

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Chapter 151

RE: Northeast Land Investment, Inc.  
Land Use Permit Application #2S0036-4-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of an application to expand the existing Okemo Pines subdivision located in both the Village and the Town of Ludlow. As is explained below, the Environmental Board concludes that the application meets 10 V.S.A. § 6086(a)(8)(A) (necessary wildlife habitat) only if the permit is conditioned to require on-site mitigation of the impact on necessary wildlife habitat which the proposed project will imperil. Accordingly, the Board is conditioning the permit to require such mitigation, and therefore does not reach issues raised concerning off-site mitigation in the Town of Chester.

I. Summary of Proceedings

On October 5, 1990, the District #2 Environmental Commission issued Land Use Permit #2S0036-4, which authorizes the Applicant to divide a 55-acre tract located off Route 103 in Ludlow into 15 lots. According to the permit, the 15 lots **consist** of eight single family residential lots, six residential lots **"under** deferment of **development,"** and one common lot to be used for a **900-foot** access road. The permit amendment also approves related sewer and water utility services. The permit amendment further approves a plan submitted by the Applicant to manage 30 acres of deer habitat located off Cummings Road in Chester, Vermont. Condition 34 of the permit amendment requires that the Chester tract be managed to perpetuate the presence of white-tail deer and to protect the deer habitat against non-conforming land uses and further development. Condition 34 states that the 30 acres of habitat are located on a 62-acre tract, and restricts development of the 32-acre remainder of the tract by requiring an amendment to the permit prior to such development.

On November 2, 1990, the Town of Chester filed an appeal with the Board. Chester contests the District Commission's findings pursuant to 10 V.S.A. § 6086(a)(8)(A) (Criterion 8(A) - wildlife habitat). Chester contends that the District Commission's decision would allow the elimination of a deer habitat in Ludlow in return for preserving a deer habitat in Chester. Chester also argues that, since the Ludlow habitat will still be at least partially eliminated, the Chester habitat cannot be considered to mitigate the impact of the proposed **project on the Ludlow habitat, Chester further** contends that the requirement to set aside deer habitat in

Chester will cause an unreasonable burden on its ability to provide services pursuant to 10 V.S.A. § 6086(a)(7) (Criterion 7 - local governmental services).

On November 26, 1990, former Chair Stephen Reynes convened a prehearing conference in the Town of Ludlow, with the Applicant, Chester, the State of Vermont Agency of Natural Resources, and the Town of Ludlow Planning Commission participating.

On December 26, 1990, the Board issued a prehearing conference report and order. During January, February, and March, 1991, the parties filed lists of witnesses and exhibits and prefiled and rebuttal testimony. The Board convened a site visit and hearings in Ludlow on April 4 and 5, 1991, with the following parties participating:

The Applicant by Melvin D. Fink, Esq.  
The Town of Chester by Sarah E. Vail, Esq. and  
Douglas P. Richards, Esq.  
The Agency of Natural Resources by Kurt Janson, Esq.

On April 26, 1991, the parties filed proposed findings of fact and conclusions of law. The Board deliberated on May 2, June 6, and June 13. On June 13, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

## II. Issues

1. Whether, pursuant to Criterion 8(A), the proposed project will destroy or significantly imperil necessary wildlife habitat.

2. If such destruction or imperilment will occur, whether the proposed project complies with the three subcriteria of Criterion 8(A) set forth at 10 V.S.A. § 6086(a)(8)(A)(i) - (iii).

3. If the proposed project does not comply with Subcriterion (ii) of Criterion 8(A) because the application lacks a proposal for on-site mitigation, whether the proposed

project complies with Subcriterion (ii) by reason of proposed off-site mitigation in Chester. Questions relevant to this issue include whether the Board may require off-site mitigation, and if so, whether the proposed mitigation in Chester complies with Criterion 7.

