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

RE: H.A. Manosh, Inc.
Land Use Permit #5L1290-EB (Revocation)
[redacted]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding involves petitions for revocation filed by Caroline Balard, Tammy Barry, Eric and Michele Beckstrom, Stephanie Bernheisel, Gene Blake, Sam and Judith Boynton, Ed and Deb Carpenter, Dennis Clancy, Helen Clark, John and Judy Clark, Jason Couture, David Davis, Lisa Dimondstein, Shirley Fagnant, Alice and Dennis Ferland, Doris Florig, Corella Gray, Scott Griswold, Terry and Catherine Judkins, Deanna Judkins, Jack Leeds, Jim McLean-Lipinski, Victoria Long, Greg and Eileen Paus, Joann and Tom Ring, John G. Ruffle, Kim and Steve Rushford, Thomas and Carolyn Stams, Gerry Smith, Richard and Jennie Ann Stone, and Arnold Willey ("First Petitioners") and Charles Davis, Bruce Emerson, and Pierre and Pat Couture ("Second Petitioners") concerning Land Use Permit #5L1290 and its incorporated Findings of Fact, Conclusions of Law, and Order (collectively the "Permit").

As explained in more detail below, Land Use Permit #5L1290 is revoked. Pursuant to Environmental Board Rule ("EBR") 38(A)(3), H.A. Manosh, Inc. ("Respondent") shall not be provided an opportunity to cure its violations because of its history of repeated violations.

I. PROCEDURAL SUMMARY

On November 13, 1997 and November 17, 1997, the District #5 Environmental Comrnission ("District Commission") issued the Permit to Respondent pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The Permit authorized Respondent to construct and use a 160 foot telecommunications tower, related control equipment building, and 900 foot access road on Davis Hill in the Town of Hyde Park, Vermont ("Project").

On April 13, 1998, Respondent filed an application with the District Commission to amend the Permit ("Amendment Application").

On June 11, 1998, the First Petitioners filed a petition to revoke the Permit and a Motion for Stay with the Vermont Environmental Board ("Board").

On June 24, 1998, the Second Petitioners filed a petition to revoke the Permit. The First Petitioners and the Second Petitioners (collectively, the "Petitioners") filed a Motion for Preliminary Stay.

On June 26, 1998, Burak Anderson & [redacted] PLC entered [redacted] Notice of

Appearance on behalf of Respondent.

On June 26, 1998, Board staff issued a Notice of Petition for Revocation and Prehearing Conference.

On July 1, 1998, Board Chair Marcy Harding issued a Chair's Preliminary Ruling ("Preliminary Ruling") granting the Motion for a Preliminary Stay for a period of thirty days pursuant to EBR 42.

On July 9, 1998, Respondent filed an Agreed Motion for Enlargement of the time within which it could file a response to the Preliminary Ruling.

On July 10, 1998, Respondent filed a letter concerning the Motion for Enlargement.

On July 13, 1998, the Chair issued an Order Granting the Motion for Enlargement.

On July 20, 1998, Respondent filed a letter addressing scheduling issues.

On July 20, 1998, Respondent filed a Motion to Dissolve Preliminary Stay and supporting memorandum and documentation.

On July 20, 1998, the Agency of Natural Resources ("ANR") filed its notice of appearance by and through N. Jonathan Peress, Esq., Associate General Counsel.

On July 21, 1998, the Lamoille County Planning Commission ("LCPC") filed a letter with attachments.

On July 21, 1998, the Garfield / Hyde Park Neighbors Alliance ("Alliance") filed a Petition for Party Status.

On July 21, 1998, Chair Harding convened a prehearing conference with the following individuals and entities participating:

Petitioners and the Alliance by Stephanie Kaplan, Esq., Michele Beckstrom, Judy A. Clark, Scott Griswold, Esther Lehman, Jennie Ann Stone, Richard Stone, and Mary Walz
Respondent by Jon Anderson, Esq., Gloria Wing, and Gary Nolan
LCPC by Michele Boomhower

Also present were Gary Underwood and Walter Earle of the Lamoille County Sheriff's Department.

On July 21, 1998, Chair Harding issued a Prehearing Conference Report and Order, which is incorporated herein by reference.

On July 30, 1998, Petitioners filed an Objection to [Respondent's] Opposition to Permanent Stay, a Memorandum in Opposition to Dissolution of Preliminary Stay and in Support of Permanent Stay, and supporting affidavits and other documentation.

On August 14, 1998, Respondent tiled a Motion for Leave to File Reply Memorandum ("Motion to File Reply"). Respondent also filed a Reply Memorandum and supporting documentation (collectively the "August 14 Filings").

On August 18, 1998, Petitioners' attorney filed a letter requesting that the Board take official notice of certain documents.

On August 18, 1998, Petitioners filed a letter in opposition to the Motion to File Reply and the August 14 Filings.

On August 19, 1998 and August 27, 1998, the Board deliberated concerning (i) whether to accept the August 14 Filings, (ii) the Motion to Dissolve the Preliminary Stay, (iii) whether to consider the July 20 Filings in connection with the Motion for Stay, and (iv) the Motion for Stay.

On August 27, 1998, the Board issued a Memorandum of Decision, which is incorporated herein by reference.

In August and September, 1998, Respondent, Petitioners, and LCPC filed direct and rebuttal prefiled testimony and exhibits.

On September 22, 1998, Petitioners and the Alliance filed objections to the evidence submitted by Respondent in this revocation proceeding.

On September 22, 1998, Respondent filed an Objection to Petitioners' Pre-Filed Testimony and Exhibits and a Motion for Partial Summary Judgment.

On September 28, 1998, Respondent filed a response, in the form of a letter, to the objections of Petitioners and the Alliance. This response was not authorized by the Prehearing Conference Report and Order issued July 2 1, 1998 and was not accepted into

the record of this case.

On September 29, 1998, Respondent and Petitioners submitted proposed findings of fact and conclusions of law.

On October 2, 1998, Petitioners and the Alliance filed a letter objecting to the inclusion in the record of Respondent's September 28, 1998 submission and to the Motion for Summary Judgment.

On October 6, 1998, the Chair issued a Chair's Preliminary Ruling on Evidentiary Objections and Other Preliminary Matters ("Evidentiary Rulings") and a Chair's Preliminary Ruling on Motion for Partial Summary Judgment ("Summary Judgment Ruling"), both of which are incorporated herein by reference.

On October 7, 1998, Respondent filed objections to the Chair's Evidentiary Rulings and Summary Judgment Ruling.

On October 9, 1998, Petitioners filed a copy of a subpoena served upon Edward Stanak, District #5 Environmental Commission Coordinator.

On October 9, 1998, the Chair convened a second preheating conference. The following individuals and entities participated:

Petitioners and the Alliance by Stephanie Kaplan, Esq. (by telephone)
Respondent by Jon Anderson, Esq.

On October 13, 1998, the Board convened a hearing in Morrisville, VT. The following parties participated:

Petitioners and the Alliance by Stephanie Kaplan, Esq.
Respondent by Jon Anderson, Esq.
LCPC by Michele Boomhower

After deliberating concerning Respondent's objections to the Evidentiary Rulings, the Board announced its decision to affirm those rulings except as noted in the record. The Board heard opening statements, conducted a site visit, and accepted documentary and oral evidence into the record. The Board provided the parties the opportunity to submit supplemental proposed findings of fact and conclusions of law and written closing statements. The Board recessed the hearing.

The Board deliberated on October 13, 1998 and October 19, 1998.

On October 19, 1998, the Board issued an Order of Stay.

On October 27, 1998, the parties filed supplemental proposed findings of fact, conclusions of law, and closing statements. In addition, Petitioners sought to introduce newly discovered evidence into the record which they labeled P28 and P29. Respondent requested the opportunity to present oral argument.

On October 29, 1998, the Chair issued a Recess Order and a Notice of Reconvened Hearing and Oral Argument.

On November 2, 1998, Respondent filed a letter responding to Petitioners' request to introduce P28 and P29 into the record.

On November 5, 1998, Respondent filed Objections to the October 29, 1998 Recess Order.

On November 10, 1998, the Chair issued an Amended Recess Order.

On November 24, 1998, the Board re-convened the hearing for the purpose of hearing the oral closing statements of the parties.

The Board deliberated again on November 24, 1998, December 9, 1998, and January 27, 1999.

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.

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., Docket No. 96-369, slip op. at 13 (Vt. Nov. 7, 1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUES

1. Pursuant to EBR 38(A), whether the Permit should be revoked and declared void because

a. Respondent has violated the terms and conditions of the Permit and its associated application by

(i) constructing an equipment building that exceeds the size of that authorized **and/or**

(ii) failing to take adequate erosion control measures; **and/or**

b. Respondent has violated Act 250 notice requirements by

(i) incorrectly identifying the Project location as Davis Hill **and/or**

(ii) failing to file an affidavit certifying that notice had been made as required by the Act 250 statute and rules; **and/or**

c. Respondent willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information concerning the location of the Project that, had it been accurate or complete, may have caused the District Commission to deny the Permit or to require additional or different Permit conditions.

2. If grounds for revocation exist, whether an opportunity to correct the violations should be provided pursuant to EBR 38(A)(3).

III. SUMMARY JUDGMENT

On October 6, 1998, the Chair issued the Summary Judgment Ruling which preliminarily dismissed Respondent's motion for summary judgment. After consideration of Respondent's objection to the Summary Judgment Ruling, the Board affirms said ruling for the reasons stated therein and dismisses the motion for summary judgment with prejudice.

IV. FINDINGS OF FACT

1. Respondent currently owns and operates a 100' telecommunications tower (" 100' Tower") located on land owned by Lloyd Jones in the Town of Hyde Park, Vermont. The Jones property is southerly of Cleveland Corners Road.

2. Respondent currently owns and operates a 160' telecommunications tower located in the Village of Hyde Park adjacent to the Lamoille County Courthouse and the Sheriff's office ("Village Tower"). The Lamoille County Sheriffs Department uses the Village Tower to provide centralized dispatch services for a wide variety of municipal emergency and other service providers.

3. On September 8, 1997, Respondent filed an application ("Application") for the Project with the District Commission.

4. The Application requested authorization for the re-location of the Village Tower, the construction of an 8' x 12' cement building, and the upgrade of a 900' ("Project Logging Road"). In addition, Respondent intends to remove the antennas currently on the 100' Tower, install them on the re-located Village Tower, and dismantle the 100' Tower.

5. Town Highway 7 ("TH 7") extends for approximately eight miles in an east / northeast direction from the Village of Hyde Park, Vermont through areas of Hyde Park known as Cleveland Comers and Garfield. Between the Village and Cleveland Corners, TH 7 is commonly referred to as Trombley Hill. The portion of TH 7 located between Cleveland Corners and Garfield is commonly referred to as Cleveland Corners Road. At some time in the past, Cleveland Comers Road has also been referred to as "the Road to Garfield" or "the Garfield Road." The portion of TH 7 beyond Garfield is known as Garfield Road.

6. The hill on which the Village Tower will be constructed ("the Project Hill") is not identified by name on any of the maps offered into the record. The Project is located on the peak of the Project Hill, which is 439 meters in height ("Project Site").

7. A common right-of-way extends southerly from Cleveland Comers Road towards the Project Site ("ROW"). The ROW extends for approximately 1/4 mile. At its end, the Project Logging Road inclines steeply to the left, providing access to the Project Site. A residential driveway also begins at the end of the ROW ("Driveway").

8. The United States Geological Survey ("USGS") map submitted with the Application identifies as "Davis Hill" a hill that is 5 18 meters in height located approximately 1.8 miles north of the Project Hill ("Davis Hill "). Davis Hill is approximately 1.9 miles northeast of Cleveland Corners.

9. Davis Hill Road extends northerly from Cleveland Comers Road from the point directly opposite the entrance to the ROW towards the peak of Davis Hill. A logging road ("Davis Hill Logging Road") extends from the end of Davis Hill Road towards the peak of Davis Hill.

10. Carpenter Road and Wolf Den Road extend southerly from Cleveland Comers Road to the east of the ROW. Beam Road and McFarlane Roads are located to the south of Davis Hill, Davis Hill Road, and the Project Site.

11. Gloria Wing has been Respondent's Land Use Consultant since 1994. Ms. Wing prepared the Application on Respondent's behalf. She has prepared three or four other Act 250 permit applications for Respondent in connection with other projects. In addition, Ms. Wing has prepared six or seven Act 250 permit applications for other applicants.

12. The cover letter accompanying the Application provided the following information regarding the location of the Project Site:

> "29+ acres owned by [Respondent] off TH 7 in Garfield, an area in Hyde Park"
>
> "less than 1/2 mile in a southerly direction from a 100 ft. radio tower already owned and operated by [Respondent]"
>
> "reached by a ROW deeded in common, owned by [Respondent], off TH 7. There is an existing logging road off the ROW that will be upgraded, 900 ft. by 16 ft."

13. Item #7 of the Application identifies the location of the Project Site as being on TH 7 in Hyde Park. Item #7 asks for the following information: town, road, route number, nearby landmark, distance from landmark, and direction from landmark. Ms. Wing completed Item #7 as follows:

town:	Hyde Park
road:	[left blank)

route number:	TH7
nearby landmark:	Cleveland Comers
distance from landmark:	3/4 mile
direction from landmark:	Southwest

14. Exhibits to the Application identified the Project Site as being located in the Garfield area of Hyde Park.

15. Respondent submitted a USGS topographical map with the Application, on which Respondent marked the location of the Project Site. The map does not specifically identify the name of the Project Hill. The USGS map does not identify the names of roads or their town highway designations. As set forth more fully above in Finding #8, the USGS map identifies Davis Hill as a hill located approximately 1.8 miles north of the Project Hill. The Project Logging Road and the Davis Hill Logging Road are indicated on the map.

16. At least one letter filed in support of the Application referred to the Project Site as the "Davis Hill site."

17. The town highway map does not depict or in any way identify Davis Hill, the Project Hill, the ROW, or the Project Logging Road. Both the Davis Hill Logging Road and Davis Hill Road are depicted on the town highway map. TH 7 is shown as extending for approximately eight miles from Hyde Park's southern boundary shared with Morristown to its northern shared boundary with Eden.

18. Ms. Wing did not submit the town highway map as part of the Application.

19. Ms. Wing submitted the Hyde Park tax map, the USGS map, and a map that identified deer wintering areas and wetlands with the Application.

20. Ms. Wing consulted the USGS map when providing information in the Application concerning the location of the Project Site.

21. Ms. Wing obtained the information that the Project Site was 3/4 mile southwest of Cleveland Comers from a surveyor working with her and Respondent's construction engineer in connection with the Project. Ms. Wing did not independently verify, on a map or otherwise, the distance between the Project Site and Cleveland Comers. She did not independently verify whether the Project Site was southwest of Cleveland Corners.

22. The Project Site is directly east of Cleveland Corners.

23. The area located 3/4 mile southwest of Cleveland Corners is on a hill bearing the designation "335T" on the USGS map, at the end of a trail or logging road that extends from TH 7 / Cleveland Corners Road.

24. When Ms. Wing prepared the Application, she was aware of roads near the Project Site, such as Wolf Den Road, Carpenter Road, Beam Road, and Garfield Road. She was aware that the name Wolf Den Road was on a sign at the road's intersection with Cleveland Corners Road.

25. The closest settlement to the Project Site shown on both the USGS map and the town highway map is Garfield, a residential hamlet less than one mile northeast of the Project Site. Garfield and some of the roads listed above in Finding #24 are closer to the Project Site than Cleveland Corners. Ms. Wing identified Cleveland Corners as the nearest land mark because she believed most people familiar with the area know where Cleveland Comers is located.

26. When Ms. Wing prepared the Application, she knew that the information contained in Item #7 of the Application (See Finding #13 above) was relied upon by the District Coordinator in order to prepare the Act 250 Notice of Application and Hearing. Ms. Wing was aware that the purpose of the notice is to provide interested persons with information and an opportunity to be involved in Act 250 proceedings. She knew that an individual must be able to identify where a proposed project is located in order to determine whether the proposal may affect his/her interests.

27. Ms. Wing visited the Project Site prior to preparing the Application.

28. The Application bears the signature of Howard A. Manosh. By signing the Application on behalf of Respondent, Mr. Manosh (i) swore that the information provided in the Application was true and accurate to the best of his knowledge and (ii) certified that he understood that Respondent must not commence construction, demolition, remodeling, or commercial use of the property until Respondent received an Act 250 permit.

29. Edward Stanak was the District Coordinator responsible for preparing the Act 250 Notice of Application and Hearing in connection with Respondent's Application. Mr. Stanak is an experienced coordinator who has worked with the Act 250 program for more than 18 years.

30. When preparing an Act 250 notice, Mr. Stanak generally tries to identify the road on which a project is located by both the common name and town highway designation.

31. Mr. Stanak reviews an application together with its attachments when he prepares an Act 250 notice. The location of a proposed project is usually clear from the applicant's submissions. Mr. Stanak usually does not need to call an applicant to clarify the location.

32. After reviewing the Application, it was unclear to Mr. Stanak how best to describe the Project Site. Mr. Stanak contacted Ms. Wing by telephone. He explained to her that he was preparing the hearing notice and that it was not clear from the Application how to describe the location of the Project Site. Ms. Wing responded that she would ask other individuals and provide him with the information at a later date. Ms. Wing subsequently informed Mr. Stanak by telephone that the Project Site was "on Davis Hill." Ms. Wing probably did not provide this information directly to Mr. Stanak, but left him a message.

33. Ms. Wing describes her response to Mr. Stanak as a "general answer" to his question. She believes that the area encompassing Davis Hill, the Project Hill, Davis Hill Road, and Carpenter Road is referred to as "Davis Hill." At the time she prepared the Application, Ms. Wing had not heard the Project Hill called Carpenter Hill.

34. Mr. Stanak had no reason to pursue identification of the location further because he believed that Ms. Wing, as Respondent's agent, was in the best position to know the location of the Project Site.

35. Mr. Stanak drafted the Act 250 notice for the Application which was published in the News & Citizen, a newspaper of general circulation in the Hyde Park area, on October 9, 1997 ("Notice"). The Notice includes the following statement:

> Application 5L1290 was filed by H.A. Manosh, Inc. on September 8, 1997 for the construction of a 150 foot telecommunications tower and an 8' x 12' equipment building along with an upgrade of 900+/- feet of logging road to provide access to the site. The 29 acre tract is located on Davis Hill off Town Highway 7 via a common right-of-way in the Town of Hyde Park, Vermont.

36. If Mr. Stanak had relied upon the information provided by Ms. Wing in Item #7 to

prepare the notice, the notice might have read: "The 29 acre tract is located on Town Highway 7, 3/4 of a mile southwest of Cleveland Comers in Hyde Park, Vermont."

37. On November 13, 1997 and November 17, 1997, the District Commission issued the Permit to Respondent. The Permit authorizes Respondent to construct and use a 160 foot telecommunications tower ("Permitted Tower"), 8' x 12' equipment building ("Permitted Building"), and 900 foot access road "on Davis Hill."

38. Judy Clark has lived off Garfield Road in Hyde Park, approximately one mile from the Project Site, for thirty years. For the previous 19 years, she lived on Garfield Road less than one mile from the Project Site, in the home now owned by her brother, Charlie Davis. Ms. Clark's mother, grandparents, and great-grandparents lived on Davis Hill.

39. Ms. Clark had never heard of the Project Hill referred to as "Davis Hill" until she attended a meeting of the Alliance at which the members discussed that the Notice had identified the Project Site as Davis Hill. She had never heard of Cleveland Corners Road referred to as TH 7. She knows of no road signs designating Cleveland Comers Road as TH 7.

40. Ms. Clark has always referred to the eastern side of the Project Hill as Bernie Emerson's Hill and the western side as Carpenter Hill. Those names derive from families who lived on the hill. Although Charlie Davis lives on the eastern side of the Project Hill, Ms. Clark has never heard the Project Hill referred to as Davis Hill, probably because another hill is called by that name.

41. A tower on Davis Hill would not be visible from Ms. Clark's home; a tower at the Project Site will be visible.

42. Eric Beckstrom has lived on Wolf Den Road in Hyde Park for more than two years. Mr. Beckstrom's home is located approximately 3/8 of a mile from the Project Hill and two miles from Davis Hill. His meadow is part of the old Carpenter farm on the Project Hill.

43. Mr. Beckstrom regularly reads the News & Citizen, including the public notices. If he had seen a notice that a tower was going to be erected on Davis Hill, he would not have been concerned because Davis Hill is not visible from his home.

44. A tower on the Project Hill would be visible from Mr. Beckstrom's garden, lawn,

and porch and from several rooms inside his home. Mr. Beckstrom would have been concerned if he had seen a notice that a tower was going to be erected on the Project Hill. He would have contacted the agency or telephone number listed in the notice and would have participated in the hearing process to oppose the tower.

45. Dennis Clancy has lived on Beam Road in Hyde Park for five years. His home is approximately 300-400 yards from the Project Hill. Previously he lived in Hyde Park Village for 13 years.. He is familiar with Davis Hill and the Project Hill.

46. On May 30, 1998, Mr. Clancy flew a 5' x 13' helium filled balloon from the project Site on a 190' cord. On May 3 1, 1998, Mr. Clancy added three 10" party balloons to the cord, 30' below the 5' x 13' balloon to simulate the height of the 160' tower approved by the Permit. The balloons at both heights were visible from Mr. Clancy's garden, pond, driveway, and field.

47. Mr. Clancy saw the Notice in the News & Citizen. He did not respond to the Notice because Davis Hill is not close to or visible from his property. If he had seen a notice that a tower was going to be erected on the Project Hill, then he would have sought to participate in the Act 250 proceeding and would have opposed the tower.

48. Mr. Clancy did not know that Cleveland Comers Road is designated TH 7 and has never heard it referred to by that name. He has only heard it referred to as Cleveland Comers Road.

49. Corella Gray (nee Davis) lives on Garfield Road in Hyde Park, approximately 1.5 miles from Davis Hill. She has lived at that location since 1982 and has lived in the area since 1917. She was born and reared on Davis Hill. Her grandfather and uncle had a farm on Davis Hill, which gave the hill its name.

50. Ms. Gray has never heard the Project Hill referred to as "Davis Hill." She calls the Project Hill Carpenter Hill. In the past it was also referred to as Jackson Hill and LaPlante Hill.

5 1 . Ms. Gray did not know that Cleveland Comers Road is designated as TH 7.

52. Ms. Gray would not have responded to a notice that stated a tower was proposed for Davis Hill because Davis Hill is not visible from her home. If she had seen a notice that a tower was proposed for the Project Hill, she would have been concerned and tried to find out more about it. Ms. Gray subscribes to the News &

Citizen and reads it regularly.

53. Tom Stames has lived on Wolf Den Road, approximately 1/4 mile from the Project Site, for six years. Mr. Stames does not refer to the Project Hill as "Davis Hill." He knows the Project Hill as Carpenter Hill. Mr. Stames did not know that Cleveland Corners Road is designated as TH 7.

54. Mr. Stames reads the News & Citizen regularly and thoroughly. He would not have been concerned if he had seen a notice that a tower was proposed to be erected on Davis Hill. If he had seen a notice that a tower was going to be erected on the Project Hill, then he would have been very concerned because the project Hill is directly in view of his house. He would have sought more information and would have participated in permit proceedings in order to protect his interests.

55. Lisa Dimondstein lives on Davis Hill Road in Hyde Park near the intersection with Cleveland Corners Road. She has lived in the area for 16 years. She refers to the Project Hill as Carpenter Hill. She did not know that Cleveland Corners Road is designated as TH 7.

56. A tower on Davis Hill would not be visible from Ms. Dimondstein's property, but a tower on the Project Hill will be visible.

57. Ms. Dimondstein reads the News & Citizen regularly. If she had seen a notice that a tower was proposed to be erected on Davis Hill, she would not have responded. If she had seen a notice that a tower was proposed to be erected on the Project Hill, then she would have been concerned and would have sought to participate in public proceedings.

58. Joanne Ring has lived on Garfield Road in Hyde Park for her entire life. A tower on Davis Hill would not be visible from her property. She would not have paid attention to a notice that stated a tower would be erected on Davis Hill.

59. Ms. Ring has always known the Project Hill as Carpenter Hill. She always uses Carpenter Hill as a reference point when giving directions to her home. She believes that the reason that she has never heard anyone refer to the Project Hill as "Davis Hill" is because the Project Hill and Davis Hill are separate hills divided by roads and flat farm land.

60. Ms. Ring had never heard of TH 7 before this proceeding.

61. Ms. Ring is aware of the Davis Hill Logging Road at the end of Davis Hill Road on Davis Hill. Therefore, for Ms. Ring, the reference in the Notice to a logging road confirmed that the Notice described Davis Hill and not the Project Hill.

62. Ms. Ring is aware that Respondent owns land at or near the peak of Davis Hill. For Ms. Ring, the reference in the Notice to land owned by Manosh confirmed that the Notice described Davis Hill and not the Project Hill.

63. A tower at the Project Site will be visible from Ms. Ring's property. If she had seen a notice that a tower was to be erected on the Project Hill, she would have wanted to participate in Act 250 hearings in order to oppose the tower.

64. Richard Stone has lived on Beam Road in Hyde Park for ten years. His property is 300-400 yards south of the Project Hill. Mr. Stone has never heard the Project Hill referred to as "Davis Hill." He has never heard of TH 7.

65. Mr. Stone reads the News & Citizen regularly and often reads the legal notices. He would have been very concerned if he had seen a notice that a tower was going to be erected on the Project Hill because it would be very visible from his property. He would have contacted whomever was mentioned in the notice and participated in the Act 250 process to voice his concerns about the tower.

66. Jim McLean-Lipinski has lived on Garfield Road since 1986. He lives less than a mile from Davis Hill, but a tower on that hill would not be visible from his property because of intervening ledges and forested land. A tower on the Project Hill would be visible from his property.

67. Mr. McLean-Lipinski reads the News & Citizen and makes a point of reading the legal notices and attending hearings when he is concerned about a proposed development. A notice that a tower was proposed on Davis Hill would not have been a concern to him. In contrast, if he had seen a notice that a tower was proposed to be erected on the Project Hill, he would have attended public hearings.

68. Bradley Benedict has lived in the Town and the Village of Hyde Park since 1973. He is a broker manager and real estate broker in Stowe, Vermont. He was a lister in Hyde Park for twelve years, ending in 199 1, and was Chair of the Board of Listers. He and his family have owned land on Davis Hill Road. Mr. Benedict has been involved in real estate transactions along Davis Hill. Mr. Benedict has never heard of the Project Site referred to as "Davis Hill." He has heard it referred

to as Carpenter Hill.

69. Mr. Benedict saw the Notice when it was published in the News & Citizen, He believed that the Notice referred to the land owned by Respondent at or near the peak of Davis Hill that is often called "the diggings." He is aware of a common right-of-way on Davis Hill off TH 7.

70. The Zoning Bylaws for the Town of Hyde Park designate the area in which the Project Site is located as Rural Residential District No. 2. Permitted uses in this area are limited to Agricultural and Forestry, Single Family Dwellings, and Home Occupations. Conditional uses include "[c]ommercial and industrial development which is not significantly different in character from other conditional uses with regard to overall appearance, volume and type of traffic, noise, or effect on neighboring properties . . . ." The zoning administrator issued a zoning permit to Respondent for the Project as a permitted use. As a result, no hearing was convened. Thus, the Petitioners did not learn about the proposed Project through a notice of hearing issued in connection with the zoning application.

71. The Project Hill has been known as Carpenter Hill since the Carpenter family lived on Carpenter Road on the western side of the Project Hill beginning in the 1940s. Before the Carpenters lived there, the hill was known by the name of the family who lived there. The old Carpenter farm extended up the hillside of the Project Hill.

72. Davis Hill is known by that name because the Davis family lived on the side of the hill for many years. The old Davis farm is located approximately 2/10 of a mile up Davis Hill Road from the road's intersection with Cleveland Corners Road.

73. Respondent's witness Kenneth Harvey, the Hyde Park Road Commissioner and former Chair of the Selectboard, knows of no written reference to the Project Hill as "Davis Hill."

74. Respondent and / or its principal, Howard Manosh, own more than one parcel of land in Hyde Park, including land just to the south of the peak of Davis Hill near the Davis Hill Logging Road.

75. Respondent and / or Howard Manosh have owned land on the Project Hill, including the Project Site, since 1975. Respondent developed some of this land, which was part of the old Carpenter farm, into residential lots now owned by

some of the Petitioners. The lots are accessed by Wolf Den Road, a road created by Respondent / Mr. Manosh.

76. Davis Hill is approximately 1.8 miles from the Project Site / Project Hill. Between the two hills is the valley along which Cleveland Comers Road is situated. The valley is nearly 140 meters lower in elevation than Davis Hill and 60 meters lower than the Project Hill.

77. The highest elevation contour line which encompasses both Davis Hill and the Project Hill extends north to encompass Bean Mountain and McKinistry Hill. The peak of Bean Mountain is more than 5.5 miles north of the Project Site. The ridge which includes the Project Hill, Davis Hill, Bean Mountain, and McKinistry Hill does not have a name.

78. The Garfield area of Hyde Park is a residential hamlet nestled around the Project Hill and Jackson Hill in a scenic rural area consisting predominantly of mixed wooded and open hillsides. There are majestic views of the surrounding mountains, including Mt. Mansfield, the Sterling range, Elmore Mountain, and the Worcester Mountain range.

79. There are more than twenty residences within a 1/2 mile radius of the Project Site and more than forty residences within a one mile radius.

80. Public highways surround three sides of the Project Site and a tower there would0 be visible from many points along the highways.

81. The trees surrounding the Project Site are primarily deciduous, although there are also fir and hemlock. The Permitted Tower will extend 1 00'-120' above the tree canopy.

82. During the October 13, 1998 site visit, Petitioners flew a 7' diameter helium balloon 160' above the Project Site. Respondent flew two 30" diameter balloons above the Project Site. The Board observed the balloons from locations along Trombley Hill Road, Cleveland Comers Road, Carpenter Road, Wolf Den Road, Davis Hill Road, McFarlane Road, and Beam Road. The Board also observed the balloons from the Couture, Beckstrom, Walz, Clark, and Stone residences.

83. No evidence was submitted into the record indicating that the Authorized Tower will fill in any alleged "dead spots" in providing emergency service coverage or indicating that any sites other than the Project Site were considered in connection

with the relocation and consolidation of the 100' Tower and the Village Tower.

84. The Lamoille County Regional Plan ("Regional Plan") addresses scenic beauty. In its section on Telecommunications Facilities, the Regional Plan states:

> One of the region's principal scenic qualities [is] its ridgelines and mountainsides. These areas are significant contributors to the maintenance and enjoyment of rural character. The ridges are predominantly undeveloped and provide an unbroken skyline viewed from the valley floor. The use of the region's ridges for telecommunications towers and related facilities needs to be undertaken in a manner that will not unduly detract nor adversely affect these scenic values. Protection of these areas from insensitive development are matters of public good.

85. The Regional Plan includes the following Policies and Strategies in support of its stated goal to "[s]upport the viability of community-based services for the benefit of residents and visitors to Lamoille County[:]"

Policies

e. Encourage telecommunication systems co-location partnerships and compatibility with existing land use when new and replacement systems are proposed.

f. Discourage development of new towers and structures for telecommunication transmission in favor of utilizing existing towers and structures.

g. minimize conflict between telecommunications towers and with [sic] scenic values, facilities and construction.

Strategies

1. Where feasible, be sited in areas not highly visible to the traveling public, or from residential areas, historic districts, and public use areas or outdoor recreation areas such as hiking trails and beaches;

2. Be located in forested areas or be sufficiently landscaped to screen the lower sections of towers and related ground fixtures from public vantage points, such as trails, roads, or water bodies;

4. Where prominent views of the site exist, be located downgrade of the ridge so as not to exceed the elevation of the immediate ridge;

6. Avoid peaks and ridges which function as reasonable focal points where feasible.

86. The Hyde Park Municipal Plan ("Town Plan") contains a vision statement which states, in part:

> [Hyde Park] enjoys a high quality environment, natural beauty and resources, [and] historic character .... Its residents want to ensure that those unique attributes not be jeopardized, and that development and growth occurs in a thoughtful manner.
>
> Hyde Park's residents recognize the need for a balanced and diverse economy. ... We believe that economic growth can occur without sacrificing the environment.
>
> The citizens of Hyde Park wish to provide for orderly and managed growth with respect for the natural environment, the Town's ability to provide for community functions and services, and respect for the historic character, settlement patterns and overall quality of life in Hyde Park.

87.' The Town Plan contains the following goal: "Manage growth and development in a way which protects and promotes the Town's historic, scenic and cultural assets without unduly infringing upon the rights of landowners." The Town Plan contains the following policy in support of this goal: "Support activities which help maintain and enhance the working landscape and natural beauty of the area."

88. LCPC submitted letters supporting Respondent's Application for the Project.

89. Respondent submitted Schedule F in connection with the Application which contains the signatures of representatives of the LCPC and the Hyde Park Select Board and Planning Commission indicating receipt of the Application.

90. Respondent did not file an affidavit with the District Commission certifying that it had either posted or caused to be posted a copy of the Notice of the Application in the Hyde Park town clerk's office.

91. On April 13, 1998, Respondent filed the Amendment Application in which it

sought authorization to "add 30' to permitted 160' tower, increase permitted building from 8' x 12' to 14' x 26', [and] add Bell Atlantic Building, 12' x 30'." The District Commission proceeding has been stayed pending a decision in the revocation action.

92. On April 20, 1998, Respondent sought an extension of the Project's construction completion date from June 1, 1998 to September 1, 1998. The District Commission has not issued a decision concerning this request.

93. The Permit authorizes an 8' x 12' building. While the Amendment Application was pending, Respondent built a 14' x 26' building approximately 3 1 feet 3 inches from the nearest property line. Respondent did not seek a jurisdictional opinion from the District Coordinator but, instead, reached an independent conclusion that the change in size was not a material change requiring a permit amendment. Respondent's construction manager, who has worked for Respondent for 23 years, was responsible for the construction of the 14' x 26' building and for constructing the building foundation too close to the property line. He has been involved in between 6 and 10 other projects involving Act 250.

94. Respondent has partially dismantled the 14' x 26' equipment building.

95. The Permit authorizes the construction of a 900' access road to the Project Site. The Permit is conditioned as follows:

> 5. The permittee shall comply with all exhibits for erosion control. Hay bale dams and silt fences shall be installed as depicted on the plans. All non-vegetated disturbed areas of the construction site shall be mulched until final vegetative cover is established. All erosion control devices shall be periodically cleaned, replaced, and maintained until vegetation is permanently established on all slopes and disturbed areas. The Commission reserves the right to schedule hearings and site inspections to review erosion control, and to evaluate and impose additional conditions with respect to erosion control, as they deem necessary.

96. A culvert was crushed during construction of the 900' access road. The culvert was located at the base of the access road where it joins the top of the shared ROW. After the culvert was crushed, runoff was not channeled through the culvert but ran onto the ROW. Neighbors who shared the ROW with Respondent dug a trench to divert water from their property. Respondent installed crushed

stone to control the runoff. Respondent has installed hay bales on the outlets of culverts while underground utility lines were being installed and has added several loads of gravel to the access road.

97. Neighbors who visited the Project Site during the summer of 1997 did not observe hay bales, silt fences, or mulched or seeded areas. They observed erosion on the sides of the access road.

98. At the site visit conducted on October 13, 1998, the Board did not observe any evidence of erosion on the access road to the Project Site.

99. Howard A. Manosh, Respondent's principal, has previously violated Act 250 and other environmental laws. For example, in 1985 and 1986 he began operating a gravel pit in Morristown without obtaining an Act 250 permit. In 1986, he violated 10 V.S.A. § 1259 by allowing mud and silt to be discharged into waters of the state. As a result of these violations he was fined $30,000. In 1993, the Vermont Attorney General's Office filed a complaint against Mr. Manosh alleging that he created a subdivision and sold lots without obtaining an Act 250 permit. In settlement of the complaint, Mr. Manosh agreed to apply for and obtain Act 250 permits and to pay $15,000 to the State of Vermont.

