

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

Re: James E. Hand and John R. Hand, d/b/a Hand Motors
and East Dorset Partnership, #8B0444-6-EB (Revised)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. SUMMARY

This decision pertains to motions to alter filed after the issuance of Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership #8B0444-6-EB, Findings of Fact, Conclusions of Law, and Order, Oct. 17, 1995 ("Board Decision") and Land Use Permit #8B0444-6-EB ("Board Permit").

The Board Permit authorized the construction of a 23,000 square foot automobile sales/service facility ("Project") on a 6.94 acre tract of land in the Dorset Business Park on Route 7A in East Dorset, Vermont ("Project Tract"). The Project requires a permit pursuant to 10 V.S.A. Chapter 151 ("Act 250") as a substantial change to a previously permitted gravel pit operation.

As explained below, the Environmental Board concludes that: (i) the Board Decision is superseded by this decision; (ii) the various pending motions to alter are granted in part and denied in part; and (iii) the Board Permit is superseded by Amended Land Use Permit #8B0444-6-EB (Revised) which is issued pursuant to this decision.

II. PROCEDURAL BACKGROUND

On July 29, 1994, James E. Hand and John R. Hand d/b/a Hand Motors ("Hand") and East Dorset Partnership ("Applicants") filed an application for the Project with the District #8 Environmental Commission ("Commission").

On February 14, 1995, the Commission issued Land Use Permit #8B0444-6 and supporting findings of fact, conclusions of law, and order ("District Permit") authorizing the Project's construction.

On March 10, 1995, Lorraine Eckert ("Eckert") and Mildred O'Neal ("O'Neal") (collectively the "Appellants") filed an appeal of the District Permit with the Board. Eckert appealed the Commission's denial of her party status and the District Permit relative to Criteria 1 (water and

¹ Rather than issue a separate memorandum of decision on the motions to alter; the Board has incorporated the rulings on the motions into this decision.

air pollution), 2, 3, 8 (aesthetics), and 10. O'Neal appealed the District Permit relative to Criteria 1 (as to both water and air pollution), 2, 3, 4, 8 (aesthetics), and 10.

On April 10, 1995, Board Chair John T. Ewing convened a prehearing conference in this appeal and, on April 26, 1995, issued a Prehearing Conference Report and Order, which is incorporated herein by reference.

On May 17, 1995, the Chair issued a Memorandum to the Parties denying the Appellants' Motion for Relief. On May 24, 1995, the Board deliberated on the petitions for party status. On May 29, 1995, the Board issued a Memorandum of Decision relative to Party Status and other preliminary issues, including the withdrawal of Criterion 4 (soil erosion) from this appeal.

On June 29, 1995, the Chair issued a Memorandum to the parties denying the Applicants' Motion to Dismiss, denying the Appellants' Motion to Postpone the Hearing and granting, in part, the Appellants' Motion to Extend Filing Deadlines. These three memoranda are incorporated herein by reference.

On July 11, 1995, the Chair convened a second prehearing conference. During the second prehearing conference, the Chair and the parties discussed an itinerary for a site visit and time allotments for the presentation of evidence and cross-examination during the hearing. The Chair also ruled on the written evidentiary objections. The Chair excluded from evidence the Town of Dorset Zoning By-Laws as amended on March 7, 1995, and all references to that amendment, because that amendment post-dated the Applicants' filing of their application.

On July 12, 1995, the Board convened a hearing in Manchester with the following parties participating:

James Hand and John Hand d/b/a Hand Motors and
East Dorset Partnership by Marilyn Hand, Esq.
Mildred O'Neal and Lorraine Eckert by
Stephanie Kaplan, Esq.

After hearing overviews from the parties, the Board took a site visit, returned to the hearing room, and re-convened the hearing.

The Board deliberated on July 27, August 9 and September 27, 1995. Following a review of the evidence and

arguments presented in the case, the Board declared the record complete and adjourned the hearing on September 27, 1995.

On October 17, 1995, the Board issued the Board Decision and the Board Permit. The Board Permit authorized the Project subject to the submission of a revised landscaping and lighting plan ("Revised Landscaping and Lighting Plan"). The Board Permit required that the Board give its final approval of the Revised Landscaping and Lighting Plan before the Board Permit would become final.

On November 15, 1995, the Bennington County Regional Commission (BCRC) and the Applicants, respectively, filed a Motion to Alter the Board Decision.

On November 16, 1995, the Appellants filed a Motion to Alter.

On December 11, 1995, the Appellants filed a response to the Applicants' Motion to Alter.

On December 11, 1995, the Chair issued a Preliminary Ruling relative to scheduling further proceedings on the motions.

On February 29, 1996, the Board issued a Memorandum of Decision relative to the pending motions which re-opened the evidence relative to Criterion 8, scheduled further proceedings, and held in abeyance a decision on the other issues raised by the various motions.

On March 28, 1996, the Chair, at the request of the parties' attorneys, issued a revised scheduling order.

On June 12, 1996, the Board re-opened this proceeding and held an evidentiary hearing and a site visit. The Board deliberated on June 12, July 10 and 31, 1996. Following a review of the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing on July 31, 1996. This matter is now ready for decision.

To the extent that any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

III. ISSUES

1. Whether, pursuant to 10 V.S.A. § 6086(a) (1), the Project will result in undue air pollution.
2. Whether, pursuant to 10 V.S.A. § 6086(a) (1) (B), the Project will involve the injection of waste materials or any harmful substances into ground water or wells.
3. Whether, pursuant to 10 V.S.A. § 6086(a) (2)&(3), the Project has sufficient water supply and will cause an unreasonable burden on an existing water supply.
4. Whether, pursuant to 10 V.S.A. § 6086(a) (8), the Project will have an undue adverse effect on aesthetics.
5. Whether, pursuant to 10 V.S.A. § 6086(a) (10), the Project conforms with the Dorset Town Plan and the Bennington Regional Plan.

IV. OFFICIAL NOTICE

As a preliminary matter, the Board, pursuant to 3 V.S.A. § 810(4) of the Administrative Procedure Act (APA), hereby takes official notice of the Town of Dorset Zoning By-laws as last amended on March 6, 1973 and subsequently amended ("By-laws"). The Board may take notice of judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. See In re Handv, 144 Vt. 610, 613 (1984), V.R.E.201(e) and (f). A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. See V.R.E. 201(e). Under § 809(g) of the APA, the Board may make findings of fact based on matters officially noticed.

V. MOTIONS TO ALTER

- A. Applicants' Motion to Alter
 - i. Additional hearings

The Applicants request that the Board convene further evidentiary hearings. As noted above, on June 12, 1996, the Board did so. Therefore, the Board has granted this request.

ii. Jurisdictional statement

The Applicants request that the Board Decision statement of jurisdiction be altered since the Project is a substantial change to a previously permitted project. The Board agrees and, therefore, this request is granted as provided for in Section I, above.

iii. Regional Plan

The Applicants contend that Section 7.3 of the BCRC Plan is the applicable plan provision. The Board agrees, in part, and, accordingly, grants the Applicants' motion to alter as further described in subsection B, below, and in Section VII, below.

iv. Board Decision Findings of Fact #6, #20,
and #25

The Applicants request that finding of fact #6 of the Board Decision be altered to reflect the Project's actual hours of operation. The Board grants the Applicants' request as provided in Section VI, below, at finding of fact #6.

The Applicants request that finding of fact #20 of the Board Decision be altered to reflect the preparation work to be done to the Project Tract. The Board grants the Applicants' request as provided in Section VI, below, at finding of fact #20.

The Applicants request that finding of fact #25 of the Board Decision be altered to reflect the relationship of the Project Tract to the Vermont Agency of Transportation ("AOT") owned Route 7A right-of-way. The Board grants the Applicants' request as provided in Section VI, below, at finding of fact #25.

v. Board Decision Criterion 8 Conclusion of Law
and Amended Permit Condition #2

The Applicants request that the Board alter its conclusion of law under Criterion 8, and Board Permit condition #2, with regard to lighting generally and, in particular, the display and lighting of the American Flag. The Board grants the Applicants' request as provided in Section VI, below, at finding of fact #34.

vi. Board Decision Conclusion of Law Criterion 8
and Amended Permit Condition #3

The Applicants contend that the Amended Permit is not a permit but, rather, an invitation to resubmit due to Amended Permit condition #3. The Board agrees.

The Board Permit was conditional upon receipt and approval of the Revised Landscaping and Lighting Plan. This is contrary to Act 250 and prior Board decisions. Before the Board may issue a permit, it must make affirmative findings with regard to the criteria on appeal. 10 V.S.A. § 6086(a). Evidence of compliance must be provided prior to the issuance of a permit. Re: Berlin Associates, #5W0584-9-EB, Memorandum of Decision at 6 (April 24, 1990). Therefore, the Board has re-opened the hearing in this matter to take further evidence under Criterion 8.

Accordingly, the Applicants' motion to alter under Criterion 8 and condition #3 of the Board Permit is granted as set forth at Section VII, below, and as further provided in Amended Land Use Permit #8B0444-6-EB (Revised).²

B. BCRC's Motion to Alter

The BCRC requests reconsideration of the Criterion 10, regional plan portion, of the Board Decision. The BCRC contends that the Project Tract is located in an area designated as "Rural Areas" under Section 7.3 of the Regional Plan and not, as stated in the Board Decision, in an area designated as an urban growth center. The Board agrees.

Accordingly, the Board grants the BCRC's motion to alter under Criterion 10, regional plan, and the Board's decision relative to the reconsideration of the evidence under Criterion 10, regional plan, is set forth at Section VII, below.

²Finding of fact #25 has also been changed to make it clear that without any screening, the 27 cars displayed in the row closest to Route 7A will be visible. However, finding of fact #42 now makes it clear that with the screening provided for therein, the first row of displayed vehicles will be substantially screened.

C. Appellants' Motion to Alter

i. Criterion 8

The Appellants request that the Board deny the Project an Act 250 permit since there was no evidence in the record to support an affirmative finding under Criterion 8. As noted above, the Board agrees that the Board Permit was issued without sufficient evidence to support an affirmative finding under Criterion 8. However, after considering all the evidence before it, the Board now concludes that the Project will not have an undue adverse effect on aesthetics under Criterion 8, as is explained in Section VII, below. Accordingly, the Board denies that portion of the Appellants' motion to alter which requests that the Project be denied an Act 250 permit under Criterion 8.

ii. Criterion 10

The Appellants request that the Board reconsider its affirmative finding under Criterion 10, both town and regional plan.

The Board has reconsidered its decision under both the town and regional plan portions of Criterion 10 pursuant to the analysis enunciated in Re: The Mirkwood Group and Barry Randall, Application #1R0780-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1996). For the reasons stated in Section VII, below, the Board concludes that the Project conforms to the applicable town and regional plans. Accordingly, the Board denies that portion of the Appellants' motion to alter which requests that the Project be denied an Act 250 permit under Criterion 10, town or regional plan.

VI. FINDINGS OF FACT

1. The Project Tract is located approximately two miles south of the Village of East Dorset on Route 7A. The Project Tract is a reclaimed and reseeded gravel pit, which is currently open and without trees. The Project Tract is a 6.94 acre lot, of which approximately 3.85 acres will be used in construction of the Project. Adjacent to the Project Tract's eastern boundary is the AOT owned Route 7A right-of-way.
2. The Applicants intend to move their present retail automobile sales and service business from Manchester to the Project Tract.

3. The Applicants' retail auto sales business shall be housed in a large barn style building (Building) to be constructed on the Project Tract. The Building shall be surrounded by the car display area and parking lots. The actual size of the Building will be 24,500 square feet. The Parking areas are broken into angled groups or islands, as opposed to strips of parallel rows.
4. The Building will be in the style of a barn with grey clapboard siding and a green pitched roof. The Building will contain 1 1/2 to 2 stories and is in scale with other large barns. The Building will be located approximately 240 feet from Route 7A and will not be positioned parallel with Route 7A.
5. The Building's roof ridge line will be 40 feet in height. The top of the highest and largest cupola will reach a height of 48 feet. The tops of the other two smaller cupolas will be 42 feet and 35 feet. Weathervanes will be installed on the top of the cupolas.
6. The Project will operate from 8 a.m. until 9 p.m. Monday through Saturday. Employee and owner arrival at the Project will be at 7:00 a.m. Monday through Saturday in order to open the Project at 8:00 a.m. Some deliveries of new cars and parts occur at night after hours, and some customers view cars or leave or pick up vehicles after hours.
7. The Project will not have an exterior loudspeaker style paging system. Project personnel will carry pagers on their belts.
8. The Project will have an internal spray booth for painting cars, which uses a minimal amount of spray. This painting system will not create an odor around the facility. It will have a low pressure, high volume **system** in which over-spray is captured within the booth, then circulated through a water filtration system whereupon the solids are removed. No body repair work will be performed outside the Building.
9. All major auto repair work will be done inside the Building. Generally, vehicles are not running when being repaired.

10. Late model vehicles have significantly less emissions than older models.
11. The Project Tract's septic disposal system was designed to handle 2000 gallons per day of domestic strength sewage effluent. Currently, the nearby veterinary hospital and engineer's office utilize the system. The design loading for these two uses totals 900 gallons per day, leaving a 1100 gallon capacity available. The Project's design loading is 540 gallons per day. Therefore, after the Project is constructed the septic system will have a residual capacity of 560 gallons per day.
12. On January 26, 1995, the Wastewater Management Division (Wastewater Management Division) of the Department of Environmental Conservation, Agency of Natural Resources (ANR), issued Water Supply and Wastewater Disposal Permit WW-8-0170-2 (WW Permit) to the Applicants, approving the construction of the Project, based on the filed engineering plans incorporated into WW Permit condition 1. Condition 2 of the WW Permit states "The floordrain system and car wash recycle system wastewaters shall be collected and trucked away as described on the unsigned floorplan referred to in Condition #1 of this permit."
13. On January 26, 1995, the Wastewater Management Division also issued Subdivision Permit EC-8-0878-1 (Subdivision Permit) to the Applicants approving the creation of one lot from three deferred lots and the construction of the Project in accordance with the WW Permit. Therefore, the Project Tract consists of one lot which was created by the combination of three deferred lots.
14. The Project will discharge stormwater into a 55 by 100 foot underground infiltration bed/injection well with an over flow pipe to an existing stormwater infiltration basin. The only waste allowed to be discharged into the injection well system is stormwater discharge. Ground water samples will be collected and analyzed from two monitoring wells on the Project Tract. The samples will be analyzed for chloride, sodium and lead before construction of the Building and parking areas on the Project Tract. Once construction on the Project Tract begins, monitoring well water samples will be analyzed for chloride, sodium and lead on a quarterly basis for four consecutive quarters. Thereafter, sampling will continue semi-annually in May

and November of each year. An instantaneous measurement of depth to groundwater in inches below land surface will be taken at the time of each sampling. All sampling results will be submitted to the Water Supply Division of ANR and the Project will be operated in compliance with Underground Injection Control Permit UIC-95-0002.

15. The Project's floor drain system will drain into an oil-water separator before draining into the primary storage tank for the water recycling system. None of this wastewater will be disposed of in the Project's septic wastewater disposal system. Particulate waste from the floor drain system will be removed by a licensed hauler. The Building's floor drains will not discharge into the soil: rather, discharge will be into a solid piping system which will carry the wastes to a holding tank until disposal.
16. The Project will have an indoor self contained car washing system. No cars will be washed outdoors.
17. Paint and automotive waste liquids will be stored inside the Building in specially designated containers for each product. These containers are supplied by the licensed haulers. The containers will be picked up by a licensed hauler on a monthly basis. A professional recycling service will remove any liquid or solid waste from the Project.
18. The Building will be heated by two oil fired furnaces with above ground interior fuel oil storage tanks. The Project will not have any in-ground, on-site or interior gasoline storage tanks.
19. Appellant O'Neal lives on Route 7A directly across the road from the Project Tract. The O'Neal well obtains water from an aquifer and has a yield of 100 gallons a minute. The Project and its lights will be visible from the O'Neal house and property.
20. Appellant Eckert's residence is immediately adjacent to the Project Tract. The Eckert house sits at an elevation about thirty feet higher than the Project Tract. The Building will be partially, but not totally, visible from the Eckert house, even with the placement of fill. From the Eckert house the glow from the Project's lights will be visible especially in winter.

There are presently no trees on the Project Tract. There will be no cutting of trees near the boundary line. There will be no grading or removal of any trees adjacent to the Eckert property. Conifer trees will be added to the "Lot #2" portion of the Project Tract.

21. The Project will have no more than 40 employees. The maximum of 40 employees will equate to a 540 gallon per day demand on the Project's well and the aquifer from which the Project and the O'Neal residence draw water. The Project's design water consumption is 540 gallons per day. This is 60 gallons per day less than the design volume for a four bedroom single family house. The O'Neal well is located about 650 feet from the Project's well.
22. There are numerous drilled wells in the area serving both commercial and residential uses. The nearest existing well is approximately 420 feet from the Project's proposed well location. Well logs from these wells demonstrate that water availability exceeds the Project's demand and the uses in the area.
23. Currently a naturally vegetated berm exists on the Project Tract parallel to Route 7A. The berm obscures the view of the Project Tract from Route 7A and the neighboring properties. Prior to construction, the Project Tract will be excavated with some raising and lowering of the grade. Therefore, the existing grades will not remain. Adjacent to Route 7A, the Project Tract will be filled raising the elevation approximately four or five feet. In the rear, the Project Tract will be lowered approximately 6 1/2 feet. The northeast corner will be lowered about 4 1/2 feet. The northeast corner of the display area will remain at the same elevation. The southeast corner of the display area will be raised about 3 feet. The northeast end of the parking area will be at the same elevation as the western edge. The Project Tract will not be completely flat, but will be pitched to provide for stormwater drainage. Appropriate landscaping will reduce the visual impacts that the Project will have upon the Route 7 traveller.
24. The car display area will begin 20 feet from the AOT right-of-way and approximately 100 feet from Route 7A.

The Project will contain a 2.88 acre asphalt parking

area. Parking is proposed primarily in front of the Building for about 48 cars. These cars can be displayed along 220 feet of the Project's 470 feet of road frontage. Without any screening, the 27 cars displayed in the row closest to Route 7A will be visible from the road, including their tires. However, not all 27 cars will be visible at the same time. Approaching from the north the first eight or nine cars will not be visible. Approaching from the South, the first car in the row would block the view of the adjacent cars. The cars displayed in the second row will be visible from Route 7A as well. Should the front row of cars be empty, the displayed cars in the second and third rows would be partially visible from the road. The cars parked behind the Building will not be visible from Route 7A. In all, cars will be visible to Route 7A travellers ~~along the 700-foot road frontage~~ from the access road to the end of the Project Tract. The entire boundary of the Project Tract along AOT lands is 470.84 feet and a substantial distance uphill away from the traveled portion of Route 7A.

26. The Project's sign will be three by four feet and illuminated by a single light.
27. The Project may include three flagpoles. The flags will not contain any advertisement. The flags will be lit at night.
28. The Project Tract is located in the area known as the Valley of Vermont. The Project's immediate surroundings at the present time are rural with mixed residential and commercial uses.
29. Neighboring commercial uses include a veterinary hospital, an engineer's office, and a gravel pit. The Project Tract is immediately adjacent to a historic cemetery, which contains the grave of Will Wilson, co-founder of Alcoholics Anonymous. Tourists regularly visit the cemetery. At night the neighborhood is quiet and dark.
30. The Project Tract is visible from Route 7, which travels on a hillside on the opposite side of the valley in which the Project Tract is located. From Route 7, a traveller will be able to observe "glittering" from the reflective metal surfaces of the Project's displayed cars. The angles of the cars in the parking lot will intensify the chaotic appearance of

the Project from Route 7. Likewise, the Route 7 traveller will be able to see the Project's lights at night.

31. On June 16, 1992, the Dorset Board of Selectmen adopted the Dorset Town Plan, 1992 ("Town Plan"). The Town Plan was in effect when the Applicants applied for the Permit, the Project's zoning permit, and the Project's site plan approval by the Dorset Planning Commission.
32. Trucks and vans, as well as cars, could be displayed in the first row of 27 vehicles adjacent to the Route 7A right-of-way. Trucks and vans are approximately one foot taller than cars.
33. The Project Tract is a former gravel pit from which all topsoil has been removed.
34. The Project will be illuminated as follows:
 - (i) Bollards, 42" high, 8" diameter: Four fixtures shall remain on from dusk to dawn. The remaining fixtures shall remain on from dusk to 9:00 p.m. and four additional fixtures shall be on motion detectors.
 - (ii.) Flag Pole lights, on 8' poles: One fixture shall remain on from dusk to dawn with the balance remaining on from dusk to 9:00 p.m.
 - (iii) Ground spot on sign: One fixture shall remain on from dusk to dawn.
 - (iv) Pole spot, on 20' pole: One fixture shall remain on from dusk until dawn.
 - (v) Double Wall Spots, mounted on building at height of 16': One head on three fixtures will be illuminated from dusk to dawn with the other heads from dusk to 9:00 p.m. and on motion detectors until dawn.
 - (vi) Single Wall Spots, mounted on building at height of 16': Fixtures shall remain on from dusk until 9:00 p.m. and on motion detectors until dawn.
35. The Revised Landscaping and Lighting Plan

provides, provides, in part, that the Project will be screened as follows:

(i) A screen of 11 white spruce will be planted along the northern boundary of Project Tract Lot 2 adjacent to the Eckert property. No other development will occur on Lot 2 related to the Project.

(ii) A screen of 24 Norway spruce will be planted on the northern corner of Project Tract adjacent to the East Dorset Cemetery Property.

(iii) Along the Project Tract's border with Route 7A and in front of the first row of cars, the Applicants will plant 8 Norway Maples on their property under-planted by a row of 30 Pfitzer Juniper bushes of two feet in height (Junipers), and an additional six Norway Maples in the AOT right of way. In addition, an arc of seven Norway Maples will be planted behind the flagpoles. The Junipers will be planted in two continuous rows; one row of 20 in front of the line of 18 cars in the first row and one row of 10 in front of the line of 9 cars in the first row. Junipers will not be planted in the 80 foot space between the two lines of cars in the first row. Likewise, Junipers will not be planted immediately to the north of the Project Tract's access road in the area of the Project's flag poles.

36. Pfitzer Junipers are not vigorous in Vermont. Pfitzer Junipers grow to approximately five feet in height and width if not trimmed.
37. Under the Landscaping Plan, the Junipers will be spaced approximately eight feet apart and planted a few inches lower than the bottom of the cars. The Junipers will filter, but not totally obscure, the first row of displayed vehicles. The hoods of cars in the first row will be visible above the Pfitzer Junipers when they are initially planted. At the time of planting, the Pfitzer Junipers will be at least two feet in height.
38. To implement the Landscaping Plan, Hand will eliminate the existing vegetation and raise the grade of the Project Tract adjacent to Route 7A. Travelers on Route 7A will look up the slope at

the Project, and not directly into the Project, as they would were the plane flat.

39. The Landscaping Plan differs from the previously proposed landscaping in that the 30 Junipers are added, 4 Arborvitae are added, and 11 white spruce are moved from the front to the rear of the property.
40. The deciduous trees proposed in the Landscaping Plan will mitigate the glare from the displayed vehicles and will soften the Buildings appearance. The birch trees proposed are sensitive to air pollution and soil compaction.
41. Junipers are an appropriate plant for use in the Project Tract because they provide screening as an evergreen, and are tolerant of poor soils. Hetz Junipers are more vigorous than Pfitzer Junipers, and grow taller and wider as compared to Pfitzer Junipers.
42. If 60 Hetz Junipers are planted along the front row of displayed automobiles, immediately adjacent to the paved area, at 4 foot intervals instead of the proposed 30 Pfitzer Junipers, and are allowed to grow to, and be maintained at, a minimum of four feet in height, then the first row of displayed vehicles will be substantially screened from view because there will be no gaps.
43. To thrive, plants and trees need regular watering; removal of dead or diseased branches; mulching to retain water; fertilizing; protection from snow removal and lawn mowers; and excessive salt.
44. The Project Tract is located in the Planned Commercial-Industrial (C-1) district ("C-I District") as designated by the Town Plan and the By-laws. The Project will be accessed by a private road off Route 7A.
45. The Town Plan provides, in pertinent part:

Section 1 Introduction

Subsection 1.3 How This Plan is Used

In preparing and reviewing development plans respecting Dorset reference should be made to all

sections of the Plan having a bearing on the proposal.

Subsection 1.4 Interpretation of This Plan

. . . .it is intended that this Plan be a) read and interpreted with a degree of flexibility, and that b) judgements be made while considering and weighing all of the planning policies which have a bearing on any particular proposal.

Section 2 General Plannins Backsround

Subsection 2.4 Economic Development

The Town is seeking to maintain its current economic base, while also encouraging new economic development in certain sectors by designating and promoting appropriate commercial/industrial activity in selected designated locations.

Subsection 2.5 Dorset's Relationship with the Resion and with Adjacent Municipalities

Dorset residents would like to maintain their town as a clean quiet place to live, recognizing the importance of nearby larger neighbors as retail and employment centers. Dorset aims to maintain its agricultural and forestry activities, and to encourage clean secondary industries and service uses compatible with its rural environs. It does not wish to encourage large scale retail growth, nor large scale tourist developments, but it does seek to:

- encourage appropriate new commercial and industrial activity in selected areas of the Town to increase local employment opportunities for its residents and those of nearby towns, and to increase the local tax base.

Section 3 Statement of Objectives

Subsection 3.1 Land Use and Economy

1. Provide for a variety of land uses which will not detract from the rural, residential, scenic, agricultural and forested character of the Town.

4. Recognize the importance of the existing village centers as traditional foci for residential development and community activity, and limited commercial development. Strengthen the importance of the villages by permitting and encouraging controlled growth within the village areas.

5. Provide appropriate locations and sufficient acreage for the limited expansion of commercial and industrial activities. Provide strong controls on uses and site design within the areas designated for commercial and industrial uses.

6. Limit development to areas along or near existing roads, thus avoiding unnecessary new road mileage and costly servicing.

Section 4 Land Use

Subsection 4.1 Existing Land Use

Apart from the villages, the major transportation corridors serve as the other focus for existing development. ... The Route 7/7A corridor has attracted a variety of uses serving tourists - including restaurants, tourist accommodation facilities, and campground, - and commercial/industrial operation which benefit from the excellent accessibility afforded by Route 7 - e.g. a U.P.S. facility.

Subsection 4.2.1 Urban Designations

"Urban" is a relative term, and in Dorset the urban areas would be considered rural in many localities. In Dorset, the "urban" designations refer to the Village Residential, Village Commercial, and the Planned Commercial/Industrial Designations.

The lands designated in these categories are intended to accommodate a large proportion of Dorset's growth during the planning period. These areas could also be called "growth centers", in which controlled development is to be encouraged, thereby relieving pressure to develop in the rural areas of the Town."

Subsection 4.2.1.3 Commercial/Industrial

(a) Location:

Five Planned Commercial-Industrial areas are designated in the Town Plan. All five of these have been designated in previous Town Plans, and zoned for Commercial-Industrial uses since the Town's first zoning by-law in 1973. Three of the Planned Commercial-Industrial areas are located along the Route 7 corridor; these areas have experienced some commercial-industrial development. Two of the Planned Commercial-Industrial areas are located along the Route 30 corridor, and contain significant existing commercial-industrial operation.

(b) Purpose:

The Planned Commercial-Industrial areas are designated in order to recognize existing commercial-industrial uses and to provide for suitable locations of adequate size to attract new light commercial-industrial development in the Town, and new employment opportunities.

(c) Uses:

Predominant uses in the Planned Commercial-Industrial areas shall be manufacturing or assembly of goods, offices, distribution centers, and similar light industries, subject to strict performance standards, as well as agriculture, forestry and other rural uses. Retail uses shall normally be permitted only as an accessory use to a permitted use, except that in the North Dorset area, the zoning by-law may permit certain types of retail uses such as lumberyards and vehicle sales.

(d) Policies:

1. Refine and amend the Town's zoning by-law with respect to the types of uses and the performance criteria within the Planned Commercial-Industrial areas. (This is in progress. The Planning Commission has recently conducted a review of the permitted uses and regulations related to the Planned Commercial-Industrial

areas, with the result being a proposed Zoning By-law amendment.)

2. Permit a wider range of commercial-industrial uses in the northern portion of Town, along Route 7/7A, than permitted elsewhere. ...

3. Maintain a high sufficiency rating of Route 7/7A by requiring controls on the number of and design of commercial-industrial access points to Route 7/7A.

4. Encourage new light commercial-industrial uses within these areas, and in accordance with high standards of performance and site design.

5. Permit a mixture of uses within these areas, designed in a way to minimize land use conflicts.

7. Uses to be particularly encouraged are those which provide employment opportunities for the local residents, such as clean, light industry.

Section 5 Natural, Scenic and Historic Resources

Subsection 5.5 Scenic Resources and Policies

The Town of Dorset is very scenic, and the residents of the Town would like to maintain its scenic quality. Also, it is recognized that the scenic character of the Town is an important economic factor in that the scenic resources enhance property values and enhance the values of the area as a tourist destination.

Important components of the scenic quality include large quantities of open lands, interesting topography, a mix of open agricultural lands and forests, broad vistas of valley lands, and unspoiled forested mountainous areas. Also the relatively small scale of Dorset's urban uses and the historic and traditional nature of the Town's villages, add to the scenic quality, and also combine to form some particularly scenic routes.

Subsection 5.5.1 Policies to Address Scenic Resources

2. Require high performance standards with respect to site design, landscaping, and

operations, for new commercial and industrial development.

3. Review new development regarding outdoor lighting and limit such lighting to that which is necessary for safety and convenience. Prevent excessive lighting of the night sky..

46. The By-Laws in effect at the time of filing the application for the Act 250 permit, the zoning permit and the Planning Commission approval, states the following relative to uses in the Commercial and Industrial District:

6.13 Uses Permitted in CI District

The following uses, subject to the limitations and requirements of Section 3.7, and in accordance with dimensional requirements of 6.16

. . . .
2. Stores, sales and showrooms for the conduct of retail business.

a. An automobile service station or garage.
. . . .

47. The By-Laws were adopted on March 6, 1973 and amended on numerous occasions. The most recent amendments were adopted on June 26, 1990, March 2, 1993, and March 7, 1995. The 1995 amendment incorporated the changes required by Town Plan section 4.2.1.3(d) (1).

48. On August 29, 1994, the Dorset Planning Commission sent a memorandum to the District #8 Environmental Commission stating that the Project does conform with the Town Plan, but noting that:

A conflict does occur with Section 4.2.1.3(c) Uses, in the Commercial Industrial section of the Plan. When the Plan was revised in 1992, it contemplated eliminating the threat of "strip" development in Dorset, particularly along Route 7a and with special regard to car dealerships. .. The Planning Commission feels that the conformance of this application with the Town Plan outweighs the conflict (refer to Section 1.4 Interpretation) and does not oppose this project on the basis of non-conformance with the Town Plan.

49. On February 20, 1992, the Bennington County Regional Commission adopted the Bennington Regional Plan, which was subsequently amended on January 21, 1992. The Amended Bennington Regional Plan ("Regional Plan") was in effect when the Applicants applied for the Permit, the zoning permit and Planning Commission approval. The Project Tract is located in an area designated as "Rural Areas" under Section 7.3 of the Regional Plan.

50. Section 7.3 of the Regional Plan provides, in part:

While concentrations of new development should be directed to established growth centers, a considerable amount of development has occurred, and will continue to occur, in rural areas outside of villages and urban centers. Such growth should be planned so that impacts on the region's rural character and environmental quality will be minimal[.]
. . . More extensive commercial development may be appropriate in certain rural areas that lie alongside principal state highways.
. . . Rural planned unit developments that are located along principal highways may contain a variety of commercial and industrial uses at densities greater than those generally characteristic of Rural areas, provided that a town has designated appropriate areas for such uses and has established standards that will promote sound economic development while preserving the rural character of these areas.

51. Section 7.6 of the Regional Plan provides, in part:

8. The following policies apply to new commercial development:

-The intensity of commercial development should be consistent with the character of the surrounding area.

-Commercial developments should include architectural and landscape design plan that complements the surrounding environment.

-The amount of noise, glare, and lighting observable from off-site locations should be minimized.

VII. CONCLUSIONS OF LAW

A. Criterion 1 (Air Pollution - Dust, Fumes, Noise)

In relevant part, Criterion 1 requires that, before issuing a permit, the Board or district commission shall find that a proposed project "will not result in undue ... air pollution." 10 V.S.A. § 6086(a) (1). The burden of proof under this criterion is on the Applicant. 10 V.S.A. § 6088(a). The Board considers noise, fumes, and dust to be relevant under this criterion. See, e.g., Re: Rowley #4C0534-1-EB, Findings of Fact, Conclusions of Law, and Order at 6-7 (Dec. 1, 1993); Re: Duckless, #7R0882-EB, Findings of Fact, Conclusions of Law and Order at 7 (June 11, 1993).

Based on the foregoing findings of fact, the Board concludes that the Project will not result in undue air pollution.

B. Criterion 1(B) (Waste Disposal)

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

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

10 V.S.A. § 6086(a) (1) (B).

Under 10 V.S.A. § 6088(a), the burden of proof on Criterion 1 (B) is on the Applicants. However, under 10 V.S.A. § 6086(d), the Board is authorized to issue rules providing for presumptions of compliance for permits issued by other state agencies. Under Environmental Board Rule (EBR) 19(E) (1), the Subdivision and WW Permits admitted into evidence create a rebuttable presumption "[t]hat waste materials and wastewater can be disposed of through installation of wastewater and waste collection, treatment

and disposal systems without resulting in undue water pollution."

By admission of the Subdivision and WW Permits into evidence, the Applicants transferred the burden of proof to the Appellants. EBR 19(F) specifies the manner in which a presumption may be rebutted. The rule provides that if:

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

In the present case, the Appellants did not rebut the presumption created by the Subdivision and WW Permits or demonstrate that undue water pollution was likely to result from the sewage created by the Project. In addition, the Applicants demonstrated that wastes from the Project's activities will be appropriately handled and disposed of off-site. Therefore, the Board concludes that the Project complies with applicable health and environmental conservation department regulations and will not involve the injection of waste material or harmful or toxic substances into the ground water or wells.

C. Criteria 2 & 3 (Sufficient Water Available and Burden on Existing Water Supply)

Criterion 2 requires that the Applicants prove that the proposed project "[d]oes have sufficient water available for the reasonably foreseeable needs of the subdivision or development." 10 V.S.A. § 6086(a) (2). The burden of proof under this criterion is on the Applicants. 10 V.S.A. § 6088(a). EBR 19(E) (3) specifies that the Subdivision and WW Permits create a rebuttable presumption "[t]hat a sufficient supply of potable water is available."

Accordingly, by admission into evidence of the Subdivision and WW Permits, the Applicants transferred the burden of proof to the Appellants. **The manner in which the presumption could have been rebutted** is set out in EBR 19(F). **It is the same** as quoted, above, under Criterion

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1(B), except that the issue is "inadequate water supply" rather than "undue water pollution,"

Criterion 3 requires that, before issuing a permit, the Board or district commission shall find that a proposed project "will not cause an unreasonable burden on an existing water supply, if one is to be utilized." 10 V.S.A. § 6086(a) (3). The burden of proof under this criterion is also on the Applicants. 10 V.S.A. § 6088(a).

The yield of the O'Neal well and the relatively small amount of water required by the Project's well demonstrates that the aquifer is sufficient to supply water to both the Project and the residences. In the present case, the Appellants did not provide sufficient evidence to demonstrate that the proposed water supply would be inadequate. Furthermore, the Applicants have demonstrated that the Project will not burden any existing water supply.

Therefore, the Board concludes that the Project does have sufficient water available for its needs and will not burden the existing water supplies in its area.

D. Criterion 8 (Aesthetics)

Criterion 8 requires that, before issuing a permit, the Board find that a proposed project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics" The Board considers noise, fumes, and dust relevant to this Criterion. See, e.g., Duckless, Supra at 7-8.

Under 10 V.S.A. § 6088(b), the opponents have the burden of proof under Criterion 8. However, the Applicants must provide sufficient information for the Board to make affirmative findings. Re: Killinston, Ltd. and International Paper Realty Corp., #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990).

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

With respect to the analysis of adverse effects on

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

In the present case, while the Building is designed to be compatible with its surroundings, the vehicle parking area will result in reflections and glare from the parked cars. This glare will be visible to neighboring residences, and motorists on Routes 7 and 7A. The proposed lighting of the Project at night will alter the character of the Project's community and create a visible presence to travellers on Routes 7 and 7A. In addition, cars will be visible on the parking areas. Therefore, the Board concludes that the Project will have an adverse effect on the scenic beauty and aesthetics of the area.

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. 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?

The Board begins its analysis with whether the Applicants have failed to take generally available mitigating steps.

The Revised Landscaping and Lighting Plan differs from the previously proposed landscaping in that the 30 Pfitzer Junipers are added, 4 Arborvitae are added, and 11 white spruce are moved from the front to the rear of the property.

The deciduous trees will mitigate the glare from the displayed vehicles and will soften the Building's appearance. Junipers are an appropriate plant for use in the Project Tract because they provide screening as an evergreen, and are tolerant of poor soils. The Revised

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Landscaping and Lighting Plan constitutes a generally available mitigating step which will reduce the Project's visibility. However, the Board believes that the Revised Landscaping and Lighting Plan can be improved upon, and that the evidence supports mandating these improvements by permit condition.

The Board's understanding of permit conditions is that such conditions alleviate adverse effects that would otherwise be caused by a project, and that those adverse effects would require a conclusion that a project does not comply with the criteria at issue unless the conditions are followed. Ultimately, any condition imposed must be reasonable. In re Denio, 158 Vt. 230, 240 (1992); Re: Taft Corners Associates, Inc., #4C0696-11-EB (Remand), Memorandum of Decision at 18 (May 5, 1995); Re: Crushed Rock, Inc. and Pike Industries, #1R0489-4-EB, Findings of Fact, Conclusions of Law, and Order at 25 (Feb. 18, 1994); Re: Homestead Desisn, Inc., #4C0468-1-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Sept. 6, 1990).

The Board will require by permit condition that Hetz Junipers be planted instead of Pfitzer Junipers because they are more vigorous than Pfitzer Junipers, and grow taller and wider as compared to Pfitzer Junipers.

Second, the Board will require that 60 Hetz Junipers be planted along the front row of displayed automobiles, immediately adjacent to the paved area at 4 foot intervals, instead of the proposed 30 Pfitzer Junipers. The 60 Hetz Junipers must be at least two feet high at the time of planting, and must be allowed to grow to, and be maintained at, a minimum of four feet in height. The 60 Hetz Junipers will ensure that the first row of displayed vehicles will be substantially screened from view because there will be no gaps.

Third, the Board will require that the Applicants take all necessary measures to ensure that the required landscaping thrives. This includes, but is not limited to, the Applicant ensuring that the landscaping is regularly watered; dead or diseased landscaping is removed and replaced with landscaping of equal size; mulching and fertilizing is done on a regular basis; and all landscaping is protected from snow removal, lawn mowers, and road salt. To further protect the Hetz Junipers, curbing or permanent barriers shall be placed within the paved area along the front row of cars to ensure that all displayed vehicles are

parked at least four feet from the edge of the pavement to protect the buffer of Hetz Junipers.

The Appellants contend that the Applicants must propose the mitigating measures, and not the Board. Generally, this is true. See, e.g., Re: Larry and Diane Brown, #5W1175-1-EB, Findings of Fact, Conclusions of Law, and Order (June 19, 1995); Re: Leonard R. Lemieux and Rose T. Lemieux d/b/a Chelsea Ledse Pit, #3R0717-EB, Findings of Fact, Conclusions of Law, and Order (March 1, 1995); Re: Waterbury Shopping Villase, #5W1068-EB, Findings of Fact, Conclusions of Law, and Order (July 19, 1991). However, the facts in this case are more similar to what confronted the Board in Re: J. Philip Gerbode, #6F0396R-EB-1, Findings of Fact, Conclusions of Law, and Order at 22 (Jan. 29, 1992) as compared to the aforementioned decisions.

In Gerbode, the Board first issued a decision which made affirmative findings under some criteria, but which reserved judgment under Criterion 8 until the applicant filed additional evidence, including a landscaping plan. After the landscaping plan was filed, the Board reviewed it as a generally available mitigating measure proposed by the applicant. While generally accepting it as proposed, the Board modified the applicant's proposal by increasing from two to five the number of deciduous hardwood species required to be planted, and by adding an entirely new second category of planting. Id. The three permit conditions added herein are similar to what was done in Gerbode, and their addition does not contradict the Board's conclusions in Brown, Lemieux, or Waterbury Shopping Villase.

Accordingly, based on the Revised Landscaping and Lighting Plan, and as further conditioned herein, the Board concludes that the Applicants have taken all generally available mitigating steps to improve the harmony of the Project with its surroundings such that the Project will not have an undue adverse effect on aesthetics.

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

The Board Decision found two clear, written community standards which the Project violated: (i) Town Plan sections 5.5 and 5.5.1; and (ii) Regional Plan sections 6.6, 7.6.8, and 9.1.

With regard to Town Plan sections 5.5 and 5.5.1, the

Revised Landscaping and Lighting Plan **ensures** that the scenic quality of the Valley of Vermont is maintained given the Projects' proximity to other commercial projects such as a veterinary hospital, an engineer's office, a gravel pit, and a cemetery. Moreover, the Revised Landscaping and Lighting Plan sets a high landscaping performance standard given the number and types of plantings, and the requirement that they be maintained throughout the Project's operation. Finally, the use of motion detectors on lights will help prevent excessive lighting of the night sky.

Under the Regional Plan, the Board has already noted that the Board Decision considered Regional Plan provisions which were not applicable to the Project. Therefore, to the extent that the Regional Plan does contain a clear written community standard, it is found at Regional Plan section 7.6.8. Because of the Revised Landscaping and Lighting Plan, the Project will be consistent with the character of the surrounding area given the other commercial uses which are present, and the Project will be based upon an architectural and landscape design plan that complements the surrounding environment.

Accordingly, based on the Revised Landscaping and Lighting Plan, and as further conditioned herein, the Board concludes that the Project does not violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area such that the Project will not have an undue adverse effect on aesthetics.

- c. 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?

The Revised Landscaping and Lighting Plan puts the Project within the context of the other commercial uses which are located in the area, and softens the Project's character so that it is in harmony with its surroundings. Unlike the situation in Re: Northshore Development, Inc., Application #4C0626-5-EB, Findings of Fact and Conclusions of Law and Order (Dec. 29, 1988), and Re: Shimon and Malka Shalit, Application #8B0334-3-EB, Findings of Fact and Conclusions of Law and Order (Feb. 8, 1991), this Project is **not** inherently inappropriate within its surroundings even if the Project is visible from the O'Neal residence or from Route 7A as one travels northward from the O'Neal residence.

Accordingly, based on the Revised Landscaping and Lighting Plan, and as further conditioned herein, the Board concludes that the Project does not offend the sensibilities of the average person, is not out of character with its surroundings, nor are the scenic qualities of the area diminished, such that the Project will not have an undue adverse effect on aesthetics.

E. Criterion 10 (Local and Resional Plans)

Criterion 10 requires that, before issuing a permit, the Board must 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 burden of proof is on the Applicants. 10 V.S.A. § 6088(a).

The Board's Criterion 10 town plan analysis is conducted in accordance with the Vermont Supreme Court's decision in In re Frank A. Molsano, Jr., 5 Vt. Law Week 314 (Nov. 10, 1994). The Molsano decision concerns the relationship of municipal plans and zoning by-laws under Criterion 10.

Under Molqano, zoning by-laws are germane to interpreting ambiguous provisions of a town plan. Therefore, the Board first determines whether the town plan provisions at issue are specific policies or ambiguous.

If the town plan provisions are specific policies, then they are applied to the proposed project without any reference to the zoning by-laws. However, if the provisions are ambiguous, then the Board next examines the relevant zoning by-laws for provisions which resolve the ambiguity. This does not mean a general review of the project for its compliance with the zoning by-laws, but rather an examination to see if there are provisions in the zoning by-laws which address the same subject matter at issue under the town plan.

Thus, even after Molqano, the issue remains whether a project is in conformance with the town plan, with the zoning by-laws available only as a tool for resolving ambiguities in the plan. Re: Manchester Commons Associates, #8B0500-EB, Findings of Fact, Conclusions of Law, and Order (Sept. 29, 1995). While parties and witnesses may highlight for the benefit of the Board those provisions which they believe are relevant to the Board's inquiry, the Board must ultimately base its conclusion upon its own understanding of the relevant plan and by-law provisions. See Re: Robert B.

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& Deborah J. McShinsky, #3W0530-EB, Findings of Fact,
Conclusions of Law, and Order at 11 (April 21, 1988).

The Board has reconsidered its decision under both the town and regional plan portions of Criterion 10 pursuant to the analysis enunciated in Re: The Mirkwood Group and Barry Randall, Application #1R0780-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1996).

Under Mirkwood, the test to determine whether a town plan provision is a specific policy which can be applied to a Project is: (a) does the provision pertain to the area or district in which the project is located; (b) is the provision intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is the provision sufficiently clear to guide the conduct of an average person, using common sense and understanding.

Accordingly, the Board will now apply the Mirkwood test to the Town Plan and Regional Plan.

1. Town Plan

i. Ambisuity

Section 4.2.1.3 is the crucial Town Plan provision that is applicable to the Project. See Re: Ronald Carpenter, #8B0124-6-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Oct. 17, 1995).

- a. Does the provision pertain to the area or district in which the project is located.

Section 4.2.1.3 of the Town Plan states the location, purpose, uses, and policies of those areas that are designated as being in the C-I District. The Project is located in one of five C-I District areas. Therefore, Section 4.2.1.3 does pertain to the area or district in which the Project is located.

- b. Is the provision intended to guide or proscribe conduct or land use within the area or district in which the project is located.

Subsection (c) of Section 4.2.1.3 states what uses are to be predominant or permitted within the C-I District. When coupled with the statements of purpose in subsection (b) and policies in subsection (d), it is clear that Section

4.2.1.3 is intended to guide or proscribe conduct or land use within the C-I District.

- c. Is the provision sufficiently clear to guide the conduct of an average person, using common sense and understanding.

Under Section 4.2.1.3, it is sufficiently clear that there are five areas within the C-I District, and that they have all been zoned as such since 1973; three of the areas are located along the Route 7 corridor; two of the areas are located along Route 30; and that the purpose of the C-I District areas is, in part, to recognize existing commercial/industrial uses.

However, the statement in subsection (b) that the purpose of the C-I District areas is, in part, "to provide suitable locations of adequate size to attract new light commercial-industrial development in the Town, and new employment opportunities" is not sufficiently clear to guide the conduct of an average person, using common sense and understanding. A person has no way of knowing what lot size is necessary to constitute "adequate size" even though a minimum acreage lot size or building size/lot size ratio could have been stated.

In addition, subsection (c) also is not sufficiently clear to guide the conduct of an average person, using common sense and understanding. Subsection (c) states:

Predominant uses in the Planned Commercial-Industrial areas shall be manufacturing or assembly of goods, offices, distribution centers, and similar light industries, subject to strict performance standards, as well as agriculture, forestry and other rural uses. Retail uses shall normally be permitted only as an accessory use to a permitted use, except that in the North Dorset area, the zoning by-law may permit certain types of retail uses such as lumberyards and vehicle sales.

The use of the words "predominant" and "normally" suggest that certain uses may occur in the C-I District in certain circumstances even if they are not the "predominant" or "normal" use which occurs within the C-I District. See Carpenter at 16. Moreover, it is not clear whether the allowance that vehicle sales may be permitted in the North Dorset area means that vehicle sales are exclusively

Dorset area means that vehicle sales are exclusively permitted in the North Dorset area.

By leaving the door open as to what is a "predominant" or "normal" use, and by not stating whether vehicle sales are exclusively permitted in the North Dorset area, subsection (c) is not sufficiently clear to guide the conduct of an average person, using common sense and understanding.

Finally, the policies contained in subsection (d) are not sufficiently clear to guide the conduct of an average person, using common sense and understanding.

Policy 4 also is not clear since it simply states "[e]ncourage new light commercial-industrial uses within these areas, and in accordance with high standards of performance and site design." The reference to "these areas" is susceptible to two interpretations--it could be all five C-I District areas or, instead, it could be the Route 7/7A area referred to in policy 3. In addition, "high standards of performance and site design" is not defined by any objective benchmark. This policy is subject to various interpretations such as a development must be completely screened; a development must be partially screened; an architect must design all structures; or a "high standard" is whatever is acceptable to the community at large.

Policy 7 states that "[u]ses to be particularly encouraged are those which provide employment opportunities, for the local residents, such as clean, light industry." By using "encouraged" this policy could be interpreted as precatory, not mandatory. Also, what happens if a business employs Town of Dorset residents and also people from other towns within Bennington County--are the latter "local" enough or must businesses that are particularly encouraged only employ people from the Town of Dorset. Moreover, there is no way to know what is "clean, light industry." One interpretation is that the industry generates no waste by-products. Another interpretation is that clean industry is that which generates waste by-products that meet all applicable federal, state, and local laws and regulations.

The Board concludes that the varying interpretations which can be drawn from the above policies means that they are not sufficiently clear to guide the conduct of an average person, using common sense and understanding.

The Appellants contend that the Town Plan does

proscribe the Project. However, the Appellants' reliance on Re: Manchester Commons Associates, #8B0500-EB, Findings of Fact, Conclusions of Law, and Order at 30 (Sept. 29, 1995) is misplaced due to the significant difference in the plan language at issue in Manchester Commons as compared to the plan language in this appeal.

In Manchester Commons, the town plan stated, "[t]he floor area of any new building in this district, measured on the first floor thereof, shall not exceed 3,000 square feet, and the maximum building coverage to land area shall be 15%" Id at 29. (Italics added.) In contrast, the town plan herein does not contain any objective numerical figure, nor is the phrase "shall not" used. Therefore, under the test applied in Manchester Commons or the Mirkwood test, Section 4.2.1.3 is not a specific policy which bars the Project.³

Based on the preceding, the Board concludes that the Town Plan lacks a specific policy with regard to the Project. Therefore, the Town Plan is ambiguous as to whether the Project conforms to the Town Plan, specifically, whether Section 4.2.1.3 is a specific policy against the Project in the C-I District. Accordingly, the Board will next examine the By-Laws to determine whether there are any provisions which resolve the ambiguity.

ii. By-Laws

The Board notes that the By-Laws have been periodically updated and, thus, reflect that the Town of Dorset as a whole has had ample opportunity to implement changes in planning strategy through zoning by-law amendments. Vermont law vests a permit applicant's rights at the date of application provided that the applicant is acting in good

³The Appellants also contend that the Board failed to address the Appellants' arguments regarding strip development. In fact, the Board did consider such arguments, as well as all of the evidence and arguments presented by the parties, and the Board Decision stated, as does this decision, that to the extent that any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

faith to implement rights under the law then in effect. See Molsano at 316.

By-Laws section 6.13(2) is the relevant zoning by-law under Molsano. It specifically allows "[s]tores, sales and showrooms for the conduct of retail business" and "[a]n automobile service station or garage" in Dorset's Commercial/Industrial Zones. The Project will have a showroom and sales area, as well as an automobile service garage. These uses are clearly permitted under the applicable By-Laws. In this respect, the By-Laws resolve the Town Plan's ambiguous treatment of automobile sales and service projects such as the Project in the C-I District. Clearly, such construction is permitted under the Town Plan based on the specific implementation of the Town Plan by the By-Laws.

The Board concludes that the Town Plan permits the Project within the C-I District and, therefore, the Project is in conformance with the Town Plan.

2. Regional Plan

Concerning the role of regional plans in Act 250 proceedings, 24 V.S.A. § 4348(h) provides:

In proceedings under 10 V.S.A. chapter 151 . . . in which the provisions of a regional plan or a municipal plan are relevant to the determination of any issue in those proceedings:

(1) the provisions of the regional plan shall be given effect to the extent they are not in conflict with the provisions of a duly adopted municipal plan;

(2) to the extent that such a conflict exists, the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact.

Based on the foregoing findings of fact, the Board concludes that the Town and Regional Plans have no provisions in conflict. The Board next considers whether the Project conforms to the Regional Plan.

The Vermont Supreme Court, in In re Green Peak Estates, 154 Vt. 363, 368 (1990), upheld the Board's denial of a permit under Criterion 10, regional plan, where the regional

plan provision at issue contained a specific policy against the proposed development. The Board concludes that the Regional Plan does not contain a specific policy against the Project.

Under Section 7.3, new development is allowed in rural areas outside of villages and urban centers, and more extensive commercial development may be appropriate in certain rural areas that lie alongside principal state highways. Along principal highways, development may be at a density greater than those generally characteristic of rural areas, provided that a town has designated appropriate areas for such uses, and has established standards that will promote sound economic development while preserving the rural character of these areas. In particular, the new development should be planned so that impacts on the region's rural character and environmental quality are minimal.

Under Section 7.6 of the Regional Plan, the intensity of development should be consistent with the character of the surrounding area; include architectural and landscape design plans that complement the surrounding environment; and minimize the amount of noise, glare, and lighting observable from off-site locations.

Rather than being a specific policy against the Project, Sections 7.3 and 7.6 endorse the Project given the Project's location along Route 7A in the C-I District; and, because of the Revised Landscaping and Lighting Plan as modified under Criterion 8, its consistency with the character of the surrounding area and the surrounding environment, and the minimizing of the amount of glare and light observable from off-site locations.

The Board concludes that the Project, as conditioned under Criterion 8, conforms to the Regional Plan.

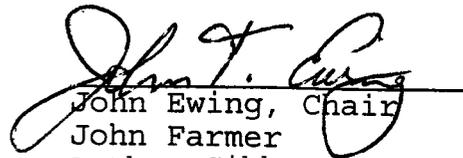
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VII. ORDER

The Board hereby issues Amended Land Use Permit
#8B0444-6-EB (Revised). Jurisdiction is returned to the
District #8 Environmental
Commission.

Dated at Montpelier, Vermont this 19th day of August,
1996.

ENVIRONMENTAL BOARD


John Ewing, Chair
John Farmer
Arthur Gibb
William Martinez
Robert G. Page

DISSENTING (Opinions Attached)

Marcy Harding
Samuel Lloyd
Steve E. Wright

VII. DISSENTING OPINIONS

A. Criterion 8

i. Members Marcy Harding and Steve E. Wright

The Board, in its October 17, 1995 **decision** gave clear instructions to the Applicant to prepare a landscaping plan that would mitigate the effects of the Project. Testimony at the June 12, 1996 hearing during which the Applicants' landscaping plan was presented made it clear that the plan failed to mitigate the impacts of the Project. The application for the Project therefore fails the Criterion 8 "**Quechee test**" because the Applicants have "**failed** to take generally available mitigating steps." The Project is adverse and undue and should be denied.

ii. Member Steve E. Wright

I believe there are additional aesthetic impacts not acknowledged. Completion of the Project will place a large expanse of chrome and glass in a rural valley adjacent to an historic cemetery. The Board, with regard to impacts on Route 7A and adjacent properties, makes an inappropriate reach in prescribing mitigating actions after the Applicants failed to do so. Yet it requires little or nothing to ease the significant visual impact from Route 7. Therefore, I conclude that the Project fails the Criterion 8 "**Quechee test**" because the Project "**is** out of character with its surroundings," and "@@significantly diminishes the scenic qualities of the **area.**" The Project is adverse and undue and should be denied.

B. Criterion 10 - Members Marcy Harding, Samuel Lloyd, and Steve E. Wright

The 1992 Dorset Town Plan clearly states that "vehicle **sales**" are to be restricted to the "**North Dorset area**" (**See** Town Plan section 4.2.1.3(c) - Uses), and goes on to state that a "proposed zoning bylaw amendment" is being prepared to implement this policy. (**See** Town Plan section 4.2.1.3(d) - Policies.) The zoning by-law amendment that the 1992 Dorset Town Plan refers to was adopted in 1995.

The Planning Commission, in its memorandum written to the District #8 Environmental Commission, stated that "conflict does occur with section 4.2.1.3.(c) **Uses.**" (See Board Exhibit #8A). The Planning Commission also stated "**The** Planning Commission has recently presented the Board of

Selectmen with a zoning by-law amendment which would disallow car dealerships in all but North Dorset in accordance with the Plan. This by-law amendment is expected to go to public vote no later than March 1995." See Board exhibit #8A as marked. We dissent from the ruling to exclude this information relative to the new zoning by-law from the evidence. Nevertheless, the memorandum does state that "conformance of this application outweighs the conflict." In other words, in the Planning Commission's view, a project whose proposed location violates a specific prohibition in the Town Plan may be allowed if it is regarded by that Commission as desirable in other respects.

Nothing in 24 V.S.A. Chapter 117 or 10 V.S.A. Chapter 151 provides for such liberties to be taken with a town plan, duly adopted with public participation and approval. A town, through its Planning Commission, can not ignore or modify the existing town plan, unless that plan is formally amended as provided by statute.

The Regional Plan places the Project in a Rural Area and calls for actions which preserve "the rural character of the these areas." The Project diminishes the character of the rural area and is in violation of the Regional Plan

Accordingly, we believe that the Project does not conform with the clear intent of the Town and Regional Plans, and, thus, the Applicants' application for the Project should be denied for failing to satisfy Criterion 10.

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