

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

*RE: Alodium Church*

Land Use Permit  
Application #3W0637-5-EB  
Docket #825

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

This is an appeal of the decision of the District # 3 Environmental Commission (Commission) granting Land Use Permit #3W0637-5 (Permit) to the Alodium Church (Permittee).

**I. PROCEDURAL SUMMARY**

On December 11, 2002, the Commission issued the Permit to the Permittee for the construction of four buildings; a 13-foot x 13-foot contemplation building, a seasonal deck, a 24-foot x 24-foot office/storage building, an 18 foot x 80 foot parsonage/office building, and an irregular shaped building with a footprint of less than 60 feet x 60 feet for chapel/parsonage/office use, and two footpaths and a tractor path providing access to the White River (Project) to be located on Whitehall Terrace in Hartford, Vermont.

On January 10, 2003, the Permittee filed a Motion to Alter (MTA) requesting the Commission to alter two conditions of the Permit, one Finding of Fact and several Conclusions of Law. The MTA was denied on February 4, 2003.

On March 6, 2003, the Permittee filed an appeal to the Vermont Environmental Board (Board) appealing certain Permit conditions concerning 10 V.S.A. 6086(a)(1)(E) and (F) and 10 (Criteria 1(E), 1(F) and 10) and asserting that the Permit violated Federal Public Law #106-274 by imposing substantial burdens on the ability of the Alodium Church parishioners to practice their religion.<sup>1</sup>

On April 8, 2003, Board Chair Patricia Moulton Powden convened a prehearing conference, and on April 11, 2003, she issued a Prehearing Conference Report and Order.

From July 1, 2003, until March of 2005 Permittee and the Agency of Natural Resources (ANR) requested a series of continuances to pursue settlement negotiations.

On March 7, 2005, Permittee and ANR submitted joint proposed findings of fact and conclusions of law.

---

<sup>1</sup>Permittee subsequently withdrew its appeal of Criterion 10.

On March 16, 2005, the Board deliberated on the parties' settlement agreement.

On April 5, 2005, the Chair issued a Notice of Public hearing.

On May 18, 2005, the Board held a hearing. The Board deliberated after the conclusion of the hearing.

## **II. DISCUSSION**

The Permittee and ANR negotiated a settlement and submitted a proposed Land Use Permit and joint Findings of Fact and Conclusions of Law. Any settlement agreement between parties must be reviewed to determine whether findings of fact and affirmative conclusions of law can be made under all criteria on appeal. The Board is not obligated to accept a settlement agreement if the necessary findings of fact and conclusions of law cannot be made. *Re:Faucett Builders Inc., #4C0763-2-EB*, Findings of Fact, Conclusions of Law, and Order at 6 (Aug. 6, 1996).

Projects that undergo certain changes pursuant to a settlement agreement while before the Board may have to be remanded for review by the district commission. If a settlement agreement does not create impacts to new parties or new impacts on Criteria not at issue before the Board, the Board can retain jurisdiction and decide the matter. See *Re:Design Contempo, Inc., #3W0370-2-EB*, Findings of Fact, Conclusions of Law, and Order (Dec. 20, 2001); *Brewster River Land Co., LLC, #5L1348-EB*, Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001); *Re:Otter Creek Development, LLC #1R0535-3-EB*, Findings of Fact, Conclusions of Law, and Order (Apr. 19, 2001); *Re:Andrew and Peggy Rogstad, #2S1011-EB*, Findings of Fact, Conclusions of Law, and Order (Dec. 19, 1996). However, when a project is changed on appeal and the changes may create impacts to new parties or new impacts on Criteria not at issue before the Board, the matter must be remanded back to the district commission. *Re:Spear Street Associates, #4C0489-1-EB*, Memorandum of Decision at 4. (Apr. 4, 1984).

Even if the changes to the project are a result of a settlement agreement, the district commission must review any increase in the project's impacts or impacts to new parties. When a case is remanded, the district commission can determine whether it is necessary to hold a new hearing to review the impacts of the project under the settlement agreement and provide notice to potential parties who may now be impacted by the project.

