

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

Re: Thomas W. Bryant  
and John P. Skinner  
d/b/a J.O.T.O. Associates  
by Julian R. Goodrich, Esq.  
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P.O. Box 808  
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Findings of Fact,  
Conclusions of Law,  
and Order,  
Application  
**#4C0795-EB**

This decision pertains to an application for a 180-unit residential development to be located within the Town of Essex, Vermont. As is explained below, the Environmental Board concludes that the application is denied pursuant to 10 V.S.A. § 6086(a)(9)(B) and (C) (primary and secondary agricultural soils). The Board also concludes that insufficient information exists to issue an affirmative finding pursuant to 10 V.S.A. § 6086(a)(1)(B) (waste disposal). The Board further concludes that the application complies with the remainder of the Act 250 criteria on appeal.

I. SDMMARY OF PROCEEDINGS

The District #4 Environmental Commission issued Findings of Fact, Conclusions of Law, and Order #4C0795 on December 22, 1989, denying an application for a 180-unit planned residential subdivision on 139 acres of land, with municipal water and sewer services, and associated roadways and utilities, located off Towers and Old Stage Road in Essex, Vermont.

On January 19, 1990, the Applicants filed an appeal of the District Commission's decision on the following criteria of 10 V.S.A. § 6086(a): 1(B) (waste disposal), 8 (aesthetics, scenic or natural beauty), 9(B) (primary agricultural soils), and 9(K) (development affecting public investments).

On February 20, 1990, Reed von Gal filed a **CROSS-**appeal with respect to Criterion 9(C) (forest and secondary agricultural soils), and a request for party status on Criteria 9(B) and 9(C). On February 23, 1990, Judy F. Carr filed a cross-appeal with respect to Criterion 10 (conformance with local or regional plans) and a request for party status on Criteria 5 (traffic), 8, and 9(K).

On February 26, 1990, former Chair Stephen Reynes convened a preliminary hearing in Essex Junction. Following the hearing, requests for party status were made by Linda S. Halsted, Catherine K. Suiter, Robert A. **McEwing**, and Kevin B. Albaugh. On March 19, the Board issued a preliminary hearing report. Subsequently, memoranda were filed regarding the cross-appeals and party status requests. On

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June 8, the Board issued a memorandum of decision determining that Criterion 5 must be considered as part of this appeal, that the cross-appeals on Criteria 9(C) and 10 must be dismissed, and that Mr. Albaugh, Ms. Carr, Ms. Halsted, Mr. **McEwing**, Ms. Suiter, and Mr. von Gal (the Neighbors) were granted party status.

On June 14, 1990, Mr. von Gal filed a request for reconsideration of the dismissal of Criterion 9(C). On June 21, the **Applicants filed** a letter stating they had no objection to the consideration of Criterion 9(C) as part of the appeal. On June 28, the Board voted to reconsider, to allow the cross-appeal on Criterion 9(C), and to grant Mr. von Gal party status on that criterion. Parties were informed of this decision orally.

During June and July 1990, parties filed lists of witnesses and exhibits and prefiled testimony. **An** administrative hearing panel convened hearings on July 31, September 12, and October 22, 1990, and January 15, 1991, with the following parties participating:

The Applicants by Julian Goodrich, Esq.  
The Neighbors, pro se

After taking a site visit and hearing testimony, the panel recessed the hearing pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and preparation of a proposed decision.

On January 30, 1991, parties filed proposed findings and conclusions. The panel deliberated on February 6 and March 21. On April 24, the panel determined that this matter was ready for proposed decision.

A proposed decision was sent to the parties on April 26, 1991, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On May 8, the Applicants and the Neighbors requested oral argument. Written responses to the proposed decision were filed by the Neighbors on June 6 and by the Applicants on June 7. The Board convened a public hearing in Montpelier on June 13. The Board deliberated concerning this matter on June 13. On that date, following a review of the **proposed** decision and the evidence and **arguments** presented in the case, the Board **declared** the record complete and adjourned the hearing. **This** matter is now

ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

## II. ISSUES

1. Whether, pursuant to Criterion 1(B), the proposed project will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and whether project waste disposal will cause undue water pollution.

2. Whether, pursuant to Criterion 5, the proposed project will create unreasonable congestion or unsafe conditions with respect to the use of highways or other means of transportation. The issue in this matter is limited to consideration of the impacts on the intersection of Route 15 and Old Stage Road in Essex Junction (the so-called "Butler Corners" intersection.)

3. Whether, pursuant to Criterion 8, the proposed project will have an undue adverse effect on aesthetics or scenic or natural beauty.

4. Whether, pursuant to Criterion 9(B), the proposed project will significantly reduce the agricultural potential of primary agricultural soils, and if so, whether the project meets the four subcriteria at 10 V.S.A. § 6086(a)(9)(B)(i) - (iv).

5. Whether, pursuant to Criterion 9(C), the proposed project will significantly reduce the potential of forest or secondary agricultural soils for commercial forestry or commercial agriculture, and if so, whether the project meets **the three subcriteria at 10 V.S.A. § 6086(a)(9)(C)(i) - (iii)**. The issue in this matter is limited to consideration of secondary agricultural and not forestry soils.

6. Whether, pursuant to Criterion 9(K), the proposed project will unnecessarily or unreasonably endanger the public or quasi-public investment in area roads, and will materially jeopardize or interfere with the function, efficiency or safety of, or the public's use or enjoyment of or access to, area roads. Similar to Criterion 5, the evaluation here is limited to impacts on the Butlers Corners intersection.

III. FINDINGS OF FACT

Project and Site Description

1. The proposed project will be located on an approximately 139-acre tract located in Essex, Vermont. The tract is roughly triangular in shape. The Applicants have divided the tract into two parts. The northern part consists of approximately 112 acres which are to be devoted to residential development and for which the Applicants are now seeking approval. The Applicants plan to use the southern 27 acres of the parcel for commercial development and will seek a permit amendment approving such development once their plans are finalized.
  2. On the northern 112 acres, the Applicants propose to build 116 single family homes and 32 multi-family dwellings each with two single-family dwelling units (the "multi-family dwellings"). The total number of proposed living units is 180, to be built in phases of 20 per year over nine years. The single-family homes will cover most of the 112 acres and will be located to the north and west of the multi-family dwellings. The average size of each lot for the single family homes is approximately half an acre. The multi-family dwellings will be located between the single family homes and the 27 acres reserved for commercial use. They will be constructed in groups consisting of four attached houses (each group thereby consisting of eight units total), clustered closely around two parking areas. The Applicants will not construct the single family homes but will construct the multi-family dwellings. The Applicants also propose to build six roads denominated Streets One through Six.
  3. The eastern border of the tract is delineated by Towers Road. Across Towers Road from the project lie lands owned by **Quinton** and Pelcher and, on the southeast, land owned by the Town of Essex which is used as a park. The Pelcher land is a residential lot. The **Quinton** land is a large tract which is hayed.
  4. The northern border of the tract consists of lands owned by Ray Paquette and party Robert **McEwing**. The Paquette land is used for residential purposes. The **McEwing** land consists of 16 acres used as a sheep farm. It is also Mr. **McEwing's** residence.
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5. The western border of the tract consists of many parcels and Old Stage Road. Specifically, starting from the north and working south along the western border, there is property owned by Sandra **Angolano** on which she has her residence and keeps four horses. The **Angolano** parcel is between the Applicants' tract and Old Stage Road. Immediately south of this parcel, a portion of the Applicants' tract (the western common area) juts out to meet Old Stage Road. This portion of the Applicants' tract is about 500 feet wide north to south and will be set aside for common use by project residents. This portion will hereafter be called "**the western common area.**" South of the western common area, the Applicants' tract recedes from Old Stage Road, with several parcels lying between it and the road. Again going north to south, these parcels are owned by parties Kevin and Cheryl Albaugh, Catherine Suiter, and Reed von Gal. All of these persons live in houses on their parcels. All of these parcels are also used for agriculture.
6. On most of the southern border of the parcel is a tract of land on which a subdivision known as Essex Ventures is located. The western portion of this subdivision consists of residential development and the eastern portion is open land presently used for agriculture. The remainder of the project site's southern border consists of land owned by Fleury which is used for residential purposes.
7. The Applicants plan to construct three vehicular entrances into the residential project. One of these entrances will curve southwest into the development from Towers Road and will be called Street Six. It will run past the multi-family dwellings which will lie to its south. Strips of land on either side of Street Six, stretching the length of the tract along Towers Road, will be left open as a common area for use by project residents (the eastern common area). To the south of Street Six, the eastern common area expands beyond being a strip to include a larger area which is south of the multi-family dwellings and which borders the portion of the tract reserved for commercial use.
8. The site of the proposed project consists of a large, open tract. The land slopes from the northwest down to the southeast, or roughly down

from Old Stage Road to Towers Road., The steepest slopes are on the northwest portion of the tract. All slopes are less than 15 percent.

9. Three wet areas exist on the site. One is located within the western common area. Street One will run through this wet area. The second wet area is located on the northeast portion of the tract immediately west of the eastern common area. Single family homes will be built on this wet area. The third wet area is located on the southeast portion of the parcel; it is delineated as having its southern border on the area which is reserved for future commercial use. On the northwest of this wet area, the multi-family dwellings will be built.
10. The Applicants have created many differing plans for the proposed project to respond to concerns raised about the project. Several of these plans have been offered into evidence. The most current plan is Board Exhibit #A-34.

Criterion 1(B): Waste Disposal

11. The Applicants plan to connect to the Town of Essex sewer system. The Town has granted a sewage allocation for all 180 units of the development based on a maximum potential flow of 74,850 gallons per day. The Town has the capacity to handle the potential flow.
12. The Applicants plan to lay gravity sewers from the residential project through the southernmost wet area to a pump station which will be located on the portion of the tract reserved for future use. Trenches will be dug within the wet area to accommodate the sewers.
13. The Applicants' proposed sewer system is subject to the requirement to obtain a subdivision permit from the Agency of Natural Resources, Department of Environmental Conservation, Division of Protection pursuant to 18 V.S.A. Chapter 23. They have applied for but not yet received a permit from the Agency because they have not finalized the design of the sewer system. For example, they have not determined the exact location of the pump station on the commercial portion of the tract. They have not finalized the design because they want to know what modifications to

the overall project design may be imposed by the Board or by the Town of Essex. They believe that such requirements may **affect** their sewer system design.

