VERMONT ENVIRONMENTAL BOARD
10 V.S.A. § 6001 et seq.

Re: Black River Valley Rod and Gun Club, Inc.
Application #2S1019-EB

MEMORANDUM OF DECISION

In this decision, the Environmental Board ("Board") concludes that the Black River Valley Rod and Gun Club ("Club") cannot avoid Act 250 jurisdiction and reject Land Use Permit #2S1019 ("Permit") by removing the pavilion and lights which were found to be substantial changes requiring a permit. Additionally, the Board denies the Club's request for guidance on what actions it must take, if any, in order to return to its previous-'status as a pre-existing development. Finally, the Board resolves four issues raised in the Club's Response to the Prehearing Conference Report and Order.

I. BACKGROUND

On July 13, 1995, the Club filed Application #2S1019 ("Application") for a Land Use Permit to construct a 20 foot by 40 foot open side pavilion building ("Pavilion") and install exterior lighting ("Lights") at the trap shooting range. The Application was filed in response to the District #2 Environmental Commission ("District Commission") Assistant District Coordinator's determination, in a Project Review Sheet, that the Club's 1991 construction of the Pavilion and addition of the Lights at the trap shooting range constituted a substantial change to a pre-existing development.

On December 4, 1995, the District Commission issued the Permit and supporting Findings of Fact, Conclusions of Law and Order, authorizing the Club to construct the Pavilion and install the Lights at the trap shooting range ("Project"). Additionally, the Permit requires the Club to install noise reduction measures at the Pavilion and restricts the Club's months, hours, and days of operation.

On January 2, 1996, the Club filed a Motion to Alter the Permit. On January 5, 1996, Marcia Dockum filed a Motion to Alter the Permit. On February 5, 1996, the District Commission issued a Decision on Motion to Alter in which it denied both motions.

On February 28, 1996 the Club filed an appeal with the Board from the Permit, its supporting Findings of Fact, Conclusions of Law and Order, and the Decision on Motion to Alter. The Club contends that the District Commission erred by imposing Permit conditions #5, 6, and 7. The Board's docket number for the appeal is #2S1019-EB ("Appeal").

On March 20, 1996, the District #2 Coordinator issued

Jurisdictional Opinion #2-96 ("Jurisdictional Opinion") at the request of the Club. The Jurisdictional Opinion concludes that the Club cannot reject the Permit if it removes the Pavilion and the Lights.

On April 19, 1996, the Club filed a petition for a declaratory ruling with the Board. The petition asks whether the Club can avoid and escape Act 250 jurisdiction by removing the Pavilion and Lights which were found to require a permit. Additionally, the petition asks what actions, if any, the Club must take in order to return to its status as a pre-existing development. The Board's docket number for the petition for declaratory ruling is D.R. #321 ("Declaratory Ruling").

The Board originally scheduled the prehearing conference in the Appeal for April 8, 1996. On April 1, 1996, the Club filed a Motion For Continuance, requesting a 30 day postponement of the prehearing conference. Per the Club's request, the prehearing conference was rescheduled for May 6, 1996.

On May 6, 1996, Board Chair John T. Ewing convened a prehearing conference in Montpelier, Vermont. On May 16, 1996, Chair Ewing issued a Prehearing Conference Report and Order ("Prehearing Order") which is incorporated herein by reference. In the Prehearing Order, Chair Ewing consolidated the Appeal and the Declaratory Ruling and ordered that both cases shall be referred to under the following heading: Black River Rod & Club, Inc., #2S1019-EB. Additionally, he ordered that the Declaratory Ruling issues shall be addressed as preliminary issues in the Appeal. None of the parties objected to the consolidation or the preliminary resolution of the Declaratory Ruling issues.

On May 31, 1996, the Club filed Applicant's Response to Prehearing Conference Report and Order in which it requested clarification in four areas of the Prehearing Order. Also on May 31, 1996, the Club filed Applicant's Memorandum Regarding Avoidance of Act 250 By Removing Improvements.

On June 18, 1996, Shirley Brand, Barbara Remis, Warren and Faith Eastwick, Marcia Dockum, and Linda Hill ("Neighbors") filed Neighbors' Reply to Applicant's Response to Prehearing Conference Report and Order. Also on June 18, 1996, the Neighbors filed Neighbors' Reply to Applicant's Memorandum Regarding Avoidance of Act 250 By Removing Improvements.

