

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

*Re: The Van Sicklen Limited Partnership*

Land Use Permit  
Application #4C1013R-EB

**Findings of Fact, Conclusions of Law, and Order**

This proceeding concerns an appeal by Friends of Muddy Brook Basin (FMBB) from a decision by the District 4 Environmental Commission (Commission) granting a permit to The Van Sicklen Limited Partnership (VSLP) for a residential development in South Burlington.

In this decision, the Board finds that VSLP meets the requirements of 10 V.S.A. §6086(a)(1)(E), 1(G), 4, 5, 8, and 10 but does not satisfy §6086(a)(9)(B), based upon a conclusion that the amount of mitigation to be paid for the loss of primary agricultural soils to this project is insufficient. As this matter is being returned to the Commission, VSLP may present a new Mitigation Agreement to the Commission with sufficient funding, and if the Commission finds that the new Agreement meets the Board's requirements, the Commission may issue a permit in accordance with this decision.

**I. Procedural History**

In April 1999, the Vermont Environmental Board (Board) issued a decision denying an application for a 55 lot subdivision (with 55 single family homes) on a 61-acre tract of land off of Hinesburg Road (Route 116) and Van Sicklen Road in South Burlington's Southeast Quadrant. *Nile and Julie Duppsstadt & Deborah and John Alden, #4C1013 (Corrected)- EB, Findings of Fact, Conclusions of Law, and Order (April 30, 1999)*. The grounds for denial were that the project failed to comply with 10 V.S.A. §6086(a)(8), (9)(B) and (10) (local plan).

VSLP purchased the property at issue in *Duppsstadt* in approximately October 1999. With Deborah and John Alden, VSLP filed an application on January 4, 2000 for a redesigned project on the parcel. The Commission treated the application as a reconsideration request under 10 V.S.A. § 6087(c) and Environmental Board Rule (EBR) 31(B).<sup>1</sup>

On December 4, 2000, the Commission issued Land Use Permit #4C1013R (Commission Permit) and supporting Findings of Fact, Conclusions of Law, and Order

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<sup>1</sup> Although FMBB argues in its filings that the Commission perhaps should not have treated the instant matter as a reconsideration, it did not appeal the Commission's decision to do so, and, therefore, the Board considers this particular issue to be closed.

(Commission Decision) to the VSLP. The Permit authorizes the VSLP to construct a planned residential development on the *Duppstadt* parcel, known as "Old Stone House Farm", consisting of 28 single-family residential lots, 20 detached carriage home units and one homestead parcel (containing the existing farm house) to be served by municipal water and sewer facilities (the Project). The Project also involves construction of 2100 linear feet of new public street and 875 feet of new private roadway with related utilities.

On January 3, 2001, FMBB filed a Motion to Alter the Permit and the Decision with the Commission.

On February 2, 2001, the Commission issued Memorandum of Decision and Order denying the Motion to Alter.

On March 2, 2001, FMBB filed an appeal with the Board from the Permit and Decision, and the Memorandum of Decision and Order on the Motion to Alter, alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(1)(E), (1)(G), (4), (5), (8), (9)(B), (9)(C), (9)(K), and (10) (Criteria 1(E), 1(G), 4, 5, 8, 9(B), 9(C), 9(K) and 10). FMBB also appealed the Commission's denial of party status on Criteria 9(B), 9(C), 9(K), and it appealed the Commission's apparent determination not to include Criterion 9(K) in its review.

On March 16, 2001, VSLP filed a cross-appeal with the Board. VSLP alleges that the Commission erred in expanding the scope of its review under EBR 31(B)(2) to include Criterion 5. VSLP alleged further that the Commission erred by expanding the scope of review of Criteria 1(E), 1(G) and 4. VSLP further appealed the Commission's grant of party status to FMBB on Criteria 1(E), 1(G), 4, 5, 8 and 10.

On April 10, 2001, FMBB filed a Motion to Amend/Clarify Statement of Issues, a Motion to Dismiss Applicant's Cross-Appeal on Party Status, and a Petition for Party Status on Criteria 1(E), 1(G), 4, 5, 8 and 10.

On April 10, 2001, Board Chair Marcy Harding convened a Prehearing Conference with the following participants: VSLP by Stephen Crampton, Esq., South Burlington Planning Commission (SBPC) by Julie Beth Hoover, Town of Williston Selectboard by Michael Munson, and FMBB by Stephanie Kaplan, Esq.

Chair Harding issued a Prehearing Order on April 13, 2001.

The Williston Planning Commission filed an April 18, 2001 letter with the Board

noting that it joins with the Selectboard as a party in this matter. (Hereinafter, the Board will refer to both the Town of Williston Selectboard and the Williston Planning Commission as "Williston.")

On June 8, 2001, the Board issued a Memorandum of Decision on party status and other Preliminary Issues identified in the Prehearing Order, including FMBB's April 10, 2001 motions.

On June 19, June 21, and 26, 2001, VSLP, Williston, and FMBB, respectively, filed objections to the June 8 Memorandum of Decision. The Board issued a Memorandum of Decision on these objections on July 26, 2001.

Chair's Preliminary Rulings were issued on August 21 and 22, 2001 to address FMBB's motions to take official notice, to strike testimony and to extend filing deadlines.

On September 28, 2001, the Board issued a Memorandum of Decision on evidentiary objections filed by the parties.

Hearings were held in this matter on October 31 and November 9, 2001. At these hearings, the parties presented stipulations that they had agreed to as to Criteria 1(E), 1(G), 4 and 5.

The Board deliberated on December 19, 2001, and January 16, February 13, and March 6, 2002. Following a review of the Proposed Findings of Fact and Conclusions of Law, related argument, testimony and the record, the Board declared the record complete and adjourned. This matter is now ready for final decision.

## **II. Issues**

As set out in the Prehearing Order, and as further modified by the Board's subsequent Memoranda of Decision, the merits issues in this case are:

1. Whether, pursuant to 10 V.S.A. §6086(a)(1)(E), the Project will, if feasible, maintain the natural condition of the Muddy Brook and its tributaries, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.
2. Whether, pursuant to 10 V.S.A. §6086(a)(1)(G), the Project complies with the rules of the Water Resources Board, as adopted under 10 V.S.A. §905(9), relating to significant wetlands.

3. Whether, pursuant to 10 V.S.A. §6086(a)(4), the Project will cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

4. Whether, pursuant to 10 V.S.A. §6086(a)(5), the Project will cause unreasonable congestion or unsafe conditions with respect to use of the highways and transportation.

5. Whether, pursuant to 10 V.S.A. §6086(a)(8), the Project will have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

6. Whether, pursuant to 10 V.S.A. §6086(a)(9)(B), the Project will significantly reduce the agricultural potential of the primary agricultural soils.

7. Whether, pursuant to 10 V.S.A. §6086(a)(10), the Project is in conformance with the South Burlington Comprehensive Plan.

### **III. Findings of Fact**

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

To the extent that they remain unchanged by the specifics of the present Project, many of the Findings of Fact from the *Duppstadt* decision are included below.

#### **A. Description of the Project**

1. The Project involves a 49-unit subdivision, including 28 single family units on single lots, 20 "carriage" homes on a large common lot, the Old Stone Farmhouse on 10 acres, internal roadways, approximately one-half mile of sewer and water lines, and various other infrastructure on 61.77 acres of land in a rural residential area of the City of South Burlington (Project Tract).

2. Most of the 28 single family house lots will be located in an area in the north and northeasterly portion of the Project Tract, immediately to the south of Van Sicklen Road known as the "lower meadow." The 20 carriage homes will be located along the western edge of the meadow and on the slope immediately west of the meadow. No dwellings are proposed within 500 feet of Hinesburg Road, and a 100-foot setback from Van Sicklen Road will be maintained for all lots.

3. The single-family dwellings will be two story structures (2000-2400 sf), while the carriage homes will be single-story structures (1600-2000 sf). Roof ridge heights of the single-family dwellings will be 30.5 feet; carriage home roof ridge height will be 22 feet. Siding colors for all new dwellings will range from white to brown and grey earth tones. Roof shingle colors will be tan, brown, dark brown or dark grey.

4. Trees will be planted along the roadways at an average spacing of 60 feet along Van Sicklen Road. In particular, shade trees will be planted at the rear of the lots facing the open meadow (Lot #52) and additional deciduous and coniferous trees will be planted between carriage homes #30 through #37 and Van Sicklen Road, to increase the screening provided by the existing deciduous shrub-tree row. Tree plantings have not been proposed along Van Sicklen Road adjacent to the lower meadow so as to preserve the intermittent views from Van Sicklen Road of the meadow area and Brownell Mountain in the distance. Additional trees will also be planted along the edges of the lots where they abut the limit of the 50-foot wetland buffer.

5. There is currently no sewer access to this parcel. The sewer line will be brought from the north a significant distance to allow this density of development. There are no sewer lines in the nearby areas of Williston or Shelburne.

6. The Project plans include provisions for six 70-watt, high-pressure sodium, down-shielded streetlights located along the public road. These will not be installed unless, after the development is completed, the City deems them necessary. All individual home and site lights will be non-glaring, shrouded or low intensity with minimal light diffusion.

7. All of the proposed house lots are in the "development areas," and none infringe upon the "restricted areas," as those terms are defined in §6.30 of the South Burlington Zoning Regulations.

8. Twenty-four of the Project Site's 61 acres fall within a "development area" under the Zoning Regulations.

**B. Comparison between the Project and the proposed *Duppstadt* subdivision**

9. The Project was redesigned after the Board denied a proposal by Nile and Julie Duppstadt for a subdivision on the Project Tract. *Re: Nile and Julie Duppstadt & John and Deborah Alden, #4C1013 (Corrected)-EB, Findings of Fact, Conclusions of Law, and Order (April 30, 1999).*

10. The Project design reduces number of housing units from those proposed in *Duppstadt* by six, from 55 to 49. Instead of 54 single-family houses on individual lots, the new design has 28 single-family houses on individual lots and 20 carriage houses on a common lot. The single-family lots are sited in a linear fashion along the roads in the subdivision. Access to all lots is from Van Sicklen Road via Cobblestone Drive, a loop road with two entrances.

11. The Project differs further from the *Duppstadt* proposal in that no lots are proposed for the upper meadow area along Hinesburg Road, lots have been eliminated in the southern half of the Project Tract, the number of access roads has been decreased, no lots include wetland areas, the extent of roads and utilities has been reduced, and more of the Project land will remain as open space.

**C. The Project Tract**

12. The Project Tract is a former farm in the southeast corner of the intersection of Van Sicklen Road and Hinesburg Road (Route 116). A small portion of the Project Tract (along its eastern boundary) borders the Town of Williston.

13. The Project Tract is located in the outer fringes of the area known as the "Southeast Quadrant" (SEQ) of South Burlington. The Project Tract's eastern boundary almost coincides with the eastern boundary of the SEQ and its southern boundary adjoins the Auclair farm, through which runs part of the SEQ's southern boundary.

14. In the northeast corner of the Project Tract are the historic Old Stone House and several older farm buildings.

15. Until recently, much of the Project Tract was used as sheep pasture.

16. The Project Tract is currently perceived as open space. It is visually interesting and diverse, as it contains old stone walls, a deciduous hedgerow, an open agricultural field along Hinesburg Road, a sloping area with a regenerating forest east of

this meadow, and meadows and other regenerating forests at the base of the slope. A wetland system winds through the site from east to west. The wetland system in the open space is mostly wet meadow and is not easily recognized as a wetland from Van Sicklen Road. When viewing the Project Tract from Hinesburg Road or along its Van Sicklen Road boundary, a hemlock ridge is visible through the trees on the eastern portion of the Project Tract.

17. A tree row of varying thickness consisting of mature trees and shrubs borders Van Sicklen Road. From within the Project Tract, except for limited areas where vegetation screens the view, one can observe the vehicles traveling on Van Sicklen Road.

18. The views from the Project Tract are generally of farms and undeveloped land.

19. The site contributes to the visual diversity and rural character along both Hinesburg and Van Sicklen Roads. Along Van Sicklen Road, the site forms a visually pleasing foreground to a view of Brownell Mountain. From Hinesburg Road the small meadow provides an appropriate setting for the Old Stone House as well as the foreground for views to Mount Mansfield and Camels Hump.

20. The open meadows also contribute to the sense of transition between the more developed areas to the north and the open spaces characteristic of the landscape to the east, south, and west of the site.

21. The Old Stone House property at the corner of Van Sicklen Road and Hinesburg Road contributes significantly to the aesthetic quality of the area. A steep wooded knoll covered with hemlocks and pine contrasts with and partially encloses broad open meadows.

22. From the higher terrain on the site there are views of Mount Mansfield and Camels Hump. There are also many scenic middleground views from the property and across the property from surrounding roads. From nearly all areas on the property Brownell Mountain is visible. Several houses are visible from the property including some houses to the north and the two historic brick buildings along Hinesburg Road associated with the Auclair Farm.

23. The wetlands on the site are diverse, consisting of wet meadow, shrub herbaceous wetlands, and forested wetlands; they contribute significantly to the overall beauty of the site.

24. The site's connection to open lands around the site, and with the Muddy Brook wetlands, encourages a wide variety of wildlife, which are frequently sighted.

25. The upper portions of the site are visible at a distance from roads in the surrounding area, particularly from the eastern portions of Van Sicklen Road and from Brownell Road near the intersection with Walker Hill Road. From those areas, the farm buildings and surrounding trees are visible. Also visible from these vantage points are the other existing developments in the vicinity of the site, especially to the north along Hinesburg Road.

**D. Criteria 1(E), 1(G), 4 and 5**

26. VSLP and FMBB have entered into a stipulation regarding Criteria 1(E), 1(G) and 4 which reads:

Now come the parties and stipulate that the following conditions be included in the conditions of any land use permit issued in the matter of The Van Sicklen Limited Partnership, Land Use Permit Application #4C1013R-EB.

