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

Re: Herbert and Patricia Clark,
#1R0785-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Herbert and Patricia Clark seek a land use permit to convert an existing storage shed into a retail hardware and home/farm supply store, including an outdoor, year-round, merchandise storage area, an outdoor seasonal sales display and a parking lot, on property located at the intersection of Arnold Hollow Lane and Route 73 in the Town of Brandon. As proposed, the project would not have a conventional waste disposal system. Instead, a cornposting toilet with an atmospheric vent stack would be utilized. No toilet facilities would be available for regular public use. The project would not be serviced by running water. Bottled water would be ysed for floor scrubbing, hardware and building and farm supply clean-up and maintenance tasks and as drinking water for employees and the general public. Handi-wipes would be available for clean-up. Further, the project would be located in the midst of one of Brandon's 30 scenic areas.

As explained below, the project would not comply with Criterion 1(B)(waste disposal), Criterion 8(aesthetics and scenic beauty) or Criterion 10(town plan). The project would not comply with applicable Agency of Natural Resources, Department of Environmental Conservation regulations regarding the disposal of wastes. The Clarks have failed to adequately demonstrate that the project would not result in undue water pollution. The project would have an undue adverse effect on the scenic beauty of the Arnold Hollow Lane/Route 73 intersection -- a scenic area under the Brandon town plan -- and violate specific policies in the town plan intended to prohibit development which threatens to adversely affect the visual amenities of Brandon. Consequently, the Clarks' application for a land use permit is DENIED.

I. PROCEDURAL BACKGROUND

On March 4, 1996, Edward and Lauren Schwiebert, Ernst and Louise Pedersen, James and Donna Disabito, Alex and Sharon Green and Robert Field ("Appellants") filed an appeal ("Appeal") with the Environmental Board ("Board") from the District # 1 Environmental Commission's February 2, 1996 land use permit #1R0785 and related findings of fact, conclusions of law and order ("Decision"). The Decision authorizes Herbert and Patricia Clark ("Applicants") to convert an existing storage shed into a retail hardware and home/farm supply store including an outdoor, year-round, merchandise storage area, an outdoor seasonal sales display and a parking lot ("Project"). The Project is located off Arnold Hollow Lane adjacent to the intersection of Arnold Hollow Lane and Route 73 in the Town of Brandon ("Brandon"). The Appellants contend that the District #1 Environmental Commission ("District Commission") erred with respect to the following criteria of 10 V.S.A. § 6086(a): 1(B)(waste disposal); 5(traffic); 8(aesthetics

4/3/97

and scenic beauty); 9(F)(energy conservation); 9(J)(public utility services); and 1 O(town plan): (collectively "Contested Criteria").

On April 18, 1996, Board Chair John T. Ewing convened a prehearing conference in Montpelier. The Applicants were represented by Gary Karnedy, Esq., and the Appellants were represented by Edward Schwiebert, Esq, The parties agreed to the following: the Appellants have party status as a matter of right pursuant to Environmental Board Rule ("EBR") 14(A) under each of the Contested Criteria; the Appellants may join together and be collectively represented by Mr. Schwiebert; and pursuant to 10 V.S.A. § 6027(g) and EBR 41, a three member hearing panel of the Board ("Panel") would hear the Appeal. A hearing on the merits of the Appeal was scheduled for June 19, 1996.

During May, 1996, the parties filed prefiled exhibits which they intended to introduce into the record and witness lists,

On June 17, 1996, Panel Chair Arthur Gibb convened a second prehearing conference via telephone in Montpelier. At this conference, the parties agreed to the following: there are no objections to Board members Gibb, Martinez and Harding serving on the Panel; there are no objections to the prefiled exhibits; and pursuant to the parties' joint request, the June 19, 1996 merits hearing shall be postponed to afford the parties more time further to explore settlement of the matters at issue. The parties were unable to reach settlement.

On August 19, 1996, Panel Chair Arthur Gibb convened a third prehearing conference via telephone in Montpelier. At this conference, the parties agreed to the logistics of a hearing day and site visit.

On September 3, 1996, the Panel convened a hearing in the Brandon Town Offices in Brandon. The Applicants were represented by Mr. Karnedy, and the Appellants were represented by Mr. Schwiebert. After the parties presented opening statements, the Panel took a site visit during which it viewed the Project and surrounding environs from a variety of locations. Upon its return to the hearing room, the Panel accepted into the record documentary and oral evidence and heard closing statements. After recessing the hearing, the Panel deliberated on several preliminary issues.

The Applicants filed proposed findings of fact and conclusions of law on September 17, 1996. On September 18, 1996, the Appellants filed proposed findings of fact and conclusions of law and a Motion to Admit Additional Testimony and Evidence Based Upon Newly Discovered Evidence ("Motion to Admit"). On September 25, 1996, the Applicants filed a Memorandum of Law in Opposition to Appellants' Motion to Admit Additional Testimony.

The Panel deliberated again on September 25, October 23, December 17, December 18, and December 30, 1996. Based upon a thorough review of the record, related argument and the parties' proposed findings of fact and conclusions of law, the Panel issued a proposed decision on January 3, 1997 which was sent to the parties ("Proposed Decision"). In the Proposed Decision, the Panel denied the Motion to Admit. The parties were allowed to file written objections and request oral argument before the Board.

On January 17, 1997, the Appellants filed Appellants' Request for Oral Argument and Memorandum Objecting to Recommendations of the Panel. Appellants James DiSabito, Louise Pedersen and Alex Greene each filed a written request for oral argument. On January 20, 1997, the Applicants filed a request for oral argument and a Memorandum of Law in Opposition to the Appellants' Motion to Admit Additional Testimony.

On January 22, 1997, the Board convened oral argument with Appellants Edward Schwiebert, James DiSabito, Alex Greene and Louise Pedersen and the Applicants participating. [1] Thereafter, the Board deliberated.

On February 5, 1997, the Board issued a Memorandum of Decision and Order advising the parties that the Board would reconvene the hearing in this matter to receive supplemental evidence pertaining to Criteria l(B), 8 and 10 on February 25, 1997. On February 18, 1997, the Applicants filed a Motion to Present Testimony via Teleconference which was granted. On February 19, 1997, the parties filed supplemental exhibits and witness lists.

On February 25, 1997, the Board reconvened the hearing. The Applicants were represented by Mr. Karnedy, and the Appellants were represented by Mr. Schwiebert. After the parties presented opening statements, the Board received, in response to a Board Subpoena Duces Tecum, documentary evidence regarding Criterion 10. The Board took a site visit during which it viewed the Project and surrounding environs from a variety of locations. Upon its return to the hearing room, the Board received supplemental evidence regarding Criterion l(B). After recessing the hearing, the Board deliberated. The Board deliberated again on February 26, March 2, and April 1, 1997 and following a review of the proposed decision and the evidence and arguments presented to date, declared the record complete and adjourned. This matter is now ready for decision. To the extent the parties' proposed findings of fact are included herein they are granted; otherwise, they are

[1] *Board Member Steve E. Wright has recused himself from this matter. The parties were notified accordingly on January 22, 1997. The Memorandum of Decision and Order incorrectly indicates that he participated in that decision.*

denied. Petition illage of Hardwick Electric Department, 143 vt. 437,445 (1983).

II. ISSUE

Whether or not the Project complies with each of the Contested Criteria.

III. FINDINGS OF FACT

1. The Project consists of the conversion of an existing storage shed ("Shed") into a retail hardware and home/farm supply store ("Store") including an outdoor, year-round, merchandise storage area, an outdoor seasonal sales display and a parking lot.

2. The Project would be located on and involve a ± 12.5 acre tract of land owned in fee simple by Herbert and Patricia Clark ("Property"). The deed evidencing such ownership is recorded in Brandon's land records at Book 84, Page 22 1.

3. Appellants Edward and Lauren Schwiebert, Ernst and Louise Pedersen, James and Donna Disabito and Alex and Sharon Greene are owners of real property adjoining. the Property or located on Arnold Hollow Lane. All of the Appellants gain access to their residences by means of Arnold Hollow Lane and pass by the Property on a regular basis. The Property and Shed can be seen from the Pedersen, DiSabito and Field residences. The Property and Shed are directly visible from many portions of Arnold Hollow Lane and Route 73. The Pedersens' property is serviced by an underground well.

4. Approximately five acres of the Property, mostly flat pasture land, would be devoted to the Project ("Project Tract"). The Project Tract does not have soils which'allow for acceptable percolation rates. Surface and ground water flows on or under the Project Tract are generally in an easterly direction toward a class II wetland which exists on the eastern edge of the Property. The Project Tract is located in Brandon at the intersection of Arnold Hollow Lane and Route 73 approximately one mile west of the Village of Brandon. Arnold Hollow Lane is a narrow, twisting, gravel road. The Project Tract is about one half of a mile further away from the center of the Village of Brandon than any existing commercial use. Additionally, every commercial use in close proximity to the Project pre-existed Act 250, Brandon's current zoning ordinance and Brandon's current town plan.

5. A 10,000 square foot seasonal display area for plants, trees and shrubs would be located to the southwest of the Store ("Display Area"). A one-half acre outdoor, year-round, merchandise storage area would be located to the north of the Store ("Storage Area"). The Storage Area would be surrounded by a twelve foot tall fence made of either wood or chain link. If the fence was made of wood it would be painted either green or brown earth tone. If the fence was made of chain link, it would include a privacy screen muted green in color.

6. The Applicants have not provided the Board with any landscaping plans demonstrating how the aesthetic impacts of the Project would be mitigated. Further, the Applicants have expressly refused to provide landscape plantings to shield the visual impact of the Display Area or the parking lot even though such plantings are generally available, reasonable in cost and frequently used for screening purposes. The Applicants do not want to obstruct the view from Route 73 of the Store and Display Area.

