VERMONT ENVIRONMENTAL **BOARD**
10 V.S.A. **§§ 6001-6092**

Re: Swanton Housing Associates
Application #6F0482-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal and cross-appeal from Corrected Land Use Permit #6F0482 ("Corrected Permit") issued to Swanton Housing Associates ("Swanton Housing")' pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") to construct low-income housing in Swanton, Vermont. Specifically, the appeal and cross-appeal concern whether, pursuant to 10 V.S.A. § 6086(a)(6) ("Criterion 6"), the project authorized by the Corrected Permit will pose an unreasonable burden on the ability of the municipality to provide educational services to students in grades 7- 12.

As explained below, the Environmental Board ("Board") concludes that the project will not pose an unreasonable burden on the ability of the municipality to provide educational services pursuant to Criterion 6. Therefore, no impact fee shall be assessed.

I. BACKGROUND

On September 23, 1994, Swanton Housing filed an application with the District #6 Environmental Commission ("District Commission") for an Act 250 permit in order to construct a low-income housing development in the Town of Swanton.

On October 16, 1996, the District Commission issued Land Use Permit #6F0482 ("Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Order"), authorizing the proposed project subject to conditions. On October 29, 1996, the District Commission issued the Corrected Permit and supporting Findings of Fact, Conclusions of Law, and Order ("Corrected Order") pursuant to Environmental Board Rule ("EBR") 3 1 (A)(4). The changes in the Corrected Permit and Corrected Order are limited to an incorrect statutory citation that occurred in condition #7 of the Permit and finding of fact #22 of the Order.

On November 14, 1996, the Missisquoi Valley Union High School District

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[1] Swanton Limited Partnership, a **Maine** limited partnership, is the record owner of the subject real property and the cross appellant in this matter. Swanton Limited Partnership does business as Swanton Housing Associates. Swanton Housing Associates is the holder of the land use permit that is the subject of this appeal. Realty Resources, a Maine partnership, is a developer working with Swanton Limited Partnership. References herein to any of these entities shall be to "Swanton Housing."

("MVU") filed an appeal with the Board from the Permit and Order. On November 27, 1996, Swanton Housing filed a cross appeal with the Board from the Corrected Permit and Corrected Order (the appeal and cross appeal are sometimes referred to collectively herein as the "Appeal").

On December 16, 1996, Board Chair John T. Ewing convened a prehearing conference in Montpelier, VT with the following organizations and individuals participating: Swanton Housing by Douglas K. Riley, Esq. and Margaret Pond; MVU by David Fraser, Jay Denault, and William Williams. Swanton Housing and MVU (sometimes referred to collectively herein as the "Parties") were provided with copies of a document entitled "Instructions for Preparing Prefiled Testimony in Act 250 Proceedings Before the Vermont Environmental Board." In addition, although Swanton Housing did not object to MVU's participation as a party under Criterion 6 in the Appeal, the Parties discussed whether said status was granted pursuant to EBR 14(A), as stated in the Corrected Order, or pursuant to EBR 14(B) ("Party Status Question").

On December 18, 1996, MVU submitted to the Board a letter dated December 16, 1996 from David Fraser, Business Manager, which, in part, addressed the Party Status Question.

On December 19, 1996, Chair Ewing issued a Prehearing Conference Report and Order ("Prehearing Order"), which is incorporated herein by reference. Among other things, the Prehearing Order set forth a procedural schedule for this matter. In particular, the Parties were required to submit prefiled direct testimony and exhibits on or before January 9, 1997, prefiled rebuttal testimony and exhibits on or before January 30, 1997, and evidentiary objections on or before February 13, 1997. In addition, the Prehearing Order addressed the Party Status Question as follows:

> The District Commission's Decision states that [MVU] has party status under criteria 6 and 9(A) pursuant to EBR 14(A). Swanton Housing did not appeal the District Commission's grant of party status to [MVU]. Therefore, that portion of the Decision granting party status to [MVU] pursuant to EBR 14(A) is final. footnote 1
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> footnote 1 This should not be construed as agreement with the District Commission's Decision regarding the type of party status granted to [MVU]. Additionally, this should not be construed as granting to [MVU] any appeal rights to the Vermont Supreme Court. See 10 V.S.A. § 6089(b).

Prehearing Order at 2. Pursuant to EBR 16, the Prehearing Order was binding on the Parties unless they filed a written objection to it, in whole or in part, on or before January 2, 1997. The Board received no written objection to the Prehearing Order.

On January 9, 1997, MVU filed documents entitled Prefiled Testimony - Jay Denault ("Denault Testimony") and Prefiled Testimony - Rolie Devost ("Devost Testimony #1"). The Denault Testimony (Paras. 3, 4, and 5) and the Devost Testimony #1 (§ IV, Paras. 1-4) concerned the Party Status Question. MVU submitted no prefiled exhibits.

On February 13, 1997, MVU filed documents entitled Prefiled Testimony - Objections of Roland Devost ("Devost Testimony #2"), Pre-Filed Testimony of Richard W. Heaps, and Pre-Filed Rebuttal Testimony of Richard W. Heaps (collectively the "Heaps Testimony"). It submitted no prefiled rebuttal exhibits.

On February 13, 1997, Swanton Housing filed its Objections to Prefiled Testimony and Exhibits ("Evidentiary Objections").

On February 18, 1997, Swanton Housing submitted a letter to the Board addressing the Party Status Question as raised in the Denault Testimony and the Devost Testimony #1.

On February 21, 1997, Swanton Housing filed proposed findings of fact and conclusions of law.

On February 24, 1997, Chair Ewing issued a Chair's Preliminary Ruling ("Chair's Ruling"), which is incorporated herein by reference. Pursuant to EBR 40(E), the Chair's Ruling expanded the scope of the Appeal to include the Party Status Question and advised the Parties that they could present live direct testimony and oral argument regarding the issue at the panel hearing scheduled for March 12, 1997. In addition, the Chair's Ruling addressed the Evidentiary Objections.

On February 24, 1997, MVU submitted to the Board a letter dated February 21, 1997 from David Fraser, Business Manager, addressing (i) Swanton Housing's letter filed February 18, 1997 regarding the party Status Question and (ii) the Evidentiary Objections.

