

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

RE: Josiah E. Lupton, Quiet River Campground  
Land Use Permit #3W0819 (Revised)-EB  
Docket #765

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

This appeal concerns the creation of two lots, with a commercial campground on Lot 1-A and a single-family residence on Lot 1-B, both lots being located off of Route 14 in Sharon, Vermont ("Project").

As explained below, the Vermont Environmental Board ("Board") concludes that the Project fails to conform with Criteria 1(F), 8, and 9(B). Accordingly, the Board denies Land Use Permit Application #3W0819-EB and vacates Land Use Permit # 3W0819 (Revised) issued by the District #3 Environmental Commission ("Commission").

**I. PROCEDURAL SUMMARY**

On June 29, 1999, Josiah E. Lupton ("Permittee") filed Land Use Permit Application # 3W0819 with the Commission pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The Applicant seeks authorization to create the Project. The tract of land containing the Project consists of approximately 9.22 acres. The Applicant originally sought a campground with 28 campsites and then later revised the application to contain 22 campsites.

On March 28, 2000, the Commission issued Findings of Fact, Conclusions of Law, and Order ("Decision") and issued Land Use Permit #3W0819 to the Permittee for the Project.

On April 26, 2000, Permittee filed a Motion to Alter.

On July 13, 2000, the Commission issued its Revised Findings of Fact, Conclusions of Law, and Order ("Revised Decision") and Land Use Permit #3W0819 (Revised) ("Revised Permit") for a campground containing 14 campsites.

On August 10, 2000, Permittee filed an appeal with the Board alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(1)(F), (8) and (9)(B) ("Criteria 1(F), 8, and 9(B)").

On September 18, 2000, Board Chair Marcy Harding ("Chair Harding") convened a prehearing conference with the following participants:

The Permittee by Lawrence G. Slason, Esq. and Josiah E. Lupton,  
The Town of Sharon and Sharon Planning Commission ("Town") by  
Gerald Tarrant, Esq., and  
Concerned Citizens of Sharon ("Citizens") by Deborah Wroth.

On September 20, 2000, Chair Harding issued a Prehearing Conference Report and Order ("PHCRO").

On September 25, 2000, Citizens petitioned for party status.

On September 28, 2000, Board members Marcy Harding, John Drake, George Holland, Samuel Lloyd, and W. William Martinez performed a preliminary site visit to the Project, at the Permittee's request, so that the Board could see the area with foliage intact.

On October 2, 2000, Permittee filed a memorandum in opposition to Citizens' petition for party status.

In an October 3, 2000 Chair's Preliminary Ruling, Citizens was granted party status pursuant to Environmental Board Rule ("EBR") 14(B)(1) under Criteria 1(F) and 8.

On November 28 and 30, 2000, Permittee filed his Motion to Withdraw Appeal and his Supplement to Motion to Withdraw Appeal, respectively.

Between December 1 and December 20, 2000, Permittee filed letters and memoranda in support of his Motion to Withdraw Appeal, while during this same period Citizens and the Town filed letters and memoranda in opposition to Permittee's motion.

The Board deliberated on Permittee's Motion to Withdraw Appeal on December 20, 2000.

In a December 27, 2000 Memorandum of Decision and Scheduling Order, the Board denied Permittee's Motion to Withdraw his Appeal and established new filing deadlines and a new hearing date.

During January 2001, the Parties filed prefiled testimony, exhibits, and witness and exhibit lists.

On January 12, 2001, Attorney Robert Woolmington filed his Notice of Appearance on behalf of Citizens.

On January 22, 2001, Permittee filed copies of Subpoenas he served upon Catherine Kashanski and Karl Jurentkuff, employees of the Vermont Agency of Natural Resources ("ANR").

In late January 2001, the Parties filed prefiled rebuttal testimony, exhibits, witness and exhibit lists and proposed findings of fact and conclusions of law.

On February 1, 2001, Permittee filed a Motion to Compel the Attendance of witnesses Catherine Kashanski and Karl Jurentkuff.

On February 5, 2001, Permittee filed a Motion to Strike the Town's Proposed Findings of Fact.

Also on February 5, 2001, ANR filed its Memorandum in Opposition to Permittee's Motion to Compel the Attendance of Witnesses.

On February 5, 2001, Chair Harding convened the second prehearing conference with the following Participants:

The Permittee by Lawrence G. Slason, Esq. and Josiah E. Lupton,  
The Town by Gerald Tarrant, Esq., and  
Citizens by Robert Woolmington, Esq. and Deborah Wroth.

During the second prehearing conference, Chair Harding announced her rulings on the parties' evidentiary objections, denied Permittee's request to offer into evidence a December 1999 letter from Barrett Tree Services, denied Permittee's Motion to Strike the Town's Proposed Findings of Fact, and denied Permittee's Motion to Compel ANR Witnesses.

On February 6, 2001, the Town filed its Opposition to Permittee's Objection to the Town's Proposed Findings of Fact.

On February 7, 2001, the Board convened a public hearing in this matter. As part of the hearing, the Board conducted a site visit to the Project.

On February 23, 2001, the parties filed closing statements.

After recessing the hearing, the Board deliberated on February 14, March 21, April 18 and 25, and May 16, 2001.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

## **II. ISSUES**

1. Whether, pursuant to 10 V.S.A. § 6086(a)(1)(F), the Project must of necessity be located on a shoreline in order to fulfill the Project's purpose, and the Project will, insofar as possible and reasonable in light of its purpose: (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 Project from the waters, and (iv) stabilize the bank from erosion, as necessary, with vegetation cover.

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

3. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(B), the Project will significantly reduce the agricultural potential of the primary agricultural soils; if yes, does the Project satisfy subcriteria (i) - (iv).

## **III. FINDINGS OF FACT**

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. *See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

The findings of fact below are organized into a general section followed by sections related to the specific issues. Because many findings are relevant to more than one issue, the findings should not be read as applicable only to the specific issue(s) under which they are contained. Where findings from the general category or another specific category are relevant, they are assumed and not repeated.

**A. General Findings**

1. The Project is a two-lot subdivision on 9.22 acres of land located between the White River and Route 14 in Sharon, Vermont.
2. In 1998, Permittee created and developed a 9-lot subdivision which did not undergo Act 250 review. Then within a year thereafter, Permittee further subdivided the ninth open lot of the prior subdivision into two lots, one being the campground (Lot 1-A) and the other being a residential lot (Lot 1-B). The other eight lots are residential. Lots 1-A and 1-B comprise the Project in this appeal.
3. Lot 1-A is 8.28 acres and is proposed to be developed as a seasonal campground having 14 recreational vehicle ("RV") campsites with on-site electric, water and septic services.
4. There is no evidence as to how these utilities will be provided to each campsite.
5. Lot 1-A also includes one service building, the "comfort station," which is 24 by 36 feet, wood framed and will house toilets and a laundry. There is no evidence of an RV pump out station at the Project.
6. Lot 1-B is 0.94 acres and is proposed to be developed as a single family residence.
7. There are 2 leach fields located in the northeasterly portion of Lot 1-A along with two replacement field sites, all to serve the comfort station.
8. The comfort station will have two permanent lights on its exterior.
9. The 14 RV campsites are clustered within an existing grove of deciduous trees at the northern end of Lot 1-A.
10. The Project includes winter storage of 10 RV campers to be stored in the

interior campsites.<sup>1</sup>

11. The Project does not impose any restrictions on the size, color or shape of the RV's or any potential tarps covering the RV's during the wintertime.
12. Each campsite is approximately 40 feet long by 10 feet wide. Each site will accommodate an RV camper and an additional vehicle.
13. A 16 square foot sign and two six square foot signs are proposed for the Project.
14. The entrance to the access drive from Route 14 will be widened to 24 feet for a distance of 42 feet from the centerline of Route 14. This equates to approximately 16 feet of access road improvements from the shoulder of Route 14.
15. There are 14 vehicle parking spaces at the Project in addition to the extra space at each campsite.
16. The Project has been designed to provide a quiet camping experience adjacent to the White River so that campers may enjoy the sound of the waters of the White River and have an opportunity to enjoy the river's aesthetic and recreational resources.
17. The operating season for the campground is May 1 through October 31 annually.
18. The approximate southern half of the campground will remain undeveloped and will be used for recreation and camper community gardens.
19. Occupants will be subject to campground rules and regulations. The Board has no evidence as to the specifics of the rules and regulations.

**B. Criterion 1(F) (Shorelines)**

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In Permittee's supplemental proposed findings of fact and conclusions of law, Permittee states that he would agree to not allow any winter storage of RV's.

20. The shoreline along the west side of the White River is a steep forested embankment and the shoreline on the east side, the Project site side, is a river floodplain.
21. The elevation of the 100 year floodplain is 972 feet above mean sea level.
22. The Project has been designed to preserve and protect a naturally vegetated conservation buffer along the entire western edge of the property between the top of the river bank and the campground.
23. Initially, a silt fence, to be replaced later with a single rail split-rail fence, will be installed along the entire interior length of the buffer.
24. The buffer will be protected from disturbance by a single rail split rail fence and signs to inform campers and others of the importance of the conservation area. The fence will be stained timbers on individual posts 18 to 24 inches high and the signs will be spaced every 200 feet.
25. The buffer is a minimum of 50 feet wide at the north end and 100 feet wide on the south end of the Project tract.
26. The Project is located in a floodplain as identified on Board Exhibit number 1. Nine of the fourteen campsites are located within the floodplain. The comfort station and associated parking are in the floodplain.
27. The bottom elevation of the septic fields, and replacement fields, is below the elevation of the floodplain.
28. A water supply well for the Project will be drilled in the open field in the southern part of the Project.
29. Permittee proposes to add fill and rip rap in the area of the well head. Permittee also proposes to add between two to four feet of fill within the floodplain to raise 9 of the 14 RV campsites, the comfort station, parking areas and roadways out of the floodplain.
30. This fill has the potential of killing trees within the grove.
31. The fill and rip rap will impose artificial conditions eliminating or reducing

the likelihood of flooding in the campsite area.

32. If flooding ceases in the area of the Project, the shoreline may be transformed into an upland forest and may affect the river's movements.
33. If flooding continues to occur, the flood characteristic will change due to the fill and rip rap.
34. A change in the flooding pattern will affect the natural condition of the shoreline.
35. Flooding will erode fill, cause sedimentation and therefore pollute the White River.
36. Attempts to stabilize the eastern river bank would direct current toward the western bank and may cause erosion and thereby add pollution to the White River.
37. Each RV campsite is more than 90 feet from the top of the riverbank and no RV campsite is less than 125 feet from the river. The closest RV campsite to Route 14 is more than 400 feet away from the road.
38. Campground occupants and their guests will have access to the White River. There will be one access point within the grove of trees in the north end of the campground tract.
39. The single river access point will have removable wooden stairs and handrails. The stairs will aid ascending and descending the river bank and provide access to the river while also minimizing disturbance to the shoreline resulting from campers walking up and down the river bank.
40. The stairs will be removed during high water and during the Project's off-season.
41. There is no evidence of public access to the White River through the Project.
42. There is evidence of a path to the White River, but it is not on the Project tract. This path traverses from east to west just north of the Project's northern property line, off of the Project tract and Permittee's property.

