



## State of Vermont

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### LAND USE PERMIT

**CASE NO:** 1R1013

Todd Boutwell  
1372 Drake Road  
Bomoseen, VT 05732

**LAWS/REGULATIONS INVOLVED**

10 V.S.A. §§ 6001 - 6093 (Act 250)

The District 1 Environmental Commission hereby issues Land Use Permit 1R1013, pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6093. This permit applies to the lands identified in Book 162, Pages 215, of the land records of the Town of Castleton, Vermont, as the subject of a deed to Todd Boutwell, the Permittee.

**This permit specifically authorizes the post-construction approval of a small-vehicle-repair garage and firewood sawing, splitting and sales operation, together with construction of related septic system and other utilities infrastructure. The project is located on 1372 Drake Road in Castleton, Vermont.**

Jurisdiction attaches because the Project constitutes development as that term is defined in 10 V.S.A. Section 6001 et seq.

1. The project shall be completed, operated and maintained in accordance with the conditions of this permit, Findings of Fact and Conclusions of Law #1R1013, the permit application, plans, and exhibits on file with the Commission, and other material representations.
2. The Permittee shall comply with all conditions of the Agency of Natural Resources Wastewater System and Potable Water Supply Permit #WW-1-3209 issued on October 1, 2019, by the ANR Drinking Water and Groundwater Protection Division. Any nonmaterial changes to permit #WW-1-3209 shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.
3. Representatives of the State of Vermont shall have access to the property covered by this Permit, at reasonable times, for the purpose of ascertaining compliance with Vermont Environmental and Health Statutes and Regulations and with this Permit.
4. No material change shall be made to the design, operation or use of this project without a permit amendment issued by the Commission or a Jurisdictional Opinion from the District Coordinator that a permit amendment is not required.
5. No subdivision or further alteration or development of the tract of land approved herein shall be permitted without a permit amendment issued by the Commission or a Jurisdictional Opinion from the District Coordinator that a permit amendment is not required.
6. Pursuant to 10 V.S.A. § 8005(c), the Commission may at any time require that the permit holder file an affidavit certifying that the project is in compliance with the terms of this permit.
7. The conditions of this permit and the land uses permitted herein shall run with the land and are binding upon and enforceable against the Permittee and his successors and assigns.

8. The building approved herein is not approved for any manufacturing use or the on-site disposal of any process wastes. The Permittee shall apply and receive amended approval from the District Commission for any change in the use of the buildings which involves the storage or handling of any regulated substances or the generation of hazardous wastes other than those described in the application.
9. The plugged floor drain shall remain permanently closed.
10. Handling, storage, and disposal of hazardous wastes by the Permittee shall be in accordance with applicable federal, state, and local regulations.
11. Discharges or releases of hazardous wastes or hazardous materials must be reported pursuant to Section 7-105(a)(2) of the Vermont Hazardous Waste Management Regulations.
12. At a minimum, the Permittee shall comply with the Vermont Department of Environmental Conservation's *Low Risk Site Handbook for Erosion Prevention and Sediment Control* (2006).
13. In addition to conformance with all erosion prevention and sediment control conditions, the Permittee shall not cause, permit or allow the discharge of waste material into any surface waters. Compliance with the requirements of this condition does not absolve the Permittee from compliance with 10 V.S.A. (§§ 1250-1284) Chapter 47, Vermont's Water Pollution Control Law.
14. The Permittee shall post a sign on the north and south facades of the garage reading substantially as follows: "Idling Engines for More Than 5 minutes is Prohibited." Motor vehicles shall not idle for more than five minutes in any 60-minute period while the vehicle is stationary, unless necessary for maintenance, service or repair, or diagnostic purposes.
15. The Permittee shall install downcast and/or fully shielded motion activated exterior lighting fixtures on the south and north ends of the project building, which shall be on for no more than 5 minutes upon being activated. All other exterior lighting shall be full cut-off and manually controlled and shall not be left on overnight.
16. Normal vehicle repair hours and customer pickups and drop-offs shall be limited to 7:30AM to 5:30PM, Monday – Saturday, except in the event of bona fide (proven) emergencies. Servicing of vehicles may occur within the building outside of these hours provided that all doors remain closed and that the facility is not open to the public. No commercial operations are permitted outside of the foregoing hours with the exception of a bona fide emergency repair or other exigent circumstances.
17. Vehicle trips and operation of outside equipment related to the firewood processing operation shall be limited to Monday – Friday, 8:00AM to 5:00PM. Occasional truck trips outside of these hours shall be allowed to bring logs or cut wood to and from the site.
18. Log splitting, sawing or other log processing is limited to Monday through Friday from 9:00AM to 5:00PM.
19. On-site storage of vehicles being worked on shall be limited to a total of 10 and shall be located on the north side of the building as depicted on the project plans.
20. Pursuant to 10 V.S.A. § 6090(b)(1), this Permit is hereby issued for an indefinite term, as long as there is compliance with the conditions herein. Notwithstanding any other provision herein, this permit shall expire three years from the date of issuance if the Permittee has



## E-Notification CERTIFICATE OF SERVICE #1R1013

I hereby certify that I, the undersigned, sent a copy of the foregoing Land Use Permit #1R1013 and Findings of Fact on March 27, 2020, by U.S. Mail, postage prepaid, to the individuals without email addresses, and by electronic mail to the following with email addresses. All email replies should be sent to [NRB.Act250Springfield@vermont.gov](mailto:NRB.Act250Springfield@vermont.gov). **Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the NRB District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify the District Office of any email address changes.**

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**State of Vermont  
NATURAL RESOURCES BOARD  
DISTRICT 1 ENVIRONMENTAL COMMISSION  
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Rutland, VT 05701**

**RE:** Todd Boutwell  
1372 Drake Road  
Bomoseen, VT  
05732

Application #1R1013  
**Findings of Fact  
Conclusions of Law, and Order**  
10 V.S.A. §§ 6001-6093 (Act  
250)

## **I. INTRODUCTION**

On November 13, 2019, Todd Boutwell filed an application for an Act 250 permit for a project generally described as Post-construction approval of small vehicle repair garage and firewood sawing, splitting and sales operation, together with construction of related septic system and other utilities infrastructure. The tract/tracts of land consist/s of 10.11 acres. The Applicant's legal interest is ownership in fee simple described in a deed recorded on February 23, 2015, in the land records of Castleton, Vermont.

