



# MEMORANDUM OF DECISION AND ORDER

State of Vermont  
Natural Resources Board  
District 2 Environmental Commission  
100 Mineral Street, Suite 305  
Springfield, VT 05156  
<https://nrb.vermont.gov/>

**RE:** Kindle Farm School  
PO Box 393  
Newfane, VT 05345

Memorandum of Decision and Order  
10 V.S.A. §§ 6001-6111 (Act 250)  
Land Use Permit **2W1140-2**

and

Health Care and Rehabilitation Services of Southeastern Vermont  
390 River Street,  
Springfield, VT 05156

## I. Summary

On February 18, 2021, Land Use Permit 2W1140-2 was issued to Kindle Farm School and Health Care and Rehabilitation Services of Southeastern Vermont authorizing the previous construction of improvements between the years 2006 and 2017, including: an addition with porch to the farmhouse; one yurt (constructed in 2015); sugar house; greenhouse with irrigation infrastructure; pavilion; pond; asphalt recreational pad; parking lot; drilled well; trail network with footbridges; and the removal and reconstruction of a shed and removal of one yurt (constructed in 2006).

The project is located on 1 Route 30 in Townshend, Vermont.

This decision is issued in accordance with Act 250 Rule 31(A)(4) where the District Commission may on its own motion, within 30 days from the date of decision, issue an altered decision or permit.


## II. Decision and Order

Land Use Permit 2W1140-2 Condition #19 reads: "The Permittees shall remove the 2006 yurt by **June 30, 2021.**"

The Commission will strike Condition #19 because the removal of the 2006 yurt is governed by the November 21, 2019 Stipulated Motion to Dismiss without Prejudice and Order issued by the

Superior Court Environmental Division. The Commission will also strike “removal of one yurt (constructed in 2006)” from the permit project description. This decision does not alter any other aspect of Land Use Permit 2W1140-2. Accordingly, the Commission will issue Land Use Permit 2W1140-2 (Altered) and Findings of Fact, Conclusions of Law and Order 2W1140-2 (Altered).

Dated this 26<sup>th</sup> day of February, 2021.

By   
Cheryl Cox, Acting Chair  
District 2 Environmental Commission

Commissioner participating in this decision: Julia H. Schmitz

This is an amended decision issued pursuant to Act 250 Rule 31.

If the District Commission issued this amended decision on its own motion, any party may file a motion to alter with the Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A). If the District Commission issued this amended decision in response to a motion to alter filed by a party, then no additional motions to alter this amended decision may be filed.

Any appeal of the Commission’s decisions must be filed with the Superior Court, Environmental Division within 30 days of the date this amended decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant 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, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court’s website at:

<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court’s mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.



## LAND USE PERMIT AMENDMENT

State of Vermont  
Natural Resources Board  
District 2 Environmental Commission  
100 Mineral Street, Suite 305  
Springfield, VT 05156  
<https://nrb.vermont.gov/>

**CASE NO:** 2W1140-2 (Altered)

Kindle Farm School  
PO Box 393  
Newfane, VT 05345

and

Health Care and Rehabilitation Services of Southeastern Vermont  
390 River Street  
Springfield, VT 05156

**LAWS/REGULATIONS INVOLVED**

10 V.S.A. §§ 6001 - 6111 (Act 250)

The District 2 Environmental Commission hereby issues Land Use Permit Amendment 2W1140-2 (Altered), pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6111. This permit amendment applies to the lands identified in Book 91, Page 415, of the land records of Newfane, Vermont, and Book 112, Page 527 of the land records of Townshend, Vermont, as the subject of a deed to Kindle Farm School and a lease to Health Care and Rehabilitation of Southeastern Vermont. The tract of land is 93.7 acres.

**This permit specifically authorizes the previous construction of improvements between the years 2006 and 2017, including: an addition with porch to the farmhouse; one yurt (constructed in 2015); sugar house; greenhouse with irrigation infrastructure; pavilion; pond; asphalt recreational pad; parking lot; drilled well; trail network with footbridges; and the removal and reconstruction of a shed.**

The project is located on 1 Route 30 in Townshend, Vermont.

Jurisdiction attaches because the Project is a material change to a permitted development, and thus requires a permit amendment pursuant to Act 250 Rule 34. See JO 2-310 issued on October 8, 2018.

The Permittees, and assigns and successors in interest, are obligated by this permit to complete, operate and maintain the project as approved by the District 2 Environmental Commission (the "Commission") in accordance with the following conditions.



