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

Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks
Land Use Permit Amendment Application #5W0743-3-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

i. Introduction

This appeal was brought by David and Nancy Brooks, and Wendell and Janice Brooks (collectively, Permittees) from Land Use Permit #5W0743-3 (Dash 3 Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Dash 3 Decision) issued by the District 5 Environmental Commission (Commission) for certain changes to a shooting range known as the Bull's Eye Sporting Center on a 35-acre tract of land owned by Wendell and Janice Brooks in Orange, Vermont (Project).

I. Procedural Summary

On June 23, 2000, the Board issued its Revocation Decision, finding that the Permittees had violated Land Use Permit 5W0743-2-EB (Altered)(Dash 2 Permit), and revoking that permit subject to an opportunity to cure the violations. *Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-2-EB (Altered) (Revocation), Findings of Fact, Conclusions of Law, and Order (June 23, 2000). Among other things, the Revocation Decision required that any permit issued to cure the violation relating to tree cutting include a no-shooting zone in the north and west of the Project tract, and gave the Commission discretion to delineate the no-shooting zone. *Id.* at 18.

Pursuant to the Revocation Decision, the Permittees filed an amendment application with the Commission. The Commission issued the Dash 3 Permit and the Dash 3 Decision on July 5, 2001.

On August 3, 2001, the Permittees appealed the Dash 3 Permit and the Dash 3 Decision to the Board. On August 17, 2001, George Wild, Jr. filed a Notice of Cross-Appeal.

On September 10, 2001, a prehearing conference was held.

On September 12, 2001, a Prehearing Conference Report and Order was issued, which among other things identified preliminary issues and the merits issue on appeal.

On November 14, 2001, the Board deliberated on the preliminary issues, and issued a Memorandum of Decision on November 29, 2001, which, among other things, set a schedule for sound testing.

On April 1, 2002, George Wild, Jr., a party to this appeal, filed a Request to Change Sound Test Date, seeking to modify the Board's November 29, 2001

Memorandum of Decision and allow him to conduct sound testing on April 29 or 30 or May 2 or 3, 2002. The Chair issued a Chair's Preliminary Ruling granting this request on April 3, 2002.

On June 19, 2002, after the sound tests had been completed, the Chair issued a Scheduling Order setting this matter for hearing.

On August 6, 2002, the parties requested a continuance to enter into mediation. This request was granted by the Chair in a Continuance Order issued on August 19, 2002. The parties were not successful in resolving issues through mediation, and on October 19, 2002, the Chair issued a Scheduling Order setting this matter for hearing, using filing dates and the hearing date suggested by the parties.

On February 10, 2003, Acting Chair Jean Richardson convened a prehearing conference to discuss the hearing schedule and other issues. The Acting Chair also ruled on the parties' evidentiary objections, as set forth below.

On February 12, 2003, the Board convened a public hearing in this matter, Acting Chair Jean Richardson presiding. The Board conducted a site visit, admitted exhibits, and heard testimony from the parties. The Board commenced deliberations immediately after the hearing. The Board also deliberated on February 19, 2003, and March 19, 2003.

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

II. Evidentiary Rulings

No party objected to the evidentiary rulings issued by the Acting Chair, so they are final. These rulings are set forth below.

The Vermont Rules of Evidence (VRE) are generally applicable in administrative proceedings, through the Administrative Procedures Act (APA). The APA provides, in relevant part, that:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. . . .

3 V.S.A. § 810(1).

The Vermont Supreme Court recently stated that: "In fact, administrative bodies have greater latitude than courts in the nature of evidence that they may consider." *In re White*, 172 Vt. 335, 348 (2002)(citing 3 V.S.A. § 810(1); *In re Quechee Lakes Corp.*, 154 Vt. 543, 552, 580 A.2d 957, 962 (1990)).

A. Permittees' Objections

Permittees object to prefiled testimony of James Cowan, Ex. GW1, claiming that "evidence that shotgun blasts are loud, intrusive, offensive and even shocking" is irrelevant. This objection was denied because the evidence is relevant to the Board's review under Criterion 8. The Board can give this evidence the weight to which it is entitled.

Permittees object to prefiled rebuttal testimony of Stephen Twombly, Ex. GW16, and his appraisal documents, Ex. GW17 and GW18, on the grounds that the value of Mr. Wild's property is irrelevant and does not rebut any of Permittees' evidence. This objection was granted because this evidence fails to rebut any of the Permittees' direct evidence, and because the type of relief sought is beyond that which is available in an Act 250 proceeding.

Permittees object to prefiled testimony of Raymond Letourneau, Ex. GW10, and the daily cash ledger spreadsheet to which it refers, Ex. GW11, on the grounds that evidence of the number of shooters at the range is irrelevant, and on the grounds that the ledger is based on incorrect assumptions. This objection was denied because this evidence is relevant, and any faulty assumption can be rebutted and/or challenged in cross-examination. The Board can give it the weight to which it is entitled.

Permittees object to prefiled rebuttal testimony of George Wild, Jr., Ex. GW14, regarding property values, specifically, questions and answers 9 and 10, as irrelevant and because it does not rebut anything Permittees have prefiled. This objection was granted for the reasons stated above.

B. Objections of George Wild, Jr., and the Town of Orange (Opponents)

Opponents object to prefiled testimony and exhibits of Jon P. Wilkinson (P3-P5), on the grounds that it fails the test for scientific evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This is an administrative proceeding, not a court of law. "Administrative tribunals can base their decisions on a broader, not narrower, range of evidence than courts can." *In re Quechee Lakes Corp.*, 159 Vt. 543, 552 (1990)(citing *In re Central Vermont Public Service Corp.,* 141 Vt. 284, 292 (1982)). Opponents cite no law in support of their claim that "[t]hese flaws render [this] testimony and exhibits inadmissible even under the

relaxed standard normally applied by the Board under 3 V.S.A. § 10(1)." (Opponents' "Daubert Motion," at 6.) Any flaws in this evidence can be addressed in rebuttal evidence and on cross-examination, and the Board will give this evidence the weight to which it is entitled. This objection is denied.

Opponents object to David Brooks' direct and rebuttal testimony, and exhibits, as follows:

1. Ex. P1, page 1, line 29 - page 2, line 3, regarding changes proposed by Permittees, and expert's testimony that noise did not increase as a result of their violation (cutting trees in the buffer). Opponents claim this is irrelevant because the issue in this matter is whether the shooting range complies with Criterion 8. This objection is denied because this evidence is relevant in this proceeding concerning an opportunity to cure.
2. Ex. P1, page 2, lines 17-22. Opponents argue that this testimony is irrelevant, hearsay, and that the witness is not qualified to offer opinion on sources of noise and noise reduction. This objection is denied because this evidence is relevant, this witness is not testifying as an expert, and the Board can base its decisions on a broader range of evidence than a court can.
3. Ex. P7, page 1, lines 26-32. Opponents object to this testimony as speculation, unreliable, and irrelevant. This testimony directly rebuts the evidence Opponents prefiled concerning the number of shots fired at the Project (namely, testimony of Raymond Letourneau, and Mr. Letourneau's chart). The fact that there are no supporting business records does not render this testimony unreliable. No statute or rule requires that Permittees produce business records to support testimony. Mr. Brooks has personal knowledge of his own business and should be permitted to testify. This objection is denied.

Opponents object to Jon Wilkinson's prefiled direct testimony (Ex. P3) and exhibit (Ex. P4) as irrelevant, on the grounds that Mr. Wilkinson failed to offer an opinion on whether the Project complies with Criterion 8. This does not render the testimony and exhibits irrelevant. As set forth above, the subject-matter of Mr. Wilkinson's evidence is relevant. This objection is denied.

Opponents object that David Adams's Prefiled Testimony, Ex. P5, as hearsay, and as irrelevant for failure to include an opinion on Criterion 8. As stated above, this does not render the testimony irrelevant. However, since Mr. Adams did not testify, this prefiled evidence is excluded as hearsay. Also, prefiled testimony cannot be admitted where the witness is not available for cross examination. EBR 17(D)(2).

