

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

Re: Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile  
Land Use Permit #3W0738-4-EB (Revocation)  
Docket #698

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

In this decision, the Environmental Board ("Board") grants the Town of Sharon Planning Commission's petition to revoke subject to an opportunity to correct the violation,

I. BACKGROUND

On November 14, 1995, the District #3 Environmental Commission ("District Commission") issued Land Use Permit #3W0738-4 and its supporting Findings of Fact, Conclusions of Law, and Order (collectively the "Permit"). The Permit authorizes Vermont RSA Limited Partnership d/h/a Bell Atlantic Mobile ("BAM") to construct a 190-foot unlit telecommunications tower, equipment shed, access road, and related improvements (collectively the "Project"). The Project is located on Baxter Mountain off of Fay Brook Road in the Town of Sharon, Vermont.

On December 29, 1997, the Town of Sharon Planning Commission ("Planning Commission") filed a revocation petition with the Board, requesting the Board to review and, if necessary, revoke the Permit. The revocation petition is filed pursuant to 10 V.S.A. § 6090(c) and Environmental Board Rule ("EBR") 38(A). The Planning Commission contends that the Project conflicts with statements contained in the Scenic Resources Evaluation, that the Project fails to conform to the Permit and exhibits incorporated into the Permit, and that the Permittee submitted inaccurate, erroneous, or incomplete information in connection with the Permit application.

On February 3, 1998, Board Chair Marcy Harding convened a preheating conference in Montpelier, Vermont.

On February 5, 1998, Chair Harding issued a **prehearing** conference report and order ("Preheating Order") which is incorporated herein by reference. The Preheating Order-set forth, among other things, a schedule of dates for the filing of **prefiled** evidence, the second preheating conference, the site visit, and the hearing. Additionally, the Preheating Order informed the participants that the Board will take official notice of the Permit, Application #3W0738-4, and the associated exhibits. The Preheating Order stated that it was binding on all parties unless a written objection to it was **filed** on or before February 17, 1998. No objections to the Preheating Order were tiled on or before February 17, 1998.

On March 5, 1998, the Town of Sharon Select Board and the Planning Commission (collectively the "Town") filed a Motion for Continuance ("Motion"), requesting changes to

the schedule set forth in the Prehearing Order. In its Motion, the Town requested rescheduling of the hearing date from May 13, 1998 to a date in June, 1998. BAM objected to rescheduling the hearing date. Alternatively, the Town requested rescheduling certain **prefiling** dates. BAM did not object to rescheduling the pretiling dates as requested by the Town.

On March 5, 1998, Chair Harding issued a revised prehearing conference report and order ("Revised Prehearing Order"), denying the Town's request to reschedule the hearing from May 13, 1998 to a date in June, 1998 and granting the Town's alternative request to reschedule certain **prefiling** dates. The Revised Prehearing Order is incorporated herein by reference. The Revised Preheating Order set forth a new schedule of dates for the filing of pretiled evidence, the proposed findings of fact, conclusions of law, and order, and the site visit itinerary.

The parties filed pretiled testimony, lists of witnesses and exhibits, proposed findings of fact and conclusions of law, and **evidentiary** objections during March and April, 1998,

On May 12, 1998, Chair Harding convened a **second** prehearing conference by telephone.

On May 13, 1998, the Board convened a hearing in the Town of South Royalton with the following parties participating: The Town by Gerald R. Tarrant, Esq., BAM by Brian J. Sullivan, Esq., and the Agency of Natural Resources ("ANR") by Andrew N. Raubvogel. Esq.

After convening the hearing, the Board conducted a site visit and returned to the hearing room to place its observations on the record. In addition, the parties were given an opportunity to place their own observations on the record. The Board then heard testimony and arguments from the parties.

At the close of the hearing, the parties agreed to submit the following supplemental filings: (1) written surrebuttal on the limited issue of camera lens use, (2) written closing arguments, and (3) supplemental proposed findings of fact and conclusions of law. Additionally, the parties waived cross-examination on the written surrebuttal and the opportunity to reconvene the hearing to respond to the written surrebuttal. See 10 V.S.A. § 6085(f) and EBR 18(F) (both stating that a hearing shall not be closed until the Board provides an **opportunity** to all parties to respond to the last evidence submitted). The parties reserved the right to submit written objections to the written surrebuttal.

On May 14, 1998, Chair Harding issued a Recess Memorandum to the parties.

setting forth deadlines for filing the supplemental filings and objections thereto.

On May 27, 1998, the parties filed the supplemental filings.

On June 3, 1998, BAM filed Permittee's Objections to Surrebuttal Filings, including objections to the **surrebuttal** testimony of Ms. Vissering, objections to the **surrebuttal** testimony of Mr. McGee, and an objection to inaccurate citation of the **hearing** transcript in the petitioners' supplemental findings. Also on June 3, 1998, the Town filed the Town's Objections to Surrebuttal Filings.

The Board conducted deliberative sessions on May 18, June 10, June 24, July 22, and August 19, 1998.

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. See Petition of Village, 143 Vt. 437, 445 (1983).

## II. ISSUES

- A. Whether, pursuant to EBR 38(A), the Permit should be revoked because the Permittee **willfully** or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the Permit application, and accurate and complete information may have caused the district commission or Board to deny the application or to require additional or different conditions on the permit.
- B. Whether, pursuant to EBR 38(A), the Permit should be revoked because the Permittee has violated the terms of the Permit or any Permit condition, the approved terms of the application, or the rules of the Board.
- C. If grounds for revocation exist, whether an opportunity to correct the violations should be provided pursuant to EBR 38(A)(3).

## III. FINDINGS OF FACT

1. On October 4, 1995, **Cellco** Partnership c/o Bell Atlantic Nynex Mobile and James A. Fisk submitted Application #3W0738-4 ("Application") for the construction of a 190-foot unlit telecommunications tower, equipment shed, access road, and related improvements (previously defined as the "Project") to the District Commission.

2. On November 1, 1995, the District Commission conducted a hearing and site visit regarding the Application. The **Planning** Commission and the Sharon Select Board each had two representatives present at the hearing and site visit.
3. On November 14, 1995, the District Commission issued the Permit to Cellco Partnership c/o Bell Atlantic Nynex Mobile and James A. Fisk, authorizing the Project.
4. BAM constructed the Project in June, 1996.
5. The Project is located on Baxter Mountain off of Fay Brook Road in the Town of Sharon, Vermont.
6. On January 26, 1998, the District Coordinator for the District Commission administratively amended the Permit pursuant to EBR 34(D) by changing the permittee's name from "Cellco Partnership c/o Bell Atlantic Nynex Mobile" to "Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile." Additionally, the administrative amendment deleted the name of James Fisk from the permit as co-permittee.
7. An engineer and a landscape architect of the engineering firm Clough, Harbour & Associates, LLP ("CHA") prepared a **viewshed** analysis ("Viewshed Analysis") which BAM submitted with the Application.
8. The **Viewshed** Analysis included a map ("Viewshed Analysis Map") which indicated that the tower ("Tower") would be visible from seven areas (approximately 421 acres) in the Town of Sharon. The **Viewshed** Analysis Map indicated that the Tower would not be visible from any other areas in the Town of Sharon due to topography and vegetation.
9. The "Viewshed Analysis and Photo Perspectives" section of Exhibit 5 of the Application states, in part:

According to a **viewshed** analysis and **field** survey conducted on August 15, 1995 the following vantage points were chosen which best represent the areas where the proposed tower would be visible. Two five foot diameter weather balloons were flown 190 feet above the ground which represent the height of the proposed tower. A thorough field survey was then completed to identify areas **from** nearby local, county and state roads in which the site would be visible. This information was later transposed onto a USGS map which also

took into account the topography and vegetation of the area. Several cross-sections were completed to determine which areas would not be visible due to topography. The final product was the "Viewshed Analysis Map" and accompanying "Photo Perspectives." The following is a brief synopsis of each of the six vantage points or views chosen.

1. View 1 was taken from Route 132 looking southwest towards the proposed site. Although the proposed project would be visible from this area along Route 132, views are scattered and are partially screened by vegetation. Visibility of the tower from this area would be limited to background views.
2. View 2 was taken from Fay Brook Road looking southeast towards the proposed site. Scattered clearings along Fay Brook Road consist primarily of agricultural fields which would enable the proposed tower to be visible.
3. View 3 was taken from Route 14 looking northeast towards the proposed site. As a result of the elevation of the existing roadway and dense vegetation along the roadway, visibility of the tower would be reduced from this vantage point.
4. View 4 was taken from Route 14 looking northwest towards the proposed site. From this vantage point, the proposed tower would be viewed in the background and would blend in with the canopy of the existing tree-line.
5. View 5 was taken from I-89 looking northwest towards the proposed site. The views from I-89 along this stretch do not deviate significantly from the one shown in the photograph. The top of the tower would be visible just above the ridge line. The size and scale of the proposed tower would be compatible with the natural environment as it would blend into the background.
6. View 6 was taken from Route 14 in the Hamlet of Sharon looking directly north towards the proposed site. Views from this stretch along Route 14 would be limited due to vegetation and structures blocking the line of sight. The top of the proposed tower from this vantage point would be directly in line with the existing tree-line.

- 10 As part of the **Viewshed** Analysis, BAM submitted photographs of the weather balloons flown at the height of the proposed tower from the proposed tower location ("Photo Perspectives"). The Photo Perspectives were taken from the six viewpoints

mentioned above. The Photo Perspectives indicated that a majority of the Tower would not be visible from five of the six viewpoints.

11. The **Viewshed** Analysis methodology employed by CHA is inherently imprecise. The methodology relies heavily on floating balloons to simulate the height of the finished tower. Shifting wind conditions may cause a drifting of the balloons and the lines by which they are anchored can become twisted around trees. CHA's engineers were aware of these phenomena in 1995. At that time, their standard operating procedure during balloon tests included maintaining visual contact with balloons during the early part of the test until several reference points had been established. As the balloon test progressed, field **personne**<sup>1</sup> would return periodically to verify that the balloons were flying at the same height and location within the frame. If wind conditions had caused a shift in balloon height or orientation, the field personnel would return to the balloon site to make adjustments or abandon the test if conditions were severe.
12. Since 1995, CHA's engineers have learned that varying wind conditions can cause the balloons to shift from their target locations for short durations and then return to their original position without detection by field personnel. CHA's engineers believe this phenomenon may have occurred during the balloon test involving the Project.
13. Recently, CHA has adopted more stringent practices, including having a balloon guard present at the balloon site for the **full** duration of the test (several hours), maintaining radio contact between the balloon guard and other field personnel, documenting balloon flight data and correlating this data with the timed observations of field personnel.
14. The use of USGS topographic maps, with a scale of one inch to 2,000 feet, also leads to some imprecision in the **Viewshed** Analysis methodology employed by CHA.
15. USGS maps for the area in question contain 20-foot contours which are considered accurate to within plus or minus 10 feet.
16. Exhibit 5 to the Application states that the Tower "may be visible, although only briefly, from I-89 which is designated as a scenic road corridor."
17. The "Landscape Context" section of Exhibit 5 of the Application states, in part:

According to the Two Rivers Ottauquechee Regional Plan, the proposed site is located in a "Rural Area" and should be developed in such a pattern that is

consistent with this land use type. The Plan recommends that: Rural Areas be developed only where potential for agriculture, forestry *or* mineral extraction is relatively low; new construction should be contained within woodland or along the edges of open fields where possible to be visually absorbed or screened by natural features; proposed structures should be developed so that they conserve space, and; siting of proposed structures should be planned as to minimize the interruption of scenic vistas as viewed from a public highway. The proposed project is located in an area: where productivity for agriculture, forestry and mineral extraction is low; which utilizes the existing woodland for a visual barrier; which utilizes less than 0.23 acres for the development of structures, and; which is partially visible for a maximum of 55 seconds from the northbound lanes along I-89 (views to the site from I-89 are distant views and can only be seen in the background, refer to Photo #5 in this section).

18. The “Conclusion” section of Exhibit 5 of the Application states:

In conclusion, the Baxter Mountain site and its context are not considered to be of statewide significance as it does not receive a high qualitative ranking **from** three *or more* of the six visual *elements* previously mentioned. In addition, this site is only partially visible for a maximum of 55 seconds from the northbound lanes on I-89 (views to the site from this area are distant views); this site is not visible **from** the Joseph Smith Monument, and; this site is not located in a recreation corridor. Because this project satisfies the criteria established by the ANR, no further review will be necessary. This project will have no significant adverse or undue visual impacts to the natural or **cultural** environment. See Exhibit 2, “*Site Plans*” for *a more* detailed description of the proposed site, Exhibit 5, “*Photo Perspectives*” Exhibit 6 “*Viewshed Analysis Map*” and Exhibit 7, “*Site Photographs*” for the location of visible areas in the Town of Sharon and photos of the proposed site.

19. On October 26, 1995, the **Planning** Commission submitted a letter to the District Commission, stating its strong opposition to the Project. The District Commission admitted the letter into evidence as exhibit #21 (“Opposition Letter”).
20. The Opposition Letter states, in part: “Although this application includes several photos taken of balloons at the approximate height of the proposed tower, there are several views that are not included, especially from the village and from across the [White] [R]iver.”

21. On October 31, 1995, Chris Ciolfi, Real Estate Manager for BAM, submitted a letter to the District Commission in response to the Opposition Letter. The District Commission admitted Mr. Ciolfi's letter into evidence as exhibit #23 ("Response Letter").
22. The Response Letter states, in part:

As the Sharon Town Plan recommends the proposed site will be located in a wooded area to screen the majority of the installation. The equipment building and the majority of the proposed tower will [sic] screened from view by the existing vegetation. Additionally, from viewing the pictures of a balloon flown to the proposed height it is clear that the proposed tower will be only somewhat visible from several points in town and not at all from others.
23. In the course of this revocation proceeding, the Town hired an expert to generate a computer modeled viewshed study ("Town Viewshed") using the geographic information system ("GIS") software "ARCVIEW Spatial Analyst."
24. The expert worked approximately 12-14 hours to generate the Town Viewshed
25. GIS is a way of looking at geographic information spatially; it is used, in part, to reflect impacts on the environment.
26. GIS based viewshed analysis is an analytical tool that has been widely used in land use planning. It measures every surface and accounts for all observation points. A computer modeled GIS viewshed analysis is meant to supplement field-based inventories of static views, such as photographs of views taken from fixed points.
27. The Town Viewshed was field verified
28. The Town Viewshed analysis is based on data which is available to the public. The data incorporated into this model includes, but is not limited to, USGS digital elevation data, land cover data for ortho photos at a scale of 1:5,000 obtained from the Vermont Department of Property and Valuation, road overlays, E911 structure data to illustrate the development pattern in Sharon. and the surface water data from the Vermont Center for GIS.
29. GIS viewshed analysis software was available in 1995

30. GIS **viewshed** analysis is a predictive tool. It creates a predictive model which is meant to indicate generally the degree of probability of visibility of an object. GIS **viewshed** analysis is not flawless. Although GIS **viewshed** analysis employs mathematical formulae, the data used in the analysis are a source of variability.
31. The Town **Viewshed** predicts that the Tower is visible from 7,466 acres in Sharon. The Town **Viewshed** is a more accurate representation of the actual visibility of the Tower than **BAM's Viewshed** Analysis. However, the Town **Viewshed** contains inaccuracies. For example, the Town **Viewshed** predicts that the Tower will be visible **from** the town center of Sharon, a point from which the Tower is not visible. Additionally, the Town **Viewshed** predicts significant visibility of the Tower from Howe Hill Road, Route 132, and Route 14; the actual views of the Tower from these locations are intermittent.
32. In the Criterion 8 section of Schedule B of the Application, BAM stated, in part: "See Exhibit 5, 'Scenic Resource Evaluation' for a detailed description of the area."
33. Exhibit 5 to the Application is a "Scenic Resource Evaluation" which was conducted according to ANR's Scenic Resource Evaluation Process ("Process").
34. ANR wrote the Process in 1991-1992. **The** Process defines when the ANR should be involved in Criterion 8 aesthetics issues under Act 250.
35. There are two components to the Process. The first step is to determine the site sensitivity and the characteristics of that site that make it scenic. The second step is to examine the proposed project and how it will affect the scenic values of the site.
36. At the time the Process was written, ANR had limited resources. The Process was intended to identify areas of state-wide significance so that ANR could best utilize its resources and involve itself in cases where scenic resources have state-wide significance.
37. The Process does not stand for the proposition that a project would comply with Criterion 8 if it does not have scenic resources of state-wide significance.
38. Since 1995, ANR has not been involved actively in aesthetics review under Criterion 8 because it does not have sufficient staff to evaluate scenic resources using the Process.
39. ANR did not use the Process to evaluate the Application in 1995,