1. That the Declaration of Covenants, Easements and Restrictions for the Homeowners' Association, and a paragraph to be included in the deeds to all lots, shall include the following language:

The Class Two wetland and associated 50-foot buffer zones shown on the site plans entitled "The Old Stone Farm House Site Plan" by Lamoureux & Dickinson, Consulting Engineers Inc. dated December 1, 1999, will remain in a natural undisturbed manner with the exception of the proposed impacts as shown on the site plan. There shall be no draining, dredging, tilling, grading, dumping of yard waste or other debris and refuse, alterations of the water flow, cutting, clearing or removal of vegetation within the wetland or buffer zone with the exception of the proposed impact areas as are approved by the Conditional Use Determination for this property. Construction of paths into or through the wetlands and wetland buffers is specifically prohibited. Allowed uses within the wetlands and their buffer zones are to be in conformance with Section 6 of the Vermont Wetland Rules effective February 23, 1990. These restrictions run with the land and are enforceable under the Vermont Wetland Rules and the associated Conditional Use

Determination for this property.

2. A line of northern white cedars, five to six feet tall at planting, will be the marker trees planted at 25 foot intervals along the portions of the rear and side boundaries of Lots 17 through 24 which are adjacent to wetland buffers. On Lots 25 through 29, iron pipes will mark the rear comers, but no marker trees will be required since the rear of the Lots are partially forested. The marker trees will be planted in the spring or fall after construction has begun on a phase of the project to provide the best chance for survival, and in any event will be planted before the sale of the first Lot in the phase. During construction, silt fencing will be placed around disturbed areas to ensure no construction encroaches into a wetland buffer. All other terms and conditions of Conditional Use Determination #2000-043, dated May 4, 2000, shall be complied with by permittee.

3. A sediment or treatment basin approximately 10 feet by 20 feet at the top and 24 inches deep, with plantings in the bottom to cause further settlement of any solids, shall be constructed at the back corner of Lots 28 and 29. Stone check dams will be placed in the remaining swale area leading from the basin to the wetland area to further reduce velocity.

Upon acceptance by the Environmental Board of the above conditions and inclusion in any land use permit issued by the Board, the Friends of Muddy Brook Basin withdraws its opposition and dismisses its appeal of the project on Criteria 1(E), 1(G) and 4.

27. VSLP and FMBB have entered into a stipulation regarding Criterion 5 which reads:

VSLP will pay for the construction of up to two rumble strips or speed tables on Van Sicklen Road in Williston and two rumble strips or speed tables on Van Sicklen Road in South Burlington at locations approved by the respective municipalities after consultation with both VSLP and FMBB. The choice of which traffic calming devises are selected shall be at the sole discretion of the Town/City. VSLP will also pay for the installation of one "Strictly Enforced Speed Limit" sign in each municipality at locations approved by the Town/City. The parties acknowledge that the obligations of VSLP are contingent upon final approval being obtained from the appropriate municipal entity with the authority to do so within

three years of the date of the final land use permit issued to VSLP for its project on Van Sicklen Road.

Based on VSLP's agreement to assume the above financial obligations, and in reliance upon the written commitments of support of the official charged with the oversight of municipal roads in the respective municipalities .... , FMBB and the Town of Williston agree to withdraw their opposition and dismiss their appeals to the project under Criterion 5.

**E. Criterion 8**

**1. Context of the Area**

28. In its *Duppstadt* decision, the Board described the Project's surroundings as follows:

This Project is to be located in a rural area of pastoral open spaces and farm land. From almost all locations on the Project site, the predominant views are of rural countryside. While other large existing residential developments are located approximately 1/2 mile away, with the exception of the Ledge Knoll development, they are not visible from the Project Tract due to an intervening ridge.

The Project Tract, with its hemlock ridge, open meadows, and attractive wetland vegetation, is viewed by neighbors and passing motorists and is an essential part of this aesthetically pleasing area...

*Duppstadt*, at 33.

29. The Project's surroundings have not changed since the *Duppstadt* decision was issued.

30. The SEQ of South Burlington is an area of special character created by the mix of open fields, agricultural land, wetlands, forests and residential areas. The character of the area is rural, with scenic middle-distance views and long-distance views to Mount Mansfield and Camel's Hump.

31. The Van Sicklen Road area of the SEQ is not close to any growth center or services, such as stores, offices or schools.

**a. North of the Project Tract**

32. Van Sicklen Road forms the northern boundary of the Project Tract. Immediately north of Van Sicklen Road, the land is generally undeveloped; a small, four-lot planned residential development has been approved by South Burlington for this area, but it has not yet been built.

33. Only the Ledge Knoll development is partially visible from the Project Tract approximately one-half mile to the north.

34. The ridgeline to the north and west of the Project Tract creates a natural boundary between the more densely developed areas of South Burlington to the north and the more rural areas to the south.

**b. South of the Project Tract**

35. To the southeast, Brownell Mountain can be viewed across the open meadows of the site.

36. The Auclair property, a 1500-acre working dairy farm with several houses and a large barn, borders the Project Tract to the south along Hinesburg Road.

37. South of the Auclair farm there are wide areas of open space which are increasingly rural; these include views toward the Shelburne Pond natural area.

**c. East of the Project Tract**

38. The eastern boundary of the site adjoins the Fife property and Abrams property. Muddy Brook runs in a north-south direction approximately 200 feet east of the property and forms the South Burlington/ Williston boundary.

39. Larger single family lots continue to the east of the site along both sides of Van Sicklen Road and the extensive meadows of the LaCasse Farm lie at the east end of the Road in Williston. The land use pattern along Van Sicklen Road in both South Burlington and Williston consists of older residential buildings interspersed with newer houses. Homes are generally well separated by woods or open meadows. Most homes are located close to the main roads, but some are set back along private driveways.

40. East of Muddy Brook, there are a number of houses, all on relatively large lots. An 80-acre horse farm borders South Brownell Road.

**d. West of the Project Tract**

41. Hinesburg Road runs along a ridgeline on the west boundary of the Project Tract. Across Hinesburg Road, to the west and southwest of the Project, there are an apple orchard, some single-family lots, and part of the Auclair Farm.

**2. Adverse impact**

42. The carriage homes at the higher elevations of the Project Tract will be visible in the distance from parts of Walker Hill Road, the eastern end of Van Sicklen Road, and South Brownell Road in Williston. From those areas, the farm buildings and surrounding trees are visible. Also visible from these vantage points are the other existing developments in the vicinity of the site, especially to the north along Hinesburg Road. Some of the houses on the western side of the site will also be partially visible from Hinesburg Road.

43. The carriage homes and the single-family homes will be visible along much of Van Sicklen Road along the northern border of the Project Tract, despite the hedgerow. Numerous natural openings appear in this hedgerow, and further openings in the hedgerow from entrance roads will increase the visibility of the Project's houses. The additional proposed plantings may slightly reduce the visibility of the Project from Van Sicklen Road.

44. Construction of the easternmost driveway and lots will require some leveling or filling, as well as the removal of some of the existing pine trees in this area. Many of the deciduous trees on the sloping hillside on the western side of the property will also need to be removed in order to construct the carriage homes and their associated roadway and drives.

45. Some of the Project's houses will be located on over five feet of fill; lots 10 and 12 will require up to 10 feet of fill on parts of the lot.

46. The view from Van Sicklen Road south to the wetlands and forest and to Brownell Mountain beyond will be mostly obstructed by the Project's houses in the lower meadow.

47. From Van Sicklen Road, the Project maintains a limited view corridor in the lower meadow to the wetlands, the open spaces and meadows, and toward Brownell Mountain beyond. However, the scale and number of houses will overwhelm and dominate the view, making it insufficient to preserve any meaningful views.

48. From Van Sicklen Road, views of many of the single-family houses will be of their back yards.

49. Parts of the upper carriage homes will be visible from Hinesburg Road. Some of the single-family houses will have a roof elevation sufficient to be seen from Hinesburg Road.

50. Views of the Green Mountains will be visible from Hinesburg Road, but the view will include some of the houses in the foreground.

### **3. Undue adverse impact**

#### **a. Written community standard**

##### **i. South Burlington City Plan**

51. The SEQ is described in the *1996 Comprehensive Plan of the City of South Burlington, Vermont* (City Plan) as an area which “still retains an open, rural character and affords numerous spectacular views of the Green Mountains, Adirondack Mountains and Lake Champlain.”

52. The need to protect the rural character of the SEQ is first highlighted in City Plan, Chapter V, *Land Use*. The introduction to Chapter V states that the land use plan “provides a strong guideline for all future development and redevelopment in the community and directly affects all other elements contained in the plan.”

53. City Plan, Ch. V(B), *Future Land Use*, provides a discussion of the “various land use categories and areas of special concern” which includes the following section on the Southeast Quadrant:

##### **5. 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 detailed discussion of the City's SEQ is contained within Chapter XV of this plan. (Emphasis added)

54. City Plan, Ch. V(C), *Recommendations*, states:

5. Southeast Quadrant - The Quadrant should be developed in a gradual, well planned manner that provides a variety of development patterns. *An overall density in the low moderate range should be maintained and development designs stressed which preserve the open, special character of the SEQ* (see also more detailed discussion and recommendations contained in Chapter XV, Southeast Quadrant). (Emphasis added)

8. *In order to encourage adequate open space and natural resource preservation, provision for recreation activities, continued agricultural uses and other creative uses of the land*, the City should consider alternative ownership arrangements of large parcels of land created by clustered development such as, but not limited to, land banking or involvement of a land trust. (Emphasis added)

55. Chapter XV of the City Plan deals specifically with the SEQ.

56. City Plan, Ch. XV(D)(c) emphasizes the preservation of existing agricultural operations, noting that agriculture "contributes to the aesthetic qualities of the SEQ. The farms will likely disappear if left unaided. The City should take positive steps . . . to retain agriculture as a land use in the Quadrant."

57. City Plan, Ch. XV(D)(d) notes that the areas in the SEQ designated as "development areas" are based on the following general objectives: "preserve natural features such as wetlands, flood plains and drainage ways;" "locate development in a manner which preserves significant views;" "provide significant setbacks along north-south arterial roads to accomplish an open feeling and promote preservation of the 'special character' " of the SEQ; "allow development to encroach into wooded areas to

hide units from view;" "protect enough wooded area to maintain viable wildlife habitat and maintain connections between habitats for wildlife movement;" and "encourage some prime farmland to remain open by clustering development."

58. The City Plan continues: Neighborhood densities were then designated for each development area" based on certain objectives, among which is that South Burlington "consider lower densities in abutting areas of Shelburne and Williston to maintain compatibility." City Plan, *Ch. XV(D)(d)*.

59. City Plan, *Ch. XV(E), Views*, reads:

*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 protection 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.(Emphasis added)*

60. City Plan, *Ch. VII(K), Natural Resources (Views)*, states:

There are a number of outstanding scenic views offered in the City. From numerous locations in the City, one can see spectacular views of the Green Mountains to the east, and the Adirondacks and Lake Champlain to the west. Sources which have identified important views include Map 7 of this Plan....

The preservation of these outstanding scenic views is important to the City. Through careful planning, appropriate development design, and through acquisitions and easements, these views should be protected for future generations to enjoy.

61. City Plan, *Map 7, Natural Resources*, includes in its legend a symbol representing "vistas." Several of these symbols appear on the east side of Hinesburg Road (Route 116) at the Project Tract, indicating scenic views to the east from these points. There are no similar symbols indicating a scenic view from Van Sicklen Road south to Brownell Mountain.

62. City Plan, Ch. XV(F), *Historic And Cultural Resources*, states:

The Quadrant contains many remnants of our historical and cultural heritage including old barns and farmhouses, stone walls, hedgerows, an apple orchard, and road rights-of-way. The Quadrant's open, pastoral character, and historic landmarks make it a very pleasant and desirable area in which to live. *Careful site plan and subdivision reviews will minimize adverse impacts to these important qualities.* (Emphasis added)

63. The importance of open space in the SEQ is found in the City Plan, Ch. XV(G), *Objectives*, which states in pertinent part:

1. *Preserve and enhance the open character, natural areas, and scenic views of the Quadrant, while allowing carefully planned development.* (Emphasis added)

2. *The rate, location, intensity, and timing of future development in the Quadrant should be in accord with the physical characteristics of the land* and the availability of municipal services and facilities, and should be consistent with the City's population growth objectives and land use recommendations. (Emphasis added)

3. Promote a variety of residential patterns and styles, including a fair share of affordable housing, while preserving the special character of the Quadrant.

64. City Plan, Ch. XV(H), *Recommendations*, states, in pertinent part:

1. *Land Use*

a) *Promote residential development which preserves open space, natural area and views through the use of such planning techniques as clustering.* (Emphasis added)

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d) Take an active role in preserving agricultural land in the Quadrant by exploring the feasibility of transfer of development rights and encouraging use of such means as land trusts

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g) Continue to consult such planning studies as the "Public Improvements and Scenic Views/Natural Area protection study, Phases I and II" (the "Boyle Study") when considering land use policies and development proposals in the Quadrant.

h) Encourage an overall density of development in the low moderate range which works to promote a total full-build density of 4,100 to 4,200 residential units in the Quadrant.

i) *Cooperate with the Towns of Williston and Shelburne to plan compatible uses and densities along the Town/City lines.* (Emphasis added)

2. *Housing*

a) Allow both single-family and multi-family units in the Quadrant.

3. *Natural Resources*

a) Preserve and protect the natural resources of the Quadrant including *water and drainageways, soil, open spaces, wetlands*, Potash Brook source and Muddy Brook. (Emphasis added)

b) *Promote development patterns and designs which preserve as much as possible public views.* (Emphasis added)

65. In its Chapter addressing the City's natural resources, the City Plan notes that Muddy Brook is one of the major streams in the City, and that special care should be taken to protect the remaining wetlands and preserve open space to help with the maintenance of wildlife habitat. *Ch. XVII(F), (G), (M), (N) and (P).*

66. The majority of the land in the SEQ, including the 61-acre Project Tract and surrounding land area, is designated on the City's Future Land Use Map (Map 6) as being in a "Residential and Open Space" Planning Area. This is described, as noted above, as "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 agriculture." *City Plan, Ch. V(B)(5)*.

## ii. **South Burlington Zoning Regulations**

67. Article VI of the South Burlington Zoning Regulations addresses the SEQ. Section 6.00, *Purpose*, states:

A Southeast Quadrant District (SEQ) is hereby formed in order to encourage open space preservation, scenic view and natural resource protection, wildlife habitat preservation, continued agricultural use and well planned residential use in the largely undeveloped area of the City known as the Southeast Quadrant. The open character and spectacular scenic views offered in this area have long been recognized as very special and unique resources in the City and worthy of protection. The location and clustering of buildings and lots in a manner that will best preserve the open space character of this area shall be encouraged. Any uses not expressly permitted are prohibited except those which are allowed as conditional uses.

68. Section 6.30 of the Zoning Regulations is captioned "Designation of Restricted Areas." Subsection 6:301 states:

Restricted Areas are hereby designated in the Southeast Quadrant District as shown and identified on a map entitled, "Southeast Quadrant Official Zoning Map", which is incorporated into this bylaw.

69. Approximately one-half of the Project Tract (its eastern and southeastern portions) is designated as "restricted areas" on the SEQ Official Zoning Map. *South Burlington Zoning Regulations* §6.301. The restricted areas include wetland areas, forests, wildlife habitat and other important resources. They also include a 500-foot setback from Hinesburg Road to preserve important views from the road corridor.

70. Subsection 6.302 of the Zoning Regulations provides:

In any location where uncertainty exists regarding the exact boundaries of a restricted area as shown on the Southeast Quadrant Official Zoning Map, an affected property owner may submit a written request that the Planning Commission define the location of the boundary. The Planning Commission shall consider a request to define the location of a boundary at a meeting of the Planning Commission held within 60 days of receipt of

a written request. At the meeting, the Planning Commission shall provide an opportunity for persons interested in the restricted area to present information relevant to determining the location of the boundary. Within 30 days following such meeting, or any continuation thereof, the Planning Commission shall establish the location of the boundary of the restricted area giving consideration to the original intent or purpose for designating the area.

71. There was no evidence submitted of any written request made pursuant to Subsection 6.302 that the Planning Commission define the location of the boundary in the area of the Project.

72. Subsection 6.303 of the Zoning Regulations provides:

Areas not located within a restricted area designated pursuant to Section 6.301 above shall constitute development areas.

73. Subsection 6.40 of the Zoning Regulations provides for the Establishment of Residential Development Density in the SEQ. Subsection 6.401 states that:

The 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 1.2 residential units per acre.

74. Higher density of development is allowed to encourage clustering of homes within the development areas, not to exceed the overall density allowed on the site. *Zoning Regulations, §6.403.*

75. Subsection 6.501 of the Zoning Regulations specifies the only activities that are permitted in designated restricted areas:

(a) Construction of access driveways, roads, and appurtenant improvements to serve approved development or uses.

(b) Construction of utility services provided they are placed underground. Appurtenant facilities such as transformers and amplifiers may be installed at ground level where such is in accordance with accepted industry standard.

(c) Accepted agricultural and silvacultural practices.

(d) Public recreation paths.

(e) Subject to the limitations applicable to non-complying structures in Section 26.00 of this bylaw, alteration of structures located in a restricted area on the date this provision becomes effective.

(f) Structures which are accessory to any structure subject to subsection (d) above.

(g) Outdoor recreation facilities, including accessory buildings and structures.

(h) The Planning Commission, taking into consideration the standards set forth in Section 6.606, below, may approve construction of one single-family residence in the restricted area on a lot in existence on the date this provision becomes effective if such lot is:

(i) located entirely within the restricted area; or

(ii) located substantially within the restricted area with an insufficient portion of the lot located in the development area to accommodate construction and use of a single-family residence.

(i) Municipal facilities.

76. Subsection 6.602 of the Zoning Regulations pertains to Planned Residential Developments (PRDs) and states when such development activities in restricted areas may occur:

In connection with approval of a Planned Residential Development, the Planning Commission may allow development activities in addition to those authorized under Section 6.501 to occur in restricted areas or allow residential lots or portions of residential lots to be located in restricted areas provided the Commission determines that such development activities are consistent with the intent and purpose of the Southeast Quadrant District.

77. Subsection 6.606 of the Zoning Regulations also pertains to PRDs and states, in pertinent part:

The Planning Commission shall review proposed development activity or the location of residential development lots in a restricted area according to the following criteria:

(a) Designated open space shall be located so as to maximize the aesthetic enjoyment of users of the site, surrounding properties, and roads in the vicinity.

(b) Proposed buildings, lots, streets and other structures shall be placed so as to maximize potential of land for open space and natural resources preservation, scenic view protection, and /or continued agricultural use. In an effort to maximize the above goals, the following shall be considered:

(i) Existing natural resources on the site including streams, wetlands, floodplains, conservation zones, wildlife habitats and special features such as mature maple groves or unique geologic features.

(ii) Scenic view corridors from existing or planned public ways.

(iii) Existing agricultural use and/or ability of the land to be improved for agriculture.

(iv) Size and shape of contiguous open space and potential for combination with open space and adjacent lots.

(v) Natural topography and existing vegetation and forest lands.

78. South Burlington's Zoning Regulations permit Planned Unit Developments (PUDs) and PRDs in order to "encourage innovation in design and layout, and more efficient use of land." Subsection 26.15 of the regulations states that, in addition to complying with South Burlington's Subdivision regulations, PUDs and PRDs "shall meet" the General Standards noted in subsection 26.151.

79. Section 26.151 of the Zoning Regulations further states that PUDs and PRDs "shall comply with the following standards and conditions:"

(g) Will protect important natural resources including streams, wetlands, scenic views, wildlife habitats, and special features such as mature maple groves or unique geological features.

(h) Will not have an undue adverse effect on the scenic or natural beauty of the area, is aesthetically compatible with surrounding developed properties, and will protect rare and irreplaceable natural areas and historic sites.

(l) Will conform with the City's Comprehensive plan.

80. In the *Duppstadt* decision at page 43, the Environmental Board made the following statement about the South Burlington City Plan's emphasis on preserving the open and rural character of the SEQ:

Throughout the City Plan, the SEQ is recognized again and again as a special area that still retains an open and rural character which should be preserved. While the City Plan recognizes the need to accommodate the intense development pressures placed upon the SEQ due to its close proximity to the city core, it stresses the importance of the use of innovative designs which work to preserve open space, natural resources and scenic views and promote the continuation of agricultural use.

81. Taken together, various portions of the City Plan and the South Burlington Zoning Regulations provide a clear written community standard as to what portions of the SEQ should be preserved, what portions should be developed, where the development should be undertaken, thereby protecting the aesthetics, scenic beauty and natural values of the SEQ.

#### **b. Mitigation**

82. In its *Duppstadt* decision, the Board identified several corrective actions that should be taken to mitigate aesthetic impacts and harmonize a residential development in the SEQ. These included landscaping plans and house design specifications to assure preservation of views and the rural appearance of the tract, and clustering the Project within the development area to preserve the aesthetic and scenic beauty of the SEQ.

83. The single family lots, carriage homes and project infrastructure are confined to the designated development areas on the site. No development encroaches into the restricted areas. The house lots will not intrude into or be located on ridgelines, nor will the Project disturb other areas identified in the *Quechee* decision as being "sensitive to change" such as wetlands, steep slopes, shorelines and flood plains.

84. By confining the homes to the designated development area and placing many of them in the lower meadow area, only portions of a few of the carriage homes will be visible through trees from Hinesburg Road located in the west of the Project, only a few carriage homes will be visible through trees from the long distance views from the east, and none will be visible from lands immediately east of the Project or from any views, long-range or adjacent, from the south.

85. Restricted areas on the site will remain as open space or in agricultural use in perpetuity.

86. The construction of 48 new residential houses uses the majority of the 24-acre development area on the Project Tract, and what land remains in the development area is in effect lost as open space. However, the balance of the Project Tract contains restricted areas, which will remain as open space.

87. The configuration of the Project leaves a small open area adjacent to Van Sicklen Road within the development area. To create a view across this open area to the southeast, the configuration leaves a 200-foot gap between proposed lots, which permits a partial view across the proposed subdivision road and toward Brownell Mountain.

88. The Project will leave the 500-foot view corridor along Hinesburg Road undisturbed. At most, the upper portions of some of the carriage homes beyond the scenic view corridor setback will be visible from Hinesburg Road.

89. The Project will be visible from Van Sicklen Road, either through the existing tree row, or through the openings for the two public roads. There will still be a view of the small open area adjacent to Van Sicklen Road and a view to the open space beyond. The view to Brownell Mountain will remain as the houses on either side of the view corridor are at a lower elevation, below the line of sight of the mountain.

90. The density of the Project is 0.79 residential units per acre, one-third less than the density allowed in the SEQ by the Zoning Regulations.

91. The tree row, shrubbery and existing stonewall along Van Sicklen Road are to remain intact except at the two access points for the new public road. The site plan calls for the installation of street trees as well as new shade and evergreen trees between the proposed residences and Van Sicklen Road and throughout the site, except where they would foreclose views across the meadows. The intent is not to create an impenetrable barrier of landscaping, but to provide ample screening to interrupt the building mass. The pump station site (Lot 50) on Van Sicklen Road has been designed to preserve the 30 inch pine tree, the stone wall, most of the white birches, and the entire adjacent wetland.

**F. Criterion 9(B)**

**1. Primary agricultural soils on the Project Tract**

92. The bulk of the surficial soils on the Project Tract are made up of lacustrine clays (Vergennes series) or silty clays (Covington series) with some limestone rock outcrops or small ridges where the soil has a higher loam content.

93. The soils on the Project Tract that are best suited for crop production are the Vergennes B series soils. They are located in two areas: one to the south of the Old Stone House (upper meadow) and the other in an area immediately to the south of Van Sicklen Road, to the east-southeast of the Old Stone House (lower meadow).

94. The lower meadow is approximately nine+ acres in size and is bounded on the west by a wooded slope, on the north by Van Sicklen Road, on the east by wetland areas, and on the south by the Project Tract's drainageway.

95. Both the upper and the lower meadows are well supplied with plant nutrients and are very responsive to the use of fertilizers and liming amendments.

96. There are areas on the Project Tract that have wetness limitations for farming operations, but they are primarily associated with the Covington and Livingston silty clays. Any wetness limitations in the two areas of the Vergennes B soils can be overcome by timing the use of field equipment operations or through the use of artificial drainage.

97. Both the upper meadow and the lower meadow, independent of each other, are of sufficient size and capable of supporting or contributing to an economic agricultural operation. Both have a history of being used for pasture and production of crops such as hay, soybeans, and sudan grass.

98. Neither the upper nor the lower meadow has average land slopes which exceed 15%.

99. Together the upper and lower meadows form a combined total of about 15 acres of primary agricultural soils which comprise 25% of the 61-acre Project Tract.

100. Of the 15 acres, VSLP proposes to preserve the agricultural potential of the entire five-acre upper meadow while most of the remaining nine-acre lower meadow will be covered with house lots, and associated roadways, driveways or infrastructure.

**a. Upper meadow**

101. Because the Project proposes no house lots in the five-acre upper meadow, VSLP has also avoided the adverse impacts which dividing the meadow into five different lots had on the agricultural potential of the soils by creating one lot of over 10 acres which includes the original stone house.

102. VSLP has eliminated the adverse impacts, which the *Duppstadt* driveways through the upper meadow had caused, by eliminating access to homes from Hinesburg Road.

103. VSLP has agreed to place a perpetual conservation and agricultural covenant and restriction on the upper meadow. VSLP has entered into a Stipulation with the Vermont Department of Agriculture, Food and Markets (DAG) and the Auclair family which operates the adjacent farm, wherein VSLP has agreed to the inclusion of certain conditions in any Act 250 permit it may receive. Paragraph 4 of this Stipulation requires the following condition pertaining to the upper meadow:

The primary purpose of this condition is to perpetually preserve the potential of the five acres of primary agricultural soils on Lot 1B for agricultural use now and in the future. A second objective is to perpetually conserve the scenic and natural resources associated with the land and to maintain, for the benefit of future generations, the essential characteristics of the open space and agricultural Vermont countryside. Lot 1B shall be used for agricultural and open space purposes only. Agricultural purposes shall include use of Lot 1B for cultivated fields, orchards and pastures in accordance with good agricultural practices as defined in 12 V.S.A. Ch. 195, together with the right to construct, maintain and repair an appurtenant building and fencing for those purposes. No residential,

commercial or industrial buildings, structures, or other appurtenant facilities or improvements shall be constructed, created, installed, erected or moved onto Lot 1B other than as shown on the site plan. In the event the open meadow on Lot 1B lies fallow for more than one year, the owner of Lot 1 shall brush hog or mow the meadow to maintain it in an open condition available for agricultural use. Failure to maintain the meadow on Lot 1B in its open condition and for agricultural use shall be a violation of Land Use Permit #4C1013R and subject to appropriate enforcement action.

The condition shall be included verbatim in each successive deed conveying Lot 1 and shall be a covenant deemed to run with the land.

104. VSLP has also provided for a specific farm access between the meadow and the Auclair farm to encourage use of the meadow for agricultural purposes.

**b. Lower meadow**

105. The nine acres of primary agricultural soils located in the lower meadow are in the center of the development area on the Project Tract.

106. Many of the single-family house lots, and some of the carriage homes, are located either entirely or partially on the nine acres of primary agricultural soils in the lower meadow.

107. The placement of house lots and their related roads, driveways and infrastructure on the nine acres of primary agricultural soils in the lower meadow will either destroy or significantly reduce the agricultural potential of all these nine acres, notwithstanding that there may be pockets of open land not covered by houses roads, driveways and infrastructure roads within this nine acre area.

108. VSLP considers the lower meadow to be the logical place to locate its residential units and their infrastructure for a series of reasons: the terrain is relatively flat, is at a lower elevation (which acts to shield the houses from view from Hinesburg Road), and is surrounded by higher terrain and trees which serve as a backdrop for the homes; the level nature of the meadow presents no impediments to clustering the units and allows the road and other utilities to be looped as required by the City and also allows ingress and egress to Van Sicklen Road at points where sight and safe stopping distances are adequate and there is no interference with existing driveways; and the

meadow is removed from the Auclair farm and will therefore lessen the Project's impacts on the farm.

109. Noises, dusts and odors typically associated with farming operations are incompatible with the typical uses of intense residential development, especially outdoor uses such as backyard recreation. In addition, unrestrained household pets harass livestock.

110. Often these incompatible uses give rise to complaints and disputes that must be addressed and may lead farm families to leave the area.

111. In addition, farm fields are inviting to neighborhood children for exploration and to adults for use as areas in which to discard unwanted items such as stones, brush, grass cuttings, and Christmas trees. Additional conflict may arise from trespass and injury that may result.

112. Paragraph 1 of the Stipulation between VSLP, DAG, and the Auclairs noted above also calls for VSLP to construct a six-foot chainlink fence on or adjacent to the northerly boundary of the Auclair property which will be maintained by the Homeowners' Association.

113. Paragraph 2 of the Stipulation further requires a pre-blast survey to insure that the Auclairs' well will be protected even though it is a significant distance from the Project. VSLP is also required to give at least 24 hours notice of blasting on the Project site so that the Auclairs can move any farm animals.

114. Paragraph 3 of the Stipulation requires VSLP to maintain a buffer in its natural state along the entire common boundary with the Auclair farm, the narrowest point of which is 330'.

115. Paragraph 5 of the Stipulation requires that the following "right to farm" covenant be included in both the Project declaration and in each deed conveying a dwelling house in the Project to wit:

Notice is given of the existence of an active, regionally significant dairy farm and agricultural operation located southerly of and in the vicinity of the lot conveyed herein and of the protection of open land for good agricultural practices on Lot 1B of the Old Stone House Farm. The current or future agricultural operations may include, without limitation, plowing, planting, fertilizing and the use of agricultural chemical, pesticides and

herbicides in the course of cultivating, harvesting, storing and transporting agricultural feed or product. The dairy operation includes herds of cows and agricultural infrastructure such as barns, silos and manure storage pits which infrastructure might be relocated to the east side of Hinesburg Road at some future time. Consistent with this notice, the lot is conveyed subject to a perpetual easement for any noise, odors, dust and/or byproducts and impacts that may occur in the course of conducting accepted agricultural and best-management practices on the nearby lands. Grantees, by the acceptance of this deed, waive any objection to impacts arising from accepted agricultural and best-management practices which are consistent with the rules established pursuant to 6 V.S.A. Ch. 215 and are further notified that existing agricultural activities which are consistent with accepted agricultural and best-management practices as defined in 12 V.S.A. Ch. 195 are entitled to a rebuttable presumption that the practices do not constitute a nuisance. (*See Exhibit #VSLP 25*).

116. The "right to farm" covenant is prominently included in the development documents to make sure everyone buying a house is aware of their farm operation. It also alerts the homeowners that as long as the Auclairs are using acceptable farming methods, there is a presumption that their practices do not constitute a nuisance, in the event that someone tries to bring a nuisance suit against them.

117. The Stipulation satisfies both the Auclairs and DAG that the Project will not interfere with the Auclairs' farming operation.

118. The Auclairs insisted on the chainlink fence to provide them with adequate assurance that children, particularly younger ones, and domestic animals, particularly dogs, would not wander on to their pastures and fields. The fence runs along their boundary to the point where the boundary passes through some dense wooded areas. The parties agreed that the chance the children or dogs would travel through several hundred feet of the wetland area and then through dense woods to reach the Auclair property was minimal. However, if, in the future, children or animals are going through the woods and into the Auclair property, the homeowners' association will further extend the fence along the boundary.

119. While the Auclairs and Clarke Hinsdale had originally suggested a buffer of approximately 100 feet, the applicant more than tripled that at the buffer's narrowest point. Most of the homes are anywhere from 600 to 1,200 feet from the boundary line. In light of the fact that almost the entire buffer is comprised of wetlands and tributaries

and forested lands, the protection the buffer provides for farming operations is substantial.

## **2. Off-site Mitigation Agreement**

120. The present Project arises out of a reconsideration of the *Duppstadt* application. The *Duppstadt* application was filed, and the Commission reviewed the present Project, before the Board issued its decision in *Southwestern Vermont Health Care Corp.*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001).

121. VSLP and DAG have executed an Off-Site Mitigation Agreement.

122. VSLP was aware of and knew from prior experience of the former Act 250 practice of accepting off-site mitigation agreements without further inquiry. This was a crucial element in VSLP's decision to purchase the property and pursue the Project permit.

123. The Mitigation Agreement states that "the proposed development ("the Project") will significantly reduce the agricultural potential of 9 of the 14 primary agricultural soils on the site...." It also states that nine acres of primary agricultural soils at the site will be lost to the Project.

124. The Stipulation between VSLP, DAG and the Auclairs acknowledges the effectiveness of the off-site mitigation agreement in assuring that the development won't significantly reduce the agricultural potential of primary agricultural soils.

125. Under the Mitigation Agreement, VSLP will contribute \$19,500 as a Mitigation Payment. This figure was determined by multiplying the number of acres of primary agricultural soils at the Project Tract that will be lost to the development of the Project (9 acres) by 2, subtracting from that total (18) the number of acres of primary agricultural soils that will be preserved by on-site mitigation (5 acres), and then multiplying the resulting amount (13) by \$1,500.00, the amount that DAG has determined is the current, average per-acre cost to acquire conservation easements on productive farmland in the geographic area covered by the Commission.

126. Development rights on 61 acres in Charlotte, Vermont were recently sold for \$4,344 per acre, and that amount included a donation of approximately \$50,000 in appraised value. The cost of conservation easements on farmland in Chittenden County ranges between \$2000.00 to \$5000.00 per acre.

**G. Criterion 10 (local plan)**

127. The applicable municipal plan is the *1996 Comprehensive Plan of the City of South Burlington, Vermont* (City Plan), the same plan that applied to the *Duppstadt* subdivision. The applicable Zoning Regulations are also the same ones that applied to the *Duppstadt* project.

128. The City Plan contains numerous applicable provisions which pertain to the area or district in which the project is located, in this case the SEQ, and are clearly intended to guide or proscribe conduct or land use within that defined area. Many of these provisions are sufficiently clear to guide the conduct of an average person, using common sense and understanding.

129. Those provisions of the City Plan and Zoning Regulations noted in these *Findings of Fact* relating to a community standard under Criterion 8, above, are incorporated herein.

130. The City Plan's development and adoption involved consideration of potential compatibility with the plans of adjoining municipalities and the region. The plans of adjoining municipalities and the Chittenden County Regional Planning Commission were consulted and discussions were held with the municipal and regional staff planners (*Ch. I, Introduction (D), p. 2*).

131. The City Plan notes that "Continuing growth in the City requires renewed planning efforts . . . to respond to traffic and other problems that have resulted from development patterns of previous years." (*Ch. II, South Burlington Planning History, p. 4*). One of the perceived problems is that the City's historic development pattern is one largely representative of a sprawling or scattered development pattern (*Ch. V(B), Future Land Use*). Specifically, in the SEQ, several large farm parcels have been subdivided into 10-acre residential lots, and houses on one and two acre parcels front on the four major roads - Hinesburg Road, . . . (*Ch. V(A)(2), Land Use*). By the end of the 1980s, this had resulted in a situation where the SEQ consisted predominantly of large-lot, low-density residential use and open land which was primarily upper income housing (*Ch. XV(D)(a)*).

132. City Plan, Ch. III, *Comprehensive Plan Goals*, states, in pertinent part:

Quality Environment:      *The City plans to protect the aesthetic quality and maintain the diversity of the living environment, both natural*

*and manmade, through open space preservation; minimized view disruption, acquisition of adequate lakeshore properties; protection of watercourses, wetlands, and wildlife habitats; requirements for landscaping, buffers and setbacks; protection of historic and cultural resources; and maintenance of ample outdoor recreation facilities. Both fiscal and statutory resources shall be used to this end. (Emphasis added)*

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Land Use Distribution: *The City shall encourage a land use pattern generally consisting of a higher density, compact urban core in the Dorset Street/Corporate Way area (i.e. proposed City Center), continued investment and growth in the City's existing developed corridors (i.e., Williston and Shelburne Roads) and generally decreasing densities and less intensive uses toward the more rural communities to the south and southeast. The City shall strive to maintain an appropriate balance between residential, commercial and industrial development and open space and natural resource protection. (Emphasis added)*

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Agricultural Lands: *The City plans to assist, support, and promote agricultural use of land wherever possible. In order to encourage the continuance of agricultural use, the City shall explore such means as transfer of development rights and land trusts. (Emphasis added)*

133. City Plan, Ch. V, *Land Use*, states that South Burlington's land use policy is based on several objectives, including:

1. Strive for a diversity in land use types including safe residential neighborhoods, healthy commercial and industrial centers, accessible public facilities, schools and recreation areas, well protected natural resources, adequate open space and continued open space.

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5. Support the growth center concept adopted by the region and state through promotion of a land use pattern in the City generally consisting of a higher density, compact urban core in the Dorset

Street/Corporate Way area, continued investment and growth in the City's existing developed corridors (i.e., Williston and Shelburne Roads) and generally decreasing densities and less intensive uses toward the more rural communities to the south and southeast.

134. City Plan, Ch. V(B)(4), *Future Land Use*, defines "moderate density" as density of 1.1 - 5 residential units per acre. "Low density" is defined as 1 residential unit per acre and lower.

135. City Plan, Ch. V(B)(4), *Future Land Use*, states that residential density for the SEQ should be "low/moderate." This term is not defined, and the City Plan is therefore ambiguous in regard to the recommended residential density for the area where the Project Tract is located.

136. City Plan, Ch. VI(D), states:

An adequate supply of affordable housing is important to the City for a number of reasons.

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[A]n affordable home for a homebuyer earning 100% of the median income would be approximately \$128,600. An affordable home to a buyer earning 80% or 50% of the median income would be approximately \$102,300 to 62,750, respectively.

137. Base prices of the Project's housing will range from approximately \$210,000 to \$280,000 depending upon the type and model chosen by a purchaser subject, however, to inflationary and regulatory impacts.

138. As noted, the topic of Chapter XV of the City Plan is the SEQ. Section D of this Chapter, *Land Use*, discusses residential development policies in the SEQ, and states, in pertinent part:

a) *Residential* The type of residential development that has occurred in the Quadrant in the past 20 years has been primarily upper income housing. *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.* (Emphasis added)

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. (Emphasis added)

139. City Plan, Ch. XVII(A), *Implementation*, reads

1. b) *Cluster Developments*

The City zoning regulations contain provisions for ... Planned Residential Developments .... (which) are designed to encourage innovation of design and layout and a more efficient use of land for ... residential developments.

140. Appendix D to the City Plan is a detailed comparison of the proposed plans of South Burlington and adjoining municipalities. The SEQ of the City shares a common boundary along Muddy Brook with the Town of Williston. The area of the SEQ in the vicinity of Van Sicklen Road is designated for low/moderate density residential use combined with open space. This is compatible with the rural residential land use intermingled with agricultural use called for on the adjacent lands of Williston under that Town's City plan and zoning regulations. In addition, compatibility of the land uses between the municipalities is enhanced because of the buffer and separation that Muddy Brook's flood plain and appurtenant wetlands provide between the lands of the two municipalities.

#### **IV. Conclusions of Law**

##### **A. Criteria 1(E), 1(G), 4 and 5**

Before granting a permit the Board must find that the Project complies with the Criteria listed in 10 V.S.A. §6086(a) generally and, in this case, §6086(a)(1)(E), (1)(G), (4) and (5). Even despite the parties' Stipulation, because the Board is charged to protect and conserve the lands and environment of the state, 1969 Vt. Laws, No. 250 §1 (Adj. Sess.), it has an independent responsibility to ensure that the public interest that the Board is charged to protect is not prejudiced. See, *Ronald L. Saldi*, #5W1088-1-EB, Memorandum of Decision at 3 (Oct. 1, 1996); and see *Rockwell Park Associates and Bruce J. Levinsky*, #5W0772-5-EB, Dismissal Order (Feb. 17, 1994); *H.A. Manosh Corp.*, Declaratory Ruling #247 (Dec. 13, 1991).

Here, the Board's responsibility is easily met. The Commission reviewed the Project and granted a permit. It was only with FMBB's appeal that the Commission's conclusions as regards certain Criteria were questioned and placed before the Board. Had those Criteria not been appealed, the Board would never have been obliged to review them and possibly come to a different result than that reached by the Commission.

The parties' Stipulation as to Criteria 1(E), 1(G) and 4 states:

Upon acceptance by the Environmental Board of the above conditions and inclusion in any land use permit issued by the Board, the Friends of Muddy Brook Basin withdraws its opposition and dismisses its appeal of the project on Criteria 1(E), 1(G) and 4.

The parties' Stipulation as to Criterion 5 is even more conclusive; because VSLP has agreed to fund certain road improvements, FMBB has withdrawn its appeal as to that Criterion:

Based on VSLP's agreement to assume the above financial obligations, and in reliance upon the written commitments of support of the official charged with the oversight of municipal roads in the respective municipalities as evidenced by the attached letters, FMBB and the Town of Williston agree to withdraw their opposition and dismiss their appeals to the project under Criterion 5.

Adding the conditions stated in the two Stipulations can only result in the further

enhancement of the values protected by Act 250 over and beyond those required by the Commission Decision.

If the Board were to be issuing a permit in this matter, the Board would require that such permit incorporate the terms and provisions of the parties' Stipulations, thereby leading to a dismissal of FMBB's appeal of the Project on Criteria 1(E), 1(G) and 4 and FMBB's and Williston's appeal of Criterion 5. Any permit issued by the Commission shall incorporate the parties' Stipulations.

## **B. Criterion 8**

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

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

### **1. Adverse Effect**

The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. First, it determines whether the proposed project will have an adverse effect under Criterion 8. *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB* (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996), *citing, Re: Quechee Lakes Corp., #3W0411-EB* and *#3W0439-EB*, Findings of Fact, Conclusions of Law, and Order at 17 -19 (Nov. 4, 1985).

[T]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's

surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

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

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

Criterion 8 was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from his or her property will remain the same forever. Change must and will come, and criterion #8 will not be an impediment. Criterion #8 was intended to insure that as development does occur, reasonable consideration will be given to the visual impacts on neighboring landowners, the local community, and on the specific scenic resources of Vermont.

*Re: Okemo Mountain Inc., #2W5051-8-EB*, Findings of Fact, Conclusions of Law and Order at 9 (Dec. 18, 1986); *and see Horizon Development, supra*, at 20.

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

**a. The context of the Project**

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

The Project’s context is one of rural, pastoral open spaces and farm land, wetlands, forests and residential areas. In all directions, in the immediate vicinity of the Project the land is generally undeveloped. Only to the north is there any view of development; to the west and south are an orchard and large dairy farm; to the east is the Muddy Brook, with homes on large lots and the meadows of other farms.

This area is on the fringes of the Southeast Quadrant and thus is an important transition zone between the higher densities to the north and the farmland to the south. In its *Duppstadt* decision, the Board held that a ridge to the north of the Project Tract both blocks the view of the more suburban development to the north and delineates a change in character to the very rural portion of the SEQ in which the Tract is located. *Duppstadt* at 33. No new developments have been built in the area since *Duppstadt*, and nothing else has changed that would affect the Board's previous finding.

**b. The impact of the Project on the Van Sicklen Road area**

Once the Board determines the context of the Project site, the Board then must consider the scope and extent of the Project's impacts on that context.

The size and density of the Project, with its associated infrastructure and changes to the Project Tract, would be incomparable to any of the existing residential development or surrounding land uses along or in the immediate area of Van Sicklen Road.

In its *Duppstadt* decision, which included only six more lots than the current proposal, the Board wrote:

The Project Tract, with its hemlock ridge, open meadows, and attractive wetland vegetation, is viewed by neighbors and passing motorists and is an essential part of this aesthetically pleasing area. The placement of 55 homes on separate lots with associated roadways and changes to the Project Tract do not fit within the surrounding context and, accordingly, the Project will have an adverse effect on the aesthetics of the area.

*Duppstadt* at 33.

While the current proposal does not consist entirely of single-family lots, the densities and the design of the subdivision will have a reduced, but still negative, impact on the aesthetics of the area.

The Project will cause the loss of most open space in the lower meadow which will be experienced by those who reside or pass through the area. While an opening has been left between the 23 houses in the lower meadow, it is visually insignificant as either meaningful open space or as a view corridor; the view from Van Sicklen Road toward Brownell Mountain and over the wetlands of the site will be disrupted by the Project.

The Project does not fit within its surrounding context, and the Board concludes that the imposition of this Project on the present landscape would have an adverse effect on the aesthetics of the area.<sup>2</sup>

## **2. Undue Adverse Effect**

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

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

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

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

*See, Quechee Lakes, supra*, at 19-20. *And see, Black River, supra*, at 19-20; *Hand, supra*, at 25-29;

### **a. Written Community Aesthetic Standard**

Under this first factor, the Board must determine whether the Project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty applicable to the area in which the Project would be located.

In evaluating whether a project violates a clear written community standard, the Board routinely looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists and should be applied in the review of the aesthetic impacts of a project. *See Raymond and Centhy Duff, #5W0952-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 29, 1998);*

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<sup>2</sup> The Board notes that VSLP's Proposed Conclusions of Law as to Criterion 8 concede that the Project is adverse.

*Re: Herbert and Patricia Clark*, Application #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 35 - 37 (Apr. 3, 1997); *Re: Thomas W. Bryant and John P. Skinner* at 22; and see *Duppstadt* at 34 (town plan can be an authoritative source of clear community aesthetic standards, and it is therefore appropriate for the Board to rely upon such a Plan “in determining whether [a] Project violates the community standard.”)

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

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

*Id.* at 21.

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

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

*Id.* at 13-14.

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

In contrast to *Barre* was the town plan provision at issue in *Re: Taft Corners Associates*, #4C0696-11-EB (Remand), Findings of Fact, Conclusions of Law, and

Order (Revised) (May 5, 1995). The Board found that the town plan identified as “significant” the views of the mountains to the east and west and foreground views from I 89 of “the high ground at the water tower and other open spaces . . .”. *Id.* at 19. The Board quoted the town plan:

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

*Id.* at 18-19. Based on the above language, the Board found a clear, written community standard “which contains provisions regarding aesthetics” that applied to the project. *Id.* at 42; *accord, Re: Herbert and Patricia Clark, supra* (Brandon Town Plan constituted clear, written community standard where it established and defined three categories of scenic resources, contained an inventory that described 30 scenic areas, and provided recommended policies and implementation measures for protecting the scenic value and resources of the listed areas and where the proposed project was located in one of the scenic areas listed in the inventory); *Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 22-23 (Aug. 19, 1996)* (Pittsford zoning ordinance constituted clear, written community standard where a proposed radio tower was located within a conservation district and the ordinance contained a clear statement of the community policy against use of conservation district lands for anything other than dwellings, forestry, and agriculture).

**i. The City Plan and relevant Zoning Regulations as a community standard**

Throughout the City Plan and in Article VI of the South Burlington Zoning Regulations, there are numerous references to the particular aesthetic attributes within the SEQ that are worthy of protection. They are set forth in the Findings of Fact and need not be repeated here. Suffice it to say that the Board is aware of few Town Plans or Zoning Regulations that go to such a great extent to identify a particular area of a town and to discuss its particular aesthetic attributes.

The Board concludes that the language within the Town Plan and the Zoning Regulations, taken together as a whole, constitutes a clear, written community standard which is intended to preserve the aesthetics or scenic beauty of the area. Unlike the

general aesthetic statements found in *Town of Barre*, which could apply to the community at large, the City Plan specifically targets the location of the proposed Project – the SEQ - as a scenic resource. The City Plan and Zoning Regulations therefore respond directly to the Board’s desire that towns “identify scenic resources that the community considered to be of special importance...” *Town of Barre, supra*, at 21.

The question, then, is whether the Project complies with South Burlington's community standard.

In *Duppstadt*, the Board concluded:

The Project is located in the SEQ, an area recognized in both the Zoning Regulations and the City Plan as having a special character that should be preserved. ... [T]he Board concludes that the intensity of this development in the outer bounds of the SEQ, using single lot design without attempts to cluster houses and provide meaningful reservation of open spaces, results in a violation of the clear written community standard reflected in the City Plan.

Similarly, the Zoning Regulations establish the SEQ as a special area with resources worthy of protection and designate restricted areas which are delineated on the "South East Quadrant Official Zoning Map." This map displays a large portion of the Project Tract as "restricted areas" comprised of Wetlands and Woodland/Wildlife Habitat. Yet, the Project plans show the same restricted areas being used for house lots and roadways. Accordingly, the Board concludes that the Project violates a clear, written community standard intended to preserve the aesthetics and the scenic beauty of the area.

*Duppstadt* at 34.

In contrast to the *Duppstadt* project, the houses have been located entirely within the "development area" outlined in the Zoning Regulations, and none of the development – and indeed no portion of any lot – lies within any of the "restricted areas" delineated in the Official Zoning Map, thereby avoiding sensitive natural areas including, in particular, wetlands, wildlife habitat and ridge lines.

While the Board recognizes that the concentration of the houses in the "development area" in the northern part of the Project Tract will interfere with views from

Van Sicklen Road to Brownell Mountain, the Board believes that the City Plan requires it to balance the competing interests stated therein. Indeed, while the City Plan requires, on the one hand, the protection of scenic views, it has likewise established a development area that results in the obstruction of those views from Van Sicklen Road. The Board finds that, on balance, the loss of the views to Brownell Mountain from Van Sicklen Road by the location of the houses in the development area in the north of the Project Tract is outweighed by the City Plan's requirement that development not occur in the restricted areas on the Tract and the fact that, by so concentrating its development, the Project preserves the scenic corridor along Hinesburg Road, the particular views that are specifically referenced in the City Plan.

Further, the present proposal presents a more compact design from that proposed in *Duppstadt*; the Project complies with one of the cited aesthetic provisions of the Zoning Regulations because the Project density is one-third less than the density allowed in the SEQ, the number of single family lots has been significantly reduced, some clustering of single family homes and multi-family dwellings has occurred in the western part of the lower meadow, and lots have been eliminated in the southern half of the Project Tract, with the resulting increase and preservation of meaningful open space in that area.

The Board accordingly concludes that the Project complies with the community standards which appear within the City Plan and the Zoning Regulations.

**b. Shocking or offensive**

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

The 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 a growing number of planned residential developments within the SEQ in light of its proximity to Chittenden County's urban core and regional growth center. The Board is also mindful of the prospective planning that the City has undertaken in seeking to

protect the unique aesthetic and natural qualities of the SEQ while still allowing residential development within the SEQ, by promoting designs which work to preserve open space, natural resources and scenic views, and promote the continuance of agricultural use.<sup>3</sup>

The Project has been designed to fit the character of the surroundings that will increasingly exist in the SEQ while protecting the scenic qualities of the SEQ, and is the type of residential development the average person would expect to see in an area adjacent to the regional growth center. That expectation is further validated by the fact that the SEQ is classified as Urban Mixed Use in the Chittenden County Regional Plan, a classification accorded "areas that are primarily residential and adjacent to growth centers" where "planned residential developments are strongly encouraged."

### **c. Mitigation**

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

There is no question that the VSLP Project is a vast improvement over the *Duppstadt* proposal and mitigation in terms of the Project's impacts on the aesthetics and the natural resources of the Project Tract has occurred: the number of house lots has been decreased, the houses are confined to the northern portion of the Project Tract, no house lot infringes on wetlands or wetland buffer zones, the agricultural soils in the western part of the Tract will be preserved, there are more acres retained as open space, traffic problems have been resolved, and the interference with the neighboring Auclair Farm has been reduced to a level acceptable to the Auclairs. VSLP has gone a long way, in this reconsideration, toward satisfying many, if not most, of the concerns that led to a denial of the *Duppstadt* project.

But the question that the Board must address is not whether this Project is better designed than the *Duppstadt* subdivision, but whether this Project complies with Act

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<sup>3</sup> The Board notes, however, that the City's efforts to protect the SEQ conflict with the density it has authorized for this area.

250. The statute reads, "Before granting a permit, the board or district commission shall find that *the* subdivision or development (satisfies the ten Act 250 Criteria)...." 10 V.S.A. §6086(a). It thus requires the Board to look at each proposed project on its own merits, and not in comparison to what proposals may have been previously proffered, or to what could be built on a particular parcel, or to other factors not directly related to the project before the Board. See, e.g., *In re Southview Associates*, 153 Vt. 171, 179 (1989). The Board cannot therefore approve a project solely because it looks good by comparison to something worse. To do so would reduce the Board's role to one of finding the lowest common denominator and then deciding whether a project somehow rises above that level.

The single family residential lots, the carriage homes, and the roads and infrastructure have been clustered in the northern portion of the Project Tract, which maximizes open space and protects the natural resources on the site in a meaningful way. The applicant has minimized perception of the mass of the Project through the use of a landscaping plan and muted house and roof colors, and is constructing homes which are consistent with the architectural styles found on surrounding properties.

The Board concludes that VSLP has taken generally available mitigating steps to improve the harmony of the project with its surroundings.

Because the Board concludes that the effects of this Project, while adverse, are not unduly adverse, the Project complies with Criterion 8. The Board does not come to this conclusion easily, however. It is based more on the failure of FMBB to carry its burden of proof on this Criterion than on a judgment that the Project's effects are not unduly adverse.

### **C. Criterion 9(B)**

Before issuing a permit for the development or subdivision of primary agricultural soils, the Board must find that the project "will not significantly reduce the agricultural potential of the primary agricultural soils," or that

- (i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and
- (ii) there are no nonagricultural or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the

purpose; and

(iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by 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.

10 V.S.A. § 6086(a)(9)(B).

“Primary agricultural soils” are defined as:

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

10 V.S.A. §6001(15).

The burden of proof under Criterion 9(B) is on VSLP. 10 V.S.A. §6088(a).

**1. The existence of primary agricultural soils at the Project Site.**

In evaluating a project for conformance with Criterion 9(B), the Board must first determine whether the site contains primary agricultural soils. *In re Spear Street Associates*, 145 Vt. 496, 498-99 (1985).

The site contains two areas where primary agricultural soils exist: the five-acre upper meadow near Hinesburg Road, and the nine+ acre lower meadow south of Van Sicklen Road. See Findings and *Duppstadt* at 38.

## **2. Reduction in agricultural potential of primary agricultural soils.**

Once the Board has determined that the site contains primary agricultural soils, it must determine whether the Project would significantly reduce the agricultural potential of the soils. *In re Spear Street Associates*, 145 Vt. at 500-01. "The Board interprets the word 'potential' to require a consideration of whether the design and location of the subdivision on the property will preclude agricultural use of the primary agricultural soils and not whether agricultural use of those soils is likely in light of current economics and surrounding land uses." *Re: Raymond Duff*, #5W0921-2R-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 13 (June 14, 1991), *citing Homer and Marie Dubois*, #4C0614-3-EB, Findings of Fact, Conclusions of Law, and Order at 7 (May 18, 1988); *Flanders Lumber Company*, #4C0695-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Apr. 18, 1988), *modifying Re: J. Philip Gerbode*, #6F0357R-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Mar. 26, 1991).

While no development will occur in the upper meadow, most of the single family house lots, and some of the carriage homes are located either entirely or partially on the primary agricultural soils in the lower meadow, and the remaining primary agricultural soils in the lower meadow will be part of the subdivision land and therefore cannot be considered to be available for commercial agricultural use. *See In re Spear Street Associates*, 145 Vt. at 501 ("[T]he very act of dividing the ownership of the parcel would significantly reduce the agricultural potential of the primary agricultural soils."). The Project would thus effectively remove from agricultural potential nine of the 15 acres of primary agricultural soils on the site. The Board concludes that the loss of almost two-thirds of the primary agricultural soils on a site constitutes a reduction in the agricultural potential of such soils.

## **3. The Mitigation Agreement**

Historically, an applicant for a Land Use Permit for a development or subdivision has been able to satisfy Criterion 9(B) in one of three ways: first, an applicant could show that its development or subdivision would not impact primary agricultural soils, either because there were no such soils on the project site or because the project would not destroy or imperil any such soils; second, if the project would impact primary agricultural soils, the applicant could comply with Criterion 9(B) by meeting the requirements of the Criterion's four subcriteria; third, if the project would impact primary agricultural soils, and meeting the subcriteria requirements was not possible, the applicant could side-step those subcriteria by entering into a Mitigation Agreement with DAG to pay for the preservation of other, off-site primary agricultural soils. *Re: J. Philip Gerbode*.

VSLP seeks to satisfy Criterion 9(B) by demonstrating that its Project "will not significantly reduce the agricultural potential of the primary agricultural soils." In furtherance of this approach, VSLP has agreed to keep the five-acre upper meadow in perpetual agricultural use and, to mitigate the loss of agricultural potential in the nine-acre lower meadow, it has entered into an off-site Mitigation Agreement with DAG. VSLP does not attempt to demonstrate that it meets the four subcriteria.

**a. *Southwestern Vermont Health Care Corporation***

In February 2001, the Board altered the standards under which it will accept Mitigation Agreements. *Southwestern Vermont Health Care Corporation*, Land Use Permit Application #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 44 (February 22, 2001) (*SVHC*). Now, Mitigation Agreements are viewed as a "last resort," and before a Mitigation Agreement will be accepted as a means to satisfy Criterion 9(B), an applicant must show that it has designed its project to meet subcriteria (ii), (iii) and (iv) of Criterion 9(B) to the extent reasonably feasible. Further, the Board wrote:

Finally, the Board must have assurances that funds donated under a Mitigation Agreement will be of an amount sufficient to ensure that at least two acres of farmland will be purchased or otherwise protected for every acre of primary agricultural soils that will be lost to development. This 2:1 ratio has been historically applied under the Mitigation Program, and it is one which the Board believes must, at the very least, be maintained.

The decision continued:

The Project Site also contains agricultural soils of very high quality, located in an area close to the center of the Town and near a well-developed infrastructure of roads and highways. As agricultural land, therefore, the Project Site has special qualities and substantial value. The mitigation amount in the Agreement does not reflect these distinctive characteristics. Rather, the mitigation amount was derived by using a countywide average cost for farmland. There is no indication, however, that this average has been adjusted to reflect inflation or the changing value of farmlands, or any cost factors associated with location, accessibility, tract size, quality of soils, and existing farm infrastructure. Further, because this average is an average of agricultural soils of all qualities, the Mitigation Agreement cannot provide assurances that soils of

a quality comparable to those lost by the Project will actually be protected.

Since the purpose of the Mitigation Program is to mitigate the loss of primary agricultural soils at a particular project site, the Board needs assurance that such loss will be adequately compensated. The present Mitigation Agreement does not provide such assurances; it does not guarantee that the funds required under its terms will be sufficient to protect at least two acres of farmland for every acre of primary agricultural soils that would be lost to the Project.

The Board therefore requests applicants, DAG and VHCB attempt to identify those lands that will be protected by a particular contribution to the Mitigation Fund. If this is not possible at the time the Mitigation Agreement is signed, DAG and VHCB should develop an appropriate mechanism for insuring that twice the number of acres of lands with an agricultural potential comparable to those destroyed by the project will be protected in perpetuity, so that the Board and the District Commissions can know that the Mitigation Program is serving its purpose. Without such identification of lands to be protected or some other means to convince the Board that the purpose of the Program is being met, the Board will continue to be concerned that Mitigation Agreements may not satisfactorily address the language and purpose of Criterion 9(B) or (C).

*Id.* at 45. Thus, after *SVHC*, it has become more difficult to satisfy Criterion 9(B) by entering into a Mitigation Agreement.

**i. application of *SVHC* to this case**

VSLP contends that, as its application predates the Board's *SVHC* decision,<sup>4</sup> it need not satisfy the subcriteria.

As a general rule, an Act 250 applicant's rights vest upon the filing of a complete application. *In Re Ross*, 151 Vt. 54 (1989). *And see, Smith v. Winhall*, 140 Vt. 178 (1981) (applicant is entitled to have a project reviewed in accordance with the laws and

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<sup>4</sup> This matter is a reconsideration of the *Duppstadt* application. *Duppstadt* was filed several years before the *SVHC* decision was issued; if the date that VSLP and the Aldens filed their reconsideration application with the Commission were to be used (January 4, 2000), this also predates *SVHC* by over a year.

regulations in effect at the time that application is submitted); *Re: Frank A. Molgano, Jr.*, 163 Vt. 25 (1994); *but see, In re Handy v. Town of Shelburne*, 11 Vt. L.W. 339 (Nov. 17, 2000) (proposed ordinance amendments that are pending at the time an application is filed may, under certain circumstances, govern such applications); *In re McCormick Management*, 149 Vt. 585, 588-590 (1988); *Preseault v. Wheel*, 132 Vt. 247 (1974); *John A. Russell Corporation and Crushed Rock, Inc.*, #1R0489-6-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Jan. 17, 2002) (pending ordinance doctrine applied to Town Plan under adoption).

The above cases, however, concern the application of statutes or regulations to applications. The Board has not dealt with the question of whether *common law* should be addressed in the same way. Should a Board decision in one case, which changes past Board precedent or applies new standards, apply to other matters pending when it was decided?

In *Solomon, et al. v. Atlantis Development, Inc., et al.*, 145 Vt. 70 (1984), the Vermont Supreme Court addressed, as a matter of first impression, the issue of the retroactive application of judicial decisions in the civil context. Noting that a court may choose whether its own decisions will apply prospectively or retroactively, *id* at 73, the *Solomon* decision then adopted the reasoning of the United States Supreme Court in the case of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971):

In *Chevron Oil*, the Supreme Court stated that a decision must meet several criteria in order to be applied prospectively. First, it must "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, *see, e.g. Hanover Shoe v. United Shoe Machinery Corp.*, [392 U.S. 481, 496 (1968)], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g. Allen v. State Board of Elections* [393 U.S. 544, 572 1969]." *Chevron Oil Co. v. Huson, supra*, 404 U.S. at 106. If this criterion is met, the Court will then inquire whether retroactive application would be inequitable: "[w]here a decision of this Court could provide substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of non-retroactivity." *Id.* at 107 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)).

*Solomon*, at 74.<sup>5</sup> The Court has also held that " these standards are to be applied

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<sup>5</sup> Interestingly, in *Lafaso v. Patrissi*, 161 Vt. 46, 57 (1993), the Court noted:

flexibly, and only as guidelines for the court's discretion." *American Trucking Ass'n v. Conway*, 152 Vt. 383, 391 (1989).

The implication of the *Solomon* decision, therefore, is that decisions should be given retroactive effect (and thus, here, VSLP should be bound by the standards enunciated in the *SVHC* decision) unless the *Chevron Oil* elements are present. See, *Vermont Accident Insurance Company, et al., v. Howland*, 160 Vt. 611 (1993) (mem.) (in civil cases, rulings are prospective *only if* the *Solomon/Chevron Oil* elements are present).

The Board finds that the *Solomon/Chevron Oil* elements are present in this case. The requirement in *SVHC* that a Mitigation Agreement will only be accepted if an application meets subcriteria (ii), (iii) and (iv) of Criterion 9(B) is a "new principle of law" which was decided as a matter of "first impression whose resolution was not clearly foreshadowed."

Further, the retroactive application of *SVHC* to this matter would be inequitable. See *Re: Ingleside Equity Group*, Declaratory Ruling #397, Findings of Fact, Conclusions of Law, and Order at 16 (Aug. 15, 2001). VSLP was aware of and knew from prior experience of the former Act 250 practice of accepting off-site mitigation agreements without further inquiry. This was a crucial element VSLP's in decision to purchase the

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This issue has become more complicated because the United States Supreme Court has abandoned *Chevron*, in part, and required that federal constitutional decisions be given "full retroactive effect in all cases still open on direct review." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, \_\_\_, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993). We need not decide in this case the extent to which *Harper* has changed the applicable law on retroactivity for constitutional and nonconstitutional questions.

There is no indication in any subsequent decision, however, that the Vermont Supreme Court has abandoned *Solomon*. Indeed, the Court recently referred to the *Solomon* test with apparent approval. *Wilk v. Wilk*, 2002 WL 253708 (Feb. 22, 2002): "Because it does not appear from the record that either party acted in reliance on our decision in *Billings*, and applying the statutes as interpreted above will not lead to an inequitable result in this case, we will not limit the effect of this decision to prospective application only. See *Solomon v. Atlantis Dev., Inc.*, 145 Vt. 70, 74, 483 A.2d 253, 256 (1984) (adopting the United States Supreme Court's criteria for determining when decision should be given only prospective effect)."

property and pursue the Project permit.

The fact that this application is a reconsideration gives further strength to the applicant's argument that non-retroactivity should be applied, as it was the Board in its *Duppstadt* decision which urged the applicant to more intensely cluster the Project within the "development area" demarcated by the City Plan in order to obtain compliance with Criterion 8, 9(B) and 10 (Local Plan). Further, both the initial application in the *Duppstadt* case and the reconsideration request were filed well before the *SVHC* decision. Accordingly, the Board declines to apply the new evaluation procedures established in *SVHC* to this Project.

**b. VSLP's mitigation contribution**

While *SVHC* may have applied a new threshold that an applicant must overcome before it may enter into a Mitigation Agreement, the decision, however, did not make new law on the question of whether the amount agreed upon by an applicant and DAG in a Mitigation Agreement is adequate. Ever since the *Gerbode* decision first allowed Mitigation Agreements, the Commissions and the Board have routinely engaged in a review of the adequacy of the amounts offered as mitigation.

Under the Mitigation Agreement, VSLP would contribute \$19,500 into a fund to protect two acres of primary agricultural soils in Chittenden County for the nine acres of primary agricultural soils which would be lost to the Project. This amount was determined by multiplying the number of acres of primary agricultural soils at the Project Tract that will be lost to the development of the Project (9 acres) by a factor of 2, subtracting from that total (18) the number of acres of primary agricultural soils that will be preserved by on-site mitigation (5 acres), and then multiplying the resulting amount (13) by \$1,500.00, the amount that DAG has determined is the current, average per-acre cost to acquire conservation easements on productive farmland in the geographic area covered by the Commission.

While the Board agrees that the stipulation between VSLP, DAG and the Auclairs will protect the agricultural potential of the five-acre upper meadow, the Board is concerned that the countywide \$1,500.00 per-acre amount established by the Mitigation Agreement is not adequate to accomplish what the Mitigation Agreement intends to do, namely, to acquire conservation easements on productive farmland in Chittenden County. Given that development rights on 61 acres in Charlotte were recently sold for \$4,344.00 per acre (and that amount *included* a donation of approximately \$50,000.00 in appraised value) and that the cost of conservation easements on farmland in Chittenden County range between \$2000.00 to \$5000.00 per acre, DAG's \$1,500.00

per-acre figure may have grown obsolete by virtue of the increasing value of real estate in South Burlington and other Chittenden County towns.

The Board cannot, therefore, accept the Mitigation Agreement as it is presently written. On remand to the Commission, however, VSLP may renegotiate a Mitigation Agreement with DAG at a per acre price that is fully reflective of the actual costs of conservation easements on Chittenden County farmland

**D. Criterion 10 (local plan)**

Before issuing a permit, the Board must find that the Project is in conformance with the Town Plan. 10 V.S.A. §6086(a)(10). The burden of proof, which consists of both the burden of production and the burden of persuasion, is on VSLP. 10 V.S.A. §6088(a).

If the town plan provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996).*

If the provisions are ambiguous, however, the Board examines the relevant zoning regulations for provisions which resolve the ambiguity. *Molgano* at 29-31. This does not mean that the Board conducts a general review of a project for its compliance with the zoning regulations, but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996), aff'd, In re Fair Haven Housing Limited Partnership and McDonald's Corporation, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished).*

**1. Preservation of open space, natural resources and scenic views and promotion of the continuation of agricultural use.**

In its April *Duppstadt* 1999 decision, the Board addressed the question of whether that subdivision complied with the City Plan:

The City Plan contains numerous provisions that pertain to the SEQ, the area where the Project Tract is located. These provisions intend to guide and proscribe land uses and conduct in the SEQ. Furthermore, ... the City Plan's provisions are sufficiently clear to guide the conduct of the average person.

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Throughout the City Plan, the SEQ is recognized again and again as a special area that still retains an open and rural character which should be preserved. While the City Plan recognizes the need to accommodate the intense development pressures placed upon the SEQ due to its close proximity to the city core, it stresses the importance of the use of innovative designs which work to preserve open space, natural resources and scenic views and promote the continuation of agricultural use.

With the exception of the Auclairs' farm to its south, the Project Tract is in the most southeasterly rural portion of the SEQ where the City Plan encourages the least intensive development. The clear intent of the City Plan regarding development polices in the SEQ is reflected in at least seven of its provisions specifying that development is to be in a manner that preserves the SEQ's open spaces and special character and encourages and promotes generally decreasing densities and less intensive uses toward the more rural communities to the south and southeast.

Through repetition, the City Plan emphasizes and conveys that the City should stress innovative designs such as clustering which work to preserve open space and promote the continuance of agricultural use. Specifically in regard to residential development, two sections of the City Plan strongly encourage affordable housing for moderate income households in the SEQ.

The Applicants have acknowledged that the Project will not have affordable homes. The Board concludes that this Project's layout is not a cluster design, rather it uses all of the developable space on the Project Tract while encroaching on the boundary and threatening the continuing viability of the neighboring active agricultural operation. These factors are inconsistent with and contrary to the City Plan's policies and

considerations for the SEQ. Accordingly, the Board does not find that the Project is in conformance with the City Plan.

Even if the Board determined that the relevant provisions of the City Plan were ambiguous and necessitated reference to the Zoning Regulations to resolve the ambiguities, the Board's conclusion would be the same. As noted above in the discussion under Criterion 8, the Zoning Regulations establish the SEQ as a special area with resources worthy of protection and designate certain "restricted areas" which are delineated on the South East Quadrant Official Zoning Map. A large portion of the Project Tract that is proposed for house lots and roadways falls within one of these "restricted areas" that is comprised primarily of Wetlands and Woodland/Wildlife Habitat.

The Zoning Regulations specifically require that development in a restricted area be reviewed according to certain criteria including that "[p]roposed buildings, lots, streets and other structures *shall* be placed so as to maximize potential of land for open space and natural resources preservation, scenic view protection, and/or continued agricultural use. South Burlington Zoning Regulations, Article VI, § 6.606(b). (Emphasis added)

*Duppstadt* at 43 - 44.

It is apparent from the Board's discussion of the City Plan that there is an internal conflict within the Plan and its accompanying Zoning Regulations. On the one hand, the Plan recognizes that growth should occur within the SEQ, albeit at reduced densities than those found within the more heavily settled parts of South Burlington. On the other hand, the Plan seeks to preserve not only the natural resources and agricultural uses within the SEQ, but also the less easily definable values of "open space" and "scenic views." The Board is therefore charged with the task of reconciling these two possibly competing goals and determining whether, in this instance, the Project can satisfy one without causing harm to the other.

The Board concludes that the present Project complies with the City Plan. Through its redesign of the *Duppstadt* proposal, VSLP has worked to "preserve open space, natural resources and scenic views and promote the continuation of agricultural use." Further, unlike the *Duppstadt* subdivision, this Project does not threaten the continuing viability of the Auclair farm.

And lastly, this Project does not infringe upon, in any way, the “restricted areas” noted in the Zoning Regulations. Indeed, all of the development in this Project occurs within the sanctioned “development areas.”

The Board has some concerns, however, about the extension of the water and sewer lines to the Project from the Ledge Knoll development through presently undeveloped lands immediately to the north of the Project. There was insufficient evidence presented to the Board concerning the possibility of additional hookups to the sewer line, thus increasing the development pressures on this part of the SEQ. If the Board were to be issuing a permit, the Board would condition such permit to require that, before by any user other than the Project may hook up to these lines, a permit amendment (which would examine all ten Criteria) be obtained.

## **2. Affordable housing**

VSLP concedes that the proposed Project does not include the creation of affordable housing. Base prices for the homes at the Project are well above the affordable housing guidelines in the City Plan.

The Board has reexamined its conclusions in *Duppstadt* concerning affordable housing and concludes that the fact that the Project does not include affordable housing units does not violate the policies in the City Plan. The City Plan does not require every residential project, or any such project in the SEQ, to include affordable housing for moderate income households. The City Plan's relevant provisions read, "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," and "[T]he City should focus its efforts to encourage affordable housing in the Quadrant on housing which is affordable to moderate income households." The use of such words in the Plan indicates to the Board that affordable housing in the SEQ is not a mandatory element of the Plan.<sup>6</sup> See *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action, #2W0694-1-EB*, Findings of Fact, Conclusions of Law, and Order at 42 (Dec. 21, 2000) (while words such as "direct," "encourage", "promote," and "review" in Town or Regional Plans may provide guidance in the interpretation of such Plans and may be used to bolster more specific policies in such Plans, they do not, by themselves, constitute a mandate). And see, *The Mirkwood Group and Barry Randall, supra*, at 29; *Ronald Carpenter, #8B0124-6-EB*, Findings of

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<sup>6</sup> With the language which the City Plan employs concerning affordable housing, the Board has doubts that such housing will become a reality in the SEQ.

Fact, Conclusions of Law, and Order at 16 (Oct. 17, 1995); *Horizon Development Corp.*, #4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Aug. 21, 1992).

The Board therefore concludes that the proposed Project complies with the City Plan under Criterion 10.<sup>7</sup>

**V. Order**

1. Land Use Permit Application #4C1013R-EB is denied.
2. Jurisdiction is returned to the District 4 Environmental Commission.

Dated at Montpelier, Vermont this 8th day of March 2002.

ENVIRONMENTAL BOARD

\_\_\_\_\_/s /Marcy Harding\_\_\_\_\_  
Marcy Harding, Chair  
John Drake  
George Holland  
Samuel Lloyd  
\*\*Alice Olenick  
Gregory Rainville  
\*\*\*Jean Richardson  
\*Don Sargent

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<sup>7</sup> While not dispositive to the Board's decision, the Board notes that the South Burlington Planning Commission actively participated in this case and argued that this Project conforms with its City Plan and Zoning Regulations.

\* Dissenting opinion of Board Member Sargent

With all due respect to my colleagues on the Board, I must dissent.

**I. Findings of Fact**

I would find the following facts in addition to those found by the Board:

**A. Criterion 8**

141. When considering the open space which VSLP claims to have preserved at the Project Tract, it is important to note that:

- only the footprints of the carriage homes and the single-family lots have been factored in as developed area; all of the leftover space between the carriage homes, which will presumably be lawn, is counted as open space. From an aesthetic point of view, these areas will not appear as meaningful open space;
- VSLP has refrained from proposing development in the restricted areas of the site, but most of this area will no longer be visible to the public from Van Sicklen Road. The open wetlands will provide some diminished ecological benefit, but they will provide no aesthetic benefit to anyone other than the people who live in the southern houses in the development; and
- the only open space which will appear from the roads off the Project Tract as having some meaningful contiguity will include the meadow along Hinesburg Road (to the south of the existing Old Stone House farm buildings) and the meadow to the south of the proposed houses. The area along Van Sicklen Road is split by the entrance road, which will diminish the visual contiguity. The acreage between the loop road and Van Sicklen Road might be considered contiguous, but it will appear insignificant in the context of the surrounding houses (some of which will stand on 10 feet of additional fill, making the ridgelines of the houses some 40 feet above existing grade) and will read as the back yard of the houses on Cobblestone Circle.

142. The Project's proposed home lots and carriage homes are arranged along

a single looped public road and a dead-end private road leading from the new public road. This arrangement of the Project's houses is neither innovative nor imaginative. All of the houses tend to be oriented toward curving interior streets which have little connection to the typical rural patterns that surround the site.

143. This Project's design is not an example of a successful cluster development, which requires sufficient, visually prominent open space, in order to provide a sense of connection to the rural landscape. One way to achieve this would be to place the houses at the Project in closer proximity on smaller lots in order to provide visually meaningful open space or to conserve important natural and/or scenic resources. Here, most of the single-family house lots are larger than the minimum lot size for the district in which they are located; it also appears Zoning Regulation §6.607 authorizes the Planning Commission to approve lots which are smaller than the minimums if circumstances warrant.

144. Clustering is only one of many approaches that need to be employed in designing subdivisions in rural areas. Other types of connections to the rural landscape can and must be made by relating patterns of houses or other development to existing patterns, protecting open farmland, and building at densities that are reasonable for the particular site and its relationship to town centers or growth centers.

145. In this situation, clustering would mean locating house lots in one or two areas of the Project Tract, leaving the lower meadow area undeveloped so that it retains its open space function. In contrast, the proposed Project's houses and yards consume the entire lower meadow, leaving only an insignificant visual corridor that cannot preserve any sense of open space or of the views to Brownell Mountain beyond.

146. The proposed Project will be dependent on the automobile as a means of transport to the urban center or other destinations, which are located a considerable distance to the north.

147. The proposed Project is a continuation of the suburban patterns of growth in South Burlington and results in the spread of undesirable sprawl into a rural area. To locate such a dense, suburban-style development on the Project Tract creates a "leapfrogging" pattern of dense development into the rural fringes before the areas in or near growth centers are developed. From an aesthetic point of view, such sprawling patterns of development appear chaotic, as they are the antithesis of defined compact growth centers separated by rural land dominated by open space, a pattern that is integral to the beauty of the Vermont landscape.

148. A dense development at the site and the extension of new water and sewer lines to serve the proposed Project will increase the development pressure on the surrounding land uses, which include the Auclair dairy farm on the immediate south border of the Project Tract.

149. Increased traffic from the proposed Project will alter the rural character of Van Sicklen Road which is at present comfortable for walking and biking.

150. South Burlington's Zoning Regulations include a mix of *quantitative* and *qualitative* development standards, both of which apply to new development.

151. Quantitative standards include such things as maximum height requirements, setbacks and maximum densities. On a single lot, these standards are expressed as maximums and minimums and tend to be applied equally throughout a district without regard to specific site conditions. The City's maximum density of 1.2 units per acre in the SEQ District, and minimum lot size of 12,000 square feet (slightly larger than 1/4 acre) are examples of quantitative standards.

152. Quantitative standards are refined by qualitative standards, which are typically applied by local review boards to impose community standards or values on a particular project. Qualitative standards address such issues as a project's compatibility with the character of an area or district, the appropriateness of a particular design given unique site conditions and broader community goals for a district or particular resource or feature.

153. South Burlington's Zoning Regulations include several qualitative standards which are intended to maintain the rural character and open spaces of the SEQ. South Burlington's recognition of the importance of applying qualitative standards to development proposals within the SEQ is made clear by the purpose of the District, as noted in §6.00 of the Zoning Regulations.

#### **B. Criterion 9(B)**

154. VSLP has not presented financial data concerning the fair market value of the Project Tract or alternative economic uses of the Project Tract which would preserve the primary agricultural soils in the lower meadow.

155. VSLP does not own or control any non-agricultural or secondary agricultural soils reasonably suited for this Project.

156. While the design of the Project represents an improvement over the *Duppstadt* subdivision in terms of an attempt to minimize the reduction of agricultural potential of the lower meadow, the proposed Project's siting of houses and roads in the lower meadow nevertheless wholly destroys the potential of the lower meadow for agricultural uses. The Project's layout does not represent an adequate use of cluster planning designed to economize on the usage of the primary agricultural soils in the lower meadow.

**C. Criterion 10**

157. The eastern boundary of the project site is located on the boundary of Williston; the boundary of Shelburne is located one parcel to the south. Both of these communities have made a concerted effort to preserve the rural character of the surrounding area while accommodating a reasonable amount of residential development.

158. In Williston, the minimum lot size requirement for the Agriculture-Rural District surrounding Van Sicklen Road is nearly seven times greater than that allowed in the SEQ. The maximum allowed density for residential uses in Williston is half that allowed in the SEQ. Finally, Williston has defined a sewer service area which prevents the extension of municipal sewer lines to serve this area, and has adopted subdivision regulations which limit the rate of development that may occur outside of the sewer service area. Together, these limit growth in this part of Williston.

159. Land in the vicinity of Route 116 in Shelburne is included in the Rural District, which establishes a 5-acre minimum lot size and allows one dwelling unit per 5 acres. Like Williston, Shelburne has established a sewer service area which restricts the extension of municipal lines into this area.

160. This proposed Project would not be possible in the rural areas of either Williston or Shelburne which border the SEQ.

161. Although the proposed Project represents a slight reduction in the number of houses proposed in *Duppstadt*, there has not been a corresponding reduction in the visual impacts from Van Sicklen Road or the impacts on prime agricultural soils.

162. Very few parcels in the surrounding area are less than one acre in size, in contrast with the more dense, suburban pattern farther to the north.

163. In light of the City Plan's emphasis on maintaining the open character and

scenic qualities of the SEQ, and promoting the continuation of agriculture and development of affordable housing, this subdivision design fails to achieve these goals, despite its characterization by the applicant as “clustered.”

164. The proposed units offer negligible variety with regard to cost, and will not result in the creation of any affordable housing.

165. Based upon the value of other homes in the SEQ, the proposed subdivision will offer higher end homes which are priced out of reach of moderate income households.

## **II. Conclusions of Law**

I disagree with the majority's Conclusions of Law as to Criteria 8, 9(B) and 10.

### **A. Criterion 8**

The Board found that the *Duppstadt* proposed subdivision “in this bucolic section of the SEQ ... offends the sensibilities of the average person as it is so out of character with its surroundings that it significantly diminishes the scenic qualities of the area.” *Duppstadt* at 35.

The question presented here is whether the redesign of the *Duppstadt* project as presented by VSLP reduces the aesthetic impacts as experienced by those living in or traveling through the area.

#### **1. Compliance with clear written community standards**

As the Board found in *Duppstadt*, South Burlington's City Plan and Zoning Regulations present clear, written community standards intended to preserve the aesthetics or scenic beauty of the area of the Project. *Duppstadt* at 34. This finding is controlling in the present appeal.

The City Plan's goals for the SEQ promote the open, rural character and scenic views and the presence of agriculture in the area; likewise the Zoning Regulations require the preservation of open space and the natural resources in the Quadrant.

The proposed Project does not promote and preserve open space, natural features, or scenic views. The important visual values of the lower meadow and the views to the wetlands and Brownell Mountain beyond will be lost. The project fails to

provide sufficient open space in the northern portion of the property. The proposed Project, through its total destruction of the nine acres of primary agricultural soils in the lower meadow, does not promote continued agriculture. It is not compatible with surrounding land uses in South Burlington and with the rural landscapes of the two adjacent towns of Williston and Shelburne.

Densities have not been appropriately reduced in this fringe area of the SEQ; indeed, this Project would accomplish exactly the opposite of the City's overall goals. Rather than discouraging scattered development and a sprawling form of growth, the Project, a typical example of single-home, automobile-dependant suburban development, promotes it; it represents a "leapfrogging" of intensive housing in the edge of the SEQ before areas closer to the city core have been fully developed.

The proposed Project employs neither an innovative layout nor design. Houses on single lots are lined along the Project's roads in a standard linear fashion and are sprinkled in the lower meadow, rather than clustered in the more wooded areas of the property.

I cannot conclude that the Project complies with the community standards set forth in the City Plan or the Zoning Regulations.

## **2. Shocking and offensive**

I must also conclude that the Project would be shocking and offensive to the average person. A project with housing densities and appearances similar to Butler Farms or Ledge Knoll is inappropriate in the more rural fringes of the SEQ where the Project Tract is located. Approached from the east or south, the Project is an abrupt transition from the more open atmosphere of the Town of Williston area and the Auclair farm. Considering the important resources provided by this site, including the visually and functionally diverse wetlands, and the open meadows which provide a window to distant views, the hemlock ridge, and Brownell Mountain, development of this property in the manner and with the density as proposed far exceeds what is appropriate for the site and the area.

The Project as proposed will completely alter the character of the site itself, as well as the character of the area, with the consequence that the scenic qualities of the area will be significantly and unnecessarily diminished. In this context, the Project as proposed is shocking and offensive.

### **3. Mitigation**

I also find that VSLP has failed to adequately mitigate the aesthetic impacts from the Project. While better than the *Duppstadt* subdivision, the design of the current Project is still highly incompatible with its surrounding context, and still fails to protect the scenic resources which are identified in the City Plan and Zoning Regulations as important to the character of the area. In this situation, adequate mitigation would require that VSLP (a) reduce the housing density down to a level that is more consistent with its surroundings; (b) protect the open space in the lower meadow in a meaningful way so that views of the lower meadow, the wetlands and Brownell Mountain in the distance are protected; (c) use house designs of less height and mass (similar to the carriage homes) throughout the Project to reduce the visual impact of the development, and (d) cluster the houses on the site to locations out of the lower meadow. This last alteration would have the twin result of protecting the views to the south and preserving the agricultural soils in the meadow.

The above mitigative steps would require a redesign of the Project. Increased screening of the lots from Van Sicklen Road would also be advisable, but screening intended to hide the houses will also hide the site's visually aesthetic resources - the views of the meadow, the wetlands and Brownell Mountain, unless the houses are moved out of the viewshed.

Thus, rather than trying to force the site to accommodate a particular design, a better attempt could be made to have the design fit the site. This means that in addition to the other natural resources on the site, the 9-acre meadow of primary agricultural soils would be left undeveloped both for agricultural use and preservation of the views and open space character of the site consistent with the mandates of the City Plan and the Board's aesthetic precedents.

If the Project were to be redesigned to address the points articulated above, I would find that the mitigation element of the *Quechee* test to be satisfied. As it presently is proposed, however, it cannot pass this inquiry.

#### **B. Criterion 9(B)**

I read the language in *Lafaso v. Patrissi* to mean that the Vermont Supreme Court has abandoned the *Solomon/Chevron Oil* test. Thus, I would follow the dictates of the United States Supreme Court's *Harper* decision and hold that *SVHC* should be given "full retroactive effect in all cases still open on direct review," and therefore applied to the instant appeal.

Even if the *Solomon/Chevron Oil* elements were to be applied, they are not present in this case. While the requirement in *SVHC* that a Mitigation Agreement will only be accepted if an application meets subcriteria (ii), (iii) and (iv) of Criterion 9(B) is a "new principle of law" which was decided as a matter of "first impression whose resolution was not clearly foreshadowed," I find no inequity in applying it to the present case.

As more fully explained below, the facts are clear that VSLP easily satisfies subcriteria (ii) of Criterion 9(B). As to subcriterion (iii), VSLP was well aware from the *Duppstadt* decision that it was necessary to cluster its house lots to mitigate the aesthetic impacts of the Project. Such clustering will have the added beneficial result of reducing the impact of the Project on the primary agricultural soils in the lower meadow. As to subcriterion (iv), VSLP was also aware that it had to go to great lengths to protect the Auclair farm from the impacts of this Project. It is not unfair to apply the *SVHC* standards in this matter.

**1. The three subcriteria which must be met under *SVHC***

**a. Subcriterion (ii)**

Under this subcriterion, VSLP must demonstrate that there are no nonagricultural or secondary agricultural soils owned or controlled by it reasonably suited to the Project. The Board has found that VSLP does not own or control any non-agricultural or secondary agricultural soils reasonably suited for this Project.

I conclude that VSLP has satisfied this subcriterion.

**b. Subcriterion (iii)**

Subcriterion 9(B)(iii) requires that the development be planned to minimize the reduction of agricultural potential by 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.

Fragmentation of agricultural land was one of the deciding factors in *Duppstadt*.

The evidence demonstrates that the Applicants have designed this Project to utilize all developable portions of the Project Site for single family home sites on separate lots and related roadways. While the Applicants claim

the Project is a cluster design, this Board has made it clear that it views “[d]etached single family homes on separate lots [as] the antithesis of cluster planning and [that such a design] do[es] nothing to economize on land usage for the purpose of minimizing the reduction of the agricultural potential.” (Citations omitted)

*Duppstadt* at 40.

With respect to cluster planning, only one part of the proposed Project -- the area containing the carriage homes -- is clustered. The rest of the Project, 28 single-family homes on individual lots, does not represent a clustered design; true cluster planning at this Project would not incorporate a typical, traditional linear subdivision design.

The subdivision design does not economize on land usage. Several techniques could be used to remove most of the development from the lower meadow area. For example, densities could be further reduced, and the sizes of the lots could be substantially smaller, similar to the land associated with the carriage homes.

I therefore conclude that this Project does not comply with subcriterion (iii).

**c. Subcriterion (iv)**

Subcriterion 9(B)(iv) requires the Board to determine whether the Project will significantly interfere with or jeopardize the continuation of agricultural operations on the adjoining lands.

In *Duppstadt*, the Board held that

It is more probable than not that the design and location of this highly concentrated residential development on the border of a large farm operation will significantly interfere with and jeopardize the continuation of agriculture on the adjoining lands. The encroachment of a 55 family housing development with eight of the homes bordering on the neighboring farmland will likely result in the conflicts inherently associated with these incompatible uses in close proximity.

Noises, dusts and odors typically associated with farming operations are incompatible with the typical uses of intense residential development, especially outdoor uses such as backyard recreation.

These incompatible uses give rise to complaints and disputes that the farmer must address. These additional burdens on farm families often lead to their leaving the area. Additional conflict may arise from unrestrained pets, trespass and injury that may result from the neighborhood children's exploration of the farm property and, adults' uses of adjoining farm lands as areas in which to discard unwanted items such as stones, brush, grass cuttings, and Christmas trees. For the Auclairs, these types of interference are likely given the significant number of homes planned and the close proximity of the eight residential backyards bordering on their pasture.

Subcriterion 9(B)(iv) is only considered in situations where the proposed project significantly reduces the agricultural potential of the primary agricultural soils. Accordingly, its inclusion reflects a recognition of the resultant effects on working farms which had previously been insulated from development pressures by the adjoining agricultural lands now proposed for the Project and, the desire to provide some protection from those pressures.

*Duppstadt* at 41-42.

Farming in the midst of a residential area is often difficult because of the conflicts that are created, such as noise, dust, and odors from the farm that people object to; *id.* at 41; or slow-moving farm equipment on roads that makes drivers impatient; or traffic on the roads from the new development that makes driving farm equipment on the roads too hazardous for farmers.

Certain projects, in particular dense residential subdivisions proposed for a rural area that has working farms, necessarily jeopardize the continuation of agriculture on adjoining lands, regardless of practical measures to separate the farming operation from the residences such as fences or buffers, because of the inherent conflicts that arise. No amount of "mitigation" can address the annoyance or even anger and resulting complaints and conflicts that arise in reaction to normal agricultural practices.

The Project is in a rural area that has working farms. The City Plan calls for the continuation of agriculture in the SEQ. Yet the Project involves extending the sewer line to the Project Tract from the Ledge Knoll development for a distance of approximately 2,200 feet, an act which will lead to further development pressures in the Project area, *see, e.g., Re: Town of Stowe, #100035-9-EB, Findings of Fact, Conclusions of Law, and Order* at 54 (May 22, 1998), including the contiguous Auclair Farm.

The new incentive for development that will be created by the VSLP project, along with the inevitable conflicts that arise when farming operations try to co-exist with dense residential development, will interfere with and jeopardize the continuation of agriculture on adjoining lands. Accordingly, the Project does not comply with subcriterion (iv) of Criterion 9(B), and DAG should not have entered into a Mitigation Agreement with VSLP, under the standards which it has established. See, *SVHC, supra*, at 17 (Finding of Fact 128: "... DAG, as a matter of policy, will not enter into a Mitigation Agreement unless a project will satisfy subcriterion (iv) of Criterion 9(B) by not significantly interfering with or jeopardizing agriculture or forestry on adjoining lands or reducing their agricultural or forestry potential.")

Because the Project fails to meet two of the three subcriteria required before the Board will accept a Mitigation Agreement under the *SVHC* decision, VSLP cannot satisfy Criterion 9(B). Even if a Mitigation Agreement were to be accepted, I would agree with the majority that the amount arrived at in the existing agreement is insufficient.

### **C. Criterion 10**

For the same reasons that this proposed Project fails community standards under Criterion 8, I believe that it fails Criterion 10.

In addition, I do not believe that this Project complies with the City Plan's affordable housing requirements.

As the majority notes, the City Plan, Ch. XV(D)(a) states that "All residential developments should preserve open space and the unique aesthetic and natural qualities of the site while serving a wide range of income levels."

In *Swain Development Corp., and Philip Mans, #3W0445-2-EB*, Findings of Fact, Conclusions of Law, and Order at 37 (Aug. 10, 1990), the Board applied provisions in a regional plan which stated that commercial activities "should" be in village centers to deny a proposed development under Criterion 10. *Accord, Waterbury Shopping Village, Inc., #5W10678-EB*, Findings of Fact, Conclusions of Law, and Order at 40 - 41 (July 19, 1991) (Board denied project based on regional plan provisions that stated "*It is recommended that future high intensity development be guided towards the service areas of [wastewater] systems....*" and "*New development outside existing settlements should be planned so as to respect the historic settlement pattern of compact villages and urban centers separated by rural countryside*" (Emphasis added)) *And see, In re*

*Green Peak Estates*, 154 Vt. 363, 368 (1990) (use of phrase "should not be permitted" in a regional plan is a specific policy sufficient to support Board's conclusion that project does not conform with the plan); *Re: Herbert and Patricia Clark, supra*, at 40 – 41 (Board held phrase in a town plan which read that "development which threatens to adversely affect the visual amenities of the Town should not be permitted" was sufficient to "preclude" a particular development which created such threats). *Compare, MBL Associates, #4C0948-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) at 48 (Jan. 30, 1996) (regional plan specifically defined "should" to be advisory only).

While it may be true, as VSLP argues, that South Burlington has not required other residential development in the SEQ to include affordable housing under the City Plan, the failure of the City to enforce its Plan does not mean that the Board should do so as well. Indeed, if each new development in the SEQ (or elsewhere) is not required to include affordable housing in the mix of its proposed units, the goal of affordable housing will likely only be furthered by non-profit organizations or government subsidies. I believe that South Burlington's stated goal of increasing affordable housing within its city limits is laudable, and one which the Board, through its application of Criterion 10, should support. It is, perhaps, time for those who wish to develop Vermont's landscape for profit to join in the effort to ensure that all Vermonters, regardless of income, have decent and safe places to live.

For all the reasons stated here, it is clear that the proposed Project does not comply with the City Plan under Criterion 10; I would deny this application.

\*\* Board Member Olenick, dissenting in part.:

I join in Member Sargent's dissent insofar as it addresses Criterion 8, primarily due to the location of the project tract in a very rural setting, with proximity to Williston and Shelburne, which have more restricted zoning districts than does South Burlington. As the majority has noted, the test is not whether this application is better than that presented in the *Duppstadt* case. The comparison of the two plans does illustrate, however, how much gain is possible with alternative planning and building selection. It therefore seems reasonable that with true clustering, possible inclusion of a different selection of types of residences, more creative landscaping to include hedges and shrubs where trees would block views, among other things, the objectives further outlined in Member Sargent's dissent could be satisfied, while maintaining a viable project for the applicant.

\*\*\* Board Member Richardson joins in Member Sargent's dissent insofar as it addresses affordable housing under Criterion 10.