14. The project will not involve the injection of waste or harmful or toxic substances into groundwater or wells.

Criteria 5 and 9(K): Traffic and Public Facilities

15. Route 15 is a state highway which runs east from the City of Burlington through the Town of Essex to points further east. Route 15 intersects with Old Stage Road approximately **8/10** of a mile south of the planned project entrance known as Street One. This intersection is known as Butlers Corners.
  16. Six accidents occurred at the Butlers Corners intersection in 1988, five of which' involved bodily injury. The accident rate and the incidence of severe accidents at the intersection are higher than average.
  17. The speed limit on Route 15 at the intersection is 40 miles per hour (mph). Safe sight distance for a car turning onto Route 15 from Old Stage Road is at least 450 to 500 feet. For a driver stopped on Old Stage Road preparing to turn onto Route 15, the sight distance to the right exceeds 500 feet, and the sight distance to the left is 200 to 300 feet. The necessary stopping distance for a vehicle traveling 40 mph is at least 300 feet.
  18. Traffic congestion is measured as a level of **service** (LOS) on scale of A to F. LOS A represents no delay; LOS C represents average conditions and is the minimum acceptable LOS; LOS E and F represent very long delays and restricted freedom to maneuver.
  19. Butlers Corners is becoming a congested intersection because of a general increase in development in Essex. It is estimated that design hour LOS was E for all turning movements from Old Stage Road and B for left turns from Route 15 onto Old Stage Road in 1989. It is estimated that, without the project, the LOS will deteriorate by 1994 to F for turns from Old Stage Road and C for left turns from Route 15. It is further estimated that by 1999 the LOS will still be F **for** turns from Old Stage Road and will deteriorate to E for left turns from Route 15, absent any measure to improve the intersection. Once LOS F is reached for left turns
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from Old Stage Road onto Route 15, it will be necessary to install a traffic signal at the intersection to mitigate unsafe and congested conditions there.

20. Based on the implementation of Phase I of the proposed project by 1989, the Applicants' LOS estimates for design hour at the Butlers Corners intersection are as follows:

	1989	1994	1999
Left from 15	B	D	F
Turns from Old Stage	E	F	F

These estimates are based in part on 1982 traffic counts by the Vermont Agency of Transportation (AOT).

21. The Neighbors recalculated the Applicants' LOS estimates based on 1990 traffic counts. These indicate LOS E in 1990 for the left turn from Old Stage Road onto Route 15. They project that this will decline to LOS F in 1991 if the initial phase of the project is built and occupied by then. Without the project, it would decline to LOS F by 1993.
22. Following full build-out and occupancy,, the proposed project will add approximately seven percent to the total traffic volume which presently passes through the intersection. At that time, at least 47 vehicles from the proposed project will travel down Old Stage Road during the afternoon peak hour and pass through the Butlers Corners intersection.
23. If a traffic signal were installed at the intersection, it would mitigate safety and congestion problems there by allowing vehicles to turn after oncoming traffic has been stopped and by limiting delay to the time between signal changes. The Town of Essex is working with AOT on the construction of a signal for this intersection. The Applicants and the Town have signed an agreement by which the Applicants will pay 14 percent of the Town's cost to improve the intersection, up to a limit of \$28,000. The Applicants estimate the cost of installing a traffic signal to be approximately \$200,000. This estimate does not include the cost of any land acquisition which may be necessary. There is no legal mandate requiring the Town or AOT to construct a signal at the intersection.
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Criterion 8: Aesthetics, Scenic and Natural Beauty

24. The proposed project is located in an area known as Essex Center which has been undergoing a transition from rural to less dense residential to more dense residential use. There is already much residential development in the area. Some of this development, such as the lots owned by the residents adjacent to the development discussed in Findings 4 and 5, above, consists of single residences on multi-acre lots, usually of ten acres or more. Other residential development in the area can be characterized as medium density, such as the nearby Essex Ventures subdivision. Essex Ventures is less dense than the proposed project will be. There are other subdivisions in the area which are similar to Essex Ventures.
25. The Town Plan designates Essex Center as a growth area with medium to high density residential uses. It is zoned residential with an allowance of approximately two units per acre, which is the highest allowable density in Essex.
26. Residents and drivers along Old Stage Road are able to look across the open, empty site of the proposed project east across foothills to the Green Mountains. Mount Mansfield and Camel's Hump are part of this view.
27. The actual frontage of the project site on Old Stage Road is approximately 440 feet. Further, except for the portion of the site which juts west to meet Old Stage Road, the site's western border runs approximately parallel to that road, behind a row of residential lots which each consists of approximately seven or more acres. Most of these lots have only one structure on them. The total length of the site's western border is approximately 2300 feet.
28. Drivers on Old Stage Road can see the Green Mountains intermittently through gaps in the houses. The speed limit on Old Stage Road is 40 mph. Drivers on that road who go approximately the speed limit therefore will see the view for short periods of several seconds in length. For example, the view interval is approximately seven to ten seconds for a driver traveling at 40 mph from one end to the other of the site's actual road frontage of 440 feet.

29. The elevation of Old Stage Road near the proposed project is 557 feet. The highest elevation on the project site is near the proposed location of Street Two, which is the **closest** residential portion of the site to Old Stage Road and the existing residences on that road. That elevation is 536 feet.
  30. The Applicants have created restrictive covenants which will apply to the proposed project (Exhibit A-10). The Applicants have included on page 13 of the covenants a requirement that the colors of houses on Street Two must blend into the background of those houses as seen from Old Stage Road. On page 18 of the covenants, the Applicants have included a restriction that no tree on Street Two may exceed 28 feet in height. The Applicants are willing to revise the covenants to restrict houses at the subdivision to a maximum height of 28 height above existing grade. If the houses on Street Two were so restricted, the top of the houses would be at an elevation of 564 feet.
  31. Viewed from Old Stage Road, the Green Mountains form ridges which can be divided into three groups: lower, intermediate, and upper. At a top elevation of 564 feet, the homes on Street Two will block the views of the lower and some of the intermediate ridges, but most of the intermediate and all of the upper ridges will still be visible because the homes will not be next to Old Stage Road but will be a minimum of approximately 950 feet away.
  32. The color of all homes at the subdivision will be restricted to earth tones. Colors will be approved by an architectural review board in accordance with the covenants. The Applicants propose plantings along the borders of the common areas and the areas which will be built upon, along the outer borders of the portion of the project site set aside for residential development, and along Street Two. (See Board Exhibits #A-34, **#A-37.**) The plantings include a mixture of deciduous and evergreen trees and shrubs. The trees along the southern and eastern borders of the residential portion will be 12 to 14 feet in height when planted and will grow to a height of 40 to 60 feet. All other trees will be of types which do not generally exceed 20 feet in height.
  33. The Applicants have stated that they are willing to revise the restrictive covenants to require planting by the owners of lots at the subdivision.- They have not stated what types of planting would be required.
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34. The Applicants will leave approximately 30 acres of common land open. They plan to establish trail links between the eastern common area, the nearby municipal park on Towers Road, and open common areas created as part of nearby developments such as Essex Ventures. The eastern common area will form a buffer between the residential project and Towers Road, with a minimum gap of 200 feet between the built areas and Towers Road.
35. This application was filed on March 21, 1989. On July 18, 1989, the Essex Open Lands Committee, appointed by the Town of Essex Board of Selectmen, adopted the Essex Open Lands Study. A map which is part of that study places the proposed project site in an area designated "Sensitive Scenic Resources." On page 18 of the study, Towers and Old Stage Roads are designated as visually sensitive areas. On page 19, the study states concerning such areas that the foreground is typically open fields or pastures which allow "the eye to enjoy the view of the mid and backgrounds without distraction and is an important element of framing-the view." The study further provides:

