

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

Re: Times and Seasons, LLC and Hubert K. Benoit Land Use Permit Application #3W0839 -2-EB

Findings of Fact, Conclusions of Law, and Order (Altered)

This matter involves an appeal by Times and Seasons, LLC and Hubert K. Benoit to the Environmental Board (Board) from the Findings of Fact, Conclusions of Law, and Order (Decision) issued by the District 3 Environmental Commission (Commission) concerning Land Use Permit Application #3W0711-5 (Application). The Application seeks authorization to demolish an existing pole barn and construct a 4,852 ± square-foot Vermont products gift shop and 20-seat deli, with approximately 1,040 linear feet of access drive and parking and an associated pump station, septic field and drilled well, all on a tract of land located adjacent to Dairy Hill Road in Royalton, Vermont. (Project)

The Board concludes that the Project complies with a 10 V.S.A. §6086(a)(1)(E), (4), (5), (9)(C), (9)(K)(Dairy Hill Road and McIntosh Pond), and (10)(Regional Plan), but does not comply with a 10 V.S.A. §§6086(a)(8)(aesthetics), (9)(B) and (10)(Town Plan).

I. History

On August 25, 2004, the Commission issued the Decision denying the Application.

On September 23, 2004, Times and Seasons, LLC¹ and Hubert K. Benoit (collectively Times and Seasons) filed an appeal with the Board, alleging error in the Decision with respect to 10 V.S.A. §§6086(a)(1)(E), (4), (5), (8), (9)(B), (9)(C), (9)(K), and (10). The appeal also alleges that the Commission erred in granting party status to Bonnie and Brent Adkins as to 10 V.S.A. §§6086(a)(1) and (5); and Pam Sawyer, Caroline Sawyer, and Eric Sawyer as to 10 V.S.A. §§6086(a)(1)(A), (1)(B), and (9)(K).

On November 10, 2004, following an October 21, 2004 Prehearing Conference, Board Chair Patricia Moulton Powden issued a Prehearing Conference Report and Order.

¹ Times and Seasons, LLC is owned by John Lefgren.

Hearings were held on March 23 and April 6, 2005, with the following parties participating:

Times and Seasons by David L. Grayck, Esq.
Brent and Bonnie Adkins
Eric Sawyer and Pamela Sawyer and Caroline Sawyer
Town of Royalton Planning Commission by Geoffrey Hand, Esq.
Two Rivers Ottauquechee Regional Commission (TRORC) by Peter Gregory

The Board deliberated on May 18, June 22, and July 20, 2005 and issued its Findings of Fact, Conclusions of Law, and Order (Decision) on August 15, 2005.

On August 31, 2005, Times and Seasons filed a motion to alter claiming a series of errors in the Board's Decision. The Royalton Planning Commission responded by a memorandum filed on September 21, 2005.

The Board deliberated on Times and Seasons' motion on October 19, 2005 and issued a Memorandum of Decision on **DATE**. The Memorandum of Decision amends Findings of Fact 31, 61, 62, 69, 70, 73, 76, 115, 133, 138, 166, and 173 of the August 15, 2005 Decision; the Memorandum of Decision also amends the Board's analysis as to 10 V.S.A. §6086(a)(9)(B)(i), but it does not amend its conclusions as to that subcriterion. This Altered Decision reflects the amendments noted in the Memorandum of Decision.

II. Issues

The Issues in this matter are:

1. Whether the Project complies with 10 V.S.A. §6086(a)(1)(E).
2. Whether the Project complies with 10 V.S.A. §6086(a)(4).
3. Whether the Project complies with 10 V.S.A. §6086(a)(5).
4. Whether the Project complies with 10 V.S.A. §6086(a)(8) (aesthetics).
5. Whether the Project complies with 10 V.S.A. §6086(a)(9)(B).
6. Whether the Project complies with 10 V.S.A. §6086(a)(9)(C).
7. Whether the Project complies with 10 V.S.A. §6086(a)(9)(K) (Dairy Hill Road and McIntosh Pond).
8. Whether the Project complies with 10 V.S.A. §6086(a)(10) (Town and 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. General Findings

The Town of Royalton

1. The Town of Royalton is located in the White River Valley. It includes two traditional New England village centers, Royalton and South Royalton.

The land for the Project

2. Hubert Benoit once owned approximately 98.1 +/- acres on Dairy Hill Road. This land is approximately 1.4 miles up Dairy Hill Road from Route 14.

3. Some years ago, Benoit sold a 10.2 +/- acre lot, west of Dairy Hill Road, to John Lefgren. Lefgren's vacation rental house and an existing gift shop are on this lot.

4. On December 29, 2004, Benoit sold to Lefgren a 41.6 +/- acre parcel, immediately to the west of and fronting on Dairy Hill Road, as two lots - a 7.3 +/- acre lot and a 34.3 +/- acre lot - described in two deeds.

5. This 41.6 +/- acre parcel is contiguous to and immediately to the east of the 10.2 +/- acre lot which Benoit sold Lefgren.

6. The Project would be built on the 7.3 +/- acre lot (Project Tract). The Project requires less than two acres for the construction of the Project building and its related parking.

7. Benoit retains 56.5 +/- acres of the 98.1 +/- acres which he originally owned. This acreage is mostly located on the east side of Dairy Hill Road; a 3.6 +/- acre portion is on the west side of Dairy Hill Road, directly northerly of the Project Tract.

The area where the Project Tract is located

8. The Project Tract is located in a quiet, rural, residential and agricultural area. It is hilly, with farmland, open meadows and wooded areas. Most of the hillsides near the Project Tract are partially forested and partially devoted to residences and hill farms.

9. North of the Project Tract is a regenerating white pine forest.

10. Views from the Project Tract to the south are of mountains and to the north are of rolling hills and open pasture lands and tree lined roads. It is a nice, quiet, classic Vermont valley.

11. Dairy Hill Road is a paved road; traffic on the road is light.

12. McIntosh Pond lies immediately to the northwest of the Project Tract and immediately north of other lands owned by Lefgren. The brook which flows out of the Pond's south end runs south, parallel to Dairy Hill Road through Lefgren's lands, west of the Project Tract.

13. The existing gift shop and pole barn are not visible from the north shore of McIntosh Pond, near the Sawyer residence.

The Project Tract

14. The Project Tract is a large open pasture and hay field, with an agricultural pole barn located on the northern edge of the property, abutting a tree-line.

15. The proposed Project would be built slightly south of where the pole barn presently sits on the Project Tract.

16. A drainageway runs east-west, to the north of the pole barn; it is a seasonal stream, bordered by wetlands.

17. A driveway to the Lefgren house and existing gift shop runs west from Dairy Hill Road south of the pole barn through the Project Tract. There is also a rough farm road that runs from Dairy Hill Road directly to the pole barn.

18. South of the pole barn on the Project Tract is an open meadow; this meadow contains Class III wetlands and primary agricultural soils. This meadow is bordered on its south by a line of mature pines.

19. Near Dairy Hill Road, the Tract slopes steeply downward to the west.

20. Dairy Hill Road has a significant upward grade as it runs, south to north, by the Project Tract.

21. Views from Dairy Hill Road to the west at the Project site are of the pole barn, the Lefgren house, and mixed deciduous and evergreen forested areas; a ridgeline rises up behind the Lefgren house.

The Project

22. Times and Seasons proposes to develop land which it owns on Dairy Hill Road in South Royalton.

Physical construction

Building and infrastructure

23. Times and Seasons proposes to remove the existing pole barn on the Project Tract and to construct and operate a 3,512 square foot gift shop (with a 1,340 square foot porch) and a 20-seat deli/restaurant.

24. The finished floor elevation at the building site is 477 feet above sea level (asl). The ridgeline of the building is at 492 feet asl and a cupola rises to about 501 feet asl.

25. The building is a one-story, low profile, linear, post and beam design with a salt box style roof and a covered front porch that extends from end to end of the building footprint. Its walls would have grey wood clapboards and cedar shakes, and its roof would be charcoal grey asphalt shingles. All finished siding would be muted earth tones. The building would be served by an associated septic system and drilled well, and below-ground electric service. The proposed propane tank would be above ground behind the proposed building. Trash dumpsters, if required, would be located behind the proposed building.

26. The front of the proposed building, visible from Dairy Hill Road, runs about 125 feet; the rear runs about 160 feet.

Signs

27. There would be a 4-foot by 8-foot parchment-type colored sign in the vicinity of the driveway, indicating the Project to be the “Land of Joseph” gift shop. The sign would not be illuminated.

Lighting

28. The Project site is currently not illuminated at night.

29. There would be two pole lights for the proposed parking area. Additionally, lights are proposed beneath the eave of the covered walkway. All lights would be downcast and shielded. Pole lights would be no taller than 12 feet. Lights would be controlled through the use of a combination photocell and timer switching system. A motion sensor controlled light would be above the door at the basement entrance behind the proposed gift shop. The motion sensor would be fixed to light only when vehicles enter the service drive.

Roads and parking

30. The Project would have two parking areas for 21 cars and two buses. Parking spaces for six cars would be in front of the gift shop building, directly adjacent to the southeast corner of the building; parking spaces for 15 cars would be south of the proposed driveway. Parking spaces for two buses would be directly in front of, and parallel to, the building.

31. While partially screened by trees, all parking areas would be visible from Dairy Hill Road.

32. The Project does not anticipate the need for overflow parking because the flow of tour buses is generally scheduled. If the parking lot is full, there is overflow parking at the existing gift shop and Lefgren’s rental house. Even if buses were to park on the side of the Project’s driveway, there would not be any interference with traffic on the Project’s driveway.

33. The Project would include approximately 958 linear feet of access drive, located and laid out in the same location as the existing driveway. The driveway would be widened to allow for two-way traffic; it would be designed with an increased radii and a reduced grade, in order to allow for smoother flow of vehicles in and out of the Project and to and improve site distances. The driveway would lead to a looped

interior drive in front of the proposed gift shop building, which would be one-way and would take motorists to the main and secondary parking areas.

34. The existing rough farm road down to the pole barn would be abandoned and re-vegetated.

35. The looped driveway is sufficiently wide to safely allow for bus parking. The Project would use the existing curb cut to access the site. The access would have a paved apron. A curb cut permit amendment has been obtained.

Operations

36. The Project would provide goods and services that are desired by the general public. At least 50% of the products sold in the gift shop are general Vermont products, such as maple syrup, and other Vermont crafts.

37. The Project's 20-seat self-serve deli/restaurant would offer take-out or eat-in sandwiches, a salad bar, snacks, soup, soft serve ice cream and maple candy products. A grill is possible. An attendant would prepare and serve food, but there would not be formal wait staff service.

The Joseph Smith Birthplace Memorial

38. The Project Tract is approximately 4/10 mile south (down Dairy Hill Road) of the Joseph Smith Birthplace Memorial maintained by the Church of Jesus Christ of Latter-Day Saints (Church).

39. There is a church and a visitor center and parking lot at the Memorial; the church is open seven days a week, 365 days a year. Camp Joseph, a campground associated with the Memorial, is located just north of the Memorial.

40. Approximately 50,000 people come to Vermont each year to visit the Memorial.

41. During the May through October season, 48 - 50 tour buses visit the Memorial. As a bus can carry, at most, 50 people, about 2,500 of the Memorial's 50,000 visitors come by bus. The balance of visitors comes by car.

42. Many visitors come to the Memorial in July, when individuals and organized bus tours visit an annual religious pageant in Palmyra, New York, and in

October, during the fall foliage season. Approximately 4,000 to 5,000 visitors come to the Memorial in these months.

43. May, June, August, and September also are popular months for people to visit the Memorial.

44. The least number of visitors come to the Memorial in the late Fall and early Spring seasons.

45. The Memorial hosts a live nativity pageant on two nights shortly after Thanksgiving.

46. The highest number of visitors to the Memorial grounds is during December, when many people come to view a Christmas light display.

47. The Memorial does not offer any commercial services to its visitors. All that can be offered to visitors are bathroom facilities, a tour of the grounds and visitor center, and the opportunity to enjoy the property by having a picnic outdoors or walking the grounds. Frequently, people ask whether they can buy postcards, stamps, film, Vermont souvenirs, or whether there is food available for purchase.

48. Those who visit the Memorial, especially tour-bus visitors, treat the Memorial as a destination; they generally come to the Memorial and then depart to travel onto their next destination and do not visit local towns or businesses as a part of the travel plans.

The relationship between the Project and the Memorial

49. The Project Tract is not visible from the Memorial or Camp Joseph.

50. There is no business connection between the Memorial and Times and Seasons or Mr. Lefgren.

51. The Project would meet a demand for services and Memorial-related products.

52. The Project would be operated seasonally to coincide with the Memorial's visitor patterns.

Times and Seasons business plan

53. Lefgren's business plan is established on the belief that some of the Memorial's visitors would visit the Memorial and then travel to the Project to purchase Vermont-products or have a meal.

54. Locating the Project close to the Memorial would work to Times and Seasons' advantage, as the Project would be able to draw upon the visitors to the Memorial. Visitors themselves would also benefit, because the Project provides goods and services that are customary to a site such as the Memorial and thus could be part of a visitor's Memorial experience.

Existing gift shop

55. To the west of the Project Tract is an existing gift shop owned by Mr. Lefgren. It is in a small building, barely visible from Dairy Hill Road, with a limited amount of floor space for merchandise in its approximately 950 square feet of space; it does not have facilities for food or beverage services, heat, running water, or bathrooms. A sign at the intersection of the driveway and Dairy Hill Road announces its existence.

56. The existing gift shop is subject to Land Use Permit #3W0839-1.¹

57. Lefgren formulated his business plan for the Project based upon his experience operating the existing gift shop. Virtually all of the existing gift shop customers are tourists who stop by after their visit to the Memorial.

58. Ten thousand people visited the existing gift shop between 2003 and 2004.

59. Approximately two to three percent of the visitors to the existing gift shop are "locals."

60. Virtually all of the existing gift shop customers are tourists who stop by after their visit to the Memorial.

61. The gift shop currently sells "Land of Joseph" Vermont maple syrup and "Land of Joseph" New York-made pancake mix.

¹ Lefgren's home, which he turned into a Bed and Breakfast and is now a vacation rental property, is subject to Land Use Permit #3W0839.

62. At the proposed Project gift shop, Times and Seasons intends to market "Land of Joseph" products and has plans to advertise the "Land of Joseph" as a destination location.

63. Times and Seasons intends to continue using the existing gift shop for commercial uses, including perhaps an art or craft gallery.

Bus visitors to the existing gift shop

64. During 2004, 17 of the 50 buses that went to the Memorial also stopped at the existing gift shop. These buses represented about 20% of the shop's business.

65. In the past, bus visits were not usually scheduled. However, because the tour bus companies are on a tight schedule, the majority of bus visits to the current gift shop are scheduled in advance.

66. For 2005, there are to date 22 scheduled visits from two tour bus companies with 19 visits in July and three in October. Of these visits, roughly half would be two bus visits on the same day, with the remaining visits being single bus day visits. The two bus visits are not at the same time during the day. A tour bus carries between 43 - 47 passengers.

67. Many tour bus visitors are on Church history tours which visit the major Church history sites in the chronological order of the Restoration, beginning with the Memorial.

68. Church history tour buses exit Interstate 89 at Exit 2 in Sharon and drive northwest on Route 14 to Dairy Hill Road. The buses then drive up Dairy Hill Road to the Memorial. After they visit the Memorial, the buses turn right into the existing gift shop's driveway. After their visit, the buses drive down Dairy Hill Road to Route 14, and then southeast to Sharon to access Interstate 89. From the Memorial the tours go to Palmyra, New York, and thereafter typically end in Nauvoo, Illinois.

69. Generally, few buses go northwest on Route 14 past South Royalton and on into Royalton because of narrow railroad underpasses on that route.

70. Tour buses visiting the Memorial visited the general store in Tunbridge, Vermont, in the past. The Tunbridge general store, now closed, was located approximately 10 miles from the Memorial, in the opposite direction from Exit 2.

The Adkins residence

71. Brent and Bonnie Adkins' home is across Dairy Hill Road from the Project. Their driveway is approximately 150 feet south of the Project's proposed driveway.

72. The Adkins' home is at a higher elevation and would overlook the Project

73. There are no existing trees between the Adkins house and the pole barn.

74. The existing gift shop is tucked into the woods and not visible from the Adkins' residence.

Development on Dairy Hill Road south of the Project Tract

75. A John Deere dealership and a logging business are located approximately one mile south of the Project Tract on Dairy Hill Road.

76. With the exception of a few enterprises such as a John Deere dealership; a logging business; the Church, Memorial, and the Joseph Smith camp ground; the existing gift shop; and Lefgren's B&B; Dairy Hill Road is rural, residential (with some home occupations) and agricultural. It has a 40 mph speed limit.

The Project Tract and South Royalton village

77. By road, the Project Tract is 2.4 miles from the intersection of Routes 14 and 110 in the village of South Royalton.

78. The Project Tract is located approximately 1.6 miles - as the crow flies - from the village of South Royalton.

79. The Project Tract is not within or close to the village centers of South Royalton or Royalton.

B. Criteria 1(E) and 4

McIntosh Pond

80. Lefgren's property is located down-gradient of McIntosh Pond. The Project would not affect the waters of McIntosh Pond.

81. The Project is approximately 180 linear feet from the brook which flows out of the Pond's south end. The Project would not affect this brook.

Drainage way

82. The drainage way to the north of the pole barn forms a boundary between the Project Tract and the lands still owned by Benoit on the west side of Dairy Hill Road.

83. The source of the drainage way is on lands which Benoit still owns on the east side of Dairy Hill Road.

84. The drainage way crosses underneath Dairy Hill Road via a 30-inch corrugated metal pipe and then runs in a westerly direction onto the Project Tract, down the slope behind the pole barn, and empties into the brook which flows out of McIntosh Pond.

85. In response to concerns raised by the Agency of Natural Resources (ANR), the design of the Project was changed to move the Project building away from the drainage way in order to provide for a larger buffer for the drainage way, establish a vegetated buffer for the drainage way, and protect the Class III wetlands.

86. ANR has reviewed and approved the changes. ANR supports a finding that the Project complies with Criteria 1(E) and 4 based upon the Project's construction in accordance with the revised plans.

87. As a result of moving the Project away from the drainage way, there have been changes to the driveway, parking, and drainage features.

88. There would be approximately 40 feet of post-construction buffer between the building footprint and the top of bank to the drainage way. During construction, a 25-foot undisturbed buffer would be maintained at all times.

89. To achieve the vegetated buffer, seven *Salix* dwarfs (Willows) and ten *Juniperus* (Evergreen) varieties would be planted essentially along the top of bank.

Wetlands

90. There are no Class I or Class II wetlands on the Project Tract. There are three Class III wetlands on the Project Tract. The Project encroaches slightly into these Class III wetlands.

Erosion

91. The Project's construction erosion control measures include: a silt fence down gradient of disturbed areas; mulching and seeding; erosion control matting on all slopes over 25% and in areas of concentrated flow; and stone checkdams, as shown on Exhibit TS-8, Sheets C0.02, C1.03, and C5.01.

92. The Project's permanent erosion control measures include: the restoration of vegetation and paving; and construction of grassed swales, stone lined swales, stone check dams, and a catch basin, as shown on Exhibit TS-8, Sheets C0.02, C1.03, and C5.01.

93. Earthwork would be minimized in the post-construction stream buffer area (within 40 feet from top of bank). Where earthwork is required, erosion control measures would be implemented as outlined in the plans and specifications, and in addition, the same day that earthwork is performed, the disturbed area within the buffer would have mulch and/or erosion control matting applied. No soil stockpiles would be allowed in this area. Equipment movement would be minimized in this area. There would be silt fence or construction fence erected to delineate the protected area and prevent construction equipment from disturbing soils.

94. Erosion controls would be inspected and maintained daily and after storm events during construction by the General Contractor. Erosion controls would also be inspected by Times and Seasons. Erosion controls would be inspected every two weeks and before significant stormwater events.

C. Criterion 5

Dairy Hill Road

95. The Project is accessed by Dairy Hill Road which is a paved, class-two town highway, classified by the Vermont Agency of Transportation (VTTrans) as a minor collector.

96. Dairy Hill Road has two twelve-foot travel lanes with two-foot shoulders on either side. According to the Vermont State Design Standards, a road of these dimensions with a design speed of 40 mph can handle 1,500 to 2,000 vehicles per day. Thus, Dairy Hill Road currently serves the Memorial's traffic with more than sufficient capacity.

97. There is presently no congestion on Dairy Hill Road.

Project's impacts on congestion on Dairy Hill Road

98. Most of the traffic that would visit the Project is already traveling on Dairy Hill Road to the Memorial.

99. Lefgren intends to have a business location sign posted on Route 14; he is currently advertising the project on a local tourism map, and on several web sites and on TV (in Salt Lake City). Such advertising, if it is associated solely with the gift shop, may generate new traffic on Dairy Hill Road.

100. The Project's impacts on the congestion on Dairy Hill Road is limited to the addition of the Project's employee traffic and visits by people who are not already visiting the Memorial, such as those who might come to the Project for meals and approximately two to three visits per week by delivery trucks and service vehicles. These other trips are insignificant additions to the existing daily volume, resulting in a negligible increase in traffic on Dairy Hill Road.

Safety

101. The Vermont State Standard (B-71) specifies a desired minimum intersection sight distance of 445 feet when the road speed limit is 40 mph.

102. The intersection sight distance from the proposed Project driveway north along Dairy Hill Road to the north is 321 feet and 664 feet to the south.

103. Even though the intersection sight distance to the north is less than 445 feet, it is greater than the stopping distance of 305 feet and therefore within the B-71 standard.

104. The location and layout of the Project's driveway is safe for ingress and egress by buses, fire trucks and other emergency vehicles, and customer vehicles.

105. Twelve white pines would be planted 25 or more feet off the edge of pavement of Dairy Hill Road. The trees would not interfere with or obstruct sight distance at the driveway's intersection with Dairy Hill Road.

Turns into the Project from Dairy Hill Road

106. The elimination of the rough farm road on the north side the Project Tract would reduce the existing number of conflicting turning movements on Dairy Hill Road.

107. Given that the vast majority of visitors would stop in after they visit the Memorial, the majority of turning movements would be right-turns into and out of the Project, not conflicting left turns.

108. Those few tour buses entering from the south would not block both lanes of Dairy Hill Road. When any vehicle makes a left turn, it blocks a lane of traffic during the period of the turn. However, this does not mean that left turns are necessarily dangerous or prohibited.

109. The changes to the driveway would not cause traffic to get closer to the Adkins' driveway. Ingress and egress to the Adkins residence would not be affected by the Project's traffic. The Project would not cause delays or unsafe conditions relative to the use of their driveway, as the vast majority of the Project's traffic is already using Dairy Hill Road.

110. The Project's traffic would not cause back-ups onto Dairy Hill Road.

111. The Project's design complies with AASHTO (American Association of State Highway and Transportation Officials) standards and Vermont Agency of Transportation design guidelines.

D. Criterion 8

Context of the area

112. The Project site, currently an open pasture and hay field, was previously a portion of the Benoit farm, which is an existing working farm.

113. The Project site is located on Dairy Hill.

114. The land uses immediately surrounding the Project site include agricultural and low density, rural residential, with recreational, tourist, and historic aspects.

115. The area is characterized by forested hillsides, farm fields and pastures, as well as agricultural buildings and small residences.

116. The Memorial is about half a mile up Dairy Hill Road from the Project site and includes the Church's summer camp. The church at the Memorial is set approximately 500 feet off of Dairy Hill Road; parking for the church is hidden from view behind the church building.

117. McIntosh Pond lies immediately to the Project's northwest.

118. Lefgren's existing gift shop and tourist rental house lie immediately to the west of the Project.

119. There are residences, such as the Adkins', in the vicinity of the Project.

120. The Trottier & Sons John Deere tractor dealership is about a mile down Dairy Hill Road from the Project site.

Views

121. In the Project's immediate vicinity, the dominant scenic attributes are the elevated hills and a scenic viewscape to the northwest, west, and southwest, above and beyond the Project.

122. Westerly views from Dairy Hill Road at the site of the Project include mountains in the background on the far side of the White River, McIntosh Pond in the northerly middle ground, Lefgren's existing house in the center middle ground, and the Project site at a slightly lower elevation in the foreground.

123. Easterly views from Dairy Hill Road are mostly uphill to the Benoit farm and southeast to the Adkins' property.

The Project building

124. The Project building would be more than twice the size of the typical residence in the area, and would be the dominant feature of what is presently a seven-acre open meadow.

The Project's location on the Project site

125. Although Times and Seasons' original plans placed the Project building close to northern border of the Project Tract, in order to address ANR's objections concerning the drainageway, Times and Seasons redesigned the Project to move the building away from the stream and tree line and toward the middle of the Project site.

126. While it would be possible to construct the Project on a less visible location south and west of the existing vacation rental, Times and Seasons dismissed this location due to increased expense, impacts on vegetation, and the need to improve the roadway over the McIntosh Pond outflow stream.

Views of the Project from Dairy Hill Road

127. In the Project's vicinity, Dairy Hill Road runs along a northeasterly/southwesterly axis.

128. The Project would be visible to travelers in either direction on Dairy Hill Road.

129. The elevation of Dairy Hill Road at the Project's proposed driveway is 491 – 497 feet asl. Directly opposite the proposed building site, the elevation of Dairy Hill Road ranges from 518 – 525 feet asl.

130. The finished floor elevation of the proposed gift shop building is 477 feet asl. The building height is approximately 505 feet asl, with a cupola that extends to approximately 512 feet asl.

131. The proposed Project building would be approximately 10 – 15 feet below the grade of Dairy Hill Road at a point on Dairy Hill Road opposite the building; the top of the building would be approximately about 10 – 15 feet above the grade of Dairy Hill Road at the Project's proposed driveway

132. The existing Lefgren House and gift shop both are located more than 900 feet from Dairy Hill Road. Portions of the Project building are as close as 250 feet to the centerline of Dairy Hill Road.

133. When first viewed, the Project would be above travelers proceeding up Dairy Hill Road and would appear across an open field, in front and in the center of the scenic views to forested ridgelines in the background.

134. While the building would be mostly at or below the grade of Dairy Hill Road along the east side of the Project Tract, it would dominate the foreground view of persons on the Road and be out of character with its rural, pastoral setting.

View of and from McIntosh Pond

135. Because of dense, mature vegetation, McIntosh Pond is not visible from Dairy Hill Road at the Project site. Past the Project, up Dairy Hill Road, McIntosh Pond becomes visible, along with a house, a barn, and the entrance area to the Memorial.

136. From the south end of McIntosh Pond, portions of the rear of the building might be partially visible, if visible at all, through the vegetation. The view would be very similar to the existing view of the back of the pole barn.

137. From the northwest (or far) side of McIntosh Pond, the proposed building would be virtually undetectable due to the distance, approximately 2,500 feet, and intervening terrain and vegetation.

Written community standards

Royalton Town Plan

138. The proposed Project is a new commercial structure located in both the Resource Conservation District and the Agricultural/Residential District as described in the Town of Royalton's Town Plan adopted on March 5, 2002.

139. The Town of Royalton does not have zoning bylaws.

140. The Royalton Town Plan describes the Resource Conservation District as follows:

Resource Conservation District. The purpose of the resource conservation district is to protect the natural resource value of lands that are essentially undeveloped; lack direct access to arterial and collector roads; are important for wildlife and wildlife habitat; have high potential for commercial forestry use; are unsuitable for land development; or include irreplaceable, limited, or significant natural, recreational, or scenic resources. Its further purpose is to protect higher elevations that have shallow soils and fragile vegetation and that provide significant recharge to the ground and surface water supplies of the Town and region. No

public sewer and water facilities are planned for these areas. Due to the limited facilities and services proposed for the district and the critical resources located within it, only certain uses should be allowed. These are: low-density residential development, limited outdoor recreation uses, conservation uses, and forestry practices that are compatible with the district purposes and do not require additional facilities and services.

Royalton Town Plan at 28 – 29.

141. The Town Plan describes the Agricultural/Residential District as follows:

Agricultural/Residential District. The purpose of the agricultural/residential district is to protect lands with an economic capability for agriculture that are now predominately undeveloped except for uses associated with agriculture or forestry, and to ensure that residential and other compatible uses are placed at densities appropriate with the physical capability of the land. Planned residential developments and land uses that do not remove the potential of the land for agricultural production such as open space, conservation, certain forms of outdoor recreation, and other uses which preserve the rural character of these areas are encouraged. The extension of public water supply and sewage disposal systems are not planned for this district. Therefore, only low-density residential and recreational development that utilizes existing facilities, that can adequately dispose of its sewage, and that is compatible with the district purposes should be permitted. Any proposed Development should not harm any irreplaceable, unique, or scarce resources or any natural areas.

Royalton Town Plan at 29.

142. The Royalton Town Plan discusses Royalton's natural and scenic resources, which are "greatly appreciated by the citizens of Royalton as the source of much of the community's beauty and character." *Royalton Town Plan at 6.* The Plan goes on to identify features which "have been identified, without limitations, as contributing to the essential rural character of the Town even as growth and change may occur." *Id.*

143. The Royalton Town Plan identifies views west from Dairy Hill as an important scenic resource for the Town:

As used in this Plan, “scenic areas” are areas which by general consensus are considered visual assets to the Town such as vistas, landscapes, *sections of roads and highways*.... These scenic areas help to define the present character of Royalton and are an asset which attracts visitors who, while they are here, provide income to Town retailers, restaurants and inns. Specific areas recognized include: ... *views from Dairy Hill looking west* ...

Royalton Town Plan at 8 (emphasis added).

144. The Project would impair the scenic views specifically identified in the Royalton Town Plan as an important scenic asset.

Two Rivers - Ottauquechee Regional Plan (TRORP)

145. The July 30, 2003 Two-Rivers-Ottawuechee Regional Plan (TRORP) governs the Project.

146. Goal 4 of the *Land Use* section of the (TRORP) states: “to protect the character of rural areas and their natural resources by avoiding scattered development and incompatible land uses.” *TRORP* at 26.

147. The *Rural Areas* subsection of the TRORP’s *Land Use* section states:

Rural Areas

Most land in the Region lies outside of the Town Centers, Village Settlements, and Hamlet Areas. Remaining areas are generally rural in character. Rural areas consist primarily of a mixed pattern of land uses, including residential, small-scale business, outdoor recreational, agricultural, forestry, and natural resource uses, including wetlands, aquifers, and flood plains. Development within these areas have been largely dependent on site limitations, including soil composition, slope, and elevation. Areas relatively free from these limitations have been more actively utilized for residential and agricultural development. Rural areas adjacent to major public highways have been subjected to greater pressure for change from the traditional passive rural uses to intensive commercial and industrial uses. Remote areas being more distant from Town Centers, Village Settlements, and Hamlet Areas, are subjected to great change and become settled despite the relatively high costs of infrastructure design and development.

1) Rural lands should be developed only in areas where potential for agriculture, forestry or mineral extraction is relatively low. In circumstances where lands are proposed for residential or non-residential uses, development should be planned to minimize or avoid adverse impacts on these resources....

2) Maintenance or enhancement of the rural environment or setting is a primary goal for rural areas....

3) In so far as is reasonable, new land development and subdivision should be planned and sited to promote the continued use of agricultural and forestry land for their intended purposes. To minimize the potential conflicts between agricultural and non-agricultural uses, projects should be planned and sited to substantially satisfy the following:

a) residential and other non-agricultural uses or structures should be sited on the least productive soils for agricultural and forestry uses;

c) siting of proposed buildings or structures should be planned as to minimize any blocking or interruption of scenic vistas as viewed from a public highway....

6) Non-residential uses, including service businesses, professional offices and inns are acceptable lands uses for rural areas provided that such uses are planned as relatively small in size or scale, are not primary or dominant uses in an area, do not unduly conflict with existing or planned residential, forestry or agricultural uses, and do not unduly affect rural character.

7) Major retail enterprises or service centers which draw principally on regional market shares ... are inappropriate and discouraged from locating in rural areas. Such uses are encouraged to locate within or in close proximity to existing village areas or designated growth centers.

148. In the TRORP's Scenic Resources subsection of its Historic, Cultural, Archeological and Scenic Resources section, the following Prominent Landscapes are listed:

The following areas are likely to be affected by projects and should be reviewed. Such areas are generally accepted as areas of scenic significance:

6. areas of high scenic quality which are ... noted examples of the dominant characteristics of an area.

TRORP at 104.

149. In discussing the "extent of Order or Harmony in the Manmade Landscape," the TRORP states within its *Scenic Resources* subsection:

Landscapes that contain a sense of order or logic, such that a clear sequence of villages and surrounding rural countryside exist. The cultural landscape that is represented by sprawl becomes indistinguishable and often times chaotic....

TRORP at 105

150. The TRORP lists a number of policies within its *Scenic Resources* subsection:

- 2) Where land development or subdivision is proposed in the foreground of a highly scenic location with distant views, design plans should work towards the goal of retaining or enhancing the view. New buildings or structures should be as unobtrusive as reasonable. To accomplish this, structures or buildings are encouraged to be designed so as to be compatible with the traditional pattern, scale, size, form, etc., and not unnecessarily block distant views from highways noted as especially scenic. Buildings or structures are encouraged to be sited in less visible areas such as at the edges of or within wooded areas rather in open meadows. Clustering of buildings or structures is encouraged to leave vistas open on the site. Design of structures which is not excessive and do not unduly compete with the existing natural or cultural focal point is encouraged.

4) Where land development or subdivision is proposed in scenic areas highly visible from a public corridor, design plans should work toward the goal of minimizing the adverse visual impacts oftentimes associated with large-scale box-like buildings and large lot parking areas. To accomplish this, structures, buildings and other site improvements should be planned so that building form, massing, and other features are compatible with dominant patterns of the area or site and in ways that reduce the apparent scale of the project on the site. Design planners are encouraged to break large parking areas into smaller lots with ample landscaping or screening from off-site views, and to locate the project on the less scenic areas of the site. Prominent grade changes that starkly contrast with existing or surrounding contours are discouraged.

5) Plans that promote large box-like structures which sharply contrast with existing scenic resource values are not recommended, particularly where the composition of the overall project is highly visible from public viewpoints.

TRORP at 105 - 06.

Mitigation by landscaping and trees

151. Mitigation planned by Times and Seasons mostly involves the planting of 15 trees and painting the Project building grey.

152. The majority of vehicular parking has been relocated to the southwestern side of the drive.

153. Times and Seasons has not proposed much screening for views of the Project from Dairy Hill Road.

154. The Project's landscaping plan includes the planting of twelve Eastern White Pine, planted in two staggered rows of six, to the southwest of the Project's entry driveway adjacent to Dairy Hill Road, and three Eastern White Pine to screen the six parking spots directly adjacent to the Project building.

155. Eastern White Pine are a hardy, indigenous tree. After taking hold during the first year, their expected growth should be 2-4 feet per year. At the time of planting, they would be 12 - 15 feet tall.

156. These Eastern White Pine trees would provide some buffer to visually screen the Project's building and main parking areas from the Adkins residence. The twelve white pines southwest of the Project's entry driveway would, however, only briefly screen views of the Project when first seen by a traveler proceeding up Dairy Hill Road; they would not screen the Project for most of its frontage on the Road. The second group of three pines would partially screen the Project's six parking spaces but would not screen the building or bus parking.

E. Criteria 9(B) and 9(C)

157. Lefgren owns the 10.2 +/- acre lot where his vacation rental house and existing gift shop are located.

158. Lefgren owns a 41.6 +/- acre parcel west of Dairy Hill Road, contiguous to and immediately to the east of the 10.2 +/- acre lot. This 41.6 +/- acre parcel consists of the 7.3 +/- acre Project Tract and the contiguous 34.3 +/- acre lot.

159. The Project would be built on the 7.3 +/- acre lot (Project Tract).

160. Lefgren does not have any financial or management interest in or control over the lands which Benoit still owns.

161. Benoit has no financial or management interest in or control over the lands which he sold to Lefgren.

162. The lands which Benoit still owns are not involved in the proposed Project in any respect.

Criterion 9(B)

163. The Project Tract contains 2.8 acres of primary agricultural soils.

164. The Project would significantly reduce or destroy the agricultural potential of 1.9 acres of the 2.8 acres of primary agricultural soils on the Project Tract.

Subcriterion i

165. Lefgren purchased the Project Tract for \$75,000.

166. There is no evidence as to the specifics of this sale.

167. Benoit owned the Project Tract land from 1966 through 2004.

168. Benoit used the Project Tract land for growing approximately 160 bales of hay annually. A hay bale sells for approximately \$3.00/bale. The cost to produce the hay on the Project Tract was \$170.00.

169. Benoit does not need the Project Tract land to maintain his farming operation.

Subcriterion ii

170. Lefgren owns 44.5 +/- acres to the west of the Project Tract; his vacation rental house and existing gift shop are located on this land.

171. Because of space and design limitations, the area where the existing gift shop is located is not suitable for the Project.

172. Other than a statement that setting the proposed Project near the existing residence would raise aesthetic concerns, no evidence was presented concerning the suitability of the remaining portion of the lands owned by Lefgren.

Subcriterion iii

173. The Project's building and infrastructure was moved on or closer to the site's primary agricultural soils in order to resolve ANR's concerns regarding a drainageway which runs along the north boundary of the Project Tract.

Subcriterion iv

174. No evidence was presented on this subcriterion.

Criterion 9(C)

175. The Project would impact 4.6 +/- acres of a total of 63.3 +/- acres of secondary agricultural soils.

176. There would be no significant reduction in the potential of the remaining 58.7 +/- acres for commercial forestry.

177. The Project would not impact any forestry soils.

Mitigation for primary agricultural soils

178. The Applicant has not proposed any mitigation for the Project's impact on primary agricultural soils.

F. Criterion 9(K)

179. The Project is located downgradient of McIntosh Pond.

180. There is no hydrologic connection between the proposed building, driveway, and the other site improvements at the Project site and McIntosh Pond. While the outflow from McIntosh Pond crosses Mr. Lefgren's property, the stream flow is out from McIntosh Pond.

181. The Project would have no impact on the water quality of McIntosh Pond.

182. From the northwest shore of McIntosh Pond, as one looks back at the proposed building to the southeast, the proposed building would be virtually undetectable due to the distance, approximately 2,500 feet, and intervening terrain and vegetation.

183. Because the Project's customers are already traveling on Dairy Hill Road to visit the Memorial, there would be no traffic increase which could interfere with people traveling to and from McIntosh Pond. The Project would have no effect on how people use and enjoy McIntosh Pond.

184. The Project would not diminish the wildlife in the area.

G. Criterion 10

Town Plan

185. The March 5, 2002 Royalton Town Plan is the duly adopted town plan applicable to the proposed Project.

186. The Town of Royalton has not adopted zoning bylaws; the Town therefore relies on the Town Plan to regulate development which is subject to the jurisdiction of Act 250.

187. The Town Plan is specifically intended to “serve as a basis for responding to Act 250 permit requests.” *Royalton Town Plan* at 2.

188. The Town Plan identifies the Plan itself as one of the primary “growth management tools” in the town, and notes that the Plan is one of the specific tools intended to carry out the goals and objectives of the Plan. *Royalton Town Plan* at 3.

189. Chapter One of the Town Plan describes its purpose:

The Royalton Town Plan provides a framework to be used for accomplishing community aspirations. It gives specific guidance, while retaining enough flexibility to be useful when faced with unforeseen circumstances. The Plan states goals, objectives, and recommendations for action that will guide future growth and development of land, public facilities, and services.

Goals, objectives, and recommendations of a plan must be viewed as an integrated interdependent system of statements that have clear relationship to each other and to the body of the plan. The Town Plan addresses critical areas that relate to growth and development. Goal statements, objectives, and recommendations describing specific actions steps begin each chapter.

Royalton Town Plan at 2.

190. Chapter One of the Town Plan provides the following definitions of *Goals, Objectives, Recommendations, and Policies*:

Goals are long-range aspirations which serve to establish the Town's future direction. The “goal” describes the end condition that is sought.

Objectives are a measurable component of a goal which are action-oriented and designed to address outstanding town problems. Objectives are achieved, in part, by implementing planning policies;

Recommendations are courses of action suggested to achieve objectives and may be used to solve existing problems or avoid their reoccurrence. These may include performance criteria, specific strategies, changes in administrative procedures, or suggestions for future study.

Policies are definite courses of action adopted and followed by a government, institution, body or individual for the attainment of desired objectives.

Royalton Town Plan at 2.

191. Chapter Two of the Town Plan identifies the town's natural and historic resources, including the town's "Scenic Areas," and establishes the protection and preservation of these resources as one of the goals of the Plan. *Royalton Town Plan* at 4 and 8.

192. Chapter Two of the Town Plan provides:

Historic sites and structures are the visual history of Royalton's cultural, social and economic life. Buildings, structures, and historic settings provide a source of pride, economic gain, and personal enjoyment for present and future generations. Historic Landmarks include the Joseph Smith Birthplace.

Royalton Town Plan at 8.

