

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

Re: MBL Associates,
Application #4C0948-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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I. SUMMARY OF DECISION

This decision pertains to an application for a project consisting of a 221-unit planned residential development (the Project). The application is on appeal by MBL Associates, Inc. (the Applicant). As is explained below, the Environmental Board concludes that the Project complies with the following criteria of 10 V.S.A. § 6086(a): 1(G) (wetlands), (2) (sufficient water available), (3) (burden on existing water supply), (8) (aesthetics and scenic beauty) and (10) (conformance with local and regional plans). The Board also conditionally accepts a withdrawal of appeal proffered by the Applicant with respect to Criterion 8 (historic sites).

The Board further concludes, with respect to Criterion 1(B) (waste disposal), that a presumption of compliance, created by permits issued by the Department of Environmental Conservation (DEC) of the Agency of Natural Resources (ANR), is rebutted because a pipe carrying Project sewage will run approximately 18 feet from an existing drinking water source. Such proximity does not comply with applicable DEC regulations requiring a 50-foot minimum isolation distance and substantially increases the risk of undue water pollution.

As required by Environmental Board Rule (EBR) 19, the Board will allow the Applicant an opportunity to demonstrate compliance with Criterion 1(B).

II. SUMMARY OF PROCEEDINGS AND FINDING OF JURISDICTION

On April 13, 1994, the District #4 Commission issued Findings of Fact, Conclusions of Law, and Order #4C0948, denying the application for the Project, which specifically includes 161 single-family lots and 60 multi-family units, to be located on 202 acres of land off Dorset Street in South Burlington, Vermont. An Act 250 permit is required for the Project pursuant to 10 V.S.A. §§ 6001(3) and (19), 6081(a), and EBR 2(A)(3) and 2(B).

The District Commission denied the application pursuant to 10 V.S.A. § 6086(a)(1)(B) (waste disposal), 1(G) (wetlands), (2) (sufficient water available), (3) (burden on existing water supply), (8) (aesthetics and scenic beauty) and (10) (conformance with local and regional plan). The District Commission also stated that, if it were issuing a permit, it would issue conditions which had been requested by the Division for Historic Preservation (the Division) with respect to historic or archaeological resources.

On May 13, 1994, the Applicant, citing EBR 31, filed a motion to alter

decision and re-open the hearing. By memorandum of decision dated June 13, the District Commission denied the motion. On July 13, the Applicant filed an appeal with the Board with respect to the District Commission's decisions under Criteria I(B), I(G), 2, 3, 8 (aesthetics, scenic beauty, historic sites) and 10. The appeal also challenged various District Commission decisions regarding party status.

On August 25, 1994, Environmental Board Chair Arthur Gibb convened a prehearing conference. Among other things during the prehearing conference, the Applicant declined an initial hearing date of November 30, 1994, asking that the date be later.

On September 7, 1994, the Chair issued a prehearing conference report and order, which is incorporated by reference.

During September 1994, petitions for party status and an opposition thereto by the Applicant were filed. On September 28, the Board deliberated concerning party status. On October 11, the Chair sent a memorandum to parties stating the results of the deliberation concerning party status.

During November and December 1994, parties filed lists of witnesses and exhibits, prefiled testimony, and exhibits.

Written evidentiary objections were filed as follows: on January 10, 1995, jointly by parties Vincent Bolduc and Jeff and Betty Goldberg; and on January 11, by the Applicant. Mr. Bolduc and the Goldbergs jointly filed a written response to the Applicant's objections on January 16.

Proposed findings of fact and conclusions of law were filed as follows: on January 6, 1995, by parties Alexander and Mary Sandra Blair; on January 9, by parties John and Susan Jewett; on January 10, jointly by Mr. Bolduc and the Goldbergs; and on January 11 by the Town of Shelburne and the Applicant.

On January 17, 1995, the Chair convened a second prehearing conference in Montpelier with the following parties participating:

MBL Associates (the Applicant) by Stephen R. Crampton, Esq.
Vincent Bolduc
Alexander and Mary Sandra Blair
John and Susan Jewett by John Jewett
Jeff and Elizabeth Goldberg by Jeff Goldberg

Downing-Calkins Trust by Bernard Chenette
City of South Burlington (the City) by Joe Weith

During the January 17 conference, Mr. Jewett stated that he was authorized to speak for the Town of Shelburne by its representative, Kate Bortz, who could not attend. During the conference, parties agreed on an itinerary for a site visit, specific time limits for presentation and cross-examination of witnesses, and were heard by the Chair concerning evidentiary objections. The Chair also made rulings concerning those objections.

On January 18, 1995, the Board convened a hearing in the City of South Burlington, with the following parties participating:

MBL Associates (the Applicant) by Stephen R. Crampton, Esq.
Vincent Bolduc
Alex and Mary Sandra Blair
John and Susan Jewett by John Jewett
Jeff and Elizabeth Goldberg by Jeff Goldberg
Downing-Calkins Trust by Bernard Chenette
Town of Shelburne by Kate Bortz
The City by Joe Weith

During the hearing, the Chair placed his evidentiary rulings in the record. After taking a site visit and hearing testimony, the Board recessed the matter pending review of the record, deliberation, and decision.

Between January 18 and 23, 1995, parties filed supplemental proposed findings of fact and conclusions of law. On January 24, the Chair issued a memorandum to parties which stated that this matter is in recess and that the Board would accept the supplemental proposed findings and conclusions filed to date to the extent they are based on the record. The Chair's January 24 memorandum is incorporated by reference.

The Board deliberated concerning this matter on February 22 and April 26, 1995. On April 26, following a review of 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.

III. PARTY STATUS

In the Chair's memorandum to parties of October 11, 1994, the Chair stated that the Board's final decision in this matter would explain the basis for the Board's party status decisions.

The Applicant challenges the following grants of party status made by the District Commission: to John and Susan Jewett under Criteria 1(B) and 8¹; to Alexander and Mary Sandra Blair under Criteria 1(B), 3, and 8; Jeff and Elizabeth Goldberg under Criterion 8; and Vincent Bolduc under Criterion 8.

The District Commission granted party status to those listed above as adjoining landowners whose property is directly affected under the relevant criteria. The Applicant does not agree that the property of these parties is so affected. The Applicant also claims that the Jewetts are not adjoining landowners. It does not dispute that Mr. Bolduc, the Goldbergs, and the Blairs own property which qualifies as adjoining. However, the Applicant claims that the Blairs do not reside on the adjoining parcel which they own but rather reside on another parcel which does not adjoin Project lands.

The Downing-Calkins Trust (the Trust) seeks party status under Criterion 8. The Trust states that it owns land which adjoins the proposed project and from a portion of which the project will be visible. The Trust was not a party before the District Commission. The Applicant opposes granting party status to the Trust.

The Board rules as follows:

- a. The Jewetts are granted party status pursuant to EBR 14(B)(1)(a) (interests affected) under Criteria 1(B) and 8 (aesthetics, scenic beauty). They reside on land which they own and which is located near the Project. Their interests may be affected under Criterion 1(B) because a pipe carrying Project sewage will be approximately 18 feet from an existing source of drinking water located on their property. Their interests may be

The appeal also challenges the District Commission's grant of party status to the Jewetts under Criterion 5 (traffic safety and congestion). However, since there has been no appeal of the District Commission's decision under Criterion 5, that criterion is not at issue.

affected under Criterion 8 because the Project's density may have an adverse effect on the aesthetics of the surrounding area and because the Project may be visible from their property.

- b. Without deciding whether the Blairs are adjoining property owners, the Blairs are granted party status pursuant to EBR 14(B)(1)(a) (interests affected) under Criteria 1(B) and 8 (aesthetics, scenic beauty). They reside on land which they own and which is located near the Project. Their interests may be affected under Criterion 1(B) because their drinking water supply is the source on the Jewetts' property described above. Their interests may be affected under Criterion 8 in the same manner as the Jewetts' interests. However, the Blairs' interests will not be affected under Criterion 3 because they will not share a water source with the Project and the quantity of water supplied to the Blairs will not be affected by the Project. See the discussion under Criterion 3, below.
- c. Mr. Bolduc, the Goldbergs and the Trust are granted party status pursuant to 10 V.S.A. § 6085(c) and EBR 14(A)(3) (adjoining property owners) under Criterion 8 (aesthetics, scenic beauty). Their property interests may be directly affected because the Project's density may have an adverse effect on the aesthetics of the surrounding area and because the Project may be visible from their property.

With regard to the party status of the above persons, the Applicant relies heavily on the case of In re Great Eastern Building Company, 132 Vt. 610 (1974). In that case, the Court upheld an Environmental Board denial of party status to people who were not statutory parties or adjoining property owners. The Court ruled that since they were not such parties, they were not entitled to participate as a matter of right under 10 V.S.A. § 6085(c). Id. at 612. The Court also separately ruled that the persons, who sought party status under Criterion 5 (traffic safety and congestion), do not have a legally protected "right to be free from the consequences of increased traffic flow." Id. at 613.

For three reasons, Great Eastern Building does not require a ruling in the Applicant's favor on party status. First, Mr. Bolduc, the Goldbergs, and the Trust are adjoining property owners and therefore do not fall within the Court's rulings in that case.

Second, the Court noted in Great Eastern Building that the Board had not yet adopted rules concerning party status as authorized under 10 V.S.A. 9 6085(c). Id. at 612. The Board subsequently has promulgated EBR 14, which allows

parties to participate by permission if their interests may be affected under the criteria or if they may materially assist the District Commission or Board. See EBR 14(B).

Third, those seeking party status in this matter may not have an absolute, legally protected right to be free from the negative impacts of development. But the absence of such a right does not deprive them of an opportunity to be heard concerning those impacts and to argue for protection for themselves.

IV. ISSUES

1. Whether the Project complies with 10 V.S.A. § 6086(a)(1)(B) (waste disposal), 1(G) (wetlands), (2) (sufficient water available), (3) (burden on existing water supply), (8) (aesthetics and scenic beauty) and (10) (conformance with local and regional plan).

2. Whether to accept the Applicant's notice of withdrawal and stipulated permit conditions with respect to 10 V.S.A. § 6086(a)(8) (historic sites).

V. FINDINGS OF FACT

General

1. The Project will be located on a 202-acre tract off Dorset Street in the City. The tract is adjacent to the Town of Shelburne. Most of the tract (154 acres) lies west of Dorset Street, with all development occurring on this western portion. The remaining 48-acre portion located east of Dorset Street is presently open space and will remain open and undisturbed.
2. On the western portion of the Project Tract, the Applicant will construct a concentrated neighborhood residential development of 221 units. There will be 60 multi-family units and 161 detached single-family units. The Applicant plans to construct several streets within the Project tract to serve the units. The area comprising the residential development will be located on approximately 75 acres, and the balance of the western portion of the Project tract (79 acres) will be undisturbed.
3. To serve the Project, municipal water and sewer lines will be extended south along Dorset Street to the Project area.
4. Calculated with reference to all acreage on the Project tract, Project

density will be approximately 1.1 residential unit per acre.

5. John and Susan Jewett own and reside on an approximately 33-acre property east of Dorset Street near the Project.
6. Alexander and Mary Sandra Blair own and reside on an approximately one-acre tract west of Dorset Street. Their house will be within 740 feet of the western portion of the Project tract. They also own an approximately six-acre tract east of Dorset Street which borders the eastern portion of the Project tract.
7. Vincent Bolduc owns and resides on an approximately 17-acre tract located directly across Dorset Street from the western portion of the Project tract and which borders the eastern portion of the Project tract.
8. Jeff and Elizabeth Goldberg own and reside on an approximately 13-acre tract located directly across Dorset Street from the western portion of the Project tract.
9. The Downing-Calkins Trust owns an approximately 222-acre tract which adjoins the Project tract to the north. From some portions of the Trust's tract, one can see the Project tract. The Trust's tract is undeveloped at present. The Trust plans to create a residential development on its tract.

Water Quality and Water Supply

10. On August 4, 1994, DEC issued Water Supply and Wastewater Disposal Permit #WW-4-0710 (the WW Permit) to MBL Associates, approving the construction of 60 multi-family units in 15 buildings, with four units per building. The WW Permit approves water supply and sewage disposal for the 15 buildings.
11. On August 4, 1994, DEC issued Subdivision Permit #EC-4-1795 (the Subdivision Permit) to MBL Associates, approving the subdivision of the Project tract into 161 single family residential lots and an 8.83-acre lot for multi-family buildings. The Subdivision Permit approves water supply and sewage disposal for the Project.
12. On August 4, 1994, DEC issue Deferral of Permit #DE-4-1944 for lots on the Project tract which are not proposed for development. This deferral of permit requires that any future development of such lots must meet the

terms of the Environmental Protection Rules (1982) (the **EPRs**).

13. Project sewage disposal will be through a proposed pipe (the Sewer Connection) connecting to a pressured sanitary sewer running along Dorset Street and ultimately to the City of South Burlington's Airport Parkway treatment facility. Sewage flows for the Project will be a maximum of 114,825 gallons per day.
14. A drilled artesian well on the property of John and Susan Jewett supplies drinking water to the property of Alexander and Mary Sandra Blair on which they reside, as well as to the nearby properties of Edward Hoehn, III and Richard N. Tritt. The well yields approximately 100 gallons per minute.
15. The Sewer Connection will be approximately 18 feet from the drilled well on the Jewett property.
16. The Sewer Connection may develop a leak through rust, frozen water inside, or faulty construction.
17. Both the Subdivision and WW Permits state that they were issued pursuant to the **EPRs**. Appendix 7-D of the **EPRs** is a table of minimum isolation distances. The table specifies a minimum isolation distance of 50 feet between a sewer and a drilled well serving two or more houses. The table also states that "[t]hese distances may be reduced when evident that the distance is unnecessary to protect an item or increased if necessary to provide adequate protection."
18. The Subdivision Permit and WW Permit contain no findings or supporting factual statements that a 50-foot isolation distance is unnecessary to protect the drilled well on the Jewett property which supplies drinking water to the Blairs and others. Further, there is no evidence before the Board independent of these two permits which supports reduction of the 50-foot isolation distance.
19. On September 7, 1994, DEC issued Discharge Permit #1-1169 to MBL associates, approving Project discharge of stormwater runoff.
20. On December 20, 1994, DEC issued Condition Use Determination #90-111 (the CUD) under the Vermont Wetland Rules, approving with conditions various actions proposed as part of the Project with respect to

significant wetlands.

21. Three significant wetlands exist on the Project tract: a northern wetland, a western wetland, and a southern wetland. The Applicant proposes no changes to or impacts on the northern wetland or an adjacent 50-foot buffer zone.
22. The Applicant proposes filling and alteration which will occur in the western and southern wetlands and adjacent buffer zones. Approximately 26,613 square feet of wetland and 109,831 square feet of buffer zone will be filled or altered. The wetland filling primarily is of ditches and associated narrow bands of wetland for seven roadway crossings. The filling or alteration of buffer zones primarily is associated with roadway crossings or construction of stormwater management systems.
23. The filling or alteration of the western and southern wetlands and adjacent buffer zones will not have an undue adverse impact on any wetland functions. The applicant has designed the Project to minimize impacts on the western and southern wetlands and will include the northern, western, and southern wetlands and adjacent 50-foot buffer zones on common land.
24. On May 3, 1994, DEC issued Public Water System Permit to Construct #E-O335 to MBL Associates for the Project. This permit approves with conditions the extension of existing municipal water main along Dorset Street to the Project area and the installation of two water mains to connect the Project to the extended water main. The estimated average day demand for the Project is 116,850 gallons per day. The City of South Burlington will supply the water.

Historic Sites, Aesthetics, Scenic Beauty

25. On November 4, 1994, the Applicant filed a "notice of withdrawal" with the Board with respect to Criterion 8 (historic sites). In the notice, the Applicant states that, should the Board issue a permit, the Applicant stipulates to the inclusion of various permit conditions contained in a letter dated March 3, 1994 from the State of Vermont Division for Historic Preservation (the Division).
26. The western portion of the Project tract presently is largely open-space and until recently was in agricultural use. It slopes gently upward from Dorset Street toward forested areas on the western border of the Tract. Along its

northern and southern borders, the Project tract also is forested.

27. The immediate context of the Project is a rural-residential area. The density of residential development in the area is much less than the proposed density of the Project. None of the existing residential development consists of multi-family units. Rather, such residential development largely consists of single-family homes on lots of four acres or more. A few tracts in the area are in agricultural use.
28. The larger context of the Project is an area on the fringes of development growing out from Chittenden County's urban core in the City of Burlington. Within a few miles of the Project tract, Dorset Street and Spear Street demonstrate increased suburban development. Several medium density developments similar to the Project exist within a few miles. Also within a few miles is a new city recreation park, middle and high schools, municipal offices, and a fire station.
29. The most dramatic views in the area occur on a 3000 feet long stretch of Dorset Street two miles north of the Project site. Along this portion of Dorset Street, viewers can see a panorama encompassing Brownell Mountain, Camels Hump, Mount Philo, Lake Champlain, and the Adirondacks. Driving south toward the Project, this panorama fades from sight before the driver reaches the Project.
30. From Dorset Street in the immediate Project area, attractive fore- and middle-ground views of hedgerows, meadows, and forests can be seen by the driver.
31. Drivers on area roads currently may see the Project tract as open space from several points along those roads.
32. The Jewetts, Goldbergs, and Mr. Bolduc presently experience views across the open space of the Project tract west to Lake Champlain and the Adirondacks.
33. Residents in the Project area, including the Blairs, presently experience views of the Project tract as open space.
34. The Applicant has clustered the single-family lots and multi-family units as far back from Dorset Street as reasonably possible. Project design includes a **50-acre** open space set-aside between Dorset Street and the Project

residences. The Applicant proposes a minimum of 800 feet between Dorset Street and the nearest Project residence.

35. Rooflines in the Project will lie below the level of trees to the north, west, and south. Residential units will not be seen against the sky in silhouette.
36. House design will be a combination of one- and two-story homes with relatively high-pitched roofs. The designs will include a variety of Cape Cod, two-story colonials, ranch-style, and split-foyers. Exterior colors will be muted ones which will blend in with the natural colors on and surrounding the Project tract. Roofs will be of darker colors to ensure they will blend into the background.
37. Project lighting will consist of 38 street lights and exterior lights for housing units. All lighting will use down-direct and soffet fixtures, No lighting will be placed on the 50-acre open space portion described in Finding 34, above. Project street lights will be a minimum of 300 feet from each other and a maximum of 100 watts. Exterior house lights will be a maximum of 60 watts.
38. The Applicant's landscaping plan is Exhibit A12, which involves extensive tree plantings to minimize the perception of the mass of the Project.
39. The applicable zoning by-laws are the City of South Burlington Zoning Regulations, last amended September 21, 1992 (the Zoning Regulations). Section 19.151(h) of the Zoning Regulations provides, concerning a planned residential development such as the Project, that such a development is allowed if, in relevant part, it "will not have an undue adverse effect on the scenic or natural beauty of the area, is aesthetically compatible with existing buildings and site characteristics"

Town and Regional Plans

40. The Project tract is in an area of the City known as the Southeast Quadrant (SEQ).
41. The Act 250 application for the Project was filed on January 18, 1994. There is no evidence in the record stating the date an application was filed with the City for a zoning or subdivision approval.

42. The applicable town plan is the 1991 Comprehensive Plan of the City of South Burlington, Vermont (the City Plan).
43. On pages 21 and 22, the Future Land Use section of the City Plan states the following:

4. Residential Areas

The Proposed Land Use Map designates areas of varying residential character which are defined as follows:

- o High density: 5.1 units/acre and greater
 - o Moderate density: 1.1 units/acre - 5 units/acre
 - o Low density: 1 unit/acre and lower
- Residential and Open Space: low moderate density residential use with an emphasis on innovative design and layout (e.g. clustering) to promote and preserve open space, natural features, scenic views and continued agricultural use.

In light of the goals described in this section, the City recommends a general land use pattern of higher residential densities in the urban core with a transition to lower densities on the periphery. As shown on Map 8, high density residential is proposed in the City's proposed urban center (i.e., city center and Kennedy Drive areas). Moving outward from the proposed urban core, residential densities transition to moderate density in the Williston Road/White Street area and Shelburne Road corridor, and then to low moderate density on the periphery of the City, namely within the SEQ. It should be noted that Map 8 presents a general land use pattern and that there will be areas of open space, recreation, and varying density neighborhoods (i.e., single family and multi-family) scattered throughout each residential use category.

Southeast Quadrant (SEQ)

The Southeast Quadrant is the area within the City lying south of I-89 and east of Spear Street. This area still retains an open, rural character and affords numerous spectacular

views of the Green Mountains, Adirondack Mountains and Lake Champlain. Considering South Burlington's location in relation to the County's urban core, the SEQ has experienced intense development pressures over the last decade and will continue to experience such pressures in the coming years. While the City intends to accommodate residential growth in the majority of the SEQ, the City will stress innovative designs and layouts which work to preserve open space, natural resources and scenic views, and promote the continuance of agricultural use. A more detail discussion of the City's SEQ is contained within Chapter XV of this plan.

44. On pages 93 through 96, the Southeast Quadrant section of the City Plan states the following:

D. LAND USE

a) Residential

... The City strongly encourages a variety of housing types in the quadrant, not only in terms of development densities and design, but in terms of affordability. A variety of development patterns and layouts as well as both single and multi-family units should be promoted. All residential developments should preserve open space and the unique aesthetic and natural qualities of the Quadrant while serving a wide range of income levels.

Affordable housing should be located near schools, parks, shopping centers, employment centers, day care facilities, transportation corridors and public transportation. Most of the City's neighborhoods meet some or all of these criteria. However, housing for low and very low income households which might be more dependent upon public transportation, should be located in areas where there is available service (definitions of low and moderate income households are provided in the Housing section). Therefore, until such public transportation is available in the Southeast Quadrant, the City feels that housing for low and very low income households is less feasible for the Quadrant. Instead, the City should focus its efforts to encourage affordable housing

in the Quadrant on housing which is affordable to moderate income households. As development and population densities facilitate the expansion of public transportation into the Quadrant, opportunities to provide housing for low and very low income households will become more feasible. ...

c) Agriculture and Open Space

Agriculture contributes to the aesthetic quality of the Quadrant. The farms in the Quadrant will likely disappear if left unaided. The City should take positive steps, exploring and implementing such means as transfer of development rights and land trusts (as opposed to subsidies), to retain agriculture as a land use in the Quadrant. In addition to agriculture, the City should encourage more variety in non-intensive uses while protecting drainageways and other open and natural areas not suited to agricultural use, but important to the overall quality of the Quadrant.

d) Development Densities

Areas designated as appropriate for development were based on the following general objectives:

- o preserve natural features such as wetlands, floodplains and drainageways.
- o locate development in a manner which preserves significant scenic views.
- o provide significant setbacks along north-south arterials to maintain open feeling and promote preservation of "special character."
- o allow development to encroach into wooded areas to hide units from view.
- o protect enough wooded area to maintain viable wildlife habitat and maintain connections between habitats for movement.
- o encourage some prime farmland to remain open by clustering development.

Neighborhood densities were then designated for each development area based on the following objectives.

- o provide higher density in development designated area[s] which are relatively small in size and well hidden from arterials.
- o encourage lower densities in larger development designated areas and in open areas.
- o consider lower densities in abutting areas of Shelburne and Williston and maintain compatibility.

E. VIEWS

The Quadrant affords many of the City's most scenic views. While development may obscure some of these, the Community's interest in such "resources" is strong enough to warrant consideration of view preservation in planning. The City should advocate development patterns, densities and land uses that preserve these unique important views for the public. Sources which have identified important views are listed in the Natural Resources Chapter. . . .

45. The proposed land use map (Map 8) of the City Plan designates the area surrounding the proposed project as "Residential and Open Space."
46. On page 30, the City Plan cites a State of Vermont definition of affordable housing as housing which can be purchased by households at or below median income without spending more than 30 percent of income. The City Plan also states that moderate income is defined as 80 to 100 percent of median income, low income is 51-80 percent of such income, and very low income is less than 50 percent of such income.
47. The Applicant proposes to sell each of the 161 single family units at a price which will allow a household with median income as measured within the City to purchase the unit without spending more than 30 percent of income. The Applicant proposes to sell each of the 60 multi-family units at a price which will allow a household with median income as measured in Chittenden County to purchase the unit without spending more than 30 percent of income.

48. The Zoning Regulations provide:
- 26.401 Maximum development density for residential development of a parcel of land or portion of a parcel of land located in the Southeast Quadrant District shall be 1.1 residential units per acre.
 - 26.402 No parcel of land or portion thereof in the Southeast Quadrant District shall be developed for a greater number of residential units or residential lots than allowed under Section 26.401 above. ...
 - 26.403 The number of dwelling units or single family dwelling lots that may be located on or created within the limits of a contiguous designated development area located within a single parcel of land shall not exceed 4 per acre.
49. The regional plan applicable to the Project is the Chittenden County Regional Plan, adopted November 12, 1991 (the Regional Plan).
50. On page three, the Chittenden County Regional Plan (the Regional Plan) states the following:

GOVERNING PRINCIPLE

The Regional Plan recognizes the necessity of protecting the Region's most valuable social, environmental, cultural and aesthetic characteristics; yet providing for the essential needs of the changing population-goods and services, employment and shelter, health and safety. The inextricable links between population demands, infrastructure capacities and resource quality is also recognized.

This Plan's primary objective is to provide guidance for development and growth TO RATIFY AND ASSURE THE TRADITIONAL AND EXISTING VILLAGE, TOWN, COUNTRY SETTLEMENT PATTERNS. TO HELP SECURE THE CHARACTER OF THE REGIONS

NATURAL AND BUILT ENVIRONMENT, THERE SHOULD BE A CLEAR AND PRONOUNCED DELINEATION BETWEEN TOWN AND COUNTRYSIDE THROUGH APPROPRIATE AND SUPPORTIVE LAND USES AND DESIGNATED GROWTH CENTERS. This primary objective can best be accomplished through a planning process that is “bottoms up”, with decisions made at the lowest level commensurate with their impacts. The Regional Planning Commission is uniquely qualified to participate in this planning process since it is locally appointed yet represents regional, as well as local, viewpoints.

We recommend exceptions to the Plan’s primary objective be made only when it can be demonstrated and established conclusively that the greater public good is served by the exception.

GROWTH CENTERS

Designating growth centers is the chief means by which the Regional Plan’s governing principle will be realized. ...

(Emphasis in the original.)

51. On pages 3, 17, and 32, the Regional Plan demonstrates a strong intent that higher density projects be placed in growth centers.
52. On page 17, the Regional Plan demonstrates a goal to distribute 75% of the Region’s future population growth to growth centers.
53. On page 19, the Regional Plan states:

Policy 6. Decent housing is essential for the Region’s residents. The quantity, type and cost of new housing shall correspond to the Region’s needs, and its location shall be in accordance with other land use policies of this plan. Affordable housing allocation to the Region’s municipalities shall take into consideration each municipality’s current housing stock.

Goals: To . . . (A) assure every municipality contributes in some way toward meeting the Region's housing needs.
(B) guarantee affordable housing units remain affordable for as long as possible.
(C) ensure affordable housing (or any one type of affordable housing, eg. elderly) not be concentrated within one neighborhood or community. . . .
(G) ensure residential development be compatible with existing architecture, community character and other land use concerns.
(H) provide accessibility between affordable housing and employment opportunities.

54. On page 20, the Regional Plan states:

Policy 8. Public services and facilities shall complement and support the orderly development of growth centers.

