

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

Re: Bernard and Suzanne Carrier
Land Use Permit #7R0639-EB (Reconsideration)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal filed by Bluffside Farms, Inc., and Richard and David Scott (collectively, "the Appellants") from Land Use Permit #7R0639 (Reconsideration), issued to Bernard and Suzanne Carrier ("the Applicants") pursuant to 10 V.S.A. §§ 6001-6092, authorizing the Permittees to create and develop a 3-lot residential subdivision while retaining the remainder of its property as undeveloped land. The central issue in this appeal is whether or not the deficiencies noted by the Board in Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 1990) concerning the Applicants' prior proposed 9-lot subdivision ("Project") have been corrected by their present Revised Reconsideration Application. The deficiencies expressly noted by the Board in its rejection of the Applicants' earlier proposal concerned Criteria 1(F) (shorelines), (4) (soil erosion), (8) (aesthetics and scenic and natural beauty), and 9(B) (primary agricultural soils). However, it appears from the text of the Board's decision that deficiencies with respect Criterion (2) (sufficient water supply) were also considered.

As explained below, the Environmental Board ("Board") concludes that the deficiencies identified by the Board in 1990 have been addressed by the Applicants and therefore Land Use Permit #7R0639-EB (Reconsideration) should be granted, thereby amending and supplementing the specific conditions set forth in Land Use Permit #7R0639.

I. BACKGROUND

The background to this proceeding extends back twelve years and centers upon a certain 10.58 acre of parcel of land located adjacent to Lake Memphremagog in Newport, Vermont ("the Parcel"). An exhaustive procedural history of the Applicants' attempts to secure approvals for the Parcel's subdivision and development through the end of 1995, and a discussion of the jurisdictional basis for Act 250 review of the Applicants' activities, is contained in Re: Bernard and Suzanne Carrier, Declaratory Ruling #246, Findings of Fact, Conclusions of Law, and Order (Dec. 7, 1995) and is incorporated by reference herein.

The procedural history since 1995 may be summarized as follows. On February 22, 1996, following the issuance of Declaratory Ruling #246, the Applicants filed with the District #7 Commission ("Commission") a request to re-open a hearing with respect to their Application for Reconsideration ("Reconsideration Application"). The Reconsideration Application had been filed in early 1991 and was intended to address and correct the deficiencies cited in the Board's

October 1990 decision. A hearing date had been scheduled for May 1991, but by mutual consent of the parties this hearing was recessed indefinitely to permit collateral litigation in Superior Court. The Applicants' February 1996 filing, in addition to requesting the re-opening of proceedings, contained a Revised Reconsideration Application ("Revised Reconsideration Application"). The Applicants offered to reduce the scope of the Project by proposing development of only Lots 7, 8, and 9 of their original subdivision proposal ("Phase I") and withholding request for approval of Lots 1-6 ("Phase II") until a later unspecified date with the aim of obtaining further guidance from the Board concerning the development potential of these lots in light of the 1990 decision.

The Commission conducted a hearing on the merits of the Revised Reconsideration Application on March 18, 1996 and completed deliberations on June 23, 1996. On July 5, 1996, the Commission issued Land Use Permit #7R0639 (Reconsideration) ("Reconsideration Permit"), with supporting Findings of Fact, Conclusions of Law and Order ("Decision"), and a related procedural Order addressing certain procedural objections ("Procedural Order"). The Reconsideration Permit specifically authorizes the Applicants to create the requested 3-lot subdivision (Lots 7-9) and to construct on these lots single family homes, related **infrastructure**, and an internal access road to serve the three lots and improve approximately 1,100 feet of Bigelow Bluff Road ("Reconsidered Project").

On August 5, 1996, the Appellants filed a Motion to Alter the Permit, Decision and Procedural Order ("Motion"). The Commission denied the Motion on August 29, 1996.

On September 30, 1996, the Appellants filed a Notice of Appeal in which they raised several procedural issues. On October 29, 1996, the Board's Chair, John T. Ewing, conducted a prehearing conference at which he directed the Applicants and the Appellants to each file memorandum of Law addressing these issue. The Appellants filed a Memorandum on Relevant Procedural Issues and Request for Relief ("Appellants' Memorandum") on November 13, 1996. On November 27, 1996, the Applicants filed a Memorandum Relative to Procedural Issues and Appellants' Request for Relief in response to the appellants Memorandum ("Applicants' Response") and a Request for Recusation. On January 22, 1997, the Board deliberated on the Appellants' Memorandum, the Applicants' Response and the Request for Recusation. On February 4, 1997, it issued a Memorandum of Decision, Statement of Issue and Order ("Board's Memorandum") disposing of all but the central issue in this appeal.

On February 10, 1997, the Appellants filed a Motion to Continue. The Applicants orally consented to the request and the Chair issued an Order establishing a schedule for evidentiary filings in this matter. The parties completed the filing of **prefiled** testimony and exhibits on April 10, 1997. The parties raised various evidentiary and procedural objections to each others filing: with the Appellant **filing** a Motion to Dismiss.

On April 28, 1997, the Chair conducted a second prehearing conference via teleconference at which time he addressed the parties evidentiary and procedural issues. His rulings were memorialized in a Chair's Memorandum of Decision and Order ("Chair's Memorandum") issued on April 30, 1997.

On May 14, 1997, the Board convened a de novo hearing on the merits of the Revised Reconsideration Application. This hearing was held at the City of Newport Council Chamber Room in Newport City, Vermont. The Appellants hand-delivered to the Board Objections to the Order of April 30, 1997 ("Objections to Chair's Memorandum"). The hearing was recessed and the Chair directed the parties to file proposed findings of fact and legal memoranda by May 28, 1997. On May 27, 1997, Appellants filed a Supplemental Motion to Dismiss ("Supplemental Motion to Dismiss"). The Applicants filed on May 28, 1997, a Memorandum Relative to Proposed Findings of Fact and Conclusions of Law and Appellants' Motion to Dismiss ("Applicants' Responsive Memorandum").