193. Chapter Nine, the *Land Use* section of the Town Plan, provides the following relevant goal and objectives:

Goal: To maintain the rural village character of Royalton, preserving scenic beauty, natural resources and the cultural assets of the Town while allowing for an acceptable rate of growth

Objectives:

1. To manage growth and development in a manner that protects Royalton's natural resources and the environment, preserves the area's historic and cultural assets, and does not strain municipal facilities and services
2. To allow for a diversity of low impact uses within the Town
3. To encourage the conservation of undeveloped land, and the preservation of farm and forest lands.

4. To maintain the character and vitality of the Town villages as commercial and service hubs.

Royalton Town Plan at 27.

194. Chapter Nine of the Town Plan sets out six *Recommendations*, which “are courses of action suggested to achieve objectives.”

1. Make capital improvements in infrastructure in a manner consistent with existing uses and planned growth patterns of the Town.
2. Establish procedures for preserving the integrity of historic sites within the Town.
3. Develop regulations to control growth, development and traffic so as to maintain the historic settlement pattern of compact village separated by rural countryside.
4. Consider future adoption of limited land use regulations as necessary to preserve community values, and to ensure that growth will not outstrip the Town’s ability to provide services or infrastructure at an affordable tax rate.
5. Adopt an impact fees by-law requiring developers to pay a fee proportional to the increased need for town facilities and services.
6. Promote the preservation of desirable existing land uses by interacting with land trusts and other conservation groups, the use of conservation easements, transfer of development rights or other innovative techniques to compensate the landowner while preserving desirable uses.

Royalton Town Plan at 27.

195. Chapter Nine of the Town Plan also sets forth seven *Policies*. As defined, these policies are “definite course of action adopted and followed by a government, institution, body, or individual for the attainment of desired objectives.” The policies are:

1. That customary uses of land – residences, farms, public uses, and home occupations – be permitted throughout the Town. Toxic, noxious or

overly noisy uses are discouraged in all areas. However, agricultural uses employing normal and customary agricultural practices shall be deemed compatible with other uses wherever located.

2. That public facilities be located in South Royalton Village and in Royalton Village, if suitable sites can be found.

3. That preservation of the agricultural aspects of the Town be encouraged.

4. That strip development be discouraged. *Where feasible, commercial development shall be located within or close to South Royalton Village or Royalton Village, re-using existing sites where possible, or in other locations specifically recommended in this plan and its amendments.*

5. That development be discouraged within specific portions of any parcel of land which contains special resources such as marshes, deer habitats, or other wildlife areas.

6. That development be discouraged where emergency services access and public access is difficult, or where water sufficient for fire suppression is unavailable.

7. That development be discouraged where it would generate traffic that overburdens existing highway infrastructure or created traffic safety problems.

Royalton Town Plan at 27 – 28 (emphasis added).

196. Chapter Nine of the Town Plan also establishes the relevant land use districts for future growth in the town and identifies these districts on the “Future Land Use Map”. *Royalton Town Plan at 27 - 29.*

197. The Town of Royalton has no zoning bylaws which implement the Town Plan’s provisions.

Regional Plan

198. The applicable regional plan is the Two Rivers-Ottawaquechee Regional Commission Regional Plan, effective July 30, 2003. (TRORP).

199. The *Definitions of Goals, Policies and Recommendations* section of the Regional Plan states:

A goal represents the state of affairs that a plan is intended to achieve. A policy is an expression of how to meet a goal. A recommendation is a means by which to implement a policy, through an action by a person or group.

TRORP at 3.

200. The Regional Plan sets forth how it is to be used in Act 250 proceedings:

The policies contained in the Plan provide specific performance standards for evaluating development and subdivision proposals for conformance with the Plan. The policies of the Plan shall be used for purposes of evaluating proposals.

TRORP at 199.

201. The “*Future Pattern of Settlement*” Goals in the *Land Use* section of the *TRORP* state, in pertinent part:

Goal 1 — to maintain and improve the accessibility to and the economic viability of existing built-up centers.

Goal 3 — to provide for intensive development only in areas where adequate public services and facilities are available or planned to adequately support such development

Goal 4 — To protect the character of rural areas and their natural resources by avoiding scattered development and incompatible land uses

TRORP at 25 -26.

202. The *Land Use* section of the Regional Plan includes a subsection entitled *Policies for Land Use Settlement*. Within this subsection, the *Policies for Town Centers* state, in parts pertinent to this Project:

(2) Commercial uses, services, offices, wholesale business, industry, transport facilities, and community facilities and services should be encouraged to locate and to provide the broadest possible range of employment in these areas.

TRORP at 27.

203. The Project is located in a “Rural Area” as set forth on Map 4 of 15 of the Regional Plan.

204. Within the *Land Use* section, the Policies for *Rural Areas* state, in parts pertinent to this Project:

(1) Rural lands should be developed only in areas where potential for agriculture, forestry or mineral extraction is relatively low. In circumstances where lands are proposed for residential or non-residential uses, development should be planned to minimize or avoid adverse impacts on these resources. Where no reasonable alternative exists but to locate such development in areas exhibiting high resource potential, the project should be planned so as (sic) minimize the reduction of such potential by providing for reasonable population densities, off-site mitigation, reasonable rates of growth, the use of cluster planning and community planning designed to economize on the cost of roads, utilities, and land usage.

(2) Maintenance or enhancement of the rural environment or setting is a primary goal for rural areas. Accordingly, the development of large undeveloped tracts should occur at a density and design that meets this goal. Rural land proximate to villages and hamlet areas should be considered locations for uses at higher densities. Areas away from existing settlements should accommodate residential uses at lower densities.

(3) In so far as is reasonable, new land development and subdivision should be planned and sited to promote the continued use of agricultural and forestry land for there (sic) intended purposes. To minimize the potential conflicts between agricultural and non-agricultural uses, projects should be planned and sited to substantially satisfy the following:

(a) residential and other non-agricultural uses or structures should be sited on the least productive soils for agricultural and forestry uses;

(b) if the tract or lot contains woodland, non-agricultural uses should be contained within the woodland, or be located along edges of open fields, to enable new construction to be visually absorbed or screened by natural landscape features;

(c) siting of proposed buildings or structures should be planned as to minimize any blocking or interruption of scenic vistas as viewed from a public highway;

(d) dwelling units and accessory buildings or structures, and proposed lots for development or sale, should be laid out or clustered so that they conserve the maximum feasible amount of farm, pasture land, or managed woodland;

(e) roads, sewage disposal and water supply systems, curb cuts, power lines and other land improvements necessary or desirable to accommodate development of such parcels should be planned so as to minimize conflicts with agricultural and forestry operations.

(5) Planning and implementation of developments or subdivisions should reflect the following principles:

(a) balancing of landowners' rights to use their land, with the corresponding rights of abutting and neighboring landowners to live without undue disturbance (e.g., noise, smoke, fumes, dust, odor, glare, stormwater runoff, etc.);

(b) convenience and safety of vehicular and pedestrian movement within the site, and in relation to adjacent areas or roads

(c) adequacy of waste disposal methods and protection from pollution of surface or groundwater.

(d) protection of historic and natural environmental features on the site under review, and in adjacent areas.

(6) Non-residential uses, including service businesses, professional offices and inns are acceptable land uses for rural areas provided that such uses are planned as relatively small in size or scale, are not primary or dominant uses in an area, do not unduly conflict with existing or planned residential, forestry or agricultural uses, and do not unduly affect rural character.

TRORP at 31- 32.

The Project, the Town Plan and the Regional Plan

205. Most of the actual Project construction would be in the Agricultural/Residential District.

206. Because the Project is specific to the Memorial, it would be economically advantageous to Lefgren to locate the Project at the proposed Project site in order to attract the 50,000 people who visit the Memorial annually (some of whom visit the existing gift shop), and because he already owns land on Dairy Hill Road.

207. Locating the Project on Route 14 would allow travelers who do not come to Royalton for the sole purpose of visiting the Memorial to have greater access to the Project; the Project would, however, be in direct competition with established gift shops and restaurants in the area.

208. The Randolph National Bank has committed to finance the Project in its present location.

209. Lefgren exercised his option to purchase the Project Tract from Benoit in December 2004, four months after the Commission had issued its decision denying the Project.

210. Lefgren made substantial investments in road infrastructure to serve his rental property and the existing gift shop.

211. The Project is not proposed to be located within an area identified in the Town Plan as appropriate for commercial development.

212. No properties within South Royalton Village, Royalton Village, the Village District, the Commercial/Industrial District and the Exit 3 Interchange District, (all as identified in the Town of Royalton Town Plan) would be as close to the Memorial as is the Project Tract.

213. In 2003, Lefgren contacted his real estate broker, Dean Goulet, to discuss purchasing additional property from Benoit. Lefgren and Goulet focused on purchasing the Project Tract land from Benoit; Lefgren did not ask Goulet to explore the purchase of any properties in the areas identified by the Town Plan as suitable for commercial use, and Goulet never discussed with Lefgren the purchase of any other properties in 2003.

214. Lefgren did not look at any alternative sites to the Benoit land prior to submitting his Act 250 application.

IV. Conclusions of Law

A. Criteria 1(E) and 4

Under Criterion 1(E) Streams, Times and Seasons must show that “the development . . . of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.” 10 V.S.A. §6086(a)(1)(E); *Re: Pittsford Enterprises, LLP, and Joan Kelley, #1R0877-EB*, Findings of Fact, Conclusions of Law, and Order at 23 (Dec. 31, 2002).

Under Criterion 4, the Board will issue a permit if the Project “[w]ill not cause unreasonable soil erosion or 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). At a minimum, Criterion 4 requires an erosion control plan specific to the Project site. *Id.*; and see, *Re: Woodford Packers, Inc., d/b/a WPI, #8B0542-EB*, Findings of Fact, Conclusions of Law, and Order at 37 (Oct. 5, 2001), *motion to alter denied*, (Feb. 22, 2002), *aff’d, In re Woodford Packers, Inc.*, 2003 VT 60 (2003).

The burden of proof is on Times and Seasons regarding Criteria 1(E) and 4. 10 V.S.A. § 6088(a). *Re: Pittsford Enterprises, supra*, at 23.

The Project would not impact the waters of McIntosh Pond or of the stream that flows out of the Pond.

Times and Seasons has provided credible evidence and the Board has found that the Project would have little impacts on the drainage way along the Project's northern boundary. The Project has been moved away from the drainage way and would provide for a vegetated buffer.

ANR has reviewed the changes made to the Project, and has determined that the Project complies with Criteria 1(E) and 4. The Project's opponents have not presented evidence under Criteria 1(E) and 4.

The Project would employ extensive soil erosion control measures specific to the site. These include silt fences, vegetation, barriers to protect the Class III² wetlands, and protective construction measures.

The Board concludes that the measures taken by Times and Seasons to address the drainage way and soil erosion would ensure compliance with Criteria 1 and 4. See *Re: Pittsford Enterprises, supra*, at 23 (Criterion 4 requires an erosion control plan specific to the Project site); *Re: Howe Center Limited, #1R0770-EB*, Findings of Fact, Conclusions of Law, and Order at 26 (May 4, 1995) (road improvements on or adjacent to brook complied with Criteria 1(E) and 4); *Re: LTH Associates, #4C0526-5-EB*, Findings of Fact, Conclusions of Law, and Order at 4 (Jan. 27, 1988) (soil erosion control plan ensured compliance with Criteria 1(E) and 4).

The Project complies with Criteria 1(E) and 4.

B. Criterion 5

Under Criterion 5, Board or Commission must find that the subdivision or development "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and air ways, and other means of transportation existing or proposed." *In re Agency of Transportation*, 157 Vt. 203, 207 (1991), quoting 10 V.S.A. § 6086(a)(5); *Re: Susan Dollenmaier and Martha Dollenmaier Spoor, #3W0125-5-EB*, Findings of Fact, Conclusions of Law, and Order at 8 (Feb. 7, 2005); *Re: Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc., #8B0301-7-WFP*, Findings of Fact, Conclusions of Law, and Order at 28 (May 16, 2000).

² Act 250 does not protect Class III wetlands. *Re: John J. Flynn Estate and Keystone Development Corp. #4C0790-2-EB*, Findings of Fact, Conclusions of Law, and Order at 2 (May 4, 2004).

The burden of proof is on a party opposing the application with respect to Criterion 5. 10 V.S.A. §6088(b); *Re: Casella Waste Management, Inc., supra*, at 28; *Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB*, Findings of Fact, Conclusions of Law and Order at 32 (May 25, 1999), *aff'd, OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000). The applicant, however, has the burden of producing sufficient evidence for the Board to make positive findings as to Criterion 5. 10 V.S.A. §6088(b); *Re: John J. Flynn Estate, supra*; *Re: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB*, Findings of Fact, Conclusions of Law, and Order at 50 (Dec. 8, 2000). *Re: Casella Waste Management, Inc., supra*, at 28; *Re: Richard and Barbara Woodard, #5L01267-EB*, Findings of Fact, Conclusions of Law, and Order at 14 (Dec. 18, 1997).

The Board cannot deny a project for failure to satisfy Criterion 5, but it may impose reasonable conditions and requirements to alleviate burdens created. 10 V.S.A. § 6087(b); *In re Agency of Transportation, supra*, 157 Vt. at 207; *In re Pilgrim Partnership*, 153 Vt. 594, 597 (1990), *Re: Susan Dollenmaier, supra*; *Re: John J. Flynn Estate, supra*, at 20; *Re: Casella Waste Management, Inc., supra*, at 28.

Safety

Safe travel on a right of way is in the public interest. *In re Pilgrim Partnership, supra*, 153 Vt. at 596.