The Board determined that the settlement agreement does not create impacts to new parties or new impacts on Criteria not at issue before the Board.

Therefore, the Board can retain jurisdiction and decide the matter. However, the settlement agreement does not supply sufficient facts concerning the “of necessity” test for Criterion 1(F). Therefore, the Board scheduled a hearing on that narrow issue.

The following findings of fact and conclusions of law are adopted from the parties’ joint proposed findings of fact and conclusions of law. Some changes were necessary in order to be consistent with the Board’s precedent and format for decisions.

### **III. ISSUES ON APPEAL**

1. Whether, and to what extent, the Project complies with Criterion 1(E).
2. Whether, and to what extent, the Project complies with Criterion 1(F).
3. If permit conditions are necessary for the Project to comply with the above Criteria, do the permit conditions violate the Religious Land Use and Institutionalized Persons Act of 2000.

### **IV. FINDINGS OF FACT**

1. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

#### *Project Overview*

2. The Project consists of four buildings; a 13-foot x 13-foot contemplation building; a 24-foot x 24-foot offices/storage building; an 18-foot x 80-foot parsonage/offices building; and an irregular shaped building with a footprint of less than 60 feet x 60 feet for use as a chapel/parsonage/offices, and two footpaths and a tractor path providing access to the White River.

3. The Project tract consists of 3.29 acres. The Permittee's legal interest is ownership in fee simple described in a deed recorded on December 3, 1998, in the land records of the Town of Hartford, Vermont.

4. Permittee is a church. Practitioners in Permittee's church require access and proximity to "living water" which Permittee considers to be water with substantial and observable flow.

5. Permittee considers the land in the immediate vicinity of the living water (approximately 50 to 75 feet depending on the contours of the river bank) as sacred space which is important to the practice of its religion.

6. A principal factor in the Permittee's purchase of this land was to include the riverbank, the river, and the wooded areas in its exercise of religion. In addition, the existence of a pre-existing foundation located on the riverbank for the construction of the Contemplation Room was a major factor in the Permittee's decision to purchase this land for the exercise of religion, as was the existing accesses to the river.

7. The contemplation room is an enclosed structure with heat and electricity. It is available for use year round. The contemplation room must be located in the immediate vicinity of living water in order for Alodium Church members to practice their religion by communicating to a higher being.

8. The seasonal deck is not enclosed and is removed each winter. The seasonal deck is used for religious conversion and cleansing rituals. These rituals occur either in the water or next to the water depending on the season. The deck allows other practitioners to be nearby to observe and participate in the rituals.

9. The seasonal deck and contemplation room are necessary for members of Permittee's church to practice their religion.

*(1)(E) Streams*

10. The Project tract is bordered to the south by the White River. An unnamed brook is located on the east of the Project tract.

11. The encroachments proposed to the stream buffer are: a 13-foot x 13-foot contemplation building on an existing foundation, one eight-foot wide stairway to be constructed over the footprint of a pre-existing footpath; one eight-foot wide stairway to be constructed over the footprint of a pre-existing footpath and to terminate at a 16-foot x 24-foot seasonal removable deck; an eight-foot wide river access footpath to be located over the footprint of a pre-existing footpath; and a tractor path access of varying width not to exceed 16 feet wide to be constructed over the footprint of a pre-existing tractor path.

12. The Permittee and ANR have agreed on a Riparian Management Plan (RMP) to replace the conditions of the previously imposed stream buffer to

the White River and to add stream buffer protections to an unnamed stream located on the east side of Permittee's property.

13. The RMP sets forth the obligations of the Permittee to maintain the shoreline and minimize any impacts to the White River. The RMP includes a list of allowable activities on the shoreline, an erosion and sediment control plan, and a timetable for restorative planting.

14. The Permittee has already done some clearing within the stream buffer to the White River. The Permittee represented that the clearing was to remove an invasive, non-native specie, honeysuckle, and to remove garbage and debris such as automotive frames left by a prior owner from the riverbank. The Permittee replanted the cleared area with winter rye.