Opponents object to the prefiled testimony of William E. deVos (Ex. P6) on grounds that he is not qualified to offer an opinion on noise, and that his testimony is

irrelevant. As set forth above, testimony on noise and trees is not irrelevant, but Permittees have failed to establish that Mr. deVos has any qualification to offer an expert opinion on noise. No resume was attached to Mr. deVos's testimony, and his testimony would be that he is an arborist. This objection is granted.

III. Issue

The issue was "tentatively identified" in the Prehearing Conference Report and Order as: "[w]hether the Project complies with 10 V.S.A. § 6086(a)(8)(scenic or natural beauty of the area, aesthetics, and rare and irreplaceable natural areas) with respect to noise." No party objected to the issue so framed. However, the amendment application on appeal concerns only the scope and extent of the no-shooting zone required in the Board's Revocation Order to correct the logging violation. Framing the issue more broadly in the Prehearing Conference Report and Order cannot confer jurisdiction on the Board to review the entire Project for compliance with Criterion 8. It is the cure which is at issue.

IV. Findings of Fact

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

1. All findings from the Revocation Decision are incorporated herein.

2. On July 21, 2000, Permittees filed an amendment application with the Commission to cure the violations found in the Revocation Decision. In relevant part Permittees proposed a 400-foot vegetated "no-shooting zone" on the north and west borders of the Project tract to be maintained for 10 years.

3. With their application, Permittees filed a revised map showing 19 shooting stations, including two in the pit area, and none in the proposed buffer zone. A copy of the application, including a copy of a portion of the map have been submitted into evidence as Exhibit P2. The map submitted with Exhibit P2 is smaller than the map submitted with the original application, and does not show the scale or legend, but the P2 map is essentially identical to the map submitted in 1996.

4. Before the Board, Permittees propose the following changes to their amendment application, to mitigate noise from the Project:

    a. No commercial use on Tuesdays.
    b. No shooting on Wednesdays from 10:00 a.m. - 2:00 p.m.

c. No shooting every other Thursday.
d. No shooting for four Saturdays per year.
e. Require shooters to use 2.75 dram loads rather than 3.00 dram loads.
f. No use of shooting stations C12 and C13, located in the pit area.

5. Permittees' proposal to eliminate the two shooting stations in the "pit" area, former stations C12 and C13, would leave 17 shooting stations.

6. Permittees also propose to align all 17 stations "so that the shooter is generally shooting towards the center of the tract."

7. This realignment of the shooting stations is proposed to address the issue of shotfall landing outside the Project tract, which is an effect of Permittees' failure to install swing stops at shooting stations, and to mitigate noise.

8. When a gun is fired, the noise travels in all directions, but the loudest noise occurs in front of the firing gun, not behind or to the side.

9. Baker Brook crosses the Project tract just south of the center, running from the west to the east, as shown on the map attached to Exhibit P2. There are shooting stations to the north and south of the Baker Brook.

10. Because Permittees intend to redirect the shooting stations, the shotfall zone would include the Baker Brook and shot could land in the water.

11. Sound pressure levels are designated on a decibel scale, and the A-weighted decibel scale has been accepted to address human sensitivity to sounds made up of different frequencies, or pitches.

12. An increase of ten decibels corresponds to a doubling in perceived loudness.

13. A 100-foot barrier of very dense trees and vegetation relatively close to the shooting station will reduce noise from shooting by approximately 10 decibels (dBA).

14. Wood is a better noise buffer than leaves and shrubs alone.

15. Distance is a more effective buffer for sound than vegetation. For example, sound decreases by approximately 6 dBA every doubling of distance from the sound source beginning at least 100 feet away.

16. Several different gauge shotguns are regularly used at the Bull's Eye range. Shooters often use 12-gauge shotguns in competitions at the range, and in practicing at the range for competitions elsewhere.

17. On March 26, 2002, Permittees' expert, Jon Wilkinson, conducted sound tests at the Project site in snowy conditions, to replicate the 1996 sound tests from the original permit proceeding. Snow attenuates sound. The standards for acousticians published by the American National Standards Institute (ANSI), standards advise against conducting sound tests in snowy conditions.

18. The 1996 sound tests from the original permit proceeding were conducted in snowy and windy conditions. The ANSI standards also advise against conducting sound tests in windy conditions because wind interferes with sound.

19. Wind velocity and direction can make up to a 30dBA difference in noise levels, depending on distance from the source.

20. Mr. Wild's expert, James Cowan, conducted sound tests on May 7, 2002. The conditions were neither snowy nor windy when these tests were conducted, and the tests were conducted using the same firing and monitoring protocol and stations as Mr. Wilkinson used on March 26, 2002.

21. The shots fired from stations in the pit area emitted the loudest noise as heard by neighbors.

22. The permits governing the Project have limited operations to April 15 through November 15 of each year.

23. There may be 1200-2600 gunshots fired sporadically during a day of shooting at the Project.

24. Reducing shot from 3.0 to 2.75 dram loads will reduce noise slightly.

V. Conclusions of Law

A. Revocation Decision

Revocation proceedings are governed by EBR 38, which requires in relevant part that the Board state the nature of the violation and state "the steps necessary for its correction or elimination. These terms may include conditions, including the posting of a bond or payments to an escrow account, to assure compliance with the Board's order." EBR 38(A)(3).

In the Revocation Decision the Board concluded that the Permittees had violated the Dash 2 Permit by logging in a vegetated buffer and ruled that the Permittees should have an opportunity to cure this violation. *See, Re: Bull's Eye Sporting Center*, #5W0743-2-EB (Altered)(Revocation), Findings of Fact,

Conclusions of Law, and Order, at 18-19 (Jun. 23, 2000).[1] The Board ordered that the cure for the logging violation must consist of a "no-shooting" zone in the north and west of the project tract.[2]

With respect to steps necessary to correct the logging violation, the Board stated in its Revocation Decision that:

> The cure that the Board contemplates in this case is not . . . a wholesale cessation of activities throughout the Project tract. However, any cure that is permitted by the Commission must prohibit shooting or the use of firearms in the areas along the western and northern boundaries of the Project tract until such time as the forest growth is equivalent (in terms of sound attenuation) to the growth that existed prior to any cutting which occurred in 1996 – 1998, or a period of ten years, whichever last occurs. How far into the Project this "no-shooting zone" should extend is left to the Commission's discretion.

Bull's Eye Sporting Center, Findings, Conclusions and Order at 18. Thus, the Board ordered in its Revocation Decision that the cure consist of a temporary no-shooting zone in the north and west of the Project site, and left the exact confines of that zone to the Commission's discretion.

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[1] In its Revocation Decision the Board found a second violation, failure to install shooting station stop-posts or swing stops to limit shooting angles and keep shotfall in a certain range. *Id.* at 18-19. On this part of the cure the Commission deferred decision until 6 months before the temporary no-shooting zone provision ended, and required that Permittees file a new amendment application at that time. This part of the Commission's decision was not appealed.

[2] Revocation Decision, at 18-19. More specifically:

> Any permit amendment issued by the Commission shall include a prohibition against the use of shooting stations for firearms in the north and west areas of the Project tract until such time as the forest growth is equivalent (in terms of sound attenuation) to the growth that existed prior to any cutting which occurred in 1996 – 1998, or a period of ten years from the date of this decision, whichever is greater. The precise size, placement, and description of this "no-shooting zone" are left to the Commission's discretion.

Id. at 22.

Permittees' amendment application (Ex. P2), proposed in relevant part to leave a 400-foot vegetated no-shooting zone along the north and west boundaries of the Project for a period of ten years. It is this amendment application which is on appeal.

B. Cure for Logging Violation

The Board revoked the Permit because Permittees had violated both the Permit and Board rules by logging in a vegetated buffer. The Revocation Decision did, however, provide an opportunity to cure. Specifically, it required that a no-shooting zone be designated at the north and west of the Project tract, and left the scope and extent of that no-shooting zone to the Commission's discretion.