Adequate sight distances are an element of the Board's safety consideration. *Re: Susan Dollenmaier, supra*; *Re: Old Vermonter Wood Products, #5W1305-EB*, Findings of Fact, Conclusions of Law, and Order at 16 - 18 (Aug. 19, 1999), citing *Re: Richard and Barbara Woodard, #5W1262-EB*, Findings of Fact, Conclusions of Law, and Order at 14 (Dec. 12, 1997); *Re: Town of Barre, #5W1167-EB*, Findings of Fact, Conclusions of Law, and Order at 19 (Jun. 2, 1994). Whether sight distances are adequate is a function of the length of unobstructed views and speed limits. *Re: Old Vermonter Wood Products, supra*, at 17. Here, the sight distances meet the Agency of Transportation's B-71 standards; the Board concludes that the Project satisfies stopping and corner sight distance concerns.

Unreasonable congestion

The Board may impose permit conditions to address congestion issues. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).

The Board does not find that the Project would cause congestion. First, buses which would bring visitors to the Project would first travel up Dairy Hill Road to the

Memorial and then visit the Project on their way back down Dairy Hill Road to Route 14; turns would be primarily right-hand turns off Dairy Hill Road into the Project driveway; it is doubtful that buses would need to stop or line up on Dairy Hill Road waiting to make left-hand turns into the Project.

Second, because the Project would primarily draw those visitors who already travel on Dairy Hill Road to the Memorial, any additional vehicles added to the Road by the Project would be insignificant.

Lastly, ten percent of the Memorial's 50,000 visitors come in both July and October. As 48 - 50 tour buses visit the Memorial each year, about four to five buses should visit during each of the peak months of July and October. Even if all of these tour buses stopped at the Project before they visited the Memorial, thus making left-hand turns off Dairy Hill Road, these turns are insignificant in terms of either safety or congestion concerns.

Conclusion as to Criterion 5

The Board finds that Times and Seasons has met its burden of producing evidence sufficient to enable the Board to make positive findings on Criterion 5. The Board further finds that the opponents to the Project have not met their burden of proving that the Project would cause unreasonable congestion or unsafe conditions with respect to use of the highways.

C. Criterion 8

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).

While the burden of proof under Criterion 8 is on those who oppose the Project, 10 V.S.A. §6088(b), an applicant for a permit must provide sufficient information for the Board to make affirmative findings. *Re: Susan Dollenmaier, supra*, at 9; *Re: Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 9, 2002); *and see, Re: Southwestern Vermont Health Care Corp.*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Feb. 22, 2001); *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.

Adverse Effect

The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. First, it determines whether the project will have an adverse effect under Criterion 8. *Re: Susan Dollenmaier, supra*, at 10, citing *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., #3W0411-EB and #3W0439-EB*, Findings of Fact, Conclusions of Law, and Order at 17 -19 (Nov. 4, 1985).

[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.

Re: James E. Hand, supra, at 25, citing *Re: Quechee Lakes Corp., supra*, at 18. In other words, if a project “fits” its context, it will not have an adverse effect. *Re: Talon Hill Gun Club and John Swinington, #9A0192-2-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (June 7, 1995). If the Board concludes that the Project has an adverse effect under Criterion 8, the Board moves to the second part of the test and evaluates whether the adverse effect is “undue.”

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 insure 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., #2W5051-8-EB, Findings of Fact, Conclusions of Law and Order at 9 (Dec. 18, 1986); *and see, Re: Main Street Landing Company and City of Burlington, #4C1068-EB*, Findings of Fact, Conclusions of Law, and Order at 17- 18 (Nov. 20, 2001).

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: Southwestern Vermont Health Care Corp., supra*, at 29; *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).

The context of the Project

To determine whether the Project is adverse in terms of aesthetics - whether it will “fit” the context of the area where it will be located - the Board first must determine what that context is. *Re: Susan Dollenmaier, supra*, at 11, citing *Re: Hannaford Brothers Co., supra*, at 14; *Re: The Van Sicklen Limited Partnership, #4C1013R-EB*, Findings of Fact, Conclusions of Law, and Order at 36 (Mar. 8, 2002).

The determination of the Project's context is one that is crucial to the Criterion 8 analysis; if the Project “fits” its context, then the Project, by definition, is not adverse, and the Board’s inquiry under Criterion 8 ends. *Re: John J. Flynn Estate, supra*, at 24 n. 6; *Re: Hannaford Brothers Co., supra* at 14.

The Project is in a scenic, rural, agricultural/residential area.

The impact of the Project on its context

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.

Assessing the impacts of a project is a fact-specific inquiry. On the one hand, the Board has found that a project would have an adverse impact on aesthetics because size and density of its units would differ from surrounding structures. *Re: Brewster River Land Co., LLC., #5L1348-EB*, Findings of Facts, Conclusions of Law, and Order at 15 (Feb. 22, 2001). On the other hand, the Board has found that a large-scale residential development in a rural area (on Dorset Street in South Burlington along the Shelburne Town line) would not have undue adverse effect. *Re: MBL Associates, #4C0948-EB (Altered)*, Findings of Fact, Conclusions of Law, and Order (Jan. 30, 1996), *aff'd, In re MBL Associates, Inc.*, 166 Vt. 606 (1997).

The proposed Project - a gift shop and restaurant - is a retail use located in an agricultural and rural residential setting with surrounding views of open spaces, small, rural residences, farms, and forested hill-sides. The commercial nature of the Project – its building, driveway, and parking areas - would differ substantially from the existing character of the area, would dominate the foreground views to the west from Dairy Hill Road, and would negatively affect the distant views of the mountains across the White River valley.

The Board concludes that the Project does not fit its context and is therefore adverse. *Compare, Re: Susan Dollenmaier, supra*, at 12 (two-story, 20,000 square foot commercial retail center with associated parking and access drives located in a mostly rural and rural residential area with other commercial enterprises in the immediate vicinity and within one-half mile of the Project is adverse to its context); *Re: Herbert and Patricia Clark, # 1R0785-EB*, Findings of Fact, Conclusions of Law and Order at 34 (Apr. 3, 1997) (retail hardware store in a relatively undeveloped area on outskirts of town beyond existing commercial enterprises would create an adverse aesthetic impact);

Undue Adverse Effect

Because the Board concludes that the Project has an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is “undue.” The Board will conclude that adverse effect is “undue” if it reaches a positive finding with respect to any one of the following factors:

Does the Project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

Does the Project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?

See, Re: Quechee Lakes Corp., supra, at 19 -20. *And see, Re: Black River Valley Rod & Gun Club, Inc., supra*, at 19 -20; *Re: James E. Hand, supra*, at 25 -29.

Written Community Aesthetic Standard

Under this first factor, the Board must determine whether the Project violates a clear, written community standard “intended to preserve the aesthetics or scenic beauty of the area” where the project would be located. *Re: Southwestern Vermont Health Care Corp., supra*, at 33 – 34; *Re: Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 24 (May 18, 2001); *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action, #2WO694-I-EB*, Findings of Fact, Conclusions of Law, and Order at 36 (Dec. 21, 2000).

In evaluating whether a project violates a clear written community standard, the Board routinely looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists and should be applied in the review of the aesthetic impacts of a project. *See, Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane, #4C1004R-EB*, Memorandum of Decision at 10 - 11 (Nov. 25, 2003); *Re: Hannaford Brothers Co., supra*, at 18; *Re: Raymond and Centry Duff, #5W0952-2-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 29, 1998); *Re: Herbert and Patricia Clark, supra*, at 35 – 37; *Re: Thomas W. Bryant, supra*, at 22; and *see Re: Nile and Julie Duppstadt & John and Deborah Alden, #4C1013-EB*, Findings of Fact, Conclusions of Law, and Order at 34 (Apr. 30, 1999) (town plan can be an authoritative source of clear community aesthetic standards, and it is therefore appropriate for the Board to rely upon such a Plan “in determining whether [a] Project violates the community standard.”)

The Board explained the intent of the clear, written community standard in the *Re: Town of Barre, #5W1167-EB*, Findings of Fact, Conclusions of Law, and Order (June 2, 1994):

In adopting the first standard in the Quechee analysis, the Board intended to encourage towns to identify scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road, for example. These designations would assist the district commissions and the board in determining the scenic value of specific resources to a town, and would guide applicants as they design their projects.

Id. at 21.

At issue in *Barre* was the following portion of a town plan discussing scenic resources:

In the 1989 planning survey dealing with future growth, preservation of visual beauty was the highest priority of the residents polled. Eighty-nine percent of those responding said that planning to retain visual beauty was necessary. . . . *Barre* Town's visual beauty is an asset which the Town has to offer to any prospective resident or employer who is considering relocating to the community. . . . [T]he Town of *Barre*'s policy regarding aesthetics is one of encouraging enhancement and preservation of natural areas, views, and vistas.

Id. at 13 -14.

In *Barre*, the Board ruled that the above quoted language did not rise to the level of a clear, written community standard, because “they apply generally to the community at large rather than to specific scenic resources in the project area.” *Id.* at 21.

In contrast to *Barre* was the town plan provision at issue in *Re: Taft Corners Associates, #4C0696-11-EB (Remand)*, Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995). The Board found that the town plan identified as “significant” the views of the mountains to the east and west and foreground views from I 89 of “the high ground at the water tower and other open spaces . . .” *Id.* at 19. The Board quoted the town plan:

Taft Corners should feature quality design, compatible with its setting. Buildings should be architecturally compatible and should be enduring, not transient. Their siting should enhance the setting, and particularly the east-west views. The placement of buildings should define public spaces, such as the streets, courtyards and greens. The area should be well landscaped, and feature green spaces, open spaces, trails and other opportunities for human interaction.

Id. at 18 -19. Based on the above language, the Board found a clear, written community standard “which contains provisions regarding aesthetics” that applied to the project. *Id.* at 42; accord, *Re: Herbert and Patricia Clark, supra* (Brandon Town Plan constituted clear, written community standard where it established and defined three categories of scenic resources, contained an inventory that described 30 scenic areas, and provided recommended policies and implementation measures for protecting the scenic value and resources of the listed areas and where the proposed

project was located in one of the scenic areas listed in the inventory); *Re: The Mirkwood Group and Barry Randall, #1R0780-EB*, Findings of Fact, Conclusions of Law, and Order at 22 - 23 (Aug. 19, 1996) (Pittsford zoning ordinance constituted clear, written community standard where a proposed radio tower was located within a conservation district and the ordinance contained a clear statement of the community policy against use of conservation district lands for anything other than dwellings, forestry, and agriculture).

The Board must therefore determine whether there exists a community aesthetic standard that is applicable to the Project.

Royalton Town Plan

Concerning the Resource Conservation District, the Royalton Town Plan states:

The purpose of the resource conservation district is to protect the natural resource value of lands that are essentially undeveloped...; or include irreplaceable, limited, or significant natural, recreational, or scenic resources.... Due to... the critical resources located within it, only certain uses should be allowed. These are: low-density residential development, limited outdoor recreation uses, conservation uses, and forestry practices that are compatible with the district purpose and do not require additional facilities and services.

Royalton Town Plan at 28 - 29.

In its discussion of its Agricultural/Residential District, the Royalton Town Plan states:

The purpose of the agricultural/residential district is to protect lands with an economic capability for agriculture that are now predominantly undeveloped except for uses associated with agriculture or forestry, and to ensure that residential and other compatible uses are placed at densities appropriate with the physical capability of the land.... [O]nly low-density residential and recreational development that utilizes existing facilities, that can adequately dispose of its sewage, and that is compatible with the district purposes should be permitted. Any proposed Development should not harm any irreplaceable, unique or scarce resources or any natural areas.

Royalton Town Plan at 29.

Chapter Two of the Town Plan specifically discusses Royalton's natural and scenic resources, which are "greatly appreciated by the citizens of Royalton as the source of much of the community's beauty and character." *Royalton Town Plan* at 6. The Plan goes on to identify features which "have been identified, without limitations, as contributing to the essential rural character of the Town even as growth and change may occur." *Id.* Among these resources, the Town Plan identifies specific "scenic areas" in Royalton:

As used in this Plan, "scenic areas" are areas which by general consensus are considered visual assets to the Town such as vistas, landscapes, *sections of roads and highways*.... These scenic areas help to define the present character of Royalton and are an asset which attracts visitors who, while they are here, provide income to Town retailers, restaurants and inns. Specific areas recognized include: ... *views from Dairy Hill looking west*....

Royalton Town Plan at 8 (emphasis added).

The Project site is located on Dairy Hill in both the Agricultural/Residential District and the Resource Conservation District.

The Town Plan provisions noted above establish a clear community standard that applies to the Project's location, which is located off of Dairy Hill Road in the Resource Conservation and Agricultural/Residential Districts. The Board has previously found similar provisions to constitute clear written community standards. *See, Re: Southwestern Vermont Health Care Corp., supra*, at 33 - 34 (project violates community standard in town plan which targets precise location of project site as a scenic resource which "shall be protected"); *Re: The Mirkwood Group, supra*, at 22 - 23 (Pittsford zoning ordinance constituted clear, written community standard where a proposed radio tower was located within a conservation district and the ordinance contained a clear statement of the community policy against use of conservation district lands for anything other than dwellings, forestry, and agriculture); *Re: Leonard R. Lemieux, #3R0717-EB*, Findings of Fact, Conclusions of Law, and Order at 9 - 10 (Mar. 1, 1995) (quarry project will violate clear, written community standard where protection of aesthetic heritage and scenic vistas is dominant policy of town plan).

The Project would impair the scenic views specifically identified in the Royalton Town Plan as an important scenic asset.² Therefore, the Project does not comply with the written community standard relating to aesthetics in the Town Plan.

Times and Seasons notes that the Town Plan includes statements that, with respect to telecommunications and other towers, “It is the policy of the town that the policies of this section serve as a clear written community standard intended to preserve the aesthetics or scenic beauty of the Town of Royalton,” and that this provision is to be used in Act 250 proceedings. *Royalton Town Plan* at 13. Times and Seasons notes further that this is the only instance where the phrase “clear written community standard” appears in the Plan. Times and Seasons thus argues that this sole use of explicit *Quechee* analysis language means that this is the *only* clear written community standard in the Town Plan; to rule otherwise, Times and Seasons contends, would mean that “even after an applicant locates explicit *Quechee* analysis language, he still has to divine whether other provisions can be cobbled together to create a standard.”

