

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).

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, construction of a new wastewater disposal system and installation of underground electrical utility line 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).

On November 7, 2002, former 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.

Chair Harding issued a Prehearing Conference Report and Order on November 8, 2002. 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.

¹ While such construction would not ordinarily trigger the jurisdiction of 10 V.S.A. Ch. 151 (Act 250), the fact that some of 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).

Following an extension of time requested by the parties, Tsimortos filed prefiled testimony and exhibits as to all the criteria on appeal on January 8, 2002. No other party filed any testimony or exhibits.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 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.

The Board deliberated on February 19 and March 19, 2003.

On April 7, 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 August 29, 2003, the Board issued a second Findings of Fact, Conclusions of Law, and Order, in which it again found that the Project did not comply with Criterion 10. In a timely Motion to Alter the August 29, 2003 decision, Tsimortos requested a hearing on Criteria 8, 9(K) and 10. Tsimortos later filed supplemental testimony and exhibits; no other party filed any other testimony or exhibits, although the WRC did file a letter concerning the Project's compliance with the Windham Regional Plan.

On March 23, 2004, the Board held a site visit, hearing and deliberations in this matter. This case is now ready for a final decision.

² The Town of Dover filed testimony through Tsimortos in support of the Project.

II. Issues

The Issues in this matter are:

1. Does the Project comply with 10 V.S.A. §6086(a)(1)(B)?
2. Does the Project comply with 10 V.S.A. §6086(a)(4)?
3. Does the Project comply with 10 V.S.A. §6086(a)(8) (aesthetics and scenic or natural beauty)?
4. Does the Project comply with 10 V.S.A. §6086(a)(9)(K) (Green Mountain National Forest and Dover Town Forest)?
5. Does the Project comply with 10 V.S.A. §6086(a)(10) (Dover Town Plan and Windham Regional Plan)?

III. Findings of Fact

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

A. *The Project and its immediate environs*

1. The Project's tract of land consists of 60 +/- acres, located near the top of Rice Hill Road on Rice Hill in Dover, Vermont.
2. Construction of the Project, some of which is above 2,500 feet in elevation, commenced in 1987 and concluded in 1988.
3. The Project consists of a two-story, New England colonial-style clapboard residence, attached stables and garage, and a separate barn, and 1800' of road improvements. The Project buildings have white and gray clapboard siding, with black trim and shutters, and steep pitched roofs. There are some plantings near to the house. There are no visible utility lines leading up Rice Hill Road or on to the Project tract; and no visible antennas or satellite dishes.
4. The slopes on the Project tract range from 2% to over 25%. Most of the slopes on the tract are in the 2% to 8% range, and all of the construction occurred on the flatter portion of the property. No construction occurred on slopes greater than 15%.
5. The Project is built on a forested hillside, near, but not on the top of a hill or ridgeline; as viewed from off-site, the ridgelines of the Project's buildings do not

extend above the tops of the trees that form their background.

6. Surrounding the Project tract is a forested area; only the Project tract in this area is cleared.

7. To the north and east of the Project house lies a medium growth, thickly-wooded forest with red maple, birch and evergreen trees and some understory. To the south and west of the house and barn, the land has been cleared.

8. Approximately 12-15 acres of woods were cleared for the Project's construction in 1986 – 1987. Approximately 6.5 acres of land were cleared of trees above 2,500 feet in elevation with about 1.25 acres cleared around the main house.

9. About an acre around the house and barn are in lawn and typical landscaping. 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.

10. 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 forest cover.

11. The Project area has been logged off and on, for many years.

12. The Project, which appears as a cleared field on the side of a hill, is visible in the distance from some residential areas and housing developments on Cooper Road, at Sawmill Farms, and along Heritage Drive. The site can also be seen in the far distance from the Mount Snow and Haystack ski areas.

13. From Sawmill Farms (which is at a distance from the Project of about three miles as the crow flies), many other single-family residences and condominiums of various colors are visible, including other homes in cleared areas on ridgelines.

14. In 1986 or 1987, Tsimortos, so that he could gain year-round access to his property, upgraded at his own expense an 1800' portion of Rice Hill Road to full town specifications.

B. Criteria 1(B) and 4

15. Tsimortos' construction of the improvements to Rice Hill Road caused stormwater and erosion problems.

16. The stormwater and erosion problems have since been resolved to the satisfaction of the Town of Dover.

17. There have been no recent complaints to the Town of Dover concerning stormwater or erosion problems caused by the road constructed by Tsimortos.

C. Criterion 8

18. The Project is in an area characterized by residences in a rural setting. There are other single-family homes in open meadows or on the edges of meadows on the lower part of Rice Hill Road and Cooper Hill Road.

19. From the Project and from other areas of Dover from which the Project is visible, one can observe a number of open meadows on forested hillsides, some with residences.

20. Several other cleared meadows are visible from the Project site. When one views the Project site from other parts of the Town, other meadows and other houses on or near ridgelines are also visible.

D. Criterion 9(K)

21. The Project lies adjacent to the Dover Town Forest and near portions of the Green Mountain National Forest.

22. In December 1988, the Town of Dover purchased the land from International Paper on which the Dover Town Forest is located; the U.S. Forest Service purchased the Green Mountain National Forest land in 1999.

23. The Project's house and barn are located more than 500 feet from the boundary with the Dover Town Forest; because of the thick forest, the Project house and barn cannot be seen from the Town Forest or National Forest.

24. One vehicle access to the Dover Town Forest is via Rice Hill Road.

25. In 1991 the Dover Board of Selectmen reclassified the portion of Rice Hill Road between Cooper Hill Road and the Dover Town Forest from Class 4 to Class 3. A part of the reason for this reclassification was to allow better access to the Dover Town Forest via Rice Hill Road.

26. Prior to the upgrade and reclassification of Rice Hill Road access to the Dover Town Forest lands was limited.

27. With the improvements to Rice Hill Road, people can more easily access the Town Forest using standard two-wheel drive vehicles, although this improved access ends at the driveway to the house. Beyond the Project driveway, for several hundred feet before the boundary to the Dover Town Forest, Rice Hill Road remains a Class 4, unimproved road, in the same condition as much of it was before Tsimortos

improved a portion of it.

E. Criterion 10

28. The Dover Town Plan in effect at the time of the filing of the Project application was adopted in March 1998.

29. The Town of Dover amended its Town Plan in December 2001.

30. Some of the language in the 1998 Town Plan continues into the 2001 Town Plan. The following sections appear in both Plans:

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.

1998 Dover Town Plan at 1; 2001 Dover Town Plan at 01.

It is a GOAL of the Town of Dover....

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

1998 Dover Town Plan at 2; 2001 Dover Town Plan at 02.

Erosion Control: "Areas above 2,500 feet mean sea level (MSL) with slopes in excess of 25% may have severe environmental constraints and should be considered fragile."

1998 Dover Town Plan at 13; 2001 Dover Town Plan at 12.

Natural and Fragile Areas

Important natural areas of aesthetic and ecological value, such as the Beaver Pond on Handle Road noted in the North Branch of the Deerfield River Basin Plan, are important wildlife areas with recreational value. Other similar natural areas exist in Dover, that are fragile and unsuitable for land development. One such area is the recently purchased Dover Town Forest on the Town's north boundary with Wardsboro. The resources of this area are identified in the Dover Town Forest Management Plan, 1991, available at the Dover Town Offices.

1998 Dover Town Plan at 15; 2001 Dover Town Plan at 14.

Policies:

1. The Town of Dover should strive to protect all fragile areas and guide the appropriate use of natural areas. Acquisition of natural and fragile areas by the Town of Dover by gift or purchase should be encouraged.
3. All natural and fragile areas shall be adequately protected, be accessible to, and should provide for public use, where appropriate.
4. When development is proposed to occur near an identified natural or fragile area, a buffer strip should be designated and maintained between the development and fragile and natural area.

