State of Vermont
NATURAL RESOURCES BOARD
DISTRICT #2 ENVIRONMENTAL COMMISSION
100 Mineral Street, Suite 305, Springfield, VT 05156-3168

RE: Town of Chester
P.O. Box 370
Chester, VT 05143
and
Drew's LLC
926 VT Route 103
Chester, VT 05143
and
Chester Andover Family Center, Inc.1
P.O. Box 302
Chester, VT 05143

Application #2S0214-8
Memorandum of Decision
on Motion to Alter
10 V.S.A. §§6001-6093 (Act 250)

I. Introduction

On December 30, 2016, Land Use Permit #2S0214-8 ("Permit") was issued to the Town of Chester, et al, authorizing the Permittees to construct a .33 MG water storage tank and 3,000 ft. of 12-inch diameter water main to connect to the Town of Chester water system. The project is located off Route 103 in Chester, Vermont.

This decision is issued in response to a request for a Motion to Alter the Permit ("Motion") filed on January 12, 2017, by Attorney James P. W. Goss on behalf of the Town of Chester. The motion was timely filed.

II. Decision on the Motion

A. The Motion

The Motion requests an alteration to conditions 20 and 21 which presently read:

20. The permanent conservation easement shall be for all of the Deer Wintering Area that was mapped by the Department in 2006 except that the easement shall: allow for the construction and maintenance of the water tower and a road to access the water tower, consistent with the conditions of this Land Use Permit. The easement may allow for development of a compact, five-acre section of undisturbed Deer Wintering Area that is fully contiguous with previously disturbed Deer Wintering Area or reclaimed Deer Wintering Area habitat.

21. Future development shall be limited to: the water tower site approved in this permit and five acres of land that is compact and fully contiguous to previously disturbed Deer Wintering Area or that is compact and located in reclaimed Deer Wintering Area habitat. All future development will be fully reviewed by the District Commission and may additionally be subject to Act 250 Rule 34(E).

The motion urges the Commission to alter those conditions as follows:

20. The permanent conservation easement shall be for all of the Deer Wintering Area that was mapped by the Department in 2006, as the same may be subsequently modified by the Department, except that the easement shall allow for the construction and maintenance of the water tower and a road to access the water tower consistent with the conditions of this Land Use Permit and shall allow, subject to the approval of the Department which approval shall not be unreasonably withheld:
a) development including, but not limited to, municipal buildings on no more than 5 acres proposed by the Permittee, located within the previously disturbed DWA and permitted DWA extraction area on the property or
b) future sand and gravel extraction on not more than 5 acres of DWA proposed by the Permittee, or
c) a combination of development and extraction on no more than 5 acres.

    The easement shall further allow the Department in its sole discretion to approve the development or extraction of up to 3 additional acres of DWA proposed by the Permittee, if the Department determines that the development or extraction is consistent with the purposes of the grant.

21. Future development and/or earth extraction shall be limited to areas outside the Deer Wintering Area mapped by the Department in 2006, as the same may be subsequently modified by the Department, or the areas identified in the foregoing Condition 20, as contemplated in Exhibit 49, Letter from the Department of Fish and Wildlife, dated September 6, 2016. All such future development and /or earth extraction will be fully reviewed by the District Commission at the time a specific development plan is proposed.

B. Analysis and Conclusion

The motion avers that "[c]onditions 20 and 21 as actually included in the Permit alter or omit some crucial details of that language, such as failure to provide for a potential additional 3-acre area of development in the future." The motion further argues that the Commission's requirement for a *Stowe Club Highlands* analysis pursuant to Rule 34 for subsequent applications seeking to alter the permit is "inappropriate." We disagree.

The Commission reviewed the proposed language in Exhibit 49 and adopted it in part, and rejected it in part after careful consideration of many factors. The factors included, but are not limited to: the extensive permitting history of this parcel; the testimony of the Department of Fish and Wildlife at the hearing; and the current un-reclaimed status of a

portion of the parcel. The approximately five-acre so-called "Irene Area" formerly functioned as a mapped Deer Wintering Area. After Tropical Storm Irene, five acres was cleared and two of the acres were used for sand and gravel extraction. By the terms of the Natural Resources Boards' Irene Policy, the site should have been fully reclaimed in 2011. It was not. The destruction of the mapped deer wintering area constitutes an ongoing material change to the permitted pit, which the Commission considered very carefully in its consideration of the application. In this case, had the Board elected to pursue formal enforcement, the Permittees would likely have been required to purchase fill, then grade and replant the five-acre section before any Land Use Permits would be issued.[a] Instead, the Commission issued the Permit allowing the five-acre section of property to remain unreclaimed until the Permittees excavate at the proposed water tank location and use that sediment to fill the five-acre section. The planting will not occur until Spring 2018.

As reviewed by the Commission in its Findings of Fact and Conclusions of Law, the outcome of this case rested upon compliance with Criterion 8(A) Necessary Wildlife Habitat. Applying the statutory requirements of the Criterion, the Commission carefully considered whether or not "all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have been or will continue to be applied." The Commission further stated:

> The Commission concludes that the feasible and reasonable means of lessening the destruction of the DWA is to require that all remaining DWA will be permanently conserved as outlined by F&W in Exhibit 049 *except* that consideration of any future development located on undisturbed DWA will be limited to a compact 5-acre segment that is fully contiguous with previously disturbed DWA. The Commission is not implying future approval of any future development on the site, but is simply <u>making clear that present approval of this project under Criterion 8(A) is contingent on the permanent conservation of 70 acres of DWA that will not undergo future and further fragmentation [emphasis added]</u>.

This five-acre unreclaimed "Irene Area" fragments the Deer Wintering Area remaining on the property. The water tower project permitted by the 2S0214-8 Land Use Permit further fragments the remaining Deer Wintering Area. The Commission considered the issue of preservation of the remaining wildlife habitat, and the minimization of further fragmentation critical to issuance of this permit. Our conditions 20 and 21 reflect that the Commission found the permit condition language now urged by the movant to be insufficient to establish and maintain conformance with Criterion 8(A). Additionally, there are other existing permits in the 2S0214 series of Land Use Permits that contain critical conditions that may be relevant to a future permit application and necessitate a *Stowe Club Highlands* analysis pursuant to Rule 34. This was demonstrated in 2007

[a] See Act 250 Rule 30(B). A Commission may stay the issuance of a permit decision pending resolution of non-compliance.

when the Commission denied a gravel extraction application for this parcel based on Rule 34(E).

Accordingly, the motion to alter is **denied**.

Dated at Springfield, Vermont, on March 6, 2017.

By_____
Cheryl Cox, Acting Chair
District #2 Environmental Commission
Natural Resources Board

Commissioners participating: James Olivier and Julia H. Schmitz

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date of this decision, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the $295.00 entry fee required by 32 V.S.A. § 1431. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Dewey Building, Montpelier, VT 05620-3201, and on other parties in accordance with VRECP 5(b)(4)(B). For additional information on filing appeals, see the Court's website at: http://www.vermontjudiciary.org/GTC/environmental/default.aspx or call (802) 828-1660. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, and Burlington, VT 05401.

E-Notification CERTIFICATE OF SERVICE # 2S0214-8

I hereby certify that I, the undersigned, sent a copy of the foregoing Memorandum of Decision on Motion to Alter on March 6, 2017 by electronic mail to the following with email addresses. All email replies should be sent to NRB.Act250Springfield@vermont.gov. **Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the NRB District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify the District Office of any email address changes.**

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