The Commission held a site visit and hearing on this application on January 13, 2020. At the end of the hearing, the Commission recessed the proceeding pending the submittal of additional information. The Commission adjourned the hearing on March 26, 2020, after receipt of the additional information, an opportunity for parties to respond to that information, and the completion of Commission deliberations.

As set forth below, the Commission finds that the Project complies with 10 V.S.A § 6086(a) (Act 250).

## **II. JURISDICTION**

Jurisdiction attaches because the Project constitutes a development or subdivision pursuant to 10 V.S.A. § 6001 et seq.

## **III. FINAL PARTY STATUS**

### **A. Parties by Right**

Parties by right to this application pursuant to 10 V.S.A § 6085(c)(1)(A)-(D) who attended the hearing are:

The Applicant by James P.W. Goss, Esq. and Nicole Kesselring, P.E.

The municipality of Castleton by Richard Combs.

The Planning Commission by Janet Currie and Jonas Rosenthal (Zoning).

The Regional Planning Commission, not represented.

The State of Vermont Agency of Natural Resources (ANR) through an entry of appearance by Kevin Anderson, ANR regulatory Policy Analyst, dated January 10, 2020.

B. Interested Parties

Any person who has a particularized interest protected by Act 250 that may be affected by an act or decision of the Commission is also entitled to party status. 10 V.S.A § 6085(c)(1)(E).

i. Preliminary Party Status Determinations

Pursuant to Act 250 Rule 14(E), the District Commission made preliminary determinations concerning party status at the commencement of the hearing on this application. The following persons requested party status pursuant to 10 V.S.A § 6085(c)(1)(E), and were either admitted as parties or denied party status, as indicated below:

Kenneth Lenz, adjoiner, by Karl Anderson, Esq., Admitted: Criteria 1B, 1(air), 5 and 9K (traffic related impacts) and 8 (aesthetics).

There were no other requests for party status.

ii. Final Party Status Determinations

Prior to the close of hearings, the District Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A § 6086(c)(6) and Act 250 Rule 14(E) and found no reason to change its preliminary determinations.

**IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Applicants has met the burden of proving compliance with the following criteria through submittal of the application:

1(A) - Headwaters	8(A) - Wildlife Habitat & Endangered Species
1(C) - Water Conservation	9(A) - Impact of Growth
1(D) - Floodways	9(B) - Agricultural Soils
1(E) - Streams	9(C) - Productive Forest Soils
1(F) - Shorelines	9(D) - Earth Resources
1(G) - Wetlands	9(E) - Extraction of Earth Resources
2 - Water Supply	9(F) - Energy Conservation
3 - Impact on Existing Water Supplies	9(G) - Private Utility Services
4 - Soil Erosion	9(H) - Costs of Scattered Development
6 - Educational Services	9(J) - Public Utility Services
7 - Municipal Services	9(L) - Settlement Patterns
8 - Natural Areas	
8 - Historic Sites	

Therefore, the application shall serve as the Findings of Fact on these criteria.

The findings of fact below are with respect to the criteria implicated in this case: 1 - Air Pollution, 1(B) - Waste Disposal, 8 - Aesthetics, 5 - Transportation, 9(K) - Effects on Public Investments and 10 - Local and Regional Plans are based on the application, Exhibits 001 - 030, and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

Under Act 250, projects are reviewed for compliance with the ten criteria of Act 250, 10 V.S.A § 6086(a)(1)-(10). Before granting a permit, the District Commission must find that the Project

complies with these criteria and, therefore, is not detrimental to the public health, safety or general welfare. The burden of proof under Criteria 1 through 4 and 9 and 10 is on the applicant, and on the opponent under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.

### **Criterion 1 - Air Pollution:**

#### Findings of Fact

1. The Project is small vehicle repair shop and firewood processing and sales operation. The only person appearing in opposition to the application was Kenneth Lenz, an individual residing to the south of the Project parcel and who operates or has operated a commercial boat storage, repair and parts sale operation on that land. The Project garage is located approximately 460 feet from the Lenz house and 110 feet from the Lenz property line. Hearing Testimony; Exhibit 010, Site Plan; Exhibit 005, Aerial Photo.

2. No activity at the Project requires an Air Pollution Control Permit from the State of Vermont. No testimony was presented that noise from any Project activity would rise to the level which would adversely impact human health. Hearing Testimony.

3. The sole source of potential air pollution from the Project involves potential diesel smells and similar odors from vehicles either idling outside the Project or passing in and out of the driveway leading to the Project building. However, the driveway leading to and from the building is further away from the Lenz house than Drake Road itself, which is a Class 3 Public Highway. In addition, the level of traffic going in and out of the Project as applied for in the Application will be extremely low. Hearing Testimony.

4. While Mr. Lenz, who reported that he suffers with a respiratory disease, voiced generalized concerns regarding fumes and odors from vehicles at the Project site, however, there was no evidence that the level of emissions from these vehicles, which appear to be minimal in number, rise to the level of causing undue air pollution or pose a significant threat to Mr. Lenz's health. The Commission will address the issue of odors from idling vehicles under Criterion 8, Aesthetics.

### **CONCLUSIONS OF LAW AS TO CRITERION 1, AIR POLLUTION**

#### Conclusions of Law

Under Criterion 1 of Act 250, a Permit will be granted when an Applicant demonstrates that a project will not cause undue air pollution. 10 V.S.A. § 6086(a)(1). Undue air pollution is to be determined from all the facts and circumstances presented in a case, although the absence of activity requiring an Air Pollution Control Permit from the State of Vermont weighs heavily in the Commission's determination regarding whether undue air pollution is not occurring. Noise can constitute undue air pollution only if it rises to a level that adversely impacts human health.

Mr. Lenz complained of diesel odors from idling vehicles at the garage and the smell of trucks going in and out of the Project property. However, the evidence was that the Project building is 460 feet away from Mr. Lenz's house and the applied for vehicle trips proceeding in and out of the Boutwell driveway are limited and likely lower than number than the number of vehicles that pass by Mr. Lenz on Drake Rd. which is located closer to the Lenz house than the Project driveway (approximately 75 feet). The Commission concludes that the smells allegedly experienced by Mr.

Lenz do not rise to the level of undue air pollution but may have ramifications under Criterion 8, Aesthetics. We will address those issues under that Criterion.

Accordingly, the Commission concludes that this Project complies with Criterion 1(Air).

**Criterion 1(B) - Waste Disposal:**

Introduction:

Under Criterion 1(B), Waste Disposal of Act 250, a Permit will be granted whenever it is demonstrated by the Applicant that in addition to all other applicable Criteria, the development or subdivision will meet any applicable health or Environmental Conservation Department Regulations regarding the disposal of wastes and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. 10 V.S.A. § 6086(a)(1)(B).

Findings of Fact

5. As part of the Project, the Applicant will construct a new septic system to service the garage building. The Permittee obtained a Wastewater System and Potable Water Supply Permit from the Agency of Natural Resources which permit is now final. Exhibit 008, Wastewater System and Potable Water Supply Permit dated October 15, 2019.
6. Under Act 250 Rule 19(E)(1)(a), the Wastewater Permit creates a rebuttable presumption that the disposal of wastes through the approved system will not cause undue water pollution. No engineering, technical or other competent evidence was introduced at the hearing in this matter or in post-hearing submittals rebutting this presumption.
7. The Project engineer testified that a State Stormwater Discharge Permit was not required for the Project due to the fact that impervious areas were below the jurisdictional threshold. Hearing Testimony.
8. The Project building contains no floor drains or other potential sources of injection of waste materials into ground water. Fluids and chemicals associated with the repair operation are stored in consumer size containers within the Project building. Waste chemicals are disposed of through a hazardous materials waste hauler. Waste vehicle oil is donated to entities which burn that oil for fuel. The Applicant testified that his operation generates two barrels of waste oil per year and approximately 20 oil filters per month, with miscellaneous parts being sent to a scrap yard. The Applicant also testified that waste oil and other hazardous materials and chemicals at the site are disposed of in accordance with normal Best Practices. Hearing Testimony. Exhibit 017, Hazardous Waste Disposal ID Form.
9. Mr. Lenz commented that he occasionally would get standing water on his property before Mr. Boutwell built his garage but now gets it all the time. He further testified that he does not see running water coming onto his property now but that some ponding occurs after heavy rainstorms. Testimony.
10. The Project engineer testified that soils on the Lenz property are of a category which has low permeability and is not good for infiltration. She also testified that because of the slow infiltration rate it is common to see standing water on such soils after heavy rain fall or during certain seasons of the year. The Project engineer further testified that on multiple visits to the property, including on the Saturday prior to the hearing after a heavy rainstorm in the middle of winter, she observed no standing water on the Lenz property. She further testified that it was highly unlikely given the topographical orientation of the Boutwell property that it makes any significant

contribution to water discharge onto the Lenz property. The Project engineer testified that Mr. Lenz has created impervious surfaces on his own property in the boat parking area which contribute directly to runoff toward the area Mr. Lenz referenced as being wet. Hearing Testimony.

11. Mr. Lenz testified that at some point in the past several years, a farm tractor driven by Mr. Boutwell dumped red hydraulic fluid on Drake Road and that he contacted local police to report the same. However, Mr. Boutwell testified that the discharged fluid was actually RimGuard non-toxic beet juice used for ballast in his tractor tires and not hydraulic fluid as alleged by Mr. Lenz. None of the municipal officials in attendance at the hearing indicated any concerns regarding this particular incident. Hearing Testimony.

12. The Applicant testified that damaged vehicles which might be prone to leaking fluids are immediately placed inside the garage which has an impervious concrete floor and no floor drains. Hearing Testimony.

13. Mr. Lenz testified that he believes that there is a danger of unspecified pollutants from the Project finding their way into Lake Bomoseen, which is located some 1,500 feet from and on the other side of a ridge from the Project property. However, the Project engineer testified that the small size of the tanks and containers in which any hazardous chemicals used at the site are contained makes the probability of a significant spill extremely low. In addition, she testified that if a spill were to occur in the vicinity of the garage, it would absorb into the soil or gravel driveway and be held in the soil matrix, where it could be addressed through removal of the soil. Raw product reaching the lake is virtually impossible given the small quantities stored onsite, and the topography and extensive isolation distances. Hearing Testimony.

14. In this case, the State Wastewater Permit for the new septic system establishes a presumption that wastes can be disposed of through this system without resulting in undue water pollution. Act 250 Rule 19. No competent technical evidence or expert testimony was introduced to rebut this presumption. In addition, there has been no competent evidence of problematic discharges or dumps of chemicals on the Project site, or as a result of the Boutwell operation, during the time it has been operating. No floor drains or other sources of pollutant discharge exist on the site.

15. The only complaint by Mr. Lenz under this Criterion appeared to be that standing stormwater runoff is sometimes visible on his property, which he believes originates from the Boutwell property. However, the Project engineer convincingly testified that the terrain and topography of the Boutwell property makes it highly unlikely that any significant portion of water on the Lenz property is coming from the Boutwell property. In addition, soils on the Lenz property may be contributing to the perception that water discharges off-site are causing ponding, which may in fact be simply due to normal discharge encountering impervious soils.