40. The Quechee Lakes analysis is the applicable Environmental Board standard to determine if a project complies with Criterion 8. The Process merely helps to determine if the scenic resources involved and the impacts of a given project warrant ANR's involvement based on ANR's protection priorities and state-wide point of view. It was not meant to exclude projects from consideration in the Act 250 process that affect resources that are not of state-wide significance and concern, as defined by the Process, but have an undue adverse effect under the Quechee Lakes analysis.
41. In finding of fact #7 under the Criterion 8 section of its Findings of Fact, Conclusions of Law, and Order #3W0738-4, the District Commission stated "Few, if any, trees will be removed as part of this project."
42. In finding of fact #8 under the Criterion 8 section of its Findings of Fact, Conclusions of Law, and Order #3W0738-4, the District Commission stated "The existing trees will screen the lower half of the tower. Testimony and Exhibits 5, 6, and 17."
43. In finding of fact #9 under the Criterion 8 section of its Findings of Fact, Conclusions of Law, and Order #3W0738-4, the District Commission stated "The tower will be visible from surrounding areas."
44. In evaluating the Application, the District Commission conducted the Quechee Lakes analysis and came to a positive conclusion under Criterion 8. In finding of fact #13 under the Criterion 8 section of its Findings of Fact, Conclusions of Law, and Order #3W0738-4, the District Commission stated "We find that the tower will be an adverse aesthetic impact due to its visibility. However, we find that the partial vegetation screening, lack of lights, and the materials and color are adequate to prevent this visual impact from being undue."
45. In finding of fact #4 under the Criterion 10 section of its Findings of Fact, Conclusions of Law, and Order #3W0738-4, the District Commission stated "The Sharon town plan encourages projects in scenic or exposed areas to be designed in a manner than minimizes 'visual disruption.' The plan also asks that towers be placed 'in a manner to reduce the visual impact.'"
46. In finding of fact #5 under the Criterion 10 section of its Findings of Fact, Conclusions of Law, and Order #3W0738-4, the District Commission stated "The applicants have selected the tower site after exploring efforts to locate the antennas on other existing facilities."

47. In finding of fact #8 under the Criterion 10 section of its Findings of Fact, Conclusions of Law, and Order #3W0738-4, the District Commission stated:

We are concerned about the “dotting” of towers in the landscape. Adequate planning, coupled with co-location efforts could have a positive effect on the placement of towers in the region. The applicants state they would allow other facilities on the tower. A better understanding of the selection process would prepare us to review future changes. Further, we must rely on the adequacy of the selection process to help us find that reasonable effort has been expended to minimize visual impact. At the hearing the applicants indicated a willingness to offer material on site selection and cellular coverage. We will not require its submittal as a condition of our approval and will not delay this decision by issuing a recess memorandum, but we do ask that it be sent soon to us and all parties.

48. Condition 2 of the Permit states:

The project shall be completed as set forth in the Findings of Fact and Conclusions of Law #3W0738-4 in accordance with the plans and exhibits stamped “Approved” and on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission.

49. The District Commission stamped only exhibits 2, 3, 4, and 18 as “Approved.”
50. Exhibit 2 is a site plan.
51. Exhibit 3 is a schematic tower exhibit with three attachments (a drawing of typical panel type antennae, a photograph of a typical 180 foot tower with panel type antennae, and a photograph of a typical wireless communications facility).
52. Exhibit 4 is building elevation and details.
53. Exhibit 5 is a Scenic Resource Evaluation. including the Viewshed Analysis and Photo Perspectives.
54. Exhibit 6 is the Viewshed Analysis Map.
55. Exhibit 17 is Schedule B of BAM’s Application.

56. Exhibit 18 is site construction drawings.
57. Condition 11 of the Permit states that “[t]he forest land provides partial screening for the tower. The tree line shall be maintained to shield the lower half of the tower.”
58. Condition 12 of the Permit states “No material changes shall be made of [sic] the tower unless this permit is amended. No dishes shall be added above the tree line unless this permit is amended.”
59. The Tower is visible from many more locations than CHA projected in the Viewshed Analysis and other Application materials.
60. When it is visible, more of the Tower is visible than CHA projected in the Application materials.
61. From River Road, the Tower is visible for approximately 200 yards before the intersection with Howe Hill Road.
62. The Tower is not visible from the intersection of Howe Hill Road and Moore Road. When traveling east on Howe Hill Road toward River Road, the Tower is visible for 0.10 miles and at the intersection of Howe Hill Road and River Road.
63. The Tower is visible intermittently along River Road for approximately 0.30 miles, At the bridge crossing the White River just before the intersection of River Road and Route 14, the Tower is not visible.
64. The Tower is not visible from the area of the Sharon Town Hall (“Town Center”).
65. More than half of the Tower is visible from the intersection of Route 14 and Quimby Mountain Road.
66. When traveling north on Route 14, more than half of the Tower is visible for approximately 0.40 miles at the edge of the Village of Sharon.
67. When traveling north on Route 14 within the boundaries of the Village of Sharon, the Tower is visible clearly for 0.15 miles and intermittently for a short stretch after that.