1. The project shall be completed, operated and maintained in accordance with: (a) the conditions of this permit, (b) Findings of Fact and Conclusions of Law 2W1140-2, and (c) the permit application, plans, and exhibits on file with the Commission and other material representations.
2. All conditions of Land Use Permit 2W1140 and amendments are in full force and effect except as further amended herein.
3. The Permittees shall comply with all of the conditions of the following Agency of Natural Resources Permits:
  - a. Wastewater System and Potable Water Supply Permit WW-2-1297-1-R issued on August 21, 2006 by the ANR Drinking Water and Groundwater Protection Division;
  - b. Individual Wetland Permit 2017-139 issued on January 18, 2018 by the ANR Watershed Management Division.
4. Any nonmaterial changes to the permits listed in the preceding condition shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.
5. Representatives of the State of Vermont shall have access to the property covered by this permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.
6. A copy of this permit and plans shall be on the site at all times throughout the construction process.
7. No change shall be made to the design, operation or use of this project without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
8. No subdivision, or further alteration or development on the tract of land approved herein shall be permitted without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
9. Pursuant to 10 V.S.A. § 8005(c), the Commission may at any time require that the permit holder file an affidavit certifying that the project is in compliance with the terms of this permit.
10. The conditions of this permit and the land uses permitted herein shall run with the land and are binding upon and enforceable against the Permittees and their successors and assigns.
11. The Permittees and all subsequent owners or lessees shall install and maintain only low-flow plumbing fixtures in any buildings. Any failed water conservation measures shall be promptly replaced with products of equal or better performance.

12. In addition to conformance with all erosion prevention and sediment control conditions, the Permittees shall not cause, permit or allow the discharge of waste material into any surface waters. Compliance with the requirements of this condition does not absolve the Permittees from compliance with 10 V.S.A. (§§ 1250-1284) Chapter 47, Vermont's Water Pollution Control Law.
13. The Permittees shall maintain an undisturbed, naturally vegetated riparian zones along all streams on the parcel except as allowed in Exhibit 065, Riparian Management & Restoration Plan dated February 26, 2020, and except for the removal of non-native invasive plants given prior written approval by the Agency of Natural Resources with copy to the Commission and removal of hazardous trees that are in proximity to and pose an imminent threat to persons using the mapped trails and crossings within the riparian zones as determined and directed by a licensed forester and notice to the Commission. The riparian zones shall be measured inland, perpendicular to and horizontally 50-feet from the top-of-bank/slope and continuing to the water's edge at base flow conditions. The term "undisturbed" means no activities that may cause or contribute to ground or vegetation disturbance or soil compaction, including but not limited to construction; earth-moving activities; storage of materials; tree trimming or canopy removal; tree, shrub or groundcover removal; plowing or disposal of snow, grazing or mowing.
14. The Permittee shall adhere to the Riparian Management & Restoration Plan, dated February 26, 2020, Exhibit 065, approved by the Agency of Natural Resources Fisheries Program. Riparian zone plantings and demarcation shall be installed within one year from issuance of the Land Use Permit: **February 19, 2022**. Riparian zone demarcations shall be designed and maintained for permanence.
15. Restoration plantings shall be monitored annually for three years following planting (2022 through 2024) and replaced if they fail as described in Exhibit 065.
16. The Permittees shall monitor the mushroom pond restoration for three years after completion and submit annual reports to the ANR and District 2 Commission, as described in Exhibit 065. Annual monitoring and reporting will continue after three years if the restoration has not been successful.
17. The Riparian Management & Restoration Plan supersedes the Forest Management Plan if there is conflicting language.
18. The Permittees shall maintain an undisturbed, naturally vegetated buffer zone on the Project Tract within 50 feet of any wetlands as depicted on Exhibit #065 except for disturbances specified. The term "undisturbed" means that there shall be no activities that may cause or contribute to ground or vegetation disturbance or soil compaction, including but not limited to construction, earth-moving activities, storage of materials,

- tree trimming or canopy removal, tree, shrub or groundcover removal; plowing or disposal of snow, grazing or mowing.
19. The Permittees shall identify Kindle Farm School and surrounding property as a historic site, designated as VT-WD-365 in the Vermont Archaeological Inventory.
  20. Modifications to the historic structure, or to any of the non-contributing buildings which include ground disturbance are prohibited without the written permission of the Vermont Division for Historic Preservation (VDHP) and the District #2 Environmental Commission (Commission). Topsoil removal, grading, scraping, cutting, filling, stockpiling, logging or any other type of ground disturbance including artifact collecting in the remainder of the property is also prohibited without written consent or a determination that it is not subject to Act 250 review. Agricultural cultivation consistent with past practice and any archaeological investigation by a qualified archaeological consultant are not considered as ground disturbance.
  21. The Permittees shall contract with a qualified archaeological consultant to complete an Archaeological Resource Assessment report addressing both the historic and potential precontact components of VT-WD-365. The ARA shall be completed by **December 31, 2022** and must conform to the VDHP *Guidelines for Conducting Archaeology in Vermont (2017)*.
  22. As part of the ARA process, the Permittee's qualified consultant shall conduct a one-day archaeological seminar for Kindle Farm School staff and students. The seminar must be completed by **November 1, 2022** and shall include a field component with limited archaeological testing. Testing locations could include any undisturbed portion of the property. Suggested locations are one or more of the following: the terrace near the sugarhouse, level areas along or adjacent to the hiking paths and pedestrian bridges, or any of the location where historic artifacts have been previously found.
  23. A digital copy of the ARA shall be submitted to the VDHP and the Commission. Any copy of the ARA report placed on Act 250 public database shall have specific archaeological site locational information redacted in accordance with 22 V.S.A. § 761(b) and 1 V.S.A. § 317(c) (20).
  24. The installation of exterior light fixtures is limited to those approved in Exhibit #025, choosing the visors which fully shield light sources. All exterior lighting shall be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view beyond the perimeter of the area to be illuminated.
  25. The Permittees shall not erect (additional) exterior signage without prior written approval from the District Coordinator or the Commission, whichever is appropriate

