VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re: Peter S. Tsimortos Land Use Permit Application #2W1127-EB

Findings of Fact, Conclusions of Law, and Order

This proceeding involves an appeal from the denial of Land Use Permit Application #2W1127 and accompanying Findings of Fact, Conclusions of Law, and Order (Commission Decision), issued by the District 2 Environmental Commission (Commission) to Peter S. Tsimortos (Tsimortos).

Because the Board cannot make positive conclusions as to the Project's compliance with the Dover Town Plan or the Windham Regional Plan, the Project cannot meet the requirements of 10 V.S.A. §6086(a)(10), and the Board denies the Application.

I. History

On July 2, 2001, Tsimortos filed Land Use Permit Application #2W1127 with the Commission. As amended on March 20, 2002, the application sought authorization for the previous construction of a residence, garage, stables, caretaker's quarters and barn, the clearing of 12.5 acres of land, the improvement of 1,800 feet of roadway, the construction of a new wastewater disposal system and the installation of underground electrical utility line, all on a 62.5 acre tract of land in the Town of Dover, Vermont (Project).[1]

On September 5, 2002, the Commission denied the application, and on October 3, 2002, Tsimortos filed an appeal with the Environmental Board (Board) from the Decision, alleging that the Commission erred in its conclusions concerning 10 V.S.A. §§6086(a)(1)(B), (4), (8), (9)(K), and (10) (Criteria 1(B), 4, 8, 9(K) and 10)

On November 7, 2002, then Board Chair Marcy Harding convened a Prehearing Conference with Tsimortos (by his attorneys, C. Daniel Hershenson, Esq., Jennifer Reining, Esq., and Lisanne Dorion, Esq.), the Agency of Natural Resources (ANR) (by Warren Coleman, Esq.) and the Windham Regional Commission (WRC) (by James Matteau), participating.

The Town of Dover and the Dover Planning Commission later filed letters seeking to participate in this case. Thus, Tsimortos, ANR, WRC, the Town of Dover and the Dover Planning Commission are parties.

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[1] While such construction would not ordinarily trigger the jurisdiction of 10 V.S.A. Ch. 151 (Act 250), the fact that it occurred above the elevation of 2,500 feet subjects it to the Act's jurisdiction. 10 V.S.A. §6001(3)(A)(vi), formerly 10 V.S.A. §6001(3).

Tsimortos filed prefiled testimony and exhibits as to all the criteria on appeal on January 8, 2002.[2]

Pursuant to Environmental Board Rule (EBR) 16(D), which encourages parties to resolve matters through informal resolution, Tsimortos, ANR and WRC filed a Mitigation and Settlement Agreement (Agreement) with the Board on February 6, 2003. These parties asked that the Board accept the Agreement in satisfaction of Criteria 8, 9(K) and 10.

On February 19 and March 19, 2003, the Board deliberated on the parties' request that the Agreement be approved. On April 2, 2003, the Board issued Findings of Fact, Conclusions of Law, and Order in which the Board rejected the Agreement. The Board further found that, based solely on Tsimortos' filings, the Project complied with Criteria 1(B) and 4, but did not comply with Criteria 8 or 10. The Board issued no decision as to Criterion 9(K).

On May 7, 2003, Tsimortos filed a Motion to Alter the Board's April 7, 2003 decision.

On May 21, 2003, the Board deliberated on Tsimortos' motion and issued a Memorandum of Decision on May 29, 2003. In this Memorandum of Decision, the Board reaffirmed its April 2 decisions as to Criteria 1(B), 4, and 9(K) but vacated its decisions as to Criteria 8 and 10.

The May 29, 2003 Memorandum of Decision reserved decision on Criterion 8 and invited briefing from all parties on Criterion 10. The WRC and the Town of Dover filed responses to the Criterion 10 argument raised by Tsimortos in his Motion and Memorandum in Support of his Motion to Alter; ANR did not.

The Board offered the parties the opportunity to present oral argument at the Board's July 16, 2003 meeting; the parties chose not to present such argument.

On July 16 and August 27, 2003, the Board deliberated on the sole question of whether the Project complies with Criterion 10. This matter is now ready for decision.

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[2] The Town of Dover, which is also a statutory party, 10 V.S.A. §6084 and EBR 14(A)(3), filed testimony through Tsimortos in support of the Project.

II. Issue

The sole issue before the Board in this matter at this time is:

Does the Project comply with 10 V.S.A. §6086(a)(10) (Dover Town Plan and Windham Regional Plan)?

III. Findings of Fact

A. The Project

1. The Project consists of the construction of a residence, garage, stables (barn) and caretaker's quarters, the improvement of 1,800 feet of roadway, the construction of a septic system, and the installation of an underground electrical utility line, on a 62.5 acre tract of land the Town of Dover, Vermont. The main Project buildings have white clapboard siding and steep pitched roofs.[3]

2. Construction of the Project commenced in 1987 and concluded in 1988.

3. The Project is constructed above 2,500 feet in elevation.

B. The Project tract

4. The Project is on 62.5 acres of land on Rice Hill Road in Dover.

5. The area where the Project is located has been logged, off and on, for many years.

6. In constructing the Project, approximately 6.5 acres of land was cleared above 2500 feet in elevation with about 1.25 acres cleared around the main house. There are approximately 8.3 acres in pasture or mowed area, and the rest of the open area is either access corridor or regenerating forest. Thus, the total amount of land which is open, both above and below 2,500 feet in elevation, is approximately 14.8 acres. The remaining land owned by Tsimortos is all in forest cover.

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[3] This finding is based on Tsimortos' Exhibit T1 and Tsimortos' Act 250 application filed with the Commission, of which the Board takes official notice, pursuant to 3 V.S.A. §814. And see, *In re Stowe Club Highlands*. 166 Vt. 33, 40 (1996) (Board may rely on applicant's representations in permit application). The remaining findings are based on the evidence submitted by Tsimortos in the present matter, Exhibits T1 – T35, which, for the purposes of this decision, the Board admits into evidence; these findings are also based on findings proposed by Tsimortos.

C. Lands in the vicinity of the Project

7. The lands surrounding the Project tract are generally forested areas, although lands owned by others in this area have also been cleared.

8. Land uses in the vicinity of the Project are generally rural residential, with several large-lot subdivisions which include Cooper Hill, Frost Hollow and two other large houses located off Rice Hill Road.

D. Criterion 10

Dover Town Plan

9. Tsimortos filed his Act 250 Land Use Permit Application #2W1127 with the Commission on July 2, 2001.

10. The 1985 Dover Town Plan (as amended through 1988) was in effect at the time the Project was constructed; the Dover Town Plan in effect at the time Tsimortos filed Application #2W1127 was adopted on March 24, 1998.

11. The *Introduction* to the 1998 Dover Town Plan (Town Plan) contains the following overview:

> The Dover Town Plan identifies the means by which the Town proposes to guide its growth. The official adoption of the Plan represents a conscious community decision towards the Town's future character, its priorities for land use, and conservation of natural resources.
>
> The goals, policies and priorities for action expressed within this Plan reflect the wishes of Dover's residents and should be used along with the Town Plan Maps to provide guidelines to the Planning Commission and Board of Selectmen in developing and updating local regulations and ordinances. The Plan should also serve to guide the Regional Planning Commission and state agencies in their planning efforts; to assist the District Environmental Commission in judging applications submitted under Act 250 and to guide those persons interested in subdividing and developing land in the Town of Dover.