Goals: To . . .

(G) encourage public investments, including the construction or expansion of infrastructure, to support development in designated growth centers and avoid disturbing designated agricultural or conservation areas.

55. On pages 21 and 22, the Regional Plan states:

Policy 12. Preservation of the Region's agricultural and forest resources, for their economic and aesthetic value, is a matter of public good.

Goals: To... (A) preserve the long term viability for farm and forest use of agricultural and forest lands by limiting alternate uses on those lands to low gross density uses. ...
(E) plan the construction, expansion or provision of public facilities and services so as not to reduce the resource value of important and economically viable adjoining agricultural or forestry lands. . . .
(G) preserve the aesthetic qualities of the forested and agricultural landscape.

56. On page 25, the Regional Plan states:

Sewage Disposal

... Towns and cities should also develop allocation policies as a means of distributing remaining capacity. In this way, the growth center concept can be implemented by ensuring a variety of uses in the designated area, including housing, commerce and industry.

Sewer line extensions should be planned to accommodate the regional and the appropriate sub-regional and local growth centers. When it is necessary that sewer and water lines extend from one growth center to another a policy of "no new or limited tap-ins" should be enacted.

57. On page 26, the Regional Plan states:

Water Supplies

... As with planning for sewer system expansion, planning for expansion of water systems should correspond to regional, sub-regional and local growth centers. Expansion should not occur outside of these areas unless the public good is clearly served.

58. On pages 30-31, the Resource Use section of the Regional Plan provides:

Affordable Housing

A decent home in a suitable living environment is a basic need of all Vermont Citizens. No one should be excluded from a suitable living environment due to race, color, religion, national origin, sex, age, physical or mental handicap, residency and/or income. The Region has affordable housing units. However, currently the Region has an insufficient supply of affordable housing. The need for affordable housing continues to grow and to surpass the available supply. The CCRPC shall promote safe and affordable housing for all of the residents of the Region. ...

For purposes of this plan, housing is affordable when households with incomes below the county median, pay no more than 30% of their income on housing costs. ...

It is in the Region's best interest to promote municipal policies which keep housing affordable on a permanent basis. It is also in the Region's best interest to encourage municipal policies which promote an income mix for its housing. ...

59. On pages 32-33, the Regional Plan includes the following relevant sections of the Future Land Use Map Description:

A. Regional Growth Center

The purpose of the Regional Growth Center is to provide for regional shopping centers, employment centers, higher education facilities, health centers, financial centers, government centers, cultural centers, high density housing, civic and convention centers, recreation opportunities and the necessary infrastructure to serve these functions. The Regional Growth Center will not only serve the needs of the Region, but other state residents and visitors.

B. Sub-Regional Growth Center

The purpose of the centers is to provide for housing, shopping centers, employment opportunities, municipal offices, public education facilities, recreation opportunities and the necessary infrastructure to support these functions.

C. Local Growth Centers

These will provide housing, convenience shopping, employment opportunities, municipal offices, recreation opportunities and public education facilities fully supported by appropriate infrastructure.

* * *

G. Agricultural Area

This area includes the Region's most valuable farmlands and scattered residential development. It should be designated for primarily agricultural uses as much as possible. Future residential development within this area should be relatively low density and clustered. The land's capability for development must also be determined prior to allowing development.

60. On page 38, the Regional Plan provides a "future land use matrix." Under the category "Agricultural Area," this matrix provides for "forestry, agriculture, recreation, residential" use. In addition, the matrix states concerning residential density: "Low gross density (1 unit/10 acres) with clustering to allow smaller lots and compact layouts, or per local bylaws."
61. On pages 39 and 41-42, the Regional Plan states specific policies concerning residential development considered to have a "substantial regional impact" in an Act 250 proceeding. For residential project in a growth center, the Regional Plan provides a "substantial regional impact" threshold of 109 housing units if the project is located in the City. The Regional Plan also states that "non-growth center development" having a substantial regional impact includes any "residential development, outside the Regional Plan's designated growth centers ... requiring an Act 250 permit."
62. On page 56, the Future Land Use Planning Map of the Regional Plan designates the area of the proposed project as an "Agricultural Area."
63. The Project is not within a regional, sub-regional, or local growth center on the Regional Plan's Future Land Use Map.
64. On page 57, in the Implementation section, the Regional Plan states an intent that municipal by-laws are the primary vehicle for implementation: "Although all goals should be addressed in both local and regional plans, the implementation of the goals will be primarily accomplished through the bylaws adopted in each community"
65. On page 79, the Regional Plan provides a definition of "Inner Ring":

The Region's suburban municipalities: Shelburne, St.
George, part of South Burlington, Williston, Essex, Essex

Junction, Colchester, Milton, and part of Winooski.

66. The Regional Plan does not state which part of South Burlington is within the Inner Ring. The Board is unable to find any other provisions of the Regional Plan which actually use the term "Inner Ring."
67. On page 81, the Regional Plan states that the word "should" is a "[k]ey word identifying that a requirement is encouraged but not mandated."

VI. CONCLUSIONS OF LAW

A. **Burden of Proof**

The burden of proof generally is considered to include both the burden of production and the burden of persuasion. In Act 250 the burden of production means the burden of producing sufficient evidence on which to make positive findings under the criteria. The burden of persuasion refers to the burden of persuading the Board that certain facts are true. Re: Killington, Ltd. and International Paper Realty Corp. #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990).

Under 10 V.S.A. § 6088(a), the Applicant has the burden of proof on the following criteria under appeal: 1(B), 1(G), 2, 3, and 10. With regard to Criteria 1(B) and 2, the introduction of appropriate permits by the Applicant operates to transfer the burden of proof to any opponents who have party status on those criteria. If they rebut the presumption, the burden returns to the Applicant. See EBR 19.

Under 10 V.S.A. § 6088(b), the opponents have the burden of proof under Criterion 8. However, as with all criteria, the Applicant must provide sufficient information for the Board to make affirmative findings. Killinnton, supra at 21.

B. **Criterion 1(B) Waste Disposal**

Criterion 1(B) is part of Criterion 1, which seeks to prevent undue air or water pollution. 10 V.S.A. § 6086(a)(1). Criterion 1(B) specifically addresses water pollution and provides:

Waste disposal. 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 ground water or wells.

The Applicant has received permits from DEC on which it has relied to demonstrate compliance with Criterion I(B). Specifically, the Applicant has submitted the Discharge Permit, which applies to stormwater runoff from the Project. The Applicant also has submitted the Subdivision Permit and the WW Permit. These permits apply, in relevant part, to disposal of Project sewage.

Under 10 V.S.A. § 6086(d), the Board is authorized to issue rules providing for presumptions of compliance for permits issued by other state agencies. Under EBR 19(E)(1), the DEC permits discussed above create a rebuttable presumption "[t]hat waste materials and wastewater can be disposed of through installation of wastewater and waste collection, treatment and disposal systems without resulting in undue water pollution."

Accordingly, the Discharge Permit creates a presumption of compliance with Criterion I(B) for any waste materials contained in Project stormwater runoff. Similarly, the Subdivision and WW Permits create a presumption of compliance with Criterion I(B) for Project sewage disposal.