Factors relevant to determining an appropriate remedy in a revocation proceeding include:

a. Whether the permittee is knowledgeable about the Act 250 process;
b. Whether the violations were substantial, and how long they continued;
c. Whether the violations caused or had the potential to cause significant harm in terms of damage to structures, the environment, and public facilities, as well as to disrupt the life of the community;
d. Whether the permittee benefitted financially from the violations; and
e. Whether the violations continued, even after neighbors and the town protested, until legal proceedings were formally commenced before the Board and in the courts.

Re: Crushed Rock, Inc., #1R0489-EB & #1R0489-1-EB (Revocation), Findings of Fact, Conclusions of Law, and Order, at 13 (Oct. 17, 1986), *vacated and remanded on other grounds, In re Crushed Rock, Inc.*, 150 Vt. 613 (1988).

On the first factor, the Permittees have been through the Act 250 process at least twice before the revocation proceeding was initiated. In the Revocation Decision the Board found that Permittees had logged between 2/3 and 3/4 of the trees whereas normal thinning would involve logging between 1/3 and 1/4 of the trees, that Permittees logged at least eleven truckloads of logs and numerous loads of firewood, and that Permittees cut down at least 28,890 board feet of logs and pulp. (Revocation Decision at 8.) The logging in question was substantial and continued for several years, from 1996 through 1999. The violation severely undermined the ability of the buffer to attenuate sound, as the Board concluded in the Revocation Decision. Also, it is clear that sound from the Project has disrupted life in the community, although it is not as clear how much of this noise is directly attributable to the violation. Permittees sold the logs for money, so there was at least some financial gain involved. *See,* Revocation Decision at 9 ("six truckloads of spruce/fir and mixed hardwoods would yield an average return of $5000.00"). On the last factor, there is no indication that the logging violation continued after any complaint.

Permittees have proposed the following measures to correct the logging violation by reducing noise:

1. 400-foot vegetated no-shooting zone along north and west Project boundaries, to last for 10 years
2. No commercial use on Tuesdays
3. No shooting on Wednesdays from 10:00 a.m. - 2:00 p.m.
4. No shooting every other Thursday
5. No shooting for four Saturdays per year
6. Require shooters to use 2.75 dram loads rather than 3.00 dram loads
7. Eliminate shooting stations C12 and C13, located in the pit area

The Board concludes that Permittees' proposals concerning limitations on hours and days of operation, reduction from 3.00 to 2.75 dram loads, and elimination of shooting stations in the pit area, are reasonable to address the noise issue and part of an appropriate cure considering the factors set forth above. But they are not enough. The no-shooting buffer logged by Permittees must be restored, improved and maintained. Considering the factors relevant to fashioning a cure in a revocation proceeding, the Board concludes that it is appropriate to require that a 400-foot vegetated no-shooting zone be maintained in perpetuity with no logging or shooting. Any permit issued by the Commission after deciding the question of shooting stops and redirected shooting stations must include such a mitigating condition, as well as the other conditions approved by the Board above.

George Wild, Jr. proposes three mitigation options[3] for Permittees:

1. Enclose the shooting range.
2. Make the entire Project tract a "no-shooting zone."
3. Pay Mr. Wild $80,000 to compensate him for lost property value and his costs in this case.

The Town of Orange supports the first two proposals. Enclosure and making the entire Project a "no-shooting zone" would mitigate noise, but would be overbroad in terms of a cure, since the violation at issue consists of logging in vegetated buffers along the north and west borders of the Project tract. With respect to the third, neither compensatory damages for lost property value nor costs are available in the Act 250 process. None of these proposals is an appropriate cure for the violation in question.

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[3] As stated herein, the Board is considering the cure for Permittees' violation, not whether the entire Project complies with Criterion 8 with respect to noise.

