

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

RE: Lawrence and Diane Brown
Land Use Permit #5W1175-1-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of Land Use Permit #5W1175-1 and supporting Findings of Fact, Conclusions of Law, and Order issued to Lawrence and Diane Brown by the District #5 Environmental Commission. As is explained below, the Environmental Board concludes that the project, as conditioned by this decision, complies with the criteria on appeal. Accordingly, the Board issues an amended permit (the Amended Permit).

I. SUMMARY OF PROCEEDINGS

On November 5, 1993, the District #5 Environmental Commission (the District Commission) issued Land Use Permit #5W1175-1 (the Permit) to Lawrence and Diane Brown (the Permittees) for the construction of a one story commercial building, 74' by 160' in size, on a 19.3 acre tract of land located on Route 14 in East Montpelier, Vermont, for use in the Permittees' printing business.

The Permit also authorizes the construction of an access road from Route 14, a connecting road between the proposed new building and an existing, permitted commercial building on an adjacent 12.9 acre tract, and a wooden sign no larger than three feet by five feet at the access drive entrance.¹

On December 3, 1993, Donald H. Donnelly and Peter Noel Duhamel, both adjoiners, respectively appealed from the District Commission's issuance of the Permit.

On January 11, 1994, then Chair Elizabeth Courtney convened a prehearing conference. Three preliminary issues for the Board's decision were identified by the parties, and deadlines were set for the submission of memoranda.

On January 14, 1994, Chair Courtney issued a Prehearing Conference Report and Order (the January 14, 1994 Prehearing Order).

On February 4 and 18, and on March 2, 1994, the Permittees filed memoranda on the preliminary Issues.

¹The existing permitted commercial building on the adjacent 12.9 acre tract is authorized pursuant to Land Use Permit #5W1175. Land Use Permit #5W1175 is not on appeal.

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On February 4 and 18, 1994, Mr. Duhamel filed memoranda on the preliminary issues.

On February 7 and 18, 1994, Mr. Donnelly filed memoranda on the preliminary issues.

On February 16, 1994, Chair Courtney appointed Board member Steve Wright Acting Chair in this appeal.

On March 17, 1994, the Board issued Re: Larry and Diane Brown, #5W1175-1-EB, Memorandum of Decision (Mar. 17, 1994) wherein the Board ruled that both Mr. Donnelly and Mr. Duhamel shall have party status only on Criteria 8 (aesthetics) and 10 (conformance with the East Montpelier Town Plan); the issues in this appeal shall be Criteria 8 and 10; and that the involved land which is subject to the Permit is a single 32.2 acre tract of land.

On April 19, 1994, the Permittees requested that the hearing scheduled in this matter for June 22, 1994, be postponed. The Permittees also requested that the filing deadlines for the submission of prefiled testimony and evidentiary objections be extended. The Permittees made their request with the consent of Mr. Duhamel and Mr. Donnelly.

On May 2, 1994, Acting Chair Wright issued a memorandum to the parties which set forth a new schedule for the submission of prefiled testimony and evidentiary objections, and the convening of a hearing (the May 2, 1994 Revised Scheduling Order). Pursuant to the May 2, 1994 Revised Scheduling Order, the parties were to file: (a) final witnesses and exhibits and prefiled testimony for all witnesses they intend to present on or before August 3, 1994; (b) prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits on or before August 31, 1994; and (c) all objections to the prefiled testimony and exhibits previously identified on or before September 14, 1994. In addition, the parties were informed that the Board would convene a hearing on Wednesday, September 28, 1994.

On July 28, 1994, the Permittees filed a Motion to Dismiss in Part pursuant to EBR 18(D) (the Motion). As part of their Motion, the Permittees voluntarily relinquished their right to construct the one story, **74' by 160'** commercial building authorized by the Permit. The Permittees retained only their right to construct the access and connecting roadways and the sign as authorized by the Permit.

On August 3, 1994, the due date for prefiled direct testimony, Mr. Duhamel requested an extension of time in which to file prefiled testimony. Mr. Duhamel did not file prefiled direct testimony notwithstanding the May 2, 1994 Revised Scheduling Order. Mr. Duhamel stated as grounds for his request that the Motion caused a reworking of the project authorized by the Permit such that the Board would be unnecessarily burdened with countless objections to testimony and evidence as being irrelevant and immaterial. Further, Mr. Duhamel stated that the **Permittees'** relinquishment of their right to construct what had been authorized by the Permit altered the quantitative basis of his appeal, and had caused him to be unfairly surprised.

On August 11, 1994, the Permittees filed a memorandum in opposition to Mr. Duhamel's request for an extension in which to file his prefiled testimony.

On August 19, 1994, Acting Chair Wright issued a memorandum to the parties which denied Mr. Duhamel's request for an extension of time in which to file prefiled testimony, but indicated that Mr. Duhamel still had the opportunity to file prefiled rebuttal testimony relative to the issues in this appeal. Finally, the memorandum confirmed that the hearing scheduled for September 28, 1994 would proceed.

Prefiled rebuttal testimony from the parties was due to be filed on or before August 31, 1994.

On August 31, 1994, Mr. Duhamel filed a "**Motion** for a Ruling by the Board on **Permittees'** Motion to Dismiss" and a "**Motion** to Compel the Permittees to Make a More Definite Statement." Mr. Duhamel did not file prefiled rebuttal testimony.

On September 2, 1994, the Permittees filed a response to Mr. Duhamel's August 31, 1994 motions. On September 9, 1994, Mr. Duhamel filed a reply to the **Permittees'** September 2, 1994 response.

On September 15, 1994, the Board issued Re: Larry and Diane Brown, #5W1175-1-EB, Memorandum of Decision (Sept. 15, 1994), the Board's second memorandum of decision in this case, wherein the Board motioned for oral argument relative to the **Permittees'** Motion, and denied (a) Mr. Duhamel's request for an extension of time to file prefiled testimony; (b) his request that the Board issue a ruling on the **Permittees'** Motion prior to the hearing scheduled for September 28, 1994; and (c) his request that the Board order the **Permittees'** to

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file a more definite statement as to the scope of the project. The Board stated, in part:

Mr. Duhamel had until August 3, 1994 to prefile direct testimony relative to the Project. The Board concludes that if, on August 3, 1994, Mr. Duhamel was prepared to submit prefiled testimony on the Project authorized by the Permit, it **was reasonable** to assume his prefiled direct testimony would have included evidence regarding the road and sign, that is, the portion of the Project which the Permittees have not voluntarily relinquished. Further, Mr. Duhamel still had the opportunity until August 31 to file prefiled rebuttal testimony to address the concerns which he asserted as the grounds for his direct prefiled testimony extension request. Mr. Duhamel has filed no prefiled rebuttal testimony.

Id. at 3.

On September 26, 1994, Mr. Duhamel filed a petition for party status pursuant to EBR 14(A) under Criteria 1, 1(G), 5, and 9(B).

On September 28, 1994, the Board convened oral argument and conducted a site visit relative to the **Permittees'** Motion with the following parties participating:

The Permittees by Frederick G. Cleveland, Esq.
Peter Noel Duhamel, pro se
Donald H. Donnelly, pro se

After the site visit, the Board deliberated regarding the Motion, re-convened the oral argument, and announced to the parties its decision to grant the Motion. The Board then convened a hearing relative to Criteria 8 and 10 with the same parties participating. The hearing could not be completed on September 28, 1994 such that the Board recessed the hearing pending its resumption at a later time.

On October 4, 1994, the Permittees filed a response to Mr. **Duhamel's** September 26, 1994, party status petition.

On October 11, 1994, Mr. Duhamel filed a petition for co-applicant status.

On October 17, 1994, the Board issued Re: Larry and Diane Brown, #5W1175-1-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 17, 1994), that is, the Board's formal

written decision relative to the Motion. The Board stated therein, in part:

The Board concludes that the **Permittees'** have waived their right to construct the one story commercial building authorized by the Permit. Further, the **Permittees'** waiver is binding regardless of whether the Board issues a permit for the portion of the Project which the Permittees seek to retain and which is on appeal before the Board.

Although Mr. Duhamel contends that he does not oppose the grant of the Motion, he requests that if the Board grants the Motion, that the Permittees then be remanded to the District Commission to obtain a permit amendment. We note that the Permittees have stated that they would seek an amendment when ordered or permitted to do so by the Board.

The Board concludes that the grant of the Motion does not require a remand to the District Commission. The **Permittees'** waiver does not require the Board to consider potential impacts under the Act 250 criteria which have not first been reviewed by the District Commission. The Board has never required that a change made to a project during the **pendency** of an appeal mandates automatic remand for the filing of a new permit amendment application. See Re: Sherman Hollow, Inc., #4C0422-5R-1-EB, Findings of Fact, Conclusions of Law, and Order at 5 and 19 (Nov. 19, 1991). Therefore, the Permittees will not be ordered, and nor are they required, to seek a permit amendment for the access and connecting roadways and proposed sign. Rather, the appeal pending before the Board under criteria 8 and 10 shall proceed relative to the constructed access and connecting roadways and proposed sign.

On October 25, 1994, the Permittees filed a memorandum in opposition to Mr. **Duhamel's** petition for co-applicant status.

On November 15, 1994, an Act 250 Notice of Public Hearing was sent to the parties informing them that the Board would reconvene the hearing in this matter on December 7, 1994. No party objected to the hearing being reconvened on this date.

On December 7, 1994, the Board reconvened the hearing in this matter with the following parties participating:

The Permittees by Frederick G. Cleveland, Esq.
Donald H. Donnelly, pro se

The Board deliberated on December 7, 1994, and June 1, 1995. On June 1, 1995, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision.

II. ISSUES

The issues are:

1. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the project will have an undue adverse effect on aesthetics.
2. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the project complies with the East Montpelier Town Plan.

III. FINDINGS OF FACT

1. The Permittees operate a printing business known as L. Brown and Sons Printing, **Inc.**
2. The Permit provides, in part:

This permit specifically authorizes the permittees to construct a one story commercial building, 74' by 160' in size, for use in their printing business. The project includes construction of an access road from Route 14 and a connecting road between the new building and existing commercial buildings on an adjacent tract.
3. In addition to the Permit, the District Commission issued Findings of Fact, Conclusions of Law, and Order. The District Commission evaluated the project authorized by the Permit under the ten Act 250 criteria.
4. On July 28, 1994, the Permittees filed the Motion with an accompanying affidavit.
5. The Permittees have abandoned all aspects of the construction authorized by the Permit except those related to the access and connecting roadways, and the authorized sign (the Project). The **Permittees'** Motion

does not require the Board to consider proposed construction which was not reviewed by the District Commission.

6. On September 28, 1994 the Board convened an oral argument relative to the **Permittees'** Motion. At oral argument, the Permittees, through their attorney, affirmed their voluntary relinquishment of their right to construct the building authorized by the Permit, and that the Project, post-Motion, only consists of the access and connecting roadways, and the relocation of their existing sign.
7. The access and connecting roadways authorized by the Permit have been constructed in substantial conformity with District Commission Exhibit #20 (the erosion/road plan dated June 18, 1993), and they form a single, newly constructed roadway.
8. The single, newly constructed roadway extends from Route 14 to the **Permittees'** home and is constructed on two contiguous tracts of land. The two contiguous tracts are 12.9 and 19.3 acres, respectively, for a total of 32.2 acres.
9. The 32.2 acre tract is on the east side of Route 14 north of the Village of East Montpelier. It is characterized by a large open field sloping to the southwest. The single, newly constructed roadway starts near the southwest corner of the 32.2 acre tract, is serpentine in character, and generally follows the topography until the final rise to the **Permittees'** residence and existing printing business.
10. The single, newly constructed roadway is narrower and more serpentine than a typical town road, and is rural in character.
11. The Permittees also have a deeded, 60-foot right-of-way over land owned by Mr. Duhamel which is adjacent to the 32.2 acre tract. The right-of-way connects with the single, newly constructed roadway at the **Permittees'** home and existing printing business.
12. The single, newly constructed roadway and the **right-of-way**, joined in the rough shape of a horseshoe, makes it possible for commercial vehicles to enter on the **right-of-way** and exit on the access road, or vice-versa, without having to back up or turn around.

13. The Permittees use, and seek to continue using, the single, newly constructed roadway in combination with the right-of-way for commercial traffic related to the operation of their existing printing business.
14. The Permittees have purchased a printing business in Barre, Vermont, but some printing activities will continue to take place at the Project location.
15. The Permittees seek to move their existing sign which is located near the right-of-way/Route 14 intersection and relocate it to the single, newly constructed roadway /Route 14 intersection.
16. Mr. Donnelly's house is in the open north of the right-of-way, set back and away from Route 14. The view from the front of Mr. Donnelly's house is that of an open field within the context of a sweeping view of the main range of the Green Mountains to the west and southwest.
17. There are no barriers between the front of Mr. Donnelly's house and the right-of-way. Vehicles using the **right-of-way** are visible, audible, and odorous from the front of Mr. Donnelly's house.
18. Mr. Donnelly is repeatedly exposed to tractor-trailers, smaller trucks, and other vehicles associated with the **Permittees'** existing printing business using the right-of-way.
19. The use of the right-of-way by the commercial traffic from the printing business transforms the character of the right-of-way from a private road used for residential purposes into what is more like a general purpose town road.
20. The change in the aesthetics of the area caused by the fumes, dust, and noise generated by the commercial traffic on the right-of-way has interfered with Mr. Donnelly's use of his property, particularly the area between the front of the house and the right-of-way.
21. Due to the distance between Mr. Donnelly's house and the single, newly constructed roadway, the aesthetics of the area surrounding Mr. Donnelly's property will not be affected by commercial traffic attributable to the **Permittees'** printing business when such traffic uses the single, newly constructed roadway.

22. East Montpelier Discount Foods, a residential and commercial structure, is at the foot of the right-of-way on the westerly side of Route 14. The Bragg Sugarhouse, a roadside commercial structure, lies immediately to the south. Next is the Bragg residence followed by the Bigelow residence.
23. Mr. Duhamel's residence is to the east and down grade from the **Permittees'** house and existing printing business. Mr. Duhamel can only see the final 200 feet of the roadway as it terminates in the **Permittees'** dooryard.
24. No tree plantings are required relative to the single, newly constructed roadway. All or a portion of the 32.2 acres within the bounds of the horseshoe shaped roadway/right-of-way acres is hayed by a local farmer.
25. The Town of East Montpelier adopted its current town plan on June 9, 1993 (the Town Plan). The Permittees filed their Act 250 application on or after July 9, 1993.
26. The Town Plan provides, in part:

Purpose of the Town Plan

The Town Plan provides general direction and recommends plans of action that will enable residents to realize their expectations for the quality of life in their community. It establishes a framework for town officials as they develop and administer zoning and **subdivision** bylaws and capital and operating budgets. The Plan **also** furnishes information for-state reviewers in the Act 250 process. The Goals and Plans of Action having the most specific bearing on the Act 250 criteria are identified with the annotation (**250**).

* * *

DISTRICT D: Residential District (formerly - Rural Residential and Agricultural District) Consists mostly of single-family dwellings, with some multi-family dwellings and several farms. Also included in this district are some small commercial enterprises. Density is light to moderate. The goal of this district is to provide for moderate residential growth while supporting agricultural operations and open

space through the site selection of residential development.

* * *

SCENIC RESOURCES

* * *

Goals

**Develop strategies for preserving the aesthetic beauty of the landscape through a combination of town and resident efforts.

BUSINESS ACTIVITY

* * *

Goals

Encourage the development of new businesses and the expansion of existing businesses in order to **crete more localized employment opportunities -- but only in a manner that will not jeopardize the town's rural character and will pose no threat of pollution. (250)

**Support the viability of agricultural enterprises and promote the development of new businesses that utilize locally grown agricultural products. (250)

**Encourage the development of home occupations, especially where such activity could enhance the town's character. (250)

The Permittees 32.2 acres is located in the District D Residential District. The Town Plan contains no specific prohibitions barring the **Permittees'** current use of their 32.2 acres as a location for their printing business and the single, newly constructed roadway.

The Town of East Montpelier has adopted a zoning ordinance. The Permittees need a Conditional Use Permit under the zoning ordinance.

A Conditional Use Permit will be granted only if the proposed use conforms to five general standards.

30. Conditional Use Permit Standard 2 provides:

The proposed use will not adversely affect the character of the area affected and impact on neighboring areas.

31. Conditional Use Permit Standard 3 provides:

The proposed use will not adversely affect traffic on roads and highways in the vicinity.

32. Permittees exhibit P-4 contains a Conditional Use Permit issued to the Permittees. Therein are portions of the zoning ordinance provisions relative to conditional uses.

IV. CONCLUSIONS OF LAW

A. Rulings Made During the September 28, 1994 Hearing

During the course of the September 28, 1994 hearing, the Board made two rulings which warrant discussion. The rulings pertain to requests made by Mr. Duhamel.

1. Mr. Duhamel's Petition for Party Status

On September 26, 1994, Mr. Duhamel filed a petition for party status pursuant to EBR 14(A) under Criteria 1, 1(G), 5, and 9(B). The Board denied Mr. Duhamel's request at the September 28, 1994 hearing noting that they were untimely.

In Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision at 12 (March 28, 1990), the Board stated that "parties in district commission proceedings are automatically parties on appeal with respect to the same criteria concerning which the district commission granted them party **status**." Mr. Duhamel's attempt to expand his party status has already been rejected by the Board in Re: Larry and Diane Brown, #5W1175-1-EB, Memorandum of Decision (Mar. 17, 1994).

Mr. Duhamel contends that his party status request is timely since the Motion has caused there to be a "new" project. Any issues Mr. Duhamel would like to address relative to the "new" project were or should have been addressed in the context of the original appeal. The granting of the Motion has resulted in the contraction of what the Permittees seek to construct, and not vice-versa. The Board concludes that Mr. Duhamel's party status request is untimely and, therefore, it is denied. See Re: Derby Plaza Associates

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Limited Partnership, #7R0886-EB, Memorandum of Decision at 5,
footnote 1, (Feb. 25, 1994).

2. Mr. Duhamel's Request for Official Notice

Mr. Duhamel also requested at the September 28, 1994 hearing that official notice be taken of the East Montpelier zoning ordinance. The Board denied this request since Mr. Duhamel had ample opportunity to prefile the zoning ordinance.

The Board may take official notice pursuant to 3 V.S.A. § 810. The Board frequently takes official notice of documents. However, it does so as a supplement to the system of prefiled testimony. Requests for official notice should not be used to avoid the prefiling of testimony. The Board concludes that Mr. Duhamel's request for official notice of the East Montpelier zoning ordinance was an attempt to avoid the consequences of his failure to prefile any testimony in compliance with the May 2, 1994 Revised Scheduling Order.

B. Mr. Duhamel's Petition for Co-Applicant Status

EBR 10(A) provides:

An application shall be signed by the applicant and any co-applicant, or an officer or **duly-**appointed agent thereof. The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement. The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ownership or control and shall describe the extent of their interests. The district commission or board may, upon its own motion or upon the motion of a party, find that the property interest of any such person is of such significance that the application cannot be accepted or the review cannot be completed without their participation as co-applicants.

The Board's authority under EBR 10(A) is discretionary.
In re Pilarim Partnershin, 153 Vt. 594, 597 (1990).

Mr. Duhamel's request for co-applicant status first depends upon whether he has a substantial property interest in any of the Project's involved land.

The Permittees use, and intend to use the right-of-way in conjunction with the single, newly constructed roadway. The Permittees have not sought approval for the use of the right-of-way. The Board ruled, prior to the submission of any testimony, that the involved land which is subject to review is the 32.2 acre tract. Re: Larry and Diane Brown, #5W1175-1-EB, Memorandum of Decision (Mar. 17, 1994). Based on the **Permittees'** testimony and Mr. Donnelly's testimony, however, the Board concludes that the Project does include the use of the right-of-way.

Under EBR 2(F), a project 's "involved land" includes:

(2) Those portions of any tract or tracts of land within a radius of five miles owned or controlled **by** the same person or persons, which is incident to the use of the project; and

(3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reasons of that relationship.

The **Permittees'** have the right to use the right-of-way. The right-of-way is located adjacent to the 32.2 acre tract. The right-of-way is used for commercial traffic attributable to the **Permittees'** existing printing business. The use of the right-of-way has had an impact on the values sought to be protected by Act 250, in particular, aesthetics. The Board concludes that, based on the preceding findings of fact, the right-of-way is part of the Project's involved land as that term is defined under EBR 2(F)(2) and 2(F)(3). The Board also concludes that Mr. Duhamel has a substantial property interest--if not the fee ownership--of the land over which the right-of-way traverses.

One of the purposes of EBR 10(A) "is to ensure the enforceability of permit provisions by requiring the record owners of involved land to sign the application." Re: Tanger, #3W0125-3-EB, Memorandum of Decision at 2 (Aug. 29, 1989). "The enforceability of a permit must not depend upon the ability of the permit holder to secure the consent of another landowner." Re: Flanders Building Supply, Inc., #4C0634-EB,

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Findings of Fact, Conclusion of Law and Order at 5 (Oct. 18, 1985).

In Flanders, the Board waived the requirement that an entity claiming an interest in a right-of-way be made a co-applicant pursuant to EBR 10(A). The Board concluded that good cause to waive the co-applicant requirement existed because the parties were seeking to have the Board determine the precise scope of an easement interest possessed by the applicant and "[such an inquiry is far beyond the bounds of this Board's jurisdiction, and should be left to the courts." See Flanders at 6.

In Re: Eastern Landshares, Inc., #4C0790-EB, Memorandum of Decision at 2 (Aug. 13, 1991), the Board again declined to adjudicate disputes over ownership of property. The Board concluded that good cause to waive the co-applicant requirement existed based on the applicant's assertion of the right to use a road. The Board concluded that if the applicant did not have the right to use the road, "it will not be able to construct its project." Id. at 2.

The Board concludes that good cause exists to waive the requirement that Mr. Duhamel be made a co-applicant. First, the Board will not be drawn into the dispute between the parties over the scope of the **Permittees'** right to use the right-of-way. Second, the Permittees do not need Mr. Duhamel's consent to comply with any of the conditions contained in the Amended Permit issued herewith. Finally, Mr. **Duhamel's** request is rendered moot based upon the Board's decision under Criteria 8 and 10 to bar the use of the **right-of-way** by commercial traffic.

In summary, the Board denies Mr. **Duhamel's** request that he be made a co-applicant with the Permittees.

C. Criteria on Appeal

1. Burden of Proof

Under 10 V.S.A. § 6088(a), the Permittees have the burden of proof on Criterion 10.

Under 10 V.S.A. § 6088(b), opponents have the burden of proof under Criterion (8). However, the Permittees must provide sufficient information for the Board to make affirmative findings. In re Denio, 158 Vt. 230, 236 (1992); Re: Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan. 27, 1987).

2. Criterion 8 - Aesthetics

10 V.S.A. § 6086(a)(8) requires that, prior to issuing a permit for the proposed project, the Board must find that the project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics" The Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (January 13, 1986).

i. adverse

With respect to the analysis of adverse effects on aesthetics and scenic beauty, the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space. Id. at 18.

The 32.2 acre tract is on the east side of Route 14 north of the Village of East Montpelier. It is characterized by a large open field sloping to the southwest. The single, newly constructed roadway starts near the southwest corner of the 32.2 acre tract, is serpentine in character, and generally follows the topography until the final rise to the Permittees' residence and existing printing business. The roadway is narrower and more serpentine than a typical town road, and is rural in character. The existing sign located at the intersection of the right-of-way and Route 14 will be relocated to the intersection of the single, newly constructed roadway and Route 14.

The single, newly constructed roadway and the **right-of-way**, joined in the rough shape of a horseshoe, makes it possible for commercial vehicles to enter on the right-of-way and exit on the access road, or vice-versa, without having to back up or turn around. The Permittees use, and seek to continue using, the single, newly constructed roadway in combination with the right-of-way for commercial traffic related to the operation of their existing printing business.

Commercial traffic, attributable to the existing printing business, using the single, newly constructed roadway will not affect the aesthetics of the area surrounding Mr. Donnelly's property due to the distance between Mr. Donnelly's house and the single, newly constructed roadway and the relocated sign.

The use of the right-of-way by the commercial traffic from the printing business is not in harmony with Mr. Donnelly's property because it transforms the right-of-way from a private road used for residential purposes into a roadway akin to a general purpose town road.

With regard to Mr. **Duhamel's** property, the only evidence is that he can see the final 200 feet of the single, newly constructed roadway as it terminates in the **Permittees'** dooryard.

In summary, based on the preceding, the Board concludes that: (a) the use by the commercial traffic attributable to the existing printing business exclusively of the single, newly constructed roadway, and the relocation of the sign, will not have an adverse effect on aesthetics; (b) the use by the commercial traffic attributable to the existing printing business of the single, newly constructed roadway in combination with the right-of-way has had and will have an adverse effect on aesthetics in the area of Mr. Donnelly's property; and (c) there is no, nor will there be, any adverse effect on Mr. **Duhamel's** property from the commercial traffic attributable to the existing printing business regardless of whether such traffic uses the right-of-way, the single, newly constructed roadway, or both.

ii. undue

In evaluating whether adverse effects on aesthetics and scenic beauty are undue, the Board analyzes three factors and concludes that a project is undue if it reaches a positive conclusion with respect to any one of these factors. Quechee at 19-20.

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

Conditional Use Permit Standard 2 provides that "[t]he proposed use will not adversely affect the character of the area affected and impact on neighboring areas." Standard 2 is not sufficiently detailed to establish an aesthetic standard. See Re MBL Associates, #4C0948-EB, Findings of Fact,

Conclusions of Law, and Order at 31 (May 2, 1995). The Board concludes that the use by commercial traffic of the single, newly constructed roadway in combination with the right-of-way does not violate a clear, written community standard.

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

Mr. Donnelly's house is in the open north to the north of the right-of-way and back from Route 14. The view from the front of Mr. Donnelly's house is that of an open field within the context of a sweeping view of the main range of the Green Mountains to the west and southwest. Mr. Donnelly is exposed to tractor-trailers, smaller trucks, and other vehicles associated with the **Permittees'** existing printing business using the right-of-way. Vehicles using the right-of-way are visible, audible, and odorous from the front of Mr. Donnelly's house.

Based on the preceding, the Board concludes that the use by the commercial traffic attributable to the existing printing business of the single, newly constructed roadway in combination with the right-of-way is out of character with its immediate surroundings in the area of Mr. Donnelly's house. The such commercial traffic significantly diminishes the scenic qualities of the area around Mr. Donnelly's house due to the visibility, noise, and odor which results from the use of the right-of-way by commercial traffic.

Based on the preceding, the Board concludes that the commercial traffic which now makes use of the right-of-way is shocking because it is out of character with the surrounding residential land uses. In effect, such traffic has made the right-of-way into a general purpose town road.

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

There are no barriers between the front of Mr. Donnelly's house and the right-of-way.

The Board concludes that Permittees have not taken generally available mitigating steps which a reasonable person

would take to improve the harmony of the commercial traffic on the right-of-way with the surroundings.

In summary, based on the preceding, the Board concludes that the use by the commercial traffic attributable to the existing printing business of the right-of-way causes an undue adverse effect on aesthetics. Therefore, the Board will include in the Amended Permit a condition which bars such commercial traffic from the right-of-way. Based on this condition being made part of the Amended Permit, the Board makes an affirmative finding under Criterion 8 relative to the Project.

3. Criterion 10 - Town Plan

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

The Town Plan became effective on June 9, 1993. The Permittees filed their Act 250 application on or after July 9, 1993. Therefore, the Town Plan is applicable in this proceeding. In re Frank A. Molsano, Jr., 5 Vt. Law Week 314, 316 (Nov. 10, 1994); In re Taft Corners Assocs., 160 Vt. 583, 593 (1993); In re Preseault, 132 Vt. 471, 474 (1974); cf. In re Ross, 151 Vt. 54, 57 (1989).

The Town Plan contains broad and general statements regarding its purpose. For example, "[t]he Town Plan provides general direction and recommends plans of action that will enable residents to realize their expectations for the quality of life in their community." The Town Plan characterizes itself as "a framework for town officials as they develop and administer zoning and subdivision bylaws and capital and operating budgets." The Town Plan specifically acknowledges that "[t]he Plan also furnishes information for state reviewers in the Act 250 process," and that the Goals and Plans of Action having the most specific bearing on the Act 250 criteria "are identified with the annotation (250)."

The Project is located in District D, Residential District. While predominantly comprised of single-family dwellings, with some multi-family dwellings and several farms, "[a]lso included in this district are some small commercial enterprises. ... The goal of this district is to provide for moderate residential growth while supporting agricultural operations and open space through the site selection of residential development."

Based on the preceding, the Town Plan contains general policies that are broad-based and non-regulatory. They do not contain specific policies which either promote or prohibit the Project. Therefore, the Board will consider East Montpelier's zoning ordinance to determining whether Criterion 10 is satisfied since such ordinance is the specific implementation of the Town Plan. Molgano at 5.

The Permittees need a conditional use permit under the zoning ordinance. Conditional use permit standard 2 provides "[t]he proposed use will not adversely affect the character of the area affected and impact on neighboring areas." Conditional use permit standard 3 provides "[t]he proposed use will not adversely affect traffic on roads and highways in the vicinity."

The Board concludes that when the Town Plan's description for the District D, Residential District is read in conjunction with conditional use standards 2 and 3, the Project, as conditioned by this decision, is in conformance with the Town Plan. Together, the Town Plan and the conditional use standards implement a balanced approach to commercial development. The emphasis is on facilitating growth without interfering with residential and agricultural uses. Because the commercial traffic attributable to the existing printing business shall be barred from using the right-of-way, the Board concludes that the relocation of the sign and the single, newly constructed roadway are consistent with the Town Plan as required under Criterion 10.

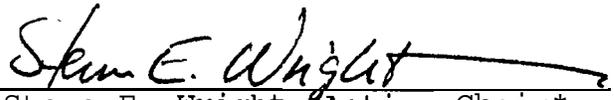
Larry and Diane Brown
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V. ORDER

1. Amended Land Use Permit #5W1175-1-EB is hereby issued.
2. Jurisdiction is returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont, this 19th day of June, 1995.

ENVIRONMENTAL BOARD



Steve E. Wright, Acting Chair*
Arthur Gibb
Samuel Lloyd
William Martinez
John M. Farmer

*On February 1, 1995, John T. Ewing became Chair of the Board. Steve Wright has continued as Acting Chair on this case at Mr. Ewing's request.

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