43. The top of a riverbank is an ecologically sensitive area. The bank is steep and the soils are highly sensitive.
44. Filling areas within the floodplain will not maintain the shoreline's natural condition.
45. If the shoreline is changed, the flow of river water will not be maintained in its natural condition.
46. Floodplains are natural disturbance areas. Flooding is necessary to maintain the floodplain community in a natural state.
47. Floodplains help to dissipate flood waters during periods of high flow.
48. Adding fill to the floodplain will channelize the river thereby increasing the river power during periods of high water flow leading to increased erosion.

**C. Criterion 8 (Aesthetics)**

49. The Project is located approximately 2 miles south of the Village of Sharon, Vermont.
50. The Project is commercial and will be located in a rural and mostly residential area.
51. The Project is bounded to the west by the White River.
52. Lot 1-A is bounded to the east by an eight lot residential subdivision created by Permittee. There are seven modular homes on the lots and each lot is less than one acre in size. Most of the modular homes are without permanent foundations and landscaping is minimal with occasional small plantings.
53. To the east of the subdivision is Route 14, a Vermont State Highway with a posted speed limit of 50 miles per hour in the vicinity of the Project.
54. Farther east is Interstate 89. Both Route 14 and Interstate 89 generally run in a north/south direction paralleling the White River and are at a

higher elevation than the Project.

55. Interstate 89 is approximately 1,000 to 1,200 feet from the Project and views from Interstate 89 of the campground would be limited by topography and vegetation.
56. The Project's Lot 1-B is bounded to the north by the above described residential subdivision, to the east by Route 14, to the west by Lot 1-A, and to the south by a residential lot.
57. The area surrounding the Project includes a steep narrow valley with open fields, the White River, and hills in the intermediate distance. The hillsides are interspersed with deciduous and coniferous trees with openings of various sizes for residences, a mobile home park, and farming purposes.
58. Additional land uses in the area include farmsteads with barns and farmhouses, residences and a few commercial properties.
59. The area surrounding the Project includes a residential trailer park, single family residences and a few commercial properties.
60. During the site visits, the Board observed the Project's area to be relatively quiet, pastoral, and scenic.
61. As the public drives north and south on Route 14, views of the White River are common. Views of the White River by travelers on Interstate 89 are possible but less common. The adjacent 8 residential lot subdivision presently enjoys predominately uninterrupted views of the White River.
62. The Project does not include ancillary facilities common to campgrounds such as small stores, recreation centers, swimming pools, etc.
63. The Project will increase traffic on the access road causing an increase in dust and noise.
64. The landscaping plan for the Project includes planting 40 to 50 conifer trees 10 to 12 feet tall along the eastern side of Lot 1-A.
65. A four foot high green chain link fence is proposed for the Project's

eastern and southern property boundaries. A stockade fence is proposed for the northern property boundary and the entire length of Edgewater Road.<sup>2</sup>

66. Visibility of the campground and RV's from Interstate 89, Route 14 and the residential subdivision to the east will be mitigated by the conifer tree plantings and, while the deciduous trees have their foliage, by the grove of deciduous trees.
67. Visibility of the campground and RV's from the White River will be mitigated by the angle of view up the stream bank and, while the trees have their foliage, the grove of deciduous trees.
68. Adding fill to campsites will raise RV's thereby increasing their visibility from the river.
69. During the off-season, when the deciduous trees are without their foliage, any RV's stored on-site would be readily visible from the White River, the residential subdivision and travelers on Route 14 and Interstate 89.
70. The Town Plan defines the White River Conservation Area as "a relatively narrow strip of land immediate to the banks of the White River and high land." Included in the Area are floodplains or flood hazard areas.
71. The Town Plan states, in pertinent part, as follows:

White River Conservation Area, Policies:

- 1) In consideration of the exceptional resource values of the river, development of lands immediate to the river should focus on conserving the very special nature and integrity of the shoreline.

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In Permittee's supplemental proposed findings of fact and conclusions of law, Permittee states that he would agree to install a wooden two rail split rail fence as a security fence around the perimeter of the Project in place of the green chain link fence.

- 4) In consideration of the exceptional resource value of the river, the preferred land use for the Area is outdoor recreation and agriculture. New commercial and industrial uses along the streambanks and shorelands are not encouraged.
- 5) Landowners are encouraged to maintain their land along streambanks in a predominantly natural vegetative state so as to preserve the natural character of the streambank and prevent erosion.

73. Appendix 1 of the Town Plan includes the following results of the Sharon Community Survey:

Sharon Community Survey - 1992

- 11. How important to you are the following uses of the White River for maintaining the quality of life in Sharon<sup>3</sup>:

	Very Important	Fairly Important	Not Important
Water Quality	255	39	6
Scenic Quality	235	62	11
Public Access	183	87	32

74. There is no evidence concerning historic sites at the Project site.

75. There are no rare and irreplaceable natural areas at the Project site.

**D. Criterion 9(B) (Primary Agricultural Soils)**

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The survey data shown in this decision is only part of the data provided within the Town Plan survey.