Permittees also propose to redirect the seventeen remaining shooting stations toward the center of the Project tract, to address Permittees' failure to install swing stops at shooting stations and the resulting shotfall issue. This issue is beyond the scope of this appeal. Even if the Board were to expand the scope of this appeal pursuant to EBR 40(E) to include the shooting station swing stops violation, it would be unable to rule on this proposal because it must first be reviewed by the Commission. The Board can review minor changes to an application made after an appeal is filed, but cannot review changes which involve additional land, potential new parties or implicate criteria other than those on appeal. *Re: Pittsford Enterprises, LLC,* #1R0877-EB, Findings of Fact, Conclusions of Law, and Order at 26-27 (Dec. 31, 2002); *Re: Realty Resources Chartered and Bradford Housing Associates*, #3R0678-EB, Memorandum of Decision (Feb. 17, 1994)(citing *In re Juster Associates*, 136 Vt. 577 (1977); *Re: Bernard and Suzanne Carrier*, #7R0639-EB, Memorandum of Decision (Sept. 28, 1989)); *see also, Re: Windsor Improvement Corporation,* #2S0455-EB, Findings of Fact, Conclusions of Law, and Order (March 27, 1980)(remand is warranted where changes were not reviewed by the commission which introduce new impacts on criteria not at issue before the Board).

Redirecting shooting stations toward the center of the Project tract may result in shotfall landing in the Baker Brook, which runs through the Project tract. This implicates Criterion 1, an issue not on appeal before the Board. It also raises safety concerns.

In the Board decision to remand the *Windsor Improvement Corporation* matter, the Board stated that remand was necessary in such cases because:

> . . . If the Board were to permit partial review on appeal of a substantially different project from that reviewed by the District Commission, the purposes of the Act [250] could well be undercut. This could occur where an alteration is proposed in order to avoid a negative finding on a particular criterion that is before the Board, if that alteration has a negative impact under one or more criteria that are not before the Board on appeal. Unless the amended application is returned to the District Commission, neither the Board nor the Commission would have the opportunity to review the project under all of the criteria of the act.

Windsor Improvement Corporation, #2S0455-EB, Findings, Conclusions, and Order at 3; *see also, In re Taft Corners Associates*, 160 Vt. 583, 591 (1993)(citing *In re Juster Associates*, 136 Vt. 577, 581 (1978)(Board has no authority to decide issues that were not ruled upon by the District Commission because "[i]nitial consideration of a land use proposal is a function assigned by the Legislature to the District Commission.").

Moreover, as noted in the Board's MOD, when the Commission examines the cure for Permittees' failure to install shooting stops, "the question of angles of fire must be addressed [and,] depending on the configuration and placement of the shooting stations, a review under other Criteria will likely have to occur." (MOD at 7.) In fact, the proposal to reorient the shooting stations permeates the entire Project, so the Commission must review this under all ten Act 250 criteria. *See, Re: Ronald E. Tucker*, Declaratory Ruling #165, Findings of Fact, Conclusions of Law, and Order at 7 (Feb. 27, 1985), *aff'd*, *In re R.E. Tucker, Inc.*, 149 Vt. 551, 553 (1988). Of course, should Permittees opt to install the swing stops and keep the remaining shooting stations as originally permitted, this would cure the violation without requiring a hearing on all criteria.[4] The Board again notes that Permittees have not submitted a complete map showing the proposed redirection of the remaining shooting stations and shotfall zones for each. This is something Permittees must file with the Commission as part of the cure for the shooting station violation.

C. Criterion 8 - Noise

As the Board noted in the Revocation Decision, the vegetated buffer played a major role in the Board's positive conclusion under Criterion 8 in the February 1997 permit decision.[5] The Revocation Decision found that the Board decided in February 1997 that: "retaining a densely vegetated tract also

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[4] The hearing in that case would be on whether the remaining shooting stations were constructed and oriented as permitted in 1997, with swing stops to limit firing angles to 30E as required by Condition 8 of Land Use Permit 5W0743-2-EB (Altered) issued May 8, 1997.