under the Act 250 Rules. Signage includes banners, flags, and other advertising displays, excepting temporary real estate marketing signs and temporary Grand Opening signs.

26. Pursuant to 30 V.S.A. § 53, the energy design and construction shall comply with Vermont's Commercial Building Energy Standards (CBES) in accordance with the NRB Criterion 9(F) Procedure effective at the time of construction.
27. The installation and/or use of electric resistance space heat is specifically prohibited without prior written approval from the District Environmental Commission.
28. The Permittee, upon completion of the construction of each commercial building and prior to use or occupancy, shall submit to the District Commission a copy of the certification submitted to the Public Service Department as described under 30 V.S.A. § 53(d).
29. The Permittees shall reference the requirements and conditions imposed by Land Use Permit 2W1140-2 (Altered) in all deeds of conveyance and leases.
30. The Permittees shall provide each prospective purchaser of any interest in this Project a copy of the Land Use Permit Amendment and the Findings of Fact before any written contract of sale is entered into.
31. Pursuant to 10 V.S.A. § 6090(b)(1), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein.
32. The Permittees shall file a Certificate of Actual Construction Costs, on forms available from the Natural Resources Board, pursuant to 10 V.S.A. § 6083a(g) within one month after construction has been substantially completed. If actual construction costs exceed the original estimate, a supplemental fee based on actual construction costs must be paid at the time of certification in accordance with the fee schedule in effect at the time of application. Upon request, the Permittees shall provide all documents or other information necessary to substantiate the certification. Pursuant to existing law, failure to file the certification or pay any supplemental fee due constitutes grounds for permit revocation. The certificate of actual construction costs and any supplemental fee (by check payable to the "State of Vermont") shall be mailed to: Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201; Attention: Certification.

Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated this 26<sup>th</sup> day of February 2021.

By   
Cheryl Cox, Acting Chair in this matter  
District 2 Commission

Member participating in this decision: Julia H. Schmitz

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

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# FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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**LAWS/REGULATIONS INVOLVED**

10 V.S.A. §§ 6001 - 6111 (Act 250)

## I. INTRODUCTION

On August 24, 2017, Kindle Farm School and Health Care and Rehabilitation Services of Southeastern Vermont ("Applicants") filed an application for an Act 250 permit for a project generally described as the previous construction of improvements between the years 2006 and 2017, including: an addition with porch to the farmhouse; one yurt (constructed in 2015); sugar house; greenhouse with irrigation infrastructure; pavilion; pond; asphalt recreational pad; parking lot; drilled well; trail network with footbridges; and removal and reconstruction of a shed. The Applicant applied for, but the Commission did not accept an application for a second yurt, constructed in 2006, see Section III below. The tract of land consists of 93.7 acres. The Applicant's legal interest is ownership in fee simple described in a deed recorded on December 3, 2001 and August 2, 2006 in the land records of Townshend and Newfane, Vermont.

The application, first submitted on June 27, 2017, was determined to be incomplete under Act 250 Rule 10(D) for reasons stated in letters from the Acting Coordinators to the Applicant dated July 14, 2017 and August 14, 2017. The application was deemed complete on August 24, 2017 upon receipt of the supplemental information.

The Commission conducted a site visit and held a hearing on this application on October 20, 2017. At the end of the hearing, the Commission recessed the proceeding pending the submittal of additional information. The Commission issued three Hearing Recess Orders and a Memorandum of Decision.

In the Memorandum of Decision, the Commission included an account of over a decade of the Applicants' numerous, substantial, and environmentally intrusive projects without filing any Act 250 applications. The application herein received and now ripe for decision, was submitted when mandated by an order from the Natural Resources Board based on a site inspection and Notice of Alleged Violations.

The Commission adjourned the hearing on February 17, 2021 after receipt of the additional information, an opportunity for parties to respond to that information, and the completion of Commission deliberations.

As set forth below, the Commission finds that the Project complies with 10 V.S.A § 6086(a) (Act 250).