Town Plan, Page 1.

12. The *Statement of Goals* section of the Town Plan states, in pertinent part:

It is a GOAL of the Town of Dover….

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b. To protect the community's irreplaceable natural resources.

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d. To preserve and enhance the community's cultural, historical, architectural and scenic resources.

e. To discourage uncoordinated or incompatible development that may jeopardize public or private investment, or damage the Town's resources or rural character. …

Town Plan, Page 2

13. The *Interpretation* section of the Town Plan states, in pertinent part, "Sections of the Town Plan that contain the language "should" are recommendations only. The language "could" or "may" are only suggestions as to the direction of a project could take. The language "shall, will, or must" are mandatory." Town Plan, Page 2.

14. The *Topography* section of the Town Plan states:

> The Town of Dover is in the center of southern Vermont, approximately equidistant from the boundaries of New York, New Hampshire and Massachusetts. The entire Town is 22,912 acres and covers 35.8 square miles. It is characterized by high, mountainous terrain. From the crests of the divides along its western and northern borders the land in Dover falls away steeply, while from the south and east, the land slopes more gently, with all streams flowing into Wilmington and Newfane.
>
> Roughly two-thirds of the Town lies in the southern end of the Green Mountains. Elevations range from 3556 feet at Mt. Pisgah (Mount Snow) to 2350 feet at Cooper Hill Inn, to 1060 feet at the East Dover Fire Department, to 1958 feet at the Mount Snow Airport. Within the boundaries of the Town are the catchment area and headwaters of the North Branch of the Deerfield River that flows southeasterly, entering Wilmington in the middle of Dover's southern boundary at an elevation of 1,600 feet. The eastern one-third of the Town slopes to the east, forming valleys of a number of streams, the largest of which is the Rock River, which enters Newfane at East Dover, at an elevation of 1,000 feet - - the lowest point in the Town.

Town Plan, Pages 5 -6.

15. The first paragraph of the *Land Use* section of the Town Plan states:

> In order to encourage a pattern of residential, commercial, and recreational development that conforms to the goals and policies outlined in the Town Plan, the following land use classification has been formulated. While taking into account the existence of current land uses and structures which cannot be changed, future land use and development in the Town of Dover *shall follow the guidelines of the designated geographic land use areas outlined below*. For exact locations, see Land Use/Zoning Districts Map.

Town Plan, Page 36 (emphasis added).

16. The *Land Use* section of the Town Plan identifies the following *Land Use Areas and Descriptions*:

> Land Use Areas and Descriptions
>
> A - Mountain Tops and Ridges
> B - High Hills and Valleys
> C - Valley Walls
> D - Agricultural/Residential
> E - Rural Residential
> F - Vacation/Residential
> G - Light Industrial/Commercial
> H - Roadside - Commercial/Residential
> I - Base Area I - Commercial/Residential
> J - Airport Area - Commercial
> K - Village Area - Commercial/Residential
> L - Base Area II - Commercial/Residential

Town Plan, Page 36.

17. *Land Use Area A*, *Mountain Tops and Ridges*, includes "A (4) The mountain tops & ridges of Rice Hill." Town Plan, Page 36.

18. The Project, above 2500 feet in elevation on Rice Hill, is located in *Land Use Area A*, *Mountain Tops and Ridges.*

19. The *Description* section of the *Mountain Tops and Ridges Land Use Area* states:

> These areas include lands 2,500 feet or more above mean sea level (MSL). They consist of thin, friable soils covered by tenuous vegetation on steep slopes. They are subject to high winds, heavy snowfall and extreme temperature variations which contribute to

> their high susceptibility to erosion, poor quality of tree growth and low capacity to support construction activity. The Dover Town Forest is located in the A(4) area and includes most of A(5) and A(6).

Town Plan, Page 36

20. The Town Plan contains the following *Land Use Recommendations* for the *Mountain Tops and Ridges Land Use Area*:

> Land Use Recommendations: Although much of these areas have been lumbered in the past, intensive cutting is no longer recognized as an appropriate use. Severe physical limitations to development prohibit extensive structural development of any kind. These areas should be maintained as natural areas and managed as open space for outdoor recreation where feasible. Utmost care should be taken to avoid unnecessary destruction of flora and fauna, including forest cover and wildlife habitat. Development and recreation activities should only be permitted when in direct support of skiing and when it can be shown that no adverse environmental impacts will result. Motorized vehicles should be limited to maintenance and rescue purposes only.

Town Plan, Page 36

21. *Land Use Areas B – I* and *K* and *L* all contain references to maximum or average densities of dwelling units. Town Plan, Pages 37 – 42.

22. The *Mountain Tops and Ridges Land Use Area* does not specifically describe a maximum density of dwelling units.

23. The only other Land Use Area in the Town Plan which does not specifically describe a maximum or average density of dwelling units is *Area J*, the *Airport Area*, described as a "small area surrounding the airport runway," which is reserved for "facilities related to loading, unloading, storing and servicing airplanes," "structures for passenger services, luggage and cargo storage and business offices," and a "parking area for cars, trucks, buses, and other transport vehicles." Town Plan, Page 41.

24. The *Town Plan Maps* section of the Town Plan contains, in pertinent part, the following statements:

> The Town of Dover has developed a computerized mapping program in conjunction with the statewide development of a Geographic Information System (GIS). Large scale maps are available at the Town Office for review. Smaller scale maps are enclosed as part of the Town Plan.

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3. Land Use Plan/Zoning Districts
Maps showing zoning district boundaries.

Town Plan, Page 46.

25. The Dover Zoning Map identifies the Project's zoning district as “Mountain Tops and Ridges (1/25).” The map's legend explains that "(1/25)" refers to "Dwelling Units/Acre for residential purposes."

26. The Town of Dover did not adopt zoning regulations until 1988.

Windham Regional Plan

27. The 1987 - 1992 Windham Regional Plan was in effect at the time the Project was constructed; the Regional Plan in effect at the time Tsimortos filed Application #2W1127 was adopted on November 26, 1996, and ratified on December 10, 1996 (Regional Plan).

28. The *Regional Priorities* section of the Regional Plan states: "Land Use…, Settlement Pattern – … New residential development should be guided so that it is compatible with existing community character and other land use concerns." Regional Plan, Page 10.

29. The Project is located in the lands described in the *Resource Land* subsection of the Regional Plan's *Land Use* section.

30. The *Resource Lands* section of the Regional Plan states:

> Resource lands are predominated by lands requiring special protection or consideration due to their uniqueness, irreplaceable and fragile nature, or important ecological function. Resource lands include: fish and wildlife habitats; areas hosting state Natural Heritage or federally identified endangered and threatened species; unique and fragile natural areas; wetlands; shorelands; floodplains; aquifer recharge area; steep slopes, *lands over 2,500-foot elevation*; ridgelines; essentially undeveloped forest lands which have limited access to an improved public road; and regionally significant scenic corridors and areas. Regional areas of special value should be preserved and protected to the greatest extent possible. Any development or land use in these areas should be designed to have a minimal impact on the resource. It is important to limit and manage human interaction in resource areas. Resource lands also include those as areas that are currently in some form of legal conservation such as: public ownership, private non-profit ownership for

> conservation purposes, or conservation easements lands. The most appropriate land uses for resource lands are conservation, forestry, recreation, and low impact, very low density rural uses.

Regional Plan, Page 30 (emphasis added).

31. Relevant *Resource Lands Policies* include, in pertinent part:

> 1. Ensure that new development reflects existing settlement patterns, is low impact and intensity, and does not conflict with the resources, but rather sustains these natural resources.
>
> 2. *Ensure protection of* fish and wildlife habitats; areas hosting Natural Heritage or federally identified endangered and threatened species; unique and fragile natural areas; wetlands; shorelands; floodplains; aquifer recharge areas; steep slopes; *lands over 2,500-foot elevation;* ridgelines; essentially undeveloped forest lands which have limited access to an improved public road*;* and regionally significant scenic corridors and areas from development that would negatively impact the resource.

Regional Plan, Page 31 (emphasis added).

32. The Project is in a fragile area, as defined by the Regional Plan.

33. The *Natural Areas, Fragile Areas, and Wildlife Resources* section of the Regional Plan states, in pertinent part:

> Natural and fragile areas are landscape features which have ecological, educational, scenic and contemplative value, and are important to wildlife and the natural heritage of the region. . .
>
> Although not formally designated as such, *areas above 2,500 feet in elevation constitute fragile areas in Vermont.* Lands above 2,500 feet are especially vulnerable natural environments because of their thin soils, steep slopes, sensitive vegetation, important wildlife habitats, and greater than average precipitation.
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> ***
>
> Policies
>
> 1. Protect natural areas, fragile areas, and critical plant and animal habitats, especially those of state and regional significance.

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3. *Protect natural and fragile areas from development. When development is proposed near a natural or fragile area, a buffer strip designed in consultation with the appropriate state agency, must be designated and maintained between the development and natural or fragile area.*

Regional Plan, Pages 55-57 (emphasis added).

IV. Conclusions of Law

A. Burden of Proof

The burden of proof consists of the burdens of production and persuasion. *Re: Applewood Corporation Dummerston Management*, Declaratory Ruling #325, Findings of Fact, Conclusions of Law, and Order at 8-9 (Sept. 25, 1996).

The burden of proof on particular criteria is established by 10 V.S.A. §6088. As to Criterion 10, the applicant bears the burden of persuasion. Further, regardless of who has the burden of persuasion on a particular issue, the applicant always has the burden of producing evidence sufficient to enable the Board to make the requisite positive findings on all of the criteria. *Re: Herndon and Deborah Foster*, #5R0891-8B-EB, Findings of Fact, Conclusions of Law, and Order at 11 (June 2, 1997).

B. Discussion of Criterion 10

Criterion 10 requires that a project must be "in conformance with any duly adopted local or Regional Plan…." 10 V.S.A. §6086(a)(10).

1. The Dover Town Plan

a. Which Town Plan applies?

The 1985 Dover Town Plan was in effect at the time Tsimortos built his house, and the present 2000 Dover Town Plan was in effect on July 2, 2001, when Tsimortos filed Land Use Permit Application #2W1127 with the Commission.

Tsimortos contends that the Board, when engaging in its Criterion 10 analysis in its April 7, 2003 decision, incorrectly evaluated his Project under the 2000 Dover Town Plan. Tsimortos argues that his compliance with Criterion 10 should be judged with respect to the 1985 Dover Town Plan, as that plan was in effect in 1987, at the time that he commenced construction on the Project and Act 250 jurisdiction attached to his land.

Tsimortos notes correctly that the Vermont Supreme Court's seminal case of *Smith v. Windhall Planning Commission*, 140 Vt. 1978 (1981), holds that the zoning regulations that are in effect at the time an application for a zoning permit is filed should govern such application. Within the Act 250 context, the Court has held that *an* applicant obtains vested rights to have his project judged in accordance with a town plan in effect at the time a complete Act 250 application is filed. *In re Ross,* 151 Vt. 54 (l989). The Court has also decided that, in certain circumstances, an Act 250 applicant may obtain a vested right to have his project reviewed under Criterion 10 in accordance with the zoning regulations (assuming that the relevant town plan is ambiguous) which were in effect at the time that the local zoning permit application is filed. *In re Molgano*, 163 Vt. 25 (1994).

As Tsimortos notes, at the time that he began construction of his house in 1987, Dover had a town plan but no zoning regulations. The Town of Dover did not adopt zoning regulations until 1988. As a result, Tsimortos is accurate in his claim that he could not have sought a zoning permit from the Town.

Tsimortos presents two arguments in favor of his claim that his Project should be evaluated with reference to the 1985 Dover Town Plan.

i. that the Town Plan in effect at the time that Act 250 jurisdiction attached to his Project should govern

Tsimortos asserts that because Act 250 *jurisdiction* attached at the time that he commenced construction in 1987, the town plan in effect in 1987 - the 1985 Dover Town Plan - should apply. He notes that the present situation differs from both *Smith* and *Ross* in that in neither of those cases had jurisdiction been triggered by construction.

Tsimortos argues, in effect, that by building his house without an Act 250 permit (and thereby violating 10 V.S.A. §6081(a)), he is entitled to obtain the benefits of Criterion 10 review under the town plan in effect at the time of his violation. Were the Board to concur with this position, it would not only reward a person who had violated Act 250, but it would encourage such violations. A person with knowledge that the adoption of restrictive town plan amendments was imminent could submit a complete application, in an attempt to obtain vested rights, pursuant to *Ross*, under the earlier plan. If, however, the immediate filing of a complete application were to be impossible or impractical, under the approach advocated by Tsimortos, vesting could be accomplished by commencing construction before a permit had been granted or even sought. In other words, an applicant could obtain the advantage of an earlier regulatory framework by commencing construction without a permit, even though such construction would violate the law.

The Board is not in the business of encouraging noncompliance with Act 250. Not only is this bad public policy, it is contrary to the Legislature's intention, as

embodied in the Uniform Environmental Environment Act, 10 V.S.A. Ch. 201, which states, as a goal, the Legislature's desire to "foster greater compliance with environmental laws." 10 V.S.A. §8001(4).

The Board therefore rejects Tsimortos' argument that the 1985 Dover Town Plan should govern because jurisdiction over his Project attached in 1987.

ii. that In re Molgano *supports a conclusion that Project should be governed by the Town Plan in effect at the time that construction commenced*

The Court's *Molgano* decision allows an Act 250 applicant, in certain circumstances, to have his project judged in accordance with zoning regulations in effect at the time that such applicant began the local zoning process. *In re Molgano*, 163 Vt. at 32. The fact that there was no local process in existence in Dover in 1987 (and that the Board does not even know that, had there been a local process, Tsimortos would have engaged in it), does not present a barrier to Tsimortos. He argues:

> If, as the Court suggests, a development's conformance with respect to Criterion 10 is to be measured at the time of the local processes, it stands to reason that if no local processes were required and construction is initiated that conformance should be measured at the time of the initiation of construction.

Tsimortos *Memorandum* at 16.

