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

Memorandum of Decision

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 gift shop and approximately 1,040 linear feet of access drive and parking with associated pump station, septic field and drilled well on a tract of land located on Dairy Hill Road in Royalton, Vermont. (Project)

I. History

The history of this matter through August 15, 2005 appears in the Board's Findings of Fact, Conclusions of Law, and Order (Decision) of that date.

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.

II. Discussion

A. Times and Seasons' general claims of error

As to the many of the Findings of Fact in the Decision, Times and Seasons makes identical arguments. Rather than reply individually to these same arguments throughout this decision, the Board will address them as a whole.

1. Times and Seasons claims that some of the Board's Findings of Fact are instead Conclusions of Law, are thus improper, and should be deleted. As the Royalton Planning Commission notes, deletion is not the remedy. The Board does not agree that any of the Findings noted by Times and Seasons are indeed Conclusions.[1]

[1] The Board makes this statement as a general response to all claims by Times and Seasons that its findings are conclusions and will not, therefore, note or respond to each claim raised by Times and Seasons with regard to specific findings below.

The Board notes further that the Vermont Supreme Court has given latitude in this regard to administrative bodies in the composition of their decisions. The Court has written:

> The Vermont Administrative Procedures Act requires that findings of fact and conclusions of law be separately stated. 3 V.S.A. §812. Where findings of fact, however, are "interspersed throughout [the Board's] decision" such that there is "no doubt as to what [the Board] decided and how its decision was reached, the Board's order will stand.

In re New England Telephone and Telegraph Co., 159 Vt. 459, 463 (1993), quoting *In re Village of Hardwick Electric Department*, 143 Vt. 437, 444-45 (1983).

Further, the Court has held that "the mere fact that a finding is a conclusion is harmless when it is sustained by other facts found which are sufficient in law to support the conclusion." *Harrington v. Dept. of Employment Security,* 142 Vt. 340, 346 (1982), quoting *LaFountain v. Vermont Employment Security Board,* 133 Vt. 42, 45 (1974).

2. In many of its claims of error as to the Board's Findings of Fact, Times and Seasons requests that the Finding either be deleted or "modified to conform to the evidence presented by [Times and Seasons]." But the fact that the Board chose not to make the finding that Times and Seasons seeks or believes is supported by its evidence does not make the findings that the Board *did* make erroneous, as long as the findings made by the Board are supported by evidence in the record. *Savard v. George and Bolles,* 125 Vt. 250, 256 (1965).

3. It is unfortunate that, in some instances, Times and Seasons does not cite specific evidence in the record to support its claims of error, as required by Environmental Board Rule 31(A)(2): "The supporting memorandum should state why each requested alteration is appropriate and the location in the existing record of the supporting evidence." Rather, Times and Seasons cites generally to exhibits (without citing to page or question), or cites, again generally, to the testimony of its witnesses. The Board does not consider this to be briefing in compliance with EBR 31 and notes that the Court has held that a reviewing forum need "not search the record for error when not adequately briefed or referenced." *In re Wildlife Wonderland*, 133 Vt. 507, 517 (1975).

The Board has not, however, denied any of Times and Seasons claims of error based solely on a failure to comply with Rule 31.

B. Times and Seasons' specific claims of error

1. Objections to the Findings of Fact in the Board's August 15, 2005 Decision

Times and Seasons claims that certain Findings are not supported by the evidence. Paragraph numbers below conform to the objections in Times and Seasons' motion.

1. Finding of Fact 1 reads:

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

Times and Seasons claims that there is no evidence in the record to support Finding of Fact 1.

Evidence to support this finding comes from the site visit and the Royalton Town Plan (Exhibit TS14, p. 17).

The Board will not amend Finding 1.

2. Finding of Fact 10 reads:

> 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.

Times and Seasons claims that the second sentence of Finding of Fact 10 is erroneous and not supported by evidence.

Evidence to support this finding comes from the site visit, Royalton Planning Commission Exhibits RPC 4 – 15; RPC 1, ¶¶10, 11, 15, and the testimony of the Royalton Planning Commission witnesses.

The Board will not amend Finding 10.

3. Finding of Fact 20 states:

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

Times and Seasons claims that Finding of Fact 20 is erroneous because there is no standard by which to characterize the upward grade as "significant."

Times and Seasons' own topographical maps (Exhibit TS8), which show the incline rising 33 feet in less than 400 feet at about 8%, support this finding.

The Board will not amend Finding 20.

4. Finding of Fact 21 states:

> 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.

Times and Seasons, citing Exhibit TS16, p. 2, claims the first sentence of Finding of Fact 21 is erroneous because the existing shop and its sign are visible from Dairy Hill Road.

Finding 21 was intended to convey a general sense of the views, not a survey of everything visible from Dairy Hill Road. As the Royalton Planning Commission notes in its reply, Times and Seasons' witnesses testified that the shop is visible mostly in the winter months. Debbie Johnson testified that the existing shop is "hard to see" during the summer because of the foliage, *merrilljohnson, 4:05-4:15,*[2] and Joseph Greene (Exhibit TS16, Answers 5 and 8) does not include the shop as a "dominant scenic attribute."

The Board also notes that Finding 55 does reference views of the existing gift shop.

The Board will not amend Finding 21.