The background component to these landscapes is usually out of Town and therefore out of the jurisdiction of design controls. The key for preserving the background view is in the control of the management of the foreground and middle ground areas.

The study also states that the mapped sensitive scenic resources are the most vulnerable to development and are "high priority locations for conservation . . . ."

Criteria 9(B) .(C) : Primary and Secondary Agricultural Soils

36. The soils on the site can be divided into three groups: those which are stony or fairly wet, those which are less wet, and those which are least wet. Each of these groups is further divided into soil mapping units which have been rated on a one through nine scale for agricultural value, with one the most and nine the least valuable for agriculture. These ratings are based on standard ratings assigned by the U.S. Soil Conservation Service adjusted for conditions revealed by site investigation.

37. Soils which fall within the first group exist in three areas of the site totaling approximately 42 acres:
- (a) A soil mapping unit of Cabot loam taxadjunct exists on the westernmost part of the site. (The term "**taxadjunct**" refers to a soil for which no classification exists but which resembles a classification which does exist; for example, the soil in this unit is not Cabot loam but resembles it, so the Cabot classification is used for convenience.) The slopes within this unit are zero to three percent. The unit includes the western common area and the wet area therein. It also extends south along a narrow band just east of the Albaugh, Suiter, and part of the von Gal parcels. The soils in this unit are not sufficiently drained for sowing and harvesting with mechanized equipment. The agricultural value is rated at nine.
  - (b) An area containing stony soils exists on the northern part of the site. The western border of this area is the **Angolano** property. The northern border is the northern site boundary running east from the **Angolano** property for approximately 900 feet. Three soil mapping units exist within this area: Peru soils taxadjunct with three to eight percent slopes, Peru soils taxadjunct with eight to 15 percent slopes, and Cabot loam taxadjunct with three to eight percent slopes. The stony soils present limitations to cultivation which cannot easily be overcome. The area has been used for pasture. The agricultural value of these soils is rated at nine.
  - (c) Two soil mapping units of Canandaigua silt loam with zero to one percent slopes exist close together on the southeast portion of the portion of the site. They are separated by a narrow band of Binghamville silt loam soils (see Finding 38(a), below). The northernmost Canandaigua unit contains the third wet area referenced in Finding 9, above. About half of this unit and the southernmost Canandaigua unit are located within the area reserved for future commercial use. Both units contain wet soils. The agricultural value of these units is rated at nine. Hay is currently grown on the southernmost unit and on part of the northernmost unit.

38. Soils which fall within the second group exist in two areas of the site totaling approximately 54 acres:

(a) A mapping unit of Binghamville silt loam with zero to two percent slopes exists beginning on the eastern central part of the site. Curving around the northernmost Canandaigua unit described in Finding 37(c), above, this unit extends east to Towers Road and south to meet with the southernmost Canandaigua unit. A narrow band of the Binghamville soils juts west to separate the two Canandaigua units. In the north, a small portion of the Binghamville unit contains the second wet area referenced in Finding 9, above. Aside from the wet area, most surface water from the Binghamville unit drains into the Canandaigua units. Binghamville soils are typically poorly drained but soil profiles from this unit taken in 1989 were not saturated within the first 33 inches below grade. Past owners of the parcel have installed shallow surface drains and some further drainage could be installed to promote easier sowing and harvesting. Donald Matthews farmed this parcel from 1971 through 1976 and grew corn in this area. Total Binghamville acreage on-site is 37, with 25 acres on the residential and 12 acres on the commercial portions of the parcel. The agricultural value of this unit is five.

(b) An area containing two mapping units of Cabot loam taxadjunct exists just south of the stony area described in Finding 37(b), above. The westernmost of these units has slopes of zero to three percent, and the easternmost has slopes of three to eight percent. The easternmost unit has good surface drainage. The westernmost unit is more wet but is drained sufficiently by a shallow ditch. Ronald Sweet farmed the project site from 1977 through 1982 and used these units for pasture or growing hay. The total acreage within these units is approximately 17. These units are on the residential portion of the parcel. The agricultural value is five.

39. Soils which fall within the third group exist on two areas of the site totaling 38 acres, all within the residential portion of the parcel:

- (a) An area consisting of five distinct mapping units is located in the center of the parcel running from the southern border to a boundary on the north. This boundary consists of the stony soils on the northwest and the northern site boundary. The two westernmost units within this area consist of soils classified as Peru loam taxadjunct. They are better drained than the Cabot soils referenced immediately above in Finding 38(b). The soils are, however, fairly dense, and during spring and other wet periods a perched water table occurs, creating temporary saturated zones due to the soil density. These temporary zones disappear soon after the start of the growing season. Corn and hay have been grown within these units in the past. The total acreage of these units is approximately 14. The agricultural value of the larger of the units is three and the smaller is five (see Board Exhibit #N-25).

