

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

**SUPREME COURT DOCKET NO. 2002-377**

**JANUARY TERM, 2003**

	}	APPEALED FROM:
	}	
	}	Environmental Court
	}	
In re Appeals of Patrick Simoneau	}	
and William Penrod	}	
	}	DOCKET NOS. 210-9-00 and 146-9-01
	}	
	}	Trial Judge: Merideth Wright
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Appellant Winooski Valley Park District appeals the Environmental Court's order conditionally approving a new trail segment that would complete a loop around Colchester Pond. Appellant challenges three of the six conditions imposed by the court. It argues that there is no credible evidence to support the court's decision to: (1) set a daily use limit; (2) impose an hourly visitor limit; and (3) require two employees to monitor, record, and enforce those limits during the first full warm-weather operating season. We agree, and we vacate the court's order as to those conditions.

In 2000, the Colchester Planning Commission approved appellant's application to establish an unimproved footpath, 1400 feet long and two feet wide, along the south end of Colchester Pond. Patrick Simoneau and William Penrod, two adjoining landowners, appealed that decision and the zoning permit issued for the project. Both appeals were consolidated before the Environmental Court. After an evidentiary hearing, the court approved the proposed trail segment but set maximum use limitations and monitoring requirements. The court concluded that to prevent any undue adverse effect, no more than sixty people could use the trail per day, with no more than twelve people allowed per hour, except for large organized groups. The court based its conclusions on appellant's estimated level of use and consequently required monitoring to ensure the validity of appellant's predictions. Appellant filed a motion to reconsider, which the court denied. This appeal followed.

In reviewing matters on appeal, we set aside the trial court's factual findings " only if they are clearly erroneous, viewing the evidence in the light most favorable to the prevailing party, and disregarding modifying evidence." Simendinger v. City of Barre, 171 Vt. 648, 649 (2001) (mem.). " A finding will not be disturbed merely because it is contradicted by substantial evidence; rather, an appellant must show there is no credible evidence to support the finding." Id. (citation and quotation marks omitted).

In this case, we conclude that there is no credible evidence to support the Environmental Court's daily and hourly use limitations. The Environmental Court concluded that limiting access to sixty people per day was necessary to protect vegetation and prevent erosion based on the maximum use level estimated by appellant. However, there is no evidence in the record to support such a limit. At the hearing, appellant's wetlands expert, Katherine O' Brien, assumed for purposes of her testimony that no more than fifty to sixty people would use the path each day. That estimate is consistent with other evidence in the record, including the limited amount of parking available. During 1999, for example, the park's caretakers observed approximately ten cars at the park per day during the heaviest month of use and approximately three cars per day during the slowest month. These numbers do not take into account the number of people engaging in activities other than hiking, such as fishing or boating. At the hearing, Ms. O' Brien stated that if "

significantly" more than fifty to sixty people used the trail daily, the trail would start to show wear. She acknowledged that if there was "extremely heavy" use of the trail on a daily basis, emergent vegetation would wear away, and the trail would become mud. There was no evidence before the court, however, to suggest that sixty people per day would use the new trail segment.

Appellant argues that Ms. O' Brien' s testimony does not support an inference that a single day' s use at sixty people would have any adverse effect, let alone an undue adverse effect. We agree. Ms. O' Brien' s testimony merely recognizes that at some significant level of use there would be a negative impact on vegetation and trail quality. Her testimony does not support the inference that a daily limit of sixty people should be imposed. We find no other credible evidence in the record from which to draw such an inference. We therefore conclude that the court' s finding setting a daily use limit is clearly erroneous. See Simendinger, 171 Vt. at 649.

Similarly, there is no evidence in the record to support the court' s imposition of hourly restrictions. The court stated that an hourly limit was necessary to prevent an adverse effect on the character of the area and to avoid disturbing residents and wildlife. However, there is no indication in the record that the proposed trail would have such an effect. As discussed above, the court found that the park currently experiences moderate use for a variety of activities, including hiking, fishing, and boating. The court also found that there are power transmission lines, a service road, and several residences with barns, farm fields, and horse pastures, in the area surrounding the pond. The court stated that the residences adjoining the proposed trail were adequately screened by existing vegetation and that fencing provided additional security for landowners. Thus, we find no basis to support the court' s finding that imposition of an hourly use limit is necessary to prevent an adverse effect on the character of the area or to prevent residents from being disturbed.

The court' s concern for the possible impact on wildlife is equally without support in the record. The court found that local wildlife would habituate easily to the level of human presence predicted for the trail, even during nesting season. At the hearing, landowners' wildlife expert, Errol Briggs, expressed concern that having more than fifty to sixty people on the trail per day would drive some species out and cause the population levels of others species to decline. However, Mr. Briggs acknowledged that he did not have any "specifics" to support that assertion. Mr. Briggs also testified that the trail, as it currently existed, appeared to be moderately used, and he acknowledged that if the loop trail were completed, it would likely receive moderate use as well. This is consistent with other evidence regarding the expected use of the trail, discussed above. We conclude that the record does not support the imposition of an hourly limit, particularly in light of the existing character of the area and the current level of human activity at the park. We therefore find the court' s twelve-person hourly limit is clearly erroneous. See id.

Because we find no credible evidence to support the court' s imposition of daily and hourly use limits, we find the court' s imposition of monitoring requirements unnecessary. We therefore vacate that portion of the court' s order imposing such conditions on the trail segment' s approval.

Conditions 1, 2, and 3 of the Environmental Court' s order are vacated. The remainder of the order is affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice