

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

Re: Manchester Commons Associates,
Michael and Linda Geer Lamb, and Cecile Torrey,
Application #8B0500-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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9/29/95
[DOCKET #631]

I. SUMMARY OF DECISION

This decision pertains to appeals of a permit issued by the District #8 Commission for the so-called Walker Project. This permit approved the development of 15,000 square feet of retail space spread over five buildings, including, among other things, the demolition of two existing buildings and replacement with two new buildings, the renovation of three existing buildings, and the relocation and restoration of a building known as the Walker House (the Project).

As is explained below, the Environmental Board denies the application for the Project because it does not conform with several provisions of the applicable town plan, including a prohibition on new buildings with "footprints" of 3,000 square feet or more. In contravention of the town plan, the Project includes the creation of two new buildings, each with a footprint well over 3,000 square feet. For more discussion, parties are referred to pages 30 to 32 as well to all the findings of fact and conclusions of law relevant to the town plan.

The Board also concludes that the Project will not have an undue adverse effect on aesthetics or historic sites, and complies with the applicable regional plan.

II. SUMMARY OF PROCEEDINGS AND FINDING OF JURISDICTION

On June 21, 1994, Manchester Common Associates (the Applicant) filed an Act 250 application for the Project. The Project site is located on approximately 2.08 acres of contiguous tracts at the confluence of Routes 11 and 30, Center Hill Road, and Elm Street in the Town of Manchester. The Project also involves approximately 1.5 acres of a four-acre tract located approximately 700 feet from the Project site. A permit is required for the Project pursuant to 10 V.S.A. Chapter 151 (Act 250) because it consists of the construction of improvements for commercial purposes on more than one acre in a town which does not have subdivision by-laws. See 10 V.S.A. §§ 6001(3), 6081(a); Environmental Board Rule (EBR) 2(A)(2), 2(F).

On September 15, 1994, the District #8 Commission issued a prehearing conference report and order concerning the Project. The report includes grants of party status to: (a) James and Nancy Sparkman "under criteria 8 and 10" as "materially assisting through the presentation of expert testimony," and (b) to Ferdinand Bongartz "under Criterion 10" as "materially assisting through the presentation of expert testimony."

On September 23, 1994, the Applicant filed a motion for interlocutory appeal with the Board concerning the grants of party status to the Sparkmans and Mr. Bongartz.

On October 17, 1994, the Board denied the motion for interlocutory appeal because it determined that the motion did not meet the standards for interlocutory appeal set forth in EBR 43. The Board stated that the Applicant may appeal the grants of party status following the District Commission's final decision on the application for the Project.

The District Commission subsequently held hearings on the application. On March 2, 1995, the District Commission issued **Land Use Permit #8B0500** (the Permit), approving the Project with conditions.

On March 27, 1995, Mr. Bongartz filed an appeal with respect to 10 V.S.A. § 6086(a)(10) (local and regional plans). Also on March 27, the Sparkmans filed an appeal with respect to 10 V.S.A. § 6086(a)(8) (historic sites, aesthetics) and (10).

On May 1, 1995, Board Chair John T. Ewing convened a prehearing conference in Montpelier. Following the prehearing conference, the parties filed memoranda regarding preliminary issues raised concerning party status and a motion to disqualify a witness filed by the Applicant.

On May 16, 1995, the Chair issued a prehearing conference report and order, which is incorporated by reference.

On May 24, 1995, the Board deliberated concerning the preliminary issues. On May 25, the Board issued a memorandum of decision on those issues, which is **incorporated** by reference. The memorandum of **decision denied the Applicant's** challenge to the party status of the Sparkmans and Mr. Bongartz, ruled that the Sparkmans and Mr. Bongartz continue to be granted party status, and denied the motion to disqualify a witness;

On June 19, 1995, the parties filed a stipulation of facts and a stipulation of exhibits. During June and early July, the parties also filed **prefiled** direct and rebuttal testimony, written evidentiary objections, and proposed findings of fact and conclusions of law.

On July 18, 1995, the Chair convened a second prehearing conference, with the following parties participating:

The Applicant by David M. Wilson, Esq. and Andrew W. **MacLean**, Esq.
Ferdinand Bongartz by Mary C. Ashcroft, Esq.
James and Nancy Sparkman by William E. Roper, Esq.

During the second prehearing conference, the Chair and 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 and overruled an objection by the Applicant to the Sparkmans' proposed findings of fact and conclusions of law.

On July 19, 1995, the Board convened a hearing in Manchester, with the following parties participating:

The Applicant by David M. Wilson, Esq. and Andrew W. MacLean, Esq.
Ferdinand Bongartz by Mary C. Ashcroft, Esq.
James and Nancy Sparkman by William E. Roper, Esq.
The Town of Manchester Planning Commission by Lee Krohn

After hearing overviews from the parties, the Board took a site visit and returned to the hearing room, where the Chair placed observations from the visit into the record. The Chair also placed on the record the rulings he made on July 18. The Board then heard testimony, after which it recessed and conducted a deliberative session.

On August 7, 1995, the Board, through counsel, issued a recess memorandum. On August 18, the Board issued a memorandum to parties concerning the status of this matter.

The Board deliberated again on September 13, 1995. On that date, following a review of the evidence and arguments presented in the case, the Board declared the record complete. and-adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

III. ISSUES

- a. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on historic sites.
- b. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on aesthetics or scenic beauty.
- c. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the Project conforms with the applicable local and regional plans.

IV. FINDINGS OF FACT

For the convenience of the reader, the findings of fact below are organized into a general section, followed by sections related to the specific issues.

By organizing the findings under "issue" headings, the Board in no way

means to imply that, with respect to any one issue, only the findings under that heading are relevant. The findings should be read as cumulative. Where findings under another heading are relevant, they are assumed and are not repeated.

General

1. The Project involves several parcels of land. Those listed immediately below, within this Finding 1, all form one block of land, which will be collectively referred to as the Project Tract under EBR 2(F)(1):
 - a. The so-called Citron parcel, consisting of approximately .34 acres, presently owned by the Applicant.
 - b. The so-called Walker parcel, consisting of approximately .84 acres,, presently owned by H.B. Partners L.P.
 - c. The so-called Fleming parcel, consisting of approximately .48 acres, presently owned by FH Corp.
 - d. The so-called Miller parcel, consisting of approximately .21 acres, presently owned by the Applicant.
 - e. The so-called Lamb parcel, consisting of approximately .24 acres, presently owned by co-applicants Michael and Linda Geer Lamb.
2. The Project also involves, under EBR 2(F)(2), approximately 1.5 acres of a four-acre tract off Richville Road in Manchester presently owned by Cecile Torrey (the Torrey Tract). The Torrey Tract is approximately 700 feet from, and is not contiguous to, the Project Tract.
3. Ben Hauben is a principal in the Applicant. He also controls H.B. Partners, L.P.¹ Each of the parcels listed in Finding 1, above, as owned by the Applicant, is contiguous to the Walker parcel owned by H.B. Partners, L.P.
4. The Project Tract is bordered on the north by Elm Street, on the west by

¹*In connection with this statement, the Board takes official notice pursuant to 3 V.S.A. § 810 of an unappealed memorandum of decision and order by the District # 8 Commission dated June 14, 1993 regarding application #8B0484. In Finding of Fact #7 of that decision, the District Commission found that "Ben Hauben controls H.B. Partners" The Board may take notice at any stage of the proceedings. In re Handy, 144 Vt. 610, 613 (1984).*

Center Hill Road, on the south by Vermont Routes 11 and 30, which combine on one roadway at this point (Routes 11/30), and on the east by properties owned by Guy and Vivian Thomas and Ambron Associates.

5. The Project Tract presently is developed with both residential and commercial uses. Existing buildings on the Project Tract include:
 - a. On the Citron parcel:
 - i. The Citron House, fronting on Elm Street, presently in retail use, with a “footprint” of approximately 2180 square feet; and
 - ii. “Building B,” fronting (more or less) on Center Hill Road, presently in retail use, with a “footprint” of approximately 1400 square feet.
 - b. On the Walker parcel:
 - i. The “Big A Building,” fronting on Routes 11/30, presently in retail use, with a “footprint” of approximately 6175 square feet; and
 - ii. The Walker House, fronting on Routes 11/30, presently vacant, with a “footprint” of approximately 2625 square feet.
 - c. On the Fleming parcel, the Fleming Building, fronting on Routes 11/30, presently in retail use, with a “footprint” of approximately 7250 square feet.
 - d. On the Miller parcel, the Miller House, fronting on Elm Street, presently in residential use, with a “footprint” of approximately 1072 square feet.
 - e. On the Lamb parcel, the Lamb House, fronting on Elm Street, presently in use as residential apartments, with a “footprint” of approximately 1318 square feet. The Lamb parcel also contains a barn being used for storage; the barn has a “footprint” of 230 square feet.
6. By “footprint,” the Board refers to the square footage of the first floor.
7. As part of the Project, the Big A Building will be demolished. A new building, “Building C,” with a footprint of approximately 5876 square feet, will be constructed on the Walker parcel in a different location from the Big A Building, much closer to Routes 11/30.

8. As part of the Project, the Fleming Building will be demolished. A new building, "Building D," with a footprint of approximately 6484 square feet, will be constructed on Fleming parcel in a different location from the Fleming Building.
9. Not one part of the Big A Building will be used in the construction of Building- C. Not-one part of the Fleming-Building will be used in the construction of Building D.
10. The Project also includes the following:
 - a. The relocation of the Walker House to the Torrey Tract.
 - b. An addition to the-Citron Building, along with restoration work to that building. The addition will add approximately 980 square feet to the building's footprint.
 - c. Conversion of the Lamb and Miller Buildings to retail use, with some restoration work, and the construction of an addition which will connect the two buildings. The footprint of this addition will be approximately 380 square feet.
 - d. The elimination of three curb-cuts on Routes 11/30, and their replacement with a single curb-cut to serve as the main Project entrance. This entrance will be constructed opposite Richville Road, at that roads intersection with Routes 11/30. The main entrance has been sited to run through the present location of the Walker House.
 - e. The elimination of several curb-cuts along Center Hill Road and Elm Street, and their replacement by a single curb-cut on Elm Street to serve as another entrance to the Project.
 - f. The creation of 85 parking spaces, which will be placed behind the various buildings, in the center of the Project Tract. These parking spaces will be shared by the various buildings.
11. Following construction, the Project will include approximately 15,000 square feet of active retail area. The tenants have not been identified.
12. Traffic congestion is a significant problem in the Town of Manchester. The intersection of Routes 11/30 and Richville Road is a major intersection currently experiencing enough congestion that a left turn from Richville Road onto Routes 11/30 is at an unacceptable level of service (F). Conditions at the intersection are expected to worsen by 1999.

28. The Walker House was built in 1905 and is historically significant. It has been in deteriorated condition for some time and its condition has worsened since it was purchased four years ago by H.B. Partners, L.P. It can be restored with proper treatment.
29. Heavy development has occurred along the Route 11/30 corridor in recent years. As a result, the Route 11/30 corridor has lost its sense of time and place. The, historic context for the Walker house, therefore, has been seriously compromised.
30. The Applicant proposes to move the Walker House to the Torrey Tract and to restore the interior and exterior of the Walker House. The restoration will be subject to review and approval by the Division. The Applicant has received a zoning permit for the relocation of the Walker House to the Torrey Tract for residential use. The Applicant has not submitted to the Board a site plan for the relocation or any details concerning 'restoration, placement of the Walker House on the Torrey Tract, or how the Applicant proposes to ensure the continued preservation, following relocation, of the Walker House as an historic structure.
31. The relocation of the Walker House will diminish the ability of the public to appreciate the House's historic context. However, that context has already been greatly compromised by changes to the Route 11/30 corridor which diminish the interaction of the House with its site. Moreover, the relocation provides an opportunity to restore and preserve the House in a location not far from its present site.
32. The relocation of the Walker House allows the Applicant to reduce the number of curb-cuts, consolidate the parking of the Project to the interior portion of the site, screen the parking from passing motorists and pedestrians, and improve vehicular and pedestrian safety. In particular, the relocation allows traffic to enter the Project Tract directly opposite Richville Road, resulting in safer, signalized intersection. These improvements, and the level of traffic safety resulting from them, **cannot** be accomplished without moving the Walker House off-site.
33. Prior to demolition, the Applicant will document and catalog the existing historic features of the Big A and Fleming Buildings under the supervision of the Division.
34. The Big A and Fleming Buildings are in a state of disrepair. The Big A and Fleming Buildings are not historically significant.
35. New Buildings C and D will be two story buildings conforming to current **height** restrictions. The buildings have been designed to enhance the

historic character of the commercial core of Manchester through a mix of **various** period architecture with authentic scale, proportions, detailing, and use of materials. The buildings will typify a “main street aesthetic” found in many Vermont downtowns.

