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

Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks
Land Use Permit Application #5W0743-3-EB

Memorandum of Decision

This proceeding concerns an appeal to the Environmental Board (Board) by Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks (collectively, Permitees) from Land Use Permit 5W0743-3 (Dash 3 Permit) issued by the District 5 Environmental Commission (Commission) for a shooting range on a tract of land (approximately 35 acres) owned by Wendell and Janice Brooks in the Town of Orange, Vermont (Project). The Commission's decision followed the Board's decision in *Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-2-EB (Altered) (Revocation), Findings of Fact, Conclusions of Law, and Order (June 23, 2000) (Revocation Decision).

I. Procedural Summary

On June 23, 2000, the Board issued its Revocation Decision, finding that the Permittees had violated Land Use Permit 5W0743-2-EB (Altered) (the Altered Permit). The Revocation Decision allowed the Permittees to cure this violation "(a) by filing a statement with the Board detailing the manner in which they have corrected the violations and have complied with the requirements of the Altered Permit and/or (b) by filing a complete amendment application with the Commission seeking authorization for any of the activities constituting violations that Permittees do not or cannot correct pursuant to subsection (a) of this paragraph." Revocation Decision at 22. [1]

The Board's Revocation Decision further stated at page 22:

> 2. Any permit amendment issued by the Commission shall include a prohibition against the use of shooting stations for firearms in the north and west areas of the Project tract until such time as the forest growth is equivalent (in terms of sound attenuation) to the growth that existed prior to any cutting which occurred in 1996 – 1998, or a period of ten years from the date of this decision, whichever is greater. The precise size, placement,

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[1] On September 21, 2001, the Board denied subsequent Motions to Alter the Decision filed by Ray Letourneau, Anita Page and George Wild and the Town of Orange.

and description of this "no-shooting zone" are left to the Commission's discretion.

The Permittees subsequently submitted an application to the Commission for a modified Project, and on July 5, 2001, following a hearing, the Commission issued the Dash 3 Permit. The Condition 6 of the Dash 3 Permit states, in pertinent part:

> The "no shooting zone" for firearms at this range shall include the entire tract until such time as either sufficient tree growth has occurred to restore basal areas in existence prior to the logging performed in 1996 – 1998 *or* a ten year period has elapsed.

On August 3, 2001, the Permittees filed a Notice of Appeal from the Dash 3 Permit and the Findings of Fact and Conclusions of Law which accompanied it (Decision).

On August 17, 2001, George Wild, Jr. filed a Notice of Cross-Appeal.

On September 10, 2001, Board Chair Marcy Harding convened a prehearing conference. The Prehearing Order issued that same day identified five Preliminary Issues raised by the parties.

On October 10, 18 and 24, 2001 the parties filed memoranda on the Preliminary Issues.

On November 14, 2001 the Board deliberated on the Preliminary Issues.

II. Discussion

The Board will address each Preliminary Issue in turn.

1. Whether this matter should be remanded to the Commission for a review of the Project under 10 V.S.A. §6086(a)(1) – (7), (9) and (10).

Citing Environmental Board Rule (EBR) 34(B), George Wild, a neighbor to the Project and party to this appeal, asserts that, because the Board's revocation decision found that the tree cutting constituted a "substantial change," the Commission should

have reviewed the Dash 3 application under all ten Criteria.

The Permittees contend that the Board's Remand Order required the Permittees to file an amendment application to address the violations, which, in this case, consisted of tree cutting and the failure to limit angles of fire. They argue that the Commission addressed these issues, and that there is no need for a remand. They argue also that since the Board's decision addressed the tree cutting solely in terms of its impacts on Criterion 8, the decision implicitly found that the Project remained unchanged from what had previously been approved.

The Town of Orange does not cite case law or the statute, but instead takes a practical approach, noting that a new review of Criteria other than Criterion 8 "would not add materially to the information that the Board needs to handle this appeal."

The Board finds that the Commission did not err in limiting the extent of its review to Criterion 8 alone and therefore will not remand this matter to the Commission for further hearings.

EBR 34(B) states:

> If a proposed amendment involves substantial changes to a permitted project or permit, it shall be considered as a new application subject to the application, notice and hearing provisions of §§ 6083, 6084 and 6085 and the related provisions of these Rules.

The question presented by this Preliminary Issue is whether the language of EBR 34(B) requires that the Commission determine all ten of the Criteria which appear in 10 V.S.A. §6086(a) when considering amendments to cure the violations found by the Board in its Revocation Decision.

The consideration of whether a "substantial change" has occurred generally arises within one of two contexts. First, under the statute, any development or subdivision which is exempt from Act 250 jurisdiction because it preexists the effective date of the Act or is otherwise not subject to the jurisdiction of the Act may lose that exemption if it has undergone a "substantial change." 10 V.S.A. §6081(b). Second, if a District Environmental Commission Coordinator or the Board conclude that a change to a subdivision or development which is subject to an Act 250 permit constitutes a "substantial change," the permitee must seek and obtain a permit amendment for such

change. In both of these instances, the determination that a "substantial change" has occurred triggers initial Act 250 jurisdiction over the previously exempt subdivision or development, 10 V.S.A. §6081(b), or an otherwise exempt change to the permitted project. EBR 34(B).

In this instance, the Board's Revocation Decision did not determine that the tree cutting at the Project was a "substantial change" in order to establish initial jurisdiction over the Project. Rather, the Board's finding of a substantial change occurred within the context of a determination that the Permittees had violated the Board's rules. As the Board wrote:

> Because the Board concludes that the Permittees' logging at the Project constitutes both a material and substantial change, a permit amendment was and is required. Because no permit amendment was obtained prior to the tree cutting, the Board concludes that the Permittees have violated EBR 34.

Revocation Decision at 12. Once the Board concluded that a violation of its rules existed, it then had grounds to revoke the Permittees' permit under EBR 38(A)(2)(b). *See, id.* at 16.

Thus, the need to conduct a review of the Permittees' amendment application under all the Criteria is not as crucial in this instance, as compared to a "substantial change" which triggers Act 250 jurisdiction *for the first time* over a preexisting development or subdivision, 10 V.S.A. §6086(b), or because the change itself must be subject to jurisdiction. EBR 34(B). In the latter two instances, it is apparent that a full review of any permit application arising out of a substantial change is required;[2] under

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[2] Even where a substantial change has occurred, Board precedent holds that only that change should be reviewed, unless its impacts extend to the entire project:

> District Commission review should not extend beyond an analysis of the [substantial] changes identified in this decision …. This conclusion is consistent with the language of 10 V.S.A. §6081(b) which confers jurisdiction only in respect to substantial changes to a pre-existing development; it does not grant jurisdiction over the entire pre-existing development unless changes permeate the entire project.

the former scenario, because its focus, purpose and results are different, such a full-scale review is unnecessary.

It is important to review what the Board found when it concluded in the Revocation Decision that a "substantial change" had occurred. Under EBR 2(G) a "substantial change" is "any change in a development or subdivision which may result in significant impact with respect to any of the 10 Act 250 criteria." The Board found

> The Permittees have physically changed the Project by logging trees. These physical changes have the potential to significantly impact Criterion 8 in terms of increased noise from the shooting. The logging is therefore a substantial change.

Thus, as to the tree cutting, which is the sole matter addressed by the Commission, only Criterion 8 was implicated in the Board's decision. [3]

We must also examine the Revocation Decision in its entirety, and not only that part of the decision which finds the existence of a substantial change. Having found grounds to revoke the Altered Permit, the Board then offered the Permittees the opportunity to cure the revocation. In its Order, the Board allowed the Permittees to cure the revocation by either (a) filing a statement detailing how they have corrected the violations and have complied with the Altered Permit and/or (b) by filing an amendment application with the Commission seeking authorization for any of the violations that they could not otherwise correct. The Board continued:

> Any permit amendment issued by the Commission shall include a prohibition against the use of shooting stations for firearms in the north and west areas of the Project tract until such time as the forest growth is

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Ronald E. Tucker, Declaratory Ruling 165, Findings of Fact, Conclusions of Law, and Order at 7 (Feb. 27. 1985). *See, In re R. E. Tucker, Inc.,* 149 Vt. 551, 553 (1988).

[3] In finding a violation of the Altered Permit, the Board wrote, "It is clear from the Conclusions in the February 1997 Decision (*see* Finding 9, *supra*) that the existence of the uncut vegetative buffer played a major role in the Board's ability to make a positive finding on the visual and auditory impacts of the Project under Criterion 8." Revocation Decision at 10.

> equivalent (in terms of sound attenuation) to the growth that existed prior to any cutting which occurred in 1996 – 1998, or a period of ten years from the date of this decision, whichever is greater. The precise size, placement, and description of this "no-shooting zone" are left to the Commission's discretion.

Id. at 22. This language provided the framework for the Commission's decision.

The Board's decision not to require the Commission to conduct a full-scale, ten-Criteria review of the tree cutting in this case despite its finding that a "substantial change" had occurred is limited to the particular circumstances under which the Board's finding of "substantial change" was made. It is the combination of all of the above elements that drives the Board to conclude that the Commission was within its discretion to limit its review to only Criterion 8. The application for a permit amendment was filed as a result of the Board's Revocation Decision, where the finding of a "substantial change" formed the basis for a finding of a violation of the Board's Rules, and where the permit condition that was violated by the Permittees' actions (as expressed in the Altered Permit through the incorporated Findings of Fact and Conclusions of Law) was grounded in only one criterion, Criterion 8.

No one should therefore read this decision to mean that a full review of all ten Criteria is not required in those instances where, as a result of a 'substantial change," initial jurisdiction is found over a preexisting subdivision or development or additional jurisdiction is asserted over such 'substantial change" to an already permitted project. Those situations differ from the present matter and are therefore not covered by the Board's decision today.

The Board therefore declines to remand this matter to the Commission for review the Project under 10 V.S.A. §6086(a)(1) – (7), (9) and (10) at this time. It recognizes, of course, that should its decision on Criterion 8 vary from that of the Commission, a review under other Criteria may be necessary at a time other than that envisioned by the Commission. When and If shooting is permitted and begins again at the Project, the question of angles of fire must be addressed; depending on the configuration and placement of the shooting stations, a review under other Criteria will likely have to occur. But such review is not required at this time.

2. Whether the Board should review the Project for compliance under 10 V.S.A. §6086(a)(1) – (7), (9) and (10).

Wild argues that, if the Board does not remand this matter back to the Commission, it should review the amendment application under all ten Criteria. The Permittees and Town respond to this claim as they responded to the first Preliminary Issue.

Wild notes that, in addition to the tree cutting, the Board's Revocation Decision concluded that the Permittees had violated Condition 8 of the Altered Permit, which restricted the allowable angles of fire from the shooting stations. While these angles are restricted for safety purposes, they also serve to restrict shotfall into Baker Brook. Thus, Criteria other than Criterion 8, including but not necessarily limited to Criterion 1, 1(B), 1(E), may be at issue.

Neither the Permittees nor the Town address the arguments raised by Wild that indicate that this Preliminary Issue is slightly different from the first Preliminary Issue.

The Commission did not reach the questions of angles of fire and shotfall in its decision. Rather, it left that to another day, when prior basal levels had been restored, or ten years had passed.

For the reasons stated relative to the first Preliminary Issue, the Board declines to review the Project under Criteria other than Criterion 8 at this time. A review under other Criteria may be necessary at a time in the future, but that review should first be conducted by the Commission.

3. Whether the application for the Dash 3 Permit should be denied because of violations of Land Use Permit 5W0743-2-EB (Altered) during the pendency of the application before the Commission.

Wild argues that, subsequent to the Revocation Decision, the Permittees violated ¶3(ii) of the Revocation Order which states: "ii. all terms and conditions of Land Use Permit 5W0743-2 (Altered) shall remain in full force and effect. Permittees shall comply with such terms and conditions." *Id.* at 23. Because of alleged violations (excess gunshot noise and logging), Wild argues that the Permittees' permit should be permanently revoked or, in the alternative, the Permittees' amendment application

should be denied. Although Wild's Memorandum does not cite EBR 38(A)(3)(a), it appears that Wild may be arguing that the Board should withdraw the opportunity to cure the revocation because of these asserted violations.

The Permittees deny that violations occurred. They also assert that Wild should file a separate action concerning the violations, as the Board lacks the authority to address them within the confines of the present appeal.

The Town notes that, in the zoning context, the practice of punishing an applicant for other unrelated behavior is discouraged. *Citing, Vermont Baptist Convention v. City of Burlington,* 159 Vt. 28, 30 (1992).[4] The Town agrees with the Permittees that claimed violations should be heard separate from the present appeal.

Claims of permit violations are not, outside the provisions of 10 V.S.A. §§6083(g) and 8011, reviewable within the context of a permit application proceeding.

4. Whether Land Use Permit 5W0743-2-EB (Altered) is void with respect to all shooting activity as a result of illegal logging activity and logging of the pit area.

Again alleging violations of excess gunshot noise, Wild argues that the shooting range's permit should be voided.

The Permittees assert that this issue has already been decided (in the Revocation Decision) and the Board decided to give them the opportunity to cure. They thus argue that *res judicata* should bar relitigation of the issue. The Town seeks to keep a potentially new revocation action separate from this appeal.