[5] The Board's Revocation Decision is a part of the record in this matter, and remains the law of the case. The law of the case doctrine holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Morriseau v. Fayette*, 164 Vt. 358, 364, 670 A.2d 820, 824 (1995)(quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 2177, 100 L.Ed.2d 811 (1988)). The Vermont Supreme Court has noted that an adjudicator may depart from the law of the case "in a proper case." *Morriseau*, 164 Vt. at 364, 670 A.2d at 824 (quoting *State v. Cain*, 126 Vt. 463, 469-70, 236 A.2d 501, 505 (1967), and citing *Converse v. Town of Charleston*, 158 Vt. 166, 169, 605 A.2d 535, 537 (1992); *Perkins v. Vermont Hydro-Electric Corp*., 106 Vt. 367, 415, 177 A. 631, 653 (1934)); *see also, Coty v. Ramsey Associates, Inc.*, 154 Vt. 168, 171 (1990)("if all questions are to be regarded as still open for discussion and revision in the same cause, there would be no end to the litigation until the ability of the parties or the ingenuity of their counsel were exhausted"). The Board finds no reason to revisit issues decided in the Revocation Decision.

contributes to noise mitigation at the property boundaries. The presence of this vegetation partially shields both the visual and audible elements of the Project." Revocation Decision, at 5 (quoting February 1997 Decision at 17-18). As set forth below, the Board concludes that the cure as set forth herein addresses the noise concerns caused by the violation and complies with Criterion 8.

To determine whether a project complies with Criterion 8 (aesthetics), the Board applies a two-part test. The first question is whether the project will have an adverse effect on aesthetics or natural or scenic beauty. *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985)(cited in *Re: Barre Granite Quarries, LLC and William and Margaret Dyott,* #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 78 (Dec. 8, 2000); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996)). If there is no adverse effect, the inquiry ends. If there is an adverse effect, the second question is whether that adverse effect is undue. *Quechee Lakes,* Findings, Conclusions and Order at 17-20 (cited in *Barre Granite*, Findings, Conclusions, and Order at 79; *Hand,* Findings, Conclusions and Order at 24).

1. Adverse Effect

To determine whether a project will have an adverse effect under Criterion 8, the Board generally examines whether the project will harmonize with, or "fit" the context within which it will be located. If a project "fits" its context, it will not have an adverse effect. *Re: Talon Hill Gun Club and John Swinington*, #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (June 7, 1995)(quoted in *Re: Josiah E. Lupton*, #3W0819 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 22 (May 18, 2001)); *see also, Re: McDonald's Corp., Rutland, Vermont*, #1R0477-5-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Dec. 7, 2000)(citing *Hand*, Findings, Conclusions and Order, at 25).

In noise cases the question is whether the noise produced by the project is out of character with its setting. *Re: Hannaford Brothers Co. and Southland Enterprises, Inc.,* #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order (Altered), at 15-16 (Nov. 27, 2002)(citing *Re: Barre Granite Quarries, LLC and William and Margaret Dyott,* #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 79-80 (Dec. 8, 2000); *Charles and Barbara Bickford,* #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 33 (May 22, 1995); *John and Marion Gross,* #5W1198-EB, Findings of Fact, Conclusions of Law and Order at 10 (April 27, 1995); *R.J. Colton Company, Inc.,* #9A0082-1R-2-EB, Findings of Fact, Conclusions of Law, and Order at 11 (January 14, 1982). This is a fact-specific determination, which considers the type of noise that the project will generate and the neighboring land uses.

Board precedent has long considered that different types of noises must be treated differently, for instance, "[s]harp, intermittent or high frequency noises must be judged differently from low frequency continuous noises." *Hannaford*, Findings, Conclusions and Order (Altered) at 18. With regard to shooting ranges the Board has stated that:

> The impact or quality of noise is not entirely reflected by decibel rating. The degree of noise annoyance must also consider the duration and intermittency of noise. Impulse noises, such as gunshots, are often judged to be "noisier" or more unwanted than non-impulsive noises have the same total integrated energy.

Re: Bull's Eye Sporting Center et al., #5W0743-2-EB, Findings of Fact, Conclusions of Law, and Order at 17 (Feb. 27, 1997)*; see also, Re: Black River Valley Rod & Gun Club,* Findings, Conclusions and Order at 19; *Re: Talon Hill Gun Club*, Findings, Conclusions and Order at 9 ("The Station Changes will generate an irregularly occurring, annoying, popping sound.").

In this case, the permanent no-shooting zone and limitations on operations of the shooting range will have a positive aesthetic impact, because they will reduce noise. Therefore, there is no adverse aesthetic impact and the cure ordered herein complies with Criterion 8 with respect to noise.

2. Undue Impact

Even if there were an adverse aesthetic impact, the Board would not conclude that it is undue. An adverse aesthetic effect is undue if the Board reaches any of the following conclusions:

a. The project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area;

b. The applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings; or

c. The project offends the sensibilities of the average person, is offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area.

Re: Home Depot USA, Inc., Ann Juster and Homer and Ruth Sweet, #1R0048-12-EB, Findings of Fact, Conclusions of Law, and Order at 31 (Aug. 20, 2001)(citations omitted). There is no clear, written community standard on aesthetics in evidence in this case, and the permanent no-shooting zone and limits on operations proposed by Permittees certainly improve the harmony of the Project with its surroundings. Moreover, this cure is not shocking or offensive.

Mr. Wild and the Town of Orange contend that the noise from the Project is shocking and offensive. However, the question here concerns the cure for Permittees' violation (logging in the vegetated buffer). The Board lacks jurisdiction to determine whether the Project merits a permit under Criterion 8, as the decision on that issue is final. The appropriate time for opponents to raise those issues was during the original permit proceeding. *Re: Synergy Gas Corporation*, #9A0204-EB (Revocation), Memorandum of Decision, at 4 (Jul. 31, 1995). Furthermore, as the Board held in the November 29, 2001 Memorandum of Decision in this matter, the violation of cutting in the vegetated buffer in the north and west of the Project tract does not permeate the entire Project such that complete review is required. *See, Re: Ronald E. Tucker*, Declaratory Ruling #165, Findings of Fact, Conclusions of Law, and Order at 7 (Feb. 27, 1985), *aff'd*, *In re R.E. Tucker, Inc.*, 149 Vt. 551, 553 (1988).

The opportunity to cure, as provided herein, complies with Criterion 8.

VI. Order

1. This matter is REMANDED to the District 5 Environmental Commission to determine a cure for Permittees' failure to install swing stops on shooting stations, based on an amendment application to be submitted by Permittees as provided below. Consistent with this decision, the Commission shall review Permittees' proposal on all ten Act 250 criteria unless Permittees propose that the remaining shooting stations comply with Condition 8 of Land Use Permit 5W0743-2-EB (Altered) issued May 8, 1997.

2. Any permit issued by the Commission shall require:

    a. A 400-foot vegetated no-shooting zone along north and west Project boundaries, in which no discharge of weapons or logging shall be allowed in perpetuity. This provision shall not apply to private hunting.
    b. No commercial use of the Project on Tuesdays.
    c. No shooting on Wednesdays from 10:00 a.m. - 2:00 p.m.
    d. No shooting every other Thursday.
    e. No shooting for four Saturdays per year.
    f. That shooters shall use a maximum of 2.75 dram loads.
    g. Elimination of shooting stations C12 and C13, and any other shooting station located in the pit area.

3. Permittees shall submit a complete amendment application, including a scaled map showing all shooting stations and shotfall zones for each, within 60 days of the date upon which this decision becomes final.

4. Within one week after the above-described amendment application and map are filed with the Commission, Permittees shall file a letter with the Board certifying that the application and map were filed with the Commission in accordance with this decision.

DATED at Montpelier, Vermont this 4th day of April, 2003.

/s/Jean Richardson
Jean Richardson, Acting Chair
Rebecca Day
George Holland
Samuel Lloyd
Patricia Nowak
Alice Olenick
Patricia Moulton Powden
Richard C. Pembroke, Sr.*

* CONCURRENCE of Board Member Richard C. Pembroke, Sr.

I concur in the majority decision, but have the following reservations. In my opinion, the magnitude of this Project is excessive for such a small tract of land. The large amount of shooting, this close to neighboring homes, creates a lot of noise and raises significant safety concerns. The Board heard evidence that the original sound tests were flawed, and I question whether the Project should have received a permit in the first place. However, as stated in the majority decision, the merits of the original permit with respect to noise are not before the Board. Likewise, the safety of the Project is beyond the scope of this appeal. Nevertheless, I am concerned that this shooting range poses a potential safety risk to its patrons and neighbors.