V. CONCLUSIONS OF LAW

A. Jurisdiction and Burden of Proof

The Board has jurisdiction to consider revocation petitions pursuant to 10 V.S.A. § 6090(c) and EBR 38(A). Pursuant to EBR 38(A)(l), the Board treats a revocation petition as an initial pleading in a contested case, in accordance with the procedures of EBR 40. The party seeking revocation, Petitioners here, has the burden of proof. E.g., Re: Roger V. and Beverly Potwin, #3W0587-1-EB, Findings of Fact, Conclusions of Law, and Order at 14 (July 15, 1997)[EB #655]; Re: Putney Paper Co., Inc., #2W0436-6-EB (Revocation) (Altered), Findings of Fact, Conclusions of Law, and Order at 12-13 (June 30, 1995)[EB #583R].

B. Revocation

The Board may revoke a permit if it finds that

(a) the applicant or representative wilfully 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 [B]oard 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 any permit condition, the approved terms of the application, or the rules of the Board ....

EBR 38(A)(2). The Board is reluctant to revoke a permit when it is doubtful or uncertain about the grounds for revocation. Potwin, supra at 14; Re: Stokes Communications Corp., #3R0703-EB (Amen ment Application Revocation), Memorandum of Decision at 9 (Mar. 20, 1996)[EB #644M2]. If the Board determines that a violation exists, then it must give the permit holder a reasonable opportunity to correct the violation prior to any order of revocation becoming final, unless there is "a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation." EBR 38(A)(3). "In the case where a permit holder is responsible for repeated violations, [however,] the [B]oard may revoke a permit without offering the opportunity to correct a violation." Id.

1. Violation of Permit

The Board may revoke a permit where the applicant has violated the terms of the permit or any permit condition or the approved terms of the application. EBR 3 8(A)(2)(b).

a. Equipment Building

The Permit authorizes the construction and use of an 8' x 12' building. Respondent does not deny that it built a 14' x 26' building, the size building it proposes in its pending Amendment Application. Respondent concluded that the change in size was not a material change requiring a permit amendment. It reached this conclusion independently without seeking a jurisdictional opinion from the District Coordinator pursuant to EBR 3(C). Respondent's construction manager, who has been involved in between six and ten other Act 250 projects, was responsible for the decision to construct the 14' x 26' building. The Board concludes that Petitioners have met their burden of proof as to this alleged violation. Respondent has violated the Permit by building an equipment shed that is larger than that authorized. The fact that Respondent has partially dismantled the building does not eradicate the violation but has, at most, mitigated it.

b. Erosion Control

Permit condition #5 requires Respondent to take certain erosion control measures and to comply with all exhibits relating to erosion control. Petitioners allege that Respondent has violated the terms and conditions of the Permit by failing to take adequate erosion control measures. Respondent installed stone to control runoff caused by a crushed culvert. Crushed gravel and hay bales were applied and other erosion control measures were taken at the site. The Board observed no evidence of erosion during its October 13, 1998 site visit. The Board concludes that Petitioners have failed to meet their burden of proof as to this alleged violation. Respondent has not violated the Permit by failing to take requisite erosion control measures.

2. **Violation of Board Rules**

The Board may revoke a permit where the applicant has violated the rules of the Board. EBR 38(A)(2)(b).

a. Affidavit that Notice Provided

EBR 1 O(E) requires that the

> applicant shall certify by affidavit in the application that the applicant forwatded notice and copies of the application to [certain statutory parties] and that the applicant has either posted or caused to be posted a copy of the notice of application in the town clerks office of the town or towns wherein the land lies.

Respondent submitted Schedule F in connection with the Application. Schedule F contains the signatures of representatives of the Hyde Park Select Board and Planning Commission and the LCPC indicating receipt of the Application. Respondent did not file an affidavit with the District Commission certifying that it had either posted or caused to be posted a copy of the Notice of Application in the Hyde Park town clerk's office. The Board concludes that Petitioners have met their burden of proof as to this alleged violation. Respondent has violated Act 250 notice requirements by failing to file an affidavit certifying that notice had been made as required by Board rules.

b. Incorrect Identification of Project Site

Public notice of an Act 250 application must be posted in the town clerk's office of the town in which the proposed project is located and published in a newspaper of

general circulation. 10 V.S.A. $6084; EBR 10. As specified in the notice, the location of the proposed project must be "sufficiently precise so that a person generally familiar with the area can approximately locate the tract or tracts of land on an official town highway map." EBR 10(G). The notice is drafted by the district coordinator based upon the information provided by the applicant in its application. The principle underlying EBR 1 O(G) is that persons whose interests may be affected by a proposed project may protect those interests through participation in Act 250 proceedings. EBR 14(B). Knowledge of the proposed activity is fundamental to the ability to protect one's interests. The accuracy of the notice published in the newspaper and posted in the town clerk's office is essential to persons who, because they are neither statutory parties nor adjoiners, are not entitled to receive personal notice that an application has been filed.

Respondent's application materials contained several references to the Project Site. Item #7 of the Application described the site as being located on TH 7 in Hyde Park, approximately 3/4 of a mile southwest from Cleveland Corners. Other parts of the Application materials, including the cover letter, describe the Project Site as being on "29+acres owned by [Respondent] in Garfield, an area of Hyde Park;" "less than 1/2 mile in a southerly direction from a 100 ft. radio tower already owned and operated by [Respondent];" and "reached by a ROW deeded in common, owned by [Respondent], off TH 7." The cover letter accompanying the Application stated that "[t]here is an existing logging road off the ROW that will be upgraded, 900 ft. by 16 ft." At least one letter submitted in support of the Application described the Project Site as the "Davis Hill site."

The Project Site is located due east of Cleveland Corners, not 3/4 of a mile southwest of that landmark as stated in Item #7. A hill is located approximately 3/4 of a mile southwest of Cleveland Corners. A trail or logging road extends up that hill from TH 7.

The Application materials do not identify the name of the road on which the Project was located, as requested in Item #7. The segment of TH 7 that runs closest to the Project Site is referred to locally and on printed maps as Cleveland Corners Road. Although the designation "TH 7" appears on the town highway map, TH 7 is approximately eight miles long. Stating that the Project is on TH 7 provides little aid in identifying the location of the Project Site.

Respondent and / or Mr. Manosh own land on or near the peaks of both Davis Hill and the Project Hill. A logging road extends from the end of Davis Hill Road towards the Peak of Davis Hill. Thus, references to property owned by Respondent and / or Mr. Manosh that is serviced by a logging road do not aid in the identification of the site, especially when those references are paired with a statement that the Project is "on Davis

Hill."

Edward Stanak, an experienced District Coordinator, was unable to determine the location of the Project based upon the information provided in the Application. In response to Mr. Stanak's request for clarification so that he could prepare the Notice, Respondent's agent stated that the Project Site was "on Davis Hill." Davis Hill is identified on the USGS map as a hill that is 5 18 meters in height located approximately 1.8 miles north of the Project Hill, which is 439 meters at its peak. Between the two hills is a valley, along which runs Cleveland Corners Road. The valley is nearly 140 meters lower in elevation than the peak of Davis Hill and 60 meters lower than the Project Hill. Many long-term and newer residents of the area have never heard the Project Hill called "Davis Hill." They refer to the 5 18 meter hill to the north of the Project Hill by that name. Many local residents refer to the Project Hill as Carpenter Hill because the Carpenter Family lived on and fanned the western side of the Project Hill beginning in approximately 1940. No maps or other documents were offered into evidence that identify the Project Hill as "Davis Hill."