7. The following types of items would be stored in the Storage Area:

> Lawn mowers, bicycles, lawn carts, wheelbarrows, log splitters, snow removal equipment, portable fish shanties, lawn furniture, lawn swings, children's outdoor gym and play furniture, pool supplies, tents, camp supplies, firewood, pine tables (picnic), screen summer houses, portable garages, portable greenhouses, bricks, patio blocks, black top sealer, landscaping timbers, wooden storage shed, cement mixers, step ladders, extension ladders, lumber, plywood, plastic pipe, drain pipe, cement blocks, water tubs, hot tubs, fencing, gates, fence posts, bailed hay and shavings, cement bags, lime, small trailers for hauling, ladders, septic tanks, oil tanks for home furnace and other items consistent with consumer demand.

8. There would be no enclosed storage such as semi-trailers or other containers in the Storage Area. Some materials in the Storage Area would be covered by canvas tarpaulins. No materials stored in the Storage Area would be stacked or otherwise kept higher than ten feet above grade.

9. No snowmobiles, ATVs or snowblowers would be stored in the Storage Area.

10. No small engine repair or testing would occur on the Property.

11. The Store would include about 4,120 square feet of retail, storage and office space. Much of the merchandise offered for sale would be located in the Store. Such merchandise would not include housewares. Rather, it would include more traditional hardware items such as hand tools, screws, nails, paints, varnishes, oils, fertilizers, etc. The cash register would be in the Store. Every time a sale occurred, the public would use the Store. In the winter, rugs would be located near the entrance to the Store, around the cash register area and in the more heavily used merchandise isles. These rugs would be changed once per week.

12. Retail operations would occur at the Store seven days per week during the hours from 6:30 a.m. to 6:00 p.m. (Monday through Saturday) and from 8:00 a.m. to 4:00 p.m. (Sunday). The activities in the Store would require water for general clean-up and employee wash-up. Handling of fertilizers, paints, vanishes, oils, nails and screws and other traditional hardware materials could require some clean-up after handling. Such materials would be spilled occasionally. Such spills would require water for suitable clean-up.

13. Employees could be required to work alone for an eleven hour shift without any break, rest period or meal time. Employees would, on occasion, eat their meals in the Store. Employees would handle money and goods sold to the public. No more than four employees would service the retail store at any one time.

14. A large overhead door currently exists on the west side of the Shed. Eleven windows and one door would be installed on the south side of the Store. This latter door would be the principal public entranceway. It would have an associated "airlock" entry vestibule built either inside or outside the Store. Four windows would be installed on the east side of the Store. All windows located in the retail sales and office space in the Store would be of a double glaze construction.

15. On a typical day, 50 retail customers would be expected to visit the Store, and, on a good day, 125 customers would be expected to visit the Store.

16. The Project would not have a conventional waste disposal system. Instead, a composting toilet with an atmospheric vent stack would be installed on the second floor of the Store. The Applicants and Store manager would take steps to preclude the public from using the composting toilet. However, there would be occasions when the public

would request and need to use the composting toilet.

17. Brandon has sufficient solid waste disposal facilities to accommodate the Project.

18. The Project would not have running water. Bottled water used in association with a natural solvent degreaser, Citra-Solv, would be used for floor scrubbing, hardware and building and farm supply clean-up and other maintenance tasks and as drinking water for the employees and the general public. Handi-wipes would be available for clean-up. Irrigation water for items in the Display Area would be trucked to the Project Tract.

19. On May 23, 1996, Raymond Dean Assistant Regional Engineer, Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), issued Waste Water and Water Disposal Permit #WW-1-0575 approving the Project subject to conditions ("WW Permit"). Mr. Dean was not advised during his review of the Applicants' application for the WW Permit that 125 customers were expected to visit the Store on a good day, that members of the public would require the use of the composting toilet on occasion and that the Store would be open for business at least ten hours per day, seven days a week. Mr. Dean issued the WW Permit without the benefit of a public hearing.

20. The WW Permit was issued pursuant to §§ 4-04(A) and 4-06(A) of the Environmental Protection Rules ("EPR") which authorize, under certain circumstances, a waiver of the standard requirement for piped potable water and conventional toilet and lavatory facilities in public buildings.

21. EPR §§ 4-04(A) and 4-06(A) provide:

> Public buildings shall be provided with an adequate volume of potable water. The water supplied to potable water outlets shall meet the drinking water quality requirements of Health Regulations, Chapter 5, Subchapter 12, effective March 17, 1980. All public buildings in which people reside, are employed, entertained, lodged, served food or congregate shall be provided with potable water delivered through a pipe system under adequate pressure for the facilities to be served. Where it would be unreasonable to require potable water under pressure due to the infrequency or briefness of occupancy, or the availability of a nearby potable water supply point, the Division may determine that

a water system for the building is not required.

EPR $4-04(A).

* * *

Each public building shall have at least one functional water closet and one functional lavatory, or more fixtures where required by regulation applicable to the particular type of planned occupancy; toilet rooms shall be supplied with the capacity to provide at least 15 C.F.M. of mechanical ventilation for each toilet fixture. Where it would be unreasonable to require a water closet and lavatory because of the infrequency or briefness of occupancy, or the availability of a nearby toilet, the Division may authorize the use of privies, chemical toilets, or incinerators or determine that the requirement for toilet facilities is unwarranted. Where privies are proposed, they shall have a durable, water tight vault.

EPR § 4-06(A).

The closest public toilet facilities are more than ½ of a mile away from the Project.

22. In relevant part, the WW Permit conditions provide:

(a) No water distribution or delivery systems shall be provided;

(b) No wastewater collection or delivery systems shall be installed or provided within the subject building, without prior review and approval by the Division of Protection;

(c) The potable water for this facility shall consist of potable water transported to the premises in suitable, portable containers. A continuous supply of fresh water, obtained from a reliable source that provides water meeting the drinking water quality standards, shall be maintained in the container depicted on the approved plans, during all hours of occupancy of the building;

(d) Domestic wastes shall be disposed by utilization of the proposed composting tilet [sic] constructed in accordance with the approved plans. No other method or location of waste disposal

shall be allowed without prior review and approval by the Division of Protection;

(e) The contents of the composting toilet shall be removed, with sufficient frequency to maintain sanitary conditions, by a commercial septic tank pumping service, and transported to a state-approved municipal wastewater treatment facility for disposal. The vault privy shah be operated and maintained at all times in a manner that will not constitute a public health hazard, public nuisance, or source of pollution;

(f) A continual supply of pre-moistened towelettes or waterless skin cleaner and paper towels shah be provided in the vault privy for hand washing purposes; and

(g) No more than 4 staff persons shall be stationed in the subject building, and the use of the building shall not be altered without prior review and approval by the Division of Protection.

The WW Permit does not require the Applicant to nor does the WW Permit itself prohibit the public from using the composting toilet.

23. The DEC's June 23, 1989 guidance pertaining to Toilet Requirements in Public Buildings ("Toilet Guidance") provides detailed guidelines regarding the exception clause contained in § 4-06(A) of the EPRs.

24. An introductory provision of the Toilet Guidance provides:

> Conventional sanitary facilities are required in the vast majority of public facilities permitted under the EPR's. 'This requirement is based on the public health and the general expectation of the public that flush toilets, running water, and washing facilities are the established norm and should be available

25. The Toilet Guidance also includes detailed requirements which must be satisfied before the "waiver" provisions of EPR § 4-06(A) can be invoked These requirements, in relevant part, are:

> (1) Toilets and lavatories are presumed to be the required sanitary facilities for ail public buildings. This is based on the need for sanitary facilities to serve employees and on the

expectation of the general public for conventional flush toilets and running water for washing in public sanitary facilities in many public buildings:

* * *

(3) If the use of the public building is infrequent or brief, non-conventional sanitary facilities may be considered in lieu of toilets and lavatories on the following basis:

a. The general public may have access but would not normally use the building.

b. Employees are limited to four (4) or less over a 24 hour day; i.e. no more than a total of four (4) individuals may be employed per day.

c. The building is only visited less than two (2) hours in any one (1) day by not more than (4) individuals, but sanitary facilities are desired. (This is a corollary to Item 2 above).

d. The activities in the building do not require water for operation or for clean-up, including employee wash-up.

e. The building is used by the general public no more than once in any month for a special event.

In determining whether a building or activity qualifies for non-conventional sanitary facilities under this item, it must be compared to each of the above subitems. If it meets all of these constraints, it may be approved for non-conventional sanitary facilities.

26. By letter dated December 22, 1995, Raymond Dean, Assistant Regional Engineer, acknowledged that the WW Permit may have resulted from "an expansion of the guidance which was issued on 6/23/89..."

27. The composting toilet proposed by the Applicants is the Sun-Mar XL. It is manufactured by the Sun-Mar Corporation of Stoney Creek, Ontario, Canada. There are approximately 800 XL dealers in the United States.

There are approximately 3 XL dealers in Vermont. Approximately 10,000 XLs are in use. Approximately 500 XLs are in use at retail establishments in the United States. It is unknown how many XLs, if any, are in use at retail establishments in Vermont. The XL is designed for and typically used in cottages, camps and other remote locations. There is greater XL use in residential and secondary structures in the United States than in Canada.

28. The XL is an aerobic cornposting toilet with a capacity to service 5-7 people in a cottage or weekend use situation and 2-4 people in a year-round use situation. The XL's maximum loading capacity is twelve uses per day.

29. The National Sanitation Foundation ("NSF"), a private, independent, wastewater technology evaluator, tested the XL from January 1989 to July, 1989 under the provisions of NSF Standard No. 4 1 relating to evaluation of wastewater recycle/reuse and water conservation devices. The XL currently meets all applicable NSF certification requirements. The XL has never been certified for use in Vermont by any state agency or department. During the NSF test, the XL received blackwater [human wastes], peat moss and a slice of bread per the manufacturers instructions. At the end of the test period, NSF analyzed a drawer of decomposed solid waste material. The results of the test were satisfactory. No liquid escape was evident and fecal coliform, a baseline indicator for bacterial substances, was below standard requirements. The test was conducted in a monitored environment.

30. Two 1/2" emergency drains occur at the rear of the XL. These drains offer protection against overloading or prolonged electrical outage or failure. The drains must lead to an overflow receiving unit located below the level of the drams. These drains are usually not "hooked-up" by XL owners.

