusion as to Issue #1 and proceeds to review the Project under Criteria 1 (F) and 8, then the Board will conduct its review based upon the site as it existed prior to 1985, while also taking into consideration the state of the Tract as it currently exists as a result of the regeneration of native plant species and the planting of trees and grass during the intervening years.

B. Official Notice

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases before administrative bodies. Id. § 810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Hardy, 144 Vt. 610, 612 (1984). judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201 (c) and (f). Upon timely request, a party is entitled to an opportunity

to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201 (e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

Pursuant to 3 V.S.A. §810(4), the Board takes official notice of the District Commission's February 22, 1999 permit and decision regarding Amendment Application #7R0639-1, from which this appeal was taken (previously defined as the Dash 1 Permit and the Commission Decision). The Dash 1 Permit and Commission Decision are accepted into the record as evidence of the findings and conclusions made by the District Commission and the permit conditions it imposed. Because of the de novo nature of this appeal, the Board cannot accord them the same value as it would a final decision and permit.

C. Motion to Dismiss

As stated at the July 28, 1999 public hearing in this appeal, the Board denies Appellants' Motion to Deny the Application Without a Site Visit or Hearing. Although some of Appellants' evidentiary objections were granted, others were not. By granting Appellants' request, the Board would have been denied the opportunity to question witnesses, hear cross-examination, or view the site in its current and disputed state of vegetation, any of which could have been crucial to the ultimate determination reached by the Board.

D. Whether the Board Should Proceed to a Review of the Permit Amendment Application on its Merits

1. Stowe Club Highlands / Flexibility versus Finality

In In re Stowe Club Highlands, 166 Vt. 33 (1996), the Vermont Supreme Court affirmed the Board's denial of a permit amendment application for a project which would have developed a lot previously set aside by permit condition under Criteria 8 and 9(B). While the Court overruled the Board's use of collateral estoppel as the analytical framework, the Court concluded that "the Board addressed certain policy considerations that it considered relevant in deciding whether to grant the permit amendment." Id. at 38. The Court stated:

> The Board framed its discussion as weighing the competing values of flexibility and finality in the permitting process. If existing permit conditions are no longer the most useful or cost-effective way to lessen the impact of development, the permitting process should be flexible enough to respond to the changed conditions. The Board recognized three kinds

of changes that would justify altering a permit condition:

> (a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology.

Id. Ultimately, the Court concluded that the Board was "justified in denying" the permit amendment application based upon the balancing of the policies of finality and flexibility. Id. at 40. See also Re: Nehemiah Associates, Inc., Land Use Permit Application #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Apr. 11, 1997) [EB #592]; Re: Town of Hinesburg, Land Use Permit Application #4C068 1-8-EB, Findings of Fact, Conclusions of Law, and Order (Sept. 23, 1998) [EB #704].

> The principle of finality is derived from the consequences of a permit being issued without any subsequent appeal. Once a permit has been issued and the applicable appeal period has expired, the findings, conclusions, and permit are final and are not subject to attack in a subsequent application proceeding .... "To hold otherwise would severely undermine the orderly governance of development and would upset reasonable reliance on the process." In re Taft Corners Associates, 160 Vt. 583,593 (1993). ...
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> [In contrast, t]he principle of flexibility is derived from the consequences of the development process. "[O]nce a permit has been issued it is reasonable to expect the permittee to conform to those representations unless circumstances or some intervening factor justify an amendment." Re: Department of Forests and Parks Knight Point State Park, Declaratory Ruling #77 at 3 (Sept. 6, 1976). ... In a permit amendment application proceeding, the central question is "not whether to give effect to the original permit conditions, but under what circumstances those permit conditions may be modified." In re Stowe Club Highlands ....

Nehemiah, supra at 2 l-22.

Generally speaking, the party seeking to change the status quo has the burden of proof. See Re: W. Joseph Gagnon, Declaratory Ruling #173 at 5 (Nov. 22, 1987) citing McCormick, Evidence 949. The burden of proof includes both the burden of production and persuasion. In this proceeding, Carrier is the party seeking to change the status quo by requesting an amendment to an existing permit. Accordingly, Carrier has the burden of proof on this preliminary issue.

