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January 14, 2015

VIA ELECTRONIC & FIRST CLASS MAIL

Greg Boulbol, Esq.
Vermont Natural Resources Board
Dewey Building
National Life Drive
Montpelier, Vermont 05620-3201

**RE: NRB v. Les Thomas and C.J. Stumpf
Comments on Draft Assurance of Discontinuance**

Dear Greg:

I am submitting the following comments on behalf of Les Thomas and C.J. Stumpf, the Respondents named in the above-referenced Draft Assurance of Discontinuance ("Draft AOD"). Respondents believe that the Draft AOD is not warranted and inaccurate in the following respects:

The Draft AOD relates to Land Use Permit Amendment #3R0470-2 (the "Permit"), that granted the subdivision approval to create the lot owned by Respondents, Lot 3A, in the Laughing Waters Subdivision. Respondents purchased their property from the original developer of the subdivision and Act 250 permittee, David Shepler. Mr. Shepler first obtained Act 250 Land Use Permit #3R0470 in 1985, in order to subdivide his approximately 25 acre property into three lots. He sold off two of those lots and kept the third, Lot 3, for himself. In 2004, Mr. Shepler sought and obtained Land Use Permit Amendment #3R0470-2, to further subdivide Lot 3 into Lot 3A, consisting of approximately five acres, and Lot 3B, consisting of approximately 10 acres. Respondents purchased their property from Mr. Shepler in October 2005.

The Draft AOD describes Respondents' violation of Permit condition 10 as follows: "Respondents have violated Condition 10 of the Permit by: 1) clearing existing vegetation." Permit condition 10 provides as follows:

Prior to October 1, 2004, in the flat, open stretch along the Second Branch of the White River, the permittee shall plant a minimum of 20 indigenous trees, a minimum of 6 feet tall, encompassing an area within 25 feet of the streambank. The understory vegetation within this 300-foot long buffer may continue to be managed. The permittee shall maintain a 25-foot undisturbed, naturally vegetated unmowed buffer strip from the top of the slope or steep bank upstream from the managed area and downstream, the

undisturbed, naturally vegetated, unmowed buffer shall be maintained from the river to the 20-foot right-of-way.

In order to pursue enforcement for violation of an Act 250 permit condition, the permit condition “must be expressed with sufficient clarity to give notice of the limitations on the use of the land.” *Secretary, Vermont Agency of Natural Resources v. Handy Family Enterprises and Taft Corners Associates, Inc.*, 163 Vt. 476, ____; 660 A.2d 309, 312 (1995). In addition, the Vermont Supreme Court has cautioned that “[w]e should be particularly careful that the conduct [sought to be penalized] falls within the clear prohibition of a permit condition before requiring the landowner to pay a large monetary penalty intended, in part, to deter such violations in the future.” *Id.* In reaching this conclusion, the Court noted that “in construing land use regulations any uncertainty must be decided in favor of the property owner.” *Id.* (quoting *In re Vitale*, 151 Vt. 580, 584, 563 A.2d 613, 616 (1989), and citing *Committee to Save the Bishop’s House Inc. v. Medical Center Hosp. of Vt.*, 137 Vt. 142, 152, 400 A.2d 1015, 1020 (1979)) (“These holdings are based on our zoning decisions that have emphasized that ambiguity must be resolved for the property owner.”).

When Respondents purchased Lot 3A in October 2005, five trees were growing in the buffer, and the buffer area around the trees was maintained as a pasture. These conditions are shown in the following photographs attached hereto: Exhibit 1 (Photographs of area by river emailed to Respondents from David Shepler in May 2005); Exhibit 2 (Photograph provided to Respondents from David Shepler, believed to be taken in mid-2005, compared to Photograph taken during Respondents’ ownership); Exhibit 3 (Google Earth image from 1996); Exhibit 4 (Google Earth image from 2003); and Exhibit 5 (Google Earth image from 2006). Respondents have now, as of fall 2014, planted the required trees. Respondents have also continued to manage the buffer in the condition that it was in when they acquired the property. Respondents vigorously dispute that they have cleared any vegetation in violation of Permit condition 10.

Permit condition 10 specifically provides that “[t]he understory vegetation within this 300-foot long buffer may continue to be managed.” The phrase “continue to be managed” indicates that whatever management was occurring in the buffer may continue. Given that this area was previously managed as pasture, absent permit condition language that specifically prohibits this particular form of management Respondents cannot be fined for, or prohibited from continuing this activity. Furthermore, to the extent that the phrase “continue to be managed” creates ambiguity as to the limitations on the use of the land, any ambiguity in the permit condition must be resolved in the favor of the property owners and cannot support a fine in the current circumstances.

In light of the foregoing, the language in Paragraph 15 of the Draft AOD that requires Respondents to “establish an understory, all appropriate to a Sugar Maple-Ostrich Fern Riverine Floodplain Forest, throughout the 300-foot long buffer zone area,” and the language in Paragraph 16.A. that provides that “After the 5 year period has expired, all management of the understory shall cease except for the selective management referenced in Paragraph 13 of this Administrative Order.” are both inappropriate restrictions on Respondents’ use of their property that are not supported by the existing Permit conditions.

