

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-375

APRIL TERM, 2002

	}	APPEALED FROM:
	}	
	}	Environmental Board
	}	
In re Allen Road Land Company	}	DOCKET NO. 4C1060-EB
	}	
	}	
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Allen Road Land Company, Inc. appeals from an Environmental Board decision issuing a land use permit subject to the condition that a portion of the project area "remain undeveloped in perpetuity." Allen Road contends that the condition: (1) exceeded the Board's statutory authority; and (2) was unsupported by the evidence. We affirm.

Allen Road applied for and obtained an Act 250 permit from the District Environmental Commission to create a 36-lot, 44-unit residential subdivision development in South Burlington. Allen Road's application proposed to set aside Lot 33 for open space, to dedicate Lot 34 as a city park, and to reserve Lot 35, consisting of approximately four and a half acres, for unspecified "future use." The District Commission approved the permit, subject to the following condition:

48. Lot 35 shall remain undeveloped in perpetuity. No trees, shrubs or other vegetation shall be removed, and no alterations, including excavation, grading or soil stockpiling, may occur on Lot 35 with the exception of the stormwater discharge outfall construction shown on the approved plans and any related stormwater maintenance activities.

Allen Road appealed this permit condition to the Board. Following a hearing, the Board ruled that the condition was a necessary measure to offset the project's undue effect on the aesthetics of the area. See 10 V.S.A. 6086(a)(8) (before granting permit, board or district shall find that subdivision will not have undue adverse effect on scenic or natural beauty of area, aesthetics, historic sites, or rare and irreplaceable natural areas). This appeal followed.

Our review of the Board's decision is necessarily limited. "This Court gives deference to the Environmental Board's interpretations of Act 250, to its own rules, and to the Board's specialized knowledge in the environmental field." OMYA, Inc. v. Town of Middlebury, 171 Vt. 532, 532 (2001) (mem.). Thus, the Board's findings of fact will be upheld if based on substantial evidence, and its legal conclusions will be affirmed if rationally derived from the findings and based on a correct interpretation of the law. In re Killington, Ltd., 159 Vt. 206, 210 (1992). With respect specifically to findings under 10 V.S.A. 6086(a)(8) (effect on aesthetics and natural areas), we have observed that "[d]etermining the degree of adverse aesthetic effect is a matter of weighing of the evidence, a role for the Board rather than for this Court." In re Denio, 158 Vt. 230, 239 (1992).

Allen Road contends the Board exceeded its statutory authority by imposing a condition that could not be amended in the future, and by restricting development on Lot 35 despite the fact that no development for the lot had been proposed. We disagree. Permit conditions restricting or prohibiting future development, or maintaining open space, are a common

means of mitigating undue aesthetic impacts under Act 250. See, e.g., In re Nehemiah Assocs., 168 Vt. 288, 290 (1998) (permit condition required subdivision developer to leave 3.38-acre lot undeveloped); Denio, 158 Vt. at 240 (condition required that subdivision developer maintain area known as "greenbelt" as open space). We have specifically upheld such conditions as reasonable, noting that "[i]f circumstances change, appellants have the opportunity to seek modification of the permit." Denio, 158 Vt. at 241; see also In re Stowe Club Highlands, 166 Vt. 33, 38-40 (1996) (factors that may justify permit amendment include unanticipated changes in factual or regulatory circumstances, unforeseeable changes in operation of project, and changes in technology).

Allen Road's contention to the contrary notwithstanding, we perceive nothing in the permit condition that prevents the permittee from seeking to amend the condition in the future under the factors set forth in Stowe Club Highlands. The "in perpetuity" condition, like any other open-ended open-space condition, may be modified if the permittee can show that changed factual circumstances beyond its control, or unforeseeable at the time of the application, justify an amendment. Accordingly, we reject the assertion that the condition exceeded the Board's statutory authority.

Allen Road also contends that the Board abdicated its responsibility to rule on future applications by imposing Condition 48 "in the absence of any proposed use for the Lot it restricts." As noted, however, the Board may impose reasonable permit conditions to mitigate a project's adverse aesthetic impact; maintaining open space has been deemed a reasonable exercise of this authority. See Denio, 158 Vt. at 240-41. The condition relating to Lot 35 was thus not an "abdication" of the Board's responsibility, but an exercise of its discretion in ruling on the application at hand. Any undisclosed future plans by the permittee to develop Lot 35 may be presented to the Board in an application to amend the permit, under the Stowe Club Highlands standards.

Finally, Allen Road contends that, absent a specific proposal to develop Lot 35, the record evidence cannot support a finding that Condition 48 was necessary to mitigate an undue adverse effect on the aesthetics of the area. As noted, the Board was obligated to rule on the project before it, which proposed simply to reserve Lot 35 for "future use." The Board concluded that - as proposed - the project would have an undue effect on the aesthetics of the area, which - despite surrounding development - represented an important open-space for local residents. Lot 35, in particular, contained stands of trees and wetlands that made it "particularly attractive from the standpoint of scenic and natural beauty;" at the same time, the wetlands and setback requirements on the lot rendered only a small percentage of it (3/4 of an acre) actually suitable for future development. These findings, which Allen Road has not specifically challenged, are supported by the record evidence, and demonstrate in turn that Condition 48 is a reasonable means of mitigating the project's undue effect on the area's aesthetics.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice