

State of Vermont  
ENVIRONMENTAL BOARD  
10 V.S.A. §§ 6001-6092

Re: Sidehill Enterprises, Inc  
#5L1237-EB (Altered)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. PROCEDURAL BACKGROUND

On December 11, 1996, the District 5 Environmental Commission ("Commission") issued Land Use Permit # 5L1237 ("Permit") to Sidehill Enterprises, Inc. ("Sidehill"). The Permit applies to the lands identified in Book 240, Page 130 of the land records of Stowe, Vermont, and Book 126, Page 324 of the land records of Waterbury, Vermont. The Permit authorizes Sidehill to commence Phase I, the creation of and construction on a 9 lot residential subdivision and related infrastructure improvements on a 285 acre tract of land ("Project").

On January 10, 1997, Barry Reit ("Reit") filed a Motion to Alter regarding the placement of a section of the Project's recreational trail. On August 28, 1997, the Commission issued Re: Sidehill Enterprises, Inc., #5L1237, Findings of Fact, Conclusions of Law and Order (August 28, 1997) and Land Use Permit Amendment # 5L1237 (Reconsideration).

On September 26, 1997, Sidehill, by its attorneys, Darby Laundon Stearns Thomdike & Kolter, filed an appeal with the Environmental Board ("Board") contending that the Commission erred by requiring Sidehill to maintain a fifty foot undisturbed buffer zone between the Reit property line and the recreation trail as mitigation under 10 V.S.A. § 6086 (a)(S) (aesthetics).

On October 20, 1997, Environmental Board Chair John T. Ewing<sup>1</sup> convened a prehearing conference and on October 27, 1997, he issued a Prehearing Conference Report and Order. There were no objections to the Prehearing Conference Report and Order.

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<sup>1</sup> From the beginning of this appeal through the end of calendar year 1997 when his resignation became effective, John T. Ewing was the Chairman of the Environmental Board. Subsequent to his resignation as Chairman, he continues to be a member of the Board and has been appointed to continue as Acting Chair on this case.

The parties filed their exhibits, exhibits list and witnesses list with the Board on December 1, 1997.

On December 16, 1997, Chair Ewing, as the hearing officer in this appeal, convened an evidentiary hearing in Waterbury, Vermont. The following parties participated:

Sidehill Enterprises, Inc. by Averill Laundon, Esq.,  
Barry Reit by Matthew T. Daly, Esq.

After opening statements, Chair Ewing, accompanied by the parties, their representatives and witnesses, visited the site and walked the contested portion of the Project trail ("Trail"). During the hearing, all exhibits of both parties were admitted into the evidence without objection except for Exhibit # S7 which depicts proposed Trail improvements. In response to an objection from Reit's attorney, Exhibit # S7 was admitted for the limited purpose of the aesthetics consideration.

At the conclusion of the hearing, the parties were directed to file proposed findings of fact and conclusions of law on or before January 6, 1998. On December 26, 1997, Sidehill's attorney, joined by Dr. Reit's attorney, filed a request to extend the January 6 filing date to January 30, 1998. On December 29, 1997, then Board Chair, John T. Ewing, issued an order extending the filing deadline as requested.

On February 12, 1998, the Environmental Board hearing officer issued a proposed decision to the parties. Pursuant to 10 V.S.A. §6027(g), parties were allowed to request oral argument before the Board. In addition, parties were allowed to file written objections to the proposed decision.

On March 6, 1998, Barry Reit filed a request for oral argument and on March 16, 1998, Dr. Reit filed written objections to the proposed decision.

On May 26, 1998, the Board, with Chair Harding presiding, convened oral argument with Dr. Reit and Sidehill both participating by and through their attorneys. Following oral argument, the Board deliberated concerning this matter. After a review of the proposed decision, the evidence and the arguments presented in the case, the Board declared the record complete and adjourned. This case 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 of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUE

The only issue on appeal is whether, pursuant to 10 V.S.A. § 6086(a)(8), the section of the Trail, designated to run along the Barry Reit property line, will have an undue adverse effect on the aesthetics or scenic or natural beauty of the area.

III. FINDINGS OF FACT

1. The applicant, Sidehill, is the owner of a 285 acre tract of land in the towns of Stowe and Waterbury, Vermont. Sidehill has received an Act 250 permit for Phase I of its plan to develop this property into a residential subdivision.
2. The subdivision is to be completed in phases with the total build out to be approximately 17 homes. The current phase, Phase I, consists of 9 house sites and a recreation trail network. The trail may be accessible by approximately 33 house sites located in the Sidehill subdivision and on certain other Association member properties
3. The Sidehill property shares two of its Waterbury boundaries with the 43 acre parcel of Barry Reit.
4. These boundaries are commonly referred to by the parties as the easterly boundary and the southerly boundary. The total distance of these common boundaries is approximately 2,600 feet: 1,050 feet on the easterly boundary and 1,550 feet on the southerly boundary.
5. The contested Trail is a segment of the Sidehill trail network which is located on the Waterbury property and designed to run around the perimeter of the development, closely aligned to the Reit property lines. This segment is not an integral part of any trail network loop.
6. The area around the Reit/Sidehill properties is rural residential with forested hills, open fields and views of the Worcester Mountain Range.
7. From the locale of the Reit property, several houses in both towns are visible. The Stowe homes are located on lots varying in size from 10 to 14 acres, The Waterbury homes are located on larger sites similar in size to Barry Reit's 43 acre parcel.
8. The placements of the area homes, in relation to their lots, provide the homeowners with significant buffers, thereby maintaining the rural open feeling of the area.

9. The Reit property residence is located near the center of a tree line which divides the 43 acre parcel into a 23± acre field to the north and a 19+ acre field to the south, The house sits back approximately 320-340 feet from Barnes Hill Road. a gravel public town highway.
10. The Reit residence is located approximately 500 feet from its closest boundary with the Sidehill property.
11. Harry Bonyun is a shareholder, vice president, secretary and treasurer of Sidehill
12. Nat Goodhue is a landscape designer and is recognized as an expert in the area of trail placement and related aesthetics.
13. Darrow Mansfield is a senior land planner with North American Consulting, a planning, engineering and surveying firm in Waterbury Vermont. Based on Mr. Mansfield's experience, the Chair recognized him as an expert on Criterion 8 as it relates to the recreation trail.
14. Harry Bonyun planned the layout of the Trail in consultation with Nat Goodhue and Darrow Mansfield.
15. The Trail passes through three of the nine Phase I house sites which range in size from **10.1** acres to 14 acres.
16. The Trail route takes into consideration the topography of the land. Where possible it follows naturally occurring or existing trails, such as deer trails and old logging roads. It is designed to cross a minimum number of seeps, to avoid wetter areas and the necessity of cutting or filling.
17. The area of the proposed Trail is wooded and drops away from the Reit property line.
18. The Trail, at its closest point along the southerly boundary, comes within 8 feet of the Reit property line. It is an area of dense softwood growth and lower wet areas.
19. The easterly boundary runs along an open meadow which can be viewed from the Trail. There is a distinct change in the gradient at the lot line creating an embankment that varies from a few feet to as much as 12 feet.
- 20.** On this easterly boundary, the Trail, at its closes. point, comes within 22 feet of the Reit property line with the exception of the border along the so-called "notch" where

the Trail actually abuts the property line.

21. Where the Trail comes within 22 feet of the Reit property, the gable end peak and widow's walk of the Reit residence is visible for a span of approximately 150 feet.

22. Conversely, this part of the Trail is not visible from the Reit home site. It may, however, be viewed from a position on the Reit property approximately  $\frac{1}{2}$  of the distance between the Trail and the residence.

23. The notch is a portion of the northeastern most tip of the Reit property where it juts into lot # 15 of the Sidehill property. The Trail abuts the notch's easterly border for a distance of approximately 100 feet.

24. The close proximity of the Trail along the notch is due to a steep bank in the area that makes alternative routing difficult.

25. Kirsten Sultan is a professional licensed engineer who testified as a witness for Dr. Reit. She prepared Exhibit #R1 which depicts an alternative proposal for the Trail's location ("Alternative Trail").

26. With the exception of the area of the notch, the Alternative Trail is proposed to run 200 feet in from the Reit property line on the Sidehill side.

27. Along the notch, the Alternative Trail is located in the same location as the Trail proposed by Sidehill.

28. The Alternative Trail was established by creating a route to follow the edge of a 200 foot buffer running along the Reit property line. This 200 foot dimension is arbitrary and was chosen solely to provide a greater buffer to the Reit property.

29. None of the witnesses had ever walked the actual layout of the Alternative Trail and there was no evidence as to its characteristics in relation to the surroundings, the land and its topography.

30. The Trail will be used by members of the homeowner association, their guests and invitees.

31. While lessees of the association members' homes will also be permitted to use the network of trails, it will not be open to members of the general public.

32. The Trail shall be for recreation, conservation, enhancement of the natural

environment and preservation of the rural character of the Property.

33. Authorized uses for the Trail include horseback riding, cross-country skiing, running, walking and other compatible recreational uses

34. Pursuant to the Sidehill Declaration of Covenants, the right to use the Trail is to be exercised by all persons in a careful manner so as not to interfere with the quiet enjoyment of the users of the Recreational Trail and of owners whose lots are crossed by the Trail.

35. Motorized vehicles are prohibited from the Trail except for the use of maintenance vehicles for mowing. Such use will occur no more than twice per year

36. As proposed, the Trail would require some improvements. Some widening may occur so that two people could walk side by side and dead or diseased trees may be removed. Bridges to span stream crossings and drainage in the area of the seeps would be added to protect against widening the Trail and disrupting vegetation.

37. Any improvements made to the Trail would be low profile and unobtrusive. They would be made of natural materials designed to blend harmoniously with the surrounding landscape.

38. The Town and Village of Waterbury Municipal Plan provides for the consideration of provisions in subdivision regulations which would encourage residential developments to set aside an appropriate amount of recreational land or comparable mitigation.

39. Article IV, Section 400 (f) (3) of the Waterbury Zoning Regulations, 1994, specifically exempts trails, including hiking, recreation, snowmobile, and bicycle trails, from the requirements of zoning permits and setbacks.

40. Maps of the general area show other significant trails networks, such as VAST (Vermont Association of Snowmobile Trails) or plans for such trails running up into the corner where the Reit and Sidehill properties meet.

#### IV. CONCLUSIONS OF LAW

##### A. Jurisdiction

There is Act 250 jurisdiction over the Project, and the Trail as an integral part of the Project, because it is a development of a 17 lot subdivision for which a permit is

required. 10 V.S.A. §§ 6001(3), 6001(19), 6081 (a) and EBR 2(A) and 2(B).

B. Burden of Proof

Because the Board is limited to de novo review of the District Commission's Decision, it must evaluate the parties' evidence based on certain rules governing the allocation of the burdens of production and persuasion.

Pursuant to 10 V.S.A. § 6086(a), the Board is required to make positive findings with respect to the Act 250 criterion, irrespective of the placement of the burden of proof. In re Denio, 158 Vt. 230,237 (1992). The applicant has the burden of producing sufficient evidence in order to enable the Board to make affirmative findings under the criterion on appeal, in this case, Criterion 8. A party with the burden of producing evidence may be denied a permit if sufficient evidence is not provided.

The Board concludes that **Sidehill** has met its burden of producing sufficient evidence to support an **affirmative** finding under Criterion 8. Once an applicant has met this burden, then pursuant to 10 V.S.A. § 6088(b), the burden of persuasion with respect to Criterion 8 is on **Reit**, the party opposing the applicant. In this case, **Reit** has failed to meet this burden of persuasion.

C. Criterion 8 (aesthetics)

As a prerequisite to issuing a Land Use Permit to the Applicants, the Board must affirmatively 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 areas." 10 V.S.A. § 6086(a)(8).

The Board uses a two-part test, known as the Quechee analysis, to determine if a project satisfies Criterion 8. Re: Quechee Lakes Corp., # 3 W041 1-EB and # 3 W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985) [EB #254 and EB #255]. First, it must determine whether the Project will have an "adverse" effect on the values described in the criterion. Second, if the effect is determined to be "adverse," the Board must additionally determine whether it is "undue". Re: Herbert and Patricia Clark, # 1R0785-EB, Findings of Fact, Conclusions of Law and Order at 33 (April 3, 1997) [EB #652].

In order to determine whether the Applicants have met their burden of proof with respect to the first part of this test, the Board must consider whether the Project will be in harmony with its surroundings, considering several factors, including the Project's impact on open space and visibility from highways and surrounding properties. Re: Chester P.

and Bertha B. Denio, #1B0036-2-EB. Findings of Fact, Conclusions of Law and Order at 7-9 (March 27, 1989) [EB #362].

1. Adverse Effect

In judging the aesthetic impact of the Project under Criterion 8, the Board must determine whether the proposed project will be in harmony with its surroundings -- will it "fit" the context within which it will be located? Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Nov. 4, 1985)[EB#254 and EB #255].

To answer this question, the Board must first determine the nature of the Project's surroundings. This requires a factual inquiry taking into consideration, among other things, the types and density of land uses presently in existence, the type of topography, and whether the area has particular scenic value. Id.

The Project is located in Waterbury, Vermont close to the Stowe, Vermont town border in a rural residential area with forested hills, open fields and views of the Worcester Mountain Range. Houses in both towns are relatively spread out. The Stowe homes are located on lots varying in size from 10 acres to 14 acres. The Waterbury homes are located on larger sites. The placement of the area homes, in relation to their lots, provide the homeowners with significant buffers, thus maintaining the rural open feeling of the area.

While the general area is varied in open space and forested areas, the Trail site is located along a deer run or naturally created path in a wooded area which slopes down and away from the Reit property. The Trail runs through brush, passing a variety of hard and soft woods and crossing wet areas and a stream. The Trail is not visible from the Reit residence, and only becomes visible from the Reit property as the observer approaches the halfway mark between the residence and the Trail.

Once the Project's surroundings are taken into consideration, the Board must assess whether the project design is compatible with those surroundings. Relevant factors for consideration are the scale of the project in relation to its surroundings, its compatibility with the other uses in the area and the suitability of the project's materials and structures with the surroundings. Black River Valley Rod and Gun Club, Inc., #2S1019-EB, Findings of Fact. Conclusions of Law. and Order at 19 (Mar. 27, 1997) [EB #651].

These factors for consideration fall within two general categories. The first is the project's physical appearance and what visual effect it may have on the area. The second

relates to the effect the project's activity may have on the aesthetics of the area.

In this case, the evidence shows that the Trail would not be obtrusively visible and that its presence would not negatively affect any scenic areas. The visual appearance of the Trail is consistent with its surroundings. In fact, only minimal changes to the physical area would occur. Because the Trail follows natural paths or old skidding roads, modifications to existing landscape is minimized. The Trail may be widened along certain segments to allow for two people to walk side by side, dead or diseased trees may be removed and mowing may occur once or twice a year for maintenance. Any improvements proposed for the Trail will utilize natural materials and be designed to blend harmoniously with the surroundings.\*

In addition, Sidehill's Declaration of Covenants restricts building anywhere within the Trail easement, thereby providing the benefit of preserving open space of the surrounding area. Sidehill's evidence demonstrates that the physical characteristics of the Trail fit within the context of its surroundings and present no adverse impact to the visual aesthetics of the area.

Physical appearance is not the only way that a project may adversely affect aesthetics. The project's activity may also result in an adverse impact on aesthetics. See Black River Valley Rod and Gun Club, Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 17 (Mar. 27, 1997) [EB #651]; John and Joyce Belter, #4C0643-6R-EB, Findings of Fact, Conclusions of Law and Order at 13 (May 28, 1991)[EB #474].

It is apparent that the association members' activities on the Trail will constitute a change in the use of the property. However, a change in property use does not necessarily equate with an adverse impact on the aesthetics of an area. The activity must have characteristics that are incompatible with the surrounding values or other area uses for it to create an adverse impact on aesthetics.

It is difficult to imagine a more compatible or anticipated use of rural residential property than the area residents' recreational enjoyment of their surroundings. Outdoor

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The information in this Decision pertaining to trail improvements is for the limited purpose of consideration of the matter on appeal, the Trail's aesthetic impact under Criterion 8. Nothing in this Decision should be read or construed as approving such improvements or to have any effect on Condition # 6 of Land Use Permit Amendment # 5L1237 (Reconsideration) which requires Sidehill to get Commission approval before making any Trail improvements.

activities such as hiking, skiing and horseback riding are common activities in rural Vermont. Area maps show plans for or the existence of recreation trail networks in close proximity to the Sidehill and Reit properties.

The actual level of use of the Sidehill Trail cannot be predicted with certainty, although its use is likely to continue to increase throughout the development of the subdivision until completion of the planned 33 homes. It is probable that the contested segment of the Trail will receive less use than other parts of the trail network because it is not an integral part of any network loop. Furthermore, Sidehill, through its Declaration of Covenants, has taken measures to limit not only the size of the user group, but the types of use as well. Only non-motorized activities that are compatible with the peacefulness of the surrounding area are permitted.

The level of noise associated with Trail activity is linked to the level of use and similarly unpredictable. However, expected types of noises can be inferred from the kinds of activities permitted. Such sounds might include the dull thuds of horses' hooves on soft ground, the swishing of skis along the surface of the snow and the sound of human voices. Minus engine noises, these sounds are similar to those that one expects to hear along a country road, such as the area's Barnes Hill Road. The permitted uses of the Trail and the sounds associated with them are compatible with and fit within the context of the area. The use of the Trail, like the physical appearance of the Trail, is not adverse to the aesthetics of the area.

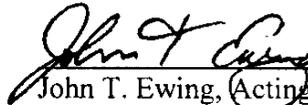
Based on the Findings of Fact, the Board concludes that the Trail will not have an adverse effect on aesthetics. Because this conclusion is based on the Trail as proposed by Sidehill, and not as approved by the Commission, we will issue an amended permit which deletes Condition #5 of Land Use Permit Amendment #5L1237 (Reconsideration). The 50 foot undisturbed buffer is not needed to prevent an undue adverse effect on aesthetics. Rather, the Trail as proposed will not have an adverse effect on aesthetics. As there is no adverse impact, it is not necessary to engage in the second part of the Criterion 8 Quechee analysis regarding whether an adverse impact is undue. Re: Quechee Lakes Corn., # 3 W0411-EB and # 3 W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985)[EB #254 and EB #255].

## VI. ORDER

1. Amended Land Use Permit #5L1237-EB (Altered) is hereby issued in accordance with the findings of fact and conclusions of law herein.
2. Jurisdiction is hereby returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont this 9<sup>th</sup> day of June, 1998

ENVIRONMENTAL BOARD

  
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