At the hearing, Carrier raised the issue of burden of proof, continuing to interpret

this to mean that he carried the burden of analysis. As he has argued before, Carrier asserted that it would be unfair to require a *pro se* applicant (i) to determine whether the Stowe Club Highlands flexibility versus finality analysis applies to an amendment application and then (ii) to conduct the analysis. The Board, he alleges, is the entity best able to conduct this analytical inquiry.

The Board now repeats what it stated at the public hearing and in its Memorandum of Decision issued May 26, 1999 and what the Chair set forth in the Prehearing Conference Report and Order. The Stowe Club Highlands analysis "requires a permittee to present *facts*. For the very reasons Carrier so eloquently explained that an applicant carries the burden under the ten criteria, an applicant/permittee also bears the burden of demonstrating a factual change justifying an alteration of a permit condition" under at least one of the three factors articulated above. Memorandum of Decision at 5. The burden of proof includes the burden of persuasion. This does not mean, however, that the Board abdicates its statutory responsibility to evaluate the facts of the case under the appropriate analytical framework. In other words, if an applicant presented sufficient facts for the Board to reach a conclusion that favored flexibility, the Board would not deny the applicant the opportunity to pursue the amendment simply because he had not analyzed those facts in the appropriate manner. Therefore, the Board reaffirms its previous conclusions that it is appropriate that an applicant, as the party most familiar with the facts of a proposed amendment application, bears the burden of producing sufficient evidence for the Board to determine which policy -- flexibility or finality -- is the weightier consideration.

2. **Whether the Stowe Club Highlands Analysis can be Applied in the Present Case**

As set forth in the preceding findings of fact, Carrier neither submitted testimony or evidence concerning the three criteria articulated in Stowe Club Highlands, nor was it his intention to do so. Rather, Carrier argues that the Stowe Club Highlands analysis is not applicable to his Amendment Application for the Project -- the subdivision of Lots 1-6 (Phase II). Carrier contends that the current Project does not attempt to amend any condition imposed by the Permit (which authorized the subdivision of Lots 7-9 as Phase I). He also asserts that Phase II was openly contemplated at the time he applied for the Permit for Phase I. Therefore, Carrier concludes, the flexibility versus finality analysis does not apply and he has not analyzed the Project under the Stowe Club Highlands factors.[2]

[2] As stated in the Prehearing Conference Report and Order issued on April 30, 1999, the first issue in this appeal is whether, after weighing the policy considerations of flexibility

Permit Condition 2 states that "[f]urther subdivision or development of the so-called 'remainder' parcel (Lots l-6) is expressly prohibited unless a permit amendment is obtained prior to the commencement of such subdivision or development. ... [A]s a preliminary matter [any such permit amendment application] will be reviewed in accordance with the analysis set forth in the Vermont Supreme Court's decision in In re Stowe Club Highlands ...." See Finding 8 above. It is clear from Permit Condition 2 that the Board intended the "remainder" parcel to remain undeveloped and would not otherwise have approved the subdivision of Lots 7-9. Indeed, Carrier's sole witness and representative acknowledged that setting aside Lots l-6 was "key" in addressing the deficiencies of the First Proposal in order to obtain the Permit in 1997 approving Lots 7-9. See Finding 34 above.

The Board's findings of fact and conclusions of law set forth in the 1997 Decision, which are incorporated into the Permit through Permit Condition 1, confirm the interpretation that the Board would not have authorized Phase I but for the fact that no development was proposed on the "remainder" parcel. In fact the Board specifically stated:

> In reaching its affirmative conclusion under criterion 8, as well as under criterion 1 (F), the Board is relying on the Applicants' representation that to correct the deficiencies in the 1990 decision, the Applicants are not requesting approval for development of Lots l-6. If the Applicants had requested approval for development of those lots, on the evidence presently before the Board, a permit would have to be denied.