No challenge has been made with respect to the Discharge Permit and Project stormwater runoff. There is no evidence in the record which would support rebuttal of the presumption created by the Discharge Permit. Therefore, the Board concludes that Project stormwater runoff complies with Criterion I(B).

Parties Blair and Jewett challenge the presumptions created with respect to Project sewage disposal. Their contentions center on the Sewer Connection which will carry sewage from the Project to municipal line. The Sewer Connection will be placed be approximately 18 feet from a well on the Jewett property which supplies drinking water to the Blair property, as well as to the nearby properties of Edward Hoehn, III and Richard N. Tritt.

The Blairs and the Jewetts specifically claim that the 18-foot proximity violates applicable DEC regulations requiring a 50-foot separation between a sewer and a water source. They also claim that the proximity of the Sewer Connection to the well on the Jewett property poses a threat of contamination.

Based on these arguments, the Blairs and Jewetts seek to rebut the

presumption created by the Subdivision and WW Permits. The Board examines their contentions in light of its supervisory authority over ANR. In re Hawk Mountain Corp., 149 Vt. 179, 185 (1988).

EBR 19(F) specifies the manner in which a presumption may be rebutted. The rule provides that if:

[A] preponderance of the evidence shows that undue water pollution. .. is likely to result, the commission or board shall rule that the presumption has been rebutted. Technical non-compliance with the applicable health and water resources and environmental engineering department regulations shall be insufficient to rebut the presumption without a showing that the non-compliance will result in, or substantially increases the risk of, undue water pollution

Accordingly, the Blairs and the Jewetts may rebut the presumption created by the DEC permits in one of two ways: (a) by showing that Project sewage disposal is likely to result in undue water pollution, or (b) by showing non-compliance with applicable DEC regulations, if such non-compliance will result in, or substantially increase the risk of, undue water pollution.

The Board concludes that the Blairs and the Jewetts have rebutted the presumption by showing non-compliance with applicable DEC regulations which substantially increases the risk of undue water pollution.

The applicable regulations at issue are DEC's Environmental Protection Rules (1982) (the EPRs). Both the Subdivision and WW Permits stated that they were issued pursuant to these rules. A subdivision permit is required for the Project under 18 V.S.A. §§ 1218, 1219 and EPR §§ 3-02, 3-04. A water supply and wastewater permit is required for the Project pursuant to 10 V.S.A. §§ 1952, 1953.

Appendix 7-D of the EPRs is a table of minimum isolation distances. The table specifies a minimum isolation distance of 50 feet between a sewer and a drilled well serving two or more houses. The table also states that "[t]hese distances may be reduced when evident that the distance is unnecessary to protect an item or increased if necessary to provide adequate protection."

If the minimum isolation distance of a sewer is to be 50 feet from a drilled well, then the Sewer Connection does not meet this distance because it will be 18 feet from the drilled well on the Jewett property. Therefore, Project sewage

disposal does not comply with applicable DEC regulations unless an isolation distance greater than 18 feet is shown to be unnecessary to protect the well. However, the Subdivision Permit and WW Permit contain no findings or supporting factual statements that such distance is unnecessary. Further, there is no evidence before the Board independent of these two permits which supports reduction of the 50-foot isolation distance.

It may be argued that Appendix 7-D does not apply to the Project because it will not be served by an on-site sewage disposal system but rather will be connected to a municipal sewer system. Specifically, Appendix 7-D is attached to Chapter 7 of the EPRs, and the first section of that chapter states:

Wherever feasible, it is recommended that projects subject to the jurisdiction of these rules connect to municipal sewer facilities approved by the Department. For projects proposing on-site sewage disposal, the following standards and criteria shall apply.

EPR § 7.01.

For several reasons, the Board does not believe that this quoted language is intended to exclude the application of the 50-foot isolation distance to projects which connect to municipal sewer systems. First, Appendix 7-D contains a specific category of isolation distances labelled "sewer."

Second, immediately following § 7.01 (which includes the quoted language) are §§ 7.02 through 7.15, which set out the various requirements for on-site disposal systems. It is likely that § 7.01 refers to these immediately following sections because undoubtedly many requirements pertaining to design of an on-site disposal system would not make sense for a sewer connection.

Third, the EPRs consistently require a 50-foot distance between a water supply and a sewer or subsurface wastewater pipe. See, e.g., EPR § 8.08 and Water Supply Rule § 11.4.0.

Fourth, by statute, the WW Permit applies to any pipe used for the conveyance and treatment of domestic, industrial, or commercial waterborne waste. 10 V.S.A. § 1952(4). The same statute authorizes ANR to promulgate rules for issuing wastewater permits. 10 V.S.A. § 1955. Therefore, such rules must apply to any pipe used for conveying and treating human waste. The EPRs are the rules under which the WW Permit was issued and the Sewer Connection clearly is conveying domestic waterborne waste for treatment.

The Project's non-compliance with the 50-foot isolation distance substantially increases the risk of undue water pollution. The 18-foot distance to the drilled well is not mere "technical" non-compliance. Rather, it represents a 60 percent deviation from the 50-foot requirement. In this regard, it may be fairly assumed that the 50-foot requirement was set to protect human health because such protection is a primary purpose of the EPRs. See EPR § 1.01B. Thus, such a significant deviation on its face creates a substantial likelihood of undue water pollution.

Moreover, should the Sewer Connection develop a leak through rust, freezing water, or faulty construction, the short distance to the drilled well substantially increases the possibility that constituents of domestic human waste will reach the drilled well. This poses a threat to the potability of the drinking water supply for the Blairs and the others using the well.

Based on the foregoing, the Board concludes that the presumption created by the Subdivision and WW Permits is rebutted. Accordingly, the Project does not comply with Criterion I(B) with respect to Project sewage disposal.

EBR 19(F) specifies that, "[u]pon the rebuttal of the presumption, the applicant shall have the burden of proof under the relevant criteria and the permit or certification shall serve only as evidence of compliance." By stating that an applicant has the burden of proof once a permit is rebutted, the rule therefore requires allowing an opportunity for the Applicant to present further evidence. See also Hawk Mountain, supra, 149 Vt. at 186.

Accordingly, the Board will set this matter for further hearing with respect to the compliance of the Project with Criterion I(B). Based on the Board's conclusions, above, the Applicant may demonstrate such compliance through one of the following two options:

- a. By showing that requiring a 50-foot isolation is unnecessary to protect the drilled well on the Jewett property, and that the 18-foot distance between the Project sewer connection and the drilled well in fact will not result in undue water pollution; OR
- b. By re-routing the Sewer Connection so that it will be no less than 50-feet from the drilled well or any other source of drinking water.

If the Applicant wishes, it may present both of these options in the alternative. The hearing will be limited to evidence and argument relevant to fulfilling these

two options. In compliance with 3 V.S.A. § 810, all parties under Criterion 1(B) will be given an opportunity to present evidence, cross-examination, and argument. The order below will set a schedule for filing testimony and lists of witnesses and exhibits, and for holding a hearing. Should the Applicant fail to file testimony by the deadline in this order, this application will be denied pursuant to Criterion 1(B).