The Board deliberated on May 14, June 11, and August 13, 1997. On August 13, 1997, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent that any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983). Because the scope of review in this proceeding is narrow, the Board makes only such new findings with respect to the Act 250 criteria under appeal as are necessary to address the specific deficiencies identified in the review of the original Project and presently addressed in the Revised Reconsideration Application. Therefore, such affirmative findings as the Board and District Commission have made under other criteria are final and not appealable.

II. ISSUE

As framed in the Board's Memorandum of February 4, 1997, the issue on appeal is:

Whether or not the deficiencies noted by the Board in Re: Bernard and Suzanne Carrier #7R0639-EB, Findings of Fact, Conclusions of Law and Order (Oct. 5, 1990) have been corrected.

The Project design deficiencies identified by the Board its October 1990 decision were with respect to the following criteria: 1 (F) (shorelines), 4 (soil erosion), 8 (aesthetics and scenic and natural beauty), and 9(B) (primary agricultural soils). The Board was unable to make positive findings with respect to these criteria, as well as with respect to criterion 2 (sufficient water supply). The Board therefore concluded that a permit should be denied for the nine-lot

subdivision proposed by the Applicants. **Re: Bernard and Suzanne Carrier, #7R0639-EB,**
Findings of Fact Conclusions of Law, and Order (Oct. 5, 1990).

III. FINDINGS OF FACT

a. Description of the Project and Revised Project

1. The Revised Project involves a **10.58-acre** tract of land (“the Tract”), owned by the Applicants, and located on a bluff along the eastern shore of Lake Memphremagog (“the Lake”) in the City of Newport. Approximately 875 feet of shoreline forms the western property line, of which approximately 400 feet comprises wetland.
2. To the east and south of the Tract is the **Scotts’ Bluffside** Farms which contains large areas of forested land that adjoin the Tract. To the north of the site are a number of residences and other structures that are located in a wooded area so that they are largely screened from the Lake.
3. Until 1985, the Tract was forested with a plantation of red and white pine and oak trees, so that the general character of the Tract was similar to adjoining properties. However, in preparation for the development of the site, the Applicants cleared the site of trees and sold the lumber, buried stumps on the tract, stripped the topsoil, excavated 17,000 cubic yards of earth which was used as fill for the stump burial area, regraded the land into terraces for house sites, and excavated a road into the subdivision.
4. The Project originally proposed for the tract consisted of nine residential lots and the construction of improvements on approximately 1100 feet of Bigelow Bluff Road as well as the development of a 700 foot access road from the end of Bigelow Bluff Road to Lots 1-7. Lots 8 and 9 were to be served by driveways entering directly on Bigelow Bluff Road.
5. The Project also called for the construction of stairways from Lots 1, 2 and 3, down a steep bluff to the shoreline to provide access to the Lake.
6. Fire protection for the Project was to be provided by a lake water withdrawal system with a pipe running up the embankment to a dry hydrant.
7. The Project Application lacked information on erosion control measures, landscaping, and development impacts on primary and secondary agricultural soils at the Tract.

8. The Revised Project Application proposes two phases of development activity, but only Phase I activities related to development of the upland portion of the Tract are described in the application. Therefore, potential development of Lots 1-6 under Phase II of the Revised Project is not before the Board for its consideration.
 9. Under Phase I of the Revised Project, the Applicants seek approval for the creation, by subdivision, of three lots (Lots 7, 8, and 9), as those lots were platted and appear in documents submitted to the Board in Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact Conclusions of Law, and Order (Oct. 5, 1990). The Applicants also seek approval of construction of single-family houses on Lots 7, 8, and 9 and the provision of utilities to those house sites. The Applicants seek approval for the construction of improvements to **Biglow** Bluff Road and the construction of an internal access road and cul-de-sac to serve the residences in the subdivision. The Applicants further propose to establish a minimum building setback of 500 feet from the Lake shoreline, but plan to provide Lots 7, 8, and 9 with access to the Lake via a right-of-way between Lots 4 and 5, in lieu of the stairways proposed in the Project Application. The Applicants will establish a **50-foot** buffer zone around the wetland located on Lots 5 and 6. The Applicants have abandoned plans for installation of a lake water withdrawal system and requested approval in the Revised Project Application for the use of internal sprinkler systems to be installed in each of the three residences at the time of construction and to be served by municipal water piped to the subdivision. The Revised Project Application provides information on erosion control and tree and stump removal associated with proposed improvements to Bigelow Bluff Road, as well as a “Vegetative and Development Overview” plan. Finally, the Applicants have provided information regarding soils on the site and analysis concerning their agricultural potential in response to deficiencies noted by the Board in its 1990 decision.
 10. In all respects, the layout of each of the nine lots in the present Revised Project **Applica-**tion is the same as those proposed in submissions made to the Board with the original Project Application, with the exception that the Applicants have represented that under Phase I approval Lots 1-6 shall be considered an undeveloped “remainder” of the Tract.
- B. Criterion 1(F) (shorelines)
9. The Tract is located on the shoreline of the Lake. The intended purpose of Revised Project is lakeside housing. Lakeside housing must of necessity be shoreline development.
 10. Construction in 1985 resulted in the removal of most existing vegetation at the Tract with the exception of the wetland area and the immediate bank along the lakeshore. In the

twelve years since tree harvesting and site regrading, grass and low lying shrubs have become established on the graded terraces of Lots 1-6 and some of the trees planted by the Applicants along the lot lines have survived and grown to be approximately twelve feet tall.