1998 Dover Town Plan at 15; 2001 Dover Town Plan at 14.

Forest Resources:

2. Timber harvesting practices should protect surface waters, shorelines, and streambanks, and should minimize all adverse environmental impacts. Landowners anticipating extensive harvesting are encouraged to follow a professionally prepared management plan.
3. No activity should have the effect of degrading any other Town's prominent mountain views.

1998 Dover Town Plan at 17; 2001 Dover Town Plan at 16

The Dover Town Forest is an important recreational and natural resource consisting of 1,392 acres located in the northern portion of Dover. The site offers numerous outdoor activities including walking, hiking, horseback riding, snowmobiling, and other winter activities. This area is valuable as both a recreational and natural resource.

1998 Dover Town Plan at 19; 2001 Dover Town Plan at 17

Scenic Resources:

Dover's hilly country provides abundant vistas of high scenic quality. Views from the Mount Snow golf course and from the summits of the ski lifts and mountain ridges are especially noteworthy. Many homes exist or are being built that enjoy beautiful vistas of the surrounding country. Route 100 provides an important scenic corridor through Dover as it winds through the Deerfield Valley. The Dover Hill Road and Cooper Hill Road, as well as many other roads also offer spectacular views.

The maintenance of an attractive rural environment is of paramount importance to the people of Dover. In addition, Dover's economy is heavily dependent on the recreation industry which, in turn, depends on the rural character and scenic beauty of the Town.

Policies:

1. Natural and man-made features which contribute to the scenic beauty of Dover including historic sites, open land, stonewalls, and views and panoramas should be protected, particularly along the Route 100 corridor. Landscapes and scenic corridors should be given special consideration.

2. Town appearance should be protected through careful siting of all development, so that the sense of a Vermont rural community is maintained.

3. The visual impact of development should be considered in relation to the exterior design of buildings, signage, landscaping, and parking.

1998 Dover Town Plan at 20 – 21; 2001 Dover Town Plan at 19

C. Implementing the Town Plan

Effective implementation of the Plan requires careful consideration and action by the townspeople, Board of Selectmen, Planning Commission, and other organizations. Managing growth is a conscious process of directing development to appropriate locations and in appropriate ways. The process requires a commitment on the part of the community to set a course for its future and to employ all of the tools available to stay on that course. This Town Plan shall provide the framework for managing Dover's future growth. Tools and techniques for implementing the Town Plan follow.

Land Use Regulation:

Land Use regulation at the local level is most effective when it is specifically directed to public health and safety, the prohibition of unsuitable uses, the protection of water quality and highly valuable natural resources, and the provision of land use incentives for affordable housing. Dover adopted a zoning bylaw in 1988 after an extensive period without zoning. Revisions to the zoning are currently in process. The subdivision of land is enforced through zoning.

1998 Dover Town Plan at 44; 2001 Dover Town Plan at 39

D. Town Plan Maps

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.

1. Facilities
Locations of community facilities (sewer facility and liens, town lands, school, buildings...)
2. Transportation
Network of roads and trails, classification (1-4), functional categories, paved vs. gravel.
3. Land Use Plan/Zoning Districts
Maps showing zoning district boundaries.

1998 Dover Town Plan at 46; 2001 Dover Town Plan at 40

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.”

1998 Dover Town Plan at 2; 2001 Dover Town Plan at 02

31. The 2001 Town Plan differs from the 1998 Town Plan in several important sections.

32. The introduction to the *Land Use* section of the 1998 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. (Emphasis added)

1998 Dover Town Plan at 36.

33. By contrast, Section 7, *Land Use* of the 2001 Town Plan now reads:

The land use descriptions and densities contained in this Plan are intended as a guide for future land use, and are not intended to either allow or restrict development based on the recommended densities and types of uses contained in this section. The Dover Zoning bylaw shall be considered the document which controls land use in Dover with respect to density and types of use.

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 *should* follow the guidelines of the designated geographic land use areas outlined below.