68. When traveling north on Interstate 89, more than half of the Tower is visible for 2.1 miles (approximately 2 minutes if traveling at the speed of 60 miles per hour). The Tower remains visible until exit 2 of Interstate 89. At exit 2, *less than* half of the Tower is visible. The Tower disappears from view at the end of the exit ramp.
69. When traveling east on Route 132, the Tower is visible briefly.
70. At the driveway of the **Inn** at Idlewood, on Route 132, slightly less than half of the Tower is visible.
71. When traveling west on Route 132, generally more than half the Tower is visible intermittently.
72. When traveling east on Fay Brook Road, the Tower is visible briefly. The Tower is visible clearly from the intersection of Fay Brook Road and Clifford Farm Road. **When traveling west** on Fay Brook Road, more than half of the Tower is visible from numerous locations.
73. There are trees approximately 25 feet high to the southwest of the Tower.
74. Clearing for the access road to the Tower creates a gap in trees to the west northwest of the Tower.
75. The vast majority of trees screening the immediate area of the Tower are deciduous.
76. The construction of the Project required only a small number of trees to be cut down. Since the construction of the Project, BAM has not cut any more trees. The clearing where the Project is located is nearly identical to the clearing viewed by the District Commission during its site visit.
77. Although the Permit authorized a **190-foot** tower, the Tower as constructed is 168 feet tall. The height from the ground level to the top of the antennae on the tower is 178 feet.

IV. CONCLUSIONS OF LAW

A. Objections to Surrebuttal Testimony and Exhibits

At the close of the hearing, the parties agreed to submit the following supplemental filings: (1) written surrebuttal on the limited issue of camera lens use, (2) written closing arguments, and (3) supplemental proposed findings of fact and conclusions of law. Additionally, the parties waived cross-examination on the written surrebuttal and the opportunity to reconvene the hearing to respond to the written surrebuttal. See 10 V.S.A. § 6085(f) and EBR 18(F) (both stating that a hearing shall not be closed until the Board provides an opportunity to all parties to respond to the last evidence submitted). The parties reserved the right to submit written objections to the written surrebuttal.

On May 27, 1998, the parties filed the supplemental filings

On June 3, 1998, BAM filed Permittee's Objections to Surrebuttal Filings, including objections to the surrebuttal testimony of Ms. Vissering, objections to the surrebuttal testimony of Mr. McGee, and an objection to inaccurate citation of the hearing transcript in the Town's supplemental findings. Also on June 3, 1998, the Town filed the Town's Objections to Surrebuttal Filings including objections to David Raphael's surrebuttal testimony and all of the exhibits attached to Mr. Raphael's surrebuttal testimony.

The Board denies BAM's objections to the surrebuttal testimony of Jean Vissering and the surrebuttal testimony of Mr. McGee. Exhibits P-38 and P-39 are admitted. The Board will give such evidence the weight it deems appropriate, if any. Since the Board did not include the Town's supplemental proposed finding of fact #9 in its findings of fact, the Board grants BAM's objection to inaccurate citation of the hearing transcript in the Town's supplemental findings. As stated above, to the extent any proposed findings of fact and conclusions of law are included in this decision, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. at 445.

The Board partially grants the Town's objections to the surrebuttal testimony of David Raphael. The written surrebuttal testimony was one of three supplemental filings allowed by the Board. On May 14, 1998, Chair Harding issued a Recess Memo which stated, in part "Each supplemental filing shall be no more than 5 pages, double-spaced." BAM submitted four pages of written surrebuttal testimony along with twenty-four pages of exhibits. Since BAM exceeded the page limit set forth by the Recess Memorandum, the Board grants the Town's objections to exhibits V29A-V29F except that the Board will admit the first page of exhibit V29A. Additionally, the Board will strike all references in David Raphael's surrebuttal testimony to exhibits V29A-V29F except any references to the first

page of exhibit V29A.

B. Revocation

The Board has jurisdiction to consider revocation petitions pursuant to 10 V.S.A. § 6090(c) and EBR 38(A). The Board treats a revocation petition as an initial pleading in a contested case, in accordance with the notice and hearing procedures of EBR 40. EBR 38(A)(t).

The Board may revoke a permit if it **finds** that:

- (a) [t]he applicant or representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission or board to deny the application or to require additional or different conditions on the permit; or
- (b) the applicant or successor in interest has violated the terms of the permit or a permit condition, the approved terms of the application, or the rules of the Board; or
- (c) the applicant or successor in interest has failed to file an affidavit of compliance with respect to specific conditions of a permit, contrary to a request by the board or district commission.

EBR 38(A)(2)(a)-(c). The General Assembly ratified EBR 38(A) in 1985; therefore, EBR 38(A) has the force and effect of a legislative enactment. 1985 Vt. Laws No. 52 § 5; In re Spencer, 152 Vt. 330,336 (1989).

The person or entity seeking revocation has the burden of proof. Re: Rover V. and Beverly Pohvin, #3W0587-1-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 14 (July 15, 1997) [EB #655]; Re: Lawrence White, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, #1R0391-6-EB (Revocation) and #1R0391-7-EB (Interlocutory) at 14 (Sept. 17, 1996) [EB #647]; Re: Putney Paper Co., Inc., #2W0436-6-EB, Findings of Fact, Conclusions of Law, and Dismissal Order (Altered) at 12-13 (June 30, 1995) [EB #583R]. The Board is reluctant to revoke a permit when doubtful or uncertain about the grounds for revocation. Potwin, supra, at 14; Stokes Communications Corp., #3R0703-EB (Amendment Application Revocation) Memorandum of Decision at 9 (Mar. 20, 1996) [EB #644M2].