11. Lots 1-4 have frontage on the shoreline of the Lake. Lots 5 and 6 have frontage on the wetland located along the shoreline.
12. Lots 1-6 are gently sloping and terraced. However, the bank that leads down to the Lake from Lots 1-4 is quite steep. The grade to the wetland and Lake shore **from** Lots 5 and 6 is more gradual and planted with an established ground cover grass and other vegetation.
13. The lakeside bank between Lots 1 and 4 is well vegetated with small trees and shrubs. However, the bank is very fragile and significant potential exists for erosion on the bank if the vegetative cover is disturbed. Natural erosion of the shoreline bank has occurred along this bank and is observable. This condition, however, could be exacerbated by the indiscriminate disturbance of existing vegetation by humans and pets. The Applicants have offered to place a fence at the top of the shoreline bank on Lots 1-4 to reduce the likelihood of such disturbance to the bank's vegetative cover.
14. No construction of housing is proposed on Lots 1-6 in Phase I of the Revised Project. The proposed house sites for Lots 7, 8, and 9 are on the upland portion of the Tract, located a minimum of 500 feet from the shoreline.
15. The Applicants have eliminated Project plans to provide access to the Lake from three stairways at Lots 1, 2 and 3. Instead, the homes to be constructed on Lots 7, 8, and 9 will be provided access via a right-of-way to a common area adjacent the wetland on Lot 5. The right-of-way will be located between Lots 4 and 5 and will **follow** an existing, moderately sloping, grassed access way. The elimination of the stairways will reduce the potential for soil erosion on the steep slope to the Lake.
16. The Applicants have abandoned plans to provide fire protection by withdrawing water **from** the Lake and pumping it through a pipe to a dry hydrant serving the subdivision. By eliminating the need to construct and maintain an intake pipe on the steep shoreline bank, concerns about erosion and resulting negative water quality impacts have been alleviated.
17. The shoreline wetland located on the Tract has not been mapped as part of the National Wetlands Inventory and therefore is not presumed to be a protected wetland under the Vermont Wetland Rules (VWR), although it has been designated as a regulated wetland

by the Army Corps of Engineers.

18. No development will occur **within** the wetland and no construction **will** occur within a fifty-foot buffer zone surrounding that wetland to be established by the Applicants. The right-of-way to the common access on the Lake will be located outside this buffer zone and the Applicants will impose restrictive covenants to prohibit lot owners from encroaching on the wetland and its buffer zone.

B. Criterion 2 (water supply)

19. The originally proposed lake water intake structure and pipeline intended to provide water sufficient for fire protection at the Tract was deficient in two respects: (i) construction and maintenance of the system would likely result in negative impacts to the shoreline; and (ii) there was inadequate protection against the system becoming frozen in cold weather.
20. The Revised Project eliminates in entirety the need for a Lake withdrawal system.
21. The Revised Project Application proposes the installation of internal sprinkler systems in each home constructed within the approved subdivision.
22. The municipal water system is adequate to serve the Revised Project and sprinkler systems.
23. The proposal to provide fire protection through the use of home sprinkler systems is an accepted method of fire protection in the City of Newport,
24. The Revised Project will continue to have access to water for fire protection from the Lake and the municipal fire hydrant located at the end of Bigelow Bluff Road.

D. Criterion soil erosion)

25. Findings of Fact under criterion 1 (F) are incorporated here by reference.
26. Natural revegetation on the Tract over the past twelve years, along with the seeding, mulching and limited replanting of vegetative cover by the Applicants, has stabilized soils at the Tract and erosion is limited to the area of the steep shoreline bank.
27. With the construction of improvements along Bigelow Bluff Road and the construction of

an internal access road and cul-de-sac, new erosion problems may emerge. The Applicants have proposed that with respect to the improvements to Bigelow Bluff Road, trees to be removed will be felled within the existing roadway. This method will minimize damage to standing trees. Since the existing road gradients are very low, the potential for scouring velocities to develop is minimal. Water will therefore follow the current sideline sheet drainage pattern. There will be little or no ditch/fill slopes. As an added precaution against erosion the Applicants will install **haybales** at 100 foot intervals along the road edges as necessary. These **haybales** will be maintained until such time that they new road surface is stable and consolidated. Seeding and mulching will be implemented as needed.

E. **Criterion 8 (aesthetics and scenic and natural beauty)**

28. Findings under criteria I(F) and (4) are incorporated here by reference.
29. A **500-foot** set back from the Lake shall apply to the siting of buildings on Lots **7, 8,** and 9.
30. Only minimal cutting of existing trees will be undertaken to establish home sites on Lots **7, 8,** and 9. There will be no clear-cutting of Lots **7, 8** and 9, nor will there be any in the future.
31. Under the Revised Project Application, the proposed house sites for Lots 7, 8, and 9 will be located farther back from the shoreline than most existing houses on neighboring parcels.
32. The Tract, while no longer possessing a mature stand of native evergreen and deciduous trees, has nonetheless become revegetated to a healthy stand of young trees and woody shrubs. The overall appearance of the property is a pasture spotted by native pine and oak trees. Additionally, a substantial screen of trees and brush presently covers the steep bank leading down to the water's edge on Lots 1-4.
33. Visually, the Bluffs area, comprised of the Tract and surrounding properties, is characterized by single-family lake-front homes set in a mature stand of white and red pines, hemlock and oaks trees. Shorefront property immediately adjacent to the Tract, especially to the north, contains many camp properties sited in close proximity to each other but well-screened from the Lake by mature trees.
34. The Applicant planted some trees on the Tract following **the** clearing in 1985. **Additional**

plantings of native species of trees on Lots 1-6 would continue to restore the Tract to a more natural setting and one more compatible with adjoining properties. Conditions imposed to require replanting of these lots with particular attention to that area closest to the lakeshore will effectively serve to mitigate the adverse effect created by the proposed subdivision, provided that there is no unauthorized cutting on Lots 1-6, now and in the future.

35. Tree cutting along Bigelow Bluff Road and open land of Bluffside Farms is detailed on the Applicants' documents, "Map of Bigelow Bluff Road" (Board Exhibit C-3) and "Vegetative and Development Overview" (Board Exhibit C-9).
 36. A total of 77 trees along Bigelow **Bluff** Road will be removed to improve this road. This represents an average of one tree for every 30 feet of road frontage on each side of the road on average.)
 37. The existing tree buffer between Bigelow Bluff Road and open land of Bluffside Farm land ranges in width between 12 feet and 190 feet along a **620-foot** border.
 38. Existing trees along the road also buffer westerly residences. The buffer width ranges in depth between 30 feet and 500 feet.
 39. Currently the road varies in width between 12 feet and 18 feet as it travels along the within its 31 foot wide corridor. The road will be widened an average of 5.5 feet on each side.
 40. The removal of trees along the road will not adversely alter the effective tree buffer between existing or proposed homes.
- F. **Criterion 9(B) (primary agricultural soils) and Criterion 9(C) (forest and secondary agricultural soils)**
41. Findings under criteria 1(F), (4), and (8) are incorporated here by reference.
 42. The Revised Project is located on Windsor and Colton soils that qualify as primary agricultural soils, except for the site's steep slopes and wetlands.
 43. Given the limitations of the site, the best use of these soils is for the growing of pine and hemlock trees, rather than for pasturage or other crops.

44. Orthophotos from 1995 show approximately 3.9 acres of open land on the Tract. While there has been selective cutting on other areas, these areas are not suitable for tillable farmland.
45. The forestry value received by the Applicants from the clearing of trees was **\$5,446.14**. The cost of clearing, stump removal, fertilizing, seeding and landscaping was **\$21,572.96**. The net cost was **\$4,134.00** per acre. Existing open farmland in the vicinity can be leased at an average annual rate of \$25 to \$75 per acre. Open farmland for farming purposes is estimated to cost between \$400 and **\$ 1,200** per acre.
46. One acre of the Tract consists of wetlands. Approximately 3.2 acres of the Tract have slopes well in excess of 15%. Another 6.4 acres contain slopes between 3% and 15%. Another 6.4 acres are further sliced and fragmented by the excessive slopes into five separate smaller areas of land.
47. The Applicant owns or controls no other nonforest or secondary agricultural soils which reasonably suited to the purposes.
48. Secondary agricultural soils must, by definition, be in such location, natural conditions, and ownership patterns capable of supporting or contributing to present or potential commercial forestry or commercial agriculture.

IV. CONCLUSIONS OF LAW

A. Scope of Review

Act 250 requires that a permit be obtained before commencing construction on a subdivision or development. 10 V.S.A. § 6081(a). When a permit is denied to an applicant, he or she may, within 6 months, apply for reconsideration of its application. 10 V.S.A. § 6087(c). The District Commission is charged with review of the application in the first instance, applying the standard of review set forth in EBR 3 1 (B)(2).

In an appeal from a Commission's decision with respect to a reconsideration request, the Board conducts a de novo hearing, applying EBR 3 1(B)(2) to those issues raised on appeal. Accordingly, the Board may, but need not necessarily, limit its scope of review to those aspects of deficiencies noted in the prior permit decision. However, EBR 3 1 (B)(2), states in relevant part:

The findings of the board or commission in the original permit proceeding shall be

entitled to a presumption of validity in the reconsideration proceeding, insofar as those findings are not affected by proposed modifications in the project. However, those presumptions may be rebutted by the district commission or by any party upon a showing that the circumstances of the application have changed, or upon a review of evidence not previously presented.

[1] In this proceeding, the Board has limited its de novo review to consideration of only those issues raised on appeal from the Reconsideration Permit and Decision issued by the Commission on July 5, 1996. However, in conducting this review, the Board has taken into consideration two factors which further affect the scope of its review.

[2] First, the Board has taken into consideration a change in circumstances. The Board reviewed the original Project Application for compliance with Act 250 criteria based upon the condition of the Tract prior to the Applicants' clearing and excavation activities. **Re: Bernard and Suzanne Carrier, #7R0639-EB**, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 1990). In evaluating whether the Applicants' Revised Reconsideration Application addresses the deficiencies identified by the Board in 1990, the Board has taken into consideration the state of the Tract as it appears today as a result of the regeneration of native plant species and the planting of trees and grass by the Applicants during the intervening twelve years.

[3] Second, the Board has reviewed only Phase I development described in the Revised Reconsideration Application. As noted previously, a Phase II development plan has not been submitted to the Board. Nevertheless, the Applicants seek guidance in this proceeding on how they might develop the lots nearest the shoreline and wetland, Lots 1-6, in preparation for the design and submission of a Phase II development plan.

The Board does not design projects for Applicants nor does it provide advisory opinions on what hypothetical elements of design would receive the Board's approval. It is incumbent upon an applicant seeking Act 250 approval to design its own project. **Re: Herbert and Patricia Clark**, Application #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 37 (April 3, 1997). Conversely, the Board does review specific proposals, supported by evidence. Thus, to the extent that the Applicants have asked the Board in this proceeding to consider Lots 1-6 as an undeveloped parcel in determining that Lots 7, 8 and 9 satisfy criteria I(F) and 8, the Board advises the Applicants that they may have severely limited their opportunities to request a subsequent amendment to authorize Phase II development of Lots 1-6. See **In re Stowe Club Highlands**, No. 95-341, slip op. at 5 (Vt. Nov. 8, 1996).

B. Motions to Dismiss

The Appellants have repeatedly asked the Board to dismiss with prejudice the Applicants' requests for reconsideration. The principal basis for the Appellants' motions has been that the Applicants have failed to make a prima facie case that they are entitled to a permit as evidenced by their filings both with the District Commission and the Board. The Chair's Memorandum issued April 30, 1997, denied Appellants' Motion to Dismiss, dated April 9 and 21, 1997, but allowed the Appellants to raise its objection again by motion at the close of the Applicants' case at the merits hearing. Chair's Memorandum at 4 (April 30, 1997). The Appellants objected to the Chair's April 30 order at the hearing on May 14, 1997. See Objections to Chair's Memorandum. Again, on May 27, 1997, the Appellants asked the Board for dismissal of the Applicants' Revised Reconsideration Application for lack of evidence on the curing of cited deficiencies.

[4] The Board has considered the Appellants' various filings and denies its Motion to Dismiss. In summary, the Board has determined that the Applicants have met their burden of proof under the respective criteria. The Board concludes that the Applicants, by redesigning their proposal so as to submit for the Board's approval only Phase I development, have **addressed** the major deficiencies identified by the Board in its 1990 decision as conditioned by the permit **ordered** pursuant to this decision. To the extent that the Applicants need to prepare and implement a more detailed revegetation plan for the Tract, the Board believes that the conditions contained in the Reconsideration Permit, as amended, should resolve any doubt concerning the Revised Project's compliance with applicable Act 250 criteria.

C. Act 250 Criteria

1. Criterion 1(F) (shorelines)

Criterion 1(F) requires that the Applicants demonstrate that 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.

[5] The Board has previously concluded that the purpose of the subdivision in this location was clearly for the landowners to enjoy the pleasures of living on a shoreline. Therefore, as a threshold matter, the Board concluded that the subdivision of necessity must be located on the shoreline to fulfill its purpose. Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Oct. 5, 1990). To the extent that development of Phase I of the Revised Project can be described as within the shoreline, the Board concludes there is no basis for altering its prior “necessity” determination in the present proceeding. See 10 V.S.A. § 6001(17) (“shoreline” defined); 10 V.S.A. §6086(a)(1)(F).

Accordingly, the Applicants must demonstrate that they meet the four subcriteria of criterion 1(F) “insofar as possible and reasonable.”

In the Project Application previously reviewed by the Board, the Applicants proposed to install for fire protection purposes a water intake structure in the Lake and to bury a water pipe line in a trench extending onto the shore using a backhoe. They also proposed to construct stairways for access to the water **from** Lots 1-3. Despite this major construction work proposed on a highly sensitive and **erodible** shoreline, the Applicants did not provide erosion control plans. Therefore, the Board could not conclude that the construction of the proposed water system would retain the shoreline and the waters in their natural condition insofar as possible and reasonable. Further, the Board concluded that the shoreline might be permanently altered as a result of construction and continuing maintenance of the stairways, and it noted that the Applicants had made no provision to prevent people or pets from climbing down the banks to the water from Lots 1-6. Finally, the Board concluded that it could not **find** that the subdivision proposal would provide stabilization of the steep bank from erosion with vegetative cover, as required by subcriterion iv. Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 11 - 12.

The Board observed that since an alternative means of access to the Lake was possible -- namely, the provision of an easement to the common access between Lots 4 and 5, the Applicants had not demonstrated that the shoreline could be retained in its natural condition insofar as possible and reasonable. Moreover, the Board noted that if it had issued a permit for the Project, it would have required installation of a fence on the bank parallel to the shoreline. Id. at 12.

[6] The Applicants have addressed the above-identified deficiencies in their Revised Project Application. They have abandoned the proposed system for water withdrawal from the Lake, substituting instead a plan to install individual sprinkler systems in the proposed homes, with water supplied **from** the municipal system. They also have eliminated plans for the construction of stairways **from** Lots 1-3. Instead, the Applicants have pursued the Board’s suggestion of an alternative access point to the Lake, by proposing a single right-of-way between Lots 4 and 5 across an area that is only moderately sloping, as opposed to steeply banked. Moreover, the

Applicants have indicated that they would install a fence along the top of the bank in the area of Lots 1-4 as an erosion control measure.

However, the Board in its previous decision found that because most of the trees had been removed from the Tract, the subdivision did not retain existing vegetation or provide new plantings which would result in adequate screening from the waters. The Board determined that neither the Applicants' planting plan nor a requirement in proposed covenants for lot owners to plant \$2,000 worth of vegetation would result in the necessary reforestation of the site to provide for such screening let alone return the Tract to its natural condition. Indeed, the Board concluded that the Tract was almost totally open to view from the lake and that it would take 15 to 25 years for the trees recently planted and proposed to be planted in accordance with the Applicants' planting plan to grow tall enough to provide any significant screening. Therefore, the Board concluded that the Applicants had not demonstrated that, insofar as possible and reasonable in light of its purpose, the subdivision would retain the waters in their natural condition (subcriterion I) or retain or provide vegetation which would screen the subdivision from the waters (subcriterion iii). **Id.** at 12-13.

The Applicants have proposed to address the above-noted deficiencies by not undertaking* development of Lots 1-6 under Phase I of the Revised Project. See **Stowe Club Highlands** discussion **infra** at 19. They also propose a minimum **500-foot** setback for the proposed houses, and a fifty-foot buffer around the shoreline wetland to assure its protection. In the twelve years since the clearing of the Tract, natural regeneration and growth of planted vegetation have occurred thereby addressing in large measure the Board's shoreline protection and aesthetic concerns under criteria 1 (F) and 8.

[7] Nevertheless, the Board concludes, as it did in 1990, that the cutting of trees along the shoreline and indeed throughout the Tract went well beyond what would have been permitted under Act 250. Although some of the trees planted by the Applicants, most notably in the area of the shoreline "remainder" parcel, have grown to roughly twelve feet in height, others have simply died. Indeed, the general character of Lots 1-6 remains open, grassed terraces with some immature white pine and other tree species planted in the vicinity of the lot lines. In the Board's opinion, the planting of additional trees and shrubs is required. These should be of essentially the same evergreen and deciduous species as were removed from the Tract in 1985, and they must be planted in sufficient density so as to return the shoreline to its natural condition and achieve the requisite screening of any proposed houses and related amenities **from** the Lake under criterion I(F). Additionally, as noted later in this decision, reforestation should be undertaken with a view toward achieving vegetative cover that is compatible with that existing on the surrounding parcels in satisfaction of the requirements of criterion 8.

Among the admitted exhibits proffered by the Applicants is a document entitled

“Vegetative and Development Overview,” dated January 22, 1996, and prepared by the Applicants’ representative in this proceeding. Board Exhibit C-9. This document is at best a sketch plan, indicating with hatch marks the approximate location of existing wooded or semi-wooded lands at the Tract and on surrounding properties. With respect to the shoreline lots, Lots 1-6, it indicates a narrow strip of existing woody vegetation on the steep shoreline bank and in the area of the wetland. It also shows the location of existing trees, natural and planted, which exist today in small clumps or as isolated specimens on Lots 1-4. However, this document is not a revegetation plan in that it does not indicate what trees and shrubs will be planted in the future on the Tract to address the deficiencies noted in the Board’s 1990 decision.

The Board finds Exhibit C-9 to be inadequate in responding to the Board’s concerns. The District Commission likewise found the Applicants’ submissions to be inadequate. Therefore, in its Reconsideration Decision and in Condition 12 of Permit #7R0639-Reconsideration, the Commission imposed the requirement that the Applicants submit a revegetation plan for its approval prior to the sale of the first lot. It also imposed Conditions 15 and 16, requiring that the Permittees assure through covenants that lot owners assume responsibility for, among other things, the “maintenance” of the revegetation plan and the protection of the shoreline wetland.

The Board has previously determined that a permit cannot be made conditional upon receipt and approval of a revised landscaping plan. 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 6 (Aug. 19, 1996). This is because before the Board may issue a permit, it must make affirmative findings with regard to the criteria on appeal. 10 V.S.A. § 6086(a). Evidence of compliance must be provided prior to the issuance of a permit. Re: Berlin Associates, #5W0584-9-EB, Memorandum of Decision at 6 (April 24, 1990).

Consequently, in order to reach a positive finding that the Applicants have addressed the deficiencies with respect to vegetative cover noted by the Board in its 1990 decision under criteria 1(F) and 8, the Board must fashion conditions, based on the evidence in the record, that will assure that reforestation of the Tract will occur in accordance with certain performance standards prior to the sale of the first lot. To this end, the Board has supplemented Condition 12 imposed by the District Condition in the Reconsideration Permit with its own condition requiring that planting of the Tract occur before the sale of the first lot.

2. Criterion 2 (water supply)

Criterion 2 requires the applicant to show that the development or subdivision has sufficient water available for the reasonably foreseeable needs of the subdivision.

The Applicants proposed to serve the fire protection needs of the Project with a water withdrawal system designed to pump water from the Lake to a dry hydrant on the site. The Board, in its 1990 decision, determined that in the absence of concrete proposals from the Applicants for ensuring that the system, once installed, would be maintained and operated properly, it could not conclude that the water would be sufficient for the reasonably foreseeable needs of the subdivision. The Board had two principle concerns about the proposed system. First, the Board concluded that the Applicants had paid insufficient attention to how and by whom the system would continue to be maintained after initial installation. Second, the Board was concerned that because the pipeline would be located within the zone of frost penetration, there would be problems with pipeline freezing potentially resulting in an inadequate supply of water reaching the site in the event of a house fire. Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 12-13.

[8] The Applicants have eliminated the Lake water intake system to address the Revised Project's fire protection needs and substituted instead a plan for sprinkler systems to be installed in each house constructed as part of the subdivision. Therefore, the Revised Project Application addresses the maintenance and freezing issues identified in the Board's 1990 decision.

The Board concludes that the Applicants have demonstrated that there will be sufficient water available for the reasonably foreseeable needs of the subdivision. The Board's conclusion is predicated on the evidence that the fire suppression sprinkler systems to be installed will meet the National Fire Protection Association ("NFPA") standard for installation of sprinkler systems in one and two family homes and the letter of endorsement from the City of Newport Fire Chief. See Board Exhibits C-5 and C-6.

3. Criterion 4 (soil erosion)

Criterion 4 requires that the Applicants demonstrate that the subdivision will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

As noted above, the Board in its 1990 decision addressed erosion of the shoreline bank under criterion 1(F)(iv). While the Board concluded that the soils at the site were generally adequate to absorb water quickly and sufficiently, it concluded that the subdivision, as proposed, would likely cause unreasonable soil erosion on the banks severe enough that a dangerous condition might occur. It reached this conclusion for the same reason expressed in its discussion of criterion 1(F). Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 14.

Additionally, the Board indicated in Finding of Fact 26, in conjunction with its consideration of the Project under criterion 5, that the Applicants had failed to provide information on the method of removing and disposing of trees and erosion control methods to be employed during the reconstruction of Bigelow Bluff Road.

[9] For the reasons explained under criterion 9(F), the Board concludes that erosion problems associated with development of the shoreline area have been addressed by the Revised Reconsideration Application, as discussed under criterion 1(F) above. Furthermore, the Applicants have presented sufficient evidence for the Board to now conclude that the potential for erosion during construction on the access road will be quite low and that the measures described in the Revised Project Application will adequately reduce or eliminate erosion at the Tract. Therefore, the Board concludes that the Applicants have demonstrated that the subdivision will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

4. Criterion 8 (aesthetics and scenic and natural beauty)

Criterion 8 requires that the Board find that the subdivision will not have an undue adverse effect on the scenic beauty of an area and on aesthetics. In making this determination, the Board applies a two-part test which it delineated in detail in In re: Quechee Lakes Corporation, #3W0411-EB and 3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985). First, the Board considers whether the proposed project is in harmony with its surroundings. This requires, in pertinent part, an evaluation of the nature of the project's surroundings, design, and visibility. The scenic qualities of certain types of land forms which are especially sensitive to change, such as "ridgelines, steep slopes, shoreline and floodplains," should be give special attention. Id. at 19. If, after weighing these factors collectively the Board concludes that a project will have an adverse effect on the scenic or natural beauty of an area or aesthetics, it must determine whether the adverse effect is undue. The Board considers an adverse effect "undue" if it reaches a positive conclusions of any of several factors set forth in the Board's 1990 decision. See Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 15-16.

The Board in its 1990 decision concluded that with respect to the site in general, the Applicants had met their burden of production but that the opponents of the Project had persuaded it that the subdivision, as proposed, would have an undue adverse effect on aesthetics and the scenic and natural beauty of the area. Regarding improvements to Bigelow Bluff Road specifically, the Board concluded that the Applicants had not met their burden of providing sufficient evidence for it to be able to conclude that the reconstruction of the road would not have an undue adverse effect. Id. at 17-18.

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Applying the Quechee test to the site generally, the Board concluded that the proposed subdivision created an adverse effect on the scenic or natural beauty of the area or aesthetics, because the Project did not fit into its surroundings. The nature of the Project's surroundings were and are a heavily wooded, rural residential lakeshore area with seasonal and summer homes. The Board found that the homes proposed to be located on lakefront lots of the proposed subdivision (Lots 1-6) would be closer to and more visible from the Lake than those situated on neighboring parcels where existing vegetation provided and continues to provide an excellent screen. The extensive clearing and regrading of the Tract, and the opening of view to the Lake, in the Board's opinion resulted in a Project that was clearly not in harmony with its surroundings. Because the Board concludes that the visual effect of the Project was adverse, it considered whether that adverse effect was "undue," and it concluded that indeed the effect was unduly adverse. Id. at 15-16.

First, the Board determined that there was no written community standard to be applied in the review of the Project. Id. at 16.

Second, the Board considered whether the Project was offensive and shocking; it concluded that it was. The Board then discussed at length the condition of the vegetative cover prior to site clearing in 1985. It observed that the clearing of the entire forest and the regrading of the natural contours of the land had resulted in the complete diminution of the scenic qualities that had existed at the site. The undisputed evidence was that it would take many years for the trees that had been planted and that might be planted to grow tall enough to provide any visual screening of the site. The Board doubted the efficacy of the Applicants' proposed requirement that lot owners be required to spend \$2,000 per lot on the planting of mature trees to screen their houses from view of the Lake. Id. at 16-17.

Third, the Board concluded that the Applicants could have created a subdivision on the Tract that would have retained the majority of trees and the natural landforms. It stated: "a reasonable person would not cut down all the trees on a 10-acre forested shoreline property." Id. at 17. By clearing the site of trees, the Applicants failed to take the obvious mitigating steps which a reasonable person would have taken to improve the harmony of the proposed subdivision with its surroundings. The Board concluded that the Applicants' proposed planting plan would not sufficiently mitigate the adverse impact of their subdivision. Id.

The Board described what it would have expected in the way of a subdivision design had the Tract not been cleared and regraded prior to the permit application process. It stated:

If we were reviewing this site for a proposed subdivision when it was still forested, we would require that the majority of trees be retained and that the houses be sited further back from the shoreline. The stark openness of this site

cannot be mitigated by a plan that calls for planting only 430 trees that will not provide effective screening for at least 15 to 25 years. Id.

In its Revised Project Application, the Applicants have argued that they have addressed the deficiencies identified by the Board in 1990. They point to their plans to develop only the three upland lots which are set back farther from the shoreline than most house sites on adjoining properties. They also note the planned 500-foot setback. But most importantly, they direct the Board's attention to the fact that in the intervening twelve years since the clearing of the site, the remaining trees have grown. On Lots 1-4, the Applicants claim the planted trees are now 10 to 12 feet in height and provide some screening between lots, but they concede that these trees provide screening to a much lesser degree from the Lake. The Applicants have not presented a planting plan for these or any of the other lots within the subdivision, arguing that landscaping/screening plans should be submitted for each specific house. Finally, the Applicants have withdrawn their offer to require lot owners to pay \$2,000 for the replanting of mature trees to hide their homes, based on the Board's purported lack of confidence in this approach to mitigation.

[10] In considering Phase I of the Applicants' Revised Project, the Board now concludes that the Applicants have remedied the deficiencies identified in the 1990 decision. By electing to develop only the three upland lots (Lots 7, 8 and 9), and by establishing a minimum 500-foot setback, the Applicants have addressed the specific aesthetic objections raised by the proposed development of housesites close to the shoreline under the original proposal. Furthermore, the Board is persuaded that the growth of planted trees on the shoreline lots (Lots 1-4), and the generally healthy condition of the bank vegetation, now provide a level of screening which when supplemented with additional plantings will assure that the Revised Project is in character with its surroundings. Therefore, with respect to Phase I of the Revised Project, the Board is satisfied that the objections its raised in 1990 have been addressed in the specific following ways: a reduction in the number of proposed housing units, a significant increase in their setbacks, and the regeneration of natural vegetation and the planting of new trees have (1) dramatically reduced the visual impact of the Project from the Lake, and (2) reduced visual incompatibility with neighboring properties.

[11] In reaching its affirmative conclusion under criterion 8, as well as under criterion 1(F), the Board is relying on the Applicants' representation that to correct the deficiencies in the 1990 decision, the Applicants are not requesting approval for development of Lots 1-6. If the Applicants had requested approval for development of those lots, on the evidence presently before the Board, a permit would have to be denied. This does not mean that the Applicants are precluded from later seeking approval by permit amendment of construction on Lots 1-6. However, any subsequent Phase II proposal shall first be evaluated in light of Stowe Club Highlands and, if applicable, any Board rule which may be adopted to implement the holding in that case.

Finally, consistent with the Board's discussion of tree cutting in connection with construction on Bigelow Bluff Road under criterion 4 above, the Board concludes that there will be no undue adverse impact upon aesthetics or other criterion 8 values resulting from the Bigelow Bluff Road improvements. The proposed widening is modest and there exists a sufficient depth of tree buffer such that the rural, wooded quality of that road will be preserved.

5. Criterion 9(B) (primary agricultural soils) and
Criterion 9(C) (forest and secondary agricultural soils)

Criterion 9(B) provides that a permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not significantly reduce the agricultural potential of the primary agricultural soils; or,

- (i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and
- (ii) there are no nonforest or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purposes; and
- (iii) the subdivision or development has been planned to minimize the reduction of forestry and agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning design to economize on the cost of roads, utilities and land usage.
- (iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential.

Primary agricultural soils are defined at 10 V.S.A. §6001(15) as:

"Primary agricultural soils" means soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to use of fertilizer, and have few limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation. If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils.

When evaluating a project for conformance with Criterion 9(B), the Board must first determine whether the site contains primary agricultural soils. The Board in its 1990 decision determined that the Tract contained such soils. The evidence in the record then demonstrated that the Windsor and Colton soils on the site were considered primary agricultural soils in that they have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanical equipment, and are highly responsive to the use of fertilizer. Evidence on the record also demonstrated that the soils were well supplied with nutrients before the site was cleared. The Board further concluded that the land was of a size capable of supporting an agricultural operation. Therefore the only question remaining to be answered was whether the land had "few limitations for cultivation or limitations which may be easily overcome." *Id.* at 20-21.

The Board concluded that there was insufficient evidence in the record to determine whether such limitations did exist. Since the Applicants had the burden of proof on criterion 9(B) (10 V.S.A. § 6088(a)) and the soils otherwise met the definition of primary agricultural soils, the Board concluded that the soils on the Tract were primary agricultural as defined in the statute. The Board further concluded that the agricultural potential of those soils would be significantly reduced by the Project. Finally, the Board concluded that the Applicants had failed meet their burden of proof with respect to two of the four subcriteria of criterion 9(B). *Id.* at 21-22.

[12] Based on the evidence provided by the Applicants in conjunction with their reconsideration request, the Board now concludes that the Revised Project will not significantly reduce the agricultural potential of the primary agricultural soils because the on-site soils have very little potential for agriculture. While some prime soils appear on the Tract, this soil exist in isolate pockets, separated by areas of slope which exceed 15% or are otherwise not suitable for agricultural use. Moreover, the Applicants have submitted data which demonstrates that a reasonable return on investment requires a land use other than agriculture. There are no other lands controlled by the Applicants which could be used for the Revised Project. Finally, the Revised Project preserves the potential for some agricultural use of the property, given the scaled-back scope of development under Phase I. However, the total area suitable for agriculture is approximately 3 to 4 acres, which is less than what is traditionally required to support agricultural uses.

Because the Board concludes that the Revised Project will not reduce the potential of the prime soils on the site, it will not require mitigation in this instance.

[13] Finally, and for reasons similar to those stated above, the Board concludes that an affirmative finding is required under criterion 9(C) (secondary agricultural soils). The Tract is adjacent to other properties developed for lakefront residential purposes, and there is no indica-

tion that there are commercial forestry operations in the vicinity of the parcel. Indeed, by virtue of its very size, just over 10 acres, the Tract is not suitable for commercial forestry purposes. Under such circumstances, the Board deems that mitigation is not warranted in this instance.

V. CONCLUSION

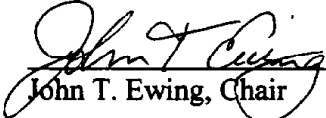
Based on the foregoing Findings of Fact, it is the Board's conclusion that the Project described in the Revised Project Application referred to above, if completed and maintained in conformance with all of the terms and conditions of that application and of Land Use Permit #7R0639-Reconsideration as amended by Land Use Permit #7R0639-EB (Reconsideration), will not cause or result in a detriment to public health, safety or general welfare under the criteria described in 10 V.S.A. ch. 151, section 6086(a).

VI. ORDER

1. Land Use Permit #7R0639-EB (Reconsideration) is hereby issued.
2. Jurisdiction over this matter is hereby returned to the District #7 Environmental Commission.

Dated at Montpelier, Vermont, this 14th day of August, 1997.

ENVIRONMENTAL BOARD


John T. Ewing, Chair

Arthur Gibb
Sam Lloyd
William Martinez
Rebecca M. Nawrath
Robert G. Page, M.D.