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

RE: Lake Champagne Campground
Declaratory Ruling #377

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns the Lake Champagne Campground ("LCC") located off Route 66 and Furnace Avenue, in Randolph Center, Vermont ("Project"). As explained in more detail below, the Board has determined that, pursuant to Environmental Board Rule ("EBR") 2(A)(5) and 2(G), a substantial change has not occurred at the Project, and therefore, the Project does not require an Act 250 permit.

I. PROCEDURAL SUMMARY

On January 29, 1999, the District #3 Environmental Commission Coordinator ("Coordinator") issued Jurisdictional Opinion #3-72 ("Jurisdictional Opinion") in which she determined that the Project is a pre-existing development that does not require a permit application pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") because a substantial change has not occurred.

On February 23, 1999, Edward H. Stokes ("Petitioner") filed a petition for declaratory ruling with the Vermont Environmental Board ("Board"), appealing the Jurisdictional Opinion pursuant to 10 V.S.A. § 6007(c) and EBR 3. The Petitioner contends that the Project requires an Act 250 permit.

On April 20, 1999, Board Chair Marcy Harding convened a prehearing conference in this matter.

On April 22, 1999, Chair Harding issued a Prehearing Conference Report and Order ("Prehearing Order"). The Prehearing Order states that it is binding on all parties unless a written objection to it, in whole or in part, is filed by May 4, 1999. None of the parties filed an objection to the Prehearing Order by May 4, 1999.

On April 23, 1999, LCC filed a Motion to Dismiss.

On April 28, 1999, the Petitioner filed an Objection to Motion to Dismiss.

On May, 10 1999, the Petitioner filed a request for acceleration of proceedings.

On May 14, 1999, LCC filed a response to the Petitioner's request for acceleration of proceedings.

On May 24, 1999, Chair Harding issued a Chair's Preliminary Ruling denying LCC's Motion to Dismiss and Petitioner's request for acceleration of proceedings.

On or about June 9, 1999, LCC filed a request for a jurisdictional opinion with the Coordinator to determine whether an Act 250 permit is required to construct a below ground pump station and force main to transport effluent sewage to the municipal sewer system.

On July 2, 1999, the Coordinator issued Jurisdictional Opinion #3-73 in which she determined that an Act 250 permit is not required to connect the Project to the municipal sewer system because a substantial change will not occur.

No petition or objection was filed by any individual or party relating to Jurisdictional Opinion #3-73.

On July 28, 1999, Petitioner filed a Request for Subpoena of Pierre LaFrance's and Elizabeth LaFrance's records and information pertaining to the Project.

On August 5, 1999, LCC filed an Opposition to Request for Subpoena.

On August 18, 1999, Petitioner filed a response to LCC's Opposition to Request for Subpoena.

On August 20, 1999, Chair Harding issued a Chair's Preliminary Ruling denying Petitioner's Request for Subpoena.

On October 29, 1999, Petitioner filed a request that his witness Frank Forward be permitted to testify by telephone at the hearing in this matter.

On November 16, 1999, LCC filed a letter stating that it did not object to Petitioner's request for telephone testimony of Frank Forward.

On October 5 and November 30, 1999, the parties filed direct and rebuttal testimony and exhibits.

On December 22, 1999, LCC filed objections to the evidence submitted by Petitioner.

On December 23, 1999, LCC filed proposed findings of fact and conclusions of law.

On December 27, 1999, LCC filed a request that the Board take official notice of the November 19, 1999, Assurance of Discontinuance ("AOD") between the Agency of Natural Resources and LCC along with an Environmental Court Order ("Court Order"). LCC also requested that the Board take official notice of Jurisdictional Opinion #3-73 ("J.O. #3-73").

Petitioner did not file a response to the request for taking official notice of the AOD, Court Order or J.O. #3-73.

On February 7, 2000, the Chair convened a second prehearing conference with the following individuals and entities participating: Gerald Tarrant on behalf of LCC. No other party or individual attended the second prehearing conference.

On February 9, 2000, a three-member panel of the Board ("Panel") convened a hearing in Randolph Center, Vermont, with the following individuals and entities participating:

Gerald Tarrant on behalf of LCC, and
Edward H. Stokes.

At the beginning of the February 9, 2000, hearing, Petitioner offered color photographs into evidence. These photographs are the originals of exhibits S-2, S-3, S-4, S-5. The exhibits which were filed with the Board and served on the parties are black and white photocopies of the color photographs. LCC objected to the Board admitting these photographs into evidence. The Panel recessed the hearing and deliberated on Petitioner's request to admit color photographs and LCC's objections thereto. After reconvening the hearing, the Panel announced its decision denying the request to admit the color photographs.