15. The Permittee has removed a large amount of garbage and debris that washes in from the White River during seasonal high water periods. The Permittee utilizes the tractor path to clean up the debris, hauling it out on a garden tractor.

16. The District Fisheries Biologist, ANR, in a February 24, 1999, memorandum stated in part:

. . . Currently there is a river buffer strip provision in the (*sic*)A 250 permit which encompasses the bank slope plus 10 ft. (*sic*) (I think) back from the top of the bank. Except for the foot and cart paths no stream slope vegetation will be cut except some brush (honeysuckle) may be trimmed back in front of the parsonage. There are a fair number of trees on the bank slope but they will not be cut . . .

. . . The proposed project would not appear to have a direct impact on fisheries resources since there is no shade from trees (project located on north side of river and immediate shoreline is bedrock), erosion concerns can probably be met, and there is no current public access that will be curtailed . . .

17. The Vermont Dept. of Agriculture stated that honeysuckle is a Class B Noxious Weed which "out compete and displace plants in natural ecosystems and managed lands; and ... has significant environmental, agricultural and economic impacts."

*(1)(F) Shorelines*

18. The stretch of the White River at the Project tract is used occasionally for recreation.

19. The Permittee proposes to construct the two sets of steps over the location of two pre-existing footpaths in a manner which would minimize any visual impact and would blend in with their surroundings.

20. There is no existing public access to the White River through the

Project tract.

21. The Project will be sufficiently screened by the vegetation and the natural contours of the shoreline.

## V. CONCLUSIONS OF LAW

### *Criterion 1(E)*

Criterion 1(E) reads:

A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.

Under Criterion 1(E), the Board first determines whether the project will disrupt the natural condition of a stream, and if so, whether the applicant has considered "all reasonable alternatives" which would allow the stream to remain in its natural condition, both during and after construction. *Re: Mark and Pauline Kisiel*, 5W1270-EB, Findings of Fact, Conclusions of Law and Order (Altered) at 26-27 (Aug. 7, 1998), rev'd on other grounds, *In re Kisiel*, 172 Vt. 124 (Dec. 29, 2000)(motion for reargument denied, Mar. 22, 2001). The Permittee has the burden of proof to demonstrate consideration of "all reasonable alternatives" which would allow the streams to remain in their natural condition. 10 V.S.A 6088(a).

The Permittee and ANR's settlement is based on the RMP which creates a 10 foot buffer beyond the top of the slope marked on the site plan as the 380 foot contour. The parties define this area as the shoreline, and the Board accepts the parties' definition. Pursuant to the RMP, the Permittee may develop the paths at issue, the seasonal removable deck, and the contemplation room. Amongst other requirements, the Permittee must permanently mark the boundaries of the riparian area, comply with erosion control measures, and plant new plants where the honeysuckle is removed.

In light of the protections contained in the RMP, the Board concludes that the Project will not disrupt the natural condition of the stream. Therefore, the Project complies with Criterion 1(E).

### *Criterion 1(F)*

Criterion 1(F) reads as follows:

A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other criteria, the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision, and the development or subdivision will, insofar as possible and reasonable in light of its purposes:

- (i) retain the shoreline and the waters in their natural condition,
- (ii) allow continued access to the waters and the recreational opportunities provided by the waters,
- (iii) retain or provide vegetation which will screen the development or subdivision from the waters, and
- (iv) stabilize the bank from erosion, as necessary, with vegetation cover.

Under Criterion 1(F), the Board conducts a two-step inquiry: first, the Board must determine whether the project must “of necessity” be located on a shoreline to fulfill its purpose; second, if so, whether the project will, insofar as possible and reasonable in light of its purpose, satisfy Criterion 1(F)(i)-(iv). *Re: Killington Ltd., Farm and Wilderness Foundation, and Dept. of Forests, Parks, and Recreation, #1R0813-5-EB* (Aug. 25, 1998).

There is no question that the paths, seasonal deck, and contemplation room are on the shoreline.<sup>2</sup> The first inquiry is whether these components of the Project “of necessity” must be located on the shoreline. The purpose of the paths is to provide access to the water for the religious purposes of the Alodium Church. Therefore, the paths satisfy the “of necessity” test.

