

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

RE: Pathway Ministries, Ltd. and Charles L. Rubner  
Land Use Permit Application #5W1336-EB

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

This proceeding concerns Land Use Permit #5W1336 authorizing the construction of improvements and operation of a summer outdoor camp for up to 45 adolescent campers located off the intersection of Town Highway 64 and Worcester Road in the Town of Calais, Vermont ("Project").

As explained below, the Environmental Board ("Board") concludes that the Project complies with all criteria on appeal. Accordingly, the Board issues Land Use Permit #5W1336-EB ("Board Permit").

**I. PROCEDURAL SUMMARY**

On August 5, 1999 the District #6 Environmental Commission ("Commission") on behalf of District #5 Environmental Commission, issued Land Use Permit # 5W1336 ("Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Decision") to Pathways<sup>1</sup> Ministries, Ltd. and Charles L. Rubner ("Permittees") authorizing the Project.

On September 3, 1999, the Friends of Curtis Pond ("FOCP"), Eleanor Ott and Noreen Bryan filed a motion to alter the Permit.

On September 30, 1999, the Commission issued an Altered Land Use Permit # 5W1336 ("Altered Permit") and a Response to Motion to Alter and Order. The Permit and the Altered Permit shall be collectively referred to as the "Commission's Permits". The Decision and the Response to Motion to Alter and Order shall be collectively referred to as the "Commission's Decisions".

On October 28, 1999, pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rule ("EBR") 40, FOCP filed an appeal with the Board from the Altered Permit, Decision and Response to Motion to Alter

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<sup>1</sup>The Permittees used the name Pathway Ministries, Ltd. in their application. However, the District Commission referred to Pathway Ministries, Ltd. as Pathways Ministries, Ltd.

and Order alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a) (1) (F) (shorelines), 5 (traffic), 8 (aesthetics), 9(K) (public investments), and 10 (local and regional plans). ("Criteria 1(F), 5, 8, 9(K) and 10"). FOCP also appealed the Commission's decision denying it party status as to Criterion 10 (local and regional plans).

On December 2, 1999, Board Chair Harding convened a prehearing conference.

On December 3, 1999, Chair Harding issued a Prehearing Conference Report and Order which is incorporated herein.

On April 27, 2000, prior to the hearing scheduled for May 3, 2000, Permittees and FOCP submitted Joint Proposed Findings of Fact, and Conclusions of Law, and Order as well as a proposed Amended Land Use Permit.

On May 1, 2000, Chair Harding issued a Chair's Preliminary Ruling canceling the hearing due to the proposed settlement between Permittees and FOCP.

On May 5, 2000, the Chair issued a Memorandum allowing all parties to submit written memoranda responding to the Proposed Amended Permit and the Joint Proposed Findings of Fact, Conclusions of Law, and Order. No parties filed memoranda.

On May 17, 2000, the Board deliberated and declared the record complete.

## **II. Issues on Appeal**

As stated in the Prehearing Conference Report and Order, and subsequent Memorandum of Decision, the issues in this appeal are as follows:

1. Whether, pursuant to 10 V.S.A. § 6086(a)(1)(F), the dock proposed to be constructed in the "narrows" area of Curtis Pond must of necessity be located in that area of the Pond and whether the construction and use of the dock will,

insofar as possible and reasonable in light of its purpose: (i) retain the shoreline and the waters in their natural condition, (ii) allow continued access to the waters and the recreational opportunities provided by the waters, (iii) retain or provide vegetation which will screen the Project from the waters, and (iv) stabilize the bank from erosion, as necessary, with vegetation cover.

2. Whether, pursuant to 10 V.S.A. § 6086(a)(5), the motor vehicle traffic from the Project will cause unreasonable congestion or unsafe conditions with respect to use of Worcester Road and the County Road in Maple Corners in the vicinity of the public swimming area and whether the use of Curtis Pond in the "narrows" area where the dock is proposed will cause unreasonable congestion or unsafe conditions with respect to use of the pond.
3. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.
4. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K), the Project will unnecessarily or unreasonably endanger the public investment in the Worcester Road and the County Road in Maple Corners and the public swimming area or materially jeopardize or interfere with the function or safety of or the public's use or enjoyment of or access to Worcester Road and the County Road in Maple Corners and the public swimming area, and whether the Project will endanger the public investment in Curtis Pond or materially jeopardize or interfere with the function or safety of or the public's use or enjoyment of or access to Curtis Pond.
5. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the Project is in conformance with the Calais Town Plan and the Central Vermont Regional Plan.