The Board appreciates Royalton’s use of specific language from the *Quechee* decision in the section of the Town Plan that addresses towers, but it cannot agree with Times and Seasons that the inclusion of such a reference in one part of the Plan must lead to the conclusion that other statements in the Plan - which also fit the Board’s precedent as to what constitute “written community standards” - cannot be given any weight within this Criterion 8 consideration. Nothing in the Plan suggests this result, and the Board hesitates to speculate on the Town’s intentions in this regard. Indeed, considering the fact that the Board has, on many occasions, noted the failure of towns to write provisions in their plans that can be given effect within the

² While some Board Members might not consider these views to be particularly scenic, this is not the Board’s judgment to make. A “community standard” is one that the appropriate “community” sets; it is not one that can be imposed or ignored by the Board. *C.f., Re: Stonybrook Condominium Owners Association*, DR #385, Findings of Fact, Conclusions of Law, and Order at 9 (Sep. 18, 2001) (if a structure is listed on the State register as an historic site, Act 250 has no discretion to declare such structure not to be historic); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶12 (6/26/03) (“The plain language of the statute states that the Secretary of ANR is authorized to make determinations as to what constitutes a floodway or a floodway fringe”), affirming *Re: Woodford Packers, Inc., d/b/a WPI*, #8B0542-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 2001), *motion to alter denied*, Memorandum of Decision (Dec. 20, 2001). We must respect Royalton’s assessment, as stated in its Town Plan, concerning those views that the Town considers to be worthy of protection.

Act 250 process, see cases cited at pages 58 - 59, *infra*, and has often urged towns to therefore take a more active role in regulating land uses within their borders, see, e.g., *Re: EPE Realty Corporation and Fergessen Management, Ltd, #3W0865-EB*, Findings of Fact, Conclusions of Law, and Order at 43 n. 10 (Nov. 24, 2004), it would be wrong for the Board to disregard the Royalton Town Plan's provisions on scenic areas based upon an unsubstantiated belief that the absence of *Quechee* language within those provisions indicated an intention by the Town that its provisions should not be given effect within the Act 250 process.³

Times and Seasons also argues that the Town has not designated Dairy Hill Road as a scenic road. While this may be the case, the Town Plan does not address its focus on Dairy Hill Road as a "scenic road"; rather, it protects views from Dairy Hill.

Lastly, citing *Re: Town of Barre, supra*, Times and Seasons contends that the Town Plan cannot be a "clear, written community standard" which protects views from Dairy Hill, because the Town Plan does not specifically identify where "Dairy Hill" is.

The issue, as noted in the *Re: Town of Barre* decision, is whether the Town Plan's use of the words "Dairy Hill" is sufficient to "guide applicants as they design their projects." *Id.*, at 21. Here, the Project site is located on Dairy Hill Road, near the highest point of the Road. The Board concludes that these facts, in and of themselves, provide Times and Seasons with a reasonable and fair warning that its Project is on Dairy Hill, a warning that would be sufficient to guide a reasonable applicant in the design of its project.

Two Rivers-Ottawaquechee Regional Plan's (TRORP)

Portions of the TRORP establish aesthetic standards. Certain types of areas are specifically mentioned as worthy of aesthetic protection: "scenic vistas as viewed from a public highway," *TRORP* at 32, and "areas of high scenic quality which are ... noted examples of the dominant characteristics of an area." *TRORP* at 104. In these areas, the Regional Plan suggests that "siting of proposed buildings or structures should be planned as to minimize any blocking or interruption of (such) scenic vistas," *TRORP* at 32, and "buildings ... should be planned so that building form, massing, and other features are compatible with dominant patterns of the area or site and in ways that reduce the apparent scale of the project on the site." *TRORP* at 106.

³ This is especially important where, as here, a town plan identifies the town's natural and historic resources, and sets, as one of the goals of the plan, the protection and preservation of these resources. See, *Royalton Town Plan* at 4.

Perhaps most relevant is the language in the *Policy 2* of the *Scenic Resources* subsection of the *Historic, Cultural, Archeological and Scenic Resources* section of the Regional Plan:

2) Where land development or subdivision is proposed in the foreground of a highly scenic location with distant views, design plans should work towards the goal of retaining or enhancing the view. New buildings or structures should be as unobtrusive as reasonable. To accomplish this, structures or buildings are encouraged to be designed so as to be compatible with the traditional pattern, scale, size, form, etc., and not unnecessarily block distant views from highways noted as especially scenic. Buildings or structures are encouraged to be sited in less visible areas such as at the edges of or within wooded areas rather in open meadows. Clustering of buildings or structures is encouraged to leave vistas open on the site. Design of structures which is not excessive and do not unduly compete with the existing natural or cultural focal point is encouraged.

TRORP at 105.

In *Re: EPE Realty Corporation*, the Board found that this same *Scenic Resources* section, which includes within its listing of *Prominent Landscapes* both “areas immediately adjacent to scenic corridors” and “areas of high scenic quality which are ... noted examples of the dominant characteristics of an area,” *TRORP* at 104, “provides a standard for evaluating the aesthetic impact of the proposed project with regard to protection of scenic public corridors...” *Re: EPE Realty Corporation, supra*, at 30,

The question, then, is whether the Project conforms to the aesthetic standard established by the *TRORP*. Here, the Town Plan has designated “views from Dairy Hill looking west” as one of the Town’s “scenic areas.” *Royalton Town Plan* at 8. As such, these views must be considered to be an “area of high scenic quality” such that they are deserving of protection under the *TRORP* as well as the Town Plan.

The Project does not comply with the written community standards evidenced by the Town Plan or the *TRORP* and thus does not meet the aesthetic requirements of Criterion 8.

Shocking or offensive

Under this second aesthetic factor, the Board must determine whether the Project offends the sensibilities of the average person. This includes whether the Project would be so out of character with its surroundings or so significantly diminish the scenic qualities of the area as to be offensive or shocking to the average person. *Re: Pike Industries, Inc. and William E. Dailey, Inc.*, #1R0807-EB, Findings of Fact, Conclusions of Law, and Order at 18 - 19 (June 25, 1998); *Re: Nile and Julie Dupstadt, supra*, at 35; and see, *Re: Robert B. & Deborah J. McShinsky*, #3W0530-EB, Findings of Fact, Conclusions of Law, and Order at 9 (April 21, 1988), *aff'd, In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990).

The Board concludes that the Project, as designed, would not be offensive or shocking to the average person.

Mitigation

Pursuant to 10 V.S.A. §6086(c), the Board has the authority to impose conditions necessary to alleviate adverse impacts with respect to the ten Act 250 criteria. As long as a condition constitutes a proper exercise of the police power and alleviates adverse effects that would otherwise be caused by a project, the Board may impose the condition. Any condition must be reasonable. *In re Denio*, 158 Vt. 230, 240 (1992).

In judging whether there should be mitigation, the Board looks to the steps that the applicant has taken or may take to reduce the aesthetic impacts of a project on the character of the area where it is proposed; the Board asks whether there are generally available mitigating steps that have or should be taken to improve the harmony of the project with its surroundings. See *Re: Thomas W. Bryant, supra*, at 22 (height and exterior color restrictions on homes, plantings to screen the development, covenants to govern future activities on the site, and retained open space all comprised generally available mitigating steps to alleviate adverse effects of subdivision on the surrounding area).

Times and Seasons has proposed to plant fifteen trees as screening - - twelve white pines near the intersection of the Project's driveway and the Road and three white pines directly adjacent to the Project building. Times and Seasons has not proposed other screening for views of the Project from Dairy Hill Road.

The Board finds this mitigation to be inadequate. While the proposed trees would provide some visual buffer for the Adkins, they would not screen views of the

Project from Dairy Hill Road. The twelve white pines southwest of the Project's entry driveway would only briefly screen the Project when first seen by a traveler proceeding up Dairy Hill Road; they would not screen the Project for most of its frontage on the Road. The second group of three pines would partially screen the Project's six parking spaces but would not screen the building or bus parking.

Were the Board to approve this Project, it would require that Times and Seasons provide better and more diverse screening (hardier, shorter species of vegetation) for travelers coming up Dairy Hill Road from Route 14; such screening would be planted on the downhill side of the access driveway.

The Board therefore finds that Times and Seasons has failed to take available mitigation measures to minimize the aesthetic impact of the Project. See, e.g., *Re: Didace and Susan LaCroix*, #3W0485-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 27, 1987).

D. Criteria 9(B) and 9(C)

Criterion 9(B)

Pursuant to 10 V.S.A. §6086(a)(9)(B), before issuing a permit for the development of primary agricultural soils, the Board must find that the project "will not significantly reduce the agricultural potential of the primary agricultural soils," or that

(i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and

(ii) there are no nonagricultural or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose; and

(iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage; and

(iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential.

“Primary agricultural soils” are defined as:

Soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation. If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils.

10 V.S.A. §6001(15).

The burden of proof under Criterion 9(B) is on Times and Seasons. 10 V.S.A. §6088(a); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact, #4C1117-EB*, Findings of Fact, Conclusions of Law, and Order at 6 (May 27, 2004);

The existence of primary agricultural soils at the Project Site.

In evaluating a project for conformance with Criterion 9(B), the Board must first determine whether the site contains primary agricultural soils. *Re: Steven L. Reynolds, supra; Southwestern Vermont Health Care Corp., supra*, at 37. Here, the 7.3-acre Project Tract contains 2.8 acres of primary agricultural soils.

Reduction in agricultural potential of primary agricultural soils.

Once the Board has determined that the site contains primary agricultural soils, it must determine whether the Project would significantly reduce the agricultural potential of the soils. *Re: Steven L. Reynolds, supra*, at 7; *Re: Southwestern Vermont Health Care Corp., supra*, at 37. “The Board interprets the word ‘potential’ to require a consideration of whether the design and location of the subdivision on the property will preclude agricultural use of the primary agricultural soils and not whether agricultural use of those soils is likely in light of current economics and surrounding land uses.” *Re: Raymond Duff, #5W0921-2R-EB* (Revised), Findings of Fact, Conclusions of Law & Order at 13 (June 14, 1991).

The Project would significantly reduce the agricultural potential of 1.9 acres of the 2.8 acres of primary agricultural soils on the Project Tract, soils which support and contribute to an existing economic agricultural operation. The loss of approximately

two-thirds of the primary agricultural soils on the site constitutes a significant reduction in the agricultural potential of such soils. *See, Re: Steven L. Reynolds, supra*, at 7; *Re: Southwestern Vermont Health Care Corp., supra*, at 38.

Subcriteria of Criterion 9(B)

As the Board has concluded that the Project significantly reduces the agricultural potential of the soils, the Board can reach an affirmative conclusion as to Criterion 9(B) only if Times and Seasons either engages in off-site mitigation under the standards established by the *Re: Southwestern Vermont Health Care* decision (which Times and Seasons has chosen not to do) or meets its burden as to the four subcriteria of 9(B). *Re: Steven L. Reynolds, supra*, at 7.

Subcriterion (i)

Under subcriterion (i), an applicant must demonstrate that he “can realize a reasonable return on the fair market value of his land *only* by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential.” 10 V.S.A. §6086(a)(9)(B)(i) (emphasis added). *Re: Steven L. Reynolds, supra*, at 7; *Re: Southwestern Vermont Health Care Corp., supra*, at 46. As the Board wrote in *Re: Thomas W. Bryant, supra*, at 26 and 28-29:

[Subcriterion 9(B)(i)] requires that the Applicants demonstrate that they can realize a reasonable rate of return *only* by devoting the property to uses which will reduce the soils’ potential. This criterion requires the computation of a fair market value for the property and the consideration of alternative land uses which will not significantly reduce the agricultural potential of the primary agricultural soils found on-site, including different designs for a residential or commercial project that use less of the primary agricultural soils. The rates of return from these alternative uses must then be related to the fair market value of the property. Evidence must also be provided concerning what is a reasonable rate of return for each specific proposal.

(Emphasis in original). *And see Re: Nile and Julie Dupstadt, supra; Homer and Marie Dubois, #4C0614-3-EB*, Findings of Fact, Conclusions of Law, and Order at 7 (May 5, 1988) (subcriterion (i) was not satisfied because the applicant could not demonstrate that there are no other economically feasible land uses which will not significantly reduce the agricultural potential of the soils)

In discussing subcriterion (i), the Board has also written:

That provision does not ask for a comparison of monetary return if the site is used solely for agricultural purposes versus use for development as proposed in the application.

Rather, the Applicants must demonstrate that there is *no land use through which they can secure a reasonable rate of return on their investment which does not significantly reduce agricultural potential*. For example, if a reasonable return could be secured by locating four single-family houses on two of the 10.3 acres, allowing the retention of the residual in agricultural production, then subcriterion (i) cannot be satisfied. It is the Applicants' burden to demonstrate that other agricultural and non-agricultural uses of the site which do not diminish the soil's potential will not afford the Applicants a reasonable return.

Re: Marvin T. Gurman, #3W0424-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 10, 1985) (emphasis added).

The Board has also made it clear that it does not compare rate of return from development against such return from agricultural use in determining this subcriterion:

Finally, we expressly reject the assertion made by all parties in this appeal that because the land is potentially and immediately more valuable in nonagricultural development than it is in agricultural use, its conversion to a subdivision is sanctioned by the subcriterion. The subcriterion is satisfied only when the applicant is unable to realize a reasonable return on the fair market value of his land in agricultural use. We are not asked to determine what its relative value might be upon conversion if this development plan were to succeed.

Re: Richard and Napoleon LaBrecque, #6G0217-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Nov. 17, 1980), cited in Re: Steven L. Reynolds, supra, at 8; Re: Southwestern Vermont Health Care Corp., supra, at 47.