5. Finding of Fact 31 states:

> 31. All parking areas would be visible from Dairy Hill Road.

Times and Seasons claims that Finding of Fact 31 is erroneous because the evidence is that the parking area will be screened from Dairy Hill Road.

---

[2] References such as this which appear in this decision are to the file, minute and second of the hearing tapes in this matter.

There is evidence to support this Finding 31. Exhibit TS9, the planting plan, shows the extent of the plantings that would screen the parking areas. The fact that 12 pines or three pines will provide partial screening does not mean that the areas will not be visible. The Board, however, will amend Finding 31 to reflect Times and Seasons' planting plan; the Finding, as amended, will read:

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

6. Finding of Fact 38 states:

> 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).

Times and Seasons claims that Finding 38 is erroneous; it asserts that the evidence supports a finding that the Project will be ¼ mile from the Church.

This Finding comes from actual odometer readings taken at the site visit where the Chair recorded that it is ½ mile from the intersection of the Church road and Dairy Hill Road to the existing gift shop road. *Sitevisit3, 4:38-4:48.* Thus, a 4/10 mile distance between the Church road and the Project Tract is accurate.

The Board will not amend Finding 38.

7. Finding of Fact 53 states:

> 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.

Times and Seasons claims that Finding of Fact 53 is erroneous because it omits the fact that the Project will sell products that are unique to the Church of Jesus Christ of Latter-Day Saints (LDS) and are not available in other shops in Royalton.

The Finding is not erroneous simply because it fails to note the points that Times and Seasons wishes it would make. Further, Finding of Fact 62[3] notes the fact that the Project shop will sell LDS wares: "62. At the proposed Project gift shop, Times and Seasons intends to market the "Land of Joseph" products as a brand

[3] Please note the amendment that the Board will make to Finding of Fact 62. *See* page 8, *infra.*

nationwide and has plans to advertise the "Land of Joseph" as a destination location." It is therefore clear from the Findings (and also from the Board's Conclusions, Decision at 62) that the Project shop will be geared toward visitors to the Memorial.

The fact that other shops in Royalton do not sell LDS-related items is not relevant to any criterion.

The Board will not amend Finding 53.

8. Finding of Fact 54 states:

> 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.

Times and Seasons claims that the first sentence of Finding of Fact 54 is misleading since there is no standard by which to characterize that locating the Project close to the Memorial would work to Times and Seasons' "advantage."

The Board finds this argument to be perplexing. Times and Seasons whole case is predicated on the fact that, as Times and Seasons states later *in the same objection,* "the Project is only feasible in its proposed location because, in part it is dependent upon the visitors to the Memorial for its financial success."

The Board will not amend Finding 54.

9. Finding of Fact 55 reads:

> 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.

Times and Seasons claims that the second sentence of Finding of Fact 55 is erroneous since there is no standard by which to judge the words "barely visible." Times and Seasons also claims that the shop is visible and that the finding should be modified.

Debbie Johnson testified that the existing shop is "hard to see" during the summer because of the foliage. *merrilldjohnson, 4:05-4:15.* This supports Finding of Fact 55. The Board believes that "hard to see" and "barely visible" are comparable standards that a reasonable person can understand.

The Board will not amend Finding 55.

10. Finding of Fact 61 states:

> 61. The gift shop currently sells "Land of Joseph" Vermont maple syrup and "Land of Joseph" New York-made pancake mix. Times and Seasons has a contract to supply these products to a large chain of stores in Utah, selling $150,000 of product to date, and also markets these items on television and the internet.

Times and Seasons claims that Finding of Fact 61 is misleading and erroneous because the sale and distribution of syrup and pancake mix is not done out of the existing gift shop nor will the Project act as an order and distribution center or warehouse for such sales.

But both Debbie Johnson and Lefgren stated that the gift shop currently sells "Land of Joseph" Vermont maple syrup. *merrilldjohnson, 19:09 – 19:12; 19:55; greene3lefgren, 1:45:24.* Further, while Finding 61 notes that Times and Seasons markets products on television and the internet, the Finding does not state or imply that warehousing or internet sales would occur at the Project. Nevertheless, it was not the Board's intention to imply that the Project would act as order or distribution center or a warehouse, and therefore the Board will amend Finding 61 to delete the second sentence. Finding 61 will read:

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

11. Finding of Fact 62 reads:

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

Times and Seasons claims that this finding is misleading and erroneous since the proposed Project will not serve as a distribution center or warehouse for sales outside the Project.

The Project is described in the opening paragraph of the decision as "a 4,852 ± square-foot Vermont products gift shop and 20-seat deli." The Finding does not contradict this statement, nor does it state or imply that the Project will be a distribution center or warehouse for internet sales, only that it will market the "Land of Joseph" brand.

The words "as a brand nationwide," however, might be construed as implying nationwide sales for the Project, and the Board will therefore amend the finding to delete those words. Finding 62 will read:

> *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.*

12. Finding of Fact 63 states:

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

Times and Seasons objects to this finding, stating that the existing shop will be used for whatever purpose the Board allows.

The Board acknowledges that Times and Seasons' attorney did note that the use of the shop could be limited by the Board as a part of the present application. *greene3lefgren, 2:13:40 – 2:14:40.* However, the application does imply that the existing shop will have some commercial use, and Lefgren testified that he might use the shop as an art gallery, *greene3lefgren, 2:12:30- 2:13:37.* The Finding, therefore, does fairly represent Lefgren's *Intentions.*

The Board will not amend Finding 63.

13. Finding of Fact 69 states:

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

Times and Seasons objects to this finding, stating that buses do not go northwest on Route 14.

The Finding is fair and accurate, especially when read in conjunction with Finding of Fact 68:

> 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.

Clearly, tour buses do not go north on Route 14. There was testimony, from Debbie Johnson, that smaller buses (the Royal Coach Line) could go through the underpass. *merrilldjohnson, 10:30* Nevertheless, to cure any implication from Finding 69 is that *tour* buses go north on Route 14, the Board will amend Finding 69 to read:

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

14. Finding of Fact 70 states:

> 70. 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.

Times and Seasons objects to the first sentence of Finding of Fact 70 on the grounds that there is no evidence that the buses were *tour* buses, and it objects to the use of the word "is" in the second sentence because the store is now closed.

Debbie Johnson testified that tour buses used to go to Tunbridge, *merrilldjohnson, 16:10 - 16:45*; thus, the first sentence of the Finding is accurate.[4] Times and Seasons is correct that Ms. Johnson also stated that such buses no longer go to Tunbridge because the store is closed. *Id.* The Board will therefore amend Finding 70 to read:

---

[4] Times and Seasons does not provide a citation to evidence to support its claim that the vehicles that visited Tunbridge are not the same size as the present tour buses. *In re Wildlife Wonderland, supra.*

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.

15. Finding of Fact 72 states:

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

Times and Seasons objects to Finding of Fact 72.

The finished floor elevation of the proposed Project is 477' asl, and the existing pole barn sits at elevation 480 – 485' asl. (Exhibit TS8 Sheet C1.03). Photos taken from the Adkins house clearly show the existing pole barn to be at or below eye level. Exhibit BBA 13(A) and (B). Therefore the Adkins house is higher and would overlook the proposed Project.

The Board will not amend Finding 72.

16. Finding of Fact 73 states:

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

Times and Seasons asserts that there is no evidence to support this finding, and trees are proposed.

Photos taken from the Adkins house clearly show that there are no trees between the Adkins house and the existing pole barn. Exhibit BBA 13(A) and (B). There is evidence to support Finding of Fact 73. However, the Board will amend the Finding to reflect Times and Seasons' proposed planting plan. Finding 73 will read:

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

17. Finding of Fact 76 states:

76. With the exception of the John Deere dealership and logging business, Dairy Hill Road is rural, residential (with some home occupations) and agricultural. It has a 40 mph speed limit.

Times and Seasons objects on the grounds that the Church, the Joseph Smith camp ground, the existing gift shop, and the Lefgren B&B are all on Dairy Hill Road.

Finding 76 is not meant to be all-inclusive and to note all commercial and other sites on Dairy Hill Road. It is intended only to give a general sense of the area, and other findings note the existence of the other sites noted by Times and Seasons. However, to cure any claims that the Finding might be misleading, the Board will amend Finding 76 to read:

> *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.*

18. Finding of Fact 79 states:

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

Times and Seasons objects that the Finding is not supported by evidence and is a Conclusions of Law.

The record supports the Finding. Lefgren states that the "Project is not feasible within or close to South Royalton Village, Royalton Village …. " Exhibit TS21, Answer 17. And see Testimony of Dean Goulet, Exhibit TS 22, Answer 7.

The Board will not amend Finding 79.

19. Finding of Fact 114 states:

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

Times and Seasons claims that the finding is erroneous because the Church, the Joseph Smith camp ground, the existing gift shop, and the Lefgren B&B are in the area of the Project site.

The finding is not erroneous; the fact that it does not mention all the sites noted by Times and Seasons does not make it inaccurate. Indeed, the Finding, intended to

paint a picture of the area, generally mentions the sites noted by Times and Seasons. Further, other findings, in particular Finding 76, as amended, note the particular sites mentioned by Times and Seasons.

The Board will not amend Finding 114.

20. Finding of Fact 115 states:

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

Times and Seasons claims that Finding of Fact 115[5] is erroneous because the dominant use in the area is the Memorial.

Finding of Fact 115 is not erroneous and is supported by the evidence. Nonetheless, to address Times and Seasons' concerns, the Board will amend Finding 115 to read:

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

21. Finding of Fact 116 states:

> 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.

Times and Seasons asserts that Finding of Fact is erroneous because it claims that the Memorial is only ¼ mile from the Project site.

As noted on page 5, *supra,* this Finding comes from actual odometer readings taken at the site visit where the Chair recorded that it is ½ mile from the intersection of the Church road and Dairy Hill Road to the existing gift shop road. *Sitevisit3, 4:38-4:48.* Thus, the "about half a mile" measure is accurate.

The Board will not amend Finding 116.

---

[5] Times and Seasons refers to Finding of Fact 114, but this appears to be a typographical error.

22. Finding of Fact 124 states:

> 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.

Times and Seasons claims error in the statement that the Project building being the "dominant feature." There is nothing inaccurate or misleading about the finding, and Times and Seasons does not note any other feature that might otherwise be dominant in the meadow.