On July 10, 1996, the Board deliberated on the preliminary issues (former Declaratory Ruling issues) and the

issues raised by the Club's Response to Prehearing Conference Report and Order.

II. DISCUSSION

A. Preliminary Issues (former Declaratory Ruling issues)

1. Avoidance of Act 250 By Removing Improvements

The Club is a preexisting development pursuant to Environmental Board Rule ("EBR") 2(O). However, on April 27, 1995, the Assistant District Coordinator determined that the Club's construction of the Pavilion and installation of Lights at the trap shooting range required a Land Use Permit pursuant to 10 V.S.A. § 6081 and EBR 2(A)(5) because the pavilion and lights constituted a substantial change to a preexisting development pursuant to EBR 2(G). The Club did not appeal the Assistant District Coordinator's Jurisdictional Opinion. Instead, the Club filed the Application and received the Permit. The Club now requests the Board to decide whether the Club can avoid Act 250 jurisdiction and reject the Permit by removing the Pavilion and Lights which were found to be substantial changes requiring a permit.

Jurisdiction under Act 250 is triggered when "the activity [is] about to impinge on the land" and attaches to "activity which has achieved such finality of design that construction can be said to be ready to commence." In re Agency of Administration, 141 Vt. 68, 78-79 (1982). See In re Wildcat Construction Co., Inc., 160 Vt. 631, 632 (1993). The "activity" at issue in this case is the Club's construction of a Pavilion and installation of Lights at the trap shooting range. That activity has already impinged on the land and has proceeded far beyond achieving "finality of design." Jurisdiction over this Project was triggered in 1991 when the Club constructed the Pavilion and installed the Lights.

"Once jurisdiction is established, 10 V.S.A. § 6081(a) mandates a land use permit before commencement of any construction on a development." In re Rusin, 162 Vt. 185, 191 (1994). According to § 6081(a), the Club should not have constructed the Pavilion or installed the Lights without a permit.

The Prehearing Conference Report and Order informed the parties that the Board has generally held that when Act 250 jurisdiction is triggered, subsequent events do not defeat the triggering of jurisdiction. See Re: John Rusin, #8B0393-EB, Findings of Fact, Conclusions of Law, and Order (June 10,

1994), aff'd In re John Rusin, 162 Vt. 185 (1994); Re: Wildcat Construction Co., Inc., #6F0283-1-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 4, 1991), aff'd In re Wildcat Construction Co., Inc., 160 Vt. 631 (1993); Re: Bernard and Suzanne Carrier, Declaratory Ruling #246, Findings of Fact, Conclusions of Law, and Order at 27 (Dec. 7, 1995); Re: Charles and Barbara Bickford, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 25 (May 22, 1995); Re: City of Barre Sludge Management Program, Declaratory Ruling #284 (Oct. 7, 1994); Re: Richard Farnham, Declaratory Ruling #250 (July 17, 1992); Re: Stevens and Gyles, Declaratory Ruling #240 (May 8, 1992). The underpinning of this principle is that Act 250 permits are issued for both construction and land use associated with construction. See Re: Interstate Uniform Services, Inc., Declaratory Ruling #147 at 7 (Sept. 26, 1984). Nevertheless, the Club did not specifically address the issue of whether this precedent is controlling in this case.

In In re John Rusin, 162 Vt. at 191, the Vermont Supreme Court affirmed the Board's conclusion that a permittee's commencement of construction on a project for which a permit was required subjected the project to Act 250 jurisdiction regardless of subsequent changes in the design of the project.

In In re Wildcat Construction Company, 160 Vt. at 632-33, the Vermont Supreme Court affirmed the Board's conclusion that Act 250 jurisdiction was not divested when a city or town went from being a "one acre" to a "ten acre" city or town. See 10 V.S.A. § 6001(3).

In Re: Bernard and Suzanne Carrier, the Board ruled that the denial of an Act 250 application does not result in no continuing Act 250 jurisdiction over a project.

In Re: Charles and Barbara Bickford, the Board ruled that subdivision of a tract over which jurisdiction had previously attached does not dissolve jurisdiction over the entire tract.