Thus, a "reasonable rate of return" does not mean the highest rate of return possible for a particular parcel, but only that a reasonable return on the fair market value of the property is obtainable through agricultural or other uses that will not result in the significant reduction of the primary agricultural soils at the project site.

Re: Steven L. Reynolds, supra, at 8, quoting, *Re: Southwestern Vermont Health Care Corp., supra*, at 47.

The burden is on Times and Seasons to provide the evidence to satisfy the requirements of subcriterion (i). 10 V.S.A. §6088(a); *Re: Nile and Julie Dupstadt, supra*, at 40.

The first step to an analysis of subcriterion (i) is to establish the fair market price for the land in question. *Re: Southwestern Vermont Health Care Corp., supra*, at 47; *Re: Thomas W. Bryant, supra*.

Board precedent is that sales price is not a valid measure of fair market value. *Re: Southwestern Vermont Health Care Corp., #8B0537-EB*, Findings of Fact, Conclusions of Law, and Order at 47 -48 (Feb. 22, 2001). Times and Seasons has, however, referred the Board to a decision by the Vermont Supreme Court that holds that sales price may form the basis of a finding on fair market value. In *Barrett/Canfield, LLC v. City of Rutland*, 171 Vt. 196 (2000), the Court held that a contemporaneous purchase between a willing buyer and a willing seller made in good faith was evidence of a parcel's fair market value for tax assessment purposes.⁴

While the Board notes that the *Barrett/Canfield* case concerned the establishment of fair market value within the context of statutes concerning the taxation of real property, 32 V.S.A. §3481(1), the Board agrees that a bona fide sale may, under defined circumstances, establish a fair market value for Criterion 9(B)(i) purposes. It is important to note that not any sale between two parties will qualify; the *Barrett/Canfield* court noted that, "It is undisputed that the sale was made in good faith between two corporations at arms-length." 171 Vt. at 197. The Court wrote:

We must consider, therefore, what makes a sale a bona fide sale. A bona fide sale is one that occurs between a willing buyer and a willing seller, at arms-length, in good faith, and not to "rig" a fair market value. An "arms-length" transaction is voluntary, generally takes place in an open market, and one in which the parties act in their own best interest.

171 Vt. at 198 (internal citations omitted). The Court placed the burden of showing that the sale was bona fide on the person who wishes to use sale price as evidence of

⁴ The Court's focus in this case was, however, on the level of a property's market exposure in order to allow the purchase price of the parcel to constitute its fair market value.

fair market value. *Id.*, at 200 (“As long as bona fide contemporaneous sale is shown....”)

We have no such showing here. We merely have evidence that a sale occurred, not the circumstances surrounding the sale. Thus, the Board cannot accept the sales price as evidence of the Project Tract’s fair market value, and compliance with 10 V.S.A. §6086(a)(9)(B)(ii) is not established.

The Board notes further that, even if Times and Seasons could use the sale price to establish the Project Tract’s fair market value, it has not met the other elements of subcriterion (i). As the Board noted in its August 2005 Decision at 52, “Under subcriterion (i), an applicant must demonstrate that he ‘can realize a reasonable return on the fair market value of his land *only* by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential.’ 10 V.S.A. §6086(a)(9)(B)(i) (emphasis added).” No such demonstration was presented; no reasonable rate of return was suggested, nor were alternative projects – which would not have impacts on primary agricultural soils as great as the ones created by the proposed Project – explored or presented to the Board.⁵ See Decision at 52, citing *Re: Nile and Julie Dupstadt & John and Deborah Alden*, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Apr. 30, 1999).

Subcriterion (ii)

While space and design limitations and aesthetic considerations make the area where the existing gift shop is located unsuitable for the Project, other than a statement that setting the proposed Project near the existing residence would raise aesthetic concerns, no evidence was presented concerning the suitability of the 44.5 +/- acres to the west of the Project Tract owned by Lefgren.

Subcriteria (iii) and (iv)

There are conclusory statements by Times and Seasons’ engineer that “the Project complies with the elements of the alternative test set forth at sub-parts (i)-(iv) of Criterion 9(B).” Exhibit TS-1, Answer 61. No other evidence was presented on subcriteria (iii) or (iv). The Board concludes that Times and Seasons does not meet its burden on these subcriteria.

⁵ Indeed, while not essential to its decision here, the Board notes that the existing gift shop appears to be a successful business venture, and while Times and Seasons believes that there are restrictions on its expansion, some increase in its size might be possible.

Conclusion as to Criterion 9(B)

Times and Seasons has not met its burden of proving the Project complies with Criterion 9(B).

Criterion 9(C)

The Project would impact 4.6+/- acres of a total of 63.3 +/- acres of secondary agricultural soils. There would be no significant reduction in the potential of the remaining 58.7 +/- acres for commercial forestry. The Project would not impact any forestry soils.

The Project complies with Criterion 9(C).

E. Criterion 9(K)

Criterion 9(K) states that

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands."

10 V.S.A. §6086(a)(9)(K). The burden of proof under Criterion 9(K) is on the applicant. 10 V.S.A. §6088(a); *Re: John J. Flynn Estate, supra*, at 21.

The Board conducts two separate inquiries under Criterion 9(K) with respect to impacts on public facilities. First, the Board examines whether the proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency, or safety of such facilities, or (b) the public's

use or enjoyment of or access to such facilities. *Re: Green Meadows Center, LLC, supra*, at 43; *Re: Munson Earth Moving Corp., #4C0986-EB*, Findings of Fact, Conclusions of Law, and Order at 11 (Apr. 4, 1997), *rev'd on other grounds, In re Munson Earth Moving Corp.*, No. 97-327 (Vt. Aug. 13, 1999); *Re: Swain Development Co., #3W0445-2-EB*, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).

Dairy Hill Road

One concern under Criterion 9(K) in this case is the Project's impact Dairy Hill Road. Public facilities include public highways. *Re: Upper Valley Regional Landfill, #3R0609-EB*, Findings of Fact, Conclusions of Law, and Order at 45 - 47 (Nov. 12, 1991); *Re: Swain Development Corp., supra*, at 34.

While the inquiry under Criterion 9(K), at least as to roads, is similar to that conducted under Criterion 5, it is not the same:

Under Criterion 5, the Board looks to see whether a proposed project will create traffic conditions which are unsafe or traffic congestion which is unreasonable. The Board may not deny a project simply because such conditions are present. In contrast, under Criterion 9(K), the Board examines whether a proposed project will *materially jeopardize or interfere* with a public facility's function, safety, or efficiency, or the public's use or enjoyment of or access to such facilities. Because public facilities include public highways, traffic conditions on those highways may be examined under Criterion 9(K), and if material jeopardy or interference will be created, the proposed project may be denied. Thus, the inquiry into traffic safety under Criterion 9(K) involves a higher threshold of material jeopardy or material interference, which is absent from the language of Criterion 5. This conclusion is consistent with the fact that a proposed project may not be denied under Criterion 5 but may be denied under Criterion 9(K).

Re: Swain Development Corp., supra, at 34; cited in, *Re: The Van Sicklen Limited Partnership, #4C1013R-EB*, Memorandum of Decision at 8 (Jun. 8, 2001), and *Re: Pittsford Enterprises, LLP, supra*, at 23; *Re: John A. Russell Corporation, #1R0849-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (July 10, 2001).

For the reasons stated above under Criterion 5, the Board concludes that Times and Seasons has met its burden of proof under Criterion 9(K). Here, the Project complies with Criterion 5. Because Criterion 9(K) sets a higher threshold than Criterion 5, it follows that the Project must also comply with Criterion 9(K). The Board

therefore concludes that this Project does not necessarily or unreasonably endanger public investment in Dairy Hill Road, and does not materially jeopardize or interfere with the function, efficiency or safety of, or the public's use of enjoyment of, the road.

McIntosh Pond

McIntosh Pond is also a public facility under Criterion 9(K).

Based on the evidence under Criteria 1(E), 4, - the lack of any hydrologic connection between the Project and McIntosh Pond, and the visual disconnect between McIntosh Pond and the Project, - the Project complies with Criterion 9(K) with respect to McIntosh Pond. See, *Re: John J. Flynn Estate, supra*, at 22 (148 units of housing in 33 buildings on approximately 13 acres complied with Criterion 9(K) with respect to Lake Champlain).

F. Criterion 10

Before issuing a permit, the Board must find that the Project is in conformance with “any duly adopted local or regional plan(s)....” 10 V.S.A. §6086(a)(10). The burden of proof is on Times and Seasons. 10 V.S.A. §6088(a); *Re: John J. Flynn Estate, supra*, at 26.

Royalton Town Plan

There are two inquiries that the Board must make in its evaluation of whether a project conforms to a Town Plan. 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? *Re: Peter S. Tsimortos, #2W1127-EB*, Findings of Fact, Conclusions of Law, and Order at 18 (Apr. 13, 2004).

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 *Re: John A. Russell Corporation and Crushed Rock, Inc., #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); *Re: Casella Waste Management Inc.*, *supra*, at 41.

But despite the fact that town plans are often couched in “abstract and advisory” language, *id.*, and see *In re Molgano*, 163 Vt. 25, 31 (1994) (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, because its purpose is otherwise, is often not written in regulatory language.” *Re: EPE Realty Corporation*, *supra*, at 38, quoting *Re: Peter S. Tsimortos*, *supra*, at 19.⁶

This does not mean that, where a town plan uses ineffectual language, the Board will nevertheless read that language to prohibit a project. *Re: Peter S. Tsimortos*, *supra*, at 19. 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*, *supra*, at 42 (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, Re: The Mirkwood Group*, *supra*, at 29; *Re: Ronald Carpenter*, #8B0124-6-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Oct. 17, 1995); *Re: 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.*, *supra*, at 54 (use of the phrase “shall be protected” in town plan is mandatory).

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

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).

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, supra*, at 29.

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 this instance, where the Town of Royalton has no zoning regulations, the Board attempts to construe the plan as best it can, based on various rules of construction or supporting evidence of municipal legislative intent. *Re: Dominic A. Cersosimo, supra*, at 11.⁷

⁷ While the Board may consider arguments from parties concerning whether a particular project conforms to the town plan, the document - the particular town plan at issue - speaks for itself, and Board must make its own independent judgment about whether a project conforms to such plan. *Re: 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.

Analysis

The first question presented is whether the Royalton Town Plan uses “nonprohibitory” language such that the Plan provides merely guidance to the Board's consideration of Criterion 10 or whether provisions of the Plan are sufficiently mandatory to require or prohibit certain conduct.

Much the Royalton Plan is written in terms of suggestions. The Board agrees with Times and Seasons that the use of the word “should” in the Town Plan is not the equivalent of “shall,” nor is “discourage” the equivalent of “prohibited,” nor is “encouraged” the equivalent of “required.” The Board therefore does not find provisions which use those terms, standing alone, to be sufficiently mandatory to be binding on the Project.

But one provision of the Plan does use language that goes beyond merely being advisory: “Where feasible, commercial development *shall be located* within or close to South Royalton Village or Royalton Village, re-using existing sites where possible, or in other locations specifically recommended in this plan and its amendments.” *Royalton Town Plan* at 28 (emphasis added). The use of the word “shall” makes the provision mandatory. *Re: Southwestern Vermont Health Care Corp., supra*, at 54 (use of the phrase “shall be protected” in Town Plan is mandatory).

But even if the provision is mandatory, is it sufficiently clear to guide the conduct of an average person, using common sense and understanding?

Times and Seasons takes issue with the one qualification in the sentence - the word “feasible” - noting, correctly, that it is not defined in the Town Plan and that there are no Royalton zoning bylaws to aid in the interpretation of the term.⁸ “Feasibility,” Times and Seasons contends, means many things to many people, such as entrepreneurship, economics, location, design, site constraints, and accessibility. But

⁸ Times and Seasons also notes in its proposed Conclusions of Law that the Town Plan does not define the term “close” in the phrase “within or close to” that appears in the sentence at issue and therefore this ambiguity leads to an unenforceable provision, as the Project would be 1.6 miles – as the crow flies - from the edge of South Royalton Village. While in other instances involving shorter distances might cause reasonable minds to differ, under any reasonable definition of the word “close,” a Project which is 2.4 miles by road and 1.6 miles by crow from South Royalton Village is not “close to” the Village.

does this contention make the term ambiguous to the point that the provision as a whole can have no bearing on this Project?

Times and Seasons makes two arguments. The first is based on economics -- that the Project can be *financially* feasible only if it is built where it is proposed. Times and Seasons argues, in effect, that the Project will not succeed unless it is located physically close to the Memorial. Its proximity to other properties owned by Lefgren is also paramount to his economic interests and therefore his consideration of the Project's location:

I have considered whether to build the Project elsewhere in Royalton. However, it is not feasible to do so. The Project can be successful only if it is close to the Memorial. My business plan's success depends upon visitors to the Memorial coming to the new gift shop and deli. The 50,000 people who visit the Memorial annually are my potential customers; they are already traveling on Dairy Hill Road. The Memorial is their destination, not other locations in Royalton. If my business were located somewhere else, I would have nothing unique to offer. There is no reason for Memorial visitors to drive into town and make a separate stop at a different location when they are looking to enhance their Memorial visiting experience. The Project's appeal to Memorial visitors is its location directly in the Memorial's immediate vicinity. Indeed, it would not be feasible for me to pursue the Project but for the fact that it is ¼ of a mile from the Memorial and Memorial visitors are already traveling on Dairy Hill Road, and but for the fact that I have already made a substantial investment in the 10.2 acres that I own. The vacation rental is part of this investment, and the Project will nicely complement it. Guests at the vacation rental want to walk down the driveway to get breakfast or lunch, not get in their car to drive somewhere else. Clearly, having the vacation rental located right next to the Project is fundamental to making the two operations financially viable, both as to employment and a return on my investment. It is not feasible for me to invest in property elsewhere in Royalton when I already own land on Dairy Hill Road, and have proved my business plan through the existing gift shop. The Project is not feasible within or close to South Royalton Village, Royalton Village, the Village District, the Commercial/Industrial District and the Exit 3 Interchange District, as identified in the Town of Royalton Town Plan.