During the February 9, 2000 hearing, the Panel conducted a site visit, accepted documentary and oral evidence into the record, and heard opening and closing statements regarding the issue on appeal. After recessing the hearing, the Panel deliberated on February 16 and 18, and May 3, 2000.

Based upon a thorough review of the record, related argument, and the proposed findings of fact and conclusions of law, the Panel issued a proposed

decision on May 4, 2000 which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board.

On May 31, 2000, LCC filed its Objection to the Proposed Decision and Request for Oral Argument. LCC also requested that the record be re-opened to take new evidence.

On June 15, 2000, Petitioner filed his objection to the record being reopened.

In a July 6, 2000 Memorandum of Decision, the Board granted LCC's request to re-open the record and accept new evidence.[1]

On February 28, 2001, the Board reconvened the hearing in this matter with Gerald Tarrant, on behalf of LCC, participating. Petitioner did not participate.

The Board deliberated on February 28 and March 21, 2001. Following a thorough review of the proposed decision and the record, the Board declared the record complete and adjourned. This matter is now ready for final decision.

II. ISSUES

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[1] The Board's July 6, 2000 Memorandum of Decision analyzes the reasons why re-opening the hearing was appropriate. The memorandum, in pertinent part, states:

> The Board has reviewed the record, the Panel's Proposed Decision and LCC's and Petitioner's arguments for and against re-opening the record. The Board concludes that there is newly discovered evidence that necessitates re-opening the record and reconvening the hearing in this matter. The Board also concludes that it is necessary to judge the credibility of witnesses relating to the evidence on the winter storage of camper units because this evidence appears to be susceptible to different interpretations. For these reasons, the full Board will reconvene the hearing in this matter...

The issue is whether, pursuant to EBR 2(A)(5) and 2(G), a substantial change has occurred with respect to the Lake Champagne Campground, a pre-existing development.

III. FINDINGS OF FACT

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

1. The Project is a private campground that was started in the spring of 1967 by Elizabeth and Morris LaFrance. The Project currently operates without an Act 250 permit.

2. The Project has been operated continuously since 1967 by the LaFrance family. Currently, the Project is owned by Elizabeth LaFrance and managed by Pierre LaFrance, the son of Elizabeth and Morris LaFrance. Pierre LaFrance has been the manager since 1991.

3. On September 1, 1994, District #3 Environmental Commission Coordinator Robert M. Sanford issued a letter stating that improvements to the Project were not substantial changes as defined by EBR 2(A)(5).[2]

4. The September 1, 1994 District Coordinator's letter was mailed to Petitioner.

5. On October 7, 1997, District #3 Environmental Commission Coordinator Julia Schmitz issued a Project Review Sheet stating that changes to the Project, including fill activities, repairing drainage systems, repairing and replacing existing septic systems, tree trimming, removal and planting and

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[2] In an August 16, 1994 letter to the District #3 Environmental Commission Coordinator, LCC disclosed that it had added the 1988 septic system to the Project. While the September 1, 1994, District #3 Environmental Commission Coordinator's letter stating that there were no substantial changes to the Project does not specifically address the 1988 septic system, the former Coordinator and author of the letter, Robert Sanford, testified before the Board on February 28, 2001 that his conclusions that no substantial change had occurred included a review of the 1988 septic system.

the addition of gravel to roads did not constitute substantial change as defined by EBR 2(A)(5).

6. In 1998, Petitioner filed a request with the District Coordinator alleging that certain changes had been made to the Project after 1970, and therefore, an Act 250 permit was required.

7. The Project is a pre-existing development as defined by EBR 2(O).[3]

8. The Project consists of 114 acres and is located in Randolph Center, Vermont.

9. A three acre pond known as Lake Champagne is located on the Project. This lake was constructed in 1964 and is used by the campers.

10. Campsites are mostly grass covered and include a 4 inch by 4 inch wooden post containing utility hook-ups and a marker identifying the site. Some sites have had crushed stone or fill added to level the site, but over time these sites have had grass grow over the stone or fill.

11. Campsites A-J, K-K5, and YY-L were added to the Project in May 1970, bringing the total number of campsites at that time to approximately 131.

12. During the pre-1970 period, campsites were occupied by tents or trailers. This is also true today.

13. In 1994, the Project had 131 sites.

14. In mid-1990's, the campsites numbered 1 through 20 were modified by removing 4 of the sites and widening the remaining 16 sites to accommodate wider trailers.