In Re: City of Barre Sludge Management Program, the Board ruled that Act 250 jurisdiction over a municipal wastewater treatment plant became final when the City of Barre applied for and obtained a land use permit but did not challenge Act 250 jurisdiction or appeal the permit.

In Re: Richard Farnham, the Board ruled that once construction had commenced on a housing project that was subject to Act 250 jurisdiction, such jurisidiction was not divested due to the sale of the property to an individual who would not have required a permit had the construction begun

under his ownership.

In Re: Stevens and Gyles, the Board ruled that the lot owners in a subdivision which required an Act 250 permit but did not have one needed to obtain an Act 250 permit to comply with 10 V.S.A. § 6081(a), notwithstanding their seller's continuing liability for failing to obtain a permit.

Based on the above precedent, and in the absence of any attempt by the Club to specifically distinguish it from this case, the Board concludes that the Club cannot avoid Act 250 jurisdiction and reject the Permit by removing the Pavilion and Lights which were found to be substantial changes requiring a permit. Having constructed improvements which were a substantial change to a pre-existing development, the Club is subject to Act 250 jurisdiction.

2. Seeking Guidance on Actions Club Must Take in Order to Return to Status of Pre-existing Development

The Club requests guidance from the Board on what actions it must take, if any, in order to return to its previous status as a pre-existing development.

The Prehearing Conference Report and Order informed the parties that, in a declaratory ruling, it is not the Board's function to issue guidelines or to outline for petitioners activities which will or will not require permits. In re Orzel, 145 Vt. 355, 360 (1985); Re: Lawrence and Darlene McDonough, Declaratory Ruling #306, Memorandum of Decision and Dismissal Order at 4 (Dec. 22, 1995). Rather, the purpose of a declaratory ruling is "to test the applicability [to a given set of circumstances or facts] of any statutory provision or of any rule or order of an agency." In re Petition of D.A. Associates, 150 Vt. 18, 19 (1988) (quoting In re State Aid Highway No. 1, Peru, Vermont, 133 Vt. 4, 71 (1974). The Club did not address the issue of whether this precedent is controlling in this case.

The above limitations exist because declaratory rulings turn on the specific facts of a case and because of the need to ensure that the Board process is not flooded with requests that are essentially advisory in nature.

Accordingly, the Board denies the Club's request for guidance on what actions it must take, if any, in order to return to its previous status as a pre-existing development.

B. Issues Raised By Club's Response to the Prehearing Order

1. No Waiver

The Club requests clarification that, by agreeing to consolidation of the Declaratory Ruling and the Appeal, it does not waive its rights to have both matters adjudicated.[1] The Prehearing Order states that both the Declaratory Ruling Issues and the Appeal issues will be resolved within the context of this consolidated proceeding.

Accordingly, the Board grants the Club's request for clarification by adding the following to Section II., A. of the Prehearing Order:

> the Club did not object to consolidation of the Appeal and the Declaratory Ruling. However, the Club stated that it did not waive its rights to have both the Appeal and the Declaratory Ruling adjudicated within this consolidated proceeding.

2. Scope of Review

The Club requests the Board to declare that the scope of review is limited to the impacts of the Pavilion and Lights under criterion 8. The Prehearing Order states that impacts under criteria 1 and 8 are at issue.

The Board denies the Club's request to alter the Prehearing Order by limiting the scope of review to criterion 8. In its Notice of Appeal, the Club contends that the District Commission erred by imposing Permit condition #7, inter alia. Permit condition #7 states "All shooting and significant noise sources shall cease at 8:00 p.m. and lights will be turned off at this time." The District Commission's Findings of Fact, Conclusions of Law, and Order (Dec. 4, 1995) indicate that condition # 7 was imposed to alleviate adverse effects under criterion 1. Permit conditions alleviate adverse effects that would otherwise be caused by a project; those adverse effects would require a conclusion that a project does not comply with the criteria at issue unless the

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[1]The Board assumes that the Club wishes to retain its right to have both matters adjudicated within this consolidated proceeding. By failing to object to the consolidation of the Declaratory Ruling and the Appeal, the Club waived its right, if any, to have each matter adjudicated in a separate proceeding.

conditions are followed. Charles and Barbara Bickford, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 24 (May 22, 1995). Therefore, by appealing condition #7, the Club has put into question the District Commission's affirmative findings under criterion 1.