The contemplation room and the seasonal deck present a more difficult determination because, on their face, they are not obviously water related. However, the Permittee presented evidence which explained its need to be near “living water” in order to practice its religion. Permittee considers living water as sacred space far removed from secular life. According to the Permittee, separating the location of the ceremonies from the ordinary world enhances the religious acts and makes them more effective. The contemplation room allows access to the sacred space during less than ideal weather.

Both the seasonal deck and the contemplation room are used for religious purposes. The Permittee holds cleansing and conversion ceremonies in these locations which need to be performed in close proximity to living water. The contemplation room is especially important because Alodium Church practitioners use it to communicate with a higher being. In light of the religious

---

<sup>2</sup> The other components of the Project are not on the shoreline and Criterion 1(F) is not applicable to them.

practices that must take place on what the Board considers the shoreline of the river, the Board concludes that the contemplation room and seasonal deck must “of necessity” be located on the shoreline. However, the Board will require the seasonal deck to be permanently removed if the Alodium Church ceases its operations on the Project tract.

The Board concludes that with the conditions contained in the RMP developed by Permittee and ANR, the Project will meet the sub-criteria of Criterion 1(F). The Project will retain the shoreline in its natural condition. There was no public access through the Project site. The Project will be sufficiently screened by vegetation and the natural contours of the river bank. The stairs and footpaths as designed will also not create erosion. Therefore, the Project complies with Criterion 1(F).

*If permit conditions are necessary for the Project to comply with the above criteria, do the permit conditions violate RLUIPA of 2000?*

If the Board determines that permit conditions are in fact necessary for the Project to comply with Criteria 1(E) and 1(F), then it must determine whether or not these permit conditions violate the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). See 42 U.S.C. §§2000cc to 2000cc-5. RLUIPA provides a “general rule” which states:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

(A) is in furtherance of a compelling government interest; and  
(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Furthermore, the above subsection applies in any case which;

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. §2000cc(a)(2)(C).

In order to establish a prima facie case that Religious Land Use and

Institutionalized Persons Act (RLUIPA) has been violated, a plaintiff must present evidence that the land use regulation in question: (1) imposes a substantial burden; (2) on the “religious exercise;” (3) of a person, institution, or assembly. *See Grace United Methodist Church v. City of Cheyenne*, 235 F.Supp.2d 1186, 1194 (D. Wyo., 2002); *see also Murphy v. Zoning Comm’n of the Town of New Milford*, 148 F.Supp.2d 173, 187 (D. Conn. 2001). If a plaintiff makes a prima facie showing that RLUIPA has been violated, the burden shifts to the local government to demonstrate that the land use regulation in question furthers a compelling governmental interest and that the land use regulation is the least restrictive means of furthering that compelling interest. *See Grace United Methodist Church*, 235 F.Supp.2d at 1196. Thus, RLUIPA in effect imposes a “strict scrutiny” standard of review on land use regulations, if they are found to substantially burden religious exercise.

However, RLUIPA does not grant religious institutions immunity from land use regulations. The legislative history notes that “[T]his Act does not grant religious institutions immunity from land use regulations, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.” *Senate Legislative History*, at 27.

In the instant case, in light of the fact that Permittee voluntarily signed a settlement agreement which included permit conditions, the Board determines that these permit conditions are acceptable to Permittee and do not impose a substantial burden on the practice of Permittee’s religion. Therefore, the Board concludes that the permit conditions do not violate RLUIPA.

**VI. ORDER**

1. The Project satisfies 10 V.S.A. §6086(a)(1)(E) and (F).
2. Land Use Permit Application #3W0637-5-EB is granted.
3. Jurisdiction is returned to the District 3 Environmental Commission.

Dated at Montpelier, Vermont this 23rd day of June, 2005.

ENVIRONMENTAL BOARD

    /s/Patricia Moulton Powden      
Patricia Moulton Powden, Chair  
George Holland  
W. William Martinez  
Patricia Nowak  
Alice Olenick  
Richard C. Pembroke, Sr.  
A. Gregory Rainville  
Christopher D. Roy