Tsimortos contends that the Board must apply the Town Plan in effect at the time that Tsimortos *could have applied* for a local zoning permit *had local zoning regulations existed.* And because there were no local zoning regulations in 1987, the applicable default date is the date of construction, and the 1985 Dover Town Plan - in effect at the time of his Project's construction - should govern.

It is important to read *Molgano* in its context and with attention to its holding.

Frank Molgano wished to construct a project in Manchester, Vermont that was subject to both local zoning and Act 250 jurisdiction. He commenced the local Manchester process first, by filing an application for a zoning permit. The local process, begun in June 1987 under zoning regulations that permitted Molgano's project, was completed four years later upon the August 1991 issuance of the zoning permit. Shortly before Molgano began the Act 250 process in October 1991, the Manchester zoning regulations were amended to prohibit Molgano's project.

Pursuant to 10 V.S.A. § 6086(b), which allows for preliminary review under one or more criteria, the parties requested that the project be initially reviewed under only Criterion 10. Both the Commission, and later the Board, found that the project did not

comply with either the Manchester Town Plan or the Regional Plan. In its decision, the Board held that the Manchester zoning regulations were irrelevant to its interpretation of the Manchester Town Plan, and that, even if the zoning regulation were to be considered, the 1991 amendments would bar the project.

The Supreme Court reversed both holdings. First, noting that the Manchester Town Plan was ambiguous, the Court ruled that the zoning regulations were essential to the plan's interpretation and should have been considered by the Board. *Molgano,* 163 Vt. at 30 (emphasis in original).

Second, the Court concluded that Molgano had a vested right to have his project reviewed with reference to the zoning regulations which were in effect at the time that he applied for his local zoning permits:

> Therefore, we hold that, where, as here, a developer diligently pursues a proposal through the local and state permitting processes before seeking an Act 250 permit, conformance with a town plan under §6086(a)(10) is to be measured with regard to zoning laws in effect at the time of a proper zoning permit application.

Id. at 33.

Significantly, *Molgano* does *not* hold that a project is governed by the *town plan* that was in effect at the time the local zoning process was initiated. The case simply states that, when a town plan is ambiguous and the Board considers a municipality's zoning regulations to assist in its interpretation, the *zoning regulations* in effect when the local process began must govern,[4] not regulations adopted at a later date.

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[4] Although not important to the present case, this aspect of *Molgano* appears to have been superseded by the recent amendments to Criterion 10, which now reads:

> (10) Is in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24. In making this finding, if the board or district commission finds applicable provisions of the town plan to be ambiguous, the board or district commission, *for interpretive purposes, shall consider bylaws, but only to the extent that they implement and are consistent with those provisions,* and need not consider any other evidence.

10 V.S.A. §6086(a)(10), as amended by Act No. 40 §6 (eff. July 1, 2001). Zoning bylaws that precede the adoption of a town plan cannot "ímplement" such a plan, unless the town plan provisions on which those bylaws are based were simply readopted. *See, John A. Russell Corporation and Crushed Rock, Inc,* #1R0489-6-EB (Remand)-EB, Findings of Fact, Conclusions of Law, and Order at 42 (Jan. 17, 2002), appeal dktd. (V.S.Ct).

The question of whether the Board must apply a *town plan* in existence at the time that a local process is commenced was neither presented nor answered by *Molgano.*[5] But to read *Molgano* to require the application of a town plan that may have been wholly revised by a subsequent plan is contrary to the Supreme Court's *Ross* decision, which, as noted, specifically holds that the town plan in effect *at the time that a complete Act 250 application is filed* is the plan that controls.

The Town Plan that applies is the 1998 Dover Town Plan, as that is the plan that was in effect as of the time that Tsimortos filed his application. *In re Ross.*

b. The Board's interpretation of the Dover Town Plan

The Board will review a town plan to determine whether it can provide guidance as to whether a particular project is in conformance with the plan's language. The Board asks two separate questions: Is the language in the town plan mandatory or does it merely provide guidance? And, are the town plan's provisions specific or ambiguous?

i. Mandatory vs. guidance language

Town plans (24 V.S.A. Ch. 117) are intended to provide a town's citizens with policy direction and goals for land use development based on an intimate understanding of the town's natural resources. Town plans provide the framework upon which the zoning regulations are built. They do not typically contain words or phrases such as "prohibited" or "shall not be allowed." Thus, while they indicate the direction that a town wants to take in terms of its development, town plans often do not set absolute, stark restrictions or prohibitions on development in a town. *See John A. Russell Corporation and Crushed Rock, Inc.,* Land Use Permit Application #1R0489-6, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1999), *citing*, *Kalakowski v. John A. Russell Corp.,* 137 Vt. 219, 225 (1979); *Casella Waste Management Inc.,* #8B0301-7-WFP, Findings of Fact, Conclusions of Law, and Order at 41 (May 18, 2000).

But despite the fact that town plans are often couched in “abstract and advisory” language, *id.,* and see *Molgano,* 163 Vt. at 31 (referring to the "nonregulatory abstractions in town plans), Act 250 requires that projects comply with a “local or regional plan,” if one or both exist. 10 V.S.A. §6086(a)(10). The Board is therefore *obliged by the language of the law itself* to give regulatory effect to a document which,

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[5] It could be argued that language in the *Molgano* decision implies that such a town plan should govern: "Section 6086(a)(10) is silent on when conformance is measured. Since the purpose of that section is *to ensure consistency with local planning and zoning*, the logical interpretation is to measure conformance at the time of the local processes." *Id.,* at 32 (emphasis added). But, again, as *no local zoning process existed in Dover in 1987*, there was nothing with which the 1985 Dover Town Plan could have been consistent.

because its purpose is otherwise, is often not written in regulatory language.[6]

This does not mean that, where a town plan uses ineffectual language, the Board will nevertheless read that language to prohibit a project. The Board has not done that in the past and will not do so here. *See, Re: The Van Sicklen Limited Partnership,* #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 55 (Mar. 8, 2002) (phrases such as "strongly encourages" and "should focus its efforts to encourage" indicate nonmandatory elements of a town plan); *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2W0694-1-EB, Findings of Fact, Conclusions of Law, and Order at 42 (Dec. 21, 2000) (while words such as "direct," "encourage", "promote," and "review" in town or regional plans may provide guidance in the interpretation of such Plans and may be used to bolster more specific policies in such plans, they do not, by themselves, constitute a mandate). *And see, The Mirkwood Group and Barry Randall*, *supra, a*t 29; *Ronald Carpenter*, #8B0124-6-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Oct. 17, 1995); *Horizon Development Corp.,* #4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Aug. 21, 1992). *Compare, Re: Southwestern Vermont Health Care Corp*., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 54 (Feb. 22, 2001) (use of the phrase "shall be protected" in town plan is mandatory).

The first question presented, therefore, is whether the Dover Town Plan uses "nonprohibitory" language such that the Plan provides merely guidance to the Board's consideration of Criterion 10.

Unlike many town plans which use nonmandatory words such as "direct," "encourage", "promote," and "review," the Dover Town Plan uses the word "shall." At issue is the development of this Project within *Land Use Area A - Mountain Tops and Ridges*. The Town Plan has a specific geographic land use area classification system with guidelines for each designated land use area. Importantly, the Plan states: "Future land use and development in the Town of Dover *shall follow* the guidelines of the designated geographic land use areas outlined below." (Emphasis added). The Plan also states the language "shall," "will," or "must" are mandatory. Town Plan, Page 2.