31. The XL cornposting process is as follows:

> The Sun-Mar XL biological toilet employs an aerobic cornposting process in the treatment of black waste products. Feces, urine, toilet paper and "bulking agent" organic matter (i.e. bread and peat moss) are deposited directly into the waste chamber. One cup of peat moss, per person, per day is a recommended addition. Once every third day when the toilet is in use, the compost is aerated and mixed by rotating the handle of the Bio-Drum. The door on the

> Bio-Drum closes and opens automatically when the drum is rotated.
>
> Aerobic composting is a biological process which relies upon micro-organisms naturally presented within the blackwater or organic material to decompose (compost) the waste in a non-aqueous, aerobic environment. The process is facilitated by maintenance of ambient temperatures above 13°C. (55°F.), a moisture content between 45 and 75 percent within the composting pile, depending upon the texture of the decomposing material, and provision of a sufficient quantity of air to maintain aerobic conditions and remove moisture and other gaseous products of the cornposting process. Decomposition is enhanced by the addition of a bulking agent, such as peat moss, to create a loose and easily aerated pile. This allows oxygen to reach the organisms, carbon dioxide and water vapor to be removed, liquid wastes to be readily absorbed, and treated liquid to drain to the bottom of the toilet through a screen to be evaporated.
>
> Air entering at the lower end of the container is drawn through the system and up the vent where it is exhausted. A continuous supply of fresh air is provided to the mass by means of a 30 watt fan installed at the rear of the toilet. The positive ventilation assures that a negative pressure is maintained in the composting device so that fresh air is continuously pulled through the system and process air is confined within, or discharged from, the system only through the vent of the system. For winter use, the toilet should still be installed in a heated space, or other means of heating the input air should be provided to obtain absolute maximum capacity.
>
> Liquid wastes entering the system are controlled by several means. First, excess liquid is absorbed by the compost pile which helps maintain the proper moisture content of the mass. Second, moisture is removed as water vapor from the composting pile. Finally, any additional free liquid percolates through the pile and drains on to the tank bottom where it is quickly evaporated by means of a 250 watt externally mounted heating pad and drawn out through the vent by a 30 watt fan.

NSF Report at 7.

32. The XL operating process is as follows:

> Prior to initiating use, a start up mixture, consisting of one bag of peat moss, a quart of soil and a loaf of stale bread broken into pieces is placed into the Bio-Drum. The drum should be rotated several times to thoroughly mix the starter material Plug the power cord into a 120 volt service.
>
> When in use, one cup of peat moss per person per day is added to the compost. Every 2-3 days the drum should be rotated 3-4 revolutions, finishing with the drum opening facing upwards.
>
> If at any time the compost appears dry, warm water should be spread over the surface. The compost mass may sometimes get too compacted to allow for proper air flow. To prevent this, and the possible odors which may occur, add additional peat moss along with rotating the Bio-Drum to loosen the compost. For proper air circulation, the room should be properly ventilated.
>
> Some of the compost should be removed when the drum gets approximately 2/3 full. Removal will depend on usage and will vary between 1 to 4 times per year. To remove the compost, release the lock on the drum and continue to hold in the unlocked position while rotating the drum counter clockwise. After each revolution, check the drawer to prevent over fill. If the system has been used just prior to emptying, the drawer should be kept in place for 3-4 weeks before removal. To empty the drawer, remove the footstool and pull out the drawer with contents. Dispose of composted materials in accordance with local regulations.

Id. at 7 and 8.

33. The finished compost is bacterially dead.

34. Ralph Van Houten, Assistant Regional Engineer, DEC, ANR, has generated a written evaluation of composting toilets in Addison County, Vermont. None of the toilets evaluated were Sun-Mar XLs. Mr. Van Houten's report is undated. However, it appears to have been generated sometime after 1989.

35. Mr. Van Houten's report discusses ten different composting toilet uses in

Addison County. He concludes as follows:

> In view of the above, it is conclusive that the application of composting toilets has achieved at best only limited success in this Addison County study group. Only case #1, which has been operational for only ± six months time, has shown success, both in owner satisfaction and compliance with the permit conditions.
>
> Unit failure was prevalent in at least five examples. In some cases direct leakage of wastes, which represents an obvious health risk, occurred. The EPRs, section 4-06 included, were written to protect the water resources of the State, as well as to safeguard the people of the State. Clearly direct exposure to human wastes is in direct conflict with the written regulations and legislative intent, It is possible that some of the failures reported were a result of poor maintenance practices, lack of dealer support, and/or inappropriate usage.
>
> Change in use of the governed structures is likely a primary reason for much of the displeasure and overall unit failure. Due to the nature of the operation of these biologic units, capacity is extremely limited. Usage above approved limits results in hydraulic overload and odor problems.
>
> Social drawbacks are also evident being that conventional plumbing is non-existent in these cases, thus not allowing for conventional lavatory facilities. Alternatives, moistened towelettes for example, are not an equal substitute and offer no relief in dealing with emergency situations resulting from burns, chemical exposure,? and the like.
>
> The permits issued for these structures in most examples set strict limits, noted specific unit models to be installed, and outlined the need for emergency eye wash stations (when applicable) and bottled drinking water, while prohibiting conventional plumbing facilities in the building (see attached sample permit). After review, only two cases were found to be in conformance with the applicable permits and regulations (cases #1 and #8).

RECOMMENDATIONS

> Due to the failures reported, the general dissatisfaction and avoidance, and the widespread non-compliance with the applicable permit conditions for a given project, the Division needs to review the current alternative toilet policy. It may be prudent to revert back to the more limiting guidance stipulations, as a minimum, to help safeguard public health. At the same time the Division needs to consider implementing a firm compliance schedule and perhaps routine inspection of approved facilities.

Van Houten Report at 4 and 5.

36. One or more of the problems identified by Mr. Van Houten and other problems would likely plague the XL if used as proposed at the Project: direct leakage of human waste, poor maintenance practices, inappropriate use, lack of dealer support, change in projected use, usage above approved limits, grey matter disposal in emergency or otherwise hurried situations, interjection of detergent and other chemicals into the unit and violation of associated permits.

37. Due to overuse, misuse and/or improper maintenance, the cornposting toilet would likely overflow. The Applicants, assuming they would connect the emergency drains, would direct such overflow to a "bucket". The contents of the "bucket" would be taken by the Applicants or a septic service to a nearby municipal waste water treatment facility for disposal.

38. The contents of the "bucket" would likely spill on occasion. Or, if the cornposting toilet becomes inoperative through breakdown or excedence of its design capacity, it is probable that employees and patrons will relieve themselves directly on the Project Tract. Untreated human wastes resulting from either event would likely enter the surface and ground water on the Project Tract and flow easterly to the class II wetlands on the Project Tract.

39. Rain water, clean-up and other types of runoff from the Storage Area, Display Area and parking lot would enter the surface and ground water on the Project Tract and flow easterly toward the class II wetlands. There is no suitable runoff containment system for the overflow "bucket" or direct deposition of human wastes on the Project Tract, Storage Area, Display Area or parking lot.

40. Class II wetlands exist on the eastern edge of the Project Tract.

41. Work on the Shed would stay at least 80 feet from the wetland edge.

42. The Brandon fire department could provide adequate fire protection to the Store.

43. The Project would not unduly burden the Brandon area rescue squad:

44. The Project would not have an adverse effect on any historic or archeological properties that are listed on or may be eligible for inclusion in the State or National Registers of Historic Places.

45. There are no known occurrences of rare and irreplaceable natural areas or threatened or endangered animals or plants on the Project Tract. There is no necessary wildlife habitat on the Project Tract. The Project would not have an impact upon fisheries.

46. The Project would not involve primary agricultural soils.

47. Brandon's Chief of Police thinks that the Project would not unreasonably impact, impede or otherwise cause any unsafe traffic conditions.

48. Location of the parking lot vis-a-vis the Store would encourage all persons who visit the Project by automobile to walk into the Store even if they were o&interested in the merchandise located in either the Storage Area or the Display Area.

49. The parking lot would be surfaced with a dust free material. It would be 62 feet wide and 72 feet long and accommodate a maximum of 15 vehicles at any one time. It would be big enough to afford emergency vehicles easy ingress to and egress from the Project Tract.

50. Access to the Project would be over an existing driveway leaving Arnold Hollow Lane approximately 150 feet north of its intersection with Route 73. The driveway would be widened to 20 feet. Brush would be removed from certain portions of the Project Tract to provide sight distance of about 375 feet north and 150 feet south from that point where the driveway meets Arnold Hollow Lane.

51. Brandon issued an Access Permit for the Project on July 24, 1995.

52. Arnold Hollow Lane and Route 73 are not heavily traveled. Route 73 was recently improved. A new railroad overpass is located to the west of the Project Tract.

53. The Store could generate 100 to 250 retail turning movements on Arnold Hollow Lane. Additionally, an unknown number of delivery trucks, including semi-trailers, would gain access to the Project Tract from Arnold Hollow Lane.

54. The Store would be serviced by a "call in" alarm system. The retail and office space in the Store would be heated with an oil fired hot air furnace.

55. Central Vermont Public Service ("CVPS") estimates that the Project would add about 10KW to the CVPS system. CVPS has the capacity to serve such reasonable loads at the Project Tract.

56. By cover latter dated November 14, 1996, Graham C. Hunter, II, AIA, Program Manager, Commercial New Construction, CVPS sent the Applicants a list of recommended efficiency measures for retail buildings such as the Store.

57. By letter dated November 17, 1995, Mr. Hunter confirmed several agreements regarding some basic measures that he and Mr. Karnedy reached. They agreed that: all exterior wails would be installed with 6" of glass fiber insulation, for an approximate "R" value of 19; the floor between the retail area and the office and the storage spaces above would be filled with 8" of glass fiber, with 6" of similar insulation in the ceiling above the second floor, except at the office, where 8" would be installed; the wall between the office and the unheated portion of the second floor would be constructed of 2 x 6 studs, and insulated with R19 glass fiber batts; florescent lighting with T8 lamps and electronic ballasts would be used in the retail area of the Store and the office space on the second floor; and all exit signs would be illuminated using light emitting diodes. The Project would include the foregoing Hunter/Karnedy agreed upon elements.