## **II. JURISDICTION**

Jurisdiction attaches because the Project is a material change to a permitted development, and thus requires a permit amendment pursuant to Act 250 Rule 34. See JO 2-310 issued on October 8, 2018.

## **III. AMENDMENT APPLICATION - RULE 34(E)**

The Commission issued an Act 250 Rule 34(E) decision as part of its Second Recess Order dated November 28, 2018 and a Memorandum of Decision ("MOD") which partially altered the previous Rule 34(E) decision dated January 10, 2019. The conclusion of the MOD was that Applicants were barred from seeking a permit amendment for the yurt constructed in 2006 and which 2W1142-1 only permitted until 2009 yet still remains on the property. The Commission accepted a permit application for the yurt constructed in 2015.

## **IV. PARTY STATUS**

### **A. Parties by Right**

Parties by right to this application pursuant to 10 V.S.A § 6085(c)(1)(A)-(D):

The Applicant;

The landowner;

The municipalities of Townshend and Newfane;

The Townshend and Newfane Planning Commissions;

The Windham Regional Planning Commission; and

The State of Vermont Agency of Natural Resources (ANR) through an entry of appearance by Karin McNeill, ANR Regulatory Policy Analyst, dated October 19, 2017 and attendance at the hearing.

**B. Interested Parties**

Any person who has a particularized interest protected by Act 250 that may be affected by an act or decision of the Commission is also entitled to party status. 10 V.S.A § 6085(c)(1)(E).

**i. Preliminary Party Status Determinations**

Pursuant to Act 250 Rule 14(E), the District Commission made preliminary determinations concerning party status at the commencement of the hearing on this application. The following persons requested party status pursuant to 10 V.S.A § 6085(c)(1)(E), and were either admitted as parties or denied party status, as indicated below:

Sarah Vangel, requested party status under Criteria 1B Stormwater; 1E Streams; 1G Wetlands; 4 Soil Erosion; 8 Aesthetics. There were no objections. The Commission granted preliminary party status under the aforementioned criteria.

**ii. Final Party Status Determinations**

Prior to the close of hearings, the District Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A § 6086(c)(6) and Act 250 Rule 14(E) and found no reason to change its preliminary determinations.

**V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Applicants have met the burden of proving compliance with the following criteria through submittal of the application:

- |  |                                       |
|--|---------------------------------------|
| 1 - Air Pollution                            | 9(A) - Impact of Growth               |
| 1(A) - Headwaters                            | 9(B) - Primary Agricultural Soils     |
| 1(C) - Water Conservation                    | 9(C) - Productive Forest Soils        |
| 1(D) - Floodways                             | 9(D) - Earth Resources                |
| 1(F) - Shorelines                            | 9(E) - Extraction of Earth Resources  |
| 5(A) - Transportation Congestion & Safety    | 9(G) - Private Utility Services       |
| 5(B) - Transportation Demand Management      | 9(H) - Costs of Scattered Development |
| 6 - Educational Services                     | 9(J) - Public Utility Services        |
| 7 - Municipal Services                       | 9(K) - Effects on Public Investments  |
| 8 - Natural Areas                            | 9(L) - Settlement Patterns            |
| 8(A) - Wildlife Habitat & Endangered Species | 10 - Local and Regional Plans         |

Therefore, the application shall serve as the Findings of Fact on these criteria.

The findings of fact are based on the application, Exhibits 001 -071, and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they

appear, and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

Under Act 250, projects are reviewed for compliance with the ten criteria of Act 250, 10 V.S.A § 6086(a)(1)-(10). Before granting a permit, the District Commission must find that the Project complies with these criteria and, therefore, is not detrimental to the public health, safety or general welfare. The burden of proof under Criteria 1 through 4 and 9 and 10 is on the applicant, and the burden is on the opponent under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.

**Criteria 1(B) - Waste Disposal and 4 - Soil Erosion:**

Findings of Fact

1. The ANR Department of Environmental Conservation issued Wastewater System and Potable Water Supply Permit WW-2-1297-1-R on August 21, 2006. Exhibit #010.
2. Chris Tomberg, from the Stormwater Division, determined on June 15, 2017, that the current project proposal includes less than one acre of impervious surface and so does not need to obtain a Stormwater Operational Permit. Exhibit 011.
3. Mr. Tomberg notes that any further development onsite will require the landowner to appropriately assess regulatory applicability with regards to the Stormwater Program as well as other programs and Agencies. Exhibit 011.

Conclusions of Law

The ANR permit(s) create(s) a presumption pursuant to Act 250 Rule 19 that the disposal of wastes through the installation of wastewater and waste collection, treatment and disposal systems authorized by the permit(s) will not result in undue water pollution. Technical determinations made by ANR in issuing the permit(s) are entitled to substantial deference. 10 V.S.A § 6086(d). The Commission concludes that the construction of the Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

The Project complies with Criterion 1(B) (Waste Disposal) and Criterion 4.

**Criteria 1 Water Quality and 1(E) - Streams:**

Findings of Fact

4. Several streams are located on the project tract shown on Exhibit 065.

5. ANR's August 12, 2019 filing requests that after it approves a Riparian Management Plan, that the Commission include the following conditions:
  - a. *The Permittee shall maintain an undisturbed, naturally vegetated riparian zones along all streams on the parcel except as allowed in Exhibit XX Riparian Management Plan [DATE], and except for the removal of non-native invasive plants given prior written approved by the Agency of Natural Resources. The riparian zones shall be measured inland, perpendicular to and horizontally 50-feet from the top-of-bank/slope and continuing to the water's edge at base flow conditions. The term "undisturbed" means no activities that may cause or contribute to ground or vegetation disturbance, or soil compaction, including but not limited to construction; earth-moving activities; storage of materials; tree trimming or canopy removal; tree, shrub or groundcover removal; plowing or disposal of snow; grazing and mowing.*
  - b. *The Permittee shall adhere to the Exhibit XX Riparian Management Plan [DATE] approved by the Agency of Natural Resource Fisheries Program. Riparian zone plantings and demarcation shall be installed within one year from issuance of the Land Use Permit. Riparian zone demarcation shall be designed and maintained for permanence.*
6. The Applicants submitted a Riparian Management Plan, Exhibit 065, on March 16, 2020.
7. The Riparian Management Plan includes: installing riparian zone demarcation; removing bridge to existing sugarhouse; relocating sugarhouse and restoring riparian zone and installing plantings at this location; removing "koi" pond, restoring grass-lined swale; relocating tractor and electric sheds and restoring riparian zone and installing plantings at this location; and removing mushroom pond and restoring stream channel. Exhibit 065.
8. The Applicants shall maintain an undisturbed, naturally vegetated riparian zone (measured inland 50-feet from the top of bank/slope to the water's edge at base flow conditions) along all streams on the parcel except as allowed in the Riparian Management Plan, and except for:
  - a. Removal of non-native invasive plants given prior written approval by the Agency of Natural Resources with copy to the District Commission; and
  - b. Removal of hazardous trees that are in proximity to and pose an imminent threat to persons using mapped trails and crossings within the riparian zones as determined and directed by a licensed forester and notice to the District Commission.

Exhibits 064 and 065.

### Conclusions of Law

The Commission concludes that the applicant will maintain the natural condition of any streams, and will not endanger the health, safety or welfare of the public or of adjoining landowners.

The Project complies with Criteria 1 Water Quality and 1(E) as conditioned by Land Use Permit 2W1140-2 (Altered).

### **Criterion 1(G) - Wetlands:**

#### Findings of Fact

9. There are Class II wetlands on the Project Tract.
10. On January 18, 2018, the ANR Department of Environmental Conservation issued Wetland Permit 2017-139, authorizing after the fact construction of a greenhouse with 660 square feet of wetland buffer impact. Exhibit 36a.
11. ANR's August 12, 2019 filing requests that the Commission include the following condition:

*The Permittee shall comply with all of the conditions of the following Agency of Natural Resources Permits:*

- a. *The ANR, Department of Environmental Conservation issued Individual Wetland Permit and Determination 2017-139 authorized on January 18, 2018, Exhibit 036a.*

#### Conclusions of Law

Individual Wetland Permit 2017-139, issued by ANR, creates a presumption pursuant to Act 250 Rule 19 that the Project will not violate the Vermont Wetland Rules relating to significant wetlands. No evidence was presented to rebut the presumption or challenge the technical determinations made by ANR.

The Project complies with Criterion 1(G).

### **Criteria 2 and 3 – Water Availability and Impact on Existing Water Supply:**

#### Findings of Fact

12. Patrick Smart, the ANR's Operations Section Supervisor, in the Drinking Water & Groundwater Protection Division (DWGPD) reviewed the application materials, as well as DWGPD records for the Kindle Farm water supply, a permitted Public Non-Transient Non-Community Water System (WSID 20860). The records indicate that the Water

System is served by one well. Land Use Permit 2W1140 included the drilling of a new well. However, the application site plan identifies two wells on the property – one north of the tractor shed, one south of the sugar house. The DWGPD has no information regarding this second well. In an email dated October 11, 2017 to Joslyn Wilschek, the ANR requested the following supplemental information:

1. Explain the use of each of the two wells on the site plan and whether any permits have been issued for these wells.

Exhibit 028a.