36. In this matter, **official** testimony of the Vermont Advisory Council on Historic Preservation has been supplied by the State Historic Preservation Officer (Townsend Anderson), who was chair of the Council at the time it considered the historic impacts of the Project, and by the Director of the Division (Eric Gilbertson), who works closely with the Council. This testimony included official minutes of Council meetings showing the conclusions reached by the Council.
37. The Board also has received testimony from the current Chair of the Council (Thomas Keefe), who represents the Sparkmans in this matter. Although a member of the Council at the time the Council reviewed the Project, the current Chair did not participate because of such representation. The current Chair’s testimony includes evidence relevant to assessing the testimony of the Preservation Officer and the Director and the conclusions reached by the Council.

Aesthetics and Scenic Beauty

38. The Project will be located in an area of mixed residential and commercial uses in an historic Vermont village. The immediate surroundings of the Project are within the core of that village, on an approach to its center.
39. There are no wooded areas, mountains, ridge lines, wetlands, streams or shorelines on or near the Project Tract.
40. No unique natural areas are located on the Project Tract or are likely to be affected by the Project.
41. The Project Tract possesses no significant open space.
42. Existing uses in the area generally are small in scale. Some of the existing uses exceed the size of the Project buildings individually.
43. Uses on the Elm Street side of the Project Tract primarily are residential. The Project will result in increased commercial use along Elm Street, resulting in increased exposure by residents to vehicular and pedestrian traffic associated with the Project.
44. Extensive commercial uses exist along the Route 11/30 side of the Project.

13. The Project will add generate approximately 167 vehicle trips, with approximately 53 of these trips being new, that is, solely attributable to the existence of the Project. The addition of these trips will somewhat exacerbate congestion at the intersection of Routes 11/30 and Richville Road but will not cause any turning movements not presently at an unacceptable level to reach such a level.
14. The Applicant will include, as part of the project access opposite the intersection of Routes 11/30 with Richville Road, a shared left-turn/through lane and an exclusive right-turn lane.
15. The Applicant proposes to pay for a traffic signal at the intersection of Routes 11/30 and Richville Road which will be necessary following project construction.
16. The proposed traffic measures will improve congestion turning movements at the intersection of Routes 11/30 and Richville Road. However, a left turn from Richville Road onto Routes 11/30 will still be at an unacceptable level of service (E).

Historic Sites

17. The Project is located within an area of Manchester known as the Manchester Depot. This area was built up in the decades around the turn of the century as a residential and commercial neighborhood associated with a railroad depot and marble and woodworking industries. The railroad depot itself dates back to the Civil War.
18. The early center of the Depot area was the intersection of Elm Street and Highland Avenues, which is northeast of the Project Tract. The district includes a variety of little-altered vernacular houses and stores and one shingle-style house. Intrusions are few and consist of two recently moved buildings, a recent garage, and two severely altered houses.
19. The historical integrity of the Depot area is presently intact but is threatened by piecemeal development.
20. In 1985 the Depot area was surveyed as a state register historic district. No evidence has been provided concerning the boundaries of the state survey or the buildings shown on the state survey as historic structures.
21. The 1987 Town Plan for Manchester, Vermont (re-adopted Aug. 18, 1992) (the Town Plan) identifies a Manchester Depot Historic District centered on the intersection of Elm Street and Highland Avenue (the Depot District). On page 32, the Town Plan includes a map of the Depot

District. The map shows the Citron, Lamb, and Miller parcels within the District, and the Citron Building, and Lamb and Miller Houses as historic structures. The map shows the Walker and Fleming parcels outside the District. The Walker House and the Fleming and Big A Buildings are not designated historic structures in the Town Pan.