The Board will not amend Finding 124.

23. Finding of Fact 125 states:

> 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.

Times and Seasons claims that the finding is erroneous because there is no evidence that the Project is either toward or in the middle of the Project site.

The Finding does not state that the Project is toward or in the middle of the Project site. It merely states that the Project was *moved* from its initial proposed location toward the middle of the Project site. Since the Project was originally proposed to be at the northern edge of the Project site and was moved some feet to the south, the finding is correct.

The Board will not amend Finding 125.

24. Finding of Fact 126 states:

> 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.

Times and Seasons argues that there is no evidence to support a finding that it would be possible to construct the Project in a location to the south and west of the existing vacation rental.

Times and Seasons points to no evidence to show this location to be an impossible one. As the Royalton Planning Commission notes, Times and Seasons witness Richard DeWolfe testified that locating the project to the south and west of the existing vacation rental would be "unacceptable," not "impossible." Exhibit TS1, Answer 67.

The Board will not amend Finding 126.

25. Finding of Fact 133 states:

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

Times and Seasons objects to this finding, claiming that there is no evidence that the Project would appear in the center of an open field.

Exhibit TS8 shows the location of the Project building on the site. When viewed by a traveler coming up Dairy Hill Road, the exhibit supports a finding that the Project would appear to be in the center of the forested background; it does not support a finding that the Project would appear to be in the center of the open field. The Board will therefore amend Finding 133 to read:

> *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.*

26. Finding of Fact 134 states:

> 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.

Times and Seasons argues that there is no evidence to support a finding that the Project building would dominate the foreground view or be out of character with its setting.

Times and Seasons concedes the Project would be "immediately visible from Dairy Hill Road." Joseph Greene, Exhibit TS25, Answer 26. There is also evidence that the Project would be out of character with the area, Exhibit RPC1, Answer 12, and would dominate the area. Exhibit RPC1, Answer 15. Since the Project building will be the only construction in the foreground view of persons on Dairy Hill Road near the Project site, the evidence supports the Board's Finding that the building will dominate the view.

The Board will not amend Finding 134.

27. Finding of Fact 138 states:

> 138. The proposed Project is a new commercial development 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.

Times and Seasons claims error in that the project is not a new development but an expansion of an existing commercial use.

Whether the Project is a new development or an amendment to an existing permit is irrelevant to the purpose of Finding 138, which is in the context of the Royalton Town Plan as a written community standard. However, the Board will amend Finding 138 to read:

> *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.*

28. Finding of Fact 142 states:

> 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." [*Royalton Town Plan* at 29.]

Times and Seasons claims that the Royalton Town Plan speaks for itself, that

the finding should be deleted to the extent that it states anything other than a direct quote from the Town Plan.

There is nothing inaccurate, erroneous or misleading in Finding 142. This Finding accurately quotes from the Town Plan. The portions outside the quotation marks do not purport to interpret the Town Plan; they merely orient the reader to the Plan, provide context to the passages in the Plan, and note portions of the Plan that are significant to this case.

The Board will not amend Finding 142.

29. Finding of Fact 143 states:

> 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).

Times and Seasons claims that the Royalton Town Plan speaks for itself, that the finding should be deleted to the extent that it states anything other than a direct quote from the Town Plan.

For the reasons stated in Paragraph 28, the Board will not amend Finding 143.

30. Finding of Fact 144 states:

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

Times and Seasons claims that there is no support for this finding in the record.

The evidence in the record supports Finding 144.

The Board will not amend Finding 144.

31. Finding of Fact 153 states:

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

Times and Seasons objects on the grounds that there is no evidentiary support for this finding.

Exhibit TS9 shows the extent of screening proposed by Times and Seasons; the Board does not consider the proposed trees to provide much screening. There is also, as noted by the Royalton Planning Commission in its memorandum, testimony from Royalton Planning Commission witness and others to support Finding 153.

The Board will not amend Finding 153.

32. Finding of Fact 164 states:

> 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.

Times and Seasons claims that the Finding is erroneous.

Exhibit TS7, Answer 54 (Chart, HB>JL-G) shows that there are 2.8 acres of primary agricultural soils on the Project site. Times and Seasons witness DeWolfe states that the Project "will affect 1.9+ acres of marginal primary agricultural soils." Exhibit TS1, Answer 51; and at the hearing, DeWolfe conceded that a 68% reduction in agricultural lands is a significant impact primary agricultural lands. *opendewolfe 45:05 - 45:32. See also* Exhibit RPC27, letter from Marian White, Agency of Agriculture.

The Board will not amend Finding 164.

33. Finding of Fact 166 states:

> 166. There is no evidence as to the appraised value of the Project Tract.

Times and Seasons asserts that the Finding is erroneous. Times and Seasons cites generally to Exhibits TS1, TS21 and TS 29 and to the live testimony of Times and Seasons witnesses DeWolfe, Lefgren and Benoit.

While the *appraised value* is not readily evident in the record, there is evidence as to the purchase price paid for the 7.3 acre Project Tract. Exhibit TS1, Answer 59. Later in its memorandum, in discussing 10 V.S.A. §6086(a)(9)(B)(i), Times and Seasons notes that the Supreme Court considers evidence of an arms-length sale to be evidence of fair market value.

The Board agrees that evidence of a sale may be relevant to a parcel's fair market value for purposes of the required analysis under subcriterion (i) of Criterion 9B. Therefore, the Board will amend Finding 166 to read:

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

34. Finding of Fact 172 states, as to subcriterion (ii) of Criterion 9(B)::

> 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.

Times and Seasons asserts that the Finding is erroneous.[6]

This Finding is made specifically with regard to subcriterion (ii) of Criterion 9(B), 10 V.S.A. §6086(a)(9)(B)(ii). Under subcriterion (ii), Times and Seasons has the burden of showing that it owns no other lands (which do not have primary agricultural soils) on which it could place its Project. No such showing was made, other than a cursory and conclusory statement by Richard DeWolfe that the "Project complies with the elements of the alternative test set forth at subparts 9(i)-(iv) of Criterion 9(B)." Exhibit TS1, Answer 61.

The Board will not amend Finding 172.

---

[6] Times and Seasons cites generally to a series of exhibits and the live testimony of four Times and Seasons witnesses, but it points to no particular piece of evidence (such as specific Answers within those Exhibits or references to the hearing tapes) that supports its claims. EBR 31(A)(2).

35. Finding of Fact 173 states, as to subcriterion (iii) of Criterion 9(B):

> 173. No evidence was presented on this subcriterion.

While Times and Seasons cites generally to exhibits and testimony of its witnesses, there is no evidence presented that Times and Seasons made any effort to design the Project in order to avoid the primary agricultural soils on the site. Indeed, the Project was moved on or closer to such soils in order to respond to ANR's concerns that the Project building was too close to the drainageway which runs along the north boundary of the Project Tract. *See* Decision, Finding of Fact 125, and Paragraph 23, *supra*.

Simply because a project must be moved in order to comply with one set of concerns does not mean that Act 250's statutory provisions can be ignored. A similar fact pattern existed in *Re: Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 27, 2004), where the Town of Williston would "not allow ABI to build within the "conservation corridor" areas along Allen Brook" thus forcing the project into an open meadow of primary agricultural soils *Id.,* Finding of Fact 5. While there was thus a conflict between the Town's desires and Criterion 9(B), the Board refused to abandon subcriterion (iii)'s requirements to accommodate local provisions. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 16 (May 27, 2004)(while an Act 250 requirement that clustering occur might be in conflict with local requirements, Board need not abandon Criterion 9(B)(iii)).

The evidence in the record supports a finding that the proposed gift shop was moved on or closer to the sites primary agricultural soils in order to resolve ANR's concerns regarding the drainageway. The Board will therefore amend Finding 173 to read:

> *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.*

36. Finding of Fact 174 states, as to subcriterion (iv) of Criterion 9(B):

> 174. No evidence was presented on this subcriterion.

Times and Seasons contends that Finding 174 is erroneous and should be deleted or modified to conform to its evidence.

Subcriterion (iv) asks whether the Project will have impacts on the operations of neighboring farms. While the Board may believe that the Project will not negatively impact those farms, the Board cannot find (and Times and Seasons does not direct the Board with any measure of specificity to) any evidence on this point.

Since the Project Tract was purchased from Hubert Benoit and Benoit continues to operate a neighboring farm, one might have expected that Benoit would have been a primary witness to testify about whether the Project would interfere with agricultural operations on neighboring farms. Contrary to Times and Seasons' references in its memorandum, Benoit's prefiled testimony (Exhibit TS29) does not address this issue. Nor does Benoit's hearing testimony speak to subcriterion (iv). In response to a question from the Chair, he stated that Lefgren would allow him to use his (Lefgren's) lands "as long as ….I'm not going to be interfering with what he's doing." *rjohnsonbenoit, 7:51 – 7:59* This is not testimony, however, that the Project will not interfere with Benoit's operations.

The Board will not amend Finding 174.

37. Finding of Fact 186 states:

> 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.

Asserting that it is unsupported by evidence, Times and Seasons objects to second phrase of Finding 186: "the Town therefore relies on the Town Plan to regulate development which is subject to the jurisdiction of Act 250." Times and Seasons cites only to Exhibit TS14, the Royalton Town Plan.

It is difficult to understand the basis for Times and Seasons' objections to this finding. First, the Town Plan at page 2 specifically notes that it is "To serve as a basis for responding to Act 250 permit requests." Second, the Royalton Planning Commission relies extensively throughout its testimony on provisions of the Royalton Town Plan in this case. *See* Exhibit RPC1, Answer 6 – 7. Lastly, the Royalton Planning Commission took an active role in this case, and directed its testimony and exhibits on Criterion 10 (and, to an extent, on Criterion 8) to a discussion of the Royalton Town Plan. The Board therefore sees no reason to amend a finding that the Town relies on its Town Plan to regulate development.

The Board will not amend Finding 186.

38 - 44. Times and Seasons claims that Findings of Fact 187, 188, 189, 191, 193, 194, and 195 should be modified to quote only from the Royalton Town Plan, that the Town Plan speaks for itself, that the finding should be deleted to the extent that it states anything other than a direct quote from the Town Plan.

For the same reasons stated in Paragraph 28 above, the Board will not amend Findings 187, 188, 189, 191, 193, 194, and 195.