13. The Applicants explained on the Riparian Management and Restoration Plan that Well #1 was authorized by WW-2-1297-1-R; Well #2 is an abandoned/historic shallow well that is not in use; and Well #3 are concrete tiles adjacent to stream, historic agricultural use. Exhibit 065.
14. ANR's August 12, 2019 filing requests that the Commission include the following condition:

*The Permittee shall comply with all of the conditions of the following Agency of Natural Resources Permits:*

- b. The ANR, Department of Environmental Conservation issued Wastewater System and Potable Water Supply Permit WW-2-1297-1-R authorized on August 21, 2006, Exhibit 010.*

#### Conclusions of Law

The Commission can conclude that there is sufficient water available to meet the reasonably foreseeable needs of this Project and will not place an unreasonable burden on an existing water supply so long as Wells 2 and 3 remain abandoned, or if future use is contemplated, that they receive the proper authorization from the Agency of Natural Resources. Therefore, the Project complies with Criteria 2 and 3.

#### **Criterion 8 - Aesthetics, Historic Sites and Rare and Irreplaceable Natural Areas:**

##### FINDINGS OF FACT

##### Findings of Fact: Aesthetics, Scenic or Natural Beauty

15. The project site includes a number of exterior lights and lighting fixtures. Applicants submitted Exhibit 025, exterior lighting spec sheets, which demonstrate that fully shielded and downcast lighting will be installed or retrofitted. Visors which fully shield the light source will be installed. Exhibit 025.

##### Findings of Fact: Historic Sites

16. The Vermont Division of Historic Preservation (“VDHP”) conducted site visits to the property on May 12 and 23, 2017, completed background and archival research, and received factual and anecdotal information on the history of the property from the Applicant. VDHP staff recommended that the property is eligible for listing in the State Register of Historic Places. Exhibit 022.
17. The Vermont Advisory Council on Historic Preservation (“VACHP”) reviewed the information about the history and significance of the property and determined that the property meets the National Register Criteria for Evaluation and is eligible for listing in the State Register of Historic Places. Exhibit 022.
18. The property meets the definition of “historic site” for purposes of Act 250 review. Exhibit 022.
19. The Kindle Farm School complex and property is now identified as VT-WD-365 in the Vermont Archaeological Inventory. Exhibit 022.
20. VDHP also assessed the archaeological sensitivity of the property, including application of the VDHP *Environmental Predictive Model for Locating Precontact Archaeological Sites*, and concluded that it is archaeologically sensitive for both historic and Native American cultural resources. Exhibit 022.
21. The overall property was originally known as the Holland Farm and dates to the early 19<sup>th</sup> century, with an initial construction date c. 1830. Archival sources also include reference to earlier historic settlement in the immediate area. Exhibit 022.
22. Although the Applicants failed to take reasonable steps to preserve the character site by consulting VDHP prior to constructing an addition to the farmhouse, the components of the project are not so significant that they created an unacceptable impact. VDHP concludes that the alterations completed on the historic building and new additions will have an adverse effect, not undue on the historic structure. Exhibit 022.
23. It is difficult for VDHP to assess the effect that the Applicants had on the archaeological resources since they occurred before VDHP was contacted. Therefore, VDHP has reached the following agreement with the Applicant. In addition to the cessation of any additional artifact collecting using a metal detector or other methods, the Applicant will contract with a qualified archaeological consultant to compile historic and archaeological background information in an Archaeological Resources Assessment (ARA) report that conforms to the VDHP *Guidelines for Conducting Archaeology in Vermont (2017)*. As part of the process, the archaeological consultant shall conduct a one-day educational seminar for interested staff and students. The seminar shall include



a basic discussion of archaeological methods, a field component with limited exaction in one or more areas of the property and shall result in the ARA. Exhibit 022.

24. VDHP recommends the following permit conditions to allow a finding of Adverse Effect, not Undue on the Kindle Farm School historic site (VT-WD-365):
- a. The Permittees shall identify Kindle Farm School and surrounding property as a historic site, designated as VT-WD-365 in the Vermont Archaeological Inventory.
  - b. Modifications to the historic structure, or to any of the non-contributing buildings which include ground disturbance are prohibited without the written permission of the Vermont Division for Historic Preservation (VDHP) and the District #2 Environmental Commission (Commission). Topsoil removal, grading, scraping, cutting, filling, stockpiling, logging or any other type of ground disturbance including artifact collecting in the remainder of the property is also prohibited without written consent or a determination that it is not subject to Act 250 review. Agricultural cultivation consistent with past practice and any archaeological investigation by a qualified archaeological consultant are not considered as ground disturbance.
  - c. The Permittee will contract with a qualified archaeological consultant to complete an Archaeological Resource Assessment report addressing both the historic and potential precontact components of VT-WD-365. The ARA shall be completed by December 31, 2017 and must conform to the VDHP *Guidelines for Conducting Archaeology in Vermont (2017)*.
  - d. As part of the ARA process, the Permittee's qualified consultant shall conduct a one-day archaeological seminar for Kindle Farm School staff and students. The seminar must be completed by November 1, 2017 and shall include a field component with limited archaeological testing. Testing locations could include any undisturbed portion of the property. Suggested locations are one or more of the following: the terrace near the sugarhouse, level areas along or adjacent to the hiking paths and pedestrian bridges, or any of the location where historic artifacts have been previously found.
  - e. A digital copy of the ARA will be submitted to the VDHP and the Commission. Any copy of the ARA report placed on Act 250 public database shall have specific archaeological site locational information redacted in accordance with 22 V.S.A. § 761(b) and 1 V.S.A. § 317(c) (20).