76. The Board finds that there is ambiguity in the evidence regarding the presence, amount and location of primary agricultural soils on the Project site.
77. The entire Project parcel may contain primary agricultural soils.
81. The southern field will have a well drilled within it and will include a raised well head stabilized by an earthen berm surrounding the well head and rip rap on the north face of the berm. The well head will be landscaped with grass and shrubs.
82. The elevation change between the well head and the top of the slope of the mounded berm surrounding the well head will be approximately 7 feet.
83. The mound is circular and approximately 40 feet in diameter at its base.
84. The Permittee does not own any other property where he could currently develop the campground. The Board finds, however, that Permittee did previously own and develop the 16 acre 8 lot subdivision immediately adjacent to the Project and could have used that land for the campground.
85. Lot 1-A clusters campsites in the northern section of the lot.
86. There are no adjoining agricultural uses having the potential to be adversely impacted by the Project.

#### **IV. CONCLUSIONS OF LAW**

##### **A. Jurisdiction and Scope of Review**

The Project involves the construction of improvements for a commercial purpose on more than one acre in a town that does not have permanent zoning regulations and thus constitutes "development" pursuant to EBR 2(A)(2). The Project comprises the tenth lot created by the Permittee within the District within a five year period, and thus, constitutes "development" pursuant to Environmental board Rule 2(B). The Project is therefore subject to Act 250 jurisdiction. 10 V.S.A. § 6001(3).

When a party appeals from a Commission determination, the Board provides a "*de novo*" hearing on all findings requested by any party that files an

appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the *de novo* review of a Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the Commission regarding the criteria on appeal in this matter. The Commission's Decision is only evidence of what the Commission found and concluded, not the truth of the matters concerning these subject areas.

The burden of proof consists of both the burden of producing evidence and the burden of persuasion. *Re: Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-6 (Jan. 27, 1987)*. The Permittee has the burden of production for all three criteria on appeal. The burden of persuasion is as set out in 10 V.S.A. § 6088.

**B. Criterion 1(F) (Shorelines)**

Before granting a permit for a Project located on a shoreline, the Board must find that:

the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the . . . [Project], and the . . . [Project] will, insofar as possible and reasonable in light of its purpose:

- (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.

10 V.S.A. § 6086(a)(1)(F). The burden of proof is on the Permittee under Criterion 1(F). 10 V.S.A. § 6088(a).

The Board must first decide whether or not the Project must of necessity be located on a shoreline in order to fulfill the Project's purpose. To decide this, the Board must define the "shoreline" of the White River at the location of the Project.

**Shoreline:**

The Act 250 statute defines "shoreline" as follows:

"Shoreline" means the land adjacent to the waters of lakes, ponds, reservoirs and rivers. Shorelines shall include the land between the mean high water mark and the mean low water mark of such surface waters.

10 V.S.A. § 6001(17).

The Board has previously determined that shorelines are not limited to the area located between the mean high water mark and the mean low water mark of such surface waters, but rather, may include lands that are adjacent to and a considerable distance from the water body itself. See *S.G. Phillips Corporation*, Declaratory Ruling #152, Findings of Fact, Conclusions of Law, and Order (June 13, 1984). In addition, the Board has found in other cases that housing projects located adjacent to a lake were projects that the Board determined to be on a shoreline. See e.g., *Re: Mill Lane Development Co., Inc.*, #2W0942-2-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 17, 1999)<sup>4</sup> and *Re: Bernard and Suzanne Carrier*, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 1990). "The Board's precedent indicates that the word 'adjacent' is a relative term that must be considered in the scale of a project." *Re: L & S Associates*, #2W0434-8-EB, Findings of Fact, Conclusions of Law, and Order at 37 (June 2, 1993).

The Board, therefore, has not established specific horizontal limits which define a shoreline, especially when considering river shorelines. However, the Board concludes that shorelines should be defined by the goals of Criterion 1(F); one of which is to maintain the natural condition of the shoreline and water.

The Project is located at the top of the river bank immediately adjacent to the water of the White River and also located within the floodplain of the river. The Board concludes that the Project is on the shoreline of the White River.

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While the project in *Mill Lane* was primarily a housing project with houses located back away from the water, the project also included a picnic area immediately adjacent to the water which provided access to the water.

### **Of Necessity**

Next, the Board must decide whether the project must *of necessity* be located on a shoreline. 10 V.S.A. § 6086(a)(1)(F). Again, the Permittee has the burden, both production and persuasion, to demonstrate this.

In analyzing "of necessity" under Criterion 1(F), the Board considers whether there are the water-dependant elements associated with the Project such as docks, boardwalks or swimming platforms that necessitate the project to be located on the shoreline; whether the purpose of the Project is clearly for the campers to enjoy the pleasures of camping on the shoreline; whether the development would be incomplete without the shoreline; and whether the purpose of the Project can be satisfied by a similar project located in other non-shoreline locations.

Historically, it has been easy for an applicant to satisfy the "of necessity" requirement of Criterion 1(F). In *Bernard and Suzanne Carrier*, the Board concluded that the purpose of building a subdivision in its specific location was "clearly for the landowners to enjoy the pleasures of living on a shoreline." This alone led the Board to conclude that the project must be located on the shoreline to fulfill its purpose. *Bernard and Suzanne Carrier, supra* at 11.

In analyzing the "of necessity" requirement of Criterion 1(F), the Board now concludes that its earlier decisions may have not given the "of necessity" requirement of Criterion 1(F) the weight it deserves and that the legislature's inclusion of the "of necessity" language evinces a clear mandate that the project must serve a water-related purpose. The phrase "of necessity" is not a soft requirement lending to compromise, but rather, the plain meaning of these words requires a finding beyond the fact that the project's purpose in locating on the shore is simply desirable. In the future, the Board will consider whether the project's location on the shoreline serves as an integral part of the developmental scheme.