45. Finding of Fact 196 states:

> 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.

Times and Seasons claims that the finding is erroneous and that there is no evidence to support it. Times and Seasons also asserts that the purpose of the Future Land Use Map is for the purpose of the adoption of a zoning bylaw by the Town of Royalton. Times and Seasons also claims that the Town Plan speaks for itself, that the finding should only quote from the Town Plan, and that the finding is a conclusion of law.

There is nothing inaccurate or erroneous about these findings. See 28 above.

As to the claim that the Land Use Map is for the purpose of the adoption of a zoning bylaw by the Town of Royalton, Times and Seasons cites no portion of the Town Plan that states this to be its sole or primary purpose. EB 31(A)(2).

The Board will not amend Finding 196.

46. Finding of Fact 206 states:

> 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.

Times and Seasons objects to the use of the phrase "economically advantageous" as misleading and asks that the finding conform to its evidence that the Project will only be feasible if it is located near the Memorial because it is dependent upon visitors to the Memorial for its financial success.

The Board fails to see the distinction between its use of the phrase "economically advantageous" and the feasibility arguments made by Times and Seasons. If, as Times and Seasons claims, the Project is only economically feasible if it is located on the Lefgren lands near the Memorial, it is difficult to contest, as Times and Seasons apparently does, the economic advantages of such a location.

The Board will not amend Finding 206.

47. Finding of Fact 207 states:

> 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.

Times and Seasons apparently disagrees with the first part of this finding. Times and Seasons argues that this finding should be deleted because there is no evidence to support a finding that travelers who come to Royalton for reasons other than to visit the Memorial would have any interest, need, or desire to visit a gift shop such as the proposed Project located on Route 14.

Times and Seasons witness Debbie Johnson testified that there are not other gift shops like the Project on Route 14; she also noted that Route 14 is a main road. *merrilldjohnson, 36:07.* Dairy Hill Road is not a main road. To get to the Project, one has to travel up Dairy Hill Road for some distance. There is evidence in the record to support a finding that more people will have access to a gift shop on Route 14 than one located on Dairy Hill Road.

The Board will not amend Finding 207.

48. Finding of Fact 211 states:

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

Times and Seasons asserts that this Finding is not supported by the evidence.

This finding is supported by the following evidence: the Project is 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. Finding of Fact 138. In the Resource Conservation District, "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 29. In the Agricultural/ Residential District "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." *Royalton Town Plan* at 29.

The Board will not amend Finding 211.

49. Finding of Fact 213 states:

> 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.

Times and Seasons objects that this is not supported by the evidence. Times and Seasons also objects to the use of the phrase "areas identified by the Town Plan as suitable for commercial use."

The finding is supported by Goulet's testimony at the hearing. *Rjohnsonbenoitgoulet, 46:45 - 47:23.* The Board's use of the phrase "areas identified by the Town Plan as suitable for commercial use" is justified for the reasons set out in Paragraph 48 immediately above.

The Board will not amend Finding 213.

2. Objections to the Conclusions of Law in the Board's August 15, 2005 Decision

Criterion 8

Times and Seasons contends that the Board erred in its conclusion that the Royalton Town Plan and the Two Rivers-Ottauquechee Regional Plan (TRORP) contain clear written community standards relevant to Criterion 8. Times and Seasons' primary argument is that the provisions in those plans are "disparate, disconnected, unrelated, standardless, ambiguous and ad hoc."

The Board disagrees. The provisions of the Town Plan and Regional Plan relied on by the Board in its decision are not ambiguous, nor do they exhibit the flaws claimed by Times and Seasons.

The Board's *Quechee* aesthetics test has been sanctioned by the Supreme Court, *In Re Petition of Halnon,* 174 Vt. 514, 515 (2002), and when the Board considers the "clear written community standard" element of that test, it undertakes an exhaustive analysis of whether a particular writing meets the requirements of that element; not every document does. The Board engaged in that analysis in this matter. Decision at 42 -48. The Board's August 15 Decision found the provisions regarding "views from Dairy Hill looking west," *Royalton Town Plan* at 8, to fit the required elements, as stated in Board precedent, of a "written community standard." The Board also found that the TRORP contained such a standard. Times and Seasons does not explain how, nor does it present persuasive arguments[7] that, the Board's analysis is in error.

The Board will not amend its conclusions as to Criterion 8(aesthetics).

Criterion 9(B)

a. Times and Seasons argues for the first time that the soils on the site are not "primary agricultural soils." This is a new argument; in neither their March 4, 2005 Proposed Findings of Fact and Conclusions of Law nor their April 20, 2005 Supplemental Proposed Findings of Fact and Conclusions of Law does this argument occur. It is therefore not allowed under EBR 31(A)(1) and Board precedent. *Re: Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 6 (Jul. 27, 2001), *rev'd on other grounds, In re Catamount Slate, Inc.,* 2004 VT 14 (2004); *Re: The Van Sicklen Limited Partnership,* #4C1013R-EB, Memorandum of Decision at 4 (Jul. 26, 2001).