C. Criterion 1(G)(Wetlands)

Criterion 1(G) provides:

Wetlands. A permit will be granted whenever it is demonstrated by the applicant, in addition to other criteria, that the development or subdivision will not violate the rules of the water resources board, as adopted under section 905(9) of this title, relating to significant wetlands.

The Applicant has submitted a conditional use determination (CUD) issued by DEC under the Vermont Wetland Rules. In accordance with a recent Board decision, under the Board's current rules this determination does not create a rebuttable presumption of compliance with Criterion 1(G) but is considered evidence of compliance. Re: St. Albans Group and Wal*Mart Stores, Inc., #6F0471-EB, Memorandum of Decision at 12 (April 15, 1994).

Based on the foregoing findings of fact and the CUD issued by DEC, the proposed project complies with Criterion 1(G). Because the Board is in part relying on the CUD, the Board will condition any permit issued to require compliance with all findings, conclusions, terms, and requirements of the CUD. Such a condition is reasonable and appropriate under 10 V.S.A. § 6086(c).

D. Criterion 2 (Sufficient Water Available)

Criterion 2 requires that the Applicant prove that the proposed project "[d]oes have sufficient water available for the reasonably foreseeable needs of the subdivision or development."

The Applicant has submitted a Public Water System Permit to Construct issued by DEC. The permit authorizes the extension of an existing municipal water main along Dorset Street and connections from the Project to the extended water main. DEC issues such permits pursuant to 10 V.S.A. Chapter 56. Formerly, these permits were issued by the Department of Health under 18

V.S.A. Chapter 24.

EBR 19(E)(3) specifies that public water system approvals issued by the Department of Health under 18 V.S.A. Chapter 24 create a rebuttable presumption "[t]hat a sufficient supply of potable water is available."

EBR 19(H) states the intent of EBR 19 to "refer to any written document issued by the appropriate state agency attesting to a project's compliance with the regulations or statutes listed in Section (E) of this rule."

Accordingly, since the health department regulations cited in EBR 19(E)(3) are now administered by DEC, the Applicant's introduction of the ANR permit to construct creates a rebuttable presumption of compliance with Criterion 2. The manner in which the presumption may be rebutted is set out in EBR 19(F). It is the same as quoted, above, under Criterion 1(B), except that the issue is "inadequate water supply" rather than "undue water pollution."

No parties have challenged the presumption and there is no evidence in the record of inadequate water supply. The water supply will be through a municipal system. Accordingly, the proposed project complies with Criterion 2.

E. **Criterion 3 (Burden on Existing Water Supply)**

Criterion 3 requires that, before issuing a permit, the Board or district commission shall find that a proposed project "will not cause an unreasonable burden on an existing water supply, if *one is to be utilized.*" 10 V.S.A. § 6086(a)(3) (emphasis added).

This would appear directed at assuring that demand on existing water supplies to be utilized by a proposed project does not unreasonably burden those supplies. Such would include impacts on the ability to meet demand of neighboring wells or water sources if those other wells or sources share the same basic source of water such as an aquifer or common spring.

However, the District Commission's decision under Criterion 3 addresses the proposed project's potential to contaminate the well on the Jewetts' property used by the Blairs. It does not appear that the project will use this well or share a water source with the well. Thus, review of the potential contamination of the well used by the Blairs is not appropriate under Criterion 3 but rather should occur, as done above, under Criterion 1(B).

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The Applicant has submitted the Subdivision and WW Permits, which in part approve Project water supply. At the first prehearing conference, the Applicant stated its belief that this would enable the Board to make positive findings under Criterion 3.

The only regulations cited in EBR 19(E) with regard to a rebuttable presumption of compliance with Criterion 3 are Department of Agriculture regulations regarding herbicide applications. See EBR 19(E)(4). Thus, consistent with the discussion of the CUD under Criterion 1(G), above, the Subdivision and WW Permits do not create a rebuttable presumption of compliance with Criterion 3 but are considered evidence of compliance.

Based on the Subdivision and WW Permits and the fact that the Project will use a municipal water supply, the proposed project complies with Criterion 3.

F. Criterion 8 (Aesthetics, Scenic Beauty, Historic Sites)

1. Historic Sites

With respect to historic sites, the Applicant appealed conditions incorporated in the permit by the District Commission at the Division's suggestion.

On November 4, 1994, the Applicant filed a "notice of withdrawal" with the Board with respect to Criterion 8 (historic sites). In the notice, the Applicant states that, should the Board issue a permit, the Applicant stipulates to the inclusion of various permit conditions contained in a letter from the State of Vermont Division for Historic Preservation (the Division) dated March 3, 1994.

Because the Applicant agrees to the conditions in the Division's letter, withdrawal on Criterion 8 (historic sites) will not be contrary to values embodied in Act 250 if such conditions are required by Act 250 permit. Accordingly, as a condition of allowing withdrawal, the Board will require compliance with the Division's letter in any such permit.

2. Aesthetics, Scenic Beauty

Criterion 8 requires that, before issuing a permit, the Board find that a proposed project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics"

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: Ouechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (January 13, 1986).

With respect to the analysis of 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 specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space. Id. at 18.

Based on the foregoing findings of fact, the Board concludes that the Project will have two adverse effects on aesthetics and scenic beauty. First, Project density will be out of context when considered against the immediate context of the Project tract. Second, the Project will cause the loss of a significant amount of open space. These adverse effects will be experienced by those who reside, use land, or pass through the area, including the Jewetts, the Blairs, the Goldbergs, Mr. Bolduc, and the Trust.

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

Based on the foregoing findings of fact, the Board concludes that the

Project does not violate a clear, written community standard concerning aesthetics. In this regard, parties have referred the Board to a provision of the Zoning Regulations which recites the language of Act 250's Criterion 8 (aesthetics) and requires aesthetic compatibility. However, recitation of Act 250 language does not tell the Board what the community's standard is. Moreover, it is difficult to conclude that the Project does not comply with the cited aesthetic provision of the Zoning Regulations when Project density is one of the aesthetic impacts and the Project complies with the Regulations' specific density provision for the SEQ (see Criterion 10 discussion below).

Based on the foregoing findings of fact, the Board also concludes that the Project will not offend or shock the average person. With respect to this issue, the Board stresses the larger context of the Project area, which includes increasing suburban development growing out from Chittenden County's urban core in Burlington. Within this larger context are several medium density residential developments similar to the Project. Thus, the Board believes that the average person would not be shocked or offended to find a project of this nature in the proposed location.

Based on the foregoing findings of fact, the Board further concludes that the Applicant has taken generally available mitigating steps which a reasonable person would take under the circumstances to mitigate the adverse effects posed by Project density and open space. Specifically, the Applicant has reasonably clustered the Project on the Project tract; minimized perception of the mass of the Project through use of a landscaping plan and muted house colors; and allowed for a SO-acre open space set-aside between Dorset Street and the Project residences.