1997 Decision at 19 (See Finding 13 above). The Board also based its decision on the fact that Carrier had proposed the establishment of a 500' minimum building setback from

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versus finality, the Board will proceed to review the merits of the Amendment Application. The issue is not whether it is *appropriate* to consider the Project under the Stowe Club Highlands analysis. Although both parties filed objections to other aspects of the Prehearing Order, neither party objected to the content of the first issue as framed or requested its clarification. Neither did they request that an additional preliminary issue be added that addressed the propriety of applying Stowe Club Highlands in this case, although it was an issue that they had argued before the District Commission. Therefore, even if Carrier chose to argue to the Board that the Stowe Club Highlands analysis does not apply, it was incumbent upon him to also address the first issue on appeal as it is drafted.

the shoreline for Lots 7-9.[3] Furthermore, the Board underscored the clear intent of its Permit Conditions and conclusions of law when it advised Carrier that, by asking the Board "to consider Lots l-6 as an undeveloped parcel in determining that Lots 7, 8, and 9 satisfy criteria l(F) and 8, [he] may have severely limited [his] opportunities to request a subsequent amendment to authorize Phase II development of Lots I-6. See In re Stowe Club Highlands …." 1997 Decision at 11 (See Finding 10 above). The Board's findings of fact in the instant appeal support the conclusion that the Project seeks to change Permit Conditions 1 and 2 by creating residential lots in the undeveloped "remainder" parcel upon which issuance of the Permit was clearly conditioned.

The Board also notes that Permit Condition 4 requires Carrier to submit and obtain approval for a revegetation plan "for the entire Tract" and plant the approved vegetation prior to the sale of the first of Lots 7-9. Permit Condition 4 dictates that the *Tract* be planted with essentially the same evergreen and deciduous species as were removed from the Tract in 1985 and that the selection and placement of individual trees and shrubs achieve compatibility with the vegetative cover on *surroundingparcels.* See Finding 8 above. The parcels to the north and south of the Tract are forested with mature red pine and deciduous trees. Carrier appears to have allowed natural vegetation to grow on Lots 4 and 5, which are now covered with less mature growth than the neighboring tracts. In contrast, residential Lots 1, 2, 3, and 6 contain a significant amount of mowed meadow areas interspersed with trees. In connection with the Project, Carrier proposes to plant an additional 3 1 trees, only 3 of which are evergreen. The Board's findings of fact in the instant appeal support the conclusion that the Project seeks to change Permit Condition 4 by maintaining mown meadows with interspersed trees in Lots 1, 2, 3, and 6.

Carrier's Amendment Application seeks to change Permit Conditions 1, 2, and 4, each of which requires the maintenance of an undeveloped "remainder" parcel which Carrier proposes to subdivide into five residential lots and one "Conservation and Recreation" parcel. As a result, Carrier's first argument -- that the current Project does not attempt to amend any condition imposed by the Permit -- fails.

[3] The Board is not persuaded by the argument Carrier made during the hearing that the 500' minimum setback was intended merely as a recognition of the horizontal distance between the shoreline and the houses, ie. that the houses on Lots 7-9 would be "set back" from the shoreline by a distance of 500' and that at some point in the future houses would be located within the 500' area. Not only did the Board clearly rely upon the representation that there would be a 500' "setback" (e.g. a 500' depth of *undeveloped* land), but there would simply have been no reason for Carrier to have proposed locating the homes 500' from the shore as a means of addressing the deficiencies of the First Proposal if he had not intended the Board to consider that space as an undeveloped aesthetic buffer between the lake and the homes on Lots 7-9.

Carrier next argues that the Stowe Club Highlands analysis is inapposite because Phase II was openly contemplated at the time he applied for the Permit for Phase I. This argument must also fail. The Permit authorized the Phase I application and the Board did not consider -- nor could it consider -- Phase II at that time. The fact that Phase II was mentioned during the Phase I process is significant only in determining the foreseeability of change under the three Stowe Club Highlands factors. See Nehemiah, supra at 16-17 (there were no unforeseeable changes in construction or operation of the project where applicant had contemplated possible development of the 3.38 acre agricultural parcel when it applied for an earlier permit). As a result, Carrier's second argument fails.