Exhibit 022.

## CONCLUSIONS OF LAW

Prior to granting a permit, the Commission must find that the subdivision or development under Criterion 8 "will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A § 6086(a)(8). This Project involves concerns under Criterion 8 related to aesthetics and historic sites.

### Conclusions of Law: Aesthetics and Scenic or Natural Beauty

The Commission uses a two-part test to determine whether a Project meets the portion of Criterion 8 relating to aesthetics and natural and scenic beauty. First, it determines whether the Project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. *In re Rinkers, Inc., No. 302-12-08 Vtec, Decision and Order at 12 (Vt. Envtl. Ct. May 17, 2010)* (citations omitted); see also, *Re: Quechee Lakes Corporation, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18-20 (Vt. Envtl. Bd. Nov. 4, 1985); In re Halnon, 174 Vt. 514 (mem.)* (applying Quechee test in Section 248 context).

The burden of proof under Criterion 8 is on any party opposing the Project, 10 V.S.A § 6088(b), but the applicant must provide sufficient information for the Commission to make affirmative findings. *In re Rinkers, No. 302-12-08 Vtec, Decision and Order at 10-11 (Vt. Envtl. Ct. May 17, 2010)* (citing *Re: Susan Dollenmaier, #3W0125-5-EB, Findings, Conclusions and Order at 8 (Vt Envtl. Bd. Feb. 7, 2005); In re Eastview at Middlebury, Inc., No. 256-11-06 Vtec, slip op. at 5 (Vt. Envtl. Ct. Feb. 15, 2008), aff'd, 2009 VT 98. "Either party's burden, however, may be satisfied by evidence introduced by any of the parties or witnesses . . ."* *In re McShinsky, 153 Vt. 586, 589 (1990)* (quoting *In re Quechee Lakes Corp., 154 Vt. 543, 553-54 (1990)*).

#### 1. Adverse Effect

To determine whether the Project will have an adverse aesthetic effect, the Commission looks to whether the Project will "fit" the context in which it will be located. In making this evaluation, the Commission examines a number of specific factors, including the following: the nature of the project's surroundings; the compatibility of the project's design with those surroundings; the suitability of the colors and materials selected for the project; the locations from which the project can be viewed; and the potential impact of the project on open space. *Quechee Lakes Corp et al. #3W0411-EB and #3W0439-EB Findings of Fact, Conclusions of Law and Order at 18 (Vt. Envtl. Bd., Nov. 4, 1985)* (cited in *Rinkers, No. 302-12-08 Vtec, Decision and Order at 12-13*).

We conclude that the Project is compatible with its surroundings and will have no adverse aesthetic impact. Accordingly, it complies with Criterion 8.

### Conclusions of Law: Historic Sites

The Commission uses a three-part test to determine whether the Project meets the portion of Criterion 8 relating to historic sites. The Commission determines:

- Whether the Project site is or contains a historic site;
- Whether the proposed Project will have an adverse effect on the historic site; and
- Whether the adverse effect will be undue.

*Re: Steven L. Reynolds and Harold and Eleanor Cadreact, #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Vt. Env'tl. Bd. May 27, 2004); Re: Manchester Commons Associates, #8B0500-EB Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Env'tl. Bd. Sept. 29, 1995).*

1. *Whether the proposed project site is or contains a historic site.*

“Historic site” is defined as “any site, structure, district or archeological landmark which has been officially included in the National Register of Historic Places and/or the State Register of Historic Places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.” 10 V.S.A § 6001(9).

Listing on the National and State Registers is a question of fact. *Re: Manchester Commons, supra, at 19.* If a structure is listed on the State Register as a historic site, Act 250 has no discretion to declare such structure not to be historic. *Re: Stonybrook Condominium Owners Association, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 9 (Vt. Env'tl. Bd. Sep. 18, 2001); Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (Vt. Env'tl. Bd. May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000).*

Even if a site has not been listed on the National or State Register, 10 V.S.A § 6001(9) allows the Commission to declare it to be a “historic site” if it is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant. Accordingly, the Commission must consider whether such testimony establishes a site, structure, district, or archeological landmark as historically significant. The Commission is not bound by the opinion provided by the Council, but rather, must weigh the testimony and make the determination. *Re: Manchester Commons, supra, at 20.*

The Commission concludes that the property is a historic site.