4. Whether, pursuant to Board 10(A), the record owners of all involved land co-signed this application.

### III. Findings of Fact

1. The proposed project is located off Freedom Hill Road north of the intersection of that road with Route 103. It involves the expansion of a subdivision known as "Okemo Pines." The subdivision is located partly within the Village of Ludlow and partly within the Town of Ludlow, which are separate entities. The following Act 250 permits have been issued with respect to the subdivision:
  - a. #2S0036, to "John Holmes Andrus, Rudolph W. Kugler, Jay Seeman, et al.," on December 21, 1971, for the creation of a 16-lot subdivision to be used for single family dwellings. This permit requires the Permittees to secure a permit "pursuant to Vt. Health Dept. Regulations . . . ." The Permittees secured Health Subdivision Permit #EC-305, dated January 4, 1972, which describes the subdivision as consisting of lots "[n]umbered 1, 3, 4, 5, 7, 8, 10-19 . . . ."
  - b. #2S0036-Amendment, to "John Holmes Andrus, Rudolph Kugler, et al.," on May 15, 1974, for the "inclusion of lots #2 and 6 in the Okemo Pines Subdivision, Ludlow, Vermont in Permit #2S0036."
  - c. #2S0036-1, to "Okemo Pines Development" on March 30, 1978 for "the purpose of allowing on-site sewage disposal for Lots 3 and 4 (Lots 5 having been joined with 4)."

- d. **"#3S0036-2,"** to Gassetts Group, Inc., on October 31, 1988, incorporating all the conditions of subdivision permit **#EC-2-1679** issued on October 19, 1988 by the Agency of Natural Resources, Department of Environmental Conservation, Division of Protection. By administrative amendment dated December 19, 1988, the number on this permit was corrected to **#2S0036-2**. The incorporated permit, **#EC-2-1679**, states that it consists of **"site** approval to a revised subdivision previously approved in permit **#EC-305** located off **Freedom Hill** in **Ludlow ....**" Condition 6 of Permit **#EC-2-1679** states that **"[t]his** revised Subdivision Permit allows construction of a road and minor lot line changes only . . . ."
  - e. **#2S0036-3**, on March 17, 1989, to Northeast Land Investments, Inc., **"incorporating** Subdivision Permit **#EC-2-1679-1** consisting of revision to lots 7, 8 and **11-19.**" The referenced subdivision permit is dated March 6, 1989.
2. The above permits authorize the creation of a total of 18 lots at the subdivision. These lots do not make up the entire subdivision tract, which consists of approximately 55 acres. Instead, the 18 lots, with associated roadways, include approximately 19 acres of the tract, and the remaining 36 acres form a large additional lot which was retained for future development.
  3. In 1988, Northeast Land Investment, Inc. (the Applicant) purchased the Okemo Pines subdivision and the associated tract. At that time, no homes had been built on the approved lots. Of the approved lots, seven lots had already been sold to third parties and eight other lots were the subject of contracts for sale.
  4. The Applicant refers to the original approved project as **"Phase I."**
  5. On January 11, 1990, the Applicant completed an application for the project at issue here, which is called Phase II. The application describes the

project as the creation of 14 lots and an approximately **900-foot** access road. The road will form a common lot. Related sewer and water utility services are also proposed. Six of the lots (including the common lot) are under deferment of development. The phrase "deferment of **development**" means in this case that subdivision permits are required and have not been obtained for the six lots from the State of Vermont, Department of Environmental Conservation, Division of Protection. Instead, the Division has issued "Deferrals of **Permit,**" which require that the Applicant waive development rights, or obtain a subdivision permit prior to development. The six lots therefore will not be immediately developed.

6. Phase II will involve the retained lot which was not used in Phase I. The eight lots which are to be developed immediately, Lots 9, 20, **21, 22, 23, 24, 25,** and 32, consist of approximately 12 acres in total, and form a parcel of land contiguous to the existing 18 lots. The building lots for which development is deferred, Lots 26 through 28, 30, and 31, consist of approximately 10 acres. The remainder of the parcel is a large retained lot, Lot 29, which consists of approximately **14** acres.
7. The Okemo Pines tract is located on a ridge which runs from a hill on the north of the subdivision south to Route 103. The ridge slopes downward to the south, running through a green forested area. A power line right-of-way runs west to east across the ridge and the Okemo Pines tract. This right-of-way forms a clear, **150-foot** wide swath across the tract. South of the power line, the ridge continues to slope downward toward Route 103 and the Black River. The slopes at the Okemo Pines tract face south or southwest.
8. The eastern boundary of the Okemo Pines tract is Preedom Hill Road. The tract forms an "**L**" shape, with the eastern part of the tract or right-hand edge of the bottom of the "**L**" being contiguous with Preedom Hill Road, and the northern boundary of the tract or top of the "**L**" being separated from Preedom Hill Road by another tract. Phase I is located immediately off Preedom Hill Road on the

southeastern portion of the tract or bottom part of the "L." Phase II is to be located north and west of Phase I, extending into the northern or uppermost portion of the "L." In addition to the Phase II lots, Lot 29, is a large **14-acre** lot which extends north to the property boundary or top of the "L." Most of Lot 29 is located north of the power line.

9. Phase I and Phase II will be located south of the power line described above. All acreage within the project tract north of the power line is within Lot 29.
10. As proposed, the eastern portion of Lot 26 and the northeastern portion of Lot 25 contain land which is not owned by the Applicant and concerning which the Applicant has an option to purchase. The land not owned by the Applicant is of small size and is a portion of a larger parcel owned by John and Charlotte Pluta. The Plutas did not sign this application.
11. The Applicant also has an option to purchase a 62-acre parcel in Chester which contains an approximately **30-acre deeryard** which is alleged to be necessary wildlife habitat. The property is owned by Maxine **Holden**, who did not sign this application. The Applicant proposes to manage the **deeryard** to maintain and preserve the habitat, as well as limit activities on the remainder of the **Holden** parcel so that they do not interfere with the habitat. The Applicant offers this in mitigation of any effect which this application might have on necessary wildlife habitat.
12. Two access roads lead into the Okemo Pines subdivision from Freedom Hill Road. The southernmost access road runs northwest into the tract. The northernmost access road runs west from Freedom Hill Road for about a thousand feet, at which point it intersects with the other access road. As part of this application, the Applicant plans to extend the southernmost access road north to end in a cul-de-sac approximately 2,250 feet away from Freedom Hill Road.
13. **Freedom Hill Road runs north from Route 103 along the eastern edge of the north-south ridge described above. North of the access roads to the Okemo Pines**

subdivision, the road goes through an area of open fields on either side which contain existing residential homes. The area of open fields is narrow and ridges slope upward into forested area behind the open field. On the eastern side of the road, behind the open field and the residences is a deer wintering area. Continuing past this area, the road goes through a forested area and comes to a second open field which contains an existing residence. Behind this open field are forested ridges. The road ends here.

14. The first major road intersecting with Route 103 west of Freedom Hill Road is Commonwealth Road. That road runs north off Route 103 along the western edge of the north-south ridge described above. Just north of Route 103, the road passes the so-called Neal subdivision, which lies east of the road. The Neal subdivision will consist of residential homes which have not yet been constructed. From there the road runs north through a forested area which contains residences, and then onto North Hill and through a large open field which contains residences.
15. The project site contains wintering habitat for **white-tailed** deer. This deer habitat is the southeastern-most part of a larger deer wintering area, consisting of approximately 130 acres. This wintering area forms the center of an area bounded by the roads and residences identified in Findings 13 and 14, above.
16. The project site is forested habitat that contains a mixture of cover types. The eastern portion of the site contains mostly white pine, and is not part of the deer wintering habitat. The western side of the site is predominantly hardwood and pine; this too is not part of the deer habitat. The remainder of the project site is typified by a mixture of hemlock and hardwood, and provides winter cover for deer. As shown on Exhibit #S3 (a map of the subdivision entitled "**Critical Cover**" dated January 4, 1990), the following lots consist entirely of deer wintering area: Phase I, Lots 8 and 15; and Phase II, Lots 23 through 26. Also as shown on that exhibit, significant portions of the following lots

contain part of the wintering area:' Phase I, Lots 7, 14, and 17; Phase II, Lots 9, 20, 21, 22, 27, 28, 31, and 32; and the retained lot, Lot 29.

17. The hemlocks in the deer wintering area shield the wintering deer from cold winds, provide areas of lower snow depths which allow the deer to move with relative ease, and provide warmer temperatures for the deer. The shelter provided by the deer habitat allows the wintering deer to minimize the depletion of their energy reserves. This preservation of the deer's energy reserves is a critical factor in the survival of the deer through the winter.
18. The project site and the larger **130-acre deeryard** contain ample evidence of historical and current use by wintering deer. This evidence includes historic and fresh bark scarring, bedding sites, tracks, and numerous pellet groups.
19. Disturbances associated with human development, such as noise, vehicles, and dogs, leads to an increased drain on deer's winter energy reserves. This additional energy loss can result in greater winter mortality of deer. A minimum of a 300-foot buffer from human activity is critical to minimize disturbance and energy losses to wintering deer. Those portions of Phase II Lots 9, 20, 21, 24, 28, 31, and 32 which are not part of the wintering area are part of the buffer zone. Significant portions of Lots 29 and 30 are also within that zone.
20. The 300-foot buffer zone can also be described as a zone of impact. That is to say, development of deer wintering area will adversely affect additional wintering area within a 300-foot radius beyond the area that is actually developed. This effect will occur because of the disturbances noted above which are associated with human development.
21. If the previously-approved Phase I is fully developed, eight to 12 acres of the deer wintering habitat will be imperiled, either directly from loss of cover or indirectly from human disturbance. This eight to 12 acres includes a zone of impact from the Phase I development beyond the actual developed area. That zone encompasses most of Phase II Lots

- 9, 21 through 24, and 32. It also includes a small portion of Phase II Lot 25. Despite this loss of habitat, the remaining on-site deer habitat can continue to provide critical wintering habitat that will be decisive to the survival of the deer that winter in the yard because of the cover that exists there, as well as the topography (see Finding 23, below).
22. There is evidence of lowered browse activity on the site in recent years. A browse line can be seen on older hemlock saplings while new seedling production in some places grows unchecked, with green boughs touching the ground. This lowered browse activity has become somewhat typical in deer habitat areas in southern Vermont during recent years due to a decline in the deer population and relatively mild winters, which have resulted in less concentrated use of deer wintering areas. A severe-winter will likely result in increased use of those areas, including the one at issue. Moreover, the recent decline in deer population resulted from State of Vermont policies which have been changed. Current State policy toward deer is to achieve a population increase.
23. The project site and neighboring properties face south. By facing south, the area is well-exposed to the sun. Such exposure assists deer by providing warmth and melting snow, thereby allowing less depletion of energy reserves.
24. Phase I of the subdivision may close deer access to the wintering area from the southeast. There will remain other avenues of access from the north and east. Deer will be able to cross the power line swath to reach the southern portion of the wintering area.
25. Surrounding residential development will not imperil the **130-acre** deer wintering area. Access will exist from other wintering areas, including the wintering area east of Freedom Hill Road, through undeveloped areas interspersed with the surrounding residences, and through portions of residential tracts which are

not themselves developed. Further, a substantial buffer exists between the Neal subdivision and the larger, **130-acre** wintering area.

26. During home construction, the proposed-project will directly destroy necessary wildlife habitat by removing trees which provide critical cover. Additional necessary habitat will be significantly imperiled as a result of the impacts of human disturbance associated with the project. In total, the proposed Phase II will destroy or imperil approximately ten acres of critical habitat.
27. Residences are typically built in three to 12 months. On average, approximately 50 people are employed in one capacity or another in the construction of a house.
28. Wildlife such as deer provide substantial, albeit mostly unquantifiable, public benefits, including scientific, recreational, and cultural benefits.
29. The Applicant could mitigate the impacts of Phase II by eliminating or relocating some of the proposed new lots. The Applicant could also protect part of the on-site deer wintering habitat to mitigate the impacts of Phase II on other portions of the habitat.
30. There is additional critical habitat on-site that is available for mitigation. The project tract includes land in addition to that earmarked for Phase I or for immediate development as part of Phase II. This land is located on the lots for which development would be deferred. Further, all land which is not yet developed and is not within the zone of impact from Phase I could be preserved.
31. The purpose of the Okemo Pines subdivision is to provide residential housing by taking advantage of the market caused by nearby skiing facilities. The Okemo Pines subdivision will contain approximately 75 to 80 percent second homes and the remainder will be primary residences. In contrast, the Chester parcel is not as near to skiing facilities. It is surrounded by farmland. If developed for

residential housing, approximately 80 percent of the residences would be primary housing., with the remainder being secondary housing.

32. The **Holden** property in Chester is the only available site which the Applicant owns or controls. Engineering tests reveal that the soils on the property do not percolate and cannot support **on-site** septic systems. There is no municipal sewer available to the property.

IV. Conclusions of Law

A. Criterion 8(A) (Necessary Wildlife Habitat)

10 V.S.A. § 6086(a)(8)(A) provides:

A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

Accordingly, review of a project pursuant to Criterion 8(A) is a three-step process. First, the Board must determine whether the project involves "necessary wildlife habitat" (or any endangered species, when at issue). If the Board finds that necessary wildlife habitat is present, the Board moves to the second step, which is the determination of whether the project will destroy or significantly imperil the habitat. If the Board determines that such destruction or imperilment will

occur, the Board turns to the final step, which is to review the project under the three subcriteria. In order to grant a permit, **the** Board must find affirmatively for the Applicant on all three of the subcriteria.

1. Existence of Necessary Wildlife Habitat

10 V.S.A. § 6001 (12) provides:

"Necessary wildlife habitat" means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods.

As interpreted by the Board, this definition applies to areas which are decisive to survival during part of the year, even if the area is not decisive during the whole of the year. Re: Killinston, Ltd., et al., #1R0584-EB-1 (Part II) and #1R0593-1-EB (Part I), Findings of Fact, Conclusions of Law, and Order at 19 (May 11, 1989). One example of such habitat is a deer wintering area. Re: Southview Associates, #2W0634-EB, Findings of Fact, Conclusions of Law, and Order at 3, 9 (June 30, 1987), affirmed, In re Southview Associates, 153 Vt. 171, 175-178 (Dec. 1, 1989).

The Okemo Pines subdivision contains land which is part of a large deer wintering area. This area is necessary wildlife habitat. It is used by deer during the winter. It is identifiable, as shown in Findings 15, 16, 18, and 23, above. It contains cover which shields wintering deer from cold winds, and provides areas of lower snow depths and warmer temperatures. It also consists of land which slopes to the south and which therefore is well-exposed to the sun. Such exposure provides for warmer temperatures and lower snow depths.

All of these factors enable deer in the area to minimize depletion of their energy reserves. Preserving that energy is critical to ensuring the survival of deer during the winter. Accordingly, the deer wintering area which includes part of the **Okemo Pines** tract is decisive to the winter survival of deer.

2. Destruction or Imperilment

The proposed project will destroy and significantly imperil approximately 10 acres of the deer wintering area. Construction of homes will destroy critical cover. Activities associated with the construction and occupancy of homes, such as noise, vehicles, and dogs, will deplete deer energy reserves and therefore will pose a risk of increased winter mortality.

3. Subcriteria (i) through (iii)

The Board will examine each of the subcriteria, but will begin with Subcriterion (ii), because the Board's conclusion on that subcriterion affects its conclusion on Subcriterion (i).

With respect to Subcriterion (ii), the Board concludes that the project as proposed does not meet that subcriterion because the Applicant proposes off-site mitigation where on-site mitigation is clearly feasible.