In his November 17, 1995 letter to Mr. Karnedy, Mr. Hunter also confirmed several recommendations he had offered to Mr. Karnedy concerning: insulation in the ceiling of the second floor; a ceiling fan in the shipping and receiving area; high intensity discharge lighting in the

shipping and receiving area; and HVAC equipment. The Project would include the foregoing Hunter recommended elements.

58. By memo dated May 7, 1996 to George E. H. Gay, General Counsel, Environmental-Board, Stuart Slote, Demand-Side Management Specialist, Energy Efficiency Division, Department of Public Service, states:

> I concur with the recommendations offered by Graham Hunter of CVPS. Additionally, all thermostats should be the 7-day programmable and heating systems should achieve a minimum annual fuel efficiency, AFUE, of 80%, and 83% if available. An air lock entry vestibule should be installed, if feasible spacewise. If a hot water heater is installed, a fossil fuel unit should achieve a minimum energy factor, E.F., of 0.58.
>
> Agreement to meet the CVPS and above listed measures will satisfy DPS concerns with regard to Criterion 9(F), Energy Conservation.

The Project would include the foregoing Slote recommended elements.

59. Signs advertising the Project would be located on each end of the Store. A single florescent light would be located at the double door, rear of the Store and above the overhead service door. These lights could be turned on shortly before dark and would be turned off when the Store closes.

60. No more than three outdoor lights would be used to illuminate the Storage Area. Seasonal lighting would illuminate the Display Area. One light on the southwestern corner and one light on the southeastern comer of the Store would be directed toward and illuminate the parking lot. These lights would be turned on shortly before dark and would be turned off when the Store closes.

61. Some or all of the outdoor lighting associated with the Project would be visible by the Appellants and passersby on Arnold Hollow Lane and Route 73.

62. Two propane tanks and a dumpster would be located along the north wall of the Store.

63. The Brandon Planning Commission did not comment upon the Project

during the course of the District Commission's proceedings or the Brandon Zoning Administrator's evaluation.

64. Brandon's current zoning ordinance ("Zoning Ordinance") became effective on March 2 1, 1983 and is the applicable zoning ordinance in this matter. It has been amended from time-to-time since it became effective.

65. The Zoning Ordinance provides that the Project would be located in Brandon's low density-multi use district.

66. The Brandon Zoning Administrator issued a land use permit for the Project on May 26, 1995. This permit approved the Applicants' request to "extend the current Light Industry Use to include a retail sales of hardware, home and farm supplies with access approval pending; parking details per site plan DWG No. 30C- 101; no wastewater facilities on site. ." This permit was not appealed.

67. Section 1106 (a)(vii) of the Zoning Ordinance provides:

> If the project conforms to the provisions of this ordinance, the Administrative Officer shall within 30 days of the receipt of the completed application issue a permit to the applicant, and deliver a copy of the permit within three days to the Listers and the Planning Commission and to all adjoining landowners, and post a copy of the permit within three days in at least one public place in the Town of Brandon for 15 days;

The Zoning Ordinance does not require the Planning Commission to review and/or approve the Project before it is initiated.

68. The current Brandon Town Plan has an effective date of January 24, 1994 ("Town Plan") and is the applicable town plan in this matter. It provides in relevant part:

> SCENIC AND AESTHETIC RESOURCES
>
> Scenic Area Value
>
> Brandon is well endowed with natural resources. The townscape is a source of community identity as well as an economic asset. The attractiveness of the landscape is derived from a variety of

> landforms and land use patterns. Brandon's varied physiography creates a diversified and interesting setting with rich visual quality. The use of land in Brandon including open pastures and fields with stone and split rail fences dividing them, wooded uplands, rivers and streams meandering through the town, the village church spires towering above the trees, farms dotting the countryside and other indigenous features, provide the landscape with a special charm and character.
>
> Scenic resources have aesthetic, historical, and economic value. They create an attractiveness enjoyed by residents, prospective residents, and visitors. Land values are enriched by a pleasant visual surrounding. Loss of these amenities would diminish the attractiveness and worth of the community.
>
> Rapid encroachment of urbanization could easily destroy Brandon's pastoral charm. If development is permitted in open fields, and overhead power lines are allowed to bisect more of the town's open space, or if industry is located in predominantly agricultural areas, the high amenity value of the landscape will be reduced. Visual pollution, like air and water pollution, diminishes the quality of both the natural and man-made environment. Development which results in destruction of these resources is not compatible with the Comprehensive Plan.
>
> Brandon has already established programs to protect the visual quality of the local environment... However, more broad- based steps need to be taken to protect the scenic value of at least the resources listed at the end of the section, and to preserve the existing "townscape".

Town Plan at 125 and 126.

69. The Town Plan establishes three categories of scenic resources. They are defined as follows:

> A Scenic Area may be a featured landscape view which contains a special point of interest such as a hill farm which is conspicuous within the subdominate background. It may also be an enclosed landscape feature which is a roadside view into a confined space such as a valley meadow, lake or tumbling brook and has a natural boundary of cliffs, gentle slopes

or vegetation.

A Scenic View is near or distant view. A panoramic view of less than 3 miles is considered near. A view greater than 3 miles should be considered a distance panoramic view.

Numerous Scenic Roads have been identified in Brandon. These roads are generally narrow and abound roadside vegetation. The color, detail and texture of lands bordering these roads create an intimacy and awareness of the rural landscape.

Town Plan at 126 (emphasis original).

70. The Town Plan contains a Scenic Areas Inventory of Brandon. Only 30 areas are listed. The inventory includes, in relevant part:

	MAP LOCATION	DESCRIPTION
8.	Arnold Hollow Lane	Scenic roadway with excellent intermittent views - split rail fence, overlook views of Otter Creek, Brandon Swamp, long views of Taconics and Adirondacks.
9.	Arnold Hollow Lane near Route 73	Eastern views of village area with Green Mountains in background. Church spires seen above trees,

Town Plan at 127. The Project is in Scenic Area 9 and is adjacent to Scenic Area 8.

71. Immediately following the inventory of scenic areas, the Town Plan sets forth recommended policies and implementation measures to follow-up the scenic and aesthetic resources discussion. These policies provide:

> The Planning Commission should encourage development which complements or enhances the scenic quality of the Brandon landscape. In conformance with 10 V.S.A. , Chapter 15 1, Section 6086(8), development which threatens to adversely affect the visual amenities of the Town should not be permitted.

Town Plan at 128. The term "should" is not defined in the Town Plan.

72. The Store, Storage Area and Display Area would be visible from many areas on Arnold Hollow Lane and Route 73.

73. The Store, Storage Area and related fence and Display Area would disrupt the view from Arnold Hollow Lane of the scenic areas and vistas which extend over and include views of the Green Mountains and the church spires of Brandon. The Project would stand out when viewed from various locations on Arnold Hollow Lane and Route 73. It would draw the attention of persons observing the church spires of Brandon and the Green Mountains from Arnold Hollow Lane. The Project would detract from the, picturesque context in which it would be located.

74. Landscaping or vegetative covers are commonly used to mitigate the visual impact of commercial enterprises such as the Project.

75. Landscaping or vegetative covers are generally available.

IV. CONCLUSIONS OF LAW

A. CRITERION 1(B)(WASTE DISPOSAL)

1. Relationship between Criterion 1 and Criterion 1(B)

10 V.S.A. § 6086(a) provides in part:

Before granting a permit, the board or district commission shall find that the subdivision or development:

> (I) Will not result in undue water or air pollution. In making this determination it shall at least consider: the elevation of land above sea level; and in relation to flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable health and environmental conservation department regulations.

10 V.S.A § 6086(a). After the foregoing list of relatively general considerations, 10 V.S.A. § 6086(a)(1) includes a list of seven specific subcriteria. Criterion l(B) provides:

> 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 and 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 ground water or wells.

10 V. S.A. § 6086(a)(l)(B).

[1] The Vermont Supreme Court addressed Criterion 1 and Criterion 1 (B) in In re Zoning Permit of Patch 140 Vt. 158 (1981). Clyde Patch received an Act 250 permit for a proposed sanitary landfill dump from the District #1 Environmental Commission. Re: Clyde M. Patch, #1R0248, Land Use Permit (December 13, 1977). The Town of Wallingford appealed the permit. Pursuant to statutory authorities in existence at the time, Patch removed the appeal to Rutland Superior Court. The superior court conducted a de novo hearing and, among other things, denied the Act 250 permit. It found that Criteria 8 and 10 were not satisfied. It also found, under Criterion l(B), that the proposed landfill would produce leachate which is a harmful and toxic substance and, implicitly, that this harmful and toxic substance would enter the ground water. The superior court acknowledged that there was a slight possibility that pollution of wells would occur. Despite making the forgoing findings regarding harmful and toxic substances, the superior court concluded that the project was in conformance with Criterion l(B).

The Patches appealed to the Vermont Supreme Court. The Town of Wallingford filed a cross-appeal in which it contended that: "the court should also have denied the Act 250 permit on the ground of 10 V.S.A. § 6086(a)(l)(B) . . ." In re Zoning Permit of Patch, supra, at 167. The Vermont Supreme Court noted:

> The Town argues for a literal reading of § 6086(a)(l)(B), and contends that, since the Patches have not shown absolutely that the project will not discharge toxic substances into the ground water, they should be denied a permit. We are not confined to such a literal reading of the statute, however. See In re Hatch, 130 Vt. 248, 251 (1972).

