VERMONTENVIRONMENTALBOARD
10 V.S.A. §§ 6001 -6092

Re: Bull's-Eye Sporting Center
David and Nancy Brooks
Wendell and Janice Brooks
Land Use Permit #5 W0743-2-EB (Revised)

MEMORANDUM OF DECISION ON APPELLANTS' OBJECTION TO THE PANEL'S RECOMMENDED DECISION AND ORDER REQUESTING SCALED SITE PLAN

On July 30, 1996, a hearing panel of the Environmental Board ("Panel") issued its Recommended Findings of Fact, Conclusions of Law, and Order ("Recommended Decision") in the above-referenced matter. On August 15, 1996, George and Valerie Wild, Robert and Mary Lefcourt, and Ray Letoumeau ("Appellants") filed a Memorandum of Objection to the Panel's Proposed Decision ("Objection Memo"). On August 19, 1996, David and Nancy Brooks, and Wendell and Janice Brooks ("Applicants") also filed an objection to the Recommended Decision. On August 28, 1996, the Environmental Board ("Board") heard oral argument on the parties' objections. The Board concludes that the record in this matter is not complete and accordingly, pursuant to Environmental Board Rule ("EBR") 20, requests additional information from the Applicants.

I. THE PANEL'S RECOMMENDED DECISION

The Recommended Decision provides that, as proposed, operation of the Bull's-Eye Sporting Center ("Project") would not result in undue air pollution attributable to noise; would have an adverse, but not an undue adverse effect on aesthetics attributable to noise; and would comply with the Orange Town Plan. Accordingly, the Panel recommended affirmative findings on criteria 1, 8, and 10 to the full Board and that the Board issue Land Use Permit #5W0743-2-EB.

II. OBJECTIONS TO THE RECOMMENDED DECISION

On August 12, 1996, Appellants filed their Request for Hearing on the Panel's Proposed Decision. On August 15, 1996, Appellants supplemented their request for hearing by filing their Objection Memo. Appellants contend that the Panel improperly allowed the revised site plan (Exhibit B-l) to serve as the basis for conclusions regarding the Project's noise impacts. Appellants maintain that the noise tests that were actually conducted provided sound measurements from the prior site visit protocol that was ordered by the Chair's Prehearing Report and Order. Appellants argue that because the shooting locations identified in the site visit protocol are different than those represented on the Applicants' current proposal, the Panel's decisions under criteria 1 and 8 are in error. Appellants also maintain that the Applicants have not met their burden of

production with respect to criterion 8 or their burden of persuasion under criteria 1 and 10.

On August 19, 1996, the Applicants also filed a Response to Proposed Decision in which they seek modification or deletion of the permit condition that restricts commercial shooting at the Project during the period November 15 to April 15. Otherwise, Applicants do not object to the Panel's Recommended Decision.

On August 28, 1996, the Board heard oral argument from the parties on their respective objections. Immediately thereafter, the Board deliberated.

III. DISCUSSION

Pursuant to EBR 41, the full Board shall have an opportunity to review a hearing panel's recommended decision along with the record. Consequently, the record was prepared and made available to all Board members. Moreover, EBR 41 (D) also requires that prior to a final decision by the Board on a matter in which a hearing officer or panel was used, the parties shall be given an opportunity to request oral argument and to present a memorandum objecting to the recommendations of the panel. On August 28, 1996, both the Appellants and the Applicants in this matter were afforded an opportunity for oral argument.

As a threshold matter, EBR 41(E) provides the full Board with an opportunity to determine whether the record is complete and that the hearing should be adjourned, or whether, upon review of the record, the recommended decision, and the parties' objections, the record should remain open. In this case, the Board declines to declare the record complete and consequently, declines to adjourn the hearing. Rather, as is described in more detail below, the Board requests additional information from the Applicants. Upon review of such additional information, or at the request of the Appellants or any statutory party, the Board reserves the right to re-open the hearing for cross-examination and Board questions on the additional information provided.

A. Appellants' Objections Regarding Criteria 1 and 8

The Board concludes, in part based on the Appellant's Objection Memo, that there may be an increase in noise levels over those submitted in evidence at certain points along the adjoining property owners' boundary lines. The Board notes that such increases may be the direct result of Applicants having altered the shooting locations from those identified on the site visit protocol ordered by the Chair in his Prehearing Conference Report and Order. Thus, the Board will require further information from the Applicants.

With respect to the noise impacts under criterion 1, the Board concludes that it is unlikely that any limited increases in noise impacts at the Project boundaries which may be caused by placing shooting stations nearer to those boundaries, would approach the level of noise which could cause adverse health impacts such as hearing loss. Notwithstanding, the Board declines to rule, as a matter of law, that the Applicants have met their burden with respect to criterion 1. The determination of the extent of noise impacts resulting from the re-location of firing stations has relevance under both criteria 1 and 8. Therefore, the Board declines to make an affirmative finding under criterion 1 until it reviews the supplemental information requested of the Applicants.

Having determined not to make partial findings on criterion 1, as allowed under EBR 2 1, the Board nonetheless advises the parties that its primary concern regarding the revised site plan and the resulting effects on the Board's assessment of noise impacts is under criterion 8. The Board concludes that under either the noise testing which was actually conducted, or that which would be conducted pursuant to the revised site plan, the Project will constitute an adverse effect on aesthetics. The Board now seeks further information to determine whether that effect is undue. As set forth in the Panel's Recommended Decision, the test for whether a project's adverse impact is undue consists of three independent inquiries. They are as follows:

1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

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

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

Re: Quechee Lakes Corn, Applications #3W041 l-EB and #3 W0439-EB, Findings of Fact, Conclusions of Law, and Order at 19-20 (Jan. 13, 1986). If the Board were to reach an affirmative finding on any one of these three questions, the Board could either deny the Project a permit, or fashion suitable conditions such that the Project, as approved, would comply with criterion 8.

In order to more adequately assess compliance with criterion 8, the Board must have a more comprehensive description of the shooting locations, a better understanding of the Project's operation, as it relates to movement and variation of the firing stations' locations from time to time, as well as a reasonable assurance that the noise resulting

from the Project (if permitted) more closely approximates the noise data which were gathered from the site visit test results. Specifically, the Board requires the Applicants to submit a scaled site plan ("Scaled Site Plan") that is at least as large as that which was filed by the Appellants as Exhibit A-25. Indeed, the Board maintains that A-25 is an excellent model for the Applicants to draw from.

The Board notes that the information which is included on Exhibit A-25 should also appear on the Applicants' Scaled Site Plan; namely, the shooting direction and the full range of allowable angles of fire, the shotfall zones, the physical features of the site including Baker Brook, the wetland, the sand pit area, the tower sites, the Project boundaries, and any distinctive topographic features which could guide the Board's analysis. The Board requests that in addition to the above-noted features, the Scaled Site Plan shall include a perimeter buffer zone ("Perimeter Zone") around the entire Project which shall be free of shotgun shooting stations. This Perimeter Zone should be at least 200 feet in width. In addition to serving as mitigation, this requirement will ensure that the noise from the Project (if permitted) more nearly reflects the noise data upon which the Board assessed compliance with criteria 1 and 8.

B. Appellants' Objections Regarding Criterion 10

The Board concludes that several issues are not sufficiently addressed to affirmatively demonstrate compliance with the Town Plan. Although none of these relates to noise, the Board expects the submission of a Scaled Site Plan to resolve certain of the Board's unanswered questions.

The first is with respect to the deposition of lead into the Baker Brook. The Board is uncertain of the magnitude of lead deposition into the Brook and believes that an accurate Scaled Site Plan with depictions of the various shotfall zones will more clearly demonstrate where deposition may occur. With the benefit of the Scaled Site Plan, the Board will be able to reach its conclusions in this regard with more certainty.

Another area in which the Board has expressed concern with the Panel's Recommended Decision is with regard to the marking of the Project boundaries. The Board requests that the Project boundaries be clearly delineated on the Scaled Site Plan. In addition, should the Board issue a permit, the Board will require that the actual Project boundaries be marked with adequate warning to those who may be approaching or entering the Project tract.

C. Applicants' Objections Regarding Dates of Operation

Condition 6 of Land Use Permit Amendment #5W0743-2 (Revised) states the

following with regard to the dates of operation for commercial shooting:

November 15 to April 15 - No commercial shooting.

This provision of the permit was not appealed by the Applicants. Likewise, Applicants did not cross-appeal on that or any other issue once the instant appeal was filed by the Appellants. Revised Permit Condition 6 is beyond the scope of the present appeal, it is a final decision of the District Commission, and should a permit be issued to the Applicants, Condition 6 is binding on them. The Board finds no merit in either the written or oral arguments of the Applicants regarding the request for extended hours of operation. Accordingly, the Board declines to address the issue further.

IV. ORDER

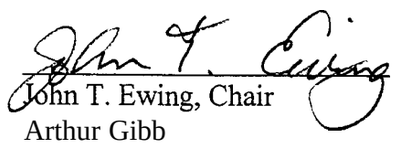
(1) Pursuant to the Board's authority under EBR 21, the Applicants are hereby ordered to file **not later than November 1, 1996** a Scaled Site Plan that conforms with the description thereof set forth in Section III.A. of this Memorandum of Decision. Applicants shall distribute 8% x 11 copies of the Scaled Site Plan to each party identified on the attached certificate of service. Such copies shall be exact duplicates of the original except in size. Thus, color copies shall be provided if necessary.

(2) The Board hereby provides to each party other than the Applicants thirty days from the date the Scaled Site Plan is filed to respond with rebuttal testimony and/or exhibits. The Appellants may also file a request, not later than ten days from the date on which the Scaled Site Plan is filed, for an evidentiary hearing. If such a hearing is convened, it will be limited in scope to those issues presented by the Scaled Site Plan and Appellants shall have an opportunity at such hearing to cross examine the Applicants and any witness who sponsors or participates in the preparation of the Scaled Site Plan.

(3) The Board will supplement this Order with a subsequent notice of hearing date, time, and location should the Appellants request a hearing, or should the Board on its own motion consider a hearing to be necessary.

Dated at Montpelier, Vermont this 30th day of September, 1996.

ENVIRONMENTAL BOARD



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