16. After considering the evidence and testimony, the Commission concludes that the Project will not cause or result in undue water pollution from the disposal of wastes and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. To ensure that the Project complies with Criterion 1(B), the Commission will condition the Permit as follows:

The Permittee shall comply with all conditions of the Agency of Natural Resources Wastewater System and Potable Water Supply Permit #WW-1-3209 issued on October 1, 2019, by the ANR Drinking Water and Groundwater Protection Division. Any nonmaterial changes to permit #WW-1-3209 shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.

The building approved herein is not approved for any manufacturing use or the on-site disposal of any process wastes. The Permittee shall apply and receive amended approval from the District Commission for any change in the use of the buildings which involves the storage or handling of any regulated substances or the generation of hazardous wastes other than those described in the application.

Handling, storage, and disposal of hazardous wastes by the Permittee shall be in accordance with applicable federal, state, and local regulations.

Discharges or releases of hazardous wastes or hazardous materials must be reported pursuant to Section 7-105(a)(2) of the Vermont Hazardous Waste Management Regulations.

At a minimum, the Permittee shall comply with the Vermont Department of Environmental Conservation's *Low Risk Site Handbook for Erosion Prevention and Sediment Control* (2006).

In addition to conformance with all erosion prevention and sediment control conditions, the Permittee shall not cause, permit or allow the discharge of waste material into any surface waters. Compliance with the requirements of this condition does not absolve the Permittee from compliance with 10 V.S.A. (§§ 1250-1284) Chapter 47, Vermont's Water Pollution Control Law.

#### Conclusions of Law

As conditioned herein, the Commission concludes that the Project complies Criteria 1(water) and 1(B).

#### **Criterion 5 - Transportation and 9K - Public Investments:**

##### Findings of Fact

17. The Project is located on Drake Road which is a Class 3 Town Highway. Testimony of the Applicant, the Town Zoning Administrator and other municipal officials present at the hearing indicated that it presently has no traffic congestion or safety issues and is lightly travelled. The grade of Drake Rd. adjacent to the Project access is essentially dead level with sight distances to the north being approximately 350 feet and sight distances to the south being approximately 900 feet. These sight distances exceed VTrans recommendations. Hearing Testimony. Exhibit 023, Applicant's Recess Response.

18. The Applicant testified that traffic generation by the Project is self-limiting, as he can only work on one or perhaps two vehicles at a time within the garage structure. He estimated that he experiences two to three customer drop-off and pick-up vehicles per day and one to six parts trucks per day in connection with the vehicle repair operation. He estimated that in connection with the firewood processing operation he experiences three to five trucks delivering logs per week and makes one to two firewood deliveries per day. The Project engineer testified that the volume of traffic generated by Project is inconsequential with respect to potential congestion or safety issues on Drake Road. Hearing Testimony.

19. The Applicant and officials of the Town of Castleton testified that during the time the Project has been operating, which has been since 2016, there have been no accidents or traffic conflicts of any kind in the vicinity of the Project or as a result of the Project. The Town has not

identified any issues with traffic infrastructure that have been or could be adversely impacted or exacerbated by the Project. Hearing Testimony.

20. Mr. Lenz submitted photographs depicting a truck unloading 55-gallon drums on Drake Road for delivery to the Project building. However, he admitted that he did not observe any problematic traffic consequences in connection with that situation. Mr. Boutwell testified that this has occurred twice since he began operations and only at times when winter conditions made travel down the Boutwell driveway temporarily problematic. No testimony was introduced that this sporadic event is causing any traffic congestion or unsafe conditions with respect to Drake Road. Hearing Testimony.

21. Mr. Lenz complained that traffic along Drake Road has increased in recent years. However, he introduced no evidence that this traffic was generated by or otherwise related to the Project. In contrast, the Town Zoning Administrator noted that other commercial businesses are located in the vicinity and that five permits were issued for construction along Drake Road not related to the Project in the last year. He believed that this likely led to some increased traffic on Drake Road in the last year. In any event, no evidence was adduced that this level of traffic is constituting undue traffic congestion or unsafe conditions. Hearing Testimony.

22. The Project engineer testified that there are no known problematic infrastructure issues with the local road system in the vicinity of the Project or which the Project could adversely impact. This testimony was corroborated by the Town Zoning Administrator's testimony. Hearing Testimony.

#### Conclusions of Law Under Criteria 5 and 9K:

Under Criterion 5 of Act 250 a permit will issue if a project will not cause unreasonable congestion or unsafe conditions with respect to use of highways, waterways, railways, airports and airways and other means of transportation existing or proposed. 10 V.S.A. § 6086(a)(5). Exacerbation of an existing unsafe condition can cause a project to not conform to this Criterion. Under 10 V.S.A. § 6088(b), the burden of proof with respect to Criterion 5 is on any party opposing the application. Under Criterion 9K, a permit will be issued for a project when it is demonstrated by the applicant that a project adjacent to governmental and public utility facilities such as highways and roads will not unnecessarily or unreasonably damage the public or quasi-public investment in the facility or the public's use, enjoyment of or access to the facility, service or lands.

Here, no competent evidence was presented that Project traffic will be causing or contributing to unreasonable traffic congestion or unsafe conditions. In addition, the testimony was that no accidents or unusual traffic conflicts have occurred in the vicinity of the Project during the entire time that the Project has been operating. Road geometry conditions in the vicinity of the Project are not problematic with sight distances exceeding VTrans' recommendations and level of grades being essentially flat. If the Town ultimately determines that it is or does, it can take appropriate traffic enforcement measures. The Commission finds that Mr. Lenz has not satisfied his burden to prove that the Project will cause or contribute to unreasonable traffic congestion or unsafe conditions. The Project therefore satisfies Criterion 5 of Act 250.

With respect to Criterion 9K, the only public investment adjacent to the Project identified by any party to the hearing was Drake Road. Testimony by the Zoning Administrator, representatives of the Planning Commission and the Town Police Chief did not reveal any problematic infrastructure or any public investments which could be adversely impacted by the Project.