22. The Depot District is eligible for inclusion on the national register of historic places. Neither the Project Tract nor any structure on it is listed on the National Register of Historic Places.
23. There is a conflict in the evidence concerning whether many of the Buildings or Houses identified above are listed on the state register of historic places.' For reasons discussed in Section V.B.1., below, the Board declines to resolve this conflict. as to most of the **Buildings** or Houses. The Board does find that the Big A and Fleming Buildings are not listed on the state register.
24. The Citron Building, and the Walker, Lamb, and Miller Houses are on the Vermont Historic Sites and Structures Survey. This means they are eligible for inclusion on the state register of historic places.
25. The Miller and Lamb Houses were built circa 1880. They are consistent with the single family construction and vernacular character of the Depot District.
26. The Applicant's proposal for the **Citron** Building and the Miller and Lamb Houses increases the commercial intrusion into Elm Street's residential streetscape. This intrusion will be accentuated by increased vehicular traffic using the newly commercial Miller and Lamb Houses and by the parking lot behind those houses which will be visible from Elm Street.
27. The Applicant's design for the Citron Building and the Miller and Lamb Houses represents an adaptive reuse of these structures. To an extent, this reuse will undermine the historic integrity of the Depot District, through the joining of the Lamb and Miller Houses into a single commercial structure, and by adding a parking lot and cars in place of the present green space and trees. However, the design restores the significant features of the historic facades of these buildings, and retains the historic quality of the streetscape. The architectural design is compatible with the Elm Street neighborhood. The interior and exterior renovation of the structures will be done in accordance with the U.S. Secretary of Interior's current Standards for Rehabilitation and will be subject to the review and approval of the State of Vermont Division for Historic Preservation (the Division).

45. Project colors are compatible with the colors of existing structures in the area of the Project Tract.
46. The Applicant's site plan includes extensive plantings along the perimeter of the Project and in the interior parking area.
47. Of 35 existing trees on the site, 16 will be untouched by the Applicant, and as many as 19 will be removed. The Applicant also will plant 45 new hardwood and softwood trees.
48. The Project will be visible to drivers and pedestrians on Routes 11/30, Center Hill Road, and Elm Street.
49. The design of the proposed Project buildings is proportionate to the existing structures in the area.
50. The Project buildings and landscaping will provide screening of the internal parking area from drivers and pedestrians in the Project area.

Town Plan

51. The local plan which was in effect on the dates the Applicant filed applications for local zoning approval and for an Act 250 permit was the Town Plan cited above.
52. The Town Plan places the Fleming parcel and most of the Walker parcel in its C-1 District. The Fleming and Big A Buildings, and the Walker House, are all within the C-1 District. The sites of the proposed Buildings C and D are also within that district.
53. The Town Plan places the Citron, Lamb, and Miller parcels, and a portion of the Walker parcel, in the C-3 District. The Lamb and Miller Houses, and the Citron Building, are all within the C-3 District.
54. Section 4.2 of the Town Plan states that the C-1 District is the "Manchester Center commercial district" and is the primary business and service center for the town.
55. Section 4.2 contains the following policies for commercial districts:
 - Policy 1: The 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%**. Exceptions to this policy may be made only in the case of such essential services as full service grocery stores, post

offices, government buildings, hospitals, and residential buildings.

- Policy 2: Historic buildings of local, state, or national significance should be preserved. New developments within a Design Review District should be compatible with the goals, policies, and permitted uses within such district.
- Policy 3: Significant natural or topographic features of the land shall be retained. Adequate open space and landscaping provisions shall be incorporated in any development project to better integrate such development with adjacent properties.
- Policy 4: High traffic generators (e.g. drive-through or fast-food restaurants, drive-through banks, etc.) shall not access directly to Routes 7, 7A, 11/30 or 30. Access to a side-street shall not be less than 100 feet from the intersection of such side street and any of the above-mentioned routes.
- Policy 5: Combined access and/or shared parking shall be provided when such a cooperative solution would allow for more efficient land use, better integrated open space, or improved pedestrian circulation.
- Policy 6: Projects which would cause an undue impact on existing public services and facilities shall not be permitted unless the applicant clearly demonstrates an ability to overcome such deficiencies.
- Policy 7: Buildings shall be sited in an orderly non-random fashion and consideration shall be given to external design of buildings and related site improvements. Materials and design details shall be harmonious and proportionate with adjacent land uses.

(Emphasis added.)

56. Section 4.3 of the Town Plan is entitled "Performance Standards by Type of Development." Section 4.3 states, in Policy 1, subsection b, that

Commercial development shall meet minimum design considerations, including: ...

- b. provision of adequate on-site parking, storage, and

- loading areas;
- c. provision of appropriate landscaping;
- d. provision of adequate screening of parking, loading, and storage areas from surrounding properties; ...

57. Section 5.6 of the Town Plan contains policies for historic districts, individual historic sites, and the central business area, including the following policies:

Policy 1: Buildings and sites of historic or architectural merit shall be preserved