Accordingly, the Project complies with Criterion 8 (aesthetics, scenic and natural beauty).

G. Criterion 10 (Local and Regional Plans)

Criterion 10 requires that, before issuing a permit, the Board find that a proposed project "[i]s in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24."

In light of the foregoing findings of fact, the Board concludes that the Project will conform to the City and Regional Plans if conditioned as discussed below.

1. City Plan

With respect to its conclusion regarding the City Plan, the Board stresses that the Plan encourages housing in the SEQ which is affordable to moderate income households and the Project is designed to be so affordable.

The Project also is reasonably clustered to preserve open space and agricultural lands and will not unduly interfere with available views.

Further, Project density is in compliance with the City Plan. While it is true that the City Plan generally encourages a lesser density in the SEQ, the City Plan also states that there will be “varying density neighborhoods ... throughout each residential use category.” Thus the City Plan is ambiguous with respect to density. To resolve this ambiguity, the Board has turned to the City’s Zoning Regulations to determine whether they contain provisions germane to interpreting the density provisions of the Town Plan. In re Frank A. Molgano, Vt. , #93-17, slip op. at 5-6 (Vt., Nov. 10, 1994). Sections 26.401 through 26.403 of the Zoning Regulations provides for a maximum density of 1.1 units per acre in the SEQ, which can be achieved through consideration of all tract acreage. So calculated, the Project complies with the density provisions of the City Plan as implemented through the City’s zoning by-law.

2. The Regional Plan

With respect to the Board’s conclusion concerning the Regional Plan, such Plan emphasizes the provision of affordable housing. The Regional Plan defines such housing as that which can be purchased by median income earners in Chittenden County without using more than 30 percent of income and the Applicant has designed the 60 multi-family unit portion of the Project to meet this definition.

Strictly construed, the Project does not meet the Regional Plan’s provisions regarding growth centers, sewer and water line extensions, and agricultural areas. However, the Board concludes that the Regional Plan does not intend these provisions to be strictly construed.

Concerning the growth center provisions, the Regional Plan calls the growth center policies a “governing principle” and states that there “should” be a clear delineation between town and country through designated growth centers. Moreover, the Regional Plan demonstrates an intent that higher density development such as the Project should be in such centers.

But the Regional Plan also states that “should” connotes a requirement which is not mandatory. It further specifies a “public good” exception to its growth center recommendations which is met by the Project’s provision of affordable housing within the meaning of the Regional Plan. In addition, the Regional Plan states that municipal by-laws are the primary means of implementing its goals. The Zoning Regulations allow a project of the proposed density on the Project tract.

With respect to the provisions concerning sewer and water line extensions, these provisions are designed to promote the Regional Plan’s growth center goals. Thus, while the Regional Plan demonstrates an intent which contradicts the extension of municipal water and sewer to the Project area, the reasons for not strictly construing the growth center provisions apply to the provisions concerning sewer and water extensions.

Turning to the agricultural area provisions, it is true that on page 33 the Regional Plan recommends that residential development in such an area be low density. However, on the future land use matrix, the Regional Plan states that density in agricultural areas is to be determined in accordance with local by-laws. The Zoning Regulations allow a project of the proposed density on the Project tract.

3. Permit Condition

The Applicant has emphasized affordability to moderate income earners in its arguments for a positive finding under Criterion 10. The Applicant proposes to sell the 161 single family units at a price which is affordable to the median income as measured within the City. The Applicant also proposes to sell the 60 multi-family units at a price which is affordable to the median income as measured in Chittenden County. Accordingly, the Board finds it reasonable to condition the first sale of any units in the Project on such affordability, and will do so if it issues a permit in this matter.

VII. ORDER

1. Parties are granted and denied party status in accordance with the rulings in Section III, above.
2. The Project, with conditions as noted above, complies with Criteria 1(G), 2, 3, 8 (aesthetics, scenic beauty) and 10.

3. The presumption created with respect to Project sewage disposal by the Subdivision and WW Permits is rebutted.

4. With respect to Criterion 8 (historic sites), the Applicant's notice of withdrawal is allowed on condition that any permit issued in this matter will include a requirement to comply with the conditions in the Division for Historic Preservation's letter of March 3, 1994.

5. The Board will hold one further hearing to allow the Applicant an opportunity to demonstrate compliance with Criterion 1(B). The Applicant may demonstrate such compliance through one or both of the following two options:

a. By showing that requiring a 50-foot isolation is unnecessary to protect the drilled well on the Jewett property, and that the 18-foot distance between the Project sewer connection and the drilled well in fact will not result in undue water pollution; OR

b. By re-routing the Sewer Connection so that it will be no less than 50-feet from the drilled well or any other source of drinking water.

6. If the Applicant does not file prefiled testimony concerning Criterion 1(B) by the deadline for such testimony contained in paragraph eight, below, the application for the Project will be denied pursuant to Criterion 1(B).

7. Should the Applicant choose to provide prefiled testimony on only one of the two options discussed in paragraph five, above, the Applicant will not be given a further opportunity to provide testimony on the option not chosen.

8. **On or before May 17, 1995**, with respect to Criterion 1(B), the Applicant and any other party seeking an affirmative finding shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.

9. **On or before noon on May 26, 1995**, parties under Criterion 1(B) shall file lists identifying any rebuttal exhibits they intend to present at hearing and any witnesses who will testify orally in rebuttal at hearing. Any such identified exhibits shall be made available to all parties for inspection and copying.

10. The Board will hold one additional day of hearing in this matter on June 1, 1995 beginning at 1:00 p.m., location to be announced subsequently. Such

hearing will be limited to Criterion 1(B). The issues under Criterion 1(B) will be limited to the options discussed in paragraph five, above.

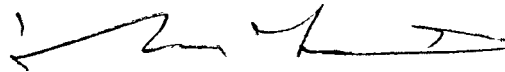
11. The Chair may subsequently set time limits for presentation of testimony and cross-examination during the hearing.

12. The Chair or duly authorized delegate may conduct a prehearing conference on afternoon of May 31, 1995. The Applicant, and parties on Criterion 1(B), should reserve the afternoon for such a conference. If such a conference is held, the parties must be prepared to identify any additional witnesses or exhibits in response to the rebuttal witnesses and exhibits.

13. The provisions of the prehearing conference report and order issued in this matter on September 7, 1994 remain in force, except that oral rebuttal testimony will be allowed at the June 1 hearing.

Dated at Montpelier, Vermont this 2nd day of May, 1995.

ENVIRONMENTAL BOARD



Arthur Gibb, Acting Chair*
Lawrence H. Bruce, Jr.* *
John M. Farmer
Samuel Lloyd
William Martinez
Robert G. Page
Steve E. Wright**

*John Ewing was appointed Chair of the Board effective February 1, 1995. At Mr. Ewing's request, Arthur Gibb remains Acting Chair for this case pursuant to 3 V.S.A. § 849.

**Members Bruce and Wright dissent with respect to Criterion 8 (aesthetics), concluding that the Project will have an undue adverse effect. They concur with regard to the other criteria.

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