On February 26, 1997, MVU filed proposed findings of fact and conclusions of law.

On February 27, 1997, MVU filed objections to the Chair's Ruling.

On March 3, 1997, the Chair issued a Memorandum to Parties addressing MVU's objections to the Chair's Ruling. The Memorandum indicated that the matter would proceed as previously scheduled and that the full Board would consider MVU's objections when it considered the merits of the appeal.

On March 11, 1997, the Chair convened a second preheating conference by telephone. The following individuals and entities participated: Swanton Housing by Mary G. Kirkpatrick, Esq., Douglas K. Riley, Esq., and Margaret Pond; MVU by David Fraser.

On March 12, 1997, a three-member panel of the Board ("Panel") convened a hearing in Swanton, VT. The following parties participated: Swanton Housing by Mary G. Kirkpatrick, Esq. and Douglas K. Riley, Esq.; MVU by David Fraser. The Panel heard oral argument regarding the Party Status Question and provided the parties with the opportunity to present live direct testimony regarding the issue. It accepted documentary and oral evidence into the record and heard opening and closing statements regarding Criterion 6. After recessing the hearing, the Panel deliberated.

Based upon a thorough review of the record, related argument, and the Parties' proposed findings of fact and conclusions of law, the Panel issued a proposed decision on April 1, 1997 which was sent to the Parties. The Parties were allowed to file written objections and request oral argument before the Board on or before April 16, 1997. No party filed written objections or requested oral argument.

On April 23, 1997, the Board convened a deliberation concerning this matter, including MVU's objections to the Chair's Ruling, and following a review of the proposed decision and the evidence and arguments presented, declared the record complete and adjourned. The matter is now ready for final decision. To the extent that any proposed findings of fact are included within, they are granted, otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUES

1. Whether MVU is entitled to party status in the Appeal pursuant to EBR 14(A) or EBR 14(B).

2. Whether, pursuant to Criterion 6, the project authorized by the Corrected

Permit will cause an unreasonable burden on the ability of the municipality to provide educational services to students in grades 7- 12.

III. FINDINGS OF FACT

1. On September 23, 1994, Swanton Housing filed an application with the District Commission for an Act 250 permit in order to construct a low-income housing development in the Town of Swanton ("Project").

2. The Project includes the construction of a 24 unit, multi-family, affordable housing apartment complex. Of the 24 units, 4 will be one-bedroom apartments, 13 will be two-bedroom apartments, and. 7 will be three-bedroom apartments.

3. On December 8, 1994, the District Commission issued a Hearing Memorandum & Order ("Recess Memorandum") concerning the Project. The Recess Memorandum granted party status to MVU under Criteria 6 and 9(A) pursuant to EBR 14(B)(l)(h) (now EBR 14(B)(2)) because it found that MVU's representative had "materially assisted the [C]ommission by providing testimony, cross examination, and offer[ing] other evidence relevant to the criteria."

4. On October 16, 1996, the District Commission issued the Permit, together with the supporting Order, to Swanton Housing. On October 29, 1996, the District Commission issued the Corrected Permit and supporting Corrected Order pursuant to Environmental Board Rule ("EBR") 3 l(A)(4). The changes in the Corrected Permit and Corrected Order are exclusively limited to an incorrect statutory citation in condition #7 of the Permit and finding of fact #22 of the Order.

5. The Corrected Order lists MVU among the parties who had been granted party status pursuant to 14(A) "at the end of the first hearing and outlined in the Commission Recess Memorandum and order."

6. The Corrected Order found that the Project would have a fiscal impact of $13,220 - $14,880 on the provision of educational services to students in grades 7-12 attending MVU. Because the District Commission found this fiscal impact to be unreasonable, the Corrected Permit, at condition #7, required Swanton Housing to deposit $14,880 into an escrow account to mitigate the impact. The funds were to be held in escrow for two years pending adoption of "an impact fee policy" by the Town of Swanton pursuant to Vermont Statutes Annotated, title 24, chapter 13 1. The funds would be released if the Town failed to adopt "an impact fee policy" within two years after the Corrected Permit was issued.

7. The Town of Swanton did not appeal from the Corrected Permit nor has it appeared in this Appeal. David Fraser, the Business Manager of MVU who has represented MVU in these proceedings, is not employed by the Town.

8. The Town of Swanton has not adopted a "capital budget and program" which is required by Vermont Statutes Annotated, title 24, chapter 13 1 as a prerequisite to assessing the beneficiaries of new development with impact fees for the costs of capital improvements. At both the March 1996 and March 1997 Town Meetings, the voters of Swanton declined to adopt a capital plan.

9. Impact fees may only be assessed for the costs of capital improvements, not for operating expenses.

10. The Town of Swanton has never assessed an impact fee on a housing project or on a developer of single family housing.

11. There is no moratorium on the development of single family housing in the Town of Swanton. There is no moratorium in Franklin or Highgate, the other towns comprising MVU.

12. There is a critical need for low income housing for people already living in Franklin County.

13. The median household incomes in Franklin, Highgate, and Swanton are comparable to the county average but, on average, the three towns have a significantly lower tax burden for schools than the average for Franklin County.

14. In 1994 there were approximately 2,187 households in Swanton.

15. Student enrollment at MVU since 1983 is as follows:

Academic Year	Swanton Students at MVU[2] (% of total MVU students)	Total Students at MVU
1983184	----	922
1984/85	----	934
1985/86	----	965
1986/87	560 (56.11%)	998
1987188	----	974
1988189	----	1008
1989190	----	1043
199019 1	----	1082
1991/92	----	1079
1992193	567 (51.22%)	1107
1993194	540 (49.05%)	1101
1994195	569 (50.18%)	1134
1995196	----	10573
1996197	586 (54.30%)	1079

16. Approximately 56 students enrolled at MVU reside in towns outside the district and pay tuition to the school. A majority of the tuition students reside in Alburg. Other tuition students reside in Sheldon, Enosburg Falls, and other small communities in Franklin and Grand Isle Counties. MVU and Alburg have entered into a contract for the provision of educational services to the Alburg students until the year 2000. No evidence was provided regarding the terms of the contract. MVU has not entered into a long-term contract with any other town.

17. A key factor in determining fiscal impact under Criterion 6 is the number of school-aged children who will live in the Project and attend MVU.

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[2] The Parties did not present evidence regarding Swanton enrollments for every year.

[3] The Parties did not indicate whether the total enrollment figures provided for the 1995/96 and 1996/97 academic years included the approximately 56 tuition students from towns other than Franklin, Highgate, and Swanton. If they have not been included, then the total enrollment figures for 1995/96 and 1996/97 are approximately 1113 and 113 5 respectively.

18. "Population multipliers" can be used to estimate the average number of school children who will reside in each apartment in the Project. Multipliers vary based upon the population surveyed to create them. A multiplier is more accurate if it is based upon housing of a type similar to that of the Project. Below are several estimates:

(i) In 1994, the average Swanson household housed 0.5409 school-aged children. When applied to the Project, this average Swanton multiplier results in an estimate of 13 school-aged children (24 units x 0.5409 = 12.9816).

(ii) In 1994, a survey conducted of 14 housing projects in Vermont, New Hampshire, and Maine similar to the Project yielded an average multiplier of 0.6747. When applied to the Project, this average housing project multiplier results in an estimate of 16 school-aged children (24 units x 0.6747 = 16.1928).

(iii) The results of the survey referenced in (ii) above resulted in a range of multipliers for the Vermont housing projects surveyed of 0.1765 to 1.7500. When applied to the Project, this range of Vermont housing project multipliers results in an estimate of **between 4 and 42** school-aged children (24 units x 0.1765 = 4.236; 24 units x 1.7500 = 42).

(iv) Swanton Housing has developed a 2 1 -unit, low-income apartment project in Bradford, Vermont that is similar to the Project. The Bradford Village project houses 14 school-aged children, yielding a multiplier of 0.6666. When applied to the project, the Bradford Village multiplier results in an estimate of 16 school-aged children (24 units x 0.6666 = 15.9984).

(v) The ***Development Impact Assessment Handbook*** indicates that the ***average*** two-bedroom and three-bedroom townhouses in the northeast house **0.1393** and **0.4151** school-aged children respectively. When applied to the Project, this average housing project multiplier results in an estimate of 6 school-aged children (15 units x 0.1393 = 2.0895; 8 units x 0.4151 = 3.7359; 2.0895 + 3.7359 = 5.8254).

(vi) MVU estimates that the Project will house **between 16 and 24** school-aged children.

19. **The** multipliers calculated above range from 0.1765 to 1.7500, resulting in an estimated 4 to 42 school-aged children who may reside in the Project. Four of the six estimates are within the 13-24 school-aged children range, with three of those four specifically calculating that 16 children is a reasonable estimate.

20. In order to obtain a conservative result, it is reasonable to rely upon a multiplier of 0.6747 for this Project for an estimated 16 school-aged residents.

21. Of the estimated 16 school-aged children residing in the Project, between 50% and 60% will be in grades K-6 and between 40% and 50% will be in grades 7-12. Relying on the most conservative projection, it is reasonable to estimate that 50% -- or 8 -- of the children living in the Project will attend MVU.

22. Some of the children living in the Project will likely move from other housing in Swanton. Some non-Swanton residents will likely move into the vacated housing. Swanton Housing provided formulae by which it is possible to estimate the net new students to MVU resulting from construction of the Project. In order to arrive at the most conservative estimate, however, the Board will assume that 100% of the school-aged children residing in the Project will be new Swanton residents and, therefore, new students to the school system.

23. Swanton pays its share of MVU's operating and capital costs based on the number of Swanton students attending the school.

24. MVU is currently overcrowded and does not conform to state standards regarding square footage and other requirements.

25. On March 5, 1996, the voters of Franklin, Highgate, and Swanton approved a bond vote in the amount of $2,508,870 for the renovation and expansion of MVU ("Expansion").

26. The tax impact on individuals in Franklin, Highgate, and Swanton for a **20** year bond was set forth in the following information sent to the voters prior to March 5, **1996. The** information did not indicate the assumptions used in calculating estimated tax rates.

TOTAL PROPOSED PROJECT COST.	$3,584,100
PROJECTED STATE AID (30%) (IF BOND APPROVED BEFORE MARCH 15TH, 1996)	- $1,075,230
ESTIMATED BOND AMOUNT	$2,508,870

Year	Tax Rate Impact (Cents)			Tax Impact ($80,000 Property)		
	Franklin	Highgate	Swanton	Franklin	Highgate	Swanton
1	1.5	2.0	1.9	$12	$16	$15
2	2.6	3.4	3.2	$21	$27	$26
3	1.7	2.2	2.1	$13	$18	$17
4	1.6	2.1	2.0	$13	$17	$16
5	1.5	2.0	1.8	$12	$16	$15
10	1.0	1.3	1.2	$8	$10	$10
15	0.5	0.6	0.6	$4	$5	$5
20	-0.1	-0.1	-0.1	($1)	($1)	($1)

27. The Expansion contemplates the addition of 20,000 square feet to the existing structure. Such addition is necessary, in part, to replace square footage that will be lost when the existing "open classroom" configuration is converted to more traditional classroom space.

28. The Expansion will be suffkient to meet the needs of a student population of 1,100. Thus, MVU is not undertaking the Expansion in order to meet projected future growth in student population, but rather to comply with State standards concerning its current approximate student population.

29. The contract for the Expansion has been awarded.

30. Swanton students currently comprise approximately 54.3% of the total MVU student body (586 / 1079 = 5430). During the years in which the evidence presented makes it possible to calculate a percentage, Swanton students have comprised between 49.05% and 56.11% of the total student body. Given a total capacity of 1,100 students upon completion of the Expansion, the addition of 8-12 students from the Project yields 54% - 54.36% (586 + 8 / 1100 = .5400; 586 + 12 / 1100 = .5436). Because the ratio has remained relatively constant, the Board finds that it is reasonable to assume that,

upon completion of the Project and the Expansion, Swanton students will comprise 54.3% of the MVU student body.