1. Information Submitted in Connection with the Permit Application

The Town must prove the existence of each of the following elements:

- a. that BAM submitted inaccurate, erroneous, or materially incomplete information in connection with the Application;
- b. that BAM did so willfully or with gross negligence;
- c. that submission of accurate and complete information may have caused denial of the Permit or issuance of different conditions.

a. Inaccurate, Erroneous, or Materially Incomplete Information

The Town contends that the Permit should be revoked pursuant to EBR 38(A)(2)(a) because BAM submitted inaccurate, erroneous, or materially incomplete information regarding (1) the number of locations from which the Tower would be visible, (2) how much of the Tower would be visible, and (3) the analysis of the aesthetic impacts of the Tower.

The Board concludes that BAM submitted inaccurate, erroneous, and materially incomplete information regarding the number of locations from which the Tower would be visible. In connection with its Application, BAM submitted a Viewshed Analysis, including a narrative, a Viewshed Analysis Map, and "Photo Perspectives." The Viewshed Analysis Map indicated that the Tower would be visible from seven areas (approximately 421 acres) in the Town of Sharon and that the Tower would not be visible from other areas in the Town of Sharon due to topography and vegetation. The Tower is visible from many more locations than indicated in the Viewshed Analysis Map. Although it has inaccuracies, the Town Viewshed, which indicates that the Tower is visible from 7,466 acres in the Town of Sharon, is a more accurate representation of the actual visibility of the Tower than the Viewshed Analysis.

In addition to inaccurate, erroneous, and materially incomplete information regarding the number of locations from which the Tower would be visible, BAM submitted inaccurate and erroneous information regarding how much of the Tower would be visible. The Photo Perspectives and statements by BAM representatives to the Town indicated that a majority of the Tower would not be visible from any location. Specifically, Chris Ciolfi, Real Estate Manager for BAM, stated in the Response Letter:

As the Sharon Town Plan recommends the proposed site will be located in a wooded area to screen the majority of the installation. The equipment building and the

majority of the proposed tower will [sic] screened from view by the existing vegetation. Additionally, from viewing the pictures of a balloon flown to the proposed height it is clear that the proposed tower will be only somewhat visible from several points in town and not at all from others.

However, more than half of the Tower is visible from several locations, including the following: at the intersection of Route 14 and Quimby Mountain Road, when traveling north on Route 14 at the edge of the Village of Sharon and within the boundaries of the Village of Sharon, when traveling north on Interstate 89, and when traveling west on Route 132.

Finally, the Board concludes that BAM submitted inaccurate and erroneous information regarding the analysis of the aesthetic impacts of the Tower under Criterion 8 Exhibit 5 to the Application is a "Scenic Resource Evaluation" which was conducted according to ANR's Scenic Resource Evaluation Process (previously defined as the "Process"). The "Conclusion" section of Exhibit 5 to the Application states:

In conclusion, the Baxter Mountain site and its context are not considered to be of statewide significance as it does not receive a high qualitative ranking from three or more of the six visual elements previously mentioned. In addition, this site is only partially visible for a maximum of 55 seconds from the northbound lanes on I-89 (views to the site **from** this area are distant views); this site is not visible from the Joseph Smith Monument, and, this site is not located in a recreation corridor.

***Because this project satisfies the criteria established by the ANR, no further review will be necessary. This project will have no significant adverse or undue visual impacts to the natural or cultural environment. See Exhibit 2, "Site Plans" for a more detailed description of the proposed site, Exhibit 5, "Photo Perspectives" Exhibit 6 "Viewshed Analysis Map" and Exhibit 7, "Site Photographs" for the location of visible areas in the Town of Sharon and photos of the proposed site.***

(Emphasis added). The Process is not the applicable standard to determine compliance with Criterion 8. The Process is an ANR document which was intended to identify areas of state-wide significance so that ANR could best utilize its resources by participating in Act 250 cases involving scenic resources of state-wide significance. The Quechee Lakes analysis is the applicable standard to determine if a project complies with Criterion 8.

Based on the above, the Board concludes that BAM submitted inaccurate, erroneous and materially incomplete information in connection with the Application.

b. Willful or Gross Negligence

The Town has not shown that BAM's submission of inaccurate, erroneous, and materially incomplete information rises to the level of willfulness or gross negligence.

An act or omission is done willfully "if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done." Lawrence White, supra, at 14 (quoting Black's Law Dictionary 1599 (6th ed. 1990)).

Gross negligence is "equivalent to the failure to exercise even a slight degree of care. It is heedless and palpable violation of legal duty respecting the rights of others." Lawrence White, supra, at 14 (quoting Shaw v. Moore, 104 Vt. 529, 531-32 (1932)).

The Board cannot conclude that BAM's actions or representations in connection with the Application were willful or grossly negligent. Both BAM's Viewshed Analysis and the Town Viewshed are based on methods with a degree of error. The inaccuracies of BAM's Viewshed Analysis are based on winds shifting the weather balloons. The use of USGS topographic maps, with a scale of one inch to 2,000 feet, also leads to some imprecision in the viewshed methodology employed by BAM. Although the Town Viewshed is more accurate than BAM's Viewshed Analysis, it is not flawless. The data used in a GIS viewshed analysis, such as the Town Viewshed, are a source of variability. Although BAM may have been negligent in its representations to the Commission, the Board cannot conclude that BAM's use of a method other than GIS viewshed analysis rises to the level of willfulness or gross negligence without specific evidence of BAM's intent to misrepresent the visibility of the Tower.

The Board also cannot conclude that BAM's submission of the Process in connection with the Criterion 8 analysis was willful or grossly negligent. Although the Process is not the appropriate standard for evaluating conformance with Criterion 8, the District Commission was able to conclude that the Project complied with Criterion 8 under the appropriate Quechee Lakes analysis based on other aesthetic evidence provided by BAM.

Based on the above, the Board cannot conclude that BAM's submission of inaccurate, erroneous and materially incomplete information was willful or grossly negligent.

c. Denial or Issuance of Different Conditions

With respect to the visibility of the Tower, the submission of accurate and complete visibility information may have caused denial of the Permit or issuance of different conditions. Since a majority of the Tower is visible from many more locations than indicated by BAM's **Viewshed** Analysis, the District Commission might have denied the Permit or issued different conditions if it had known the locations from which the Tower would be visible and how much of the Tower would be visible. However, since the Board has already concluded that BAM was not **willful** or grossly negligent in submitting the **Viewshed** Analysis, BAM's conduct does not meet the requirements of EBR 38(A)(2)(a).

With respect to submission of the Process in connection with the Criterion 8 analysis, the submission of accurate and complete information would not have caused denial or issuance of different conditions because the District Commission concluded that the Project complied with Criterion 8 under the appropriate Quechee Lakes analysis based on other aesthetic evidence provided by BAM.

Based on the above, the Board concludes that BAM's conduct does not meet the requirements of EBR 38(A)(2)(a).

2. Permit Terms and Conditions

Under EBR 38(A)(2)(b), the Board may revoke the Permit if it finds that BAM violated the terms of the Permit or any permit condition or the approved terms of the Application. The Town contends that BAM violated the terms of the Permit and Permit conditions.

First, the Town contends that BAM violated the terms of the Permit by building the Tower which is more visible than indicated in its **Viewshed** Analysis. Condition 2 of the Permit states:

The project **shall** be completed as set forth in the Findings of Fact and Conclusions of Law #3W0738-4 in accordance with the plans and exhibits stamped "Approved" and on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission.

The District Commission stamped only exhibits 2, 3, 4, and 18 as "Approved." Exhibit 2 is a site plan. Exhibit 3 is a schematic tower exhibit with three attachments (a drawing of

typical panel type antennae, a photograph of a typical 180 foot tower with panel type antennae, and a photograph of a typical wireless communications facility). Exhibit 4 is a building elevation and details. Exhibit 18 is site construction drawings. The Viewshed Analysis (Exhibit 5) and the Viewshed Analysis Map (Exhibit 6) are not part of the terms of the Permit because they were not stamped "Approved." Therefore, BAM did not violate the terms of the Permit by building the Tower which is more visible than indicated in its Viewshed Analysis.

Second, the Town contends that BAM violated Permit condition 11. Condition 11 of the Permit states that "[t]he forest land provides partial screening for the tower. The tree line shall be maintained to shield the lower half of the tower." The construction of the Project required only a small number of trees to be cut down. The clearing where the Project is located is nearly identical to the clearing viewed by the District Commission during its site visit. Since the construction of the Project, BAM has not cut any more trees. Therefore, BAM has not decreased the screening of the Tower. However, because more than half of the Tower is visible from a number of locations, the Board concludes that BAM has violated condition 11 of the Permit.

Similarly, BAM has violated condition 2 of the Permit. Condition 2 of the Permit requires the Project to be completed "as set forth in the Findings of Fact and Conclusions of Law #3W0738-4."<sup>1</sup> Finding of fact #8 ("Finding #8") under the Criterion 8 section of Findings of Fact, Conclusions of Law, and Order #3W0738-4 states "The existing trees will screen the lower half of the tower." Finding #8 was based on BAM's testimony before the District Commission and BAM's exhibits 5, 6, and 17. Additionally, BAM's Response Letter, exhibit 23 before the District Commission, states, in part:

As the Sharon Town Plan recommends the proposed site will be located in a wooded area to screen the majority of the installation. The equipment building and the majority of the proposed tower will [sic] screened from view by the existing vegetation. Additionally, from viewing the pictures of a balloon flown to the proposed height it is clear that the proposed tower will be only somewhat visible from several points in town and not at all from others.

Because BAM's representations that the lower half of the Tower would be screened were

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<sup>1</sup>Findings of fact and conclusions of law may become permit conditions by their incorporation in a land use permit. In re Denio, 158 Vt. 230,241 (1992); Re: L.P. Carrara & Sons, Inc., Land Use Permit #1R0589-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 12 (May 13, 1992) [EB #498].

incorporated into the Permit as conditions, the Town and District Commission reasonably relied on such representations. See Re: Stowe Club Highlands, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order at 8 (June 20, 1995) [EB #616], aff'd, In re Stowe Club Highlands, 7 Vt. Law Week 333 (1996); Re: Crushed Rock, Inc., Land Use Permits #1R0489-EB and #1R0489-1-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 10-12 (Oct. 17, 1986) [EB #306], vacated and remanded on other grounds, In re Crushed Rock, Inc., 150 Vt. 613 (1988) (stating that a permit applicant's representations may be incorporated into a permit as conditions and, therefore, a District Commission and the parties have a right to rely on the material information provided by an applicant). Contrary to BAM's representations before the District Commission, the existing trees do not screen the lower half of the Tower. More than half of the Tower is visible from a number of locations. Therefore, the Board concludes that BAM has violated condition 2 of the Permit.