This argument is also contrary to the testimony of Times and Seasons' own witness; Richard DeWolfe states that the Project "will affect 1.9+ acres of marginal primary agricultural soils." TS1, Answer 51.

b. As to subcriterion (i), which requires that the fair market value of the primary agricultural soils to be established, Times and Seasons notes that it presented the purchase price of the Project Tract when it was sold by Benoit to Lefgren. The Board agrees that this evidence was presented and has amended Finding of Fact 166

[7] On page 15 of its motion, Times and Seasons cites to a series of Vermont Supreme Court cases in support of its argument. These decisions, however, are Criterion 10 decisions, not Criterion 8 decisions.

to reflect such purchase price.

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.[8]

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 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

---

[8] 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.

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. *See* Decision at 52, citing *Re: Nile and Julie Duppstadt & John and Deborah Alden*, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Apr. 30, 1999).

The Board will amend its analysis as to Criterion 9(B)(i).as stated above. It will not, however, amend its conclusion

c. In its August decision, the Board found:

> 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.

Times and Seasons asserts that this conclusion is in error, as it did present evidence as to the suitability of other lands owned by Lefgren for the construction of the Project.

As noted in the Board's discussion of Findings of Fact 126 and 172, *supra,* the Board does not find Times and Seasons' assertions convincing. The Board's conclusion as to subcriterion (ii) are based on these Findings, and nothing in Times and Seasons present motion persuades the Board that such conclusions are in error, and the Board will therefore not amend its conclusions as to Criterion 9(B)(ii).

d. As to subcriterion (iii), Times and Seasons appears to argue that the subcriterion does not apply to its Project because this Project does not involve "reasonable population densities" or "reasonable rates of growth," and, because the Project is a single building, there is nothing to cluster.

The Board agrees that the considerations of "reasonable population densities" or "reasonable rates of growth" do not play a role in this case. But merely because the Project involves only one building does not make the third subcriterion (iii) consideration irrelevant.

The subcriterion requires that a project be sited to "minimize the reduction of agricultural potential" by providing for "the use of cluster planning and new community

planning designed to economize on the cost of roads, utilities and land usage." Whether a project is one building or twenty is not a relevant factor; as the Vermont Supreme Court has written, subcriteria (iii) requires "careful consideration of design alternatives that could reduce a project's impact on primary agricultural soils, and [requiring] adoption of a land-conserving design when it is reasonable to do so." *In re Spear Street Associates*, 145 Vt. 496, 502 (1985). Thus the Court (and the Board and Commissions) examine the entirety of the *project*, not just the placement of one building. Projects almost always involve, as here, supporting infrastructure such as roads and parking areas. Indeed, here it is not the Project's building that infringes on the primary agricultural soils; it is the Project's road. Thus, the fact that Times and Seasons may not be able to "cluster" its single Project building is not important; what is important is whether the Project as a whole can be designed so as to avoid primary agricultural soils.

No evidence was presented as to alternative designs that could better avoid the sites primary agricultural soils.

The Board will not amend its conclusions as to Criterion 9(B)(iii).

e. As to subcriterion (iv), as noted in the Board's discussion of Finding of Fact 174, *supra,* there is no evidence in the record that the Project would not interfere with an adjoining agricultural operation.

The Board will not amend its conclusions as to Criterion 9(B)(iv).

Criterion 10

a. The Royalton Town Plan requires that "[w]here feasible, commercial development shall be located within or close to South Royalton Village or Royalton Village…." The Board found that, "The Project Tract is not within or close to the village centers of South Royalton or Royalton." Decision, Finding of Fact 79. The Board also addressed the question of whether the Project was "close" to the villages in its Decision at 60, n.6:

> 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.

Times and Seasons argues that the word "close" cannot be defined and that an ambiguous standard cannot be applied against Times and Seasons to its detriment.

The Board does not agree that the word is ambiguous. Since the Royalton Town Plan does not define "close,"[9] 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). *The American Heritage Dictionary*, 2d College Ed. (1976), defines "close" as "near in time or space." There is no error in the Board's finding that the Project is not "close" to the villages.

The Board further notes that Lefgren himself states that the "Project is not feasible within or close to South Royalton Village, Royalton Village …. " TS21, Answer 17. And see Testimony of Dean Goulet, TS 22, Answer 7. And see Times and Seasons' March 4, 2005 Proposed Findings of Fact and Conclusions of Law, Finding of Fact 96: "The Project is not feasible within or close to South Royalton Village, Royalton Village…." Certainly, if Lefgren and Goulet can opine about what is "close," so can the Board.

b. The August 15 decision noted that "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." Decision at 62. Times and Seasons argues that it met this economic "unfeasiblilty" requirement through Lefgren's, Goulet's and Merrill's testimony. But the Board cannot find any evidence in the record that the Project would *not succeed* if it were located downtown, only that it will do better if located near the Memorial.

Times and Seasons has not presented any convincing argument that the "where feasible" language of the Town Plan should be interpreted any differently than the *physically feasible* interpretation given by the Board in August.

Times and Seasons also introduces new arguments of economic and religious discrimination.[10] In ¶63 of its motion, Times and Seasons argues that the Board's

---

[9] The Royalton Town Plan does not define any of the thousands of words that it contains, Exhibit TS14, but that does not mean that they have no meaning.