The Club also requests the Board to declare that the impacts of the pre-existing rod and gun facilities, including the trap range, are not at issue in this appeal (ie. that the only issue is the impact of the Pavilion and the Lights). The Prehearing Order states that the Board may consider the aggregate impacts of the substantial change (Pavilion and Lights) and the pre-existing rod and gun facilities if the impacts are not severable.

10 V.S.A. § 6081(b) confers jurisdiction with respect to substantial changes to a pre-existing development. However, in assessing the impact of substantial changes, the Board may consider the aggregate impact caused by the substantial changes over which it has jurisdiction and the remainder of the operation over which it does not have jurisdiction because the impacts often are not severable. Re: John and Marion Gross d/b/a John Gross Sand and Gravel, #5W1198-EB, Findings of Fact, Conclusions of Law, and Order at 13 (April 27, 1995). See also Re: Ronald E. Tucker, Declaratory Ruling #165, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1985) (stating that 10 V.S.A. § 6081(b) does not grant jurisdiction over the entire pre-existing development unless the changes permeate the entire project).

The Board denies the Club's request to limit the scope of inquiry to the impact of the Pavilion and the Lights. It is impossible to determine on a preliminary basis in the context of a de novo review whether the impacts of the Pavilion and Lights are severable from the impacts of the remainder of the Club. Consequently, for the purposes of preparing their cases and presenting evidence, the parties should present evidence relative to the issue of whether the impacts of the Pavilion and Lights are severable from the impacts of the remainder of the Club which takes into account the holdings in Gross and Tucker.

3. Permit Conditions

The Club wishes the Board to determine the following issue:

> [I]n cases where Act 250 jurisidiction is asserted because of a substantial change to a pre-existing use, any conditions imposed in a permit should

relate to the impact the substantial change has on the ten Act 250 criteria; and that the application should not be treated as a new application for the pre-existing use in which there has been no substantial change.

The Board denies the Club's request to add the above issue, as stated, to the Prehearing Order. The issue, as it applies to this particular case, will be addressed within the Board's review of permit conditions imposed under criteria 1 and 8. See section II., B., 2., above.

4. Neighbors' Participation in Hearing

The Club requests the Board to clarify that Barbara Remis, Warren and Faith Eastwick, and Shirley Brand (adjoining property owners) may participate in this proceeding only to the extent that the Pavilion and Lights have a direct effect on their respective properties as specified in 10 V.S.A. § 6085(c)(1). The Neighbors contend that the Pavilion and Lights have increased noise generated by the trap shooting range by increasing (1) the days and hours of operation of the trap range and (2) the number of member and nonmember shooters participating in the trap shoots sponsored by the Club.

10 V.S.A. § 6085(c)(1) states, in part:

> An adjoining property owner may participate in hearings and present evidence only to the extent the proposed development or subdivision will have a direct effect on his or her property under section 6086(a)(1) through (a)(10) of this title.

(emphasis added).

Therefore, the Board will amend Section VI., 1. of the Prehearing Order by adding the following:

> Barbara Remis, Warren and Faith Eastwick, and Shirley Brand may participate in the hearing and present evidence only to the extent the Pavilion and Lights, and any noise caused thereby, will have a direct effect on their properties under criteria 1 (Air/Noise) and 8 (Aesthetics/Noise)[2] and to the extent they claim the impacts of the Pavilion and

[2]The Prehearing Order granted party status to Barbara Remis, Warren and Faith Eastwick, and Shirley Brand under criteria 1 (Air/Noise) and 8 (Aesthetics/Noise).

> Lights are not severable from the impacts of the remainder of the Club.

Further, the Club requests the Board to clarify that Marcia Dockum and Linda Hill (neighboring property owners but not adjoiners) may participate in hearings and present evidence only to the extent that the Pavilion and Lights will have a direct effect on their respective properties as specified in EBR 14(B)(l). EBR 14(B) (1) states, in part:

> (B) Parties by permission. The board or a district commission may allow as parties to a proceeding individuals ... not otherwise accorded party status by statute upon petition if it finds that the petitioner has adequately demonstrated:
>
> > (1) That a proposed development or subdivision may affect the petitioner's interest under anv of the provisions of § 6086(a) or ...