The Project Hill and Davis Hill are two distinct hills in a ridge with several peaks. The ridge includes Bean Mountain and McKinistry Hill, which are several miles to the north of the Project Site. The entire ridge is not called Davis Hill, nor does the ridge itself appear to have any name. McKinistry Hill is not called "Davis Hill" simply because it is part of the same ridge as Davis Hill. There is similarly no reason to call Project Hill by the name "Davis Hill" merely because it is part of the same ridge as Davis Hill. The Board concludes that the entire ridge is not commonly referred to as Davis Hill. It also concludes that the Project Hill is not "Davis Hill." Respondent provided erroneous information to Mr. Stanak's request for clarification when Respondent's agent identified the Project as being located "on Davis Hill."

At least one of the First Petitioners, Dennis Clancy, recalls seeing the Notice when it was published in the News & Citizen. Other First Petitioners read the legal notice section of that newspaper on a regular basis. Many of the First Petitioners would have attempted to get more information or to participate in the application process if they had known that a tower was proposed to be erected on the Project Hill. They would not have been concerned about a tower on Davis Hill because they do not have views of Davis Hill from their properties. None of the First Petitioners would have been able to "approximately locate the tract or tracts of land on an official town highway map" or in any other way based upon the information provided by Respondent and included in the Notice. In fact, some of the information provided --for example, that the Project would be on land owned by Respondent and was accessed by a logging road -- would serve to reinforce a belief that the Project was to be located on Davis Hill, not the Project Hill. It

was due to these reasons that Bradley Benedict, a real estate broker and former lister in Hyde Park who saw the Notice when it was published, believed that the Project was located on Davis Hill, not the Project Hill.

Respondent has violated Act 250 notice requirements by failing to provide accurate and complete information in violation of Board rules. As a result, the First Petitioners were denied the opportunity of accurate and complete newspaper notice sufficient to allow them to protect their interests through participation in the Act 250 application proceeding.'

On more than one occasion, the Board has revoked a permit when an adjoining property owner did not receive notice because the applicant failed to list the adjoiner in its application in violation of EBR 10(F). See, e.g., Re: Lawrence White, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, #1R0391-6-EB (Revocation), Findings of Fact, Conclusions of Law, and Order (Sept. 17, 1996)[EB #647]; Re: Charles and Barbara Bickford, #5W1093-EB (Revocation), Memorandum of Decision (Apr. 12, 1993) [EB #568M2]. Similarly, the Board has remanded a proceeding to the district commission for a hearing where adjoiners did not receive personal notice pursuant to EBR 10(F). Re: Richard and Sandra Conway, #1R0632-EB, Findings of Fact, Conclusions of Law, and Order (Sept. 1, 1988), aff'd, In re Conway, 152 Vt. 526 (1989).

Respondent argues that the EBR 10(F) line_ of cases is inapposite because the First Petitioners are not adjoiners. The Board concludes that this distinction is without merit. The principle underlying EBR 10 (F) and cases such as White, Bickford, and Conway is the same as that underlying EBR 10(G): Notice and an opportunity to participate are fundamental elements of due process. As stated above, knowledge of the proposed activity is integral to the ability to protect one's interests. There is an obvious interrelationship in the Board rules between the categories of parties and notice requirements. The accuracy of the notice published in the newspaper and posted in the town clerks office is essential to persons, like the First Petitioners, who are not entitled to receive personal notice that an application has been filed

The Board concludes that the Application and the agent's response to Mr. Stanak's request for clarification contained multiple instances of erroneous and

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[1]The denial of this opportunity was compounded by the fact that the Project was erroneously treated as a permitted use under the zoning bylaws. Therefore, no notice was issued or hearing conducted in connection with the zoning application.

incomplete information concerning the location of the Project Site such that it would be nearly impossible, even for a person familiar with the area, to identify the tract on an official town highway map -- or in any other way. Accordingly, the Board concludes that Petitioners have met their burden of proof as to this alleged violation.

3. Willful or Grossly Negligent Erroneous Submissions

The Board may revoke the Permit if it concludes that Respondent willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information concerning the location of the Project that, had it been accurate or complete, may have caused the District Commission to deny the Permit or to require additional or different Permit conditions. EBR 38(A)(2)(a).

a. Inaccurate, Erroneous, or Materially Incomplete

The Board must first consider whether Respondent provided inaccurate, erroneous, or materially incomplete information. For the reasons set forth in Section V.B.2.b. above, the Board concludes that the Application and Ms. Wing's response to Mr. Stanak's request for clarification contain multiple instances of inaccurate, erroneous, and materially incomplete information concerning the location of the Project Site.

b. Willfully or with Gross Negligence

Because the Board concludes that Respondent provided inaccurate, erroneous, or materially incomplete information, the Board must now consider whether Respondent provided the information willfully or with gross negligence.

i. Willfully

"Willfully" has been defined as "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." See, e.g., Re: Lawrence White, supra at 14 and cases cited therein.

Petitioners have provided no evidence tending to support a conclusion that Respondent provided inaccurate, erroneous, and materially incomplete information with a specific intent to fail to provide what was required of it in the application process. The Board concludes that Respondent did not willfully provide inaccurate and incomplete information regarding the location of the Project.

ii. Gross Negligence

The Board has historically analyzed allegations of gross negligence by referring to Shaw v. Moore, 104 Vt. 529, 531-32 (1932), which states in part:

> Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. ... Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ from willful and intentional conduct which is or ought to be known to have a tendency to injure.

Respondent provided inaccurate, erroneous, and materially incomplete information concerning the Project site in the Application. The Application was prepared by Gloria Wing, who has been Respondent's Act 250 consultant since 1994. She has prepared between nine and eleven applications for Respondent and other applicants. Ms. Wing knew that the information she provided in the Application would be relied upon to prepare the published notice and she was aware that the purpose of the notice is to provide interested persons an opportunity to be involved in Act 250 proceedings. Edward Stanak, an experienced District Coordinator, was unable to determine the location of the Project based upon the information in the Application. In an attempt to clarify the location, Mr. Stanak contacted Ms. Wing. He explained to Ms. Wing that he was preparing the hearing notice and that it was not clear from the Application how to describe the Project location. In response to Mr. Stanak's request for clarification, Respondent's agent stated that the Project Site was "on Davis Hill."

Respondent was negligent when it submitted the Application containing errors and omissions regarding the Project location. That negligence ripened into gross negligence when the District Coordinator contacted Ms. Wing for clarification and she responded that the Project was located "on Davis Hill." Ms. Wing is an experienced consultant who knew the purpose of Mr. Stanak's request, who understood the significance of public notice, and who had visited the Project site. Nevertheless, Ms. Wing allowed an incorrect and misleading description of the Project location to remain on record and be incorporated into the Notice. By perpetuating the inaccurate description, Respondent acted in a grossly negligent manner. Ms. Wing's response to Mr. Stanak's query caused Respondent's actions to be "substantially and appreciably higher in magnitude and more culpable than ordinary negligence [and amounted] to the failure to exercise even a slight degree of care. [The actions demonstrate] materially more want of care than. .. simple inadvertence." Shaw, 104 Vt. at 531. Ms. Wing's response

"amount[ed] to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It [was the] heedless and palpable violation of legal duty respecting the rights of others." Id. As the Shaw Court stated: "Ordinary and gross negligence differ in degree of inattention, while both differ from willful and intentional conduct which is or ought to be known to have a tendency to injure." Id. at 532. Respondent's degree of inattention constitutes "gross negligence."

