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

Re: Roger Loomis d/b/a Green Mountain Archery Range
and Richard H. Sheldon
1 R0426-2-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal from Land Use Permit #1R0426-2 issued to Roger Loomis d/b/a Green Mountain Archery Range ("Appellant") and Richard H. Sheldon pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") authorizing the conversion of a previously permitted gymnastics facility to an indoor/outdoor commercial archery facility with increased parking capacity in North Clarendon, Vermont. Specifically, the appeal concerns whether and at what point in the proceeding Omya, Inc. ("Omya"), the owner of the land on which a portion of the project is located, must be joined as a co-applicant and whether the proposed project conforms with 10 V.S.A. §§ 6086(a)(1)(air), 1(B)(waste disposal), (3)(water supplies), (5)(traffic), (8)(aesthetics), and (lO)(town and regional plans) ("Criteria 1, l(B), 3, 5, 8, and 10" respectively).

As explained below, the Environmental Board ("Board") concludes that the Project complies with all criteria on appeal. Accordingly, the Board issues Land Use Permit #1R0426-2-EB. In addition, the Board concludes that Omya must be joined as a co-applicant prior to operation of the outdoor archery facility.

I. BACKGROUND

On September 20, 1981, the District #1 Environmental Commission ("District Commission") issued Land Use Permit #1R0426 to Richard H. Sheldon authorizing the construction and operation of an indoor gymnastics facility on the southeast side of Town Highway 22 in North Clarendon, Vermont ("Sheldon Permit").

On July 27, 1995, Appellant, with Mr. Sheldon as co-applicant, filed an application ("Application") with the District Commission seeking an amendment to the Sheldon Permit to convert the previously permitted gymnastics facility to an indoor commercial archery facility with increased parking capacity and to construct an outdoor commercial archery facility on land leased from Omya on the northwest side of Town Highway 22 ("Project").

On October 30, 1995, Appellant filed an appeal with the Board from a memorandum of decision of the District Commission, holding that Omya be joined as a co-applicant.

On February 26, 1996, the Board issued Findings of Fact, Conclusions of Law, and Order on the issue of Omya's co-applicancy holding that good cause existed to

preliminarily waive the requirement that Omya be joined as a co-applicant. The matter was remanded to the District Commission with instructions to hold a hearing on the merits. The Order indicated that the District Commission could re-examine the issue of co-applicancy.

On March 3 1, 1997, the District Commission issued Land Use Permit #1R0426-2 together with supporting Findings of Fact, Conclusions of Law, and Order to Issue Permit (collectively, the "Loomis Permit").

On June 27, 1997, the District Commission issued its Decision on Motions to Alter and Order to Provide Additional Information,

On July 28, 1997, Appellant filed a Notice of Appeal with the Board contending that the District Commission erred by finding that Omya is required to be joined as a co-applicant in the Application pursuant to Environmental Board Rule ("EBR") 10(A).

On July 28, 1997, John Colvin ("Cross-Appellant") filed a Notice of Cross-Appeal with the Board contending that the District Commission erred by finding that the Project complies with Criteria 1, l(B), 3, 5, 8, and 10. Cross-Appellant also alleges that the District Commission erred by requiring Omya to sign the Application prior to the operation of the Project rather than prior to the issuance of an Act 250 permit.

On August 28, 1997, Board Chair John T. Ewing convened a prehearing conference. On August 29, 1997, the Chair issued a Prehearing Conference Report and Order ("Prehearing Order"), which is incorporated herein by reference.

On September 15, 1997, Appellant filed Comments regarding the Preheating Order, which the Board has regarded as objections thereto. On September 23, 1997, the Chair issued an Order, which is incorporated herein by reference, permitting the parties to submit memoranda of law concerning the scope of Cross-Appellant's participation concerning the issue of co-applicancy.

On September 30, 1997, the parties filed direct testimony and exhibits. On October 2, 1997, Appellant objected to the submission of certain oversize exhibits filed by Cross-Appellant. On October 7, 1997, the Chair issued an Order, which is incorporated herein by reference, sustaining Appellant's objections.

On October 21 and 22, 1997, the parties filed rebuttal testimony and exhibits.

On November 4, 1997, the parties filed proposed findings of fact and conclusions of law.

On November 10, 1997, the Chair convened a second prehearing conference by telephone.

On November 18, 1997, the Board deliberated and affirmed the preliminary rulings made in the Orders issued September 23, 1997 and October 7, 1997. Also on November 18, 1997, the Board convened a hearing in Rutland, VT. The following parties participated: Appellant by Kimberly K. Hayden, Esq. and Cross-Appellant by Stephanie J. Kaplan, Esq. The Board conducted a site visit, accepted documentary and oral evidence into the record, and heard opening and closing statements.

On November 25, 1997, the parties filed supplemental proposed findings of fact and conclusions of law.

After recessing the hearing, the Board deliberated on November 18, 1997 and December 17, 1997.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision. To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUES

1. (a) Whether good cause exists to waive the requirement, under EBR 10(A), that Omya be joined as a co-applicant.

(b) If issue l(a) is answered in the negative, then whether Omya must be joined as a co-applicant before a permit is issued or before the Project begins operation.

2. Whether, pursuant to 10 V.S.A. § 6086(a)(l), the Project will result in undue air pollution with respect to the dust that will be generated by vehicles driving to and from the Project and in the parking lot.

3. Whether, pursuant to 10 V.S.A. § 6086(a)(l)(B), the Project will "meet

any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into the groundwater or wells."

4. Whether, pursuant to 10 V.S.A. § 6086(a)(3), the Project will "cause an unreasonable burden on an existing water supply."

5. Whether, pursuant to 10 V.S.A. § 6086(a)(5), the Project will "cause unreasonable congestion or unsafe conditions with respect to use of' Town Highway 22.

6. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will "have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas."

7. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the Project is in conformance with the Clarendon Town Plan and the Rutland Regional Plan.

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases before administrative bodies. Id. § 810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Handy, 144 Vt. 610, 612 (1984). judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201 (e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

At the November 18, 1997 public hearing in this matter, the Board took official notice of the Environmental Protection Rules Guidance issued by the Vermont Department of Environmental Conservation dated June 23, 1989 regarding Environmental Protection Rule §4-06. 3 V.S.A. § 810(4). The parties raised no objection to this action of the Board.

IV. FINDINGS **OF** FACT

1. On September 20, 198 1, the District Commission issued the Sheldon Permit to Richard H. Sheldon authorizing the construction and operation of an indoor commercial gymnastics facility located off West Tinmouth Road/Town Highway 22 ("TH 22") in the Chippenhook area of North Clarendon, Vermont ("Chippengym").

2. Appellant and Mr. Sheldon seek approval to construct and operate an indoor/outdoor commercial archery facility on both sides of TH 22 in the Chippenhook area of North Clarendon, Vermont (previously identified as the "Project").

3. The Project includes the conversion of the Chippengym building to an indoor commercial archery facility ("Indoor Range"). It also includes an increase in parking capacity from that permitted under the Sheldon Permit. These portions of the Project will be located on land Appellant has leased from Marilyn and Richard Sheldon ("Sheldon Tract").

4. The Sheldon Tract is bordered on the north by Cross-Appellant's property, on the southeast by property of Omya, on the southwest by property of Marilyn and Richard Sheldon, and on the northwest by TH 22. Mr. Sheldon's residence is located on TH 22 immediately to the south of the Indoor Range.

5. Stone walls run along the north and northwest property boundaries of the Sheldon Tract.

6. TH 22 is an unpaved, winding country road without shoulders and with dense vegetation on its edges. The road is frequented by pedestrians and persons on horseback.

7. To create the Indoor Range, Appellant has renovated the Chippengym building by removing an interior wall and constructing a loft on the northeast wall from which archers may shoot at targets. Appellant has also covered the interior walls with a protective paneling.

8. The Project involves no additional alterations or construction to the Indoor Range.

9. Archers using the Indoor Range will move among marked stations. From these

stations they will shoot at free-standing, Styrofoam wildlife targets.

10. The entrance to the Indoor Range is located on the northern end of the northwest side of the building.

11. On March 3, 1997, the Department of Environmental Conservation, Wastewater Management Division ("DEC"), issued Water Supply and Wastewater Disposal Permit #WW-1-0657 ("WW Permit") to Appellant and Richard Sheldon in connection with the Project.

12. The WW Permit states that it was issued pursuant to 10 V.S.A. Chapter 61 and the Environmental Protection Rules, Chapter 1 (Small Scale Wastewater Treatment and Disposal Rules), Subchapters 4 and 7, and Chapter 21 (Water Supply).

13. The WW Permit approves use of the of the existing drilled water well supplying water to the Indoor Range. Such use is limited, however, to employees of the Project. The WW permit requires that Appellant provide bottled drinking water for archers at the Project.

14. The WW Permit approves use of the previously approved septic system servicing the Sheldon Tract, subject to certain leach field modifications. The use of the septic system and its associated indoor plumbing fixtures located within the Indoor Range is limited to employees of the Project.

15. The WW Permit provides that the toileting needs of archers at the Project shall be satisfied by a vault privy located to the north of the Indoor Range and screened from view by shrubbery. The WW Permit requires that

> [t]he contents of the vault privy shall be removed with sufficient frequency to maintain sanitary conditions, by a commercial septic tank pumping service, and transported to a State-approved municipal wastewater treatment facility for disposal. The vault privy shall be operated and maintained at all time [sic] in a manner that will not constitute a public health hazard, public nuisance, or source of pollution.

16. The WW Permit provides that, for persons not employed at the Project, "[a]n adequate and continual supply of pre-moistened towelettes or waterless hand cleaner and paper towels shall be provided in the vault privy, for hand washing purposes."

17. The WW Permit was issued

> based on the anticipated daily water demand and volume of wastewater from an archery facility, having a maximum of two employees stationed on the premises, with an anticipated maximum usage of 60 persons per day for the indoor range and 80 persons per day for the outdoor range, with the ranges not operating concurrently.

18. The privy will be a permanent structure, with a 1,000 gallon concrete septic tank and block foundation. It will be stained red to match the exterior of the Indoor Range.

19. There will be no difference between the pumping of the privy's septic tank for the removal of waste and the pumping of a more conventional septic tank with a leach field.

20. When the Chippengym was in operation, both employees and students used the indoor water supply and waste disposal systems.

21. Only Appellant and one employee will use the indoor water supply and waste disposal systems. The door to the indoor toilet will be locked and Appellant will post a sign on it indicating that it is solely for the use of employees.

22. Cross-Appellant has a water well located approximately 150 feet down-gradient from the location of the privy. The well is approximately 25 feet deep. It is no longer Cross-Appellant's primary well although he uses it periodically.

23. The Vermont Department of Environmental Conservation issued an Environmental Protection Rules ("EPR") Guidance on June 23, 1989 regarding toilets in public buildings ("Toilet Guidance"). The Toilet Guidance addresses EPR § 4-06.[1] The Toilet Guidance states in part:

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1 The EPRs were revised effective August 8, 1996. EPR§ 4-06 was amended and replaced by § l-406. The WW Permit was issued under the revised EPRs. See Finding #12, Supra. Because the Board concludes that any technical non-compliance with Agency rules by the Project is not dispositive in this case, see page 19 infra, it does not find it

(continued.. .)

Conventional sanitary facilities (flush toilets and handwashing sinks) are required in the vast majority of public facilities permitted under the EPRs. This requirement is based on public health and the general expectation of the public that flush toilets, running water, and washing facilities are the established norm and should be available.

24. The Total Guidance provides the following guidelines for interpreting EPR § 4-06:

3. If the use of the public building is infrequent or brief, non-conventional sanitary facilities may be considered in lieu of toilets and lavatories on the following bases:

a. The general public may have access but would not normally use the building.

b. Employees are limited to four (4) or less, over a 24 hour day; i.e., no more than a total of four (4) individuals may be employed per day.

c. The building is only visited less than two (2) hours in any one (1) day by not more than four (4) individuals, but sanitary facilities are desired. (This is the corollary to Item 2 above).

d. There is no food or drink handling, preparation, or consumption in the building.

e. The building is used by the general public no more than once in a month for a special event.

In determining whether a building or activity qualifies for non-conventional sanitary facilities under this item, it must be compared to each of the above subitems. If it meets all of these

[1](. , .continued)
necessary to determine whether the Toilet Guidance provides guidance only to former §4-06 or to the revised EPRs as well.

constraints, it may be approved for non-conventional sanitary facilities.

25. The Toilet Guidance states that it is not a rule or policy within the meaning of 3 V.S.A. Chapter 25, Administrative Procedure.

26. Individuals will pay a membership fee for the privilege of using the facilities. Non-members will use the archery ranges only as the guest of a member. The Project is a "commercial purpose" pursuant to Act 250.

27. Vehicles will enter the Sheldon Tract from an existing curb cut on TH 22 used in connection with the Chippengym.

28. Signs will be posted along TH 22 alerting motorists to the presence of pedestrians and horseback riders.

29. The Sheldon Permit authorized a gravel parking lot for ten vehicles located to the northwest of the Chippengym building, between the building and TH 22.

30. The Project will include the addition of gravel to the periphery of the existing parking lot in order to accommodate a maximum of 24 vehicles ("Expanded Lot").

31. Appellant proposes to create an additional 25 "overflow" parking spaces parallel to the north and southeast property lines of the Sheldon Tract. He proposes 11 spaces along the north property line and 6 spaces along the northern half of the southeast property line (the "North Parking Spaces"). He also proposes 8 spaces along the southern half of the southeast property line ("South Parking Spaces").

32. The North and South Parking Spaces and the driveways used to reach them are grass-covered. Appellant does not propose to add gravel to these areas.

33. Appellant proposes that vehicles will access North Parking Spaces along the north side of the Indoor Range ("North Driveway"). In order to reach these spaces, vehicles will travel down a very steep, grass-covered slope which will create a potential for erosion along the slope.

34. Access to the South Parking Spaces will be along the south side of the Indoor Range.

35. All of the parking spaces are located on the Sheldon Tract.

36. No vehicles associated with the Project will park along TH 22.

37. Appellant will apply small amounts of water or calcium chloride as needed to the graveled portion of the parking area in order to control dust generated by vehicles. Appellant will use machinery from his father's business to apply the calcium chloride.

38. When use of the overflow parking spaces becomes necessary, an employee of the Project will be posted in the driveway in front of the Indoor Range to direct traffic to the spaces via the appropriate route.

39. Marilyn and Richard Sheldon operated the Chippengym until 199 1. The Chippengym operated throughout the year providing, on average, three to four classes per day, with each class enrolling approximately 20 students. The Chippengym also hosted special events several times each year during which more than 20 patrons would drive to and park at the facility, along the south side of the barn located to the southwest of the Chippengym building, and on the lawn and driveway of the Sheldon residence. There were regularly more than 10 vehicles parked near the Chippengym.

40. The Project is located in a rural environment with long distance views of the Green Mountains, rolling pasture lands alternating with woodlots, stonewalls, country homes, and farms.

41. Under the Project as proposed, buildings, parking spaces, and driveways cover nearly all of the Sheldon Tract.

42. The proposed development on the Sheldon Tract will be visible from TH 22.

43. A hedgerow of mature trees lines the north property boundary of the Sheldon Tract. Nevertheless, there is a clear view of the Indoor Range from Cross-Appellant's home.

44. The Sheldon Tract is up-gradient from Cross-Appellant's home. Although Cross-Appellant will be unable to see the surface of the North Parking Spaces and the Expanded Lot, he will be able to see vehicles parked there.

45. Appellant will plant eleven 8- 10 foot white pines along the north property line of the Sheldon Tract.

46. The existing and proposed landscaping along the north property line will not entirely screen the Project from Cross-Appellant's view.

47. The Project also includes the creation of an outdoor commercial archery range on approximately 65 acres of land on the northwest side of TH 22 ("Outdoor Range"). The 65 acre tract is a portion of an approximately 380 acre parcel owned by Omya ("380 Acre Parcel").

48. Appellant has a leasehold interest in the 65 acre tract ("Omya Tract") by virtue of a Memorandum of Lease by and between Appellant, lessee, and Omya, lessor ("Omya Lease").

49. Appellant's leasehold interest in the Omya Tract is for a period of one year, expiring in March, 1998.

50. Each February since 1994, Appellant and Omya have executed a virtually identical lease for a one year term to expire in March of the following year.

51. The Omya Lease contains the following provision for termination of the lease prior to expiration of the one year term:

> [Omya] reserves the right to terminate [the Omya Lease] at any time on sixty (60) days written notice to [Appellant].

52. The Omya Lease contains the following provision regarding improvements made by Appellant during the term of the lease:

> At the expiration of the term of [the Omya Lease], or upon termination, [Appellant] shall have the right to remove any improvements he may have placed upon or made to the [Omya Tract] provided that in doing so, no damage shall be done to the [Omya Tract] as a result of such removal. If not removed within thirty (30) days after the expiration or termination of this lease, said improvements shall be deemed abandoned by [Appellant] and shall become the property of [Omya].

53. The Omya Lease contains the following further "Conditions and Covenants:"

> [Appellant] shall keep the [Omya Tract] in good repair, order and condition as the same are at the beginning of the term and will permit no nuisance thereon. [Appellant] shall use the [Omya Tract] for proper and lawful activities or uses only and shall peaceably surrender same at the end of the term or upon earlier termination. [Appellant] shall not remove or waste any part of the [Omya Tract].

54. The Outdoor Range is located entirely on the Omya Tract.

55. The Omya Tract is forested and hilly. A stone wall runs along the boundary of the Omya Tract and TH 22. There is a break in the wall at the entrance to the Outdoor Range. Appellant did not create this opening. He has, however, cleared away stones that have fallen into the entrance to the trail.

56. The Outdoor Range consists of a trail network in the shape of a "figure eight."

57. The trails utilized by the Outdoor Range existed at the time Appellant first entered into a lease for the Omya Tract. These trails have historically been used by loggers, horseback riders, and persons wishing to access a sugarbush.

58. Appellant has mowed the trails on the Outdoor Range. He has cut brush encroaching onto the path with a clipper. He has not created any new trails.

59. The trails on the Outdoor Range will not be widened, cleared, cut, or otherwise developed except for occasional mowing to keep vegetation from overgrowing the paths.' No new trails will be added to the Outdoor Range.

60. With Appellant's permission, Omya has posted the Omya Tract with no trespassing signs.

61. The concept of the Outdoor Range is to simulate bow hunting in the natural setting.

62. Thirty stations are located along the trail network of the Outdoor Range. Each station will contain a moveable, free-standing, Styrofoam wildlife target. Signs with arrows will be set up along the trail. They will be either free standing or suspended by ropes from trees along the trails. Bow racks will be suspended from

trees. Stakes will be inserted into the ground indicating the location from which the archers will shoot.

63. The station nearest to TH 22 is Station #1. Archers shooting at Station #1 will stand further than 100 feet from TH 22. Arrows shot at Station #1 will follow a course roughly parallel to the length of TH 22.

64. An arrow can travel a maximum of approximately 90 yards.

65. The arrows used at the Outdoor Range will have a metal tip that can penetrate skin if it hits a person.

66. All of the targets, signs, and bow racks on the Outdoor Range can be removed with one day's notice without impacting the land.

67. All targets, signs, and bow racks will be removed during the winter when the Outdoor Range is closed.

68. The targets, directional signs, and bow racks on the Outdoor Range cannot be seen from TH 22. The figure eight trail on the Outdoor Range cannot be seen from TH 22, except for the entrance to the trail off of TH 22.

69. Bow hunting is a quiet sport that requires great concentration and a peaceful, rural setting.

70. It will take archers approximately three hours to complete the Outdoor Range.

71. Each station of the Outdoor Range will support a maximum of six archers.

72. The maximum occupancy of the Outdoor Range is 80 persons per day.

73. The Outdoor Range will operate from April 1 to December 15 each year during the following hours:

Monday - Friday	4:00 p.m. - 9:00 p.m.
Saturday and Sunday	8:00 a.m. - 6:00 p.m.

74. Archers will not be permitted to begin using the Outdoor Range at any time later than 6:00 p.m. on weekdays and 3:00 p.m. on weekends.

75. Use of the Outdoor Range must be scheduled in advance and will be scheduled on a "staggered start" basis similar to a golf course.

76. It will take archers approximately one hour to complete the Indoor Range.

77. The maximum occupancy of the Indoor Range is 60 persons per day.

78. The Indoor Range will operate throughout the year. The hours of operation are as follows:

Monday - Friday	5:00 p.m. - 9:00 p.m.
Saturday and Sunday	8:00 a.m. - 9:00 p.m.

79. The Indoor Range and the Outdoor Range will not be open concurrently.

80. Use of the Indoor Range will be on a first come / first served basis.

81. "Scrambles" and other special archery events will be conducted at the Project site. Participants in such events will reserve use of the facility in advance of the event. Participants in these events will never exceed the numbers set forth in these Findings. Such events will be conducted only within the limited hours set forth in these Findings.

82. Special events expecting to attract more than the permitted number of persons per day will be scheduled at locations other than the Project site.

83. On average, there will be 2-3 archers inside each vehicle arriving at the Project.

84. The Expanded Lot and the South Parking Spaces will provide sufficient parking capacity to accommodate the Project.

85. No exterior lighting will be added to that approved under the Sheldon Permit. Appellant will install a light inside the privy.

86. By letter dated April 19, 1995, the Clarendon Planning Commission conferred its approval of the Project under the town plan.

87. The current Clarendon Town Plan ("Town Plan") was adopted in June, 1995, two months after the Clarendon Planning Commission approval issued. The parties

have not objected to use of this Town Plan for purposes of Act 250 review.

88. The Project site is within a "residential district" as defined by the **Town Plan.**

89. Regarding residential districts, the Town Plan provides:

> The purpose of the residential district is to provide for residential and other compatible uses at densities appropriate with the physical capability of the land and the availability of community facilities and services. Planned residential development, open space preservation, and other techniques for preserving the residential character of these areas are encouraged. Development should take place in such a way that any irreplaceable, unique, scarce resources and natural areas are not harmed.

90. The Town Plan includes the following among its Goals and Objectives to Guide Future Growth:

> Preserve rural character by maintaining the historic settlement pattern of more densely settled villages and neighborhoods surrounded by undeveloped land.

91. The Town Plan states that the Town will work to observe the following policies regarding Recreation:

> Promote the maintenance and enhancement of recreation opportunities[.]
>
> Discourage land uses that would significantly diminish the value and availability of outdoor recreation activities.

92. The Rutland Regional Plan ("Regional Plan"), adopted November 15, 1994, discourages land uses that would significantly diminish the value and availability of outdoor recreation activities.

93. Section 4, Future Land Use, of the Regional Plan provides:

> Goals * * *
>
> 2 To protect the character of rural areas and resource areas by discouraging scattered development and incompatible land

uses

3 To encourage and facilitate development in existing and future growth areas appropriate to the scale of those areas.

* * *

5 To protect the environment and its economic, ecological, sociological, psychological, and aesthetic benefits.

94. The Project will ensure that the 65 acres of the Omya Tract remain in their present forested state.

95. Appellant operated the archery facility for a short period of time in 1995. It was in connection with that use of the Outdoor Range that Appellant mowed the trails and renovated the interior of the Indoor Range (see Findings #7, #55, and #58 supra). At that time, bow racks and directional signs were screwed into trees along the trails.

96. The Town of Clarendon Planning Commission minutes report that the Town conducted a traffic count while the archery facility was in operation. The Town counted ten cars associated with the archery facility on TH 22 in a one hour period.

97. Omya has refused to sign the application for an Act 250 permit in relation to the Project. Omya has been included on the certificate of service used in the District Commission and Board proceedings.

V. CONCLUSIONS OF LAW

A. **Jurisdiction and Scope of Review**

The Project constitutes a material change to the Sheldon Permit pursuant to EBR 2(P) and is therefore subject to Act 250 jurisdiction. EBR 34(C). The Project is independently subject to Act 250 review because the Indoor and Outdoor Ranges constitute the construction of improvements for a commercial purpose on a tract of involved land in excess of the jurisdictional minimum. EBR 2(A).

When a party appeals from a district commission determination, the Board

provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the de novo review of a District Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the District Commission in this matter concerning the issues on appeal. Rather, it must regard the Loomis Permit as evidence to be offered by the parties.

B. Criterion 1 (air pollution - dust)

Before issuing a permit, the Board must find that the Project "[w]ill not result in undue. .. air pollution." 10 V.S.A. § 6086(a)(l). The burden of proof is on Appellant under Criterion 1. Id. § 6088(a). In general, the Board considers noise, fumes, and dust to be relevant under this criterion. See, e.g., Re: James E. Hand, #8B0444-6-EB(Revised), Findings of Fact, Conclusions of Law, and Order at 22 (Aug. 19, 1996)[EB #629R]. In this matter, however, the Prehearing Conference Report and Order limited Criterion 1 to consideration of the dust to be generated by vehicles accessing the Project. Prehearing Conference Report and Order at 3.

The existing parking lot will be expanded by the addition of gravel to the lot's perimeter. Appellant will sprinkle water and calcium chloride as needed to control dust in the Expanded Lot. The South Parking Spaces are covered with grass and will be used solely as "overflow" parking. These are the only areas on which parking is permitted (see analysis relating to Criteria 5, 8, and 10, infra).

Appellant has sustained his burden of proof. Although the parking capacity will expand under the Project, the Board concludes that the Project will not result in undue air pollution under Criterion 1.

C. Criterion l(B) (waste disposal)

Criterion 1 (B) is part of Criterion 1, which seeks to prevent undue air and water pollution. 10 V.S.A. $6086(a)(l)(B). Criterion 1 (B) provides:

> Waste Disposal. A permit will be granted whenever it is demonstrated by the applicant that ... the development ... will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells.

Id. The burden of proof is on Appellant. 10 V.S.A. §6088(a). When a water supply and wastewater disposal permit is entered into the record, however, a rebuttable presumption arises that waste materials and wastewater can be disposed of without undue water pollution. EBR 19(E)(1). This presumption transfers the burden of proof to Cross-Appellant who can rebut the presumption as follows:

> If... a preponderance of the evidence shows that undue water pollution ... is likely to result, then the ... [B]oard shall rule that the presumption has been rebutted. Technical non-compliance with the applicable health, water resources, and Agency of Natural Resources' rules shall be insufficient to rebut the presumption without a showing that the non-compliance will result in, or substantially increases the risk of, undue water pollution ....

EBR 19(F). See, e.g., Re: Herbert and Patricia Clark, #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 26-27 (Apr. 3, 1997)[EB # 652]; Hand, supra at 22-23. If Cross-Appellant rebuts the presumption, then the burden returns to Appellant, who must be permitted the opportunity to submit additional evidence. EBR 19(F); Re: MBL Associates, #4C0948-EB(Altered), Findings of Fact, Conclusions of Law, and Order at 35 (Jan. 30, 1996)[EB #610R].

Appellant has offered the WW Permit into evidence creating a rebuttable presumption that waste materials and wastewater can be disposed of without undue water pollution and transferring the burden of proof to Cross-Appellant. Cross-Appellant has failed to rebut the presumption created by submission of the WW Permit under either test set forth in EBR 19(F). First, based on the evidence presented and set forth in the Findings above, the Board concludes that Cross-Appellant has failed to demonstrate, by a preponderance of the evidence, that undue water pollution is likely to result. Cross-Appellant has done nothing more than assert that he has a shallow well located approximately 150 feet down-gradient from the proposed privy. Such evidence is insufficient to rebut the presumption of compliance created by acceptance of the WW Permit into the record.

Second, Cross-Appellant alleges that the Project does not comply with the relevant EPRs (see footnote 1, supra) and the Toilet Guidance states, the WW Permit was improperly granted, Citing this Board's decision in Clark, Cross-Appellant argues that the Permit must be denied under Criterion 1 (B). Assuming for the purpose of this analysis that the WW Permit was improperly granted, Cross-Appellant has failed to prove that such non-compliance will result in or substantially increase the

risk of undue water pollution. In Clark, the opponent presented extensive evidence concerning the risk of failure and other hazards posed by installation of a cornposting toilet. Clark. supra at 10-l 5. In contrast, Cross-Appellant has merely stated an unsubstantiated concern that his well will be contaminated due to a malfunction or overflow of the privy during regular operation or during pumping. Cross-Appellant has not demonstrated that any non-compliance with the EPRs or Toilet Guidance will result in or substantially increase the risk of undue water pollution.

Appellant has sustained his burden of proof. Cross-Appellant has failed to rebut the presumption created by submission of the WW Permit into the record. The Board concludes that the Project will meet applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells pursuant to Criterion l(B).

D. **Criterion 3 (existing water supplies)**

Under Criterion 3, the Board must find that the Project "[w]ill not cause an unreasonable burden on an existing water supply, if one is to be utilized," before issuing a permit. 10 V.S.A. § 6086(a)(3). This criterion addresses the Project's "impacts on the ability to meet demand of neighboring wells or water sources if those other wells or water sources share the same basic source of water such as an aquifer or common spring." MBL, supra at 38. It is appropriate to consider contamination of wells under this criterion. Id. The burden of proof is on Appellant. 10 V.S.A. § 6088(a). See, e.g., Hand, supra at 24.

Only Appellant and one employee will use the indoor water supply and waste disposal system. All other persons will use the privy and pre-moistened towelettes. Water use by the Project will be substantially less than that approved under the Sheldon Permit. In addition, although the WW Permit does not create a rebuttable presumption under Criterion 3, the Board considers it as evidence of compliance. MBL. supra at 39.

Appellant has sustained his burden of proof. The Board concludes that the Project will not cause an unreasonable burden on an existing water supply in violation of Criterion 3.

E. Criterion 5 (traffic)

Before issuing a permit, the Board must find that the Project "[w]ill not cause unreasonable congestion or, unsafe conditions with respect to the use of' TH 22. 10 V.S.A. § 6086(a)(5). A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created. Id. $6087(b). The burden of proof is on Cross-Appellant under Criterion 5, id. § 6088(b), but Appellant must provide sufficient information for the Board to make affirmative findings.

TH 22 is a rural country lane frequented by pedestrians and horseback riders. The maximum occupancy levels of the Outdoor and Indoor Ranges are 80 archers and 60 archers respectively. The two ranges will never run concurrently. Because use of the Outdoor Range will be scheduled in advance and archers proceed on a staggered start basis, it is unlikely that all 80 archers would arrive at the Project simultaneously. The Project's authorized level of use is comparable to that experienced by the site when the Chippengym was in operation, The Board concludes that Appellant has met the initial burden of production under Criterion 5.

Cross-Appellant alleges that by providing parking for 49 vehicles at the site, the Project creates a potential for a high volume of traffic to travel on TH 22 at one time. He argues that a large influx of vehicles will present a danger to pedestrians and others on TH 22. The Board concludes, however, that permit conditions can alleviate this effect so that the Board can make an affirmative finding. The Board has found that the Expanded Lot and the South Parking Spaces will provide sufficient parking to accommodate the Project. Therefore, in order to further limit the number of vehicles arriving at and leaving the Project at any one time, the Board will condition an affirmative finding under this criterion on the reduction in parking spaces from the 49 requested to the 32 that can be accommodated by the Expanded Lot and the South Parking Spaces.[2] It will prohibit

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2 The Board may impose permit conditions to alleviate adverse effects that would otherwise be caused by the Project and that, if not alleviated, would require a conclusion that a project does not comply with Criterion 8. 10 V.S.A. § 6086(c); Re: Black River Valley Rod and Gun Club. Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at **18-21 (June 12,** 1997)[EB #651 **R]; Re: Charles and Barbara** Bickford, #5W1186-EB, **Findings** of Fact, Conclusions of Law, and Order at 24 (May 22, 1995)[EB

(continued.. .)

parking in any other location, including along TH 22.

Cross-Appellant has failed to sustain his burden of proof. The Board concludes that the Project, as conditioned, will not cause unreasonable congestion or unsafe conditions with respect to the use of TH 22 in violation of Criterion 5.

F. Criterion 8 (aesthetics)

Before issuing a permit, the Board must find that the Project "[w]ill 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). The burden of proof is on Cross-Appellant under Criterion 8, id. §6088(b), but Appellant must provide sufficient information for the Board to make affirmative findings. See, e.g., Re: Black River Valley Rod & Gun Club. Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997)[EB #651R] and cases cited therein.

The Board relies upon a two part test to determine whether the Project satisfies Criterion 8. First, it determines whether the Project will have an adverse effect under Criterion 8. Id. See also Hand, supra; Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985)[EB #241]. Second, the Board must evaluate whether the adverse effect is "undue." Id. Under the first inquiry,

> the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context 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.

[2](. . continued)
#595]. Although Appellant bears the responsibility of designing the Project, the Board's conditions are permissible modifications of Appellant's plans. E.g., Hand, supra at 27; Re: J. Philip Gerbode, #6F0396R-EB- 1, Findings of Fact, Conclusions of Law, and Order at 22 (Jan. 29, 1992)[EB #486].

Hand, supra at 25.

The Project is located in a rural environment with long distance views of the Green Mountains, rolling pasture lands alternating with woodlots, stonewalls, country homes, and farms. The potential noise impacts are minimal because archery is a quiet sport requiring great concentration, the Project will not host large scale events, and start times are staggered on the Outdoor Course. Therefore, noise generated by the Project will not cause an adverse impact.

The privy will be a permanent structure with a foundation, will be stained to match the exterior of the Indoor Range, and will be partially screened by foliage. Therefore, locating the privy on the north side of the Indoor Range will not create an adverse impact.

The Project will use an existing trail network. The Project will involve neither the widening of existing trails nor the creation of new trails. The trail network cannot be seen from TH 22, except for the entrance to the trail. The targets, bow racks, and directional signs cannot be seen from TH 22. The Board's determination under Criterion 8 relies on the fact that the Outdoor Range will remain in a natural, wooded state and that the trails and stations will not be seen from TH 22. The Board will condition an affirmative finding under this criterion on the prohibition of any widening of existing trails and any creation of new trails. The Board concludes that use of the Omya Tract, as conditioned, will not create an adverse impact.

Under the Project as proposed, buildings, parking spaces, and driveways cover nearly all of the Sheldon Tract. Appellant's proposed landscaping along the north property line will not completely screen the Project from Cross-Appellant's view. This intensive use of the Sheldon Tract will also be visible from TH 22. The Board agrees with Cross-Appellant that the intensity of the Project, as proposed, could have an adverse effect under Criterion 8 because it will not "fit" with its surroundings. The Board concludes, however, that permit conditions can alleviate this effect so that the Board can make an affirmative finding. The Board will condition an affirmative finding under this criterion on the reduction in parking spaces from the 49 requested to the 32 that can be accommodated by the Expanded Lot and the South Parking Spaces. It will prohibit parking in any other location, including along TH 22.

The Project, as conditioned, is not out of character with its surroundings. Therefore, the Board concludes that the Project, as conditioned, will not have an adverse effect under Criterion 8. Because Cross-Appellant has failed to sustain his burden of

proof as to this first inquiry under Criterion 8, it is unnecessary for the Board to proceed to the second inquiry and evaluate whether the adverse effect is "undue." Nevertheless, based on the evidence presented and set forth in the Findings above, the Board concludes that had it proceeded to the second inquiry, it would have concluded that there would be no *undue* adverse impact because the Project, as conditioned, (i) will not violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area, (ii) will employ generally available mitigating steps to improve its harmony with its surroundings, and (iii) will not offend the sensibilities of the average person. See Black Quechee, supra at 19-20; supra at 19-20.

Cross-Appellant has failed to sustain his burden of proof. The Board concludes that the Project, as conditioned, will not have an undue adverse effect on aesthetics in violation of Criterion 8.

G. Criterion 10 (town and regional plans)

Before issuing a permit, the Board must find that the Project is in conformance with the Town Plan and the Regional Plan. 10 V.S.A. § 6086(a)(10). The burden of proof is on Appellant. Id. § 6088(a). See, e.g., Hand, supra at 29-35 and cases cited therein.

1. Town Plan

The Board first must determine whether the Town Plan provision is specific under the Mirkwood test:

> (i) Does the provision pertain to the area or district in which the Project is located?
>
> (ii) Is the provision intended to guide or proscribe conduct or land use within the area in which the Project is located?
>
> (iii) Is the provision sufficiently clear to guide the conduct of an average person, using common sense and understanding?

Re: The Mirkwood Group, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1996)[EB #641]. The Board concludes that the Town Plan is sufficiently specific. First, the Project is within what the Plan defines as a residential district. Second, within residential districts, the Plan encourages the preservation of open space

and residential character. It states that development "should take place in a way that any irreplaceable, unique, scarce resources and natural areas are not harmed." Regarding the Town of Clarendon as a whole, the Plan adopts a policy promoting the enhancement of recreational opportunities and discouraging land uses that diminish the availability of outdoor recreation activities. The Plan also states that one of the Town's goal's guiding future growth is the preservation of historic settlement patterns. Third, the Plan is sufficiently clear to guide analysis of this Project. Therefore, the Board concludes that the Town Plan satisfies the specificity requirement of the Mirkwood test. Because the Board reaches the conclusion that the Plan is clear and unambiguous, it is unnecessary for it to review zoning by-laws. See In re Frank A. Molgano, Jr., 163 Vt. 25 (1994).

The Project, as proposed, violates the Town Plan by the intensity of development on the Sheldon Tract. The Board concludes, however, that permit conditions can alleviate this effect so that the Board can make an affirmative finding. The Board will condition an affirmative finding under this criterion on the reduction in parking spaces from the 49 requested to the 32 that can be accommodated by the Expanded Lot and the South Parking Spaces. It will prohibit parking in any other location, including along TH 22.

Appellant has sustained his burden of proof. The Board concludes that the Project, as conditioned, is in conformance with the Town Plan.

2. **Regional Plan**

Concerning the role of regional plans in Act 250 proceedings, Title 24 of the Vermont Statutes provides:

> In proceedings under 10 V.S.A. chapter 151 ... in which the provisions of a regional plan or a municipal plan are relevant to the determination of any issue in those proceedings:
>
> > (1) the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan;
> >
> > (2) **to** the extent that such a conflict exists, the regional plan shall be given **effect if it is demonstrated that the project under consideration in the proceedings** would have a substantial regional impact.

24 V.S.A. § 4348(h).

The Town and Regional Plan provisions are not in conflict. Both seek to protect historic settlement patterns and the rural nature of the area. Both encourage the promotion of outdoor recreational activities. As conditioned above in the analysis under the Town Plan, the Project is an example, of development that preserves the rural nature of the Chippenhook area of North Clarendon while providing clean, quiet, outdoor (and indoor) recreational opportunities.

Appellant has sustained his burden of proof. The Board concludes that the Project, as conditioned, is in conformance with the Regional Plan.

****

Therefore, the Board concludes that the Project, as conditioned, satisfies the requirements of Criterion 10.

H. Co-Applicancy of Omya

The Board has previously considered the issue of Omya's co-applicancy in connection with this Project ("Dash One Appeal"). Re: Roner Loomis d/b/a/ Green Mountain Archery Range, #1R0426-1-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 29, 1996)[EB #645]. In the Dash One Appeal, the co-applicancy issue came before the Board as an appeal from the District Commission's Memorandum of Decision and Order requiring Omya to be a co-applicant. The Board took notice of stipulated facts and heard oral argument, during which it accepted limited oral testimony into the record. At the time the Board issued its decision in the Dash One Appeal, neither the Board nor the District Commission had convened a hearing on the merits of the application under the ten Act 250 criteria.

Although the Board concluded that no construction was proposed on the Omya Tract, the Board was nevertheless "cognizant that not all evidence of project impacts or possible permit conditions has been taken since a hearing on the merits has not been convened." Id. at 6 and 7. Based on the evidence presented and set forth in findings, the Board ordered that (i) pursuant to EBR 10(A) good cause existed to *preliminarily* waive the requirement that Omya be a co-applicant, (ii) the District Commission proceed with a hearing on the merits of the application, and (iii) "[p]ursuant to EBR 10(A), the District [] Commission may re-examine the issue of Omya's co-applicancy following hearing on the merits if the District [] Commission determines construction will in fact occur on Omya's

tract or that permit conditions must be issued which require Omya to be a co-applicant." Id. at 8. On remand, the District Commission concluded that Omya's co-applicancy was required. The instant appeal ensued.

The parties have raised two issues regarding the co-applicancy of Omya. The Board must first consider whether Omya must be a co-applicant with Appellant and Mr. Sheldon. If the Board answers in the affirmative, then it must decide whether Omya must be joined as a co-applicant prior to issuance of a permit. As stated in more detail above, appeals to the Board from District Commission determinations proceed de novo. 0 V.S.A. § 6089(a)(3); EBR 40(A).

1. Omya Must Be a Co-Applicant

EBR 1 O(A) provides in part:

> The record owner(s) of the tract(s) of involved land ***shall*** be the applicant(s) or co-applicant(s) [for an Act 250 permit] unless good cause is shown to support waiver of this requirement. ... The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ***ownership or control*** and shall describe the extent of their interests.

EBR 1 O(A) (emphasis supplied).

Under Act 250, "involved land" includes "the entire tract or tracts of land upon which construction of improvements for commercial ... purposes occurs." EBR 2(F)(1). See, e.g. In re Stokes Communications Corp., where applicant leased one-acre parcel from owner of 92 acre parcel, entire 92 acres were considered "involved land"); Bickford, supra at 25 (where proposed project was to be conducted on 26 acres of a 192 acre parcel, entire 192 acres were "involved land" for purposes of Act 250 jurisdiction).

Omya is the record owner of the 380 Acre Parcel, which includes the approximately 65 acre Omya Tract leased to Appellant for the Outdoor Range. Omya is therefore the "record owner[] of the tract[] of involved land" pursuant to EBR 10(A). Omya must be a co-applicant in this Project, and a co-permittee, "unless good cause is **shown to waive this requirement."** EBR 10(A).

One of the reasons that EBR 10(A) requires record owners of involved land to be

co-applicants is to ensure that any permit conditions imposed by a district commission or the Board will be enforceable. E.g., Re: David Enman (St. George Property), Declaratory Ruling #326 at 19 (Dec. 23, 1996); Re: George and Marjorie Drown, #7C0905-EB, Findings of Fact, Conclusions of Law, and Order at 12 (June 19, 1995)[EB #607]; Re: Pilgrim Partnershin, #5W0894-1-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Oct. 4, 1988)[EB #373], affd. In re Pilgrim Partnership, 153 Vt. 594 (1990); Re: Flanders Building Supply, Inc., #4C0634-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Oct. 18, 1985)[EB #270]. "Co-permittees, however, do not always share equal responsibility for permit violations. Rather, the determination of individual liability is the responsibility of the Environmental Law Division, and that court must analyze the circumstances of each party individually when assessing penalties." Drown, supra at 12 (citing Secretary, Vermont Agency of Natural Resources v. Handy Family Enterprises, 163 Vt. 476 (1995)). EBR 10(A) include the need to ensure that the owners of lands involved in a subdivision or development have consented to the activity under review, and the need to ensure that persons with a substantial interest in the involved lands have an opportunity to participate in the permit proceedings. Pilgrim, supra at 4-5; Flanders. supra at 5.

For each of these reasons, EBR 1 O(A) states that the record owner of the involved land "*shall* be the applicant(s) or co-applicant(s) ***unless*** good cause is shown to support waiver of this requirement." There can be no "good cause" waiver where a hearing on the merits reveals that "construction will in fact occur on [the] tract or that permit conditions must be issued which require [the record owner] to be a co-applicant." Loomis, supra at 7. Decisions regarding co-applicancy under 10(A) are within the discretion of the district commissions and the Board. In re Pilgrim Partnershin, 153 Vt. 594, 597 (1990); Drown, supra at 18.

As set forth more fully below, the Board concludes that Omya must be a co-applicant for this Project on two independent bases: first, construction will occur on the Omya Tract and, second, permit conditions must be issued that require Omya to be a co-applicant.

a. Construction of Improvements

An Act **250** permit is required before a person "commence[s] construction on a .. . development" or "commence[s] development." 10 V.S.A. § 6081(a). EBR 2(A)(2) defines "development" as the "construction of improvements for any commercial ... purpose." "'Construction of improvements' means *any* ***physical action*** on a project site which initiates development." EBR 2(D)(emphasis supplied).

In order to prepare the Outdoor Range for operation, Appellant has mowed existing trails and cut brush encroaching onto the path. He will periodically maintain the trails in a similar manner. He has removed stones that have fallen from an existing wall. Each of the thirty stations on the Outdoor Range will contain a moveable, Styrofoam wildlife target and bow racks suspended from the trees. Directional signs will be positioned along the trails, also suspended from trees. Stakes will be inserted into the ground indicating the location from which archers will shoot.

The Board acknowledges that the activity already taken and proposed to occur on the Omya Tract does not involve significant physical disturbance. Nevertheless, "construction of improvements" is defined as "*any physical action* on a project site." There is no de minimis exception in the Act 250 statute, the EBRs, or Board precedent.[3]

The Project involves construction of improvements on the Omya Tract for a "commercial purpose" because physical actions have and will be taken on the site in connection with the Outdoor Range. Therefore, the Board concludes that Omya must be a co-applicant for the Project.

b. Permit Conditions

Even if the Board had not determined that there will be construction of improvements on the Omya Tract, the Board would require that Omya be a co-applicant for the independent reason that permit conditions must be issued requiring its co-applicancy.

An Act 250 permits runs with the land. 10 V.S.A. § 6090; EBR 32(B); EBR 33. "[S]uch land, including the use thereof, is subject to [the permit] such that any substantial or material change requires an Act 250 permit amendment." Enman, supra at 19-20 (citing In re Barlow, 160 Vt. 513,520 (1993)).

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3 In the Board's Loomis decision in the Dash One Appeal, Finding #3 states that Appellant proposes no construction on Omya's land. Finding #3 also recites that the proposed use of the property includes the "deployment of moveable Styrofoam targets and signs suspended from trees." To the extent that the Board's decision appears to establish a de minimis exception to EBR 2(D), the Board's decision today clarifies that no such exception exists under Act 250 law.

Appellant's leasehold interest in the Omya Tract, however, is merely for a period of one year. The fact that it has been renewed for one year terms each year since 1995 does not ensure or even suggest that it will ever be renewed again. Furthermore, either Omya or Appellant can terminate the lease without cause on 60 days' notice. Where the record owner relinquishes so little of its property rights to the applicant, the Board cannot find that the record owner's property interests are sufficiently insignificant to waive co-applicancy. Compare, e.g., Pilgrim, supra at 5 (where improvements to road involved land beyond right-of-way, owner of additional land was a necessary co-applicant) with Re: Central Vermont Public Service Corporation, #7C0734-EB, Memorandum of Decision at 2 (Aug. 6, 1991)[EB #434] (owner of fee underlying utility easement need not be named co-applicant because easement conveyed effective control to applicant). Rather, Omya's property interests are so significant that the Board cannot waive the requirement that it be a co-applicant.

Omya's co-applicancy is required to ensure that permit conditions regarding the Outdoor Range, which run with the land, are enforceable. As set forth more fully above, the Board conditions an affirmative finding under Criterion 8 on the prohibition of the widening of existing trails and the creation of new trails. See Board Permit Condition #7. In addition, the Permit issued by the District Commission sets forth conditions relating to the Outdoor Range that remain in full force and effect after the Board's decision today. For example, District Commission conditions control the hours during which the Outdoor Range may operate (Loomis Permit Condition #10) and prohibit use of the Outdoor Range for any purpose other than archery (Loomis Permit Condition #6). These conditions are integral to the Board's determination that a permit can issue for the Project. If Omya is not a co-applicant, it is not difficult to envision a number of scenarios where it will be impossible to enforce these conditions.

Permit conditions must be issued requiring Omya's co-applicancy. Therefore, the Board concludes that Omya must be a co-applicant for the Project.

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Pursuant to EBR 10(A), the Board concludes that, for two independent reasons, Omya must be joined as a co-applicant.

2. **Omya Must Sign as a Co-Applicant Prior to Operation of the Outdoor Range**

Finally, the Board must consider whether a permit may issue and whether Omya

may file as a co-applicant at any time prior to operation of the Outdoor Range, as ordered by the District Commission, or whether Omya must be a co-applicant before the Board can issue a permit, as Cross-Appellant alleges. Although Cross-Appellant raised this issue in his Notice of Cross-Appeal, neither party has addressed it orally or by memorandum of law. Accordingly, the Board will dispose of the issue as follows.

EBR 10(A), which requires that the record owner of involved land be a co-applicant, does not state when in the process the filing of co-applicancy must occur. The issue of co-applicancy may be raised at any time and need not be addressed prior to a hearing on the merits of an application. E.g., Pilgrim, supra at 4-5. joinder of a co-applicant need not occur prior to the issuance of a permit. E.g., George and Marjorie Drown, Amended Land Use Permit #7C0905-EB at 2 (June 19, 1995)(permit condition requiring that contractor-operator of permitted project be joined as a co-permittee under EBR 1 O(A)).

Pursuant to EBR 10(A), the Board concludes that a permit condition can require that Omya file as a co-applicant prior to operation and use of the Outdoor Range.

VI. ORDER

1. Official notice is hereby taken of the Toilet Guidance.

2. Land Use Permit #1R0426-2-EB is hereby issued.

3. Omya shall file as a co-applicant prior to use or operation of the Outdoor Range.

4. Jurisdiction is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont this 18th day of December, 1997.

ENVIRONMENTAL BOARD

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