2001 Dover Town Plan at 32 (emphasis added).

34. The *Land Use* Section of the 1998 Town Plan identified 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

1998 Dover Town Plan at 36.

35. Under the 1998 Town Plan, the Project was located in the *Mountain Tops and Ridges* Land Use Area: "A(4) the mountain tops & ridges of Rice Hill." *1998 Dover Town Plan at 36.*

36. The description of the *Mountain Tops and Ridges* Land Use Area in the 1998 Town Plan stated:

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).

1998 Dover Town Plan at 36

37. The 1998 Town Plan contained 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.

1998 Dover Town Plan at 36

38. The *Mountain Tops and Ridges* Land Use Area in the 1998 Town Plan did not specifically describe a maximum density of dwelling units.

39. Land Use Areas B – I and K and L the 1998 Town Plan all contain references to maximum or average densities of dwelling units. *1998 Dover Town Plan at 37 – 42.*

40. The only other Land Use Area in the 1998 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." *1998 Dover Town Plan at 41.*

41. The Dover Zoning Map (attached as an appendix to the 1998 Town Plan) identifies the Project area as "Mountain Tops and Ridges (1/25)." The Maps' legend explains that "(1/25)" refers to "Dwelling Units/Acre for residential purposes."

42. The *Land Use Areas and Descriptions* section of the 2001 Town Plan is entirely changed from the *Land Use Areas and Descriptions* section of the 1998 Town Plan.

43. The 2001 Town Plan's places the Project's location within its new *Resource Reserve and Conservation* Land Use Area. None of the restrictive language that appeared in the former *Mountain Tops and Ridges* Land Use Area appears in the 2001 Town Plan's *Resource Reserve and Conservation* Land Use Area.

44. The density requirements for the *Resource Reserve and Conservation* Land Use Area in the 2001 Town Plan allow "very low" density. *2001 Dover Town Plan at 34.*

45. The 2001 Town Plan notes that "very low" density is one house/25+ acres; a footnote to this definition states that this definition "reflects future densities" and refers the reader to the Zoning Bylaws. *2001 Dover Town Plan at 37.*

46. The only Dover Zoning Bylaws in the Record are those adopted in 1998.

Windham Regional Plan

47. The Regional Plan in effect at the time the application was filed is the Windham Regional Plan which was adopted November 26, 1996, and ratified on December 10, 1996 (Regional Plan).

48. The Project does not have regional impacts.

IV. Conclusions of Law

A. Burden of Proof

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

The burden of proof as to particular criteria is established by 10 V.S.A. §6088. However, regardless of who has the burden of proof 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. *Herndon and Deborah Foster, #5R0891-8B-EB, Findings of Fact, Conclusions of Law, and Order at 11 (June 2, 1997).*

B Discussion of the criteria

1. Criterion 1(B) and Criterion 4

Criterion 1(B) requires the Board to conclude, before issuing an Act 250 permit, that, among other things, the disposal of wastes will not involve the injection of waste materials into groundwater or wells. 10 V.S.A. §6086(a)(1)(B).

Criterion 4 requires the Board to conclude, before issuing an Act 250 permit, that the project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result. 10 V.S.A. §6086(a)(4).³

While Tsimortos' construction of the improvements to Rice Hill Road initially caused stormwater and erosion problems, these have since been resolved to the satisfaction of the Town of Dover. There is no evidence of any violation of water quality standards, the injection of waste materials into groundwater or wells, or recent incidents of stormwater or erosion problems caused by the road constructed by Tsimortos.

The Board concludes that Criteria 1(B) and (4) have been satisfied.

³ The Commission found that the Project would not comply with Criterion 1(B) because the construction of the road to the Project, which raised and altered the level of a portion of Rice Hill Road, created concerns over stormwater being transported and injected into a neighboring well and further leading to the flooding of the Snow property, leading to water collecting around a utility pole and the entry point for underground power and the deposition of sand and gravel on to the Anstatt property. *Commission Decision at 6.*

2. Criterion 8 (aesthetics)

Under Criterion 8, before issuing a permit, the Board must find the proposed Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare or irreplaceable natural areas. 10 V.S.A. §6086(a)(8).

The burden of proof under Criterion 8 is on those who oppose the Project, 10 V.S.A. §6088(b), but the applicant for the permit must provide sufficient information for the Board to make affirmative findings. See, e.g., *Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997) and cases cited therein. Thus, even when there is no opposing party or evidence in opposition with respect to Criterion 8, an applicant will not automatically prevail in the aesthetics issue. See, e.g., *Re: Herndon and Deborah Foster*, #5R0891-8B-EB, Findings of Fact, Conclusions of Law, and Order at 12 (June 2, 1997).

The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. This is known as the “Quechee Test,” as it resulted from an in-depth analysis of a method for evaluating aesthetics in the case of *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17-19 (Nov. 4, 1985).

First, the Board determines whether the proposed project will have an adverse effect under Criterion 8. *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996), citing, *Re: Quechee Lakes Corp.*, *supra*.

[T]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will “fit” the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

Hand, supra, at 25, citing, *Quechee, supra*, at 18.

Board precedent notes that application of Criterion 8 does not guarantee that views of the landscape will not change:

Criterion #8 was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from his or her

property will remain the same forever. Change must and will come, and criterion #8 will not be an impediment. Criterion #8 was intended to ensure that as development does occur, reasonable consideration will be given to the visual impacts on neighboring landowners, the local community, and on the specific scenic resources of Vermont.

Re: Okemo Mountain Inc., #2S0351-8-EB, Findings of Fact, Conclusions of Law and Order at 9 (Dec. 18, 1986).

While a built environment is not always adverse, projects that result in the loss of open space and the alteration of vistas can have an adverse effect on aesthetics and scenic beauty. *E.g., Re: Thomas W. Bryant and John P. Skinner, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 21 (June 26, 1991). See also Re: Maple Tree Place Associates, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 48-49 (June 25, 1998); Re: George, Mary, and Rene Boissoneault, #6F0499-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Jan. 29, 1998).*

i. The context of the Project

To determine whether this Project would “fit” the context of the area, the Board first has to determine what that context is.

The Project’s context is one of forests and undeveloped hills; there are some residential developments some miles away. In all directions, in the immediate vicinity of the Project, the land is generally undeveloped. However, the Project is in a low-density rural residential area characterized by other single-family homes in or near open meadows along Rice Hill Road and Cooper Hill Road.

Several other cleared meadows are visible from the Project site. When one views the Project site from other parts of the Town, other meadows and other houses on or near ridgelines are also visible.

ii. The impact of the Project on the area

Once the Board determines the context of the Project site, the Board then must consider the scope and extent of the Project's impacts on that context in order to determine whether the Project fits within its surrounding context. If it does fit its context, then the Board's inquiry under criterion 8 ends.

The Project is a main house with a garage and stable attached. The buildings have white clapboard siding, shutters, and steep pitched roofs, similar to other residences in its vicinity. Seen from other parts of the Town of Dover, the Project appears as a cleared meadow, with a white house and gray barn. The Project can be seen in the far background from housing developments on Cooper Road, at Sawmill

Farms, and along Heritage Drive. The site can also be seen in the far distance from the Mount Snow and Haystack ski areas.

The Project is near, but not on the top of a hill or ridgeline; as viewed from off-site, the ridgelines of the Project's buildings do not extend above the tops of the trees that form their background.

Conclusion as to Criterion 8 (aesthetics)

The Board concludes that the Project fits and does therefore not have an adverse effect on its context. The Project complies with Criterion 8 (aesthetics).

3. *Criterion 9(K)*

Criterion 9(K) requires the Board to conclude that a development will not unnecessarily or unreasonably endanger the public or quasi-public investment in public lands or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to these lands. 10 V.S.A. §6086(a)(9)(K).

The Project tract abuts the Dover Town Forest and is near to the Green Mountain National Forest, both of which are public investments. Although the construction of the Project occurred prior to acquisition of those public lands,⁴ because the application for the project was not filed until July 2, 2001, the Board must consider the Project's effect on these public investments.

The Project lands border the Town Forest, but the house and barn are separated from the Forest by a substantial treed buffer, several hundred feet thick. The Board cannot conclude that the construction that occurred on the Project tract has any negative aesthetic impacts on the Forests.

It can be argued that Tsimortos' improvements to Rice Hill Road have impacts on the Town Forest. Prior to Tsimortos' improvements, the portion of Rice Hill Road which was passable by two-wheel drive vehicles ended several hundred feet below Tsimortos' property. Beyond that point, the road functioned as an old logging trail. Now that Rice Hill Road has been upgraded, there is greater access to the Town Forest by vehicles which heretofore were unable to drive the road. These improvements can have both positive and negative impacts to the Town Forest. On the one hand, the upgraded road allows improved access to the Forest for some uses and users; on the other hand, these uses include some, such as by four-wheel drive vehicles and ATVs, that many may consider to be destructive to the forest.

Nonetheless, the Board concludes that the Project's impacts under Criterion 9(K)

⁴ The Dover Town Forest was acquired by the Town of Dover in 1988; the U.S. Forest Service purchased the Green Mountain National Forest land in 1999.

are minimal at most and are not sufficient to cause the Board to deny a permit.

First, the physical structures on the Project tract (the house and barn) have little, if any, impact on the public's use or enjoyment of the Forests at issue here. The structures are some distance from the Forests, separated by an extensive buffer of trees and understory.

Second, the Project's aesthetic impacts, deemed critical by the Commission in its Criterion 9(K) analysis, are not, in the Board's consideration, significant.⁵

Third, while the ability to travel Rice Hill Road in conventional vehicles was extended up the hill as a result of the improvements constructed by Tsimortos, a significant portion of the road still remains as an unimproved Class 4 road beyond the driveway to the Tsimortos house. Thus, while access to the Town Forest has eased it has not been opened entirely.

Fourth, to the extent that access has been eased to ATVs or other off-road vehicles, these vehicles had access *before* the Tsimortos improvements.

Lastly, in 1991 the Dover Board of Selectmen reclassified the portion of Rice Hill

⁵ The Commission's conclusions as to the Project's Criterion 9(K) impacts on the Forests are solely aesthetic in nature:

The Commission concludes the project interferes with the public's enjoyment of public recreation lands on the Green Mountain National Forest and the Dover Town Forest by introducing a visual presence which does not fit within the scenic context. The project detracts from the enjoyment of a panoramic view which is of primarily wooded hillsides leading up to the distinct Green Mountain and New Hampshire peaks. In this panoramic viewshed, there are few visible buildings or other cultural features other than Mount Snow ski slopes. As noted previously, there are no other structures of the size and scale of the project when viewed from afar. The project is of such prominence in the viewshed that it is used as a visual guide by pilots in locating the Mount Snow airport. The house and cleared areas, while they would be an attractive visual asset to the community at a lower elevation, are out of context in this high elevation location and interfere with the enjoyment of the users of the public lands. The Commission concludes the project fails to conform with this criterion.

Commission Decision at 25-26.

The Board disagrees with this assessment.

Road between Cooper Hill Road and the Dover Town Forest from Class 4 to Class 3. One of the reasons for this reclassification was to allow better access to the Dover Town Forest via Rice Hill Road. This indicates that, as far as the Town is concerned, the improvements to the road increase the public use and enjoyment of the Dover Town Forest, a position with which the Board does not disagree.

The Project complies with Criterion 9(K).

4. *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).

a. *Which Town Plan applies?*

Dover has had a number of Town Plans, and there are references in the testimony to a 1985 Town Plan that was in effect at the time Tsimortos built his house and a 2000 Town Plan that is presently in effect. The 1998 Town Plan was in effect as of the time that Tsimortos filed his application, and, ordinarily, this would be the Town Plan that would govern the present application. *Raymond F. and Lois K. Ross and Rochelle Levy, #2W0716-EB (11/2/87), aff'd, In re Raymond F. Ross, 151 Vt. 54 (1989)* (town plan in effect on date a complete application is filed applies).

However, in December 2001, the Town of Dover adopted a new Town Plan. While this Plan was adopted *after* Tsimortos filed his application with the Commission, the Board has consistently held that, at an applicant's request, Town Plan amendments which occur after the application date and which favor an applicant may govern. *Re: Fred and Laura Viens, #5W1410-EB, Memorandum of Decision at 4 - 5 (Sept. 3, 2003); Juster Development Corp., #1R0048-8-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Dec. 19, 1988)*. In this case, amendments implemented by the 2001 Town Plan work to Tsimortos' advantage, and Tsimortos has requested that his Project be governed by the 2001 Town Plan. Thus, the 2001 Town Plan controls the analysis under Criterion 10 in this case.

b. *How does the Board interpret a 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: (1) Is the language in the Town Plan mandatory or merely a guidance? (2) 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 the Town citizens with policy direction and goals for land use development based on an intimate understanding of the Town's natural resources. A Town Plan provides a 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 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 recognition that Town Plans are "abstract and advisory," *id.*, Act 250 requires that projects comply with a "local or Regional Plan," if one exists. 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, because its purpose is otherwise, is often not written in regulatory language.

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 need 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*, at 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).

But where the language of a Town Plan is sufficiently clear in its intent not to allow a project, the Board must give effect to the language of §6086(a)(10), even if the Town Plan is not written in prohibitory terms similar to those found in zoning regulations. 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).

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 Vermont Supreme Court's decision in *In re Molgano, 163 Vt. 25 (1994)*, instructs the Board to examine the 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 (April 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).*

c. *Taking evidence as to Criterion 10*

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

The statute was amended in 2001 to reflect the *Molgano* decision, and 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:*

In making this finding [whether a project is “in conformance with any duly adopted local or Regional Plan...”], 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).

d. The 1998 and 2001 Dover Town Plans

As noted in the Findings of Fact, while similar in many respects, the 2001 Town Plan differs in significant sections from the 1998 Town Plan. Certain sections of the 1998 Town Plan, noted in Findings of Fact 30, 34 - 41, and 44 in the Board's April 7, 2003 decision, no longer appear in the 2001 Town Plan.

In its August 29, 2003 Findings of Fact, Conclusions of Law, and Order in this case, the Board found that the Project violated particular standards found in the 1998 Town Plan. The August 2003 decision states:

The Board concludes that the Project fails to conform to at least one critical section of the Town Plan. [Footnote omitted] 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.

August 29, 2003 Findings of Fact, Conclusions of Law, and Order at 17.

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.

Id. at 21.

There are three significant differences between the 1998 Town Plan, upon which the Board relied in its August 2003 decision, and the 2001 Town Plan.

First, an important change has occurred within the *Land Use* section of the 2001 Town Plan. On page 32 of the 2001 Town Plan, the first paragraph under Section 7, *Land Use* is new; it reads:

The land use descriptions and densities contained in this Plan are intended as a guide for future land use, and are not intended to either allow or restrict development based on the recommended densities and types of uses contained in this section. The Dover Zoning bylaw shall be considered the document which controls land use in Dover with respect to density and types of use.

Also, in the second paragraph under Section 7, *Land Use*, the second sentence reads:

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 *should* follow the guidelines of the designated geographic land use areas outlined below.

2001 Town Plan (emphasis added). The same sentence in the 1998 Town Plan said "*shall* follow." (Emphasis added).

The change from "shall" to "should" is a controlling difference. While in some instances the word "should" is given mandatory effect, see, *Re: Swain Development*

Corporation #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 37 (Aug. 10, 1990), in this instance, because the Town Plan specifically defines “should” as a non-mandatory term,⁶ the Board will respect the Town’s intent. See, *Re: MBL Associates, #4C0948-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) (Jan. 30, 1996), *aff’d, In re MBL Associates*, 166 Vt. 606, 606 (1997) (where Town Plan explicitly defines the word “should” as a “[k]ey word identifying that a requirement is encouraged but not mandated,” use of word “should” is not indicative of a mandatory requirement). Thus, the use of the word “should” in place of the word “shall” makes the mandatory language in the 1998 Town Plan now just a recommendation in the 2001 Town Plan.