In Josiah Lupton's prefiled testimony, at question 4, he states:

The campground has been designed to provide a quiet camping experience adjacent to the White River with RV campsites positioned within a grove of trees to promote a feeling of seclusion and privacy. The campers will enjoy the sound of the rushing waters of the White River and will have the opportunity to enjoy the

river's aesthetic and recreational resources.

This stated purpose is similar to the purpose of the *Bernard and Suzanne Carrier* development which passed the "of necessity" test. The Board does not, however, reach a conclusion as to whether or not the Project must of necessity be located on a shoreline under the Board's heightened scrutiny because the Project fails to meet three of the four subcriteria of Criterion 1(F) as follows.

In considering whether the Project will meet the following four subcriteria "insofar as possible and reasonable," the Board concludes that the Project fails to satisfy subcriteria (i) and (iv). Again, Permittee has the burden of proof to demonstrate compliance with these subcriteria. The Board considers each subcriteria in order.

(i) *The Project must retain the shoreline and waters in their natural condition.*

The Project includes efforts to mitigate impacts to the shoreline and waters of the White River. These same efforts also attempt to retain the shoreline and waters in their natural condition. The efforts include, but are not limited to, the riparian buffer strip that will be protected from disturbance by a fence and signs to inform campers of the importance of the buffer area. Also, initially a silt fence, which will later be replaced with a single-rail split rail fence, will be installed along the entire interior length of the buffer and access to the river which will be restricted to one area equipped with a wooden stairway.

The Board concludes that even with these mitigating steps, the natural conditions of the shoreline and waters of the White River will not be retained. The Project is to be constructed on the shoreline of the White River in the specific area of a floodplain. This section of shoreline is dynamic. The Project will hinder natural changes due to the addition of rip-rap, fill (which in some areas will be as much as four feet deep), and the construction of the permanent comfort station. These aspects of the project will alter flooding and other conditions of the river. Additionally, with the addition of two to four feet of fill in specific areas of the Project, river flow will be channelized and erosion is likely during high water events. Erosion of fill material will pollute the waters of the White River. The fill also creates the possibility of killing the trees within the grove

where the fill will be added for nine campsites. Although Josiah Lupton testified that care will be taken to protect the trees against damage due to fill placement, the engineering drawings show no such protective measures, but rather indicate a continuous level of fill across the grove area. Thus, the Project will not retain the shoreline or waters in their natural dynamic condition, and therefore, the Project fails to satisfy 10 V.S.A. § 6086(a)(1)(F)(i).

(ii) *The Project must allow continued access to the waters and the recreational opportunities provided by the waters.*

With respect to public access to waters within Vermont, the Board has previously stated:

Nothing in this decision should be interpreted as creating a public right of access through the Project property if none currently exists, or as diminishing or eliminating any such right if one does currently exist.

*Re: Mill Lane Development Co., Inc., supra at 24, footnote 5..* Accordingly, if no public access currently exists on the Project, then none should be created or required by the Act 250 permitting process.

There is no evidence of public access to the White River across the Project tract. During the preliminary site visit in the fall, Board members observed what appeared to be a public access path to the north of the Project's northern property boundary, outside the limits of the Project tract on land not owned by Permittee. The Board has no other evidence of public access. Accordingly, if the Board were to issue a land use permit for this Project the permit would not include any conditions requiring public access through the Project tract.

Based on these facts, the Board concludes that the Project, as designed, will meet the public access requirements of 10 V.S.A. §6068(a)(1)(F)(ii).

(iii) *The Project must retain or provide vegetation which will screen the Project from the waters of the White River.*

The Project is designed to maintain the naturally vegetated riparian buffer along the western Project property boundary between the White River and the

campsites. This buffer will be 50 feet to the north and over 100 feet to the south. This buffer will partially screen the Project. The screening vegetation in the buffer is primarily deciduous trees. When the river water is at or near mean low water levels, the angle of view from the surface of the waters of the White River would aid in screening the project. The Project includes, however, plans to place two to four feet of fill for nine campsites and the comfort station to raise these elements of the Project out of the floodplain. In addition, some trees outside of the buffer, but within the northern grove, will be cut to establish campsite locations and roadways. The fill will increase the potential to view the Project from the river.<sup>5</sup>

Based on the findings of fact, the Board concludes that during periods that the deciduous buffer has its foliage and when water flow is at normal to low levels, the Project would be partially screened from the waters of the White River. The Board concludes, however, that during non-foliage or high water flow times, the Project would not be effectively screened from the waters of the White River. Additionally, the Board is concerned that foot traffic by campers may damage vegetation both within the camping area and along the river bank buffer zone thereby reducing the screening potential. See *Robert B. and Deborah J. McShinsky, #3W0530-EB*, Findings of Fact, Conclusions of Law and Order at 7 (Apr. 21, 1988). The proposed fence and signs alerting campers of the sensitive and protected buffer area would discourage direct access to the river banks, but campers could still gain access from either end of the fence or from the shoreline. Accordingly, if the Board were to issue a land use permit for this Project, the Board would impose conditions to maintain, and/or replace as needed, the vegetation within the buffer and to prohibit the off-season storage of RV's. With these conditions, the Project would satisfy the requirements of 10 V.S.A. §6068(a)(1)(F)(iii).

(iv) *The Project must stabilize the bank from erosion, as necessary, with vegetation cover.*

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As discussed in subcriterion (i) above, the evidence before the Board concerning the fill to be placed on the Project site is inconsistent. Permittee's engineering drawings, filed as exhibit P3, sheets 1 - 13, show continuous fill in the area of campsites numbered 1 through 9. Permittee's testimony at the hearing was that fill would only be added to the specific camper pad locations. The Board finds that the engineering drawings accurately reflect how the campground would be constructed if a Permit were being granted.

The Project Tract is located on the bank of the White River and people will travel down the bank to access the river. The Project is designed so that access to the vegetated buffer is prohibited and that access to the river is restricted to one access point with removable wooden stairs; both are intended to limit the potential erosion of the riverbank.

Based on the findings of fact, the Board is concerned that the vegetated buffer may not be wide enough to protect against erosion. Furthermore, the sporadic placement of two to four feet of fill across the Project will destabilize the eastern riverbank and any attempts to stabilize the Project's riverbanks would direct current toward the opposite bank and cause erosion of that bank, thereby adding sediments to the water and polluting the river. Also, as discussed above under subcriterion (iii), the Board is concerned that camper foot traffic will cause river bank erosion and that the proposed fence and warning signs will not provide adequate protection. See *McShinsky, supra* at 7. The Board, therefore, concludes that the Project does not satisfy the requirements of 10 V.S.A. § 6086(a)(1)(F)(iv).

In sum, the Board concludes that the Project does not comply with Criterion 1(F).

### **C. Criterion 8 (Aesthetics)**

Before issuing a permit, the Board must find that the Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas. 10 V.S.A. § 6086(a)(8) (aesthetics). The burden of proof is on the opponents under Criterion 8, *id.* § 6088(b), but the applicant must provide sufficient information to allow the Board to make affirmative findings. See, e.g., *Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) at 19 (June 12, 1997) and cases cited therein.

Criterion 8, "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from her property will remain the same forever." *Re: Okemo Mountain, Inc., #2S0351-8-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 18, 1986). Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to the visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Horizon Development Corp.,*

#4C0841-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 21, 1992). Nevertheless, projects that result in the loss of open space and the alteration of vistas can have an adverse effect on aesthetics and scenic beauty. See e.g., *Re: Thomas W. Bryant and John P. Skinner*, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 21 (June 26, 1991); see also *Re: Maple Tree Place Associates*, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 48-49 (June 25, 1998); *Re: George, Mary, and Rene Boissoneault*, #6F0499-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Jan. 29, 1998).

### **Aesthetics, Scenic and Natural Beauty**

The Board uses a two-part test to determine whether a project satisfies Criterion 8 (aesthetics). First, it must determine whether the project will have an adverse effect under Criterion 8. *Id.*; see also *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996); *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985). Second, it determines whether the adverse effect, if any, is undue. *Hand, supra*, at 24; *Quechee Lakes, supra*, at 17-20.

#### 1. Adverse Effect

In determining whether a project will have an adverse effect,

[T]he Board looks to whether the proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

*Hand, supra* at 25. In other words, if a project "fits" its context, it will not have an adverse effect. *Re: Talon Hill Gun Club and John Swinington*, #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (June 7, 1995).

The area surrounding the Project includes a steep narrow valley with open fields, the White River, and intermediate hills. The hillsides are interspersed with deciduous and coniferous trees with openings of various sizes for residences, a mobile home park, and farming purposes. Additional land uses in the area include farmsteads with barns and farmhouses, residences, a residential trailer park, and a few commercial properties. The Project site is in a relatively flat floodplain immediately adjacent to the White River. A grove of deciduous trees are present on the north end of the Project tract.

The adjacent 8 lot subdivision recently created by the Permittee rises easterly in elevation. Both Route 14 and Interstate 89 are at a higher elevation than the Project. Accordingly, views of the Project will be possible from the adjacent subdivision lots, Route 14 and Interstate 89. At present, scenic views of the White River are possible from the adjacent subdivision lots, Route 14 and Interstate 89. The intervening campground will interrupt, if not eliminate, these scenic views.

The Project represents a significant departure from those land uses existing in the area and it will be visible to some residents and the traveling public. The area of the Project will experience an increase in noise and traffic generated by the Project. In addition, during the Project's operating season, there will be 14 large RV's located in a concentrated area which will be elevated from the natural ground level. During the off-season up to 10 RV's will be stored in this same concentrated and elevated area. The presence of the RV's will be a substantial visual intrusion along a pastoral river bank. The Project's night-time lighting and the lighting from campers staying at the Project will introduce light to the area where no lighting presently exists. Accordingly, the Board finds that the Project does not "fit." The Board concludes that the Project will not be in harmony with its surroundings and that the Project will create an adverse aesthetic impact.

## 2. Undue

As the Board concludes that the proposed Project will have an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is "undue." *Hand, supra* at 25. The Board will conclude that the adverse effect is undue if it reaches a positive finding with respect to any one of the following factors:

- a. Does the project violate a clear, written community standard

intended to preserve the aesthetics or scenic beauty of the area?

b. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

c. Has the applicant failed to take generally available mitigation steps which a reasonable person would take to improve the harmony of the project with its surroundings?

*See, e.g., Black River, supra, at 19-20, Hand, supra, at 25-29; Quechee Lakes, supra, at 19-20.*

**a. Written Community Aesthetic Standard**

With respect to the first factor, the Board concludes that there are no clear, written community standards intended to preserve the aesthetics or scenic beauty of the area. The Town Plan includes several statements regarding the desire to protect the resources of the White River. A few examples are as follows:

White River Conservation Area, Policies:

- 1) In consideration of the exceptional resource values of the river, development of lands immediate to the river should focus on conserving the very special nature and integrity of the shoreline.
- ...
- 4) In consideration of the exceptional resource value of the river, the preferred land use for the Area is outdoor recreation and agriculture. New commercial and industrial uses along the streambanks and shorelands are not encouraged.
- 5) Landowners are encouraged to maintain their land along streambanks in a predominantly natural vegetative state so as to preserve the

natural character of the streambank and prevent erosion.