**III. FINDINGS OF FACT<sup>2</sup>**

1. The Commission's Permit and Decision authorized Permittees to construct and operate the Project on the land identified in Book 34, Pages 315-326, of the land records of Calais, Vermont ("Project Tract"). The Project Tract is 219 acres in size. The Project is located off of the intersection of Town Highway 64 and Worcester Road in Calais. Mr. Rubner's personal residence is located on the Project Tract.
2. FOCP is a Vermont non-profit corporation and group of 50 people living on or near Curtis Pond. Of this group, 22 have residences on Curtis Pond. Most of the other members live in Maple Corner in residences near Curtis Pond. FOCP is a party to this proceeding and is the only party which has appealed the Commission Decisions to the Board.
3. The Project is located in the Maple Corner section of the Town of Calais. Maple Corner is one of the rural residential centers of the Town of Calais. Approximately 100 residents live in the part of Maple Corner near Curtis Pond, that is, people along Worcester Road which is adjacent to the pond, and along North County Road, which runs parallel to the east side of the pond but not directly adjacent it.
4. The Project's operation will consist of up to 12 one-week camp sessions during the months of June through September each year. The Project will emphasize outdoor activities and religious studies. The exterior site of the Project will be closed for the season on or before October 7 of each year. The Project will be staffed by up to 10 personnel.
5. Permanent improvements are limited to interior renovations to an existing barn, installation of a subsurface wastewater disposal system, construction of a short driveway and small parking lot, and

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<sup>2</sup>For the most part, the Board adopted the Joint Proposed Findings of Fact, Conclusions of Law, and Order. However, the Board made some modifications in order to be consistent with the Board's recent prior decisions.

construction of a basketball court and sand volleyball court.

6. Seasonal and non-permanent improvements include the siting of eight tent platforms, erection of a ropes course apparatus, and installation of a short walkway and wooden dock on the west shore of Curtis Pond.
7. The renovated barn will be used principally for dining, meetings, recreation, bathing, office space, a nurse's station, and staff sleeping quarters.
8. The tent sites are located in the woods approximately 600 feet from the Worcester Road and 1,200 feet from Curtis Pond. The sites consist of three "pod" areas. Two of the areas (one for boys, one for girls) will consist of three platform tents, each tent for use by up to eight campers, a fire pit, and a portable toilet. The other area will consist of two smaller platform tents for up to four counselors each, a fire pit and a portable toilet. The tents are seven feet high.
9. Northwest of the tent sites will be a driveway and small parking area for up to eight vehicles. The driveway will proceed northerly from Worcester Road and consist of improvements to an existing woods road. A three foot by five foot sign affixed to two four inch by four inch posts will be erected at the driveway, and this area will be improved with landscape plantings. The parking area is not visible from the public road.
10. The Project includes a dock for swimming and canoeing ("Dock"). The Dock's dimensions are as set forth in the Commission Permits, except that the width of the Dock's "T" may be up to 10 feet.
11. The Dock will be located on the Project Tract's shoreline frontage in the southern end of Curtis Pond, at the existing water entry at the end of the existing footpath. The approximate location of the Dock and footpath are shown on Joint Exhibit 1 which the parties stipulated as introduced into evidence and which is attached hereto. The Project Tract has approximately 4,000 feet of frontage on Curtis Pond running from south to north along the west side of Curtis Pond. The Project's swimming and canoeing activities will take place from the Dock. No motorized vessels will be used by

campers, except that canoes may be ferried to and from the Fish and Game Access using motorized craft.

12. Curtis Pond is at its widest at its southern end, so the addition of campers and canoes from the Dock will not interfere with the use of Curtis Pond. Access to the Dock will be via an existing footpath, improved where necessary to meet the standards of the State Lands Hiking Trails Manual published by the Vermont Department of Forests, Parks and Recreation. There will be no portalet on the access trail to the Dock, because of the proximity of indoor facilities.
13. The Dock's location at the southern end is consistent with the southern end of Curtis Pond being the location for the Town of Calais public swimming area and the State of Vermont fishing access area.
14. The Project Tract shall retain a 100 foot natural vegetated buffer zone between the mean water level of Curtis Pond and the limit of any earth disturbance.
15. There shall be no disturbance within the 100 foot buffer zone to the trees, shrubs, groundwater or duff layer and no construction, earth moving activities or groundwater removal, except to improve the existing footpath within and through the buffer zone.
16. Clearing of vegetation for the footpaths to Curtis Pond shall involve only trees less than four inches in diameter, with no stump or root removal. Waterbars and/or turnouts will be used along the path to divert any concentrated runoff into the woods.
17. The number of campers allowed at the Dock, the number of swimmers, and the number of canoes to be used shall be determined by the Permittees but, in any event, will all be subject to appropriate waterfront safety standards of the American Camping Association, and be at levels which are consistent with the overall maximum number of 45 campers (including counselors) at each session and 10 staff.
18. The Permittees will oversee the Dock's use and make sure that