15. Also in the mid-1990's, campsites C-36, C-37, and C-38 were eliminated.

16. Presently, there are 124 campsites at the Project having the following utilities:

    a. 66 sites with electricity, water and sewer,

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[3] The Petitioner and LCC stipulated to this fact at the first prehearing conference on April 22, 1999.

b. 44 sites with electricity and water,
c. 14 unimproved sites.

Some improved campsites also include telephone and cable television utilities.

17. The Project does not operate at full occupancy for the season. Heavy occupancy occurs only on holidays and some weekends.

18. The Project has a season of less than five months, opening on the weekend before Memorial Day and closing October 15.

19. Approximately 40 to 50 camper units remain at the Project throughout the camping season.

20. The Project has several on-site septic disposal systems serving the campsites.

21. In 1988 a septic field was added to the Project. This septic field is located within the wellhead protection area of the Randolph Center Fire District Water System. This system was installed without a permit in violation of the applicable Environmental Protection Rules. This field serves sites Y, Y2, X, W, V, U, T, S, R, Q, Q2, P, O, N, M and L. Eleven of these sites, Y, Y2, X, W, V, U, T, S, R, Q, and Q2, were in existence with only water and electric hookups by Memorial Day 1970. These eleven sites therefore were upgraded in 1988 by the addition of the sewer utility. Sites P, O, N, M and L were in existence before 1970 and already had full hook-ups, including septic at that time.

22. The septic hookup was added to sites Y-Q2 in 1988 to make the sites more desirable to trailers, although trailers could use the sites without the septic hook-ups.

23. In 1992 an existing septic system located near the middle of the Project failed and was replaced to serve the same sites. This system serves eleven, so-called "top deck" campsites. This system was installed without a required permit in violation of the applicable Environmental Protection Rules.

24. Site number 22 was also added to the 1992 replacement system. Site 22 has existed since 1967, but originally only had water and electric hookups.

25. A third wastewater disposal system serving K,K1,K2,K3,K4 and K5 failed in 1997.

26. On November 19, 1999, LCC entered into an AOD with the Agency of Natural Resources to connect the disposal system located in the wellhead protection area and the system which failed in 1997 to the municipal disposal system to comply with Vermont's Small Scale Wastewater Treatment and Disposal Rules.[4]

27. There are seven buildings on the Project property which were all in existence prior to 1970.

28. In 1980, one of these buildings, the bath house/laundromat, was made smaller due to deterioration and wood rot. No new stalls or toilets were added.

29. The bath house/laundromat was made handicapped accessible in 1993 to comply with federal law.

30. A porch roof was added to the bath house/laundromat in 1994.

31. In 1993, fill was added to cover ledge outcroppings and low areas to help make the land easier to maintain and mow. The fill came from the Vermont Pure construction site close to I-89.

32. Gravel was added to the roadbed after 1970. Gravel was added to some campsites to make the sites level.

33. None of the fill or gravel used on the Project was used to enlarge, expand or in any other way change the Project except to smooth out areas.

34. In May 1970, a road was extended to connect the new campsites that were added at the same time.

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[4] Jurisdictional Opinion #3-73 concludes that hooking up to the municipal sewer system will not create a substantial change. This Opinion was not appealed by any party and is therefore a final controlling opinion and is not at issue in this Declaratory Ruling.

35. The roads at the Project are the same as they were in 1967, except for the road added in May 1970 which is associated with accessing the campsites added at that time.

36. Utility services have been added to the Project since 1970, including: sewer systems, electric upgrades, telephone and cable television.

37. The utility hookups at the Project are connected underground and are located at each campsite on a wooden post. The utilities at each campsite include an electric outlet, a four (4) inch plug for sewer, a three-quarter (3/4) inch water connection, or a combination of these utilities.

38. Some time after 1970, electric services were upgraded. Electricity is supplied in series to groups of campsites via underground cables. Upgrades included installing new underground cables, some of which were installed in conduit, thereby increasing the service to 20 and 30 amp / 110 volt and 50 amp / 220 volt supply.

39. Cable television and telephone cables were added to campsites at the same time and in the same underground trench as the electric service.

40. Campsites L, M, N, O, and P were provided with increased electric amperage via a new cable in a conduit. Telephone and cable television cables were run in the same trench.

41. In the mid-1990's, campsites in locations 1 through 20 were widened (eliminating sites 17 - 20), the wooden posts holding the utilities at each site were relocated. At the same time, new electric cable was run to these sites in underground conduit.