Accordingly, the Board concludes that it is appropriate to consider the Project under the analysis articulated in Stowe Club Highlands.

3. **Analysis Under Stowe Club Highlands**

The Board is now ready to consider Carrier's Amendment Application in light of the Stowe Club Highlands analysis.

It will first consider the factors favoring flexibility. Carrier's sole witness and representative stated that none of the pre-filed testimony or exhibits offered into the record provided evidence concerning the three factors under Stowe Club Highlands. In fact, he stated that it was not his intention to provide such evidence. Therefore, Carrier has failed his burden to produce evidence of changes, such as those indicated in Stowe Club Highlands, that would favor flexibility. Furthermore, the Board has been unable independently to identify any changes supportive of flexibility in this matter. See also Nehemiah, supra at 16-l 7 (there were no unforeseeable changes in construction or operation of the project where applicant had contemplated possible development of the 3.38 acre agricultural parcel when it applied for an earlier permit).

In contrast, the facts weigh heavily in favor of finality because, as discussed above, it is clear that in 1997 the Board relied upon the buffer created by the lack of development on the "remainder" parcel, the 500' setback, and the contemplated revegetation to reach a positive conclusion as to Criteria l(F) and 8. See Section IV.D.2. above. See also Nehemiah, supra at 20-23 (finality outweighed flexibility where District Commission relied upon an "open space" condition to reach positive conclusions under Criteria 8 and, without that condition, would have denied the original permit). "While an applicant controls the *application* that is submitted for Act 250 approval, it is the Commission [or Board] that controls the Act 250 *permit* that is ultimately issued." Id. at 22 (emphasis in original).

> If conditions to mitigate impacts can simply be ignored and not complied with, and instead relitigated at a future date, the protection of the public and the environment from the impacts those conditions are designed to remedy is less likely to occur. In such a circumstance, the Act 250 decision-making process will become less one of making decisions which are adhered to, and more one of picking the time and composition of [the] Act 250 tribunal most favorable to one's interest.

Re: Stowe Club Highlands, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order at 10 (June 20, 1995) [EB #616], aff'd, In re Stowe Club Hi&lands, supra (quoting Re: Cabot Creamery Cooperative. Inc, #5W0870-13-EB, Memorandum of Decision at 11 (Dec. 23, 1992)).

The Supreme Court has observed that "foreseeability is related to the degree of change" and that "while small or moderate changes are expected and even common, extreme changes will likely come as a surprise to all." Stowe Club Highlands, 166 Vt. at 39. Therefore, a permit applicant "should consider foreseeable changes in the project during the permitting process, and not suggest conditions that [it] would consider unacceptable should its project change slightly. Otherwise, the initial permitting process would be merely a prologue to continued applications for permit amendments." Sl. e e also Re: The Stratton Cornoration, #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Jan. 15, 1998) [EB #688].

Accordingly, the Board concludes that the policy of finality outweighs the policy of flexibility in this appeal. Therefore, Carrier's Amendment Application for the Project is denied.

E. Criteria l(F) (shorelines) and 8 (aesthetics)

Because it answered Issue #1 in the negative, the Board does not reach the question of whether the Project as proposed satisfies the requirements of Criteria 1 (F) and 8.

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V. ORDER

1. Official notice is taken of the Dash 1 Permit and Commission Decision as set forth in Section IV.B. above

2. Appellants' Motion to Deny the Application Without Site Visit or Hearing is denied.

3. Carrier's Amendment Application is denied becausethe policy of finality outweighs the policy of flexibility.

4. The Board does not reach the questions of whether the Project conforms with Criteria l(F) and 8.

5. Jurisdiction is returned to the District #7 Environmental Commission.

Dated at Montpelier, Vermont this 19th day of August, 1999.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
W. William Martinez
Rebecca M. Nawrath
Alice Olenick

Board Member Robert H. Opel did not participate in this proceeding.

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