[10] As the Royalton Planning Commission notes new arguments are not permitted by EBR 31(A)(1).

decision, by requiring that commercial development follow the Royalton Town Plan provisions concerning the location of such development in the villages,

> has manipulated the Royalton Town Plan into an economic regulatory document which benefits individual competitors to the Project who do not carry products which are unique to the history and theology of the Church of Jesus Christ of Latter-Day Saints and individual landowners who own commercial property located [in the villages and away from the Memorial. … The Board has impermissibly directed economic activity to a particular store and property owners and has deprived Mr. Lefgren of his right to operate a profitable business that *does* carry [Church products]….

The Board finds these arguments to be puzzling. The Board's decision is strictly limited to an analysis of the Act 250 criteria, similar in all respects to all its other decisions. The Board's decision is economically and religiously blind. It does not matter to the Board what products are sold in Lefgren's gift shop. It is the fact that the gift shop is a commercial enterprise that matters.

The Royalton Planning Commission memorandum, at Paragraph 62, addresses this argument quite well:

> Every land use regulation that allows commercial uses in some parts of town but not in others is similarly discriminatory to any person seeking to develop land for a prohibited use. The Plan does not inappropriately discriminate on the basis of religious affiliation, nor does it interfere with or impose a substantial burden on the Applicant's exercise of religion, but rather only regulates the location of commercial activity in town.

The Board agrees with the Planning Commission.

c. Times and Seasons does not appear to argue that the Board erred in giving the word "feasible" its plain and ordinary meaning. Rather, in ¶64 of its motion, Times and Seasons asks, "why has the Town of Royalton *failed* to define feasible in its Town Plan?" (Emphasis in original) *Why* a word is not defined[11] in a Town Plan is an irrelevant question. The only question is whether the Plan meets the requirements of Criterion 10. *See,* Decision at 57 – 59. Were a town's failure to explain why it does not define every word in its Plan to be the test, then no Plan would ever be given

[11] The Town Plan does not define *any* of the words that appear in it, but this does not mean that the Plan is useless in a consideration of Criterion 10.

effect, and Criterion 10 would be rendered void. The Criterion does not demand such a standard.

d. Times and Seasons contends that the evidence is "undisputed that the Project cannot be successfully carried out in another location."

This argument focuses on the *economic* feasibility of the Project not on its *locational* feasibility, which is how the Board read the term in the Town Plan. Further, even if an economic feasibility test applied, the Board found that there was no evidence that a Project in the downtown will fail.

e. Times and Seasons takes issue with the Board's determination that arguments about the availability of real estate in the village districts were made "after the fact." *Times and Seasons Motion,* ¶65. Times and Seasons contends that this conclusion conflicts with the *de novo* review that the Board must undertake.

The fact that the hearing before the Board is *de novo* has nothing to do with the Board's "after the fact" statement in its August 15 Decision. Rather, the statement addresses the fact that, at the time that Lefgren was contemplating the Project, the *only place that he considered building was on the 7.3 acre tract next to his house.* Indeed, Lefgren never asked his real estate broker to even *consider* other sites in Royalton's commercial areas in accordance with the provisions of the Town Plan. The statement is tied to the Board's conclusion that neither Lefgren's nor Goulet's testimony as to the suitability, cost, or availability of other village locations was credible, Decision at 64 n.10, because their analysis of other sites was performed *after* Lefgren purchased the Project Tract from Benoit, hence, "after the fact."

This is not, therefore, an issue that involves the *de novo* nature of hearings before the Board. It involves questions of credibility.

f. The Board noted that the use of the words "where feasible" provide an "out" or an "escape clause" to a developer that the Town did not have to provide:

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

Decision at 65.

Times and Seasons contends that the Board's discussion about how the Plan "*could have been written* perfectly demonstrates why it is ambiguous *as it was written*." *Times and Seasons Motion*, ¶66. (Emphasis in original) It argues that, again, the failure of the Plan to define "feasible" leads to ambiguity and discrimination (apparently, again, against the LDS Church).

Times and Seasons appears to have missed the point that the Board intended to make -- that the Town Plan could have required *all* commercial development to be located in the village, but the inclusion of the phrase "where feasible" allows a developer to argue that it is physically impossible to locate his project in the village. The fact that this argument may be available to some developers and not others, depending on their projects, does not make the provision either illegal or unenforceable.

g. Times and Seasons raises the specter of a takings claim. It can make such a claim if it wishes but not within the context of this motion.

The Board will not amend its conclusions as to Criterion 10.

III. Order

1. Findings of Fact 31, 61, 62, 69, 70, 73, 76, 115, 133, 138, 166, and 173 of the Decision are amended as stated above.

2. All other Findings of Fact in the Decision are not amended.

3. The Conclusion of Law in the Decision as to 10 V.S.A. §6086(a)(9)(B)(i) is amended as stated above.

4. All other Conclusions of Law in the Decision are not amended.

5. Findings of Fact, Conclusions of Law, and Order (Amended) is issued this date.

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*
Alice Olenick
Patricia Nowak*
Karen Paul
Richard C. Pembroke, Sr.*
A. Gregory Rainville
Christopher D. Roy*

* Board Members Holland, Martinez, Nowak, Pembroke, and Roy dissented to various points in the Board's August 15, 2005 Decision. They dissent from this decision to the extent that it conflicts with those dissents.