Wild appears to be asserting that new violations of the Altered Permit have occurred. As such, the Permittees *res judicata* arguments are misplaced; however, claims of *new* violations should be brought within the context of a new revocation

[4] It is worthwhile noting, however, that the legislature thinks otherwise. Act 40 (2001) added subsection (g) to 10 V.S.A. §6083 to allow a Commission to stay the issuance of a permit to a person who has a violation that is related to the permit application or who has a substantial unrelated violation(s). *See also* 10 V.S.A. §8011.

petition; this would necessarily be an action separate from the present matter, which is solely an appeal from a District Commission decision.

5. Whether the Permittees should be allowed to conduct shooting at the Project for the purpose of conducting sound testing and presenting the results of such testing to the Board.

The Permittees have asked to be able to conduct new shooting sound tests at the Project in order to substantiate their claims that the logging that was done (and which provided the grounds for the revocation) has not increased the sound levels emanating from the Project Site. They want to do this testing in March 2002, at the same time of the year that testing was conducted during earlier proceedings in this matter. They note that no shooting can occur at the Project during the time between now and March, so that any prejudice falls on them, not their neighbors. They assert that this should be allowed in this *de novo* proceeding, even though they did not present shooting test evidence to the Commission.

Wild objects. His neighbor and a party to this appeal, Ray Letourneau, did their own sound testing during a shooting exhibition at the Project Site in September 2000. Wild believes that, had the Permittees wanted to test for noise, they should have done so then. If the Permittees are allowed to test, Wild seeks additional time to obtain rebuttal tests.

The Town believes that no testing should occur.

As this is a *de novo* proceeding, the Board will allow the testing requested by the Permittees, subject to the following stipulations. Sound tests by the Permittees may occur only on one day in March 2002; such testing may occur only upon 72 hours notice to the Board and to other parties, through their representatives. Such notice must inform the Board and parties of the time when the testing will occur and the estimated duration of the testing.

Within two weeks following such testing by the Permittees, the Permittees shall allow the Board and all other parties reasonable access to their land, during ordinary business hours, for the purpose of shooting and conducting their own sound tests. Notice that such parties wish to conduct such tests shall be given to the Board and the Permittees at least 72 hours prior to such testing and must inform the Board and the

Permittees of the time when the testing will occur and the estimated duration of the testing. [5]

Any party which conducts a sound test shall give all other parties, their representatives and the Board reasonable access to its property in order to allow full and complete observation by such others of the manner by which the sound tests are conducted. If sound readings are to be taken on lands owned by parties, such landowner parties shall give access to all other parties, their representatives and the Board for the purpose of observing such readings.[6]

III. Order

1. The request to remand this matter to the Commission for review of substantial changes under all ten Criteria is denied.

2. The request that the Board review this matter at this time under all ten Criteria is denied.

3. The application for the Dash 3 Permit is not denied because of alleged violations of Land Use Permit 5W0743-2-EB (Altered) during the pendency of the application before the Commission.

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[5] It would be best if sound testing by all parties could occur on the same day with notice to all parties as required above. The Board will leave it to the parties to determine if they can agree upon a mutually acceptable date for conducting the tests; if no agreement can be reached, then the testing should occur as stated herein.

[6] While the Board is willing to permit the testing requested by the Permittees, it recognizes that it may be very difficult, if not impossible, to duplicate the conditions that were in effect when sound tests were conducted during earlier proceedings in this matter. Comparisons between such earlier tests and those to be conducted in the Spring of 2002 may be difficult to draw, but the Board is willing to allow the Permittees and other parties to perform sound tests and present to the Board that evidence they deem to be relevant.

4. Land Use Permit 5W0743-2-EB (Altered) is not void with respect to all shooting activity as a result of alleged illegal logging activity and logging of the pit area.

5. As provided in §II(5) above, the Permittees and other parties may conduct shooting at the Project for the purpose of conducting sound testing and presenting the results of such testing to the Board.

6. The parties shall notify the Board when all tests have been completed, but no later than April 17, 2002. The Board will then issue a Scheduling Order setting dates for further filings in this matter.

Dated at Montpelier, Vermont this 29th day of November 2001.

ENVIRONMENTAL BOARD

*/s/Marcy Harding*_____
Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
W. William Martinez
Rebecca M. Nawrath
Alice Olenick
Jean Richardson *
Nancy Waples

* Dissent of Board Member Richardson:

I dissent as to the first Preliminary Issue only. While Rule 34(B) does not itself provide details as to what a "new application" must encompass, before the Board can grant an application for an Act 250 permit, it must find that it complies with all ten Criteria. 10 V.S.A. §6086(a). Logically, therefore, a new application must present evidence on all Criteria. A full review should occur when a "substantial change" has been identified. *In re Taft Corners Associates, Inc.,* 160 Vt. 583, 594 (1993).