31. Swanton is responsible for $1,362,3 16.40 of the bond ($2,508,870 x 0.5430).[4]

32. In FY 95, 41% of the Swanton school budget was funded by State aid to education and 59% was funded by local tax revenues. In FY 96, the percentages are 42.8% and 57.2% respectively. In order to arrive at a conservative estimate, the Board will assume for this decision that the percentages will remain constant at 41% state aid funding and 59% local tax revenues. Therefore, the Board finds that the portion of the bond that will be funded by Swanton tax revenues is $803,766.67 ($1,362,316.40 x 0.59).

33. To determine the proportion of the cost of Expansion attributable to the Project, the cost of the addition must be reduced by the percentage of the addition's square footage resulting from the current need to meet State standards for public school approval. The Board would use this percentage to reduce the total capital cost of the Expansion to an amount that could be attributed to projected new students. There is no evidence in the record on which to base a determination of the square footage currently needed to meet State standards. Indeed, it would appear from the evidence presented that 100% of the Expansion is necessary in order to meet State standards and 0% is attributable directly to Project.

34. In the absence of a reduction for improvements to meet State standards, the portion of the Expansion's cost potentially attributable to the Project should be calculated by multiplying the actual cost to Swanton by the percentage obtained by dividing the number of students the Project will contribute by the total projected number of new students who will use the planned addition. Because the Expansion is based upon current needs rather than projected future increase in student population, this percentage cannot be calculated.

35. MVU estimates that the addition of new students from the Project will have a fiscal impact on the Town of Swanton of $32,993 to $52,597. MVU estimates the impact by multiplying the capital cost per student (which it estimates to be $4,916 after State aid) by the number of school-aged children attending MW (8-12) to obtain a

[4] The Parties did not provide evidence as to the amount of interest that will be paid during the 20-year life of the bond so the Board has not included interest payments in calculations involving bonded debt.

portion of the cost of the Expansion attributable to the Project ($39,328 - $58,992), less taxes paid ($934), less future taxes ($5,461).

36. MVU asserts that Swanton Housing should be assessed an impact fee of $50,000.

37. Swanton Housing contends that it is inappropriate to assess the Project an impact fee based on the cost of the Expansion because the Expansion will meet only current needs and does not provide for projected future growth. Swanton Housing anticipates that MVU will need to add an additional 20,000 to 25,000 square feet during the 2005/06 academic year ("Second Expansion"). Swanton Housing calculates the cost of the Second Expansion attributable to the Project as follows:

(i) A 20,000 to 25,000 square foot addition will accommodate 200 new students. The cost of 20,000 square feet in 1996 is estimated to be between $1,932,000 and $2,100,000. The present value of construction costs in academic year 2005106 is estimated to be between $2,352,939 and $2,557,5 12. After deducting projected State aid of 30%, the cost to the residents of Franklin, Highgate, and Swanton would be $1,647,057 to $1,790,258.

(ii) Based on a cohort ratio, which Swanton Housing explains in detail, only 34% of the 20,000 to 25,000 square feet would be used by new development. The other 66% would come from a natural increase in population attributable to existing development. Therefore, $555,999 to $608,688 of the cost of the Second Expansion would be attributable to new development.

(iii) Swanton Housing calculates that there are on average 0.54 students per dwelling unit in Swanton and that only half of those students attend MVU. It estimates that it would take 10 years for Franklin, Highgate, and Swanton to grow suffkiently to justify construction of the Second Expansion. During those 10 years, Swanton Housing estimates that 5 10 new dwelling units would be constructed. The cost of the Second Expansion attributable to new development would be between $1,098 and 1,194 per dwelling unit ($$559,999 / 510; $608,688 / 510).

(iv) Adjustments made to reflect the present value of future payments that new development would make on bond debt reduces the cost per dwelling unit to between $701 and $777.

(v) When this cost is further discounted by 20% to adjust for uncertainties introduced when costs are inflated, Swanton Housing concludes that the estimated cost of the Second Expansion attributable to new development, and therefore the proper amount of any impact fee, would be $560 to $620 per dwelling unit.

Therefore, using Swanton Housing's calculations, the Project's fiscal impact on Swanton's ability to provide educational services would be $13,440 to $14,880 ($560 x 24 units; $620 x 24 units).

38. For the 1996197 academic year, Swanton's portion of MVU's operating budget is $3,065,000 before it is reduced by State aid. After State aid funding is deducted, the remaining $1,753,4 15 is raised by local property taxes.

39. By letter dated June 6, 1994, then Superintendent Douglas E. Harris informed Swanton Housing that "the anticipated building project at MVU could accommodate some growth in [grades] 7-12. Thus the impact of development would be short-term assuming that the communities carry forward some form of construction and renovation."

40. The Project will be financed by the USDA Rural Economic and Community Development Service (RECD) under the Section 5 15 Rural Rental Housing program.

41. The Section 5 15 program will help Swanton Housing to develop rental housing for households with low to moderate incomes by providing a long term, low interest loan for construction. It also supplies an operating subsidy to ensure that no more than 30% of any tenant's household income is spent on rent. The Section 5 15 program, when combined with the Low-Income Housing Tax Credit, ensure that the Project will provide housing to households with incomes no higher than 60% of the area's median income.

42. Although RECD regulations do not explicitly prohibit phasing of the projects RECD funds, phasing typically renders a project economically unfeasible.

43. The Project would be economically unfeasible if it were phased.

IV. PRELIMINARY ISSUES

A. Jurisdiction to Expand Issues on Appeal

[1] The Chair's Ruling, issued February 24, 1997, expanded the scope of this Appeal pursuant to EBR 40(E) to include the Party Status Question as an issue to be considered by the Board. MVU objects to this aspect of the Chair's Ruling.

EBR 40(E) limits the issues on appeal to those raised by the appellant and cross-appellant, "unless substantial inequity or injustice would result from such limitation." Therefore, in certain circumstances, the Board may expand an appellate proceeding to include issues not raised by the parties in their notices of appeal.

Neither MVU nor Swanton Housing raised the Party Status Question as an issue on appeal. In addition, neither Party filed a written objection to the Prehearing Order on or before January 2, 1997, the final date for filing objections. Nevertheless, MVU repeatedly raised the Party Status Question in its written submissions to the Board. See, e.g., Letter from David Fraser dated December 16, 1996 and filed with the Board on December 18, 1996; Denault Testimony (Paras. 3, 4, and 5) and Devost Testimony #1 (§ IV, Paras. 1-4), both filed January 9, 1997.

Notwithstanding MVU's failure to file its objections to the Prehearing Order in a timely manner and its decision to raise them in the context of its prefiled direct testimony, the issue is one which does not appear to be resolved in the minds of the Parties. The Board finds that there existed the potential for "substantial inequity or injustice" if the Parties were not provided the opportunity to address the Party Status Question more fully. EBR 40(E). Therefore, it was appropriate for the Chair's Ruling to expand the scope of appeal to include the Party Status Question and to permit the Parties to present live testimony and oral argument on this issue during the March 12, 1997 hearing.

In its objection to the Chair's Ruling, MVU contends that it is prejudiced by the addition of the Party Status Question for two reasons. First, it argues that the hearing day schedule was drawn around the existence of only one issue on appeal. The Board finds that neither party is prejudiced by the addition of the Party Status Question as an issue on appeal. Many proceedings before the Board -- including those with one issue on appeal and those with several issues -- proceed according to a schedule identical to the one established for the instant Appeal. The Chair granted the Parties additional time in which to make opening statements at the panel hearing precisely so that they would have sufficient opportunity to address the Party Status Question. In addition, he provided the Parties the opportunity to present live direct testimony on this new issue. In light of the

fact that MVU raised this issue in the context of its prefiled direct testimony, it is disingenuous for it now to argue that it is prejudiced by the Board's decision to allow it to address the issue more fully through live testimony and oral argument at the hearing.

Second, MVU argues that it is prejudiced because the Chair "accepted a letter of February 18, 1997 from Swanton Housing addressing the Party Status Question as a formal objection and challenge to [MVU's] Party Status, yet ignores and dismisses the Appellant's December 16, 1996 letter addressing the Party Status Question." Letter from David Fraser dated February 26, 1997 at 1. The Board has not ignored MVU's December 16, 1996 letter. In fact, the Chair considered the contents of that letter when drafting the Prehearing Order. The Board cannot consider the December 16, 1996 letter to be an objection to the Prehearing Order because the letter is dated three days prior to the Preheating Order and was received one day before the Preheating Order was issued. In fact, the first time that MVU filed something that could reasonably be construed as an objection to the Prehearing Order, it was in the form of prefiled direct testimony. This testimony was submitted seven days after the deadline for filing objections. Swanton Housing's letter dated February 18, 1997 concerning the Party Status Question responded to the issue *as raised by MVU in its prefiled testimony.* Again, it is disingenuous for MVU to argue that it is prejudiced because the Board has allowed it additional opportunity to address an issue that it raised itself.

MVU also appears to **argue** that it is prejudiced by reopening the issue of party status because, if the Board ultimately determines that it is a party under Rule 14(B), then it will not enjoy the appeal rights to the Vermont Supreme Court it would have as a Rule 14(A) party. Appeal rights to the Vermont Supreme Court are not governed by EBR 14, however; they are determined by statute. 10 V.S.A. §§ 6089(b), 6085(c)(l), and 6084(a)[5]. In addition, the Board is confident that even if Rule 14(A) party status could, on it own, grant a right of appeal to the Vermont Supreme Court, the Court would not allow the appeal if it determined that 14(A) status had been improperly conferred. Therefore the Board concludes that MVU will not be prejudiced by including the Party

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[5] A Board decision may be appealed to the Vermont Supreme Court pursuant to 10 V.S.A. § 6085(c). Id. $6089(b). "[O]nly the applicant, the landowner. .., a state agency, the regional and municipal planning commissions and the municipalities required to receive notice" can be parties to a Supreme Court appeal. Id. § 6085(c)(1). In pertinent part, $6084(a) provides that notice must be provided to "the municipality in which the land is located, the municipal and regional planning commissions for the municipality in which the land is located; [and] any adjacent Vermont municipality and municipal and regional planning commission if the land is located on a boundary."

Status Question as an issue in this Appeal.

For the reasons stated above, the Board concludes that the Party Status Question was properly included as an issue in this Appeal pursuant to EBR 40(E).

B. Evidentiary Rulings

The Board and its Chair have the authority to impose reasonable requirements on the parties, including the submission of prefiled testimony and exhibits, in order to ensure that the proceedings will be conducted in a judicious, fair, and expeditious manner. EBR 17(E) and 18(C). The Board takes seriously its obligation to address matters before it efficiently and thoroughly. In cases where the issues are technically complex or numerous, the Board often requires the submission of prefiled testimony and exhibits. Not only does this procedure reduce the amount of hearing time required for the presentation of direct testimony, but also it allows the parties and the Board to prepare their cross-examination and questions for the witnesses. The submission of prefiled testimony and exhibits is useful in the pending Appeal. In addition, it assists the entire Act 250 process by reducing delay in hearing other matters before it.

The Chair has the power to "rule on questions of evidence and offers of proof." EBR 18(C). In addition, the Board, or its Chair, has the discretion to waive requirements of the Preheating Order, including deadlines, "upon a showing of cause, tiling a timely objection, or if fairness so requires." EBR 16(C) and 18(C); Prehearing Order at 8. Nevertheless, if parties were free to ignore the Board's Orders, as MVU has done in this case, it would thwart the Board's efforts to expedite the appeal process and to ensure that all parties are provided an equal and adequate opportunity to prepare their cross-examination.

[2] The Prehearing Order was clear as to the deadlines imposed and the consequence of failure to follow those deadlines. It also clearly stated that exhibits filed in the District Commission proceeding were not automatically a part of the record on appeal, but must be submitted to the Board. MVU filed the Heaps Testimony not a day or two after the stated deadlines, but weeks beyond them. The Devost Testimony #2 was filed two weeks after the deadline for rebuttal testimony. MVU failed to submit any exhibits or even a list of exhibits in support of its position. Furthermore, MVU neither submitted a timely objection to the Prehearing Order nor contacted the Board in order to request the extension of deadlines before those deadlines had passed. In contrast, Swanton Housing complied with deadlines regarding the submission of testimony and exhibits. For these reasons, and as set forth more fully in the Chair's Ruling, it would be manifestly unfair to allow MVU to submit the Heaps Testimony, the Devost Testimony #2, and any exhibits

into evidence in this Appeal.

The Board is not required to extend deadlines. Rather, it has the discretion to do so "upon a showing of cause, filing a timely objection, or if fairness so requires." EBR 16(C). The Board concludes that the evidentiary rulings made in the Chair's Preliminary Ruling issued February 24, 1997 are reasonable. The Board confirms and adopts the evidentiary rulings contained therein in their entirety.

V. CONCLUSIONS OF LAW

When a party appeals from a district commission determination, the Board provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. §6007(c). Board rules provide for the de novo review of the district commission's conclusions of law and permit conditions as well. EBR 40(A). Thus, the Board cannot rely upon the facts stated or conclusions drawn by the District Commission, but rather regards the Corrected Permit and its supporting Corrected Order as but one piece of evidence offered by the Parties.

A. Party Status

Parties to Act 250 proceedings include "those who have received notice." 10 V.S.A. § 6085(c). Notice must be provided to

> the owner of the land if the applicant is not the owner; the municipality in which the land is located; the municipal and regional planning commissions for the municipality in which the land is located; [and] any adjacent Vermont municipality and municipal and regional planning 'commission if the land is located on a boundary.

10 V.S.A. § 6084(a). Similarly, EBR 14(A) states that, in addition to certain others, the following entities are entitled to party status under EBR 14(A):

> (3) The *municipality in which the project site is located,* and the *municipal and regional planning commissions for that municipality;* **and** if the project site is located on a boundary, any Vermont municipality adjacent to that border and the municipal and regional planning commissions for that municipality; and the solid waste management district in which the land is located, if the development or subdivision constitutes a facility pursuant to §6602(10) of Title 10.

EBR 14(A) (emphasis supplied).

[3] The Environmental Board has specifically held that a school district is not a "municipality" for purposes of 10 V.S.A. §§ 6084 and 6085. Re: Realty Resources Chartered and Bradford Housinp Associates, #3R0678-EB, Memorandum of Decision at 9-l 0 (Feb. 17, 1994). Furthermore, it is impossible to interpret EBR 14(A) as including school districts within its definition of "municipality." Even if the first clause of the Rule could be read expansively so that a school district were considered a "municipality in which the project is located," such an interpretation is negated by the following clause: "the municipal and regional planning commissions for *that municipality*."

EBR 14(B) allows other individuals or entities to petition for permission to participate in Act 250 proceedings where the petitioner demonstrates that the proposed project "may affect the petitioner's interest under any of the provisions of § 6086(a)" or that the petitioner's participation in the proceeding will "materially assist" the Board or District Commission "by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant" to the Act 250 criteria. EBR 14(B)(1) and (2).

[4] MVU has provided material assistance to the Board regarding Criterion 6 by providing testimony of Jay Denault and Rolie Devost, by cross-examining Swanton Housing's witnesses, and by offering oral argument. Furthermore, that portion of the Corrected Order that confers Rule 14(A) party status on MVU states that party status was granted "at the end of the first hearing and outlined in the Commission Recess Memorandum and order." Corrected Order at 2. The Recess Memorandum states that MVU was granted party status at the District Commission proceedings pursuant to Rule 14(B) and refers to the material assistance MVU provided during the permit process. The Board finds that the conferral of 14(A) status in the Corrected Order was a scrivener's error.

The Board concludes that MVU is a party to this Appeal pursuant to EBR 14(B)(2).

B. Criterion 6

Act 250 requires that, before issuing a land use permit, the Board or district commission must find that the proposed project "[w]ill not cause an unreasonable burden on the ability of a municipality to provide educational services." 10 V.S.A. § 6086(a)(6).

[5] The burden of proof is on the opponents under Criterion 6. 10 V.S.A. § 6088(b) The applicant, however, must first provide sufficient information for the Board to make

affirmative findings. E.g., Re: Fair Haven Housing Limited Partnership, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 16, 1996); Re: St. Albans Group and Wal*Mart Stores. Inc., #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 50 (June 27, 1995). A permit may not be denied under Criterion 6, but the Board may impose conditions to alleviate any burden created by the proposed project. 10 V.S.A. § 6087(b); Re: Horizon Development Corporation, #4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Aug. 2 1, 1992) (finding that proposed subdivision will not create an unreasonable burden if residential construction is completed in phases).

[6] If the applicant provides sufficient evidence to allow the Board to make a positive finding, the opponents must prove (i) that the project will impose a burden on the town; (ii) that this burden is unreasonable; and (iii) that an impact fee is an appropriate remedy for the burden. E.g., Fair Haven Housing at 14; Re: Clarence and Norma Hurteau, #6F0369-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Apr. 24, 1989; as corrected May 9, 1989) (town failed to meet burden of proof as to (i), (ii), and (iii) above).

1. Provision of Sufficient Evidence by Swanton Housing

Looking solely at the evidence provided by Swanton Housing, the Board concludes that the applicant has provided sufficient information on which to make an affirmative finding that the Project will not create an unreasonable burden on Swanton's ability to provide educational services to students in grades 7- 12.[6] Swanton Housing has submitted information from which it is reasonable to conclude that there will be 8 children from the Project who will attend MVU. The Expansion will not meet the needs of projected future growth in student population, but rather will bring MVU into compliance with State standards regarding its current student population. It is therefore impossible to determine that a portion of the Expansion is directly attributable to the Project and it is possible to conclude that the Project will have no impact on the Expansion. An impact fee cannot be assessed unless the Expansion is undertaken, at least in part, to benefit the Project students. 24 V.S.A. §§ 5200-5206.

Swanton Housing has also provided evidence regarding the need for and costs of a Second Expansion in academic year 2005/06. From Swanton Housing's calculations, it is possible to determine that the Project's fiscal impact on Swanton's ability to provide

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[6] The Board does not necessarily agree with Swanton Housing regarding all of the conclusions that can be drawn from the evidence it has provided.

educational services is $13,440 to $14,880. A burden of $14,880 is 0.49% of Swanton's portion of the MVU operating budget ($14,880 / $3,065,000 = 0.0049). When State aid is deducted, the burden is 0.85% of that portion of MVU's operating budget to be raised by Swanton property taxes ($14,880 / $1,753,415 = 0.0085). In addition, the estimated 8 MVU students residing in the Project are 1.37% of the total number of Swanton students currently attending MVU (8 / 586 = 0.0137) and 0.74% of the total MVU population (8 / 1079 = 0.0074). In Hurteau, the Board found that the burden resulting from the Laura's Woods development in Georgia was reasonable where it represented approximately 4% of the town's school budget and where the increase in students was 8%. Although the Hurteau conclusions were based in part on the fact that the development would be phased over 10 years, the Board concludes that the percentages listed above are sufficiently small for it to determine that the Project's fiscal impact is reasonable.

The Board is able to make affirmative findings on the basis of the information submitted by Swanton Housing that the Project will not place an unreasonable burden on Swanton to provide educational services. Accordingly, the burden shifts to MVU with regard to the three issues cited above -- the burden on Swanton, the unreasonableness of this burden, and the appropriateness of fee assessment.

2. Burden / Impact on Swanton

[7] First, the Board must consider whether the Project will impose a burden on Swanton. The burden on the town can be ascertained by calculating what would be an appropriate impact fee. Pair Haven at 14; Hurteau at 9.

> In assessing the burden or impact on [the town,] the central factors to consider are: (1) whether new facilities are necessary because of a proposed project; (2) if so, what the costs of these new facilities will be; and (3) whether credits should be given to the proposed project because of other revenues the proposed project will generate. In this regard, it is important for the party with the burden of proof to provide a formula for assessing these factors.

Hurteau at 10.

The Board concludes that MVU has not met its burden of providing evidence that the Project would cause a burden on Swanton's ability to provide educational services.

a. Need for Additional Facilities

To adequately determine whether new facilities are needed because of the **Project,** the Board needs to know the current conditions at MVU, the estimated number of MVU students who will reside in the Project, whether improvements are needed to meet public school approval standards, and the aggregate number of MVU students the existing homes in Swanton will produce in the future. Id. at 10.

MVU has provided some but not all of the evidence the Board considers relevant. More importantly, based on the evidence that MVU *has* provided, the Board concludes that new facilities are not needed because of the Project. MVU has provided evidence that it is currently overcrowded and is out of compliance with State standards. It has provided evidence that the Expansion is necessary to bring the building into compliance for its current population of approximately 1,100 students. It did not plan the Expansion with the ability to accommodate future projected growth in the student population.

MVU provided testimony that each year it permits approximately 56 students from communities other than Franklin, Highgate, and Swanton to attend the school by paying tuition. Only one town, Alburg, has entered into a multi-year contract with MVU. The Alburg contract terminates in the year 2000. MVU provided no testimony or other evidence indicating that this contract is binding regardless of an increase in student population within the district that results in overcrowding the facility. Because there are no contracts with communities other than Alburg, the Board assumes that these tuition students can be replaced by students from within the district at MVU's discretion. MVU also provided testimony that the 1996/97 enrollment is 1079, although it is not clear whether this figure includes the 56 tuition students.. If the 1079 students include the 56 tuition students, then there are at least 77 spaces available to accommodate additional students from within the district; if the figure does not include the tuition students, then there are at least 21 spaces available. Because the Board has found that it is reasonable to estimate that 8 MVU students will reside in the Project, there is sufficient room to accommodate these students, Even if the Board were to accept MVU's highest estimate of Project students attending MVU (12), there is still sufficient room to accommodate them.

MVU presented no evidence regarding projected population growth (of which it might have argued the Project students were a part) and the related need for a second phase of school expansion in the future.

The Board concludes that MVU has not met its burden of providing evidence that the Project creates a need for additional facilities.

b. Cost of Additional Facilities

If the Board had determined that new facilities were ***necessary*** because of the Project, MVU would have had the burden to provide evidence concerning the cost of the facilities. Again, while MVU provided some evidence, it did not provide all of the information necessary for the Board to make a determination.

For example, MVU provided an estimate ($4,916) of the capital cost per student of the Expansion after deducting state aid. It provided no evidence, however, regarding the construction costs of a second phase of expansion to accommodate projected future ***growth, the*** percentage of any facility expansion (whether the Expansion or a potential second phase) necessary to accommodate students from the Project, and &percentage of Expansion costs currently necessary to meet State public school approval standards.

Thus, even if MVU had provided enough evidence for the Board to determine a new facility was necessary (V.B.2.a. above), MVU has not met its burden of providing evidence as to cost of additional facilities.

C. **Credits Based on Other Revenue from the Project**

To aid the Board in a fair assessment of fiscal impact, MVU must provide sufficient information concerning what credits should be given based upon other sources of revenue from the Project. MVU provided the Board with information concerning the projected property tax revenues from the Project that can be applied against capital costs. Without information regarding the need for and cost of additional facilities (V.B.2.a. and V.B.2.b. above), however, this tax information by itself is insufficient for the Board to determine whether the Project will create a fiscal impact on Swanton's ability to provide educational services.

3. **Reasonableness of Burden / Impact**

[8] Although the Board has concluded that the Project does not impose a burden on Swanton's ability to provide educational services, the Board will consider the second step of the Criterion 6 analysis -- whether the impact is reasonable. In order to make this analysis, the Board must consider whether the burden on the town is unreasonable in light of(i) the ability of the community as a whole to absorb the burden, (ii) other burdens from developments which have been accepted or not accepted as reasonable by the town or other communities, and (iii) other measures which may be taken, or factors which may exist, to mitigate the burden. Hurteau at 12.

The Board concludes that MVU has not met its burden of providing evidence concerning whether the fiscal impact of the Project is unreasonable.

a. Ability of Community to Absorb Burden

MVU alleges that the Project has a fiscal impact of $32,993 to $52,597. It also asserts that the Project should be assessed an impact fee of $50,000. Because "assessing the burden on [Swanton] can be done through the same calculation as would be made to assess the impact fee," Hurteau at 9, the Board will assume that MVU believes the fiscal impact of the Project is $50,000. Even if, for the purpose of these calculations, the Board accepts that the Project's impact on Swanton would be $50,000, it still cannot conclude that Swanton is unable to absorb this burden.

Swanton Housing provided uncontested evidence that, although the median Swanton household income is comparable to the Franklin County average, the Town has a significantly lower tax burden than the average for the County. The Board found that in 1994 there were approximately 2,187 households in Swanton. A $50,000 impact would result in an average, one time cost for each Swanton household of approximately $22.86 ($50,000 / 2,187) compared to a cost of $2,083.33 per Project household if the impact was borne solely by the Project ($50,000 / 24 units). The average cost for each Swanton household would decrease if additional housing units have been developed since 1994. Furthermore, although it is not clear from MVU's evidence, it appears that the $50,000 impact is related to that portion of the Expansion which MVU believes should be borne by the Project. Assuming that there is such a relationship, the annual tax impact (on property valued at $80,000) of Swanton's portion of the entire bonded debt for the Expansion is estimated to be between $15 and $17 during four of the first five years, peaking at $26 in year two. The tax burden decreases from year six forward. "The Board does not believe that impact fees should only be assessed if a town cannot use the property tax to finance a project. [Nevertheless, the] Board does believe that, to determine whether a burden is unreasonable, it is important to see what the burden might be on the individual taxpayer." Id. at 12.

Again, for the purpose of these calculations, if the Board accepts that the impact on Swanton were $50,000, then the fiscal impact is 1.63% of Swanton's share of MVU's operating budget ($50,000 / $3,065,000 = 0.0163). When State aid is deducted, the burden is 2.85% of that portion of MVU's operating budget to be raised by Swanton property taxes ($50,000 / $1,753,415 = 0.0285). In addition, MVU estimated that there would be between 8 and 12 MVU students residing in the Project. Even if the Board accepted the high end of this estimate, 12 students are 2.05% of the total number of Swanton students currently attending MVU (12 / 586 = 0.0205) and 1.11% of the total

MVU population (12 / 1079 = 0.0111). In Hurteau, the Board found that the burden resulting from the Laura's Woods development in Georgia was reasonable where it represented approximately 4% of the town's school budget and where the increase in students was 8%. Although the Hurteau conclusions were based in part on the fact that the development would be phased over 10 years, the Board concludes that MVU has provided no evidence to indicate that the community is unable to absorb a burden that is 1.63% (before State aid) and 2.85% (after State aid) of Swanton's school budget, 2.05% of Swanton's MVU population, and 1 .1 1% of the total MVU population.

MVU has not met its burden to prove that the community as a whole is unable to absorb MVU's estimate of the fiscal impact created by the Project.

b. Burdens from Other Developments

In order to assess the reasonableness of a project's fiscal impact under Criterion 6, the Board must also determine whether or not fiscal burdens from other developments have been accepted as reasonable. Hurteau at 12. MVU has provided no evidence regarding the fiscal impact of developments in Swanton or in other communities. Swanton has never assessed an impact fee on a housing project or on a developer of single family housing. In addition, at both the March 1996 and March 1997 Town Meetings, the voters of Swanton declined to adopt a capital plan so it has *no* authority to assess an impact fee.

MVU has not met its burden to provide evidence from which the Board can make this determination.

c. Other Measures to Mitigate the Burden

Finally, in order to assess the reasonableness of a project's fiscal impact under Criterion 6, the Board must also determine whether other measures might be taken, or whether other factors may exist, that mitigate the impact. Hurteau at 12. MVU has alleged that the Project creates an unreasonable fiscal burden that can be mitigated if the development were phased. The Project cannot be phased because it would be economically unfeasible according to RECD regulations.

MVU has not met its burden to provide evidence concerning other measures that might be taken to mitigate any alleged burden.

4. Appropriateness of Impact Fee Assessment

[9] Finally, the Board must determine if an impact fee is an appropriate remedy. "An impact fee must be fair and 'spent within a reasonable time and only to remedy the impacts for which they (sic) are levied."' Fair Haven Housing at 15 (quotinp Hurteau at 12).

Although a permit may not be denied under Criterion 6, "reasonable conditions and requirements ... may be attached to alleviate the burdens created." 10 V.S.A. § 6087(b). Section 6087(b) does not address which party bears the burden with respect to fashioning **a** remedy. The Board has held, however, that MVU, "as the party affirmatively seeking such fees, must bear the burden of coming forward with adequate information for fair fee assessment." Hurteau at 13.

MVU has failed to come forward with any evidence that its proposed impact fee of $50,000 is fair or is being assessed "only to remedy the impacts for which [it would be] levied." An impact-fee cannot be assessed unless the capital improvements are undertaken, at least in part, to benefit the residents of new development. 24 V.S.A. §§ 5200-5206. MVU has provided evidence that the Expansion is necessary to bring the building into compliance with State standards. It has presented evidence that the Expansion is purely to accommodate the needs of its current population of approximately 1,100 students and not to plan for projected future growth. Therefore, even if Swanton had passed a capital plan, an impact fee cannot be levied in connection with the Expansion. In addition, because MVU has presented no information regarding a possible second phase of construction that would accommodate future growth in the grade 7-12 population, an impact fee cannot be levied in connection with this potential school construction.

The Board concludes that MVU has failed to come forward with information necessary to make a fair impact fee assessment. MVU has not met its burden of providing evidence that the Project would cause an unreasonable burden on the municipality's ability to provide educational services.

VI. ORDER

1. Land Use Permit #6F0482-EB is hereby issued.

2. Jurisdiction is hereby returned to the District #6 Environmental Commission.

Dated at Montpelier, Vermont this 24th day of April, 1997.

ENVIRONMENTAL BOARD

John T. Ewing, Chair
Arthur Gibb
Marcy Harding
Rebecca M. Nawrath
Robert H. Opel
Robert Page, M.D.
Steve E. Wright

* Board Members Samuel Lloyd and William Martinez did not participate in the deliberations concerning this matter.

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