The Commission concludes that the Project will not cause unreasonable congestion or unsafe conditions with respect to use of roads, highways, waterways, railways, airports, and other existing or proposed means of transportation.

The Project complies with Criterion 5(A).

The Project incorporates all appropriate transportation measures and complies with Criterion 5(B).

Criterion 9(K) applies to projects that are adjacent to governmental and public utility facilities, services, or lands. With regard to such projects, the applicant bears the burden of proving that the project will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service or lands.. 10 V.S.A § 6086(a)(9)(K).

The Commission concludes that the Project complies with Criteria 5 and 9(K).

### **Criterion 8 - Aesthetics, Historic Sites and Rare and Irreplaceable Natural Areas:**

#### Introduction:

Under Criterion 8 of Act 250, the Commission will grant a permit upon finding that the Project will not have an undue adverse effect on the scenic or natural beauty of the area, or aesthetics. 10 V.S.A. § 6086(a)(8). The burden of proof under this Criterion is on the opponents to an application although the applicant bears the burden of producing sufficient evidence to allow positive findings. 10 V.S.A. § 6088. We would specifically note that Criterion 8 of Act 250 is not a guaranty that aesthetics in an area will never change, but simply ensures that such change will be reasonable. *Times and Seasons, LLC*, No. 3W0839-2-EB (Altered) Findings and Conclusions at 39 (Nov. 4, 2005); *John J. Flynn Estate*, No. 4C0790-2-EB, Findings and Conclusions at 25 (May 4, 2004). Here the Project's potential impacts under aesthetics are limited to noise from the repair and firewood operation, visual impacts from the building and vehicles accessing the Project site and odors from vehicles accessing the Project.

The Commission determines conformity with Criterion 8, Aesthetics, by employing the test set forth by the former Environmental Board in *In re Quechee Lakes* (the "Quechee Lakes test"). No. 3W0411-A-EB (Nov. 4, 1985), *aff'd. In re Quechee Lakes*, 154 VT 543 (1990). That test is intended to ensure that projects will not have an "undue adverse" aesthetic impact under Criterion 8 of Act 250. To determine whether a project will have an "adverse" aesthetic impact, the Commission is charged to look at how the project fits within the context of its area in terms of size, scale, nature of use and various off-site impacts, here with specific regard to dust and noise. *Id.* See also, *In re Free Heel, Inc.*, No. 217-9-06 Vtec at 5 (March 21, 2007). If a project fits within its aesthetic context, it will not have an "adverse" aesthetic impact and will comply with Criterion 8.

Even if the Commission finds that a project does not fit within its context, and therefore would have an "adverse" aesthetic impact on the area, a project will still be found to comply with Criterion 8, Aesthetics, unless the adverse aesthetic impact is found to be "undue." In order to find an "undue" adverse aesthetic impact under the *Quechee Lakes* test, one of the following sub-tests must be met:

1. the project must be shocking to or offend the sensibilities of an average person;
2. the project must violate some clear written community standard, such as a provision in a town or regional plan, with respect to aesthetics;
3. reasonable mitigation measures with respect to aesthetic impacts must not have been employed.

## Findings of Fact

23. Potential aesthetic impacts identified by the parties at the hearing in this matter were visual impacts from the structure, noise and visual impacts from the operation and vehicles accessing the site and potential odors from vehicles accessing the site.

24. With respect to the repair operation, the Project structure is a pitched roof garage set back approximately 175 feet from Drake Rd. and is finished with earth tone colors. Due to vegetation and topography it is not easily visible from Drake Road. The Project building fits into the general style of the area in terms of size and scale and is not visually shocking or offensive. Exhibit 006, Building Photo; Exhibit 010, Site Plan.

25. The Castleton Zoning Administrator and the Chair of the Castleton Planning Commission both testified that the Project area is characterized by residences with interspersed small and medium sized commercial uses. The Project use fits within this land use pattern. Hearing Testimony.

26. Equipment used in connection with the firewood operation consists of a small log splitter and a saw installation. Visibility off the site is highly limited. The Applicant has proposed restricted hours and days of operation for this component of the Project. Exhibit 001, Schedule B; Exhibit 003, Project Program; Exhibit 010, Site Plan.

27. The Project building is visible from some portions of the Lenz house. However, the Commission has taken note that Mr. Lenz, as a condition of his own zoning permit was required to plant screening on his property between his house and the Boutwell property line. He has not established these plantings which would have screened his view of the Project building had they been so established. Moreover, the Commission finds that earthen material placed by Mr. Lenz along his property line (to divert stormwater) has made these plantings problematical due to the fill material used. We would also note that Mr. Lenz was required by conditions in his own zoning permit to screen his own commercial operation from Mr. Boutwell's property. Given the fact that the record suggests that he has caused his own hardship regarding lack of screening due to his disregard of a permit condition imposed on his own property, the Commission declines on the facts of this case to impose any further screening requirements on the Project as visual mitigation with respect to Mr. Lenz' property. Hearing Testimony; Exhibit 024, Zoning Administrator Letter.

28. The Applicant testified he would install two motion activated lighting fixtures, one on the north end of the building and one on the south end of the Project building. He further testified that all other exterior lighting would be manually operated and would not be left on overnight. Hearing Testimony.

29. Testimony at the hearing indicated that noise from the Project repair operation is largely contained within the garage structure and is primarily limited to hand and other tools operated by compressed air. There are occasional vehicles idling outside of the premises. Noise from vehicles is limited to customers dropping off and picking up their vehicles, flatbeds coming to and from the site, parts and similar truck deliveries, occasional truck deliveries of uncut logs and occasional truck deliveries of cut logs off the site. The unrebutted testimony at the hearing was that this amounts at most to a handful of vehicles per hour and not every hour of the day. Hearing Testimony.