42. At the time of the electric upgrades, electricity was brought to the Project via overhead cable to a utility pole with a distribution box at ground surface.

43. Some time after 1970, exterior lighting was added to the outside of the office building and to other buildings.

44. The Project has continually stored camper units during the off-season since operations began in 1967.

45. The off-season storage of the trailers has always been in the area north and northwest of the campground access road. Approximately 6 units

were stored to the northwest of the campground access road adjacent to the Daniels Property. The remaining trailers were stored north of the access road and east of the first 6 trailers and were separated from the first 6 trailers by the grass covered loop road.

46. The storage of the 6 trailers adjacent to the Daniels Property was discontinued sometime around 1980 to 1982, and thereafter, all winter storage occurred in the location north of the access road and within the loop road. The reason for the discontinuance of the storage of 6 trailers adjacent to the Daniels Property is unknown.

47. The number of camper units stored during the off-season may change slightly from year to year based on people's desires or needs, but there has always been storage.

48. During the first year the campground began operations, 1967, there were approximately 20 trailers stored on-site during the off-season. By 1969-1970, there were approximately 28 to 30 trailers stored on-site during the off-season.

49. During the 1998-1999 winter, there were 24 camper units stored at the Project.

50. At the time of the site visit on February 9, 2000, there were approximately 24 camper units stored at the Project.

51. Softwood trees have been planted by LCC along the Project's western boundary adjacent to the Trask residence. These trees were planted to replace Poplar trees which had grown quickly and then died. There are taller softwood trees for which the planting date is unknown. On the north and south ends of the taller trees there are shorter softwoods that were planted in 1982 or 1983.

52. Arborvitae was planted after 1970 along U.S. Route 66 to reduce noise from traffic.

53. Petitioner has lived next to the Project for more than 18 years.

54. From October 1980 through July 1998, Petitioner rented and lived in a house owned by Ennis Daniel located off U.S. Route 66 adjacent to LCC.

55. In July 1998, Petitioner bought his current property on U.S. Route 66 just north of the Daniel property. Petitioner's eastern boundary abuts the Project.

56. Shortly after Petitioner moved into his current residence in July 1998, LCC planted softwood trees to screen an exterior light and a satellite dish on Petitioner's property. The total length of the row of trees planted adjacent to Petitioner's property is 70 to 80 feet. These trees are separated by large gaps and are approximately 3 to 4 feet high. It will take years for these trees to effectively screen the properties.

57. Some trees, including Pin Oak, Maple, Blue Spruce, and Crab Apple were planted after 1970 throughout the project around campsites to provide shade, aesthetics and screening.

58. Petitioner and his wife regularly have taken walks through the Project for many years.

IV. CONCLUSIONS OF LAW

A. Scope of Review

The purpose of a declaratory ruling is to test the applicability of any statutory provision, rule or order of the Board to a given set of circumstances or facts. *Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, Memorandum of Decision at 5 (July 12, 1996) (citing *In re Petition of D.A. Associates*, 150 Vt. 18, 19 (1988)); EBR 3(D); 3 V.S.A. § 808. A declaratory ruling is conducted de novo on the issue of whether specific activities are subject to Act 250 jurisdiction. *Re: Spring Brook Farm Foundation, Inc.*, Declaratory Ruling #290, Prehearing Conference Report and Order and Memorandum of Decision at 7 (Jan. 6, 1994). Although the petition may come to the Board as an appeal of a jurisdictional opinion or project review sheet, the issue in a declaratory ruling proceeding is not whether the opinion, or any part thereof, is correct. *Re: Vermont Institute of Natural Science*, Declaratory Ruling #352, Supplemental Prehearing Order and Chair's Preliminary Ruling on Party Status at 3 (Jan. 30, 1998). Thus, facts stated or conclusions drawn in a jurisdictional opinion are not considered by the Board. *Id.* Provided a petition is timely filed, the only issue in a declaratory ruling proceeding is whether there is Act 250 jurisdiction over the project described in the jurisdictional opinion under appeal. *Id.*; *Re Spring Brook Farm Foundation, Inc., supra* at 7.