The easternmost units in this area consist of two units of Raynham silt loam with two to six percent slopes and a unit classified as a variant of Vergennes silt loam with three to eight percent slopes. The Raynham soils are more thoroughly described immediately below. The Vergennes variant sits on top of a layer of gravelly soil and has a **very low** clay content. It is neither excessively drained nor wet. It has the potential for growing food and forage crops. The total Vergennes variant acreage is approximately seven and its agricultural rating is three.

- (b) A unit of Raynham silt loam soils with two to six percent slopes lies on the northeast part of the site along Towers Road. This unit is separated from one of the other Raynham units mentioned immediately above by the second wet area. All of the Raynham units have good surface drainage and the potential for growing food and forage crops. The total Raynham acreage is approximately 17 and the agricultural rating is three.

40. When Mr. Matthews farmed the parcel, he grew *corn in* rotation with hay and pasture. His farm was a dairy farm, with a herd of approximately 200 head of cattle.
41. When Mr. Sweet farmed the parcel, he grew hay on the southeast portion and used the northwest portion, including the stony areas, for pasture. He ran a dairy

farm with as many as 220 head of cattle, with approximately "90 head milking." He harvested approximately 20,000 bails or 363 tons of hay per growing season. He made a profit on his farm and left because he was leasing the land and decided to buy his own farm.

42. Mr. von Gal rents farm buildings which exist on his land to Darlene Smith. Ms. Smith uses the farm buildings in connection with maintaining a dairy cattle herd of about 100 head. She also leases the agricultural portion of the adjacent Essex Ventures subdivision (about 30 acres), and the property site. She uses the leased lands for hay **supply**, manure spreading, and pasture. Ms. Smith could maintain a viable operation on approximately 60 acres of land; she would have to reduce the herd size to do so. If the proposed project goes forward, she would then have the von Gal land, the 30 acres at Essex Ventures, and whatever remaining land was available on the proposed project site. The von Gal land consists of ten acres; farm buildings prevent farming on part of that land. The Essex Ventures land consists of poor soils which have about the same value for her purposes as 20 acres of better soils. Ms. Smith therefore needs at least 31 to 35 acres in addition to the von Gal and Essex Ventures properties.
43. The proposed project will cover most of the 112 acre portion of the site. The roads, single-family home lots, multi-family dwellings, and parking lot will cover all but approximately 30 acres of the residential portion of the tract. All soil mapping units with a rating of five or better will have permanent improvements built on them except for the easternmost Raynham unit and the easternmost portion of the Binghamville unit along Towers Road. The only other areas which will be left open are the wet areas in the western common area and the northern Canandaigua unit, and if the commercial portion of this project does not go forward, the portion of the parcel set aside for commercial use. The western common area consists of about ten acres and some of this will be used for Street One. The wet area in the Canandaigua unit consists of about 12 acres. The proposed project will block Ms. Smith's access to the Essex Ventures agricultural parcel because single-family home lots will be placed between that property and the von Gal parcel. The Applicants have stated that they are willing to eliminate an unspecified number of lots to allow access.
44. The Applicants own no other lands in Chittenden County.

45. The Applicants estimate the fair market value of the property to be approximately \$400,000. This is based in part on a purchase price of \$210,000 paid by the current owners when they bought the land ten years ago, multiplied by a factor of ten percent per year. The analysis presented to justify this figure was cursory and referred to an appraisal which was not actually presented. The fair market value estimate includes all 139 acres (the residential and commercial portions).
  46. The Applicants assert that a reasonable rate of return from the proposed project is ten percent per year. The Applicants estimate the return from the proposed project over their investment to be approximately 12 percent per year over nine years. This is based in part on selling 112 of the 116 single-family lots and all of the 64 units in the multi-family dwellings. If all 116 lots are sold, the return will be nearly 18 percent.
  47. The Applicants' twelve percent per year estimate for rate of return includes the purchase price for the entire parcel, but only 112 of the **139 acres** are being devoted to the residential project. No estimate of returns from the commercial project is included.
  48. If the Applicants' figures are adjusted to take into account that portion of the purchase price related to the 112 acres, the return from the project would be 16.5 percent per year over nine years (assuming only 112 single family lots are sold).
  49. The Applicants estimate that agricultural value of the land would be approximately \$250 per acre. This estimate is not based on an appraisal or detailed analysis. Using the fair market value of \$400,000 referenced above, they estimate that the rate of return from agricultural use of the parcel would be negative or zero. Their analysis does not account for profit from growing crops or selling milk.
  50. The Applicants have offered no numerical analysis of other uses of the parcel which do not reduce agricultural potential. They have also offered no evidence regarding returns from alternate designs. They assert that all other possible uses of the parcel would reduce that potential.
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IV. CONCLUSIONS OF LAW

A. Criterion 1(B) (Waste Disposal)

10 V.S.A. § 6086(a)(1) requires that, prior to issuing a permit, the Board find that a project will not create undue water pollution. 10 V.S.A. § 6086(a)(1),(B) provides:

A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells.

The Applicants' waste disposal plan as it currently stands does not involve the injection of waste or harmful or toxic substances into groundwater or wells. However, no evidence has been submitted to show that the waste disposal plan will meet applicable regulations. Instead, the Applicants have not finalized the waste disposal system design and have asked the Board to issue a permit contingent on obtaining a permit from the Department of Environmental Conservation.