Finally, the Town contends that BAM violated finding of fact #8 under the Criterion 10 section of Findings of Fact, Conclusions of Law, and Order #3W0738-4. In finding of fact #8, the District Commission stated:

We are concerned about the "dotting" of towers in the landscape. Adequate planning, coupled with co-location efforts could have a positive effect on the placement of towers in the region. The applicants state they would allow other facilities on the tower. A better understanding of the selection process would prepare us to review future changes. Further, we must rely on the adequacy of the selection process to help us find that reasonable effort has been expended to minimize visual impact. At the hearing the applicants indicated a willingness to offer material on site selection and cellular coverage. We will not require its submittal as a condition of our approval and will not ~~del~~ this decision by issuing a recess memorandum, but we do ask that it be sent soon to us and all parties.

While finding of fact #8 under the Criterion 10 section of Findings of Fact, Conclusions of Law, and Order #3W0738-4 is a condition of the Permit, it merely requests the submission of information after issuance of the Permit. BAM may choose whether or not to honor the request. The Board will not revoke the Permit based on BAM's failure to provide information requested by the District Commission.<sup>2</sup>

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<sup>2</sup>Finding of fact #8 under the Criterion 10 section of Findings of Fact, Conclusions of Law, and Order #3W0738-4 closely resembles a condition subsequent (requiring submission of evidence of compliance *after the* issuance of a permit). Conditions subsequent are not allowable because 10 V.S.A. Section 6086(a) requires the applicant to **supply** evidence of compliance with the ten criteria prior to the issuance of a permit. Re:

Based on the above, the Board concludes that BAM has violated conditions 2 and 11 of the Permit because more than half of the Tower is visible from a number of locations. Accordingly, the Board grants the Planning Commission's petition to revoke.

3. Opportunity to Correct

Under EBR 38(A)(3), “[u]nless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, the [B]oard shall give the permit holder reasonable opportunity to correct any violation prior to any order of revocation becoming final.” EBR 38(A)(3).

For this purpose, the [B]oard shall clearly state in writing the nature of the violation and the steps necessary for its correction and elimination. These terms may include conditions, including the posting of a bond or payments to an escrow account, to assure compliance with the board's order. In the case where a permit holder is responsible for repeated violations, the [B]oard may revoke a permit without offering an opportunity to correct a violation.

Id.

Because the Board concludes that BAM has violated conditions 2 and 11 of the Permit, the Board grants the Planning Commission's petition to revoke. Based on the findings above, however, the Board concludes that there is no “clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation.” Id. Therefore, the Board will revoke the Permit subject to BAM's opportunity to correct the violation. The Board will allow BAM 90 days from the date of issuance of this decision to correct the violation in one of two ways. BAM may either (i) file a statement with the Board detailing the manner in which it has corrected the violation or (ii) submit a complete amendment application with the District Commission seeking amendment of condition 11 and Finding #8 which was incorporated into the Permit under Condition 2.

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(...continued)

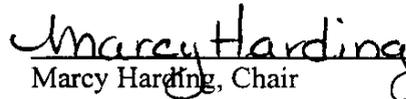
Pierce and Judith Crompton, #3 W0749-EB, Preliminary Ruling at 5 (Dec. 18, 1997) [EB #692] (emphasis supplied); Re: James E. Hand, #8B0444-6-EB. Findings of Fact, Conclusions of Law, and Order (Revised) at 6 (Aug. 19, 1996) [EB #629R]; Re: Berlin Associates, #5W0584-9-EB, Memorandum of Decision at 6 (Apr. 24, 1990) [EB X379].

V. ORDER

BAM has violated conditions 2 and 11 of the Permit. The Permit is revoked subject to BAM's opportunity to correct the violation on or before 90 days from the date of issuance of this decision, either (i) by filing a statement with the Board detailing the manner in which it has corrected the violations or (ii) by submitting a complete amendment application with the District Commission seeking amendment of condition 11 and Finding #8.

Dated at Montpelier, Vermont this 21 st day of August, 1998

ENVIRONMENTAL BOARD

  
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Marcy Harding, Chair

John T. Ewing

George Holland

Samuel Lloyd

Rebecca M. Nawrath

Dissenting Opinion of Board member Arthur Gibb

I dissent from the portion of the Board's decision which concludes that BAM violated Permit conditions 2 and 11 under EBR 38(A)(2)(b). I conclude that BAM did not violate conditions 2 and 11 because BAM has not decreased the screening of the Tower. Rather, Finding #8 (incorporated into the Permit by condition 2) and condition 11 are based on inaccurate evidence presented at the District Commission level. Since the Town did not appeal the Permit to the Board, the Permit, including Finding #8 and Condition 11, is final and is not subject to attack in this revocation proceeding, regardless of whether or not finding of fact #8 and condition 11 were properly imposed in the first instance. See In re Taft Corners Assocs., 160 Vt. 583, 593 (1993) (stating that because two permits were not appealed to the Board, the findings, conclusions and permits are final and are not subject to attack in a subsequent application proceeding, whether or not they were properly granted in the first instance).

Additionally, I conclude that condition 11 presents some difficulties. For example, from which vantage points will the lower half of the tower be screened? This depends upon the location of the viewer. Also, at some point in time existing trees will achieve a height more consistent with the conclusion that, in fact, the lower half of the tower will be screened. I believe that, to revoke on the basis of a permit condition violation, there must be

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the clarity and specificity required by EBR 32(A), and such is not the case in this proceeding.

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