B. Burden of Proof:

The party seeking to change the "present state of affairs" generally has the burden of proof. *See Re: W. Joseph Gagnon*, Declaratory Ruling #173, Memorandum of Decision (July 3, 1986) at 5, citing McCormick, Evidence 949. The burden of proof consists of the burdens of production and persuasion. *Applewood Corporation Dummerston Management*, Declaratory Ruling #325, Findings of Fact, Conclusions of Law, and Order (Sept. 25, 1996) at 8-9. As to the specific question of burden of proof in Declaratory Ruling petitions, the Board has written:

> The person who raises the question of jurisdiction has the burden of production; that is, he must provide sufficient evidence to the Board for the Board to be able to find that the particular activity in question meets the definition of "development" or "subdivision" under 10 V.S.A. §6001 so that it requires an Act 250 permit under 10 V.S.A. § 6081(a). *L.W. Haynes, Inc.*, Declaratory Ruling #192, Findings of Fact, Conclusions of Law, and Order (Sept. 25, 1987) at 8, *aff'd In re L.W. Haynes*, 150 Vt. 572 (1988).

If the Board finds that a particular activity falls within the definition of "development" or "subdivision," the burden of proof is on the person conducting the activity to show that the activity is nonetheless exempt from jurisdiction under 10 V.S.A. § 6081(b) because it predated the enactment of the law. *Re: Pizzagalli Properties and Town of Colchester*, D.R.#374, Findings of Fact, Conclusions of Law and Order (May 20, 1999) and cases cited therein. The person carrying on the activity must establish by a preponderance of the evidence that it was in existence prior to the Act's effective date, or a permit must be secured. *Weston Island Ventures*, D.R. # 169 (June 3, 1985); *Bluto v. Dept. Of Employment Security*, 135 Vt. 205 (1977). At the prehearing conference, the parties stipulated that the Project is a pre-existing development as defined by EBR 2(O).

Once it has been established that a pre-existing development or subdivision is exempt and not subject to Act 250 jurisdiction, a permit will nevertheless be required if a "substantial change" has occurred. There is no presumption that a substantial change either has or has not occurred since the enactment of Act 250. Petitioner contends that the Project requires an Act 250 permit because a substantial change has occurred. In this proceeding, therefore, the burden of production is on LCC to provide information to the Board on the nature of the Project prior to 1970 and the nature of the Project after 1970. *John Gross Sand and Gravel*, D.R. #280, Findings of Fact, Conclusions of Law, and Order (July 28, 1993). This allocation makes sense in light of the fact that the person conducting the activity possesses the information on which

the Board must base its decision. As the Petitioner is seeking to change the status quo and has raised the question of jurisdiction over the Project, the Petitioner has the burden of persuasion that a substantial change to the Project has occurred. *Id*. This may include providing additional evidence or just arguing, based upon the evidence submitted by LCC, that certain activities constitute a substantial change.

C. Official Notice

LCC filed a letter on December 27, 1999 requesting that the Board take official notice of the following documents:

1. A November 19, 1999 Assurance of Discontinuance between the Agency of Natural Resources and Lake Champagne Campground and a corresponding December 3, 1999 Environmental Court Order.

2. Jurisdictional Opinion #3-73.

Petitioner did not file a response to this request.

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. A declaratory ruling is a contested case under the Administrative Procedures Act. *Id.* at §801(b)(2); *See also* 10 V.S.A. §6007(c). The rules of evidence, as applied in civil cases, shall be followed in contested cases before administrative bodies. 3 V.S.A. § 810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); *See In re Handy*, 144 Vt. 610, 612 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f).

Pursuant to the above standards, the Board takes official notice of the November 19, 1999 Assurance of Discontinuance between the Agency of Natural Resources and LCC and the December 3, 1999 Environmental Court Order.

The failure to appeal from a jurisdictional opinion of a district coordinator within 30 days of the mailing of the opinion renders the jurisdictional opinion the final determination with respect to jurisdiction. 10 V.S.A. § 6007(c) and EBR 3. Jurisdictional Opinion #3-73 was mailed to Petitioner on July 2, 1999. No appeal of Jurisdictional Opinion #3-73 has been filed by Petitioner, and

therefore, it is a final determination. Accordingly, the Board also takes official notice of Jurisdictional Opinion #3-73.

D. Discussion

1. Pre-existing Development

An Act 250 permit is not required for a pre-existing development. 10 V.S.A. § 6081(b). EBR 2(O) defines pre-existing development as any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

Petitioner and LCC stipulated at the first prehearing conference that the Project is a pre-existing development as defined by EBR 2(O). The Project therefore is not subject to Act 250 jurisdiction unless "substantial changes" to the project have occurred after March 1, 1971.

2. Substantial Change[5]

"Substantial change" is defined as "any change in a development . . . which may result in significant impact with respect to any of the criteria specified in" Act 250. EBR 2(G).