The Board concludes that it is not authorized to grant the Applicants' request. 10 V.S.A. § 6086(a) begins with the words: "Before granting a permit, the board or district commission shall find that the subdivision or development . . ." Section 6086(a) continues to list many criteria, including 1(B), which requires a showing that the proposed project will meet applicable health and environmental conservation regulations. Thus, the Board cannot issue a permit unless it finds that a proposed project will meet applicable regulations. In this case, Department regulations apply to the project and no evidence has been introduced to demonstrate compliance.

Rule 21(A) allows an applicant to elect to have the Board issue partial findings of fact and conclusions of law to facilitate review of projects. Such findings and conclusions are to be valid for a period to be determined by the Board.

The Applicants have applied to the Department for a permit and plan to move forward on that application following resolution of concerns about the proposed project which might necessitate changes in the waste disposal system design. Were

the Board to find positively for the Applicants on the other criteria at issue, -the Board would seek to issue partial findings of fact regarding those criteria. These findings would be valid for a year, which would allow the Applicants an opportunity to finalize the waste system design, obtain a permit from the Department, and supply that permit to the District Commission as a presumption of compliance pursuant to Rule 19(E)(1).

B. Criteria 5 and 9(K): Traffic and Public Facilities

Criterion 5 requires that, prior to issuing a permit, that Board must find that a proposed project:

Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

10 V.S.A. §6086(a)(5). In addition, Criterion 9(K) provides:

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 Board may not deny an application pursuant to Criterion 5 but may condition a permit to alleviate the impacts of a project. 10 V.S.A. §§ 6086(c), 6087(b). The Board may deny a permit pursuant to Criterion 9(K). 10 V.S.A. § 6087(a).

The issue in this case is the impact of the project's traffic on the Butlers Corners intersection. This intersection has an above average accident rate and an above average incidence of severe accidents. The sight distance is 300 feet for vehicles turning left from Old Stage Road onto

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Route 15, much less than the necessary safe sight distance. Further, vehicles traveling the speed limit of 40 mph on Route 15 need at least 300 feet to stop. Thus, a vehicle turning left from Old Stage Road onto Route 15 may not see an oncoming vehicle until just that moment when the oncoming vehicle needs to begin stopping. If the turning vehicle has begun its turn before seeing the oncoming vehicle, and the driver of the oncoming vehicle does not react quickly enough, the likelihood of collision is significant.

The Butlers Corners intersection is' also already congested. The LOS for turning movements from Old Stage Road onto Route 15 is currently E. By as early as 1993, that LOS will likely deteriorate to F. In addition, the LOS for left turns from Route 15 onto Old Stage will probably deteriorate from B to F by 1999. Even without the project, a traffic signal will be required at Butlers Corners at least by 1993.

Vehicles from the proposed project will travel along Old Stage Road and Route 15 through the Butlers Corners intersection. Credible evidence has been introduced that the first phase of the project will accelerate the build-up of congestion at the intersection to LOS F by two years, at which time a traffic signal will be needed. Further, traffic from the proposed project will contribute approximately seven percent of the total traffic volume at the Butlers Corners intersection following full build-out. At that time, at least 47 vehicles from the proposed project will travel down Old Stage Road through the Butlers Corners intersection. It is inferred that some of these vehicles will turn left onto Route 15 from Old Stage Road.

Under these circumstances, the Board concludes that the proposed project will create unsafe conditions and unreasonable congestion, absent any mitigating improvement. Unsafe conditions will be created for traffic from the project which must turn left from Old Stage Road onto Route 15 without sufficient sight distance at an intersection which already experiences an above average rate of severe accidents. Each driver of a vehicle generated by the proposed project will be subject to this unsafe condition. Further, the project will accelerate congestion at the Butlers Corners intersection such that a traffic signal may be needed two years earlier than it otherwise would be.

The Applicants have offered to pay a portion of the cost installing a traffic signal at the Butlers Corners intersection, up to a limit of \$28,000. The Applicants claim that \$28,000 represents 14 percent of the signal's total cost, based on a \$200,000 estimate which does not include land

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acquisition costs. Thus, the cost of a signal may be significantly higher than \$200,000. Since the project will contribute seven percent of the traffic through Butlers Corners following full build-out, the Board would require, if it were issuing a permit, that the Applicants pay \$28,000 or seven percent of the total cost of the intersection, whichever is greater. The Board also would require that the Applicants place \$28,000 in an interest-bearing escrow account to be released to pay for installation of a traffic signal, or to the Applicants after five years, whichever is sooner.

The Board notes that the installation of a traffic signal at the Butlers Corners intersection is primarily under the control of the Town of Essex and the State of Vermont. Therefore the Applicants cannot guarantee the installation of a traffic signal, leaving open the possibility that no signal will be installed and the above-noted conditions will not be remedied.

The proposed phasing of the project allows time for development of an alternate solution should efforts to install a traffic signal prove unfruitful. Accordingly, if the Board were issuing a permit, it would add a condition requiring that the project be phased and that, if no traffic signal has been installed at the intersection within five years, the Applicants shall submit an amendment application to the District Commission with proposed alternative remedies, and that no further construction of units at the subdivision occur until such alternatives are reviewed and approved.

On the basis of the foregoing, the Board concludes that the proposed project complies with Criteria 5 and 9(K).

C. Criterion 8: Aesthetics, Scenic and Natural Beauty

Prior to issuing a permit, the Board must find that the proposed project will "not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics ...." 10 V.S.A. § 6086(a)(8).

The Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (Jan. 13, 1986).

1. Adverse Effect of Provosed Project

With respect to the analysis of whether a project will result in adverse effects on aesthetics and scenic beauty, the 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 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. Id. at 18.

The Board concludes that the proposed project will have an adverse effect on the aesthetics and scenic beauty of the surrounding area. The project site is a large open tract which can be viewed from Old Stage and Towers Roads. The context of the proposed project is an area in transition from rural to low and medium residential use. There is an interspersion of parcels with a variety of uses: rural and open (the Quinton and municipal park tracts), low density residential (the many nearby tracts of approximately ten acres), and medium density residential (the nearby approved subdivisions such as Essex Ventures). There are mountain views across the parcel from Old Stage Road. These views, and the open nature of the parcel, form an aesthetically significant counterpoint to an area of increasing residential use.

The proposed project will be built on much of the open area of the site. This will adversely affect the open space view from Old Stage and Towers Roads. In addition, the proposed project will have an adverse effect on the views of the Green Mountains from Old Stage Road and adjoining homes by blocking views of the lower and intermediate ridges of those mountains.

2. "Undue" Adverse Effect

In evaluating whether adverse effects on aesthetics and scenic beauty are undue, the Board analyzes three factors and concludes that a project is undue if it reaches a positive conclusion with respect to any one of these factors, which are:

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

- b. 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?
- c. Have the Applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Quechee at 19-20.

The Board does not reach a positive conclusion with respect to any of the above three factors. To begin with, the proposed project's adverse effect does not violate a clear, written **community** standard. In fact! the Town Plan targets this area for the type of use proposed.

The Neighbors contend that the Essex Open Lands Study should be considered a written community standard which is violated by this project. The Board agrees that the study is a community **standard**. The study, however, focuses on protection of prominent background and mid-ground views of objects which are located out of town, such as the Green Mountain views at issue here. The study emphasizes that measures shall be taken to protect these off-site views, and emphasizes that foreground views should be controlled in order to protect background and mid-ground views. (See Finding 35, above.) The study does not, however, state that foreground view control is the only means of protecting background and mid-ground views. The Applicants have elected to pursue other means of preserving background and mid-ground views, which the Board concludes below are adequate for the purpose. That community standard will therefore not be violated by the proposed project.

The Board also does not conclude that the proposed project is shocking or offensive to the average person.

Further, the Applicants have taken the generally available mitigating steps which a reasonable person would take to alleviate the adverse effects of the subdivision on the surrounding area. The Applicant has placed height restrictions on homes and trees, proposed planting to screen the development, proposed covenants to govern future construction and activities on the site, placed limits on exterior house colors, and retained open space, as shown in Findings 30, 32, and 34, above. Were the Board to issue a

permit, it would ensure this by incorporating as permit conditions the restrictions on colors of homes cited in Findings 30 and 32, above, and the 28-foot height limit on houses at the subdivision and of trees along Street Two cited in Finding 30, above, and the retention of common land described in Finding 34, above. The Board would also specify that the tops of houses of the subdivision and trees along Street Two be no higher than 564 feet in elevation or 28 feet above existing grade, whichever is lower.

D. Criteria 9(B), (C): Agricultural Soils

Prior to issuing a permit, the Board must make findings regarding primary and forest and secondary agricultural soils. The burden of proof here is on the Applicants. 10 V.S.A. § 6088(a). "Primary agricultural **soils**" mean:

[S]oils 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 definition of "forest and secondary agricultural **soils**" provides that they are:

[S]oils which are not primary agricultural soils but which have reasonable potential for commercial forestry or commercial agriculture, and which have not yet been developed. In order to qualify as forest or secondary agricultural soils the land containing such soils shall be characterized by location, natural conditions and ownership patterns capable of supporting or contributing to present or potential commercial forestry or commercial agriculture. If a tract of land includes other than forest or secondary agricultural

soils only the forest or secondary agricultural soils shall be affected by criteria relating specifically to such soils.

10 V.S.A. § 6001(8).

Based on the evidence presented, the Board concludes that some soils on the property are neither primary nor secondary agricultural soils, some soils are primary agricultural soils, and some soils are secondary agricultural soils. Specifically:

- (1) The Cabot loam taxadjunct soils described in Finding 37(a), above, are not primary or secondary agricultural soils. In addition, the portions of the Canandaigua and Binghamville units containing wet areas are not primary or secondary agricultural soils (see Findings 37(c) and 38(a), above) .
- (2) The primary agricultural soils on the site consist of the Cabot loam taxadjunct units described in Finding 38(b), above; and all of the soils described in Finding 39, above.
- (3) The secondary agricultural soils on the site consist of **the stony** soils described in Finding 37(b), above, which have been used for pasture; the portions of the Canandaigua units described in Finding 37(c), above, on which hay is currently grown; and the Binghamville soils unit described in Finding 38(a), above, except for the wet area within that unit.

The total acreage on-site of primary agricultural soils is approximately 55. The total acreage of the secondary agricultural soils is difficult to ascertain based on the evidence provided. For example, the Board has concluded that all of the Canandaigua and Binghamville units are secondary agricultural soils except for the wet areas within the units, but no acreage has been provided for the Binghamville wet area. In addition, no acreage has been given for the stony pasture **which** the Board has concluded is secondary agricultural soils.

The Applicants have argued strenuously that most of the primary agricultural soils identified above should not be so identified. However, these arguments have been in the form of attacks on the evidence presented by the Neighbors, and have had the effect of making the evidence appear confusing

rather than clearly showing the absence of primary agricultural soils. Thus, the Applicants have not persuaded the Board that the 55 acres are not primary agricultural soils. Further, the Board would conclude that all of the 55 acres are secondary agricultural soils if it concluded that they were not primary agricultural soils.