Second, all of the language that the Board relied on in its August 2003 decision as to what development would be allowed (skiing, rescue, etc.) in the *Mountain Top and Ridges* District (which district itself does not exist anymore) no longer appears in the 2001 Town Plan.

Lastly, the Board's August 2003 decision found the Project to be in violation of the 1998 Town Plan's density requirements. The density requirements in the 2001 Town Plan now appear to allow the Tsimortos Project. The 2001 Town Plan allows “very low” density is allowed in the *Resource Reserve and Conservation* Land Use Area, where the Project is located. While the definition of “very low” is unclear,⁷ the Board cannot conclude that the Project, with one house on 60+ acres, could conceivably be contrary to this restriction.

The Project complies with the 2001 Dover Town Plan.⁸

Windham Regional Plan

⁶ See, the *Interpretation* section of the 2001 Town Plan, which 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.” *2001 Dover Town Plan at 02”*

⁷ See Findings of Fact 44 – 46, above.

⁸ The Board would have preferred that Tsimortos had filed the 2001 Town Plan with the Board in 2003, as the Board might have been able to render positive conclusions as to Criterion 10 several months ago.

In his Summer 2003 filings, Tsimortos argued that the Windham Regional Plan conflicted with the Dover Town Plan and therefore could not apply to this case unless the Project were to be of regional significance.

In response, the Board wrote in its August 2003 decision at 25:

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.

(Emphasis added)

Case precedent states that where local and regional plans conflict, the regional plan controls only if it is demonstrated that the project under consideration would have a substantial regional impact. *In re Green Peak Estates*, 154 Vt. 363, 368 (1990); 24 V.S.A. §4348(h)(2); *Richard Provencher*, #8B0389-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Oct. 19, 1988) (when conflict exists between town and regional plan, 24 VSA §4348 provides that the regional plan applies to the extent that it is not in conflict with the local plan, in which case the regional plan will apply if project has substantial regional impacts; if project does not have substantial regional impacts, town plan, not regional plan, applies)

Assuming that there is a conflict between the 2001 Dover Town Plan and the Windham Regional Plan, a controlling question is whether the Project has regional impacts. The Windham Regional Planning Commission has taken the position, and the Board finds, that the Project does not have regional impacts. Thus, the Project is not barred by the Regional Plan, and the Project complies with Criterion 10.

V. Order

1. The Project complies with 10 V.S.A. §6086(a)(1)(B), (4), (8)(aesthetics), (9)(K), and (10).

2. Jurisdiction over this matter is remanded to the District 2 Environmental Commission for the issuance of a Land Use Permit consistent with this decision.

Dated at Montpelier, Vermont this 13th day of April 2004.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
W. William Martinez
Patricia A. Nowak
Alice Olenick
* Richard C. Pembroke, Sr.
Jean Richardson
Christopher D. Roy

* Board Member Pembroke, dissenting:

As to the consideration of aesthetics under Criterion 8, I do not agree with the majority's determination that the Project fits its context. In particular, I am guided by the specific factors enumerated in *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB* (Revised), Findings of Fact, Conclusions of Law, and Order at 25 (Aug. 19, 1996):

[T]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

In the instant case, “the nature of the project’s surroundings” is one of thick forest; the Project’s design - a cleared area with a white house against a background of dark trees - has made little attempt to be compatible with its surroundings; there are no other structures of the size and scale of the project when viewed from other housing developments in Dover. Thus, I must agree with the Commission’s determination that, “[t]he house and cleared areas, while they would be an attractive visual asset to the community at a lower elevation, are out of context in this high elevation location and interfere with the enjoyment of the users of the public lands.”

Because I conclude that the Project has an adverse effect on its context, I would therefore continue an aesthetic examination of this Project under the standards set out in *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17 -19 (Nov. 4, 1985). I would further find that Tsimortos has failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings, *Quechee Lakes, supra*, at 20. Therefore, after weighing all of the factors that are important to an aesthetic consideration, because I find that the construction that occurred on the Project tract has negative aesthetic impacts, I must conclude that the Project does not comply with 10 V.S.A. §6086(a)(8).