The only "guidelines" in the *Mountain Tops and Ridges Land Use Area* are the *Land Use Recommendations* within that section. These *Recommendations* use the word "should." However, regarding the *Recommendations* as only suggestions would be improper in this instance, as the phrase "shall follow the guidelines" causes the

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[6] To do otherwise would be comparable to ignoring Criterion 10's requirement that a project conform to town and regional plans, something which the Board cannot do. *State v. Stevens*, 137 Vt. 473, 481 (1979) (in construing a statute, every part of the statute must be considered, and every word, clause, and sentence given effect if possible); *State v. Racine*, 133 Vt. 111, 114 (1974) (presumption that all language is inserted in a statute advisedly).

Recommendations to be mandatory provisions. [7]

ii. Specific vs. ambiguous provisions in a Town Plan

If a town plan's provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. 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*, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996).

If a town plan's provisions are general in nature or ambiguous, the Court's *Molgano* decision instructs the Board to examine relevant zoning regulations to attempt to resolve the ambiguity. This does not mean that the Board conducts a general review of a project for its compliance with the zoning regulations, but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc*., #2W0813-3 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Apr. 19, 2001); *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation,* #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996*), aff'd, In re Fair Haven Housing Limited Partnership and McDonald's Corporation*, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished).

In the instant case, the Board finds that the relevant language of the Town Plan is specific under the *Mirkwood* test. The *Land Use Recommendations* for the *Mountain Tops and Ridges Land Use Area* pertain to the area in which Tsimortos' Project is located; they govern land use within that area; and they are sufficiently clear to guide an average person's conduct, using common sense and understanding.

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[7] Tsimortos cites to the Vermont Supreme Court decisions in *In re Green Peak Estates*, 154 Vt. 363 (1990); *In re Molgano*, *supra*; *In re MBL Assocs.,* 166 Vt. 606 (1997); and *In re Kisiel*, 172 Vt. 124 (2000), for the proposition that the Court has found projects to be in compliance with town plans that contain language far more prohibitory and less ambiguous than that in the Dover Town Plan. At issue in each of these cases was the use of the word "should," the question being whether the word is mandatory or provides only a guidance. Tsimortos never specifically argues, however, that the word "should" in the Dover Town Plan is "nonprohibitory."

c. Conformance with the Dover Town Plan

The Board concludes that the Project fails to conform to at least one critical section of the Town Plan.[8] The construction of the Project is in direct conflict with the *Land Use Recommendations* for the *Mountain Tops and Ridges Land Use Area* where it lies:

> Land Use Recommendations: Although much of these areas have been lumbered in the past, intensive cutting is no longer recognized as an appropriate use. Severe physical limitations to development prohibit extensive structural development of any kind. These areas should be maintained as natural areas and managed as open space for outdoor recreation where feasible. Utmost care should be taken to avoid unnecessary destruction of flora and fauna, including forest cover and wildlife habitat. Development and recreation activities should only be permitted when in direct support of skiing and when it can be shown that no adverse environmental impacts will result. Motorized vehicles should be limited to maintenance and rescue purposes only.

Town Plan, Page 36

The Project - the construction of a residence, garage, caretaker's quarters and barn, the clearing of land, roadway improvements, and the construction of infrastructure - is "extensive structural development."

The Project does not maintain the area as a "natural area," nor is the Project tract "managed as open space for outdoor recreation."

The clearing of approximately twelve acres of woods as a part of the Project did not avoid unnecessary destruction of the forest cover and wildlife habitat.

The development of the Project is not in direct support of skiing.

The use of motorized vehicles for the Project is not limited to maintenance and rescue purposes only.

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[8] Because the Board's May 29, 2003 Memorandum of Decision vacated its earlier decision as to Criterion 8 and further stated that the Board would not address Criterion 8 at this time, and because the Board has not taken evidence relative to Criterion 8 from all parties and has not conducted a site visit of the Project, references in the Town Plan to aesthetic concerns are not included in this decision. Should this matter be later considered under Criterion 8, such references may be important to such consideration and further analysis under Criterion 10.

i. Tsimortos' claim that the Dover Town Plan is ambiguous and that, if the local zoning regulations are referred to for interpretive guidance, the Project complies with Criterion 10

Tsimortos notes the holding in *Molgano* that, where a Town Plan is ambiguous, resort must be had to the local zoning regulations. *Molgano,* 163 Vt. at 30 – 31; *and* see 10 V.S.A. §6086(a)(10). He then contends that the Board has intentionally found the Dover Town Plan *not* to be ambiguous, because had the Board found it to be so, it would then have had to look to the Dover zoning regulations, which allow his Project. Tsimortos *Memorandum* at 20.

A. that the word "extensive" is ambiguous

Tsimortos first asserts that the word "extensive" (in the sentence "Severe physical limitations to development prohibit extensive structural development of any kind") is ambiguous and that the Board should therefore look to the Dover zoning regulations to understand how the Town has interpreted the word. The analysis takes the following path:

a. the sentence in the Town Plan, "Severe physical limitations to development prohibit extensive structural development of any kind," is read in isolation;

b. the Town Plan's use of the word "extensive" is assumed to be ambiguous;

c. an examination of §320 of the Dover zoning regulations reveals that residences are a permitted use in the *Mountain Tops & Ridges* zoning district; and

d. the conclusion is drawn that, since §320 includes "single dwelling units" and "accessory uses" as a permitted uses, if the Board look to the regulations to interpret the word "extensive" in the Town Plan, then Tsimortos' house will comply with at least the sentence, "Severe physical limitations to development prohibit extensive structural development of any kind."

There are several problems with this approach:

First, word, phrases, sentences and even sections of a Town Plan cannot be read in isolation. Rather, they must be read within the context of a town plan as a whole. *See, by analogy, In re Vermont Verde Antique International Inc.*, 13 Vt.L.W. 231, 232 (2002) (words of a statute are not to be read in isolation, but rather in the context and structure of the statute as a whole); and see *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 84 (1997). Indeed, one could just as easily isolate two other sentences in the *Land Use Recommendations* for the *Mountain Tops and Ridges Land Use Area:* "Development and recreation activities should only be permitted when in direct support

of skiing and when it can be shown that no adverse environmental impacts will result" and "Motorized vehicles should be limited to maintenance and rescue purposes only." If this is done, then there is no ambiguity in the Town Plan as to the existence of Tsimortos Project on Rice Hill - - its construction plainly fails those sentences.

Second, Tsimortos' approach assumes that the word "extensive" is ambiguous. But if the word "extensive" is ambiguous, then *every* adjective which is subject to interpretation is ambiguous; there are an infinite number of "shades of gray." But the ambiguity referenced in 10 V.S.A. §6086(a)(10) must be a true ambiguity, one which reasonable people would agree exists, not merely one which can be argued. *See, by analogy, In re Pyramid Co.*, 141 Vt. 293, 306-07 (1982) (analysis of the "substantial ground for a difference of opinion" element in interlocutory appeals). Otherwise, Criterion 10's "ambiguous" language is rendered meaningless; the exception swallows the rule, a result not in keeping with the Vermont Supreme Court's admonition that statutes must be construed to avoid absurd, irrational or unreasonable results. *In re McShinsky*, 153 Vt. 586, 591 (1990); *In re Southview Assocs.*, 153 Vt. 171, 175 (1989) (interpretation of a statute should not cause it to become meaningless); *In re Crushed Rock, Inc.*, 150 Vt. 613, 623 (1988).