*Town Plan* at 31. The plan defines the White River Conservation Area as “a relatively narrow strip of land immediate to the banks of the White River and high land.” Included in the Area are floodplains or flood hazard areas. *Town Plan* at 30. The Board concludes that the Project is located within the White River Conservation Area. The Board concludes that these are clear policies, but that the policies are intended to preserve the resources of the river, not aesthetics or scenic beauty of the area. While such natural resources and aesthetics or scenic beauty may be related, they are not one in the same.

Appendix 1 of the Town Plan includes the results of the 1992 Sharon Community Survey. *Town Plan* at 83. One question asked within the survey refers to scenic quality as follows:

11. How important to you are the following uses of the White River for maintaining the quality of life in Sharon<sup>6</sup>:

	Very Important	Fairly Important	Not Important
Water Quality	255	39	6
Scenic Quality	235	62	11
Public Access	183	87	32

*Town Plan* at 85.

While it is clear that those responding to the survey overwhelmingly value the White River’s scenic quality, this survey can not be construed as a policy intended to preserve aesthetics or scenic beauty of the area.

Accordingly, although the Town Plan clearly evinces a general desire to preserve the resources of the White River, the Plan does not contain a clear, written community standard regarding aesthetics and scenic beauty applicable to

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The survey data shown in this decision is only part of the data provided within the Town Plan survey.

the area in which the Project would be located. *Compare* the instant proceeding with *Re: Herbert and Patricia Clark*, #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 35-37 (Apr. 3, 1997) (Brandon Town Plan constituted clear, written community standard where it established and defined three categories of scenic resources, contained an inventory that described 30 scenic areas, and provided recommended policies and implementation measures for protecting the scenic value and resources of the listed areas and where the proposed project was located in one of the scenic areas listed in the inventory) and *Re: The Mirkwood Group and Barry Randall*, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 22-23 (Aug. 19, 1996) (Pittsford zoning ordinance constituted clear, written community standard where proposed radio tower was located within conservation district and the ordinance contained a clear statement of the community policy against use of conservation district lands for anything other than dwellings, forestry, and agriculture).

The Board finds that the record is devoid of a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area in which the proposed Project is located. Therefore, the Board concludes that no such standard would be violated by the Project.

**b. Generally Available Mitigating Steps**

Applicant proposes to locate the Project immediately adjacent to the White River. The Project would be situated in a visually sensitive area, that being the shoreline or floodplain. The Project would be located some 400 yards away from Route 14. Planting of coniferous trees is planned along the eastern boundary to form a screening barrier between both Route 14 and the residential subdivision, and the Project site. Views of the Project would be further minimized by retaining a portion of the natural grove of trees in the campground area. Noise from the Project's traffic and campers would be apparent to the inhabitants of the residential subdivision.

Permittee has taken mitigating steps to screen the Project from neighbors and persons traveling on Route 14, Interstate 89 and the White River. These efforts mitigate the adverse effect of the Project and assist in harmonizing it with its surroundings, however, additional steps could be taken. See *George, Mary, and Rene Boissoneault*, #6F0499-EB, Findings of Fact, Conclusions of Law, and Order at 20-21 (Jan. 29, 1998) (mitigating steps not taken where applicants attempted to hide poor design behind a row of trees rather than make effort to

harmonize the proposed project with its surroundings). For instance, although Permittee testified that he was no longer seeking a permit involving off-season storage of RV's, Permittee's Project on appeal seeks approval to store 10 RV's during the off-season. Any off-season RV storage will be highly visible with foliage gone from the trees. Additionally, the Project includes two to four feet of fill to raise nine campsites and the comfort station out of the floodplain. Filling will increase the visibility of the Project. Permittee testified that the Project has Rules and Regulations, however, Permittee did not introduce the Rules and Regulations into evidence to demonstrate how Project impacts may be controlled or otherwise reduced. Therefore, although Permittee has undertaken some efforts to mitigate project impacts, the Permittee has not taken other generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings.

### **c. Offensive or Shocking**

In deciding if a project is offensive and shocking, the Board views the Project as an average person would. The Board concludes that the Project will offend the sensibilities of the average person, and that the Project is offensive or shocking because it is out of character with its surroundings. During the site visit, the Board observed the Project's area to be relatively quiet, pastoral, and scenic. The adjacent 8 residential lot subdivision presently enjoys predominately uninterrupted views of the White River. Even though the Project is designed with trees to mitigate aesthetic impacts, the Board is not persuaded that the mitigation will effectively reduce the offensiveness of the adverse aesthetic impacts. The scale and height of RV's as viewed would be shocking, especially considering the 9 campsites elevated with 2 to 4 feet of fill. Additionally, the Project will increase traffic on the access road causing adverse impacts of dust and noise. Although Permittee testified that there are Rules and Regulations for the Project, Permittee did not introduce into evidence the actual rules or regulations or other evidence of these potentially mitigating controls. The Board, therefore, finds that the increased level of traffic with its associated impacts and intrusions on the lives of those in the area, the scale and magnitude of the RV's as viewed from the surrounding area, the increased visibility of the winter storage of RV's due to the lack of deciduous foliage, and the blocked or interrupted views of the scenic White River will be offensive or shocking.

Based on the above, the Board concludes that the Project will have an undue adverse effect on the scenic or natural beauty or aesthetics of the area.