30. The pick-ups and drop offs in connection with the repair operation will be limited to 7:30AM – 5:30PM, Monday - Saturday, except for emergencies. If repairs occur after hours, the overhead garage doors will be closed. The firewood operation is limited to 8:00AM – 5:00PM,

Monday – Friday. While vehicles occasionally arrive at the property outside of these hours, they do not arrive late at night or early in the morning. Exhibit 001, Schedule B; Exhibit 003, Project Program. Hearing Testimony.

31. Mr. Lenz testified that he was concerned about dusk to dawn lights outside the Project. This concern will be addressed by the Applicant's agreement to not leave the manually operated lights on overnight and to use motion activated lights at the two ends of the building. Mr. Lenz also complained regarding vehicles driving down the Boutwell driveway to the garage. However, the Commission notes that the low level of traffic produced by the Project and the limitation of the hours of operation would make such impacts adverse, but do not rise to the level of "offensive or shocking to the average person."

32. Mr. Boutwell testified that his firewood processing operation has been going on at the property since approximately 2002. He further testified that the garage has been operating since 2016. Mr. Boutwell indicated that other than Mr. Lenz no other neighbors in the area have raised any complaints concerning his operation. Nor, the Commission noted, did any other neighbors or adjoining attend the Hearing. Testimony.

33. Mr. Lenz complained regarding odors from vehicles traveling down the Boutwell driveway to the garage. However, he did not indicate how these odors were any different, either in terms of magnitude or frequency, than odors that would be experienced from vehicles travelling along Drake Road, which is closer to the Lenz house than the Boutwell garage.

34. While counsel for Mr. Lenz presented a legal memorandum on the question, the Commission finds that the applicant's arguments the more persuasive of the two as noted under Criterion 10 below.

### **Conclusions of Law - Criterion 8**

In this case, the testimony of the Castleton Planning Commission Chair and the Town Zoning Administrator indicated that the area in which the Project is located consists of residences with interspersed small to medium-sized commercial uses. No party at the hearing disputed this characterization of the Project vicinity with the result that the Project use fits within its context. The Project structure consists of a simple pitched roof building with earth-tone colors and is set back considerably from Drake Rd. and the Lenz residence. The Applicant has agreed to use motion activated lighting on the south and north ends of the building and to not leave other Project lighting on overnight. The firewood operation uses limited amounts of small equipment not readily visible from any public area or residence. Hours of operation limitations will prevent the Project from operating during times when significant outside residential usage is likely to occur. Accordingly, the Project fits within its general and visual context and will not have an adverse impact under Criterion 8 of Act 250.

The Commission also concludes that the Project fits within its acoustical context. Repairs occur entirely within the garage building with the result that the potential for significant offsite noise from that operation has been minimized. Testimony is that the firewood operation uses small equipment and only occurs occasionally and given the hours applied for will not occur in the early morning, evening or on weekends. The testimony also was that the traffic going to and from the Project will be relatively light. Given the un rebutted testimony that the Project area consists of residences with interspersed commercial operations, it is reasonable to expect light to moderate commercial vehicle traffic to be traveling in the area. Further, the minimal amount of traffic being predicted for the Project operation is not out of context with the overall traffic on Drake Road which is also relatively light. The Project therefore fits within its acoustical context and will not have an adverse aesthetic impact.

Finally, the Commission notes that while Mr. Lenz complained regarding odors from vehicles passing down Mr. Boutwell's driveway to the garage, he failed to demonstrate how brief transient odors from vehicles passing down the driveway some 250 feet away from his house would be out of context given the fact that his house is located only 75 feet away from Drake Road, a town highway, and its existing car and truck traffic. Accordingly, we cannot find that use of the driveway to access the garage is out of context with the general area. The Commission concludes that the Project fits within its visual context and therefore will not have an adverse visual impact on aesthetics.

The Commission notes that even if it were to conclude in this case that the Project will have an adverse aesthetic impact (as we do with respect to noise and potential odors), that impact will not be "undue" and the Project still satisfies Criterion 8 of Act 250. The Commission concludes that no visual, auditory or olfactory aspect of the Project will be shocking or offensive to the average person in this setting. Finally, the Applicant has employed multiple aesthetic mitigation measures in this case, including, but not limited to:

- a. limitation on hours of operation to avoid night and early morning hours and operation of the firewood operation on weekends;
- b. the employment of motion activated lighting fixtures on the north and south facades of the building;
- c. the use of earth-tone colors and a pitched roof;
- d. significant setbacks from the Project building and the firewood processing areas from sensitive receptors;
- e. agreement to keep the garage doors closed when repairs are occurring outside of posted business hours and the parking of vehicles being worked on to the north side of the building, thus using the building façade to shield visibility from Mr. Lenz's house.

To ensure that the Project will comply with Criterion 8, Aesthetics, the Commission will condition the permit as follows:

The Permittee shall post a sign on the north and south facades of the garage reading substantially as follows: "Idling Engines for More Than 5 minutes is Prohibited." Motor vehicles shall not idle for more than five minutes in any 60-minute period while the vehicle is stationary, unless necessary for maintenance, service or repair, or diagnostic purposes

The Permittee shall install downcast and/or fully shielded motion activated exterior lighting fixtures on the south and north ends of the project building, which shall be on for no more than 5 minutes upon being activated. All other exterior lighting shall be full cut-off and manually controlled and shall not be left on overnight.

Normal vehicle repair hours and customer pickups and drop-offs shall be limited to 7:30AM to 5:30PM, Monday – Saturday, except in the event of bona fide (proven) emergencies. Servicing of vehicles may occur within the building outside of these hours provided that all doors remain closed and that the facility is not open to the public. No commercial operations are permitted outside of the foregoing hours with the exception of a bona fide emergency repair or other exigent circumstances.

On-site Storage of vehicles being worked on shall be limited to a total of 10 and shall be located on the north side of the building as depicted on the project plans.

As conditioned herein, the Commission concludes that the Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas and therefore complies with Criterion 8.