Third, even assuming that the word "extensive" *is* ambiguous, Tsimortos fails to look first to the Town Plan itself for guidance; instead he jumps directly to the zoning regulations.

The *Kisiel* decision noted that "nothing in the plan … provides contextual guidance" on the meaning of "steep;" 172 Vt. at 130, it therefore looked to other sources to provide such guidance. The plain instruction from the *Kisiel* Court is that the Board may look to the Dover Town Plan itself to determine the meaning of words used by the Plan, because if reading the Plan itself resolves an ambiguity in one of its provisions, then the Plan is not ambiguous and interpretive guidance need not be sought from other sources.[9]

The question, then, is whether the Town Plan provides the "contextual guidance" to interpret its use of the word "extensive." The Board finds that it does.

Two provisions which appear within the *Land Use Recommendations* section of the *Mountain Tops and Ridges Land Use Area*, the Town Plan place specific restrictions on the kind of construction that may occur in the Area, restrictions which are wholly incompatible with even single family homes. The Plan states, "Development and recreation activities should *only be permitted when in direct support of skiing* and when it can be shown that no adverse environmental impacts will result." (Emphasis added).

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[9] As an example, if the word "extensive" were to be defined in a definitional section of the Dover Town Plan, it would be proper for the Board to look first to that section to resolve any ambiguity that might arise from the use of the word in a different section.

The Plan further states, "Motorized vehicles should be limited to *maintenance and rescue purposes only*." (Emphasis added) Thus, any development which is *not " in direct support of skiing"* is "extensive." And any development that is served by motorized vehicles other than "*maintenance and rescue"* vehicles is "extensive" development.

The Tsimortos Project is not "development … in direct support of skiing." And residential vehicles and vehicles that must support a residence, such as private cars and oil trucks and school buses, and, indeed, the very construction vehicles that were used to build Tsimortos' house, do not fit the language of the Plan.

Further, other than the *Airport Area*, (Land Use Area J) of the Dover Town Plan The *Mountain Tops and Ridges Land Use Area* (Area A) is the *only area* which does not specifically describe a maximum or average density of dwelling units. All other Land Use Areas (Areas B – I and K and L) contain references to maximum or average densities of dwelling units. Town Plan, Pages 37 – 42.

Ultimately, Tsimortos' argument has a single foundation - - that §302 of the Dover zoning regulation allow residences as permitted uses within the *Mountain Tops & Ridges* zoning district. The Board finds that the Town Plan does not allow residences in that district. Thus, §302 is inconsistent with the language of the Dover Town Plan. Thus, Tsimortos' reliance on the zoning regulations conflicts with Criterion 10, which requires that zoning regulations which are used to interpret applicable provisions of a town plan must be "*consistent with* those provisions." 10 V.S.A. §6086(a)(10) (emphasis added).[10]

B. that the Town Zoning Map - and therefore the Dover zoning regulations - are incorporated into the Town Plan

As noted in Finding of Fact 19, the first paragraph of the *Land Use* section of the Town Plan states, in pertinent part:

> In order to encourage a pattern of residential, commercial, and recreational development that conforms to the goals and policies outlined in the Town Plan, the following land use classification has been formulated. … For exact locations, see Land Use/Zoning Districts Map.

Tsimortos contends that this mention of the Town Zoning Map incorporates the Map - with its references to "residential dwelling units per acre" (one unit per 25 acres in the zoning district described as “A - Mountain Tops and Ridges") - into the Town Plan.

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[10] Tsimortos' Act 250 application was filed on July 2, 2001; it is therefore controlled by the 2001 amendments to Criterion 10.

If incorporation has occurred, the argument implicitly continues, then residential uses are allowed in the Town Plan's *Mountain Tops and Ridges Land Use Area*.

The Board finds that the Town Plan's reference to the Zoning District Map does not incorporate the density legends or the Dover zoning regulations into the Plan. It is clear from the context of the Town Plan language which mentions the Zoning Map that the Map is referenced *only to show the locations of the Land Use Areas* which are discussed at length in the Town Plan. This conclusion is buttressed by the language in the *Town Plan Maps* section of the Town Plan which states, "3. Land Use/Zoning Districts: Maps *showing* zoning district boundaries." (Emphasis added)

Further, as noted above, unlike the other Land Use Areas (except for the *Airport Area*), the *Land Use Recommendation* portion of the *Mountain Tops and Ridges Land Use Area* in the Town Plan includes no recommended density for residential development.

Lastly, again as noted above, the language *Land Use Recommendations* for the *Mountain Tops and Ridges Land Use Area* which restricts development in that Area to that in support of skiing and the use of motorized vehicles to maintenance and rescue purposes only further supports the Board's commonsense reading of the Town Plan's reference to the Zoning Districts Map. To incorporate the Map (and its density legends) into the Town Plan would allow residential uses in the *Mountain Tops and Ridges Land Use Area.* This would render the Plan internally inconsistent, a result which finds no approval in Supreme Court statutory construction precedent. *See, Hardingham v. United Counseling Service of Bennington*, 164 Vt. 158, 163 (1995); *In re Lowe*, 164 Vt. 166, 172 (1995).

C. that vehicles in support of residential uses are allowed by the Dover zoning regulations

Concerning the "maintenance and rescue" vehicles language within the Town Plan's *Mountain Tops and Ridges Land Use Area*, Tsimortos argues that, since residential uses are allowed in the *Mountain Tops & Ridges* zoning district, vehicles in support of such uses must also be permitted. But this approach puts the cart before the horse; one can only arrive at this position if one jumps immediately (and only) to the Dover zoning regulations to interpret the Town Plan.[11]

[11] Tsimortos raises one final argument as regards the Town Plan's restrictions on motorized vehicles in the *Mountain Tops and Ridges Land Use Area*; he contends that this provision, "if strictly construed, would prohibit the Town citizens from driving up Rice Hill Road to use the Town forest lands which are located at a higher elevation than Mr. Tsimortos' development." This argument is without merit. The Dover Town Plan, for most Dover citizens, is not a law or a regulation that governs their lives; it only has teeth within the Act 250 context - - it only applies to those who engage in activities that trigger Act 250 jurisdiction. Thus, the Plan does not prohibit people from driving up Rice Hill

Based on his initial assumption that the Town Plan is ambiguous, Tsimortos contends that one must refer to the zoning regulations to resolve that ambiguity. But if that assumption is false, and if one should first look to the Town Plan itself for guidance before resort is had to the zoning regulations, then it follows that his entire analysis fails.

d. Taking evidence as to Criterion 10

While the Board may consider arguments from parties concerning whether a particular project conforms with a town plan, the document – the town plan – speaks for itself (the town plan *itself is the evidence*) and Board must make its own independent judgment about whether a project conforms to a plan. *J. Philip Gerbode*, #6F0396R-EB-1, Findings of Fact, Conclusions of Law, and Order (Jan. 19, 1992).