campers are respectful of Curtis Pond. The Permittees may install buoys up to 200 feet from the shore for safety reasons, and the buoys may remain in place throughout the Project's camp season.

19. Organized canoeing instruction may take place up to two sessions per week of approximately three hours each. Additional casual canoeing may occur in the late afternoon and early evening. Swimming from the Dock may take place at the times that swimming is allowed from the Town of Calais public swimming area. The Town of Calais public swimming area currently closes at 9:30 p.m.
20. The Project's operation typically consists of a weekly program of arrival on Sunday, four off-site days, one on-site challenge day, and departure on Saturday, as described in the Operational Management Policy ("OMP") of Pathway Ministries, Ltd. The Permittees filed the OMP with the Commission as Exhibit No. 58, and the OMP has been incorporated into the Permit pursuant to condition #20. Similarly, the parties stipulated that the OMP will be introduced as evidence and incorporated into the Board Permit as a guide to the Project's typical operation, subject to the Board Permit also allowing swimming and canoeing as provided for herein.
21. The Project will be operated in conformance with the Accreditation Standards for Camp Programs and Services published by the American Camping Association.
22. All trails on the Project Tract will be maintained in conformance with the Vermont Department of Forests, Parks and Recreation "State Lands Hiking Trail Manual."
23. Minimum corner sight distances at the access of the Project's entrance drive are 355' in both directions. Minimum stopping sight distance is 200 feet. The Permittees shall clear all limbs and brush in the right of way necessary to ensure this distance in both directions. The posted speed limit is 30 mph. The estimated traffic from the Project will occur primarily by passenger vans. The Project will generate approximately 20 trip ends to and from the Project's barn facility each day and approximately 18 trip ends to

and from the Project's parking area each day. This traffic is relatively minor compared to the current uses of Worcester Road and County Road, which includes substantial heavy truck traffic.

24. The Project will generate traffic only during the camp season. The Project has received its local access permit from the Town of Calais.
25. Project vehicles shall not park on Worcester Road adjacent to the Town public swimming area.
26. The Project Tract is situated on the western shoreline of Curtis Pond. This rural area includes pastoral open space, woodlands, a ridge and scenic views.
27. It is possible that, because of the geography in the Project Tract area, certain activities of the Project may be audible in the area. In rural residential communities such as Maple Corner, where the workday may begin at or before 6 a.m., nearby activities must be designed and permitted to respect the need for reasonable peace and quiet.
28. The Project shall be operated according to the following quiet hours schedule. Lights out for campers shall be at 11:00 P.M. every night. On Thursday, Friday and Saturday evenings, outdoor recreation games, singing and other activities may occur until 11:00 P.M., and may include a bonfire in the meadow or near the "farm pond" located on the Project Tract. During Sunday through Wednesday evenings:
  - A. There shall be no outdoor recreation or games after 9:30 P.M.
  - B. Discussion groups, hymn singing and acoustic guitar (without amplification) shall be permitted until 11:00 P.M. provided that such activities are not consistently audible and disturbing to the quiet residential character of the neighborhood. This standard applies to these activities regardless of where they take place.



- C. After 9:30 P.M. the activities listed in subsection B, above, shall be located only in the barn or at woodland sites, which may include campsites, provided the standard in subsection B, above, is met.
29. The Narrows is an area of Curtis Pond used by people for modes of quiet recreation. There are no commercial or public activity centers located in the Narrows or the northern end of Curtis Pond. Mr. Rubner may install, and use at any time, a dock for his personal use (friends and family) in this area, north of the island ("the Northern Dock"), at or near the location authorized for the Project's dock in the Commission Permits, of dimensions no larger than 200 square feet and encroaching no more than 25 feet into the pond, which Mr. Rubner may use at his discretion at any time. Campers and counselors shall not use the Northern Dock. Project staff (other than year-round residents of the Project Tract and their families) shall not use the Northern Dock, provided that they are allowed to use the Dock as guests and friends of Mr. Rubner. Pathway Ministries, Ltd. consents to the use of the Dock by Project staff.
30. The Calais Town Plan ("Town Plan") states, in part, as follows:
- Land Use Goals (p. 17)**
5. Wetlands and Water Resources:
- a. Protect wetlands so as to preserve their ability to moderate floods, reduce water pollution, provide essential habitat for fish and other wildlife.
- b. Protect lakes, streams, flood plains and groundwater to insure potable water supplies as well as good fishing and safe swimming now and in the future.
7. Scenic Areas: Protect the rural character of Calais through identification of and protection of scenic areas including open spaces, ridge lines and the working landscape.

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**Land Use Districts and Overlay Districts (p. 21)**

**Resource Recreation District:** The purpose of the Resource Recreation District is to protect the natural resource value of those lands which are essentially undeveloped, are important because they contain wildlife and wildlife habitat, could have high potential for commercial forestry use or other extractive enterprise, are unsuitable for commercial, industrial or agricultural development, or are necessary to protect ground water and aquifers, a fragile ecology or significant natural recreational or scenic resources. Low density residential development of no more than one family unit per 10 acres will be permitted. Limited outdoor recreation, conservation and forestry uses will also be permitted. No additional class 2 or 3 highways will be built in this district. Those areas over 1,500 foot elevation will require 25 acres per family unit.

**Shore Land District:** Our lakes and ponds are valuable and irreplaceable resources. In the water resources section of the natural resources element of this plan, one of the goals is to preserve the water quality of the town's open waters sufficient for swimming and the support of aquatic life. To this end, the Shore Land District is designed to reduce pollution and over-development through safeguards such as set back and vegetative buffer requirements and measures to minimize soil compaction and the creation of impermeable surfaces. This district consists of an 800 foot distance from the shoreline (normal mean watermark) of all lakes or ponds 20 acres or more (Bliss Pond, Curtis Pond, Nelson Pond, North Montpelier Pond, Mirror Lake or #10 Pond, and Woodbury Lake). The distance may vary by one hundred feet or so in either direction in order to utilize landmarks such as roads or ridges to clearly delineate the district. Residential development of no more than one unit per three acres will be permitted in the district.

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### **Natural Resources (p. 24-25)**

#### **Current Conditions**

**Lakes, Ponds and Streams:** Some fifteen ponds of five or more acres are contained within, or partly within, the Town. The largest are Bliss Pond (46 ), Curtis Pond (103 acres), Mirror Lake (77 acres), Nelson Pond (131 acres), and North Montpelier Pond (53 acres). Many of the ponds are accessible to the public and provide recreational opportunities in the form of swimming, fishing, canoeing, boating, and wildlife observation. Recognizing their importance, Calais has adopted shore land zoning to protect the aesthetic and ecological qualities of its lakes and ponds.

#### **Natural Areas**

**Natural areas:** A natural area is an area of land or water that retains or has reestablished its natural character and retains unusual or significant flora, fauna, geological features or similar features of scientific interest. Such places, often remote, quiet and beautiful, are of great, but unquantifiable value to local residents and visitors. There are currently five natural areas identified by the state Agency of Natural Resources (ANR) within Calais which are known to contain rare, remnant or unique species of flora and/or fauna. These areas are:

Chickering Bog	Little Mud Pond	Curtis Pond
Watson Pond	East Hill	

### **Recreational Resources (p. 35)**

Calais also owns lands which may be used for hiking, swimming access and other low impact recreation. These include our three town forests, town trails, the Curtis Pond swimming area and our town roads which many use for biking, jogging, horseback riding and walking. The State of Vermont provides public access to area lakes and ponds in the form of boat ramps on Curtis Pond, Number 10 Pond, Nelson Pond and Woodbury Lake.

31. The current version of the Central Vermont Regional Plan ("Regional Plan") was adopted on August 11, 1998. The Regional Plan provides, in part, as follows:

Recreation is a basic psychological need; not a frivolous luxury. To recreate (literally, to "make new") is to refresh minds, bodies, and spirits. The ability to recreate enhances the quality of our lives immeasurably. Where the opportunity for recreation is denied, history and science have shown, the spirit withers.

32. The Regional Plan provides in the "Outdoor Recreation Goal" and implementing policies set forth on pages 78 and 79, that "significant water related natural areas should be maintained and protected."

### III. CONCLUSIONS OF LAW

#### A. De Novo Review and Burden of Proof

When there is an appeal from a District Commission determination, the Board provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). The Board rules provide for the de novo review of a District Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the District Commission in this matter. Rather, it must regard the decision and exhibits below as evidence to be offered by the parties to the Board.

The term "burden of proof" refers to two separate burdens: the burden of going forward and producing evidence, and the burden of persuasion. See 10 V.S.A. § 6088; In re: Denio, 158 VT. 230, 236 (1992); Re: Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan. 27, 1987). 10 V.S.A. § 6088 operates in conjunction with the requirement that before a permit can be issued, the Board must make the affirmative findings required under the 10 criteria. See 10 V.S.A. § 6086(a). Because the Board is limited to de novo review of the District Commission's decision, it must evaluate the parties' evidence based on certain rules governing the allocation of the burdens of production and persuasion.

The Permittees have the burden of production with respect to all criteria on appeal. Pratt's Propane, supra at 5. The Permittees also bear the burden of persuasion with respect to Criteria 1(F), 9(K), and 10. FOCF bears the burden of persuasion with respect to Criteria (5) and (8).

B. Settlement by the Parties

Before the Board can grant the parties' request to issue Findings of Fact, Conclusions of Law, and Order and a Permit based on Permittees' and FOCF's Joint Proposed Findings of Fact, Conclusions of Law, and Order and the proposed amended Permit, the Board must conclude that doing so will not harm the public interest. The Board and District Commissions are charged to protect and conserve the lands and environment of the state. 10 V.S.A. Ch 151. An administrative agency has discretion to reject a settlement if it would prejudice the public interest the agency is charged to protect. Cf., Re: Rockwell Park Associates and Bruce J. Levinsky, #5W0772-5-EB, Dismissal Order (Feb. 17, 1994); Re: H.A. Manosh Corp., Declaratory Ruling #247 (Dec. 13, 1991). The Board concludes that the Permit and the Findings of Fact and Conclusions of Law, and Order made herein will protect the public interest.

C. Criterion 1(F) - Shorelines

Criterion 1(F) provides as follows:

(F) Shorelines. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other criteria, the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision, and the development or subdivision will, insofar as possible and reasonable in light of its purpose: (i) retain the shoreline and the waters in their natural condition, (ii) allow continued access to the waters and the recreational opportunities provided by the waters, (iii) retain or provide vegetation which will screen the development or subdivision from the waters, and (iv) stabilize the bank from erosion, as necessary, with vegetation cover.

Under Criterion 1(F), the Board conducts a two-step inquiry. First, the Board determines whether the Project must of necessity be located on

a shoreline to fulfill the Project's purpose. If this is so, then the Board determines whether the Project will, insofar as possible and reasonable in light of its purpose, satisfy the four elements of Criterion 1(F). Re: Mill Lane Development Co., Inc. #2W0942-EB Findings of Fact, Conclusions of Law, and Order (December 19, 1999).

As defined in 10 V.S.A. § 6001(17), "shoreline" is "the land adjacent to the waters of lakes, ponds, reservoirs and rivers. Shorelines shall include the land between the high water mark and the mean low water mark of such surface waters".

The question of whether the project of necessity must be built along a shoreline is a factual question for the Board to consider. First, the Board must determine a project's purpose. Second, the Board must consider whether a project will satisfy its purpose. If a project will not satisfy its purpose, then the Board will state what it believes are reasonable alternatives to a project. See Re: Town of Barre, #5W1167-EB, Findings of Fact, Conclusions of Law, and Order at 16-18 (June 2, 1994).

The Project's purpose is to allow teenagers to enjoy the natural resource values of Vermont, including swimming and canoeing. The Project's inclusion of swimming and canoeing is a positive use of Curtis Pond as a natural resource. Swimming and canoeing require access to a body of water. The Project's purpose will be met with access to the southern end of Curtis Pond.

With regard to the four elements under Criterion 1(F), with the Dock located in the same general location as the Town of Calais public swimming area and the State of Vermont fishing access area, the Permittees have accomplished what is possible and reasonable with regard to the Dock's location. In re: McShinsky, 153 Vt. 586, 591 (1990) Criterion 1(F) requires that the Board make its own determination that a development needs to be located on the shoreline and that, considering the purpose of the development, "possible and reasonable" measures have been taken to protect the shoreline.

The Board concludes that locating the Dock in the southern end of Curtis Pond which already has substantial waterfront activity as detailed in the Findings of Fact, will maintain the natural condition of the shoreline

and the waters. In addition, the use of the Dock and the pathway leading to it will help maintain the natural condition of the shoreline.

The Dock will allow continued access to Curtis Pond and it has vegetation which helps screen the Project, and helps set the Dock within the overall shoreline context. For the same reasons, there will not be bank erosion due to the existing vegetation.

Accordingly, based on the Findings of Fact made herein, and in light of the Dock's purpose and location, the Board concludes that the Project complies with Criterion 1(F).

D. Criterion 5 - Vehicular Traffic & The Dock

Before issuing a permit, the Board must find that the Project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways . . . ." 10 V.S.A. § 6086(a)(5). A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created. 10 V.S.A. § 6087(b). Re: J. Philip Gerbode #6F0396R-EB-1, Findings of Fact, Conclusions of Law, and Order (January 19, 1992). The burden of proof is on FOCP under Criterion 5, but the Permittees must provide sufficient information on which the Board can make affirmative findings.

Originally, this appeal concerned the placement of the Dock in the Narrows portion of Curtis Pond, where congestion and unsafe conditions could have resulted. However, because the dock has been relocated to the southern end of Curtis Pond, and because the use of Mr. Rubner's dock, although located in the Narrows, will be limited to his family and friends, the Board concluded, based on the Findings of Fact, that no unreasonable congestion or unsafe conditions will be presented. The Board therefore concludes that the two docks will be in compliance with Criterion 5.

Because the Project will generate only minor traffic during the camp season and sight distances at the access will be sufficient with the clearing of brush and limbs outlined in the Findings of Fact, the Board also concludes that the Project's traffic complies with Criterion 5 such that no unreasonable congestion and unsafe conditions will result on the roads.

E. Criterion 8 - Scenic beauty, aesthetics, rare and irreplaceable natural areas

Before granting a permit, the Board must find that a proposed project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A. § 6086(a)(8). The burden of proof is on the opponents under Criterion 8, 10 V.S.A. § 6088(b), but the Permittees must provide sufficient information for the Board to make affirmative findings. See, e.g., Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Mar. 27, 1997) and cases cited therein.

The Board uses a two part test to determine whether a project satisfies Criterion 8. First, it determines whether the project will have an adverse effect under Criterion 8. Hand, supra; Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17-20 (Nov. 4, 1985). Second, it determines whether the adverse effect, if any, is undue. Hand, supra, at 24; Quechee Lakes, supra, at 17-20.

If a project will not have an adverse effect on aesthetics, then the Board does not need to conduct the second part of the Quechee analysis, and the project at issue therefore complies with Criterion 8. Re: Timothy and Mary Baker, #8B0506-WFP, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 10, 1996).

In determining whether a project will have an adverse effect on aesthetics, "[t]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space." Hand, supra at 25.

The Project is well designed and its operation will be subject to



conditions detailed in the Findings of Fact such as quiet hours and locating the Dock in the southern end of Curtis Pond. These conditions are in keeping with the quiet residential character of the neighborhood and help integrate the overall Project into its aesthetic environment.

Based on the Findings of Fact, and the incorporation of the above referenced operating conditions into the Board Permit, the Board concludes that the Project will not have an adverse effect on aesthetics. Because the Project will not have an adverse effect on aesthetics, the Board does not need to reach the question of whether an adverse effect is undue. Accordingly, the Project complies with Criterion 8.

F. Criterion 9(K) - Public investment

10 V.S.A. § 6086(a)(9)(K) provides that:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

The burden of proof to show that the proposed development will satisfy Criterion 9(K) is on the Permittees. 10 V.S.A. § 6088(a).

The Board conducts two separate inquiries under Criterion 9(K) with respect to governmental and public facilities. First, the Board examines whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency or safety of such facilities, or (b) the public's use or enjoyment of or access to such facilities. Re: Swain

Development Corp., #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).

The Board's reasons for making affirmative findings under criteria 1(F), 5, and 8 are also applicable to Criterion 9(K). Accordingly, based on the Findings of Fact, and as conditioned by the Board Permit, the Board concludes that the Project will not unnecessarily and unreasonably endanger the public investment in Curtis Pond and the Worcester Road, nor will the Project materially jeopardize and interfere with (a) the function, efficiency or safety of these public facilities, and (b) the public's use and enjoyment of and access to these facilities.

G. Criterion 10 - Town and Regional Plan

Under Criterion 10, before granting a permit, the Board must find that the Project is in conformance with any duly adopted local or regional plan. 10 V.S.A. § 6086(a)(10). The Permittees have both the burden of production and the burden of persuasion.

1. Town Plan

The Board's town plan analysis under Criterion 10 is conducted in accordance with In re: Molgano, 163 Vt. 25 (1994). The Molgano decision concerns the relationship of municipal plans and zoning by-laws under Criterion 10.

The Board first determines whether the town plan provisions at issue are specific or ambiguous policies or prohibitions. A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law and Order at 29 (August 19, 1996).

The Board has carefully reviewed the quoted portions of the Calais Town Plan which are included in the Findings of Fact. Overall, the quoted portions meet the test for evincing a specific policy. The Calais Town Plan makes careful choices as to what is, and what is not, appropriate

within the Shore Land District and Resource Recreation District.

As to the Resource Recreation District: the Board finds that this project complies with Criterion 10 because it promotes the purpose of the Resource Recreation District by protecting the natural resource values of these lands. The Board also finds that these lands are suitable for this type of commercial development because the intrinsic nature of the Project is compatible with the district's provision that "limited outdoor recreation... uses will also be permitted."

As to the Shoreline District: the Board finds that the Project meets the specific requirements stated therein and that it is also consistent with the goal of preserving water quality and meets setback and vegetative buffer requirements.

Accordingly, based on the Findings of Fact, the Project, as it will be conditioned by the Board Permit, is consistent with the purposes and requirements of the Shore Land District and Resource Recreation District and the Board therefore concludes that the Project is in conformance with the Calais Town Plan.

## 2. Central Vermont Regional Plan

The Board performs its analysis regarding regional plans consistent with Re: Nile and Julie Dupstadt and John and Debra Alden, Land Use Permit #4C1013 (Corrected)-EB, Findings of Fact, Conclusions of Law and Order at 44 (April 30, 1999). See In re: Green Peak Estates, 154 Vt. 363, 369-70 (1990)(Project was not in compliance with regional plan that contained a specific policy against the type of development at issue); In re: Molgano, 163 Vt. 25, 31 (1994)(Project was in compliance with broad and vague regional plan that had no specific prohibitions against type of development at issue). See also Re: Mark and Pauline Kiesel, 5W1270-EB, Findings of Fact, Conclusions of Law and Order (Altered) at 47 (August 7, 1998), appeal docketed, In re: Mark and Pauline Kiesel, No. 98-371 (filed Aug. 12. 1998); Re: The Mirkwood Group and Barry Randall, supra. These cases indicate that the Board is to apply specific policies contained in a regional plan and that an ambiguous provision is not such a policy. Duppstadt, supra.

For a regional plan's provisions to be deemed a specific policy, the

applicable provisions must meet the same Mirkwood test discussed supra. Like Molgano, the Regional Plan in this area is broad and vague and does not contain a specific policy against this type of development. Therefore, the Project is in conformance with the Regional Plan.

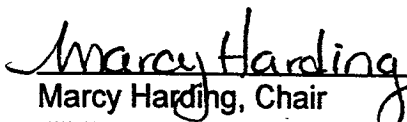
Furthermore, the Project is being designed to integrate into the overall patterns and uses of Curtis Pond and Maple Corners. The Project, as it will be conditioned by the Board Permit, will allow for positive recreation and enjoyment of nature without jeopardizing or interfering with the over all use of Curtis Pond. Accordingly, the Board concludes that the Project complies with Criterion 10.