The Board's conclusions above lead to the following picture of the project site: The extreme western portion does not contain primary or secondary agricultural soils. The middle portion consists of primary agricultural soils, with a stony pasture of secondary agricultural soils at the northern end. The eastern portion consists of secondary agricultural soils, except for a portion of primary agricultural soils located in the northeast off Towers Road, and two small areas which are too wet to be considered primary or secondary agricultural soils. In this light, the Board will examine whether the proposed project complies with Criteria 9(B) and (C).

1. Primary Agricultural Soils

10 V.S.A. § 6086(a)(9)(B) provides:

A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not significantly reduce the agricultural potential of the primary agricultural soils; or,

- (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.

The Board concludes that the proposed project will significantly reduce the agricultural potential of the primary agricultural soils. The Applicants plan to use as part of the project all of the acreage involved with these soils except for the small portion of primary agricultural soils located off Towers Road. The acreage which will be used will primarily be divided into single-family lots on which homes eventually will be built. Roads will also be built on the primary agricultural soils.

With respect to Subcriterion (i), "**rate** of return," the Applicants have not met their burden of proof. That subcriterion 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. Homer and Marie Dubois, Application #4C0614-3-EB, Findings of Fact, Conclusions of Law and Order at 7-8 (May 18, 1988).

The Applicants have not provided sufficient evidence under Subcriterion (i). While the Applicants have presented a fair market value for their parcel, they have presented only cursory and meager analyses **concerning the** rates of return from the proposed project and the rates of return from agricultural use of the parcel. The Board concludes that these analyses are insufficient. For example, the Applicants' calculation of rate of return from the proposed project is based on the fair market value of the entire property and a comparison of that value with the return from the proposed project, which only uses a portion of the property. Yet the other part of the property is planned for commercial development and as such will generate a return. Thus, either the return from the commercial development must

be included or the fair market value reduced to reflect on .y that of the 112 acres which are to be used for the residential project.

More importantly, the Applicants have not provided any calculation of rates of return from land uses which do not reduce agricultural potential except for agricultural use itself. At least two alternative designs emerge for which rates of return could have been provided. One is a possibility of constructing only the commercial development in the southeastern part of the parcel. Another is a possibility of no construction on the primary agricultural soils and clustered construction on the secondary agricultural soils. This could be achieved, for example, if only the multi-family dwellings were built as planned. In the absence of information on rates of return from these obvious alternatives, the Board cannot conclude that Subcriterion (i) is met.

The Board does conclude that the application meets Subcriterion (ii) because the Applicants own no other lands in Chittenden County.

The Board further concludes that the application does not comply with Subcriterion (iii) because the improvements to be built on the primary agricultural soils are not clustered. The primary agricultural soils will be divided up into single-family lots in the manner of a traditional subdivision with no grouping of lots to avoid primary agricultural soils.

Finally, the Board concludes that the application does not comply with Subcriterion (iv) because it will interfere with an adjoining agricultural operation. Darlene Smith uses the Applicants' parcel in connection with her dairy farm which she operates out of the adjacent von Gal parcel. Ms. Smith needs at least 60 acres of good soils to maintain a viable operation. The von Gal parcel provides somewhat less than 10 acres. The Essex Ventures parcel provides approximately 30 acres of poor soils which are the equivalent of 20 acres of good soils. Accordingly, Ms. Smith will need to use at least 31 to 35 acres of the proposed project site to maintain the viability of her operation. While approximately 30 acres of the residential portion of the site will be left open, at least 22 of these acres are wet areas or non-agricultural soils (or both). Thus, Ms. Smith will not be left with the requisite acreage, unless the commercial portion of the site consisting of 27 acres is not developed.

2. Forest and Secondary Agricultural Soils

10 V.S.A. § 6086(a)(9)(C) provides:

A permit will be granted for the development or subdivision of forest or secondary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not significantly reduce the potential of those soils for commercial forestry, including but not limited to specialized forest uses such as maple production or Christmas tree production, of those or adjacent primary agricultural soils for commercial agriculture; or

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

(ii) there are no nonforest 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 forestry and 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.

The Board concludes that the proposed project will significantly reduce the potential of secondary agricultural soils. Many of the single-family lots on which homes will be built will be created on soils which are secondary agricultural. These includes all or portions of Lots 23 through 32, 35 through 42, 43 through 48, 59, and 69 through 80. In addition, the multi-family dwellings and portions of Streets Two and Six will be built on secondary agricultural soils.

The Board also concludes the proposed project does not comply with Subcriteria (i) and (iii), and does comply with Subcriterion (ii), for reasons which are similar to those given above under the analysis of impact on primary agricultural soils. Rather than repeat that analysis, the

Board will state that it is the same except for two important differences. First, it applies to those areas of the site found to be secondary rather than primary agricultural soils. Second, the Board notes that the multi-family dwellings themselves are clustered on only a portion of the secondary agricultural soils. By themselves, these houses may meet the subcriteria. However, in view of the fragmentation of and construction on secondary agricultural soils to be caused by the single-family lots and other construction, the Board cannot conclude that the overall application complies with the subcriteria of 9(C).

Finally, the Board notes that if it concluded that the 55 acres of primary agricultural soils were not such soils, it would conclude that they were secondary agricultural soils. In that event, the Board's conclusions regarding compliance with Subcriteria (i) and (iii) of Criterion 9(C) would apply to those 55 acres.

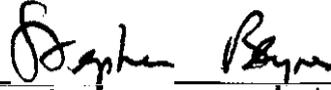
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V. ORDER

Application #4C0795-EB is denied.

Dated at Montpelier, Vermont this 26th day of June,  
1991.

ENVIRONMENTAL BOARD



Stephen Reynes, Acting Chair  
Ferdinand Bongartz  
Samuel Lloyd .  
Charles F. Storrow  
W. Philip Wagner  
Steve E. Wright

Dissenting:

Lixi Fortna  
Arthur Gibb

bryant.dec(awp2)