EBR 14(B)(1) does not limit parties' participation to the direct effect of a development on their property under 10 V.S.A. § 6086(a) (1) through (a) (10). Rather, EBR 14(B) (1) indicates that the participation of EBR 14(B) (1) parties may be limited to the extent that the development affects their interests under any of the provisions of § 6086(a). Therefore, the Board will amend Section VI., 2. of the Prehearing Order by adding the following:

> Marcia Dockum may participate in the hearing and present evidence only to the extent the Pavilion and Lights, and any noise caused thereby, may affect her interests under criteria 1 (Air/Noise) and 8 (Aesthetics/Noise)[3] and to the extent she claims the impacts of the Pavilion and Lights are not severable from the impacts of the remainder of the Club.

Additionally, the Board will amend Section VI., 3. of the Prehearing Order by adding the following:

> Linda Hill may participate in the hearing and present evidence only to the extent the Pavilion and Lights, and any noise caused thereby, may affect her

[3]The Prehearing Conference Report and Order granted Marcia Dockum party status under criteria 1 (Air/Noise) and 8 (Aesthetics/Noise).

interests under criterion 8 (Aesthetics/Noise)* and to the extent she claims the impacts of the Pavilion and Lights are not severable from the impacts of the remainder of the Club.

III. ORDER

1. The Club cannot avoid Act 250 jurisdiction and reject the Permit by removing the Pavilion and Lights which were found to be substantial changes requiring a permit.

2. The Board denies the Club's request for guidance on what actions it must take, if any, in order to return to its previous status as a pre-existing development.

3. Section II., A. of the Prehearing Order is amended as follows:

the Club did not object to consolidation of the Appeal and the Declaratory Ruling. However, the Club stated that it did not waive its rights to have both the Appeal and the Declaratory Ruling adjudicated within this consolidated proceeding.

4. The Board denies the Club's request to alter the Prehearing Order by limiting the scope of review to criterion 8.

5. The Board denies the Club's request to alter the Prehearing Order by limiting the scope of inquiry to the impact of the Pavilion and the Lights.

6. The Board denies the Club's request to add the following issue, as stated, to the Prehearing Order:

[I]n cases where Act 250 jurisidiction is asserted because of a substantial change to a pre-existing use, any conditions imposed in a permit should relate to the impact the substantial change has on the ten Act 250 criteria; and that the application should not be treated as a new application for the pre-existing use in which there has been no substantial change.

7. Section VI., 1. of the Prehearing Order is amended

[4]The Prehearing Conference Report and Order granted Linda Hill party status under criterion 8 (Aesthetics/Noise).

by adding the following:

> Barbara Remis, Warren and Faith Eastwick, and Shirley Brand may participate in the hearing and present evidence only to the extent the Pavilion and Lights, and any noise caused thereby, will have a direct effect on their properties under criteria 1 (Air/Noise) and 8 (Aesthetics/Noise) and to the extent they claim the impacts of the Pavilion and Lights are not severable from the impacts of the remainder of the Club.

8. Section VI., 2. of the Prehearing Order is amended by adding the following:

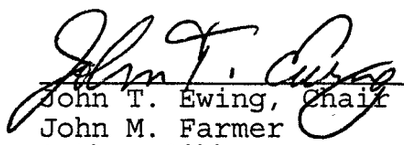
> Marcia Dockum may participate in the hearing and present evidence only to the extent the Pavilion and Lights, and any noise caused thereby, may affect her interests under criteria 1 (Air/Noise) and 8 (Aesthetics/Noise) and to the extent she claims the impacts of the Pavilion and Lights are not severable from the impacts of the remainder of the Club.

9. Section VI., 3. of the Prehearing Order is amended by adding the following:

> Linda Hill may participate in the hearing and present evidence only to the extent the Pavilion and Lights, and any noise caused thereby, may affect her interests under criterion 8 (Aesthetics/Noise) and to the extent she claims the impacts of the Pavilion and Lights are not severable from the impacts of the remainder of the Club.

Dated at Montpelier, Vermont this 12th day of July, 1996.

ENVIRONMENTAL BOARD



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