Testimony of John Lefgren, Exhibit TS 21, Answer 17. ⁹

⁹ Times and Seasons' Proposed Conclusions of Law also support a conclusion

Certainly, Lefgren's business plan is based on capturing a percentage of the 50,000 people who visit the Memorial annually and being near the Memorial would heighten the opportunities that Times and Seasons may have to attract those visitors to enter the gift shop and purchase its products. But Times and Seasons has provided no market study or analysis to support a claim that its business would fail if it must locate in the commercial areas of the Town. Rather, the only evidence that has been presented to support the claim that the Project would not survive financially if it is not located on Dairy Hill Road comes from the testimony of the manager of the present existing gift shop who states her belief that visitors to the Memorial would not stop at the Project if they have to drive even a short distance out of their way. But even this testimony is belied by the fact that, as the manager admitted on cross-examination, tour buses visiting the Memorial have visited the general store in Tunbridge, Vermont, in the past. The Tunbridge general store is located approximately 10 miles from the Memorial, and is in the opposite direction from Exit 2. There is thus sparse evidence that tourists would not be willing to travel a similar distance to visit the proposed Project were it to be located in South Royalton.

Common sense would indicate it is likely that a gift shop located at the proposed Project site, which caters to those who visit the Memorial, might prove to be more financially successful than one that is physically located on Route 14 in South Royalton village. But this is not the test; "feasible" does not mean "most profitable." Indeed, if the definition espoused by Times and Seasons were to be adopted, then the language of the Town Plan would always be subservient to an applicant's economic desires and would have no meaning.

that economics was the driving force behind the decision to pursue the Project's proposed location: "It is not feasible for Mr. Lefgren to locate the Project somewhere else *when he has already made a substantial investment at his existing location, and the Project's economic feasibility depends upon visits by at least 20% of the Memorial's 50,000 annual visitors.*" (Emphasis added). Other statements within the Proposed Conclusions are similar; for example: "No other site, and especially in comparison to those identified by the Royalton Planning Commission, offers him a reasonable rate of return on his investment commensurate with the risks involved." "There is no evidence to dispute or contradict Mr. Lefgren's decision that the Project's proposed location is the only feasible location in which to implement his business plan."

“Feasible” is defined¹⁰ as “capable of being done, executed, affected or accomplished. Reasonable assurance of success. See Possible.” *Black’s Law Dictionary*, 6th Ed. (1990).¹¹ The federal Bankruptcy Court in Vermont “views the word feasible within its ordinary meaning that something is capable of being done or carried out; capable of being used or dealt with successfully; suitable; reasonable; likely. It does not connote absolute insurance of success but only reasonable assurance of success.” *In re Trail’s End Lodge, Inc.*, 54 B.R. 898, 904 (Bkrcty. D. Vt. 1985). Board precedent similarly defines the word “feasible” in terms of what is “possible.” *Re: St. Albans Group and Wal*Mart Stores, Inc.*, #6FO471-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Dec. 23, 1994); *Re: Norman R. Smith, Inc. and Killington, Ltd.*, #IR0593-1-EB, Findings of Fact and Conclusions of Law and Order (Revised) at 18 (Sep. 21, 1990); *Re: Swain Development Corp.*, *supra*, at 25. In its discussion of whether a ski area had met its burden under 10 V.S.A. § 6086(a)(1)(E) to prove that its project would, “whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners,” the Board placed a high burden on the applicant to investigate all possible alternatives to its proposed project:

Based upon the evidence, the Board concludes that Okemo did not fully explore all reasonable alternatives to withdrawing additional water from the Black River. Additional storage capacity could provide additional water for snowmaking because water could be pumped from the Black River during times of high flow when water is not being used for snowmaking. However, no studies were conducted to determine the possibility of reconstructing the West Hill Reservoir to provide more storage capacity. Okemo did not demonstrate that it is foreclosed from negotiating an arrangement with the Town that would allow Okemo to reconstruct the reservoir to enlarge its storage capacity.

¹⁰ The Town Plan does not define the term “feasible;” thus the Board must give the word its “plain and commonly accepted meaning.” *Vincent v. State Retirement Board*, 148 Vt. 531, 535 -36 (1987); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, Declaratory Ruling #406, Findings of Fact, Conclusions of Law, and Order at 10 n.2 (Dec. 31, 2002).

¹¹ This is a common definition. See, *The American Heritage Dictionary*, 2d College Ed. (1976): “capable of being accomplished or brought about; possible; a *feasible project*” (emphasis in original); and *Merriam Webster College Dictionary*, 11th Ed. (2003): “capable of being done or carried out; capable of being used or dealt with successfully.”

Nor was any serious analysis provided to the Board concerning the construction of storage facilities on other land owned or controlled by Okemo that could provide at least some portion of the additional snowmaking capacity that Okemo seeks. Okemo has the burden of proof on this criterion. 10 V.S.A. §6088. The Board is not persuaded that other reasonable alternatives do not exist which would enable Okemo to increase its snowmaking capacity without significantly changing the natural condition of the river.

Re: Okemo Mountain, Inc., #250351-12A-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Mar. 27, 1992).

Times and Seasons bears an equally heavy burden of proof in this case. Even if we were to agree with the dissent that “feasible” could be read in terms of economic and financial considerations, Times and Seasons has not met its burden of proving that the Project would *not* be financially feasible if located as the Town Plan directs. 10 V.S.A. §6088(a).

But the Board does not read the word in such a limited fashion. Rather, the Board reads the phrase “where feasible” – especially because of the use of the word “where” - to be less related to economic concerns and more related to physical considerations. Is it physically “feasible” or possible to locate a project in Royalton’s downtown? Certainly, one likely cannot physically locate the Essex IBM complex or the Waterbury Ben and Jerry’s ice cream factory in South Royalton village. Nor would it be “feasible” to locate, as the Commission noted, some commercial enterprises, “such as marinas or hunting preserves, where the natural resources and/or rural setting are intrinsic to the development” in downtown commercial districts. Decision at 21 - 22. But a project which is a typical and traditional commercial use (such as a gift shop and deli) and which would require, at most, less than two acres for its building and parking areas, can find a home in the area of the Town that the Town Plan notes as suitable for commercial development.¹²

¹² While Times and Seasons argues that certain locations are either not suited for the Project’s physical needs or are otherwise too expensive or unavailable, the Board does not find the evidence presented by Times and Seasons to be credible. The Board also finds that these arguments were made after the fact.

Concerning the physical location of the Project, both Lefgren (Exhibit TS21, Answer 16) and his engineer, Richard DeWolfe (TS1, Answers 64 – 69), only considered and rejected, within the Criterion 10 context, locating the Project on Lefgren’s other Dairy Hill Road properties. Dean Goulet notes in his pre-filed direct

The Board also notes that the Royalton Town Plan could have been written without any reference to “feasibility” and merely stated that “commercial development shall be located within or close to South Royalton Village or Royalton Village...” Clearly, however, the Town recognizes (as did the Commission) that it will sometimes be impossible to site a commercial development in the villages, and the Town Plan therefore grants some leeway – by the inclusion of the phrase “where feasible” - to permit such arguments to be made. It would be ironic, in the Board’s view, to allow a claim of ambiguity in the exception language (the phrase “where feasible”) to swallow the rule and negate the mandatory language of the Plan. Were the Board to agree to the reading proposed by Times and Seasons and the dissent, future town plans might

testimony that “There is not an inventory of properties for the Project within or close to South Royalton Village, Royalton Village, the Village District, the Commercial/ Industrial District and the Exit 3 Interchange District, as identified in the Town of Royalton Town Plan.” (Exhibit TS22, Answer 7). But Goulet testified on cross-examination that he never looked at properties in those districts when Lefgren sought to purchase land for the Project in 2003, and it is clear that Goulet’s understanding of what is “feasible” includes, to a large extent, economic considerations: “Even if properties have been available in these districts, none of them are in the proximate location of the Memorial which is crucial to Mr. Lefgren’s business.” (Exhibit TS22, Answer 7). Goulet’s testimony at the hearing also spoke the Project’s “feasibility” in terms of Lefgren’s business plan and the need for the gift shop to be physically close the Memorial.

The choice to propose the Project in its proposed location was not made after other alternative sites were considered and rejected for their physical inability to site the Project. Rather, Times and Seasons intended from the beginning to site the Project on Lefgren’s land on Dairy Hill Road, and never considered any other possible alternative sites.

Most telling is the statement in Times and Seasons’ Proposed Conclusions of Law that “There is no sound reason why Mr. Lefgren would have even looked for land elsewhere on Dairy Hill Road (or anywhere else in Royalton) once he obtained Act 250 approval for the existing gift shop.” While this statement is tied to a claim that the Town, having allowed the existing gift shop to proceed through the Act 250 process unopposed, should be estopped from opposing the present application. But it is also indicative of Lefgren’s decision to proceed with the Project on his Dairy Hill Road land, without requesting that his real estate broker even consider other sites in Royalton’s commercial areas in accordance with the provisions of the Town Plan.

be written with no escape clauses, much to the detriment of both landowners and the towns themselves

The Royalton Town Plan has designated South Royalton Village and Royalton Village as areas appropriate for commercial development; as is the case with the Town's identification of its scenic areas, the Board should honor the Town's decision. *See, supra*, at 46 n.2. The Project is not located within or close to either of Royalton's villages, and Times and Seasons has not met its burden of proving that it is not feasible to locate its Project in either village. 10 V.S.A. §6088(a). The Project does not comply with 10 V.S.A. §6086(a)(10)(Town Plan).

Two Rivers Ottauquechee Regional Plan

The Board finds that, unlike the Town Plan, the Regional Plan's provisions, while compelling, are not mandatory, given the pervasive use of words such as "should" and "encourage." The Project, therefore, meets the TRORP and thus 10 V.S.A. §6086(a)(10)(Regional Plan).¹³

¹³ Times and Seasons might argue that there is a conflict between the Royalton Town Plan and the TRORP because the Town Plan prohibits the Project, but the TRORP does not. *See, Re: Peter S. Tsimortos, supra*, at 24. Under such circumstances, Times and Seasons might claim that the Regional Plan should control. First, even if the Board were to agree that a conflict existed between the Town and Regional Plans, statute and case precedent holds that, in case of conflict, a regional plan is given effect only if it is demonstrated that the project under consideration would have a substantial regional impact. *Id., citing, In re Green Peak Estates*, 154 Vt. 363, 368 (1990); 24 V.S.A. §4348(h)(2); *Re: Richard Provencher, #8B0389-EB*, Findings of Fact, Conclusions of Law, and Order at 13 (Oct. 19, 1988). There is no evidence that the Project has such an impact. Second, neither the statute nor Board precedent states that a Town Plan is *not* given effect where a project has a regional impact; indeed, it would be ironic were a town plan to be disregarded in a situation in which a project was so massive and substantial that it had regional impacts

V. Order

1. The Project complies with a 10 V.S.A. §6086(a)(1)(E), (4), (5), (9)(C), (9)(K)(Dairy Hill Road and McIntosh Pond), and (10)(Regional Plan).
2. The Project does not comply with a 10 V.S.A. §6086(a)(8)(aesthetics), (9)(B) and (10)(Town Plan).
3. Land Use Permit Application #3W0839 -2-EB is denied.
4. Jurisdiction is returned to the District 3 Environmental Commission.

Dated at Montpelier, Vermont this 4th day of November 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland *
W. William Martinez ** ‡
Patricia Nowak ‡
Alice Olenick
Karen Paul
A. Gregory Rainville
Richard C. Pembroke, Sr. ‡
Christopher D. Roy ‡

* *Board Member Holland, dissenting in part:* I agree with the majority that the Project is adverse to its surroundings and does not comply with the Town Plan's aesthetic standard which protects views from Dairy Hill. However, I dissent from the majority's conclusion that further mitigation is required to achieve compliance under Criterion 8.

** *Board Member Martinez, dissenting in part:* While I do not find the views from Dairy Hill at the Project site to be particularly scenic, I concur with the majority, *supra*, at 45 n. 2, that this is this not a determination that is within the Board's province to

make. I cannot, however, join in the majority's conclusion under Criterion 8 that the Project violates a clear written community standard in the Town Plan. I am authorized to state that Board Member Nowak joins this dissent.

‡ *Board Member Roy, dissenting in part:* Despite the majority's determination that the word "feasible" concerns only a locational directive, I am far less certain of its modifying limitations. To me, "feasible," in the context in which it appears in the Town Plan, could also relate to the economic or financial potentials of a commercial business; the word is therefore ambiguous.

Normally, if a provision of a town plan is susceptible of different meanings, we look to the town's zoning bylaws for guidance in its interpretation. "Zoning bylaws are designed to implement the town plan, and may provide meaning where the plan is ambiguous." *In re Kiesel*, 172 Vt. 124, 130 (2000), citing *In re Molgano*, 163 Vt. 25, 30 (1994). Here, Royalton has no zoning bylaws, so we are forced to attempt to construe the Town Plan as best we can, based on various rules of construction or supporting evidence of municipal legislative intent. *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 11 (Apr. 19, 2001); *Re: The Mirkwood Group and Barry Randall*, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 25 (Aug. 19, 1996). But the Plan gives us no indication as to what its drafters intended the meaning of or limitations on the word "feasible" to be. Such ambiguity and uncertainty renders the word meaningless, and I therefore conclude that this provision of the Plan is unenforceable. A landowner is entitled to know what rules apply to his property so that he may plan accordingly. When a town plan does not provide sufficient certainty to guide individuals in the normal conduct of their affairs, this Board should not use it to the detriment of applicants. This holds especially true when the result is a land use regulatory board imposing economic choices upon private citizens.

I would find that the Project satisfies Criterion 10. I am authorized to state that Board Members Martinez, Nowak, and Pembroke join this dissent.