The language of Subcriterion (ii) is focused on preventing or lessening the destruction or imperilment of habitat. See 10 V.S.A. § 6086(a)(8)(A)(ii). As in this case, where destruction or imperilment of habitat will occur, it will occur on-site, and is therefore best prevented or lessened by on-site mitigation.

The Board does not mean to imply that off-site mitigation is never appropriate. The Board believes that Subcriterion (ii) can be interpreted to allow consideration of off-site mitigation. However, in view of the subcriterion's focus on prevention or lessening of impacts, the Board believes that off-site mitigation should only be considered after on-site mitigation alternatives have been exhausted.

In this case, as shown in Findings 29 and 30, above, on-site mitigation alternatives exist. The Board therefore will require the Applicant, by permit condition, to perform on-site mitigation. Specifically, the Board will prohibit construction on, or development or division of, the portion of the tract which is located north of the power line, the remainder of Lot 29 south of the power line, Lot 25 (because it is the only lot proposed for immediate development which is significantly outside of the Phase I impact zone), and the other lots proposed to be put under deferment of development

(Lots 26 through 28, 30, and 31). The Board will, however, allow timber cutting on Lots 25 through 31 if done pursuant to a forest management program approved by the State of Vermont, Agency of Natural Resources, Departments of Fish and Wildlife and Forest, Parks, and Recreation. The Board also will require that no dogs be allowed to run free at the Okemo Pines subdivision and that all dogs allowed outside shall be leashed or kept within a fenced area. The Applicant will be required to place restrictive covenants in all deeds for the approved Phase II lots which include these restrictions on dogs. Further, the Board will issue other permit conditions which prohibit all vehicles from using any land on Lots 25 through 31, which mandate that signs be posted to alert vehicle users of this prohibition, and which require that the proposed access road not be constructed beyond a point which is 50 feet northwest of the northwestern boundary of Lots 9 and 24 as shown on Exhibit #S3. To protect the **deeryard** that is being preserved from vehicular disturbance, the Board would prohibit all roadway construction northwest of Lots 9 and 24, but is authorizing road construction 50 feet beyond those lots to allow access to Lot #32. Finally, the proposed off-site mitigation is not authorized, and the Board will delete those conditions in the District Commission permit which relate to off-site mitigation. On this basis, the proposed project meets Subcriterion (ii).

With regard to the remaining subcriteria, the Board concludes that the project, as conditioned, meets Subcriterion (i). The Board also concludes, based on Findings 31 and 32, above, that the proposed project meets Subcriterion (iii).

On the basis of the foregoing, the Board concludes that the proposed project meets Criterion 8(A). Because of the Board's decision to require on-site mitigation, the Board does not reach the issues concerning off-site mitigation raised by Chester.'

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<sup>1</sup>In view of the fact that no part of this development will now occur in or adjacent to Chester, Chester is no longer a party to this proceeding. 10 V.S.A. §§ 6084, 6085; Rule 14(A).

B. Rule 10: Co-applicancy

Rule IO(A) requires that "the record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement."

In this case, Maxine **Holden** and John and Charlotte Pluta, the owners of involved land, have not co-signed the application. However, Ms. **Holden's** signature is no longer necessary because the Board is requiring on-site mitigation and is not authorizing the off-site mitigation plan regarding the Chester parcel. Further, the Board concludes that good cause exists to waive the requirement that the Plutas sign the application because the Board is prohibiting development of Lots 25 and 26, which are the lots which contain portions owned by the Plutas. The Board therefore believes it likely that the Applicant will not exercise its option to purchase part of the Plutas' land.

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V. Order

Land Use Permit Amendment #2S0036-4-EB is hereby issued. Jurisdiction is returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont this 20<sup>th</sup> day of June, 1991.

ENVIRONMENTAL BOARD

  
Charles F. Storrow, Acting Chair  
Rebecca J. Day  
Arthur Gibb  
Samuel Lloyd  
Steve E. Wright

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