EBR 38(A)(2)(a) clearly contemplates a class of conduct falling between ordinary negligence and willful misconduct. It would be difficult to imagine a clearer example of the class than the failure to exercise care when confronted with evidence of one's own negligence and given an opportunity to correct its damaging effects. Accordingly, the Board concludes that Respondent acted with gross negligence when it submitted erroneous and materially incomplete information concerning the location of the Project.[2]

c. **Potential for Different Conclusion**

Because the Board concludes that Respondent acted with gross negligence, the Board must consider whether it is possible that provision of accurate and complete information regarding the location of the Project site might have caused the District Commission to reach a different conclusion or include additional or different conditions in the Permit. Upon review of the evidence submitted by Petitioners concerning Criteria 8 (aesthetics) and 10 (conformance with regional plan), as set forth above in the Board's Findings of Fact, the Board concludes that if Respondent had provided accurate or materially complete information so that the First Petitioners had the opportunity of accurate and complete newspaper notice, the District Commission *might* have reached a different conclusion or *might* have included different or additional conditions in the Permit concerning those criteria.

Accordingly, the Board concludes that Petitioners have met their burden of proof as to this alleged violation.

4. **Summary**

The Board concludes that the Permit shall be revoked because Respondent violated Board notice provisions when it submitted inaccurate and incomplete information concerning the location of the Project and thereby denied the First Petitioners

[2]Board Members Arthur Gibb and Rebecca M. Nawrath dissent from this conclusion in a separate opinion appended to this decision.

the opportunity of accurate and complete newspaper notice sufficient to allow them to protect their interests through participation in the Act 250 application proceeding. The Board also concludes that the Permit should be revoked for the additional, independent reason that Respondent, with gross negligence, submitted inaccurate, erroneous, and materially incomplete information concerning the location of the Project that, had it been accurate or complete, may have caused the District Commission to deny the Permit or require additional or different conditions under Criteria 8 and / or 10. Although either one of these individual violations is sufficient cause for revocation in itself, the Board additionally bases revocation upon Respondent's violation of the Permit in connection with the construction of the 14' x 26' equipment building and upon Respondent's violation of Board rules in connection with its failure to file an affidavit pursuant to EBR 10(E).[3]

Accordingly, the Board revokes the Permit pursuant to EBR 38(A)(2).

C. **Opportunity to Cure**

Because the Board has determined that at least one reason for revocation exists, it must give Respondent a reasonable opportunity to correct the violation prior to any order of revocation becoming final, unless (i) there is "a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation" or (ii) the "permit holder is responsible for repeated violations." EBR 38(A)(3).

Petitioners have provided information concerning violations of Act 250 and other environmental laws by Respondent's principal, Howard A. Manosh. Respondent argues that the Board has held that "only violations of the particular permit (or a permit for the same operation) that is the subject of the revocation proceeding are relevant to determining whether to grant an opportunity to cure." Respondent interprets EBR 38(A)(3) too narrowly. Nothing in EBR 38 limits its application to violations of the permit that is currently the subject of the revocation proceeding. Rather, the rule states that where a ***permit holder*** is responsible for repeated violations, the permit may be revoked without an opportunity to cure. Interpreting EBR 38(A)(3) according to its plain meaning is logical because it gives the Board the discretion to withhold an opportunity to cure from a party with a history of violations.

Respondent's reference to the Board's decision in Re: Felix J. Callan, #5 W 1056-EB (Revocation) (June 2, 1992) [EB #493], does not support Respondent's interpretation

[3]The Board notes that Respondent's prompt partial removal of the equipment building would be a mitigating factor in the Respondent's favor if civil enforcement is undertaken.

of EBR 38(A)(3). In Callan, the Board determined that a permit holder should not be provided an opportunity to cure. In reaching this determination, the Board stated:

> The Board has found repeated violations of Land Use Permit #5W1056-EB. Furthermore, the permit holder is responsible for repeated violations of his previous Act 250 permit that authorized operation of this same gravel pit.

Callan, supra at 9. Respondent quotes the footnote to this passage, which states: the Board does not take the previous revocation into account in determining whether violations of this permit have occurred, it takes official notice of the prior revocation for violation of conditions of a permit for the same operation." Id. at n. 3 (emphasis in original). It is merely a coincidence that the same gravel pit was the subject of both the earlier permit revocation and the Callan revocation proceeding. Nothing in Callan supports the narrow interpretation Respondent would place on EBR 38(A)(3). Rather, the footnote quoted by Respondent clarifies that prior violations are not pertinent in determining whether a violation has *occurred* in the pending revocation action. The prior violations are pertinent, however, when determining whether to provide Respondent an opportunity to cure its violations. EBR 38(A)(3).

In considering whether to deny Respondent the opportunity to cure, the Board conducts both a qualitative and quantitative review of past violations. The Board concludes that the severity and the number of previous violations justifies denying Respondent the opportunity to cure its current violations.[4]

[4]Nothing in this decision precludes Respondent from withdrawing the pending Amendment Application and filing a new application for the project it currently proposes. The Board notes that the practical result of denying Respondent the opportunity to cure its violations is the same as the result that would have been attained by granting Respondent an opportunity to cure: the publishing and posting of an accurate and complete notice of Respondent's proposal so that all interested parties are able to participate in a hearing on the application.

VI. ORDER

1. The Summary Judgment Ruling is affirmed. Respondent's motion for summary judgment is dismissed with prejudice.

2. Land Use Permit #5L 1290 is revoked pursuant to EBR 38(A)(2) for each of the following independent violations:

(i) The violation of Board notice provisions by submitting inaccurate and incomplete information concerning the location of the Project and thereby denying the First Petitioners the **opportunity** of accurate and complete newspaper notice sufficient to allow them to protect their interests through participation in the Act 250 application proceeding.

(ii) The submission, with gross negligence, of inaccurate, erroneous, and materially incomplete information concerning the location of the Project that, had it been accurate or complete, might have caused the District Commission to deny the Permit or require additional or different conditions under Criteria 8 and / or 10.

(iii) The violation of the Permit in connection with the construction of the 14' x 26' equipment building.

(iv) The violation of Board rules in connection with Respondent's failure to file an affidavit pursuant to EBR 1 O(E).

3: Respondent shall not be granted the opportunity to correct the violations pursuant to EBR 38(A)(3).

4. Jurisdiction is returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont this 3rd day of February, 1999.

ENVIRONMENTAL BOARD

Marcy Harding, Chair
John Drake, Alternate Member
John T. Ewing
Arthur Gibb
Samuel Lloyd
Rebecca M. Nawrath
Robert H. Opel

Board Members George Holland and W. William Martinez did not participate in this proceeding. Board Member Alice Olenick had not received her appointment to the Board until after the initial public hearing was convened and so did not participate in this proceeding.

Dissenting Opinion of Arthur Gibb and Rebecca M. Nawrath

We respectfully dissent from the Board's conclusion regarding gross negligence. Ms. Wing's response to Mr. Stanak's query evinces a very high degree of carelessness. We are unable to conclude, however, that Petitioners have met their burden to demonstrate that Respondent's actions rise to the level of gross negligence. Although we dissent from the Board's conclusion regarding gross negligence, we concur with all other conclusions reached by the Board.

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