Id. at 169. In approving the superior court's evaluation of "undue water pollution" in the context of Criterion l(B), the Vermont Supreme Court provided that when, as in Patch, Criterion l(B) is at issue, the Board may, at its discretion, consider whether or not noncompliance with Criterion l(B) will cause undue water pollution under Criterion 1. If, as the superior court found in Patch, an applicant adequately demonstrates that such noncompliance will not result in undue water pollution, the Board may conclude that the

project at issue complies with both Criterion 1 and Criterion l(B). [2]

[2] The foregoing guidance was amplified by the Vermont Supreme Court in In re Hawk Mountain Corn, 149 Vt. 179 (1988). Hawk involved a 60 lot expansion of an existing vacation home development and the enlargement of an associated sewage system to service an eventual total of 146 lots. The District #3 Environmental Commission granted the permit. Re: Hawk Mountain Corporation and Our World Sewer Asso. Inc., #3W0347, Land Use Permit (January 24, 1985). The Town of Pittsfield appealed to the Board. The Board found that the proposed sewage system would not remove all of the various contaminants, bacteria and viruses from the wastewater and that the unremoved material would leach into the ground water. Further, the Board found an overall lack of baseline evidence pertaining to the treatment capability of the proposed system and existing water quality. The Board concluded that the applicants did not carry their burden of proof with respect to undue water pollution. In addition, the Board concluded that the proposed development did not meet applicable Water Resources Department regulations and, because- wastes would be discharged into the nearby Tweed River, a discharge permit was needed under 10 V. S.A. § 1263. Re: Hawk Mountain Corporation and Our World Sewer Asso. Inc., #3W0347-EB, Findings of Fact, Conclusions of Law and Order (August 21, 1985).

Hawk Mountain Corporation and Our World Sewer Association, Incorporated appealed to the Vermont Supreme Court. They challenged, among other things, the Board's ruling that they failed to sustain their burden of proof on the issue of undue water pollution. The Vermont Supreme Court found that the Board did not abuse its discretion in determining that the applicants had not met their burden of proof. In re Hawk Mountain Corp., 149 Vt. at 183. Further, the Hawk court, in addressing the applicants' contention that the Board erred in considering whether or not the project complied with the applicable Water Resources Department's regulations -- the Water Resources Board's water quality standards and discharge permit requirements -- stated that the Board, when considering whether or not a project will cause undue water pollution under Criterion 1, is not limited to the Criterion 1 'subcriteria:

> First, we note that the purposes of Act 250 are broad: 'to protect and conserve the environment of the state.' In re Juster Associates, 136 Vt. 577, 580 (1978). To achieve this far-reaching goal the Environmental Board is given authority to conduct an independent review of the environmental impact of proposed projects,

---

[2] *while &&pertained to the relationship between Criterion I and Criterion I(B), the Board, although not specifically addressing the question at this time, sees no reason why Patch would not apply to the relationship between -Criterion I and all of the Criterion I subcriteria.*

> and in doing such the Board is not limited to the considerations listed in Title 10. See 10 V.S.A. § 6086(a)(1).

Id. at 184. Lastly, the Vermont Supreme Court evaluated the Board's requirement that the applicants obtain a discharge permit and stated:

> [T]he legislative scheme indicates that the legislature intended to confer upon the Board powers of a supervisory body in environmental matters. For example, although 10 V.S.A. § 6082 provides that the permit required under Act 250 does not replace permit requirements from other state agencies, 10 V.S.A. § 6086 (d) provides that the Environmental Board is not bound by the approval or permits granted by the other agencies. Permits and Certificates of Compliance from other agencies create a presumption that the project satisfies the relevant 10 V. S .A. § 6086 (a)(1) criteria; however, the Board must conduct an independent review of the proposed develoomeni and ***may*** deny the Act 250 permit if it finds that the Certificate of Compliance or other required permits were improvidently granted. 10 V.S.A. $6086 (d).

In re Hawk Mountain Corp., 149 Vt. at 185 (emphasis added). The Hawk decision provides, in no uncertain terms, that upon a determination that a proses not comply with Criterion l(B), the Board may deny the project. On the other hand, Hawk confirms that the Board may, at its discretion, approve a project if the Board determines that the applicant, despite the project's technical noncompliance with Criterion l(B), adequately demonstrates that the project will not cause undue water pollution under Criterion 1. Further, in Hawk, the Vermont Supreme Court establishes that the Board is not limited to an analysis of the Criterion 1 subcriteria when determining whether or not a project would comply with Criterion 1. [3]

2. Presumptions

[3] The Project would be serviced by a cornposting toilet located on the second floor and available to no more than four employees and, on occasion, the public. On May 23, 1996, the DEC issued the WW Permit pursuant to EPR §§4-04(A) and 4-06(A) which

---

[3] *In instances where an applicant has not obtained* ***a*** *permit from the Department Environmental Conservation and the Board or its Waste Facility Panel determines that such* ***a*** *permit is necessary, the Board has appropriately exercised its discretion to deny the Act 250 permit without considering whether or not the project would result in undue water* ***pollution*** *under Criterion I. See In re Hawk Mountain Corp., 149 Vt. at 185; C.V. Landfill, Inc. and John F. Chapple, #5 WI 150-WFP (unlined* ***Landfill*** *Facility), Findings of Fact, Conclusions of Law, and Order at 34-36 (October 15, 1996).*

authorize a waiver of the standard requirement for piped potable water and conventional toilet and lavatory facilities in public buildings under certain special circumstances.

Under 10 V.S.A. § 6086(d), the Board is authorized to issue rules providing for presumptions of compliance for permits issued by other state agencies. Under EBR 19(B), the WW Permit "when entered into the record pursuant to Rule 17(B), will create presumptions of compliance with the applicable criteria of the Act in the manner set out in section (F) of this rule." Under EBR 19(E)(l), the WW Permit creates a rebuttable presumption that waste materials and wastewater can be disposed of through installation of wastewater and waste collection, treatment and disposal systems without resulting in undue water pollution.

The Appellants seek to rebut this presumption. The Board examines their contentions in light of its supervisory authority over ANR in environmental matters. In re Hawk Mountain Corp 149 Vt. 179, 185 (1988); Re: MBL Associates, Inc., #4C0948-EB, Findings of Fact, Conclusions of Law, and Order at 24 (May 2, 1995); Re: Sherman Hollow... et al., #4CO422-5R-1-EB, Findings of Fact, Conclusions of Law, and Order (Revised) at 2.5 (June 19, 1992); Re: Barre Granite Association, #5W0483-3-EB, Findings of Fact, Conclusions of Law and Order at 5 (March 7, 1989).

EBR 19(F) specifies the manner in which a presumption may be rebutted. It provides that:

> If a party challenges the presumption, it shall state the reasons therefore and offer evidence at a hearing to support its challenge. If the commission or board concludes, following the completion of its own inquiry or the presentation of the challenging party's witnesses and exhibits, that a preponderance of the evidence shows that undue water pollution … is likely to result, then the commission or board shall rule that the presumption has been rebutted. Technical non-compliance with the applicable health, water resources and Agency of Natural Resources' rules shall be insufficient to rebut the presumption without a showing that the'non-compliance will result in, or substantially increases the risk of, undue water pollution. …

EBR 19(F). Accordingly, the Appellants may rebut the presumption of compliance created by the WW Permit in one of two ways: (1) through a showing, by a. preponderance of the evidence, that the Project is likely to result in undue water pollution: and (2) a demonstration that the Project does not comply with the EPRs coupled with a showing that such non-compliance will result in. or substantially increase the-risk of,

undue water pollution. [4]

The Board heard supplemental evidence regarding the presumption on February 25, 1997. The Appellants presented several witnesses who testified about the composting toilet and water pollution that was likely to result from it. In addition, the Board received documentary evidence about the toilet and related water pollution. The Applicants, despite the opportunity to do so, did not-put on any supplemental testimony regarding whether or not the presumption was rebutted. Instead, they relied upon the evidence in the record to date.

[4] After receiving the Appellants' supplemental evidence, the Board recessed the hearing and conducted an EBR 19 deliberation. As it subsequently advised the parties on the record at the close of this deliberation, the Board concluded that the presumption had been rebutted. The Board found that based upon the credible evidence introduced by the Appellants without any supplemental evidence presented by the Applicants to the contrary, that a preponderance of the evidence demonstrated that undue water pollution caused by uncontained runoff including human waste overflow from the composting toilet would be likely to result from the Project. Additionally, the Board found that the WW Permit did not comply with the applicable EPRs and that such noncompliance would result in, or substantially increase the risk of, undue water pollution. Upon the Board's determination that the presumption had been rebutted, the Applicants had the burden of proof regarding Criterion l(B), and the WW Permit served only as evidence of compliance. EBR 19(F).

3. Applicable DEC Regulations

[5] The Board then reconvened the hearing to take supplemental evidence regarding whether or not the Project complied with Criterion l(B). First, the Board concludes that

---

[4] The *current two part test for rebuttal differs from that which was addressed by the Vermont Supreme Court in Hawk. Prior to and while Hawk was pending in the courts, the applicable provision of EBR 19 stated in relevant part:*

> *If the district commission or board determines that its inquiry has revealed, or that a challengingparty has submitted, sufficient evidence upon which it could base a finding that the requirements of the criterion at issue have been* **fulfilled,** *the board or district commission shall rule that the presumption has been rebutted*

EBR 19(F)(amended effective September 1, 1984). This language was amended by the Board to its present form effective May 4, 1990.

the Project does not comply with EPR § 4-06(A) which provides in relevant part:

> Each public building shall have at least one functional water closet and one functional lavatory, or more fixtures where required by regulation applicable to the particular type of planned occupancy; toilet rooms shall be supplied with the capacity to provide at least 15 C.F.M. of mechanical ventilation for each toilet fixture. Where it would be unreasonable to require a water closet and lavatory because of the infrequency or briefness of occupancy, or the availability of a nearby toilet, the Division may authorize the use of privies, chemical toilets, or incinerators or determine that the requirement for toilet facilities is unwarranted. Where privies are proposed, they shall have a durable, water tight vault.

EPR § 4-06(A). Clearly, composting toilets may be authorized only when it would be unreasonable to require a water closet and lavatory because of the infrequency or briefness of occupancy, or the availability of a nearby toilet. The DEC's Toilet Guidance provides detailed standards which must be applied to determine when requiring a water closet and lavatory would be unreasonable. As noted in the Introduction and Rationale section of the Toilet Guidance:

> Conventional sanitary facilities are required in the vast majority of public facilities permitted under the EPR's. This requirement is based general expectation of the public that flush toilets, running water, and washing facilities are the established norm and should be available.

EPR § 4-06(A)(emphasis added). The Toilet Guidance provides a relatively detailed discussion on the exception clause contained in EPR § 4-06(A) and guidelines which ANR is compelled to apply when making the determinations required under EPR § 4-06(A). These guidelines provide in relevant part:

> (1) Toilets and lavatories are presumed to be the required sanitary facilities for all public buildings. This is based on the need for sanitary facilities to serve employees and on the expectation of the general public for conventional flush toilets and running water for washing in public sanitary facilities in many public buildings.
>
> * * *
>
> (3) If the use of the public building is infrequent or brief, non-conventional sanitary facilities may be considered in lieu of toilets and lavatories on the following basis:
>
> a. The general public may have access but would not normally use

the building.

b. Employees are limited to four (4) or less over a 24 hour day; i.e. no more than a total of four (4) individuals may be employed per day.

c. The building is only visited less than two (2) hours in any one (1) day by not more than (4) individuals, but sanitary facilities are desired. (This is a corollary to Item 2 above).

d. The activities in the building do not require water for operation or for clean-up, including employee wash-up.

e. The building is used by the general public no more than once in any month for a special event.

In determining whether a building or activity qualifies for non-conventional sanitary facilities under this item, it must be compared to each of the above subitems. If it meets all of these constraints, it may be approved for non-conventional sanitary facilities.

Id. (emphasis added)..

The Project does not meet the provisions of EPRs §§ 4-04(A)[5] and 4-06(A) or several of the guidelines set forth in the Toilet Guidance for a waiver of EPR § 4-06(A).[6]

[5] *The Appellants did not appeal the Project under Criterion 2(water supply). Therefore, the Board will not address whether or not the Project conforms with Criterion 2(water supply).*

[6] *Subject to the exception'noted below, the Board feels strongly that all public buildings in which a commercial enterprise is ongoing and open to business invitees on a regular and frequent basis should have potable water through a piped system under adequate pressure for the facilities to be served and at least one functional water closet and one functional lavatory available to all employees and business invitees on the premises at all times the commercial enterprise is occupied. Such water closets and lavatories should be supplied with sufficient capacity for necessary mechanical ventilation. The foregoing improvements are unnecessary in those instances where, as demonstrated by an applicant 's evidence, an alternative system will serve the needs of the public. Such a demonstration was not adequately made by the Applicants evidence in this case. The Board believes that such a requirement is consistent with the EPRs which provide:*

The general public would have access to the Project and would normally use the Store. Much of the merchandise offered for sale would be in the Store. Location of the parking lot vis-a-vis the Store would encourage all business invitees who visit the Project by automobile to walk into the Store even if they were only interested in the merchandise located outside. The cash register would be in the Store. Every time a sale occurred, the public would use the Store. If the Project was successful, approximately 125 business invitees would enter the Store on a good day. The Store would be open at approximately 7:00 a.m. and would remain open for at least ten hours per day. As noted previously, more than four people would be likely to visit the Store during any two hour period in which the Store is open. Further, the activities in the Store would require water for general clean-up and employee wash-up. By their very nature hardware and farm supplies can be messy. Handling of fertilizers, paints, varnishes, oils, potting soils and other materials require some clean-up after handling. On occasion, just one employee would be on the job for ten or eleven continuous hours. This employee would require meal breaks. It is likely, despite testimony to the contrary, that he or she would consume his or her meals while on the job in the Store. Finally, the Store would be used by the general public on a daily basis -- much more than once in any month for a special event.

The Board finds that the WW Permit was improvidently granted. For this reason alone, the Board can and does conclude that the Applicants have failed to meet their burden to demonstrate that the Project complies with Criterion 1(B)(waste disposal). See In re Hawk Mountain Corp. 149 Vt. 179 (1988); C. V. Landfill, Inc. and John F. Chapple, #5W1150-WFP (&lined Landfill Facility), supra. [7]

4. Undue Water Pollution

> *Public buildings subject to these rules **shall** have a water supply and sewage disposal facilities which comply with the **standards** set forth in these rules unless otherwise authorized by the Division **under** these regulations. Public buildings and additions to public buildings subject to these rules shall be designed to comply with these rules and Chapter* 9, *Plumbing.*

*EPR § 4-03(E)(emphasis added). The foregoing requirement should not be read to mandate installation of appropriate facilities in all public buildings and, at the same time, allow an owner of such a building to exclude the public **from** using such facilities. Such an interpretation would inappropriately minimize the scope of this requirement.*

[7] *Because the Project violates **the first** prong of Criterion I(B), the Board does not need to and will not determine whether or not the Project will involve the injection of waste materials or any **harmful** or toxic substances into ground water or wells.*

[6] As authorized by Patch and Hawk, the Board also considers whether or not the Applicants have met their burden to establish that the Project will not cause undue water pollution.

The Board has noted that there is no clear definition of what constitutes "undue water Pollution". As stated in Upper Valley Regional Landfill, #3R0609-EB, Findings of Fact, Conclusions of Law, and Order (July 26, 199 1):

> A review of decisions addressing the term 'undue water pollution' in the context of Act 250 indicates that it has been interpreted in the context of the specific facts of each case under consideration; the decisions are more instructive about what is not undue rather than what is.

Id. at 33. The Board has reviewed its relevant precedent, including In re Wii Wonderland, Inc. 133 Vt. 507 (1975); Patch, supra; Re: Howard and Louise Leach #6F03 16-EB, Findings of Fact, Conclusions of Law and Order (June 11, 1986); Hawk, supra; Upper Valley, supra. The Board concludes that the facts of Wildlife Wonderland are the most analogous to those of the instant matter.

The Applicants have not submitted to the Board plans, drawings, testimony or any other type of evidence to indicate how they would contain or control surface and ground water runoff that would result from the Project. This failure, while not in and of itself "fatal" to the Project, is significant. Heavy equipment, pool supplies, cement mix and other similar substances would be kept in the Storage Area. Not all of the items in the Storage Area would be covered. Rain and cleaning water runoff from items in the Storage Area would flow into the surface water, ground water and wetlands on the Project Tract, The Display Area suffers from the same limitations. Prepackaged plants, holiday greens and other seasonal items would be kept in the Display Area. The prepackaged plants are heavily fertilized before they would arrive at the Project Tract. While at the Project Tract, they would be watered regularly. As this water runs from the Display Area, it would contain chemicals previously included in the plantings. This runoff would flow into the surface waters, ground waters and wetlands on the Project Tract. The parking lot is likewise problematic. As water runs from the parking lot surface, it would contain oils and chemicals from automobiles. Finally, chemicals, oils, varnishes, paints and other typical "hardware" items would be kept in the Store. These items would on occasion, be knocked over, spilled, etc. Such spills would be cleaned-up with a solution made up of Citra-Solv and water. The Board believes, despite testimony to the contrary, that spill clean-up residue would be deposited directly on the ground outside of the Store. This residue would then flow into the surface waters, ground waters and wetlands on the Project Tract.

The Board concludes that the cornposting toilet facility proposed by the Applicants would likely lead to the introduction, directly and indirectly, of fecal coliform bacteria, nutrients and disease organisms from human wastes into the surface water, groundwater and wetlands on the Project Tract. The Board would not, as a condition of a permit, preclude public use of toilet facilities in a public building. If the Project is not so conditioned by the Board, the Board, despite testimony to the contrary, believes that the public would likely use the composting toilet on a relatively regular basis. The Board believes that, despite the testimony to the contrary, the composting toilet at issue is not easy to maintain. It requires a warm environment, no introduction of grey water, detergents, or chemicals, regular peat moss application, deposit of a slice of bread after almost every use, periodic drum turning and a constant energy source. It is designed to receive no more than 12 uses per day. The Board concludes as a matter of fact and as was the case with many of the composting toilets reviewed by Mr. Van Houten, that the composting toilet would likely regularly overflow due to overuse and improper use and maintenance. Mr. Van Houten's report indicates that the actual application of composting toilets, in general, has not been satisfactory in Addison County. Unit failure is prevalent. Mr. Van Houten's report notes that such failure can result in complete unavailability of toilet facilities. The Board, based upon the record, believes that the Applicants' composting toilet woud have the same level of success in Brandon. When the composting toilet is not available for public use, employees and patrons will likely relieve themselves directly on the Project Tract. Untreated human wastes would likely enter the surface and ground water on the Project Tract and flow easterly to the class II wetlands on the Project Tract.

The Applicants did not offer to the Board a suitable plan to adequately contain toilet overflow. Instead, they a suggested that an overflow pipe or pipes leading from the toilet to a "bucket" which would be transported to the Town's nearby municipal waste water treatment facility for disposal would be adequate. The Board believes that such a system would break down. Spills of the human waste overflow would likely regularly occur. The Applicants' contingency plan is unacceptable. Spills resulting from toilet overflow would likely flow directly and indirectly into the surface water, ground water and wetlands on the Project Tract. They would not be contained in any reliably effective manner. Further, the Applicants did not offer to the Board a suitable plan to adequately address situations in which employees and patrons relieve themselves directly on the Project Tract because access to the composting toilet is denied or the composting toilet is inoperative due to overuse and improper use and maintenance.

As the Board noted in Upper Valley:

> Undue water pollution may also result where water supplies are not contaminated, depending upon other factors which exist in a given situation.

Upner Valley, supra, at 34, f.n. 2. The water pollution which would result from the cornposting toilet would be eliminated through strict application of and adherence to the EPRs. The Board concludes that water pollution which would result from development that would be in violation of applicable health and environmental conservation department regulations regarding the disposal of wastes is undue.

The Board concludes that the Applicants have not met their burden of proof under Criterion 1(B)(waste disposal).

B. CRITERION 5(TRAFFIC)

Before granting a permit, the Board must find that a project "will not cause unreasonable congestion or unsafe conditions with respect to the use of highways ...." 10 V.S.A. § 6086(a)(5).

The Project would be located on Arnold Hollow Lane at the intersection of Arnold Hollow Lane and Route 73. Route 73 is a well maintained roadway. Arnold Hollow Lane is an unimproved gravel road. It is not heavily traveled. The Project would result-in approximately 50 to ,125 extra automobile trips down a short portion of Arnold Hollow Lane and into the Project's parking lot and vice-versa.

