

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

Re: Larkin Tarrant Hoehl Partnership  
Land Use Permit Amendment #4C1057-1-EB

**MEMORANDUM OF DECISION**

This Memorandum of Decision addresses preliminary issues in this appeal, which was filed by Larkin Tarrant Hoehl Partnership (LTH). As set forth below, the Board limits the scope of its review under Criterion 8 (aesthetics) to the signage as requested by LTH, and rules that *Stowe Club Highlands* applies.

**I. PROCEDURAL SUMMARY**

On February 24, 2000, the District #4 Environmental Commission (Commission) issued Land Use Permit #4C1057 (Original Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Original Decision) to Permittee for the construction of a 71-room hotel on 5.61 acres of land at the corner of Dorset Street and Williston Road in South Burlington, Vermont (the University Inn), a central utility building, and parking and traffic circulation improvements to an existing 89-room Howard Johnson's hotel and 275-seat Friendly's restaurant, (Original Project).

On July 27, 2000, Permittee filed a permit amendment application, for the demolition of part of the existing Howard Johnson's hotel building that is connected to the Friendly's restaurant, and the construction of a 24-foot wide driveway between the two buildings with walkways and other landscape improvements, among other things (together with the University Inn changes described below, referred to herein as the Project).

On August 18, 2000, Permittee amended its permit amendment application to seek retroactive approval for changes that Permittee had made to the University Inn, including changing from a brick veneer façade, to a stucco façade on the top three stories with a real brick façade on the first story, and changing the building-mounted signage from cast aluminum letters backlit with white neon, to green, internally illuminated letters.

On January 25, 2001, the Commission issued Land Use Permit Amendment #4C1057-1(Amended Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Decision) to Permittee. The Commission denied the amendment application insofar as it sought retroactive approval for University Inn signage that differed from that authorized by the Original Permit.

On February 26, 2001, Permittee filed an appeal with the Board from the Amended Permit and Decision alleging that the Commission erred in its conclusions under 10 V.S.A. § 6086(a)(8)(Criterion 8), concerning the signage.

On March 30, 2001, Board Chair Marcy Harding convened a Prehearing Conference. The Permittee, represented by Carl Lisman, Esq., was the sole participant. On April 2, 2001, Chair Harding issued a Prehearing Conference Report and Order (PHCRO). Among other things, the PHCRO identified preliminary and merits issues and set a schedule for prehearing filings.

On April 10, 2001, Permittee filed a Motion to Continue the appeal for sixty days.

On April 13, 2001, Chair Harding issued a Chair's Preliminary Ruling granting Permittee's Motion and ordering that Permittee file a status report on or before June 13, 2001. Permittee did not file any objection to the Chair's Preliminary Ruling.

On July 16, 2001, over one month after the deadline for filing a status report had passed, the Chair issued a Chair's Proposed Dismissal Order. The Chair's Proposed Dismissal Order proposed dismissal of the case, subject to an opportunity for any party to object or to make oral argument to the Board, or both.

On July 18, 2001, Permittee filed an objection to the Chair's Proposed Dismissal Order. In the objection, Permittee stated that it did not wish to make oral argument to the Board. Permittee requested that the case be continued for another 60 days.

The Board deliberated on the Permittee's objections on August 15, 2001 and August 29, 2001.

On August 30, 2001, the Board issued a Memorandum of Decision granting Permittee's request for a continuance, and requiring that Permittee file a status report and request for further action on or before September 18, 2001, or the case would be dismissed.

On September 18, 2001, Permittee filed a status report and motion to continue the appeal for another 45 days. On October 2, 2001, the Chair proposed to grant this motion in a Chair's Proposed Continuance Order. No objection was filed and the continuance went into effect through November 2, 2001.

On November 5, 2001, Permittee filed a status report and a motion to continue the appeal for another 45 days.

On November 6, 2001, the Chair denied LTH's request for a continuance and ordered LTH to brief preliminary issues on or before December 26, 2001. The Order also provided that the matter would be scheduled for hearing after preliminary issues were resolved. LTH filed a brief on December 26, 2001.

The Board deliberated on January 16, 2002.

## II. PRELIMINARY ISSUES

- A. Whether the entire Project should be included in the Board's review of the Merits Issues, and if not, what portions of the Project should be included.
- B. Whether the test established by the Board in *Re: Stowe Club Highlands*, #5L0822-12-EB (Jun. 20, 1995), *aff'd* 166 Vt. 33 (1996), applies to the amendment application.