### **Historic Sites**

The Board uses a three-part test to determine whether a Project satisfies Criterion 8 (historic sites). First, it must determine whether the Project is or contains an historic site. Second, it determines whether the proposed Project will have an adverse effect on the historic site. Third, it determines whether the adverse effect, if any, is undue. *Re: Manchester Commons Associates, #8B0500-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Sept. 29, 1995).*

As stated at the outset, the burden of proof is on the opponents under Criterion 8, *id.* § 6088(b), but the applicant must provide sufficient information to allow the Board to make affirmative findings. *Black River Valley Rod & Gun Club, Inc., supra* at 19. No party produced evidence that the Project site or

surrounding area contains any historic sites. The Board, therefore, finds that the Permittee failed to meet his burden of producing sufficient information to allow the Board to make affirmative findings that the Project will not have undue adverse effects on historic sites.

### **Rare and irreplaceable natural areas**

The Board uses a four-part test to determine whether a Project satisfies Criterion 8 (rare and irreplaceable natural areas). First, it must determine whether the Project is located in a natural area. Second, it determines whether the natural area is rare and irreplaceable. Third, it determines whether the Project will have an adverse effect on the rare and irreplaceable natural area. Fourth, it determines whether the adverse effect, if any, is undue. *Re: Leo and Theresa Gauthier, #4C0842-EB, Findings of Fact, Conclusions of Law, and Order at 11-13 (June 26, 1991).*

#### 1. Natural Area

There are two guidelines for identifying natural areas:

- a. an area which contains an identifiable type of ecological community; and
- b. an area in which natural conditions predominate over human influences.

*Id.* at 11. There are 24 officially designated "natural areas" in Vermont, but the Board has specifically ruled that a site does not have to be officially listed to be considered a natural area. *Id.* at 9.

Again, the burden of proof is on the opponents under Criterion 8, *id.* § 6088(b), but the applicant must provide sufficient information to allow the Board to make affirmative findings. *Black River Valley Rod & Gun Club, Inc., supra* at 19. Based on the findings of fact, there are no rare and irreplaceable natural areas at the Project site. The Board, therefore, concludes that the Project will not have undue adverse effects on rare and irreplaceable natural areas.

The Board concludes that the Project fails to conform to 10 V.S.A. § 6086 (a)(8).

**D. Criterion 9(B) (Primary Agricultural Soils)**

Before issuing a permit for the development or subdivision of primary agricultural soils, the Board must find that the proposed project will not significantly reduce the agricultural potential of those soils; or

(i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and

(ii) there are no nonagricultural or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose; and

(iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage; and

(iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential.

10 V.S.A. § 6086(a)(9)(B) (emphasis added). The burden of proof is on the Permittee under Criterion 9(B).

If the Board determines that the site contains primary agricultural soils, it must then determine whether the proposed project will significantly reduce the agricultural potential of the soils. The Board interprets the word 'potential' to require a consideration of whether the design and location of the Project on the property will preclude agricultural use of the primary agricultural soils and not whether agricultural use of those soils is likely in light of current economics and surrounding land uses. For instance, the agricultural potential of soils is significantly reduced where substantially all of a tract's agricultural soils are used by proposed residential lots and related roads and driveways.

If the Board concludes that the Project significantly reduces the agricultural potential of the soils, the Board can reach an affirmative conclusion as to Criterion 9(B) only if it determines that the Permittee has met his burden as

to each of the four subcriteria of 9(B).

The Board is concerned with the quality of evidence relating to this Criterion. There is little evidence before the Board relating to whether or not there are primary agricultural soils on-site and if they are present, where they are located. Permittee's proposed findings of fact and conclusions of law alleges that there are 4 acres of primary agricultural soils, however, the Board is without written or verbal testimony to support this allegation. Permittee made several conflicting statements before the Board with respect to the presence of and impact to primary agricultural soils. At the hearing, Permittee himself testified that all soils on the Project tract could potentially be primary agricultural soils.

Permittee also testified that he will not undertake any actions which will permanently reduce the agricultural potential of the primary agricultural soils on-site. The Board notes, however, that the Project includes a drilled well in the open field in the southern half of the Project. This well will include a protection berm 7 feet high and 40 feet in diameter. Based on the limited evidence, the Board believes that primary agricultural soil exists in the location of the proposed well. Some agricultural activities would be restricted in this area because a "well isolation zone" would be necessary. See, *Southwestern Vermont Health Care Corporation, #8B0537-EB*, Findings of Fact, Conclusions of Law, and Order at 38 (Feb. 22, 2001). Accordingly, the well itself will reduce the agricultural potential of the soils in which it is located.

The Board concludes that Permittee failed to meet his burden of producing enough evidence to enable the Board to reach an affirmative conclusion that the Project satisfies Criterion 9(B).

## **V. ORDER**

1. The Project fails to comply with Criteria 1(F), 8 and 9(B).
2. Land Use Permit Application #3W0819 (Revised) is DENIED.
3. Land Use Permit #3W0819 (Revised) is VACATED.
4. Jurisdiction is returned to the District #3 Environmental Commission

RE: Josiah E. Lupton, Quiet River Campground  
Land Use Permit #3W0819 (Revised)-EB  
Findings of Fact, Conclusions of Law and Order  
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Dated at Montpelier, Vermont this 18th day of May, 2001.

ENVIRONMENTAL BOARD

\_\_\_\_\_/s/Marcy Harding\_\_\_\_\_  
Marcy Harding, Chair  
John Drake  
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Samuel Lloyd  
W. William Martinez  
Rebecca M. Nawrath  
Alice Olenick  
Rebecca Day