There is no indication that the intersection is in any way problematic. Brandon's Chief of Police notes that the Project, in his opinion, would not unreasonably impact, impede or otherwise cause unsafe traffic conditions. On occasion, Route 73 is closed due to flooding nearby. However, recent improvements to Route 73 have reduced the frequency of such events.

The Project would conform with Criterion 5(traffic).

C. CRITERION 8(AESTHETICS)

[7] Before granting a permit, the Board must find that a 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." 10 V.S.A. § 6086(a)(8). The Board uses a two part test to determine if a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corp. Applications #3W041 l-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (Jan. 13, 1986).

1. Adverse Effect

If a project "fits" its context, it will not have an adverse effect. In making this evaluation, the Board examines a number of factors including the nature of a project's surroundings, the compatibility of a project's design with those surroundings and locations from which a project can be seen. Id.

The Project would be placed in a relatively undeveloped field on the outskirts of Brandon -- beyond any existing commercial enterprises. The Storage Area filled with machinery, hardware and various building and farm supplies would abut the Store. A twelve foot tall privacy fence would surround the Storage Area. The Display Area would occur to the south of the Store. It would include a display of seasonal merchandise on what could be a continuous basis -- pumpkins and gourds during the Halloween season, Christmas trees and wreaths during the Christmas season, spring flowers and plantings in the spring, etc. Cars would come in and out of the parking lot everyday throughout the year. The Project would introduce an unscreened storage area complete with machinery and stacks of merchandise, a commercial enterprise, a seasonal display area and a screened parking lot into a picturesque, tranquil area -- one listed by Brandon in its Scenic Areas Inventory.

The Project would stand out when viewed from various locations on Arnold Hollow Lane and Route 73. It would draw the attention of persons observing the church spires of Brandon and the Green Mountains from Arnold Hollow Lane. The Project would detract from the picturesque context in which it would be located.

The Board concludes that the Project would not "fit" its surroundings. Consequently, the Project would have an adverse effect on aesthetics and scenic beauty of the area in which it would be located.

2. Undue

[8] The Board analyzes three factors to determine whether a project's adverse effects are undue. The Board concludes that a project's adverse effects are undue if the Board reaches a positive conclusion with respect to any one of the following factors:

> Does the project violate a clear written community standard intended to preserve the aesthetics or scenic beauty of the area?
>
> Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?
>
> Does the project offend the sensibilities of the average person? Is it offensive or

shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

Quechee Lakes, supra, at 19-20.

a. Clear Written Community Standard

The Town Plan contains a clear, written community standard regarding aesthetics and scenic beauty. The Town Plan describes Brandon's overall policy regarding the value of Brandon's scenic resources:

SCENIC AND AESTHETIC RESOURCES

Scenic Area Value

Brandon is well endowed with natural resources. The townscape is a source of community identity as well as an economic asset. The attractiveness of the landscape is derived from a variety of landforms and land use patterns. Brandon's varied physiography creates a diversified and interesting setting with rich visual quality;, The use of land in Brandon including open pastures and fields with stone and split rail fencesdividing them, wooded uplands, rivers and streams meandering through the town, the village church spires towering above the trees, farms dotting the countryside and other indigenous features, provide the landscape with a special charm and character.

Scenic resources have aesthetic, historical, and economic value: They create an attractiveness enjoyed by resident, prospective residents, and visitors. Land values are enriched by a pleasant visual surrounding. Loss of these amenities would diminish the attractiveness and worth of the community.

Rapid encroachment of urbanization could easily destroy Brandon's pastoral charm. If development is permitted in open fields, and overhead power lines are allowed to bisect more of the. town's open space, or if industry is located in predominantly agricultural areas, the high amenity value of the landscape will be reduced. Visual pollution, like air and water pollution, diminishes the quality of both the natural and man-made environment. Development which results in destruction of these resources is not compatible with the Comprehensive Plan.

Town Plan at 125 and 126. The general policy ends with the following directive:

Brandon has already established programs to protect the visual quality of the local

> environment. ... However, more broad- based steps need to be taken to protect the scenic value of at least the resources listed at the end of the section, and to preserve the existing "townscape".

Id.

The Town Plan establishes three categories of scenic resources -- scenic areas, scenic views and scenic roads. They are defined as follows:

> A Scenic Area may be a featured landscape view which contains a special point of interest such as a hill farm which is conspicuous within the subdominate background. It may also be an enclosed landscape feature which is a roadside view into a confined space such as a valley meadow, lake or tumbling brook and has a natural boundary of cliffs, gentle slopes or vegetation.
>
> A Scenic View is near or distant view. A panoramic view of less than 3 miles is considered near. A view greater than 3 miles should be considered a distance panoramic view.
>
> Numerous Scenic Roads have been identified in Brandon. These roads are generally narrow and abound roadside vegetation. The color, detail and texture of lands bordering these roads create an intimacy and awareness of the rural landscape.

Town Plan at 126 (emphasis original). Near the end of the section, the Town Plan contains a Scenic Areas Inventory of Brandon. Only 30 areas are listed. The inventory includes in relevant part:

	MAP LOCATION	DESCRIPTION
8.	Arnold Hollow Lane	Scenic roadway with excellent intermittent views - split rail fence, overlook views of Otter Creek, Brandon Swamp, long views of Taconics and Adirondacks.
9.	Arnold Hollow Lane near Route 73	Eastern views of village area with Green Mountains in background. Church spires seen above trees.

Id. at 127. Immediately following the Scenic Areas Inventory, two Recommended Policies and Implementation Measures are listed. These policies are the "more broad-based steps [which] need to be taken to protect the scenic value of at least the resources

listed at the end of the section" and the resources are the 30 scenic areas listed in the Scenic Areas Inventory. Town Plan at 125 and 126. The first of these two policies is very specific and states:

> The Planning Commission should encourage development which complements or enhances the scenic quality of the Brandon landscape. In conformance with 10 V.S.A., Chapter 15 1. Section 6086(8), development which threatens to adversely affect the visual amenities of the Town should not be permitted.

Id. at 128 (emphasis added). This is sophisticated scenic areas protection strategy which relates directly to the 30 scenic areas listed in the inventory.

As agreed upon by the parties, the Project would be located in Scenic Area 9 -- one of the scenic areas expressly listed in Brandon's scenic areas inventory. These areas are rare in Brandon. The foregoing provision of the Town Plan is clear vis-a-vis such areas. Through the Town Plan, the citizens of Brandon have adopted a "better safe than sorry" approach to their scenic areas. The Town Plan prohibits any development which even threatens to adversely affect them, Such protection, while more expansive than that afforded under Criterion 8, is well within the authority of the Town Plan. It is commended and supported by the Board. This is especially true in this matter because the Project would not "fit" its surroundings and would have an adverse effect on aesthetics and scenic beauty of the area in which it would be located.

The Board concludes that the-Project would violate a clear written community standard regarding aesthetics. [8]

b. Mitigation

[9] It is incumbent upon an applicant for an Act 250 permit to design its own project. The Applicants have not provided the Board with any landscaping plans demonstrating how the aesthetic impacts of the Project would be mitigated. Further, the Applicants have expressly refused to provide landscape plantings to shield the visual impact of the Display Area or the parking lot even though such plantings are generally available, reasonable in cost and frequently used for screening purposes. The Applicants do not want to obstruct

---

[8] *Board Members Gibb and Martinez dissent from this portion of the Board's decision. They believe that the Project would not violate a clear written community standard intended to preserve' the aesthetics of the area in which the Project would be located.*

the view from Route 73 of the Store and Display Area. [9]

The Board concludes that the Applicants have failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings.

c. Offensive or Shocking

[10] Because of the Board's conclusions regarding the other two "undue" factors, the Board does not need to and will not determine whether or not the Project would offend the sensibilities of the average person or would be offensive or shocking.

The Board concludes that the Project would not comply with Criterion 8(aesthetics).

D. CRITERION 9(F)(ENERGY CONSERVATION)

Before granting a permit, the Board must find that the planning and design of a project "reflect the principles of energy conservation and incorporate the best available, technology for efficient use or recovery of energy." 10 V.S.A. § 6086 (a)(9)(F).

As noted by Graham Hunter, Program Manager, New Commercial Construction, Central Vermont Public Service Corporation, in his November 17, 1995 letter to Mr. Kamedy, the Applicants agree that all exterior walls would be installed with 6" of glass fiber insulation, for an approximate "R" value of 19; the floor between the retail area and the office and the storage spaces above would be filled with 8" of glass fiber, with 6" of similar insulation in the ceiling above the second floor, except at the office, where 8" would be installed; the wall between the office and the unheated portion of the second floor would be constructed of 2 x 6 studs, and insulated with R19 glass fiber batts; florescent lighting with T8 lamps and electronic ballasts would be used in the retail area of the Store and the office space on the second floor; and all exit signs would be illuminated using light emitting diodes. Further, Herbert Clark indicated at the September, 1996 hearing a willingness to follow the several recommendations of Mr. Hunter as set forth in his November 17, 1995 letter to Mr. Karnedy concerning insulation

[9] *Members Gibb and Martinez dissent from this portion of the Board's decision. They would include a planting requirement in a permit for the Project. If the planting requirement was met, the Project would, in their opinion, include all generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings.*

in the ceiling of the second floor; a ceiling fan in the shipping and receiving area; and HVAC equipment. Likewise, Mr. Clark indicated at the September, 1996 hearing a willingness to follow the several recommendations of Stuart Slote as set forth in his May 7, 1996 memorandum to George Gay which note that all thermostats should be 7 - day programmable and heating systems should achieve a minimum annual fuel efficiency of 80% and 83%, if available; and an air lock entry vestibule should be installed if feasible.

The, Board concludes that, if it were to issue a permit for the Project, the permit would be conditioned in accordance with the agreements reached by Mr. Hunter and the Applicants, the recommendations of Mr. Hunter as noted in his November 17, 1995 letter to Mr. Karnedy, and the recommendations of Mr. Slote as noted in his May 7, 1996 memorandum to Mr. Gay.

The Board concludes that, subject to such conditions, the Project would conform with Criterion 9(F)(energy conservation).

E. CRITERION 9(J)(PUBLIC UTILITY SERVICES)

The Board will make a positive finding under Criterion 9(J) with respect to a project if necessary public facilities are or will be available under a duly adopted capital program, demand on such facilities is not excessive and the provisions of such facilities has been planned on the projection of population and economic growth. 10 V.S.A § 6086(9)(J).

Based upon the Applicants' case, the Board concludes that the Project would conform with Criterion 9(J)(public utility services). The Appellants have not presented any credible evidence to the contrary.

G. CRITERION 10(TOWN PLAN)

[11] Prior to issuing a permit, the Board must find that a project "[i]s in conformance with any duly adopted local or regional plan or capital program under chapter 117 of title 24." 10 V.S.A § 6086(10). Brandon has a duly adopted Town Plan. The Board will consider whether the Project is in conformance with such plan.

The Board's town plan analysis under Criterion 10 is conducted in accordance with In re Molgano, 163 Vt. 25 (1994); Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law and Order (August 19, 1996); Re: Manchester Commons Associates, #8B0500-EB, Findings of Fact, Conclusions of Law, and Order (September 29, 1995).

The essential holding of Molgano is that zoning by-laws are germane to interpreting ambiguous provisions of a town plan. Re: Manchester Commons, supra, at 27. Molgano does not stand for the proposition that zoning by-laws control or override the specific policies of a town plan in an Act 250 proceeding. Id. Thus, the Board first considers whether the town plan provisions at issue are specific policies or ambiguous. If such provisions are specific policies, they are applied to the proposed project without any reference to the zoning by-laws. However, if such provisions are ambiguous, the Board next examines the relevant zoning by-laws for provisions which help the Board construe the town plan provisions at issue and thereby resolve their ambiguity. Re: Manchester Commons, supra, at 28. This does not mean a general review of a project for its compliance with the zoning by-laws, but rather an examination to see if there are provisions in the zoning by-laws which address the same subject matter addressed by the town plan provisions at issue. Id. at 32. If the Board determines that the town plan provisions at issue are ambiguous and there are no relevant zoning by-laws, the Board will attempt to construe the town plan provisions at issue by further consideration of the town plan. Re: Bulls-Eye Sporting Center #5W0743-2-EB, Findings of Fact, Conclusions of Law and Order (February 27, 1997); *Cf.* Re: Donald and Gary Thomas, #2S0993-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 20, 1995).

[12] When is a town or regional plan provision a specific policy such that it must be applied by the Board? This question was recently answered by the Board: "a provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding." Re: The Mirkwood Group and Barry Randall, supra, at 29.

1. Town Plan -- Specific Policies or Ambiguous

The Town Plan states the following with respect to scenic areas listed on Brandon's Scenic Areas Inventory:

> The Planning Commission should encourage development which complements or enhances the scenic quality of the Brandon landscape. In conformance with 10 V.S.A., Chapter 15 1, Section 6086(8), development which threatens to adversely affect the visual amenities of the Town should not be permitted.

Town Plan at 127. The foregoing provision, as the Board noted in its discussion concerning Criterion 8, is a clear written community standard. Further, the Board believes that this provision is an unambiguous, specific policy. The Board is guided in this regard by the Vermont Supreme Court's decision in In re Green Peak Estates, 154 Vt.

363 (1990) in which the Court construed a regional plan provision similar to the town plan provision at issue in the instant matter.

In Green Peak, the Board denied a land use permit application for residential detached homes on the ground that the certain phases of the project did not conform with either the applicable town or regional plan. The applicant appealed the Board's denial to the Vermont Supreme Court which affirmed the Board.

Section 5.8 of the Bennington County Regional Plan was the operative regional plan provision at issue, in Green Peak. It provided: "Residential development should be carefully planned in areas where the natural slopes are greater than 15%. On slopes greater than 20%, residential development should not be permitted" In re Green Peak Estates, supra, at 368 (emphasis added). The Board found as a matter of fact -- and the parties did not dispute -- the following with respect to the project at issue in Green Peak: "Thus, with the exception of the southerly portion of phase III, the entire project area is characterized by slopes which exceed 20%. Those areas scattered throughout the site which do not exceed 20% slopes fall within the 15 to 20% slope category and only a very small portion of the site consistsof slopes of less than 15%." Id. The Court stated in light of the foregoing finding: "Given the specific policy in the regional plan against residential development on slopes exceeding twenty percent the Board's findings are sufficient to support its conclusion that the project does not 'conform to the plan." In re Green Peaks, supra, at 369 (emphasis added) citing *Cf.* In re Patch, 140 Vt. 158, 167 (198 1). Thus, it is clear in light of Green Peak that a town or regional plan provision which-reliesupon the clause "should not be permitted" to discourage certain types of development can be a specificpolicy. *Cf.* In re MBL Associates, supra.

The town plan provision at issue pertains to a specifically designated area in which the Project would be located -- Scenic Area 9. Further, the provision is clearly intended to guide or proscribe conduct or land use within Brandon's scenic areas including the area in which the Project would be located -- it precludes development which threatens to adversely affect Scenic Area 9. The provision is sufficiently clear to guide the conduct of an average person, using common sense and understanding. Such a person would know that any development which even threatens to adversely affect a resource listed on Brandon's Scenic Areas Inventory -- including Scenic Area 9 -- shall be prohibited. The provision is specifically directed toward the Act 250 review process. It expressly references Act 250 and, specifically, Criterion 8. The drafters of this provision established their intent that this provision would be applied by the Board during its review of Act 250 permit applications involving projects proposed within Brandon. This is particularly relevant in the instant matter because the Project has not been reviewed by the Town of Brandon Planning Commission. The provision at issue in this matter is a specific policy which is quite clear.

The Project, a development which would have an adverse effect upon the Arnold Hollow Lane/Route 73 intersection, would not conform with the Town Plan provision at issue according to the express terms of such provision. Therefore, the Project would not conform with Criterion 1 O(town plan).

2 . Zoning Ordinance

Because the Town Plan provision at issue is a specific policy the Board does not need to review the Zoning Ordinance under Criterion 10. However, if the Town Plan provision at issue was ambiguous and the Board reviewed the Zoning Ordinance, the Board would conclude that the Zoning Ordinance provides no insight into the meaning of the Town Plan provision at issue. There is simply no mention of Brandon's aesthetic resources and scenic beauty in the Zoning Ordinance.

3. Town Plan Construction

If the Town Plan provision at issue was ambiguous, in light of the lack of guidance in the Zoning Ordinance, the Board would be compelled to construe the applicable provision of the Town Plan by further consideration of the Town Plan. Re: Bulls Eye Snorting., supra at 6. In doing so, it would again conclude -- that any development which even threatens to adversely affect a resource listed on Brandon's Scenic Areas Inventory -- including Scenic Area 9 -- shall be prohibited.

[13] The fundamental rule in statutory construction is -- when the plain meaning of a statute at issue is not apparent on its face, the entity applying the statute must engage in an exercise of statutory construction whereby it seeks to ascertain and give effect to the intention of the legislative body which adopted the statutory provision at issue. Vermont Agency of Transportation v. Mazza, 16 1 Vt. 564 (1993). Thus, the Board would seek to ascertain and give effect to the intention of the legislative body that adopted the Town Plan provision at issue. Of course, in doing so, the Board would presume that no unreasonable or unjust result was intended by the legislative body that adopted the Town Plan provision at issue. In re Cottrell, 158 Vt. 500 (1992).[10] Further, the Board, in

[10] *The Board received supplemental evidence from the Town's Zoning Administrator regarding:*

> *All those minutes or other official documents of the Town of Brandon Planning Commission dated or approved on or before June 24, 1995 and which pertain to or address the purpose, scope and intent of the Scenic and Aesthetic Resources provision, in full or in part, of Section 9 of the January 24, 1994 Brandon Town Plan.*

interpreting the Town Plan provision at issue, would look to the whole of the Town Plan and every part of it, its subject matter and the effects and consequences and the reason and spirit of the law. Winev v. William E. Dailey, Inc., 161 Vt. 129 (1993) citing Mabee v. Mabee, 159 Vt. 282,284 (1992).

> The key sentence in the Town Plan provision at issue is that which states:
>
> In conformance with 10 V.S.A., Chapter 15 1, Section 6086(8), development which threatens to adversely affect the visual amenities of the Town should not be permitted.

Town Plan at 128. The first clause of this sentence -- in conformance with 10 V.S.A., Chapter 15 1, Section 6086(8) -- is a general reference to the Criterion 8 standards. As noted earlier, these standards require that a project will not have an undue, adverse effect on the scenic or natural beauty of the area in which a project would be located. Criterion 8 does not, in and of itself, prohibit development which threatens to adversely affect the visual amenities within the jurisdiction in which a project under review is located. However, the second clause of the sentence -- development which threatens to adversely affect the visual amenities of the Town should not be permitted -- is more restrictive than the Criterion 8 standards and does preclude such development. This second clause is the more restrictive clause in the critical sentence of the Town Plan provision at issue. Consequently, it is controlling. See Vt. Baptist Convention v. Burlington Zoning Board, 159 Vt. 28, 30 (1992) citing Kalakowski v. John A. Russel Cot-p., 137 Vt. 219, 224 (1979). Thus, if the Town Plan provision at issue was ambiguous on its face and the Board was compelled to construe it, the Board would conclude that it prohibits any project which would have an undue adverse effect on the aesthetic or scenic beauty of the area in which a project would be located.

The material submitted to the Board does not assist the Board in its construction of the applicable provisions of the Town Plan.

V. ORDER

1. Application # 1R0785 is **DENIED**.

2. Jurisdiction is returned to the District Commission.

Dated in Montpelier this 3rd day of April, 1997.

ENVIRONMENTAL BOARD

John T. Ewing, Chair
Marcy Harding
Rebecca Nawrath
Samuel Lloyd
Robert Opel
Arthur Gibb*
William Martinez*

* Members Gibb and Martinez dissent with respect to Criteria 8(aesthetics) and 10(town plan). They concur with regard to the other Criteria and, as a consequence, denial of the application.

J:\DATA\DECISION\EB\APPEALS\CLARK.F2