The statute was recently amended in 2001 to reflect the *Molgano* decision, but to also make it clear that the Board *need not consider or be bound by interpretations of the Town Plan, even those of members of the Town Selectboard or Planning Commission*. 10 V.S.A. §6086(a)(10) (Board should consider zoning regulations to interpret an ambiguous town plan "and need not consider any other evidence.")

The Board concludes that the language of the Dover Town Plan is clear and provides sufficient information as to its meaning, and the Board therefore does not need the assistance of the Town's interpretations.

e. Conclusion as to the Project's conformance with the Dover Town Plan

The Project does not comply with Criterion 10 (Town Plan).

2. The Windham Regional Plan[12]

Criterion 10 requires that a project must be "in conformance with any duly adopted … Regional Plan…." 10 V.S.A. §6086(a)(10). The burden of proof under Criterion 10 is on the Applicant. 10 V.S.A. § 6088(a).

The Board performs its analysis regarding regional plans consistent with *Re: Nile and Julie Duppstadt and John and Debra Alden*, Land Use Permit #4C1013

Road to the Town Forest. It merely prohibits Act 250-covered construction that implicates the prohibited vehicles.

[12] As discussed above with respect to the Town Plan, aesthetic references in the Regional Plan which appeared in the Board's April 7, 2003 decision are not repeated here but may be relevant should later proceedings be necessary.

(Corrected)-EB, Findings of Fact, Conclusions of Law and Order at 44 (April 30, 1999*). See In re Green Peak Estates,* 154 Vt. 363, 369-70 (1990)(Project was not in compliance with regional plan that contained a specific policy against the type of development at issue); *In re Molgano*, 163 Vt. at 31 (Project was in compliance with broad and vague regional plan that had no specific prohibitions against type of development at issue). These cases indicate that the Board is to apply specific policies contained in a regional plan and that an ambiguous provision is not such a policy. *Duppstadt, supra*.

For a regional plan's provisions to be deemed a specific policy, the applicable provisions must (a) pertain to the area or district in which the project is located; (b) intend to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) be sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Id.* at 45; *Re: Herbert and Patricia Clark*, #1R0785-EB, Findings of Fact, Conclusions of Law and Order at 40 (April 3, 1997); *Mirkwood*, *supra* at 29.

The applicable Windham Regional Plan is the one in effect at the time of the Tsimortos' application: the Plan adopted November 26, 1996 and ratified on December 10, 1996.

The Project, as it includes lands above 2500 feet in elevation, is located in the lands described in the *Resource Land* subsection of the Regional Plan's *Land Use* section, lands which the Regional Plan finds worthy of "special protection." Appropriate uses for these lands include "conservation, forestry, recreation, and low impact, very low density rural uses." Regional Plan, Page 30. The Plan's *Resource Lands Policies* seek to "Ensure that new development reflects existing settlement patterns, is low impact and intensity, and does not conflict with the resources, but rather sustains these natural resources" and to "Ensure protection of … lands over 2,500-foot elevation…." *Id.* at 31. In *Re: Mill Lane Development Companies,* #2W0942-2-EB, Findings of Fact, Conclusions of Law, and Order at 40 (Dec. 17, 1999), the Board found these *Policies* to be specific.

The Project is not a conservation, forestry, recreation, or other low impact use. While it certainly is a very low density *residential* use, the Board questions whether it is a "very low density rural use." But the Board's decision does not hinge alone on the Project's impacts on the lands designated by the Regional Plan as *Resource Lands.*

More significant than the Project's location in *Resource Lands* is its location in a "fragile area," as defined by the Regional Plan: "areas above 2,500 feet in elevation constitute fragile areas in Vermont." *Id.* at 56. The Regional Plan's *Policies* for "fragile areas" state: "Protect natural and fragile areas from development. When development is proposed near a natural or fragile area, a buffer strip designed in consultation with the appropriate state agency, must be designated and maintained between the development and natural or fragile area." *Id.* at 57.

The Project is contrary to the Plan's mandates as to fragile areas. The Regional Plan requires that, when development is proposed *near* a fragile area, a buffer strip between the development and the area "*must* be designated and maintained." (Emphasis added) Here, the development occurred *within* the fragile area itself, a *per se* violation of the buffer requirement.[13]

a. Whether the Windham Regional Plan conflicts with the Dover Town Plan

Vermont statutes and Board precedent state that when both a local and a regional plan are relevant to issues raised by a particular project and they are not in conflict, a project will be reviewed for its conformance with *both* plans. 24 V.S.A. § 4348(h)(1); *Re: Green Peak Estates*, #8B0314-2-EB (July 22, 1986), *aff'd*, *In re Green Peak Estates*, 154 Vt. 363, 367-68 (1990); *Re: Heritage Group, Inc.,* #4C0730-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 27, 1989); *Re: George & Barbara Musbek*, #2W0600-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 13, 1986). When local and regional plans *are* in conflict, the regional plan controls only if it is demonstrated that the project under consideration would have a substantial regional impact. 24 V.S.A. §4348(h)(2); *In re Green Peak Estates*, 154 Vt. at 368. If project does not have substantial regional impacts, then the town plan, not the regional plan, applies. *Re: Richard Provencher*, #8B0389-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 19, 1988). [14]

Tsimortos contends that, to the extent that the Windham Regional Plan is interpreted to preclude *any* construction on lands over 2500 feet, it is in conflict with the Dover Town Plan and should not be given effect.

The first question is whether the Regional Plan precludes such construction. The Windham Regional Plan does not state that construction on lands over 2500 feet is precluded. The Regional Plan requires, in several places, that such lands be given special *protection*; but it does not specifically prohibit all development in those areas that it describes as "fragile," those lands above 2500 feet.

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[13] WRC's most recent filing states that the Project is not of regional significance and that, with some suggested changes to Tsimortos' Proposed Findings of Fact, the Project complies with the Regional Plan. The Board believes that the plain language of the Regional Plan is clear on its face and does not require outside information to aid in its interpretation. 10 V.S.A. §6086(a)(10).

[14] Although not the case here, a regional plan will also apply where the town has not adopted a local plan. *Re: Robert B. & Deborah J. McShinsky*, #3W0530-EB, Findings of Fact, Conclusions of Law, and Order (Apr. 21, 1988), *aff'd*, *In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990).

Even if the Regional Plan did forbid any construction on lands over 2500 feet, the second question is whether this constitutes a conflict, such that the Regional Plan should not be given any effect.

The Board reads both the Town Plan and the Regional Plan to prohibit the Tsimortos Project. Both plans give special protection to the area where the Project was constructed; both plans limit development. In these important factors, there is no conflict between the two plans. Even assuming that the Regional Plan goes further than the Town Plan in prohibiting the Tsimortos Project, is this the type of conflict that leads to the disqualification of the Regional Plan in this case? Certainly, if the Town Plan were to allow the Tsimortos Project and the Regional Plan were to prohibit it, this sort of conflict would have some meaning, such that the Regional Plan would not control unless the Project were to be of regional significance. But where, under both plans, a project is not permitted (even if the grounds for the prohibition differ), they cannot be said to be in conflict.

The relevant provisions of the Regional Plan are not in conflict with the Dover Town Plan and therefore the provisions of the Regional Plan are given effect, without regard to whether the Project has a regional impact.