2. *Whether the proposed Project will have an adverse effect on the historic site*

The next question is whether the Project will have an adverse effect on the historic site, or whether the Project is in harmony with or fits the historic context of the site.

Important guidelines in evaluating this fit include the following: (1) whether there will be physical destruction, damage, or alteration of those qualities which make the site historic, such as an existing structure, landscape, or setting; and (2) whether the proposed project will have other effects on the historic structure, landscape, or setting which are incongruous or incompatible with the site's historic qualities, including, but not limited to, such effects as isolation of an historic structure from its historic setting, new property uses, or new visual, audible or atmospheric elements. *Re: Middlebury College, #9AO177-EB, Findings of Fact, Conclusions of Law and Order at 10 (Vt. Envtl. Bd. Jan. 26, 1990); cited in Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (Vt. Envtl. Bd. May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000).*

For the reasons enumerated by the VDHP, the Commission agrees that there has been an adverse impact on the historic site.

*3. Whether the adverse effect will be undue.*

An adverse effect is undue if any of the following factors exists:

1. the applicant has failed to take generally available mitigating steps which a reasonable person would take to preserve the character of the historic site;
2. the proposed project will interfere with the ability of the public to interpret or appreciate the historic qualities of the site;
3. the cumulative effects on historic qualities of the site by the various components of a proposed project, when taken together, are so significant that they create an unacceptable impact;
4. the project violates a clear, written community standard which is intended to preserve the historic qualities of the site.

*Middlebury College, supra at 10; cited in Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 40 (May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000); see also, Manchester Commons, supra at 22.*

Again, the Commission agrees with VDHP that by including their recommended permit conditions (adjusting the dates of completion to align with permit issuance and providing an extra year because of COVID-19 restrictions), that the impact will not be unduly adverse.

**Criterion 9(F) - Energy Conservation:**

Findings of Fact

25. The Applicants propose installing an EPA-certified wood pellet stove: Heatilator CAB50 pellet stove. There will be no cooling equipment installed. Exhibit 064.
26. Barry Murphy, Vermont Department of Public Service confirmed that the installation of a pellet stove would result in the yurt not needing to comply with the envelop section of the Commercial Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 53 (“CBES”) but lighting and hot water systems still need to comply. Exhibit 064.
27. The Applicants will comply with the lighting and hot water system portion of the CBES for the 2015 yurt. Exhibit 064.
28. Regarding the addition to the farmhouse, the addition has no hot water supply, uses 9 light bulbs and is heated by an electric 1500-Watt wall heater. The Applicant hired Austin Design to opine on the addition’s compliance with building codes. The report concludes that the addition meets the applicable codes, except for insulation. Based on their recommendation, the School implemented the following: Farnum Insulators added insulation on December 20, 2019 which increased the r-value to meet or exceed the CBES; Jeffers Plumbing added baseboard radiation heat to the Kitchen addition from the existing boiler on January 29, 2019; and Sparky Electric removed the electric heat from the Kitchen addition on February 21, 2019. Exhibit 064.

#### Conclusions of Law

Criterion 9(F) requires the Applicant to show that the planning and design of the Project “reflect the principles of energy conservation, including reduction of greenhouse gas emissions from the use of energy, and incorporate the best available technology for efficient use or recovery of energy.” 10 V.S.A § 6086(a)(9)(F).

Criterion 9(F) requires the Applicant “provide evidence that the subdivision or development complies with the applicable building energy standards under 30 V.S.A. §51 (e)(RBES Stretch Code) or 53 (CBES).”

The Commission concludes that the Project complies with Criterion 9(F).

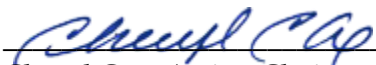
#### **VI. SUMMARY CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with the findings and conclusions of this decision and the conditions of Land Use Permit 2W1140-2 (Altered), will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

**VII. ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit 2W1140-2 (Altered) is hereby issued.

DATED this 26<sup>th</sup> day of February, 2021.

By  \_\_\_\_\_  
Cheryl Cox, Acting Chair  
District 2 Environmental Commission

Commissioner participating in this decision: Julia H. Schmitz

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Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant 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, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at: <http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2<sup>nd</sup> Floor, Suite 303, Burlington, VT 05401.

## **E-Notification CERTIFICATE OF SERVICE # 2W1140-2**

I hereby certify that I, the undersigned, sent a copy of the foregoing Land Use Permit, Findings and MOD on February 26, 2021 by U.S. Mail, postage prepaid, to the individuals without email addresses, and by electronic mail to the following with email addresses. All email replies should be sent to [NRB.Act250Springfield@vermont.gov](mailto: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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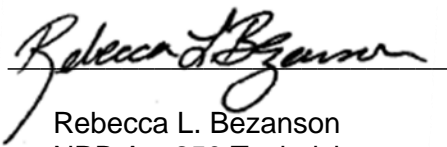
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