## III. DISCUSSION

### A. Scope of Appeal

LTH argues that the scope of appeal should be limited to whether the signage complies with Criterion 8 (aesthetics). LTH correctly claims that its appeal from the amendment determination should not subject the entire Project to Board review under Criterion 8. However, the amendment application involved other as-built changes, including changes to the face of the building, in addition to the signage changes.<sup>1</sup> The

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The amendment application, which originally concerned only the driveway, walkways, and related changes to the Howard Johnson's and Friendly's buildings, was amended to seek retroactive authorization for the following changes LTH had made to the University Inn building:

1. the exterior of the building was changed from dark-colored brick façade to an as-built first-story brick façade (brick extends to the second floor on the north elevation, only) with light-cream colored stucco on the upper three stories;
2. spandrel panels were deleted on the north, south and west elevations, under the first floor windows;
3. a curved arch was added on the north and south elevations of the covered entrance from driveway;
4. two columns of windows (east and west sides of the south elevation) were eliminated;
5. a louver was deleted from south elevation first floor and exhaust vents added to west elevation first floor;
6. a first-floor window was deleted from the center west elevation;
7. the roof was changed from metal standing seam to asphalt shingle; and
8. the building-mounted signs were modified from cast aluminum channel letters individually mounted and back lit with white neon tubing, to the as-built,

question is whether the Board can hear this Criterion 8 appeal on the signage changes without considering other aspects of the amendment application.

In its Memorandum of Law, LTH states that, in *Re: Stanmar, Inc., #5L0558-EB, #5L0558-1-EB*, Findings, Conclusions and Order (Nov. 26, 1979), "the Board ruled that the scope of review of an amendment to a permit is limited to the effects of the changes brought about by the amendment; it does not go to the impacts of the underlying project." (LTH's Memorandum of Law at 4.) In *Stanmar*, the Board discussed the need for finality and concluded that the Board's review of an amendment request was "properly limited to the effects of the changes comprehended by the amendment itself under the criteria of Act 250." *Stanmar*, Findings, Conclusions and Order at 5-6. As the Board held in *Stanmar*, this rule precludes an opponent from challenging the merits of an underlying permit by appealing a permit amendment. Only issues presented in the amendment proceeding may be considered. The question here, however, concerns narrowing the factual scope of appeal even further, to only a portion of the changes sought in the amendment application.

The general rule is that, once a criterion is appealed, the Board considers all issues within the scope of that criterion. "The policy of the Board has always been to construe notices of appeal liberally." *Re: Finard-Zamias Associates, #1R0661-EB*, Memorandum of Decision at 5 (Mar. 28, 1990); *see also, Re: Michael Caldwell and Estate of Gilbert H. Meyer, Jr., #5L1199-EB*, Findings, Conclusions and Order at 3 (Mar. 13, 1995). As the Vermont Supreme Court has stated, "Once an Act 250 criterion is noticed for appeal . . . issues generally within the scope of the criterion are properly before the Board." *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590-91 (Apr 30, 1993)(citing *In re Killington*, 159 Vt. 206, 214-16 (1992)); *accord, Re: City of Montpelier and Ellery E. & Jennifer D. Packard, #5W0840-6-WFP*, Memorandum of Decision at 9 (Sept. 9, 1999)(citing also *Re: Raymond James and Leslie Rowley, # 4C0534-1-EB*, Findings of Fact, Conclusions of Law, and Order at 8 (December 1, 1993)).

But where an appellant seeks Board review of a particular sub-issue within a criterion, and no other party objects or requests to broaden the scope of review, the Board generally will limit its review to the issue requested by the appealing party. *Re: Realty Resources Chartered and Bradford Housing Associates, #3R0678-EB*, Memorandum of Decision at 5 (Feb. 17, 1994)(cited in *Re: Woodford Packers, Inc., d/b/a WPI, #8B0542-EB*, Memorandum of Decision at 6 (Feb. 27, 2001)). For instance, in *Re: Josiah Lupton*, the permittee appealed a permit condition requiring it to maintain public access to the White River under Criterion 1(F), but parties opposing the permit

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internally illuminated, bright green signs.

LTH asks the Board to review only the signage, change #8 here, in this appeal.

sought, in relevant part, to expand the scope of appeal to include all of 1(F). *Re: Josiah E. Lupton, #3W0819 (Revised)-EB, Findings, Conclusions and Order at 16 (May 21, 2001).* Applying this rule, the Board held that all of Criterion 1(F) was properly at issue. In this case, however, no other party seeks to broaden the scope of the appeal filed by LTH.

LTH seeks to appeal the Commission's decision only insofar as it relates to the signage, and no other party objects. Accordingly, the second merits issue identified in the Chair's PCRO is limited to whether, pursuant to 10 V.S.A. § 6086(a)(8), the building-mounted signage has and will have an undue adverse effect on the scenic or natural beauty of the area and aesthetics.

#### B. *Stowe Club Highlands*

"The Board has consistently held that it will only reach the merits of a permit amendment application under any of the Act 250 criteria under appeal after applying the balancing test first set out in its seminal decision, *In re Stowe Club Highlands, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order (June 20, 1995), aff'd, In re Stowe Club Highlands, 166 Vt. 33 (1996).*" *Re: McDonald's Corporation and Murphy Realty Co., Inc., #100012-2B-EB, Findings, Conclusions and Order at 7 (Mar. 22, 2001)(citing also, In re McDonald's Corp., Rutland, Vermont, #1R0477-5-EB, Findings of Fact, Conclusions of Law, and Order at 12 - 14 (Dec. 7, 2000) (Rutland McDonald's); Re: Richard Bouffard, #4C0647-6-EB, Findings of Fact, Conclusions of Law, and Order at 7 - 9 (Oct. 23, 2000); Re: Donald and Diane Weston, #4C0635-4-EB, Findings of Fact, Conclusions of Law, and Order at 18 (March 2, 2000); Re: Ronald L. Saldi, Sr., and Marylou Saldi, #5R0891- 16-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Jan. 13, 2000); Re: MBL Associates, LLC, #4C0948-3-EB, Findings of Fact, Conclusions of Law, and Order at 12 - 14 (Oct. 20, 1999); Re: Town of Hinesburg and Stuart and Martha Martin, #4C0681-8-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Sept. 23, 1998); Re: Bernard and Suzanne Carrier, #7R0639-EB (Reconsideration), Findings of Fact, Conclusions of Law, and Order at 16 - 22 (Aug. 19, 1999); Re: The Stratton Corporation, #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Nov. 20, 1997); Re: Nehemiah Associates, Inc., #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order at 4 (Apr. 11, 1997), aff'd, 168 Vt. 288 (1998)).*

This appeal concerns an amendment application, and more specifically, the signage portion of an amendment application. Under existing Board precedent, *Stowe Club Highlands* applies. LTH does not provide any legal argument which would support not applying *Stowe Club Highlands*, and the Board finds no reason to modify its precedent in this case.

LTH contends that *Stowe Club Highlands* should not apply. In its Memorandum of Law, however, LTH appears to concede applicability by arguing the merits of *Stowe Club Highlands*.

LTH's arguments in this regard, listed on page 3 of its Memorandum, are somewhat overlapping. First LTH claims that there is "no such thing as back lit neon tubing," and that this is an unforeseeable change in construction or factual circumstances beyond the appellant's control. (LTH's Memorandum of Law, at 3.) However, the Commission did not require "back lit neon tubing," it required "cast aluminum channel letters individually mounted and back lit with white neon tubing." LTH concedes (in its argument listed as #3) that white neon tubing was, in fact, installed. Nevertheless, if there has been a relevant change in fact, LTH can make its case at the hearing. This does not go to the applicability of *Stowe Club Highlands*, the only issue before the Board.

Second, LTH argues that the City of South Burlington approved different signage than the Commission did, "thereby producing a regulatory circumstance beyond the control of the applicant." (LTH's Memorandum of Law, at 3.) Again, this would go to the merits of the *Stowe Club* analysis, not whether it should apply. LTH will have an opportunity to prove this alleged regulatory change at the merits hearing.

Third, LTH claims that it installed white neon tubing to backlight each letter, but that the "sides of the letters are green with gold trim." (LTH's Memorandum of Law, at 3.) LTH claims that this "fully complies with the original Permit," but that the City of South Burlington mandated a colored sign, and that this constitutes a change in regulatory circumstances. Apart from the claim of compliance with the existing permit, this argument is substantially the same as LTH's second argument. It also goes to the merits of the *Stowe Club Highlands* analysis.

In its Memorandum of Law, LTH argues the merits of *Stowe Club Highlands* rather than its applicability. LTH argues, in effect, that *Stowe Club Highlands* should not apply to bar the sign changes. As stated above, the fact that *Stowe Club Highlands* applies does not mean that the Board is precluded from reviewing the implications of the signage under Criterion 8 (aesthetics). *Stowe Club Highlands* does not necessarily bar changes to a permit, it merely ensures the proper balance between flexibility and finality.

*Stowe Club Highlands* applies here. The *Stowe Club Highlands* analysis, including the threshold question of whether the need for flexibility outweighs the need for finality, is a merits issue.

#### **IV. ORDER**

1. The first preliminary issue is answered in the negative. The second merits issue on appeal is whether, pursuant to 10 V.S.A. § 6086(a)(8), the building-mounted signage has and will have an undue adverse effect on the scenic or natural beauty of the area and aesthetics.
2. The second preliminary issue is answered in the affirmative. The first merits issue on appeal is whether, based on the competing policy considerations of flexibility and finality articulated in *Stowe Club Highlands*, the Board will consider amendment of Land Use Permit #4C1057, and proceed to review the building-mounted signage under Criterion 8, as set forth in the second merits issue.
3. The Chair shall issue a Scheduling Order setting this matter for hearing.

DATED at Montpelier, Vermont, this 22nd day of January, 2002.

ENVIRONMENTAL BOARD

    /s/Marcy Harding\_\_\_\_\_  
Marcy Harding, Chair  
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