The Project does not comply with Criterion 10 (Regional Plan).

C. Tsimortos' right to a hearing

In his Motion to Alter, Tsimortos objected to the fact that the Board had not held a formal hearing in this matter, and he argues that this violates 10 V.S.A. §6089(a)(3), 3 V.S.A. §809, and precedent in several Vermont Supreme Court and Board cases.

Section §6089(a)(3) of title 10 requires the Board to hold a *de novo* hearing on "all findings requested by any party;" section 809 of title 3 states what that hearing must encompass: "Opportunity shall be given all parties to respond and present evidence and argument on all issues involved." Further, 3 V.S.A. §809(g) states that "Findings of fact shall be based exclusively on the evidence and on matters officially noticed."

The Board did not hold a hearing in this case at which witnesses appeared in person and were subject to cross-examination and Board questions. This decision, however, is limited to the sole question of whether the Project complies with Criterion 10.[15] The factual findings which are relevant and necessary to a decision under

[15] The Board has already found, based upon the evidence submitted by Tsimortos, that the Project complies with Criteria 1(B) and (4); Tsimortos does not take issue with the Board's findings in this regard. The Board has also determined that, pursuant to the authority granted by 10 V.S.A. §6086(b), it will not address Criteria 8 (aesthetics) or 9(K) at this time.

Criterion 10 are, unlike other criteria, similarly limited in scope; for the Board to decide Criterion 10 in the instant case, the Board need only have before it the applicable Dover Town Plan and the Windham Regional Plan and have sufficient information as to the nature and location of the Project. Information relating to the Project, the Project tract, the lands in the vicinity of the Project, and portions of the 1998 Dover Town Plan and the Windham Regional Plan, appears in the application[16] and the prefiled testimony and exhibits submitted by Tsimortos. The factual findings in this decision are based solely on such filings by Tsimortos, which the Board will admit into the record for the limited purpose of this decision. Further, the Conclusions as to Criterion 10 have been drawn after considering the complete legal arguments presented by Tsimortos and other parties.

The question, then, is whether the Board's acceptance and use of this evidence and the Board's consideration of Tsimortos' legal arguments, without affording Tsimortos the right to present his witnesses within the context of a live hearing, violates Tsimortos' statutory or due process rights or relevant Vermont case precedent.

In *In re Crushed Rock, Inc.*, 150 Vt. 613, 625 (1988), the Vermont Supreme Court held that the Board erred when it restricted parties to presenting their case solely through a five-minute offer of proof by their attorneys. The Court wrote:

> The Administrative Procedure Act, 3 V.S.A. § 809(c), provides that: "[o]pportunity shall be given all parties to respond and present evidence and argument on all issues involved." We have emphasized in the past the right of the parties to offer evidence. See *Fairchild v. Vermont State Colleges,* 141 Vt. 362, 366, 449 A.2d 932, 934 (1982) (Vermont Labor Relations Board must "recognize the right of parties to present witnesses, give evidence, and examine witnesses."); *In re Vermont Public Power Supply Authority,* 140 Vt. 424, 429, 440 A.2d 140, 141 (1981) (opportunity provided by § 809(c) is "important because the Board's decisions must be based on the evidence"). An instructive case on this point is *In re Central Vermont Public Service Corp.,* 141 Vt. 284, 449 A.2d 904 (1982), where the Public Service Board excluded evidence offered by the utility in support of a particular method of valuing purchased power costs. The Board excluded the evidence because it concluded as a matter of law that it would not accept the alternative valuation method. This Court reversed holding that it was the duty of the Board to take the evidence and to determine the proper valuation method based on the entire record. *Id.* at

[16] The application submitted by Tsimortos to the Commission, of which the Board has taken official notice and on which the Board may rely, *In re Stowe Club Highlands*. 166 Vt. 33, 40 (1996) (Board may rely on applicant's representations in permit application), includes a sales brochure, which describes the Project in detail and includes several photographs of the Project. Since this is an "as built" application, these details will not change as a result of evidence provided to the Board at any hearing.

> 291, 449 A.2d at 908-09. The Court noted that "the essence of the Board's inquiry should have been a careful sifting of the evidence offered by both sides...." *Id.* at 291, 449 A.2d at 909.
>
> We cannot accept in this case that the offer of proof gave to appellants the opportunity to "present evidence and argument" required by 3 V.S.A. § 809(c). They insisted on their right to present evidence and were told repeatedly that they would have that right. Both the prehearing order and the recess order specified their right to offer evidence, and these orders controlled the subsequent course of the proceedings. Cf. V.R.C.P. 16 (pretrial order "controls the subsequent course of the action"). The Board did not rescind these orders or disclose that it would make its remedy decision solely on the offers. The offers were relatively brief because of the Board-imposed time limit. The Board's decision was in an area of substantial discretion. The procedure was inconsistent with "a careful sifting of the evidence offered by both sides" as required by *In re Central Vermont Public Service.*

In re Crushed Rock, Inc., 150 Vt. at 625. The Board precedent cited by Tsimortos is consistent with this language.

Here, the Board has followed the requirements of both statutes and case precedent. Tsimortos has been afforded the right to offer evidence; Tsimortos has presented his evidence through his application and prefiled testimony and exhibits. Tsimortos has not been given the right to rebut or cross-examine the witnesses of other parties, but no other such witnesses have thus far appeared or presented evidence.[17] Further, Tsimortos has presented his legal argument as to Criterion 10 through his Motion to Alter.[18] Thus, the requirements under the statutes and caselaw have been met.

If , however, Tsimortos believes that the process afforded by the Board thus far as to Criterion 10 continues to deny him hearing rights under the statutes or case precedent, Tsimortos may request, in a Motion to Alter this decision, that the Board hold

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[17] Tsimortos notes that other parties have not been afforded the right to present their own witnesses or to cross-examine his witnesses. *Memorandum in Support of Motion to Alter* at 4. The Board, however, fails to see how this has prejudiced Tsimortos or otherwise denied Tsimortos any rights guaranteed by statute or case precedent. Nor have other parties raised this as a concern.

[18] The Board's May 29, 2003 Memorandum of Decision offered Tsimortos and other parties the opportunity to file additional legal argument, to respond to such argument filed by other parties, and to request oral argument before the Board. Tsimortos declined these opportunities.

a hearing on Criterion 10 (or on Criteria 8, 9(K) and 10), and the Board will grant this request.

V. Order

1. The Project does not comply with the Dover Town Plan or the Windham Regional Plan and therefore does not satisfy 10 V.S.A. §6086(a)(10).

2. Land Use Permit Application #2W1127-EB is denied.

Dated at Montpelier, Vermont this 29th day of August 2003.

ENVIRONMENTAL BOARD

***/s/Patricia Moulton Powden*_____**
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Donald Marsh
*Patricia A. Nowak
Alice Olenick
Richard C. Pembroke, Sr.
Jean Richardson

* Board Member Nowak dissenting: I participated in all deliberations prior to those held on August 27, and I must dissent from the decision which the Board has ultimately reached in this matter. I believe that the Project should be judged with reference to the regulations in effect at the time that its construction occurred. I also believe that our review of this Project is barred by concepts embodied in the statute of limitations.