In addition to the foregoing, Respondents note the following inaccuracies in the Draft AOD:

1. Paragraph 1. The address of the property is 232 Laughing Waters Way, rather than 252.

2. Paragraph 3. This paragraph contains the following inaccuracies:

line 3 "horse barn" should be "shed-row"

line 3 "hoop house" should be "hoop shed"

line 3 "located just above" should be "located 150 feet above"

line 4 "from the barn level" should be "from the house level".

3. Paragraph 5. This paragraph contains the following inaccuracies:

The 300 foot buffer encompasses land located both on lot 3A and lot 3B. There is not 300 feet of space between the treed area on lot 3A and the northern boundary of Lot 3A. The buffer begins at the northern end of the shaded (treed) area abutting the Second Branch of the White River on lot 3A and extends northward to a point on lot 3B approximately 100 feet north of the boundary between lot 3A and lot 3B.

line 3 "beginning at the northern-end" should be "beginning at the southern-end"

line 4 ", and extending northward..." to end of clause should be replaced by ", and extending northwards across Respondent's property line to a point approximately 100 feet beyond on Lot 3B to where the bottom of the steep bank intercepts the Second Branch of the White River." This clause in fact reverses the order of land-features as described in #3R0470-2 Condition 10, which demarcates the northern end of the 300 foot buffer as "the top of the slope or steep bank upstream from the managed area." This steep bank referred to is on Lot 3B. To be consistent with Permit condition 10, the language should in fact read as follows:

"beginning at a northerly position on Lot 3B at a point where the bottom of the steep slope intersects the Second Branch of the White River and extending southwards across Lot 3A to the undisturbed, naturally vegetated, unmowed buffer between the river and the 20-foot right-of-way."

4. Paragraph 6. Note that this paragraph should replace "contains only 4 trees" with "contains 40 trees, 30 of which were planted in 2014"

5. Paragraph 9. As of January 14, 2015, all exterior lighting has been down shielded.

6. Consistent with the above discussion, all language relating to the management of the understory within the 300 foot buffer that is inconsistent with Permit condition 10 must be deleted and/or revised in order to be accurate.

Greg Boulbol, Esq.
Vermont Natural Resources Board
January 14, 2015
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Thank you for your attention to this matter.

Very truly yours,



Nathan H. Stearns
nate@hesmlaw.com

NHS/jam

cc: Les Thomas and C.J. Stumpf (via electronic mail only)



Leslie Thomas <les.thomas@gmail.com>

Fw: VT HOUSE- lower field

1 message

DavidS <geomancer@together.net>
Reply-To: DavidS <geomancer@together.net>
To: les.thomas@gmail.com

Sat, May 28, 2005 at 8:35 PM

-----Forwarded Message-----

From: DAVID SHEPLER
Sent: May 7, 2005 7:33 PM
To: DAVID SHEPLER
Subject: VT HOUSE- lower field

----- Original Message -----

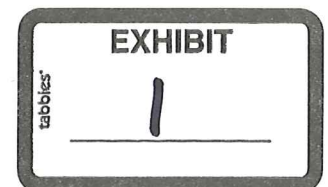
From: DAVID SHEPLER
To: John Kukowski
Cc: mkeeling@direcway.com
Sent: Saturday, May 07, 2005 6:55 PM
Subject: VT House

To view the picture, double-click the icon. If asked what program to open it with, select your Internet browser.

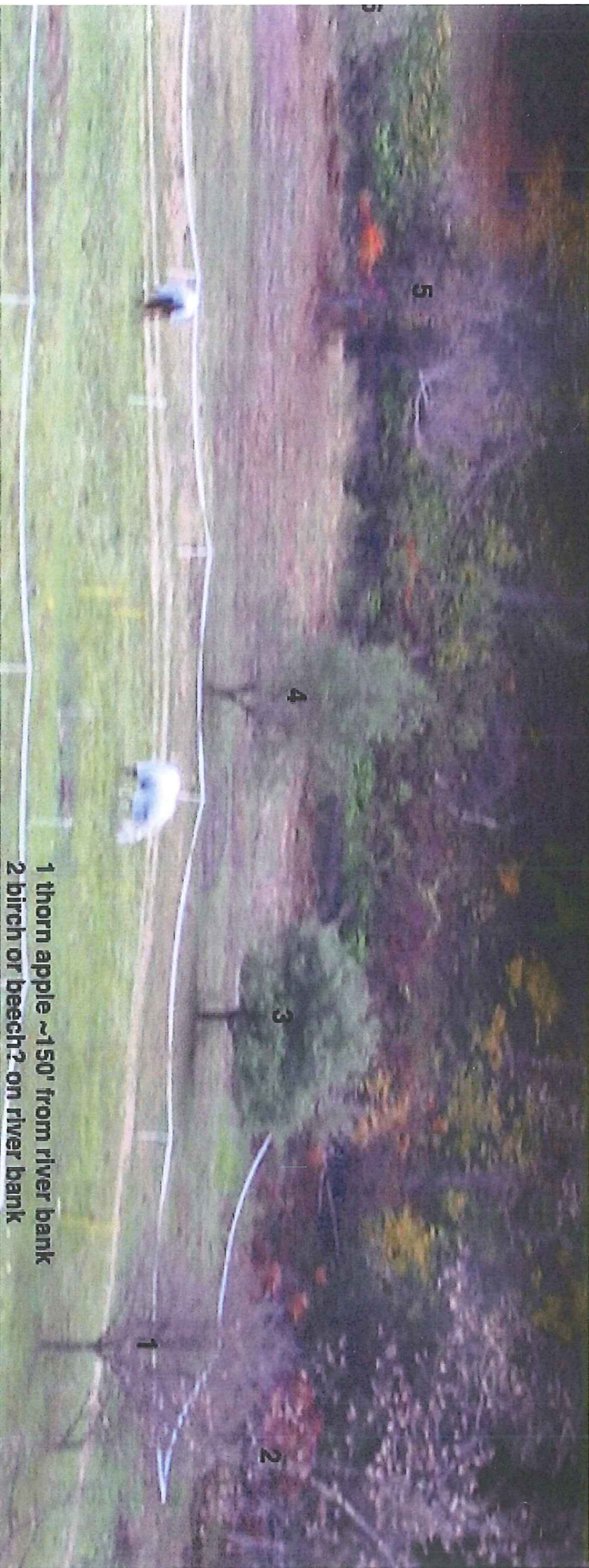
This picture is best for online viewing. If you want to print a higher-quality print, please ask the sender to send pictures that are the actual size (not reduced or enlarged) of the original picture.



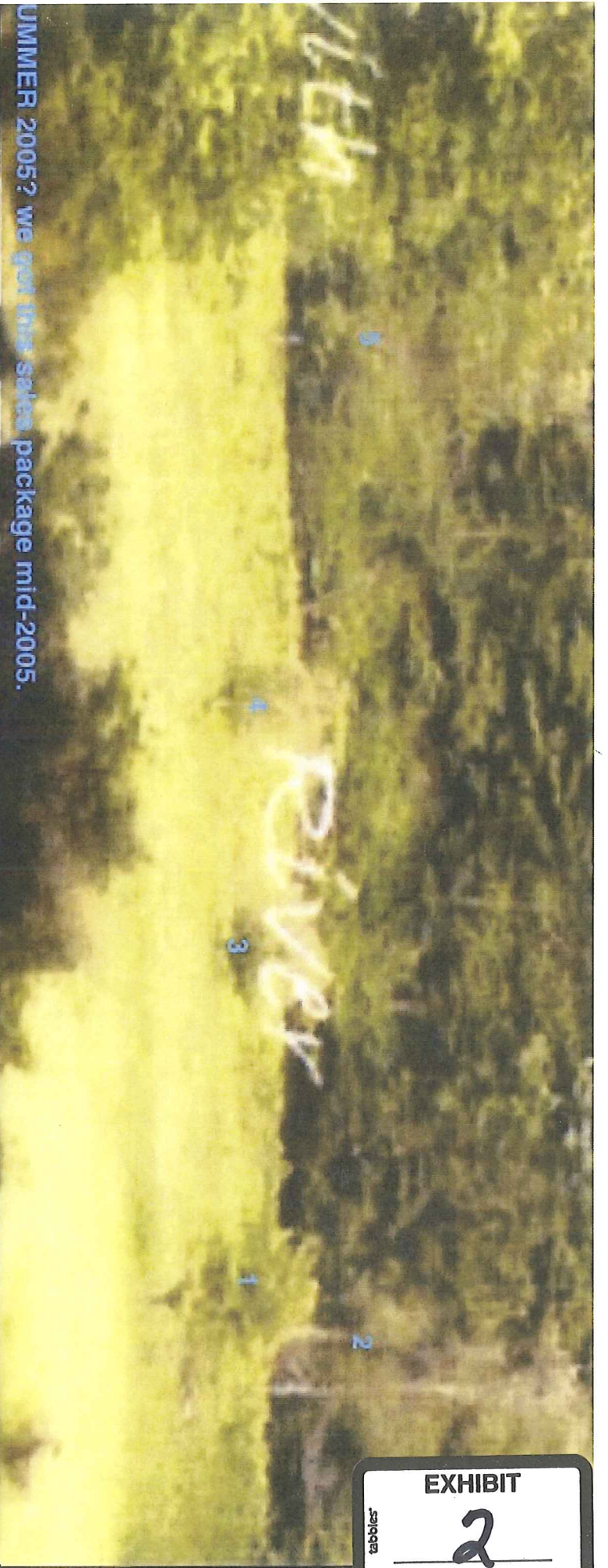
RIVER PATH N.jpg
27K







UMMER 2005? we got this sakes package mid-2005.



tabbles

EXHIBIT

2

1 thorn apple ~150' from river bank
2 birch or beech? on river bank