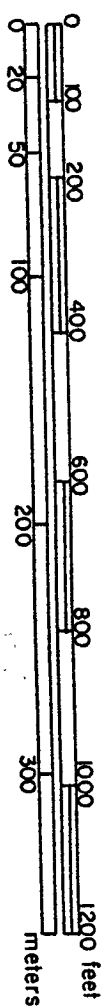
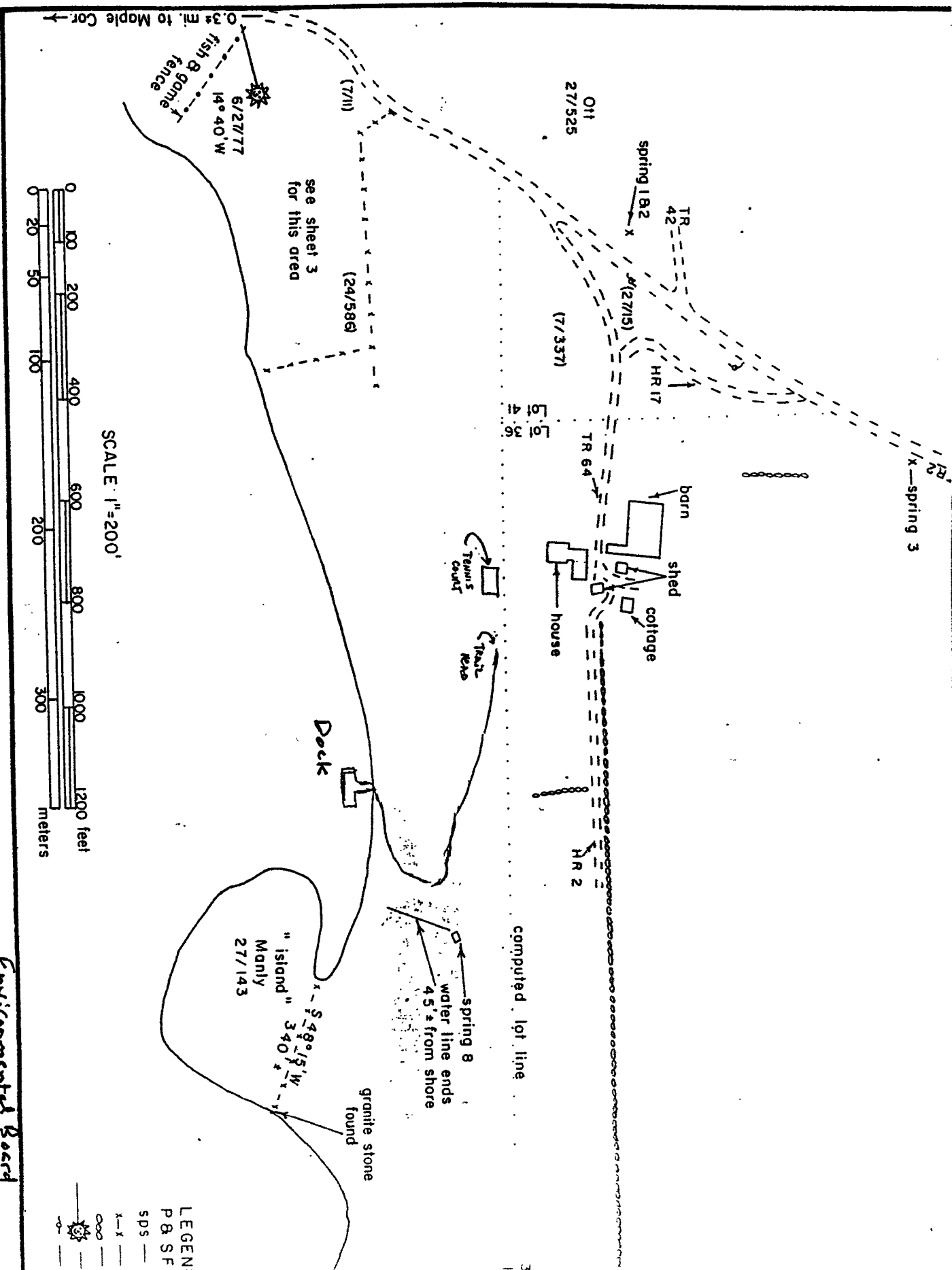
#### IV. ORDER

1. The Board concludes that, as conditioned by this Board Decision, the Project complies with 10 V.S.A. § 6086(a)(1)(F), (5), (8), (9)(K), and (10).
2. Land Use Permit #5W1336-EB is hereby issued.
3. Jurisdiction over the Project is returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont this 2nd day of June, 2000.

#### ENVIRONMENTAL BOARD

  
\_\_\_\_\_  
Marcy Harding, Chair  
Jill Broderick  
John Drake  
George Holland  
Sam Lloyd  
W. William Martinez  
Rebecca M. Nawrath  
Alice Olenick  
Donald Sargent



LEGEND:  
 P & SF —  
 SPS —  
 —X—  
 —○—  
 —○—

Environmental Board  
 Pathology Ministries  
 and Charles E. (over)  
 50th Exhibit

0.3+ mi. to Maple Cor

fish & game fence  
 6/27/77  
 14° 40' W

see sheet 3  
 for this area

Dock

"island"  
 Manly  
 27/143

granite stone  
 found

spring 8  
 water line ends  
 4.5' from shore

computed lot line

barn  
 shed  
 cottage  
 house

spring 1B2  
 TR 42

Oit  
 27/525

spring 3

5.6  
 2.6

TR 64

HR 17

M(27/15)

(7/337)

(24/586)

(7/11)

HR 2

Tennis court

Tennis Rens