### **Criterion 10 - Town and Regional Plans:**

#### Findings of Fact

35. No party identified any provision of the Rutland Regional Plan which the Project would violate. Thus, the Commission's inquiry was limited entirely to the Castleton Town Plan adopted on July of 2018.

36. The Project is located in the Rural Residential 2 Acre District under the Town Plan. This District subsumes the vast majority of land in the Town of Castleton.

37. The testimony of the Town Zoning Administrator and the Chair of the Planning Commission indicated that land use patterns within this District consists of residential uses and interspersed commercial uses. These individuals also indicated that the Town desires to encourage this pattern of development within the District. Hearing Testimony.

38. The majority of the Castleton Town Plan is essentially aspirational and consists of nonmandatory policy statements. The Castleton Town Plan contains only one provision specifically applicable to the Rural Residential 2 Acre District:

The Rural Residential 2 Acre District includes the vast majority of land in Castleton. This area is appropriate for residences. Castleton Town Plan at p. 9.

39. Under existing caselaw, the Commission finds that no provision of the Castleton Town Plan specifically and with mandatory language prohibits or materially circumscribes a small commercial garage in the Rural Residential 2 Acre District. In addition, there is no provision of the Castleton Town Plan which forbids commercial usage in general within that District.

40. The Project is located in the Rural Residential 2 Acre District under the current version of the Castleton Zoning Regulations as well.

41. Both the Applicant and Mr. Lenz submitted legal memoranda regarding Criterion 10, Town Plan in this matter. Exhibits 025 and 026-026b. As noted above, the Commission finds the applicant's arguments to be the more compelling of the two.

#### Conclusions of Law

Under Criterion 10 of Act 250, the Commission must find that a proposed project conforms with any applicable, duly adopted town and regional plan. 10 V.S.A. § 6086(a)(10). The Vermont Supreme Court and the Environmental Division have set forth specific legal standards by which a project's conformity with a town plan must be judged under Criterion 10. For a project to be found not in conformity with a town plan, the project must first violate a "specific policy" set forth in the plan. *Re Green Peak Estates*, 154 Vt. 363, 369 (1990). A town plan provision is a "specific policy" if it 1) pertains to the area of the district in which the project is located, 2) is intended to guide or prescribe conduct or land use within that area or district, and 3) is sufficiently clear to guide the

conduct of an average person using common sense and understanding. *In re Times and Seasons, LLC*, #3W0839-2-EB (Altered), Findings and Conclusions at 59 (Nov. 4, 2005); *EPE Realty Corporation*, #3W0865-EB, Findings and Conclusions at 39 (Nov. 24, 2004); *Peter S. Tsimortos*, #2W1127-EB, Findings and Conclusions at 20 (April 13, 2004).

Secondly, the “specific policy” must be stated “in language that ‘is clear and unqualified, and creates no ambiguity’” *John A. Russell Corp.*, 176 Vt. 520, 523 (2003), quoting *In re MBL Associates*, 166 Vt. 606, 607 (1997). “Broad policy statements phrased as ‘non-regulatory abstractions’ may not be used to deny a project.” Thus, standardless, vague or merely aspirational policy statements in a town plan are not enforceable to prevent a project. *In re Chaves*, 2014 Vt. 5, ¶ 38. Most importantly, in order to prohibit a project the town plan provision must be mandatory, not simply provide guidance to development. See, e.g. *Times and Seasons, LLC, supra*; *In re Pike Industries, Inc., et al.*, #5R1415-EB, Findings and Conclusions at p. 51 (June 7, 2015); *In re John Flynn Estate*, #4C0790-2-EB, Findings and Conclusions at 27 (May 4, 2004). Thus, a provision of a town plan is not mandatory, and cannot be used to bar a project, if it lacks a mandatory term such as “must,” “shall” or “prohibited.” Town plan provisions employing words such as “should,” “encouraged,” “discouraged” or “may” are non-mandatory and cannot be used to bar a project based upon Criterion 10. See, e.g., *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits (Jan. 20, 2010); *Green Meadows Center, LLC*, #2W0694-1-EB, Findings and Conclusions at p. 42 (Dec. 21, 2000). Further, where a Town Plan uses ineffectual language, that language cannot be used to prohibit a project. *Times and Seasons, supra*.

In this case, virtually all of the Castleton Town Plan can be characterized as aspirational except for those provisions which prohibit undue water pollution and similar police power matters which are not at issue in this case. Indeed, as noted above the Castleton Town Plan contains only one provision specifically applicable to the Rural Residential 2 Acre District:

The Rural Residential 2 Acre District includes the vast majority of land in Castleton. This area is appropriate for residences.

Castleton Town Plan at p. 9. Notably, this language does not say that the area is “inappropriate” for small commercial uses or that the same are “prohibited,” “forbidden,” “not allowed” or even “discouraged” (which would not be “mandatory” language under the applicable case authority). Nor is there any provision of the Castleton Town Plan that says that commercial uses are restricted to only one particular area of the Town. The Commission concludes that if the Castleton Planning Commission believed that commercial uses were inappropriate and should be forbidden in the Rural Residential 2 Acre District, they could have said so in this provision. They specifically did not do so. As a result, under the rules of construction above, the fact that the Plan does not proscribe commercial uses in the Rural Residential 2 Acre District in clear mandatory language, the project is not barred by operation of the Town Plan or its relevant zoning ordinances.

Mr. Lenz essentially cites only one policy of the Castleton Town Plan as proscribing the Project, namely Policy Number 3 “to Maintain and Protect the quality and character of historic settlement patterns.” Town Plan at p. 10. This Policy language in and of itself is merely aspirational, does not specifically apply to the Rural Residential 2 District, and is insufficient to legally bar the Project. The two provisions cited under this Policy which Mr. Lenz believes forbid the Project simply state as follows:

Channel non-residential growth into existing growth areas and areas serviced by sewer and/or water.