Finding substantial change involves a two step process. First, there must be a "cognizable" (i.e. physical) change to the permitted project. *See, e.g., Sugarbush Resort Holdings, Inc.*, Declaratory Ruling #328, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1997); *Re: David Enman (St. George Property)*, Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order (Dec. 23, 1996); *Re: Village of Ludlow*, Declaratory Ruling #212, Findings of Fact, Conclusions of Law and Order (Dec. 29, 1989). Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. Id.; EBR 2(G). In considering the issue of substantial change, the Board has stated:

> In deciding whether Act 250 jurisdiction applies . . . , the appropriate consideration is whether the potential for significant impact is raised. This consideration does not require an in-depth review of possible

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5 "Material change" analysis is not relevant to this Declaratory Ruling because the Project at issue is a pre-existing development. "Material changes" are relevant only to permitted projects. See EBR 34(A).

impacts, but simply a determination that significant impacts may occur.

Village of Ludlow, supra, at 9 (quoting *Re: City of Montpelier*, Declaratory Ruling #190, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 6, 1988)). *See also In re Barlow*, 160 Vt. 513, 521-22 (1993) (upholding validity of EBR 2(G) by finding that an impact can be potential as long as it is significant and affirming Board determination that an increase in the extraction rate and frequency of use of a gravel pit was a substantial change); *Re: Taft Corners Associates, Inc.*, #4C0696-11-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995) (substantial change found where increase in size of project involving retail and warehouse buildings would, without certain improvements to existing roads, have a potential for significant impact on Criterion 10 (town / regional plan)); *Re: Village of Ludlow, supra* (substantial change to an existing sewage treatment plant found where new parts were added and others were replaced with parts that were physically different because additional traffic and noise impacted Criteria 1(air), 5(traffic), and 8(aesthetics)).

3. The Board's Conclusions Regarding Substantial Change

Based on the findings of fact made herein, the Board concludes that it is bound by the determination of the September 1, 1994 District #3 Environmental Commission Coordinator's advisory opinion that the septic system work at the Project did not constitute substantial changes. The Board also concludes that the changes in the winter storage of camper units, the changes to utility services (other than septic systems), the changes to trees, and any changes in the number of campsites are not substantial changes to the Project.

a. Septic Systems

In 1988 a new septic system was added to the Project. This septic system is located within the wellhead protection area of the Randolph Center Fire District Water System. This system was installed without a permit in violation of the applicable Environmental Protection Rules. This system serves sites Y, Y2,X,W,V,U,T,S,R,Q, Q2, P,O,N,M and L. Eleven of these sites, Y, Y2,X,W,V,U,T,S,R,Q, and Q2, were in existence with only water and electric hookups by Memorial Day 1970. These eleven sites therefore were upgraded in 1988 by the addition of sewer utility hookups. Sites P,O,N,M and L were in existence before 1970 and already had full hook-ups, including septic, at that time. The septic hook up was added to sites Y-Q2 in 1988 to make the sites more desirable to trailers, although trailers could use the sites without the sewer utility hook-ups.

In 1992 an existing septic system located near the middle of the Project failed and was replaced to serve the same sites. This system serves eleven campsites, the so-called top deck sites. This system was installed without a required permit in violation of the applicable Environmental Protection Rules. Site number 22 was also added to this replacement system. Site 22 has existed since 1967, but originally only had water and electric hookups.

Under Board precedent and former and current EBR's, a party who receives notice of an advisory opinion (now called a jurisdictional opinion), and does not appeal the advisory opinion to the Board within 30 days of mailing of the jurisdictional opinion to the person appealing, is bound by the advisory opinion. *See Re: Rock of Ages (Bethel White Quarry)*, Declaratory Ruling #291, Memorandum of Decision and Dismissal Order (Mar. 28, 1994) and the EBR's cited therein. *See also*, current *EBR 3(C)*. Once the advisory opinion (now jurisdictional opinion) is final, the Board is also bound by the opinion.

Based on the findings of fact made herein, the Board concludes that Petitioner was mailed the September 1, 1994, District #3 Environmental Commission Coordinator's opinion letter concluding that both the 1988 addition of a new septic system and the 1992 replacement of a different septic system which failed are not cognizable changes. No appeal of the advisory opinion was taken to the Board. Accordingly, both Petitioner and the Board are bound by the 1994 determination.[6]

b. Winter Storage of Camper Units

The Board concludes that the modification of the storage location of camper units stored over the winter are "cognizable" (i.e. physical) changes to the Project. Second, the Board concludes that the changes do not have the potential to impact significantly on one or more of the ten Act 250 criteria.

i. Cognizable Change

Based on the findings of fact made herein, the Board concludes that the modification of the storage location of camper units stored over the winter months are cognizable changes. The Project has continually stored camper

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6 Any potential concerns relating to the 1988 septic system are not presently within the Board's jurisdiction, however, the Board does find comfort in the fact that pursuant to the Assurance of Discontinuance identified above, LLC has taken or will take action to eliminate the use of the 1988 septic system.

units during the off-season since operations began in 1967. The off-season storage of the trailers has always been in the area north and northwest of the campground access road. Approximately 6 units were stored to the northwest of the campground access road adjacent to the Daniels Property. The remaining trailers were stored north of the access road and east of the first 6 trailers and were separated from the first 6 trailers by the grass covered loop road.

The storage of the 6 trailers adjacent to the Daniels Property was discontinued sometime around 1980 to 1982, and thereafter, all winter storage occurred in the location north of the access road and within the loop road. The reason for the discontinuance of the storage of 6 trailers adjacent to the Daniels Property is unknown.

The number of camper units stored during the off-season may change slightly from year to year based on people's desires or needs, but there has always been storage. During the first year the campground began operations, 1967, there were approximately 20 trailers stored on-site during the off-season. By 1969-1970, there were approximately 28 to 30 trailers stored on-site during the off-season. During the 1998-1999 winter, there were 24 camper units stored at the Project. At the time of the site visit on February 9, 2000, there were approximately 24 camper units stored at the Project.

The Board concludes that the modification of the storage location by ceasing off-season storage adjacent to the Daniel's property is a cognizable change. Since there is relatively no change in the number of units stored in the off-season, the number of units stored does not constitute a cognizable change.

ii. Potential for Significant Impact on Act 250 Criteria

The Board concludes that the modification of the storage location, i.e. the ceasing of storage adjacent to the Daniel's property, does not have the potential to impact significantly on one or more of the ten Act 250 criteria. Accordingly, this modification does not constitute a substantial change and does not trigger Act 250 jurisdiction.

c. Utility Services

The Board concludes that the changes to utility services (other than septic systems) are "cognizable" (i.e. physical) changes to the Project. Second, the Board concludes that these changes do not have the potential to impact significantly on one or more of the ten Act 250 criteria.

i. Cognizable Change

Based on the findings of fact made herein, the Board concludes that the changes made to the utilities at the Project are cognizable physical changes in the project.

Elizabeth LaFrance's prefiled testimony stated that "I believe the only work we have done to the campground since 1970 has related to maintenance of the hookups..." *Prefiled Testimony of Elizabeth LaFrance*, page 1, line 28. Pierre LaFrance's prefiled testimony stated that "To the best of my knowledge the only work we have done to the campground over the past 29 years has related to maintenance of the hookups..." *Prefiled Testimony of Pierre LaFrance*, page 1, line 26.

During the hearing, however, these witnesses testified to work at the Project relating to the utility hookups that is beyond maintenance. Witnesses testified that utility services have been added to the Project since 1970 including: electric upgrades and new telephone and cable television utilities.

The utility hookups at the Project are connected underground and are located at each campsite on a wooden post. These posts may contain an electric outlet, a four (4) inch plug for sewer, a three-quarter (3/4) inch water connection, or a combination of these utilities. Some time after 1970, electric services were upgraded. Upgrades included installing new underground cables, some of which were installed in conduit, thereby increasing the service to 20 and 30 amp / 110 volt and 50 amp / 220 volt supply. Cable television and telephone cables were added in the same underground trench as the electric service.

When campsites 1 through 20 were widened (eliminating sites 17 - 20), the posts holding the utilities at each of these campsite were relocated. At the same time, new electric cable was run to these sites in underground conduit. Telephone and cable television cables were run in the same underground trench.

These changes to the utilities are upgrades. Such changes provided a campground and campsites in an improved condition as compared to the campground that was originally constructed. This work does not simply prevent or eradicate alteration to an existing development that would occur through normal wear and tear. Therefore, the Board concludes that the utility changes are an upgrade to the original condition of the Project and are not repair and routine maintenance. Accordingly, the utility changes are cognizable changes.

ii. Potential for Significant Impact on Act 250 Criteria

Although the changes to the utilities within the Project (other than septic system changes) are cognizable changes, the Board concludes that such changes do not have the potential to impact significantly on one or more of the ten Act 250 criteria. Accordingly, the utility changes do not constitute a substantial change and do not trigger Act 250 jurisdiction.

d. Trees

The Board concludes that the addition of arborvitae and changes to trees are "cognizable" (i.e. physical) changes to the Project. Second, the Board concludes that these changes do not have the potential to adversely impact significantly on one or more of the ten Act 250 criteria.

i. Cognizable Change

Based on the findings of fact made herein, the Board concludes that the addition of arborvitae and trees at the Project are cognizable changes. There have been several plantings of trees at the Project. Softwood trees have been planted by LCC along the Project's western boundary adjacent to the Trask residence. These trees were planted to replace Poplar trees which had grown quickly and then died. There are taller softwood trees along the Project's western boundary adjacent to the Trask residence for which the planting date is unknown. On the north and south ends of the taller trees there are shorter softwoods that were planted in 1982 or 1983. These trees replaced trees that once screened the Project. Therefore, the planting of these trees is repair and maintenance and is not a cognizable change. Accordingly, this activity eradicated alteration to the existing Project that occurred through normal wear and tear, i.e. trees dying off.

Arborvitae was planted after 1970 along U.S. Route 66 to reduce noise from traffic. Additionally, shortly after Petitioner moved into his residence in July 1998, LCC planted softwood trees to screen an exterior light and a satellite dish on Petitioner's property. The total length of the row of trees planted adjacent to Petitioner's property is 70 to 80 feet. These trees are separated with large gaps and are approximately 3 to 4 feet high. Lastly, some trees including Pin Oak, Maple, Blue Spruce, and Crab Apple were planted throughout the Project and around campsites to provide shade, aesthetics and screening. The additions of the arborvitae and trees are upgrades. Such changes provided a campground and campsites in an improved condition as compared to the campground that was originally constructed. This work does not simply prevent or eradicate alteration to

an existing development that would occur through normal wear and tear. Therefore, the plantings are upgrades to the original condition of the Project and are not repair and routine maintenance. Accordingly, the addition of the arborvitae and trees are cognizable changes.

ii. Potential for Significant Impact on Act 250 Criteria

Although the addition of arborvitae and trees are cognizable changes, the Board concludes that such changes do not have the potential to adversely impact significantly on one or more of the ten Act 250 criteria. Accordingly, the changes do not constitute a substantial change and do not trigger Act 250 jurisdiction.

e. Number of Campsites

The Board concludes that the decrease in the number of campsites is a "cognizable" (i.e. physical) change to the Project. Second, the Board concludes that these changes do not have the potential to adversely impact significantly on one or more of the ten Act 250 criteria.

i. Cognizable Change

Based on the findings of fact made herein, the Board concludes that the changes in the number of campsites at the Project are a cognizable physical change in the Project. The Project in 1970 had a total number of campsites of 131. In 1994, the Project had 131 sites. In the mid-1990's, the campsites numbered 1 through 20 were modified by removing 4 of the sites and widening the remaining 16 sites to accommodate wider trailers. Also in the mid-1990's, campsites C-36, C-37, and C-38 were eliminated. Presently, there are 124 campsites at the Project. Accordingly, the number of campsites has slightly decreased since 1970 by 6 sites, but generally the area and location devoted to campsites has remained approximately constant. This decrease is a cognizable physical change.

ii. Potential for Significant Impact on Act 250 Criteria

Although the decrease in the number of campsites is a cognizable change, the Board concludes that such a change does not have the potential to adversely impact significantly on one or more of the ten Act 250 criteria. Accordingly, the changes do not constitute a substantial change and do not trigger Act 250 jurisdiction.

V. ORDER

1. Pursuant to 3 V.S.A. § 810(4), the Board takes official notice of the November 19, 1999 Assurance of Discontinuance, between the Agency of Natural Resources and Lake Champagne Campground, the December 3, 1999 Environmental Court Order, and Jurisdictional Opinion #3-73.

2. Both Petitioner and the Board are bound by the determination in the September 1, 1994 District #3 Commission Coordinator's determination that septic system work does not constitute a substantial change and does not trigger Act 250 jurisdiction.

3. The changes in the winter storage of camper units, changes to utility services (other than septic systems), addition of arborvitae and trees, and the decrease in the number of campsites are not substantial changes to the Project and do not trigger Act 250 jurisdiction.

4. A land use permit is not required for Lake Champagne Campground.

Dated at Montpelier, Vermont this 22nd day of March, 2001.

ENVIRONMENTAL BOARD

__/s/Marcy Harding_____
Marcy Harding, Chair
John Drake *
George Holland
Samuel Lloyd
William Martinez
Rebecca Nawrath
Alice Olenick
Nancy Waples

* John Drake was not present for Board deliberations on March 21, 2001 but he has reviewed and concurs with this decision.