*Id.* The provision noted does not use language such as “forbid,” “prohibit,” “not allowed,” “must,” “shall” or similar mandatory language regarding location of non-residential growth in areas other

than those served by water and sewer. This non-mandatory language has been found insufficient to prohibit a project under Criterion 10. The same, we conclude, is true of the second provision cited by Mr. Lenz which is as follows:

Continue to require site plan review of all commercial development proposals to encourage the sound design, orderly maintenance and establishment of infrastructure responsibility.

*Id.* Again, we conclude there is no clear mandatory language forbidding a small commercial project in the Rural Residential 2 District. As a result of the foregoing, no party has identified any mandatory, unambiguous provision of the Castleton Town Plan applicable to the Rural Residential 2 Acre District which prohibits or circumscribes the Project. Under existing Act 250 authority, the inquiry ends there.

Even if the Castleton Town Plan is found to be ambiguous as alleged by Mr. Lenz, the Project still conforms to Criterion 10 of Act 250. Where a town plan provision arguably applicable to a project is ambiguous, the Commission may resort to review of the local zoning regulations for the limited purpose of resolving the ambiguity for purposes of determining conformity with Criterion 10. *Diverging Diamond Interchange SW Permit, #50-6-16 Vtec* at 3, (Motion for Reconsideration at 3) (March 15, 2018); *In re Kisiel*, 172 Vt. 124, 130 (2000), citing *In re Molgano*, 163, Vt. 25, 30 (1994). This does not mean that the zoning regulations become applicable in the Act 250 proceeding. Rather, their only role is to assist the Commission in determining what the meaning of the applicable town plan language actually is. *Times and Seasons, supra* at p. 60; *EPE Realty Corporation, Supra.* at p. 39.

As noted above, there is nothing prohibitory about the Castleton Town Plan's treatment of small commercial operations in the Rural Residential 2 Acre District. However, even if the Zoning Regulations are considered, there is nothing in those Regulations which prohibits a small automotive repair operation in this District.

The Castleton Zoning Regulations amended through 2013, contain provisions concerning the Rural Residential 2 Acre District where the Project is located on page 6. That provision in its entirety reads as follows:

RR - 2A Rural Residential 2 Acre District, Minimum Lot Size: Two Acres

1. Purpose: To provide residential opportunities in the major portions of the community to the extent there are not substantial conflicts with natural resources.
2. Flood Hazard Areas: There may be some land within this district that is within the Flood Hazard Overlay District. Please check the Official Zoning Map and see Attachment A.
3. Water Source Protection Areas: There may be some land within this district that is within the Water Sources Protection Overlay District. Please check the Official Zoning Map and see Section 201.J.

Castleton Zoning Regulations at p. 6. Nothing in this provision categorically prohibits commercial operations in the District. Article 3 of the Zoning Regulations at p. 13, contains the Table of Uses allowed in the RR-2A District. Under that Table, the following commercial uses are allowed within the RR-2A District following approval by the Development Review Board:

Appliance - retail sales and service; associations, clubs and lodges; **automobile - parts and supplies, sales/used vehicles, sales and service**; banks; building materials - sales and storage; convenience stores/small grocery stores (no gas); electrical supplies - wholesale and retail; fabric retail sales; fire station; carpet installation; funeral home; furniture and home furnishing - retail sales/new and used, upholstering, wholesale and storage; retail - garden center; gift shops; antique shops; crafts; glass sales and repair; golf course; kennels; lumber yard; light manufacturing; motels; retail sales and service of musical instruments; nursing homes; retail sales and service of office equipment; **other retail sales and services**; pet shops; plumbing fixtures - supplies retail and wholesale; professional offices; quarries involving removal of sand, gravel and top soil; recycling station; restaurant; **retail sales and services**; solid waste drop off; sporting goods and camping retail sales; stone contractors and sales; trailer sales - renting and leasing; **truck supplies and parts storage**, and veterinary hospitals.<sup>1</sup>

Emphasis added. As is clear from the foregoing, the Zoning Regulations clearly contemplate that many types of commercial operations can be located in the RR-2A District and specifically automotive sales and service operations and truck supplies and parts storage. In fact, many of the commercial uses allowable in this District are significantly more intensive than what is being proposed in this case.

As a result, to the extent that Mr. Lenz is arguing that the Town Plan states that commercial use per se cannot be located in the RR-2A District, that assertion is contradicted by the terms of the Castleton Zoning Regulations. The Project therefore complies with Criterion 10 of Act 250 even if the Commission were to determine that the express language of the Castleton Town Plan is ambiguous with regard to the permissibility of the Project due to its light commercial nature.

Finally, while the Commission is not bound by the interpretation of local officials regarding their ordinances and regulations, the Commission can consider those interpretations as evidence regarding what the intention of the municipality is in a particular town plan provision under Criterion 10. *In re Phillip Gerbode, #6F0396E-EB-1* (Jan. 29, 1992). In this case, both the Chair of the Castleton Planning Commission, and the Castleton Zoning Administrator testified at the hearing that not only does the Town Plan not prohibit this Project but that the Town wishes to encourage uses of this type in this District, which subsumes the vast majority of land in Castleton. Thus, the opinion of those who promulgated the Town Plan and who are charged with its implementation clearly and unambiguously indicated that the Project is allowed under that document. As a result, there literally no interpretation of the applicable law which would prohibit the Project under Criterion 10.

Accordingly, the Commission concludes that the Project complies with Criterion 10.

## **V. SUMMARY CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with in the findings and conclusions of this decision and the conditions of Land Use Permit #1R1013, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

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<sup>1</sup> While some of the commercial uses noted above require town sewer to receive a zoning permit, the requirement of town sewer has nothing to do with the suitability of these commercial uses in this District. In addition, in this particular case, a State Wastewater Permit for the Project has been issued and is final with the result that there is an unrebutted presumption under Act 250 that waste water can be disposed of adequately from the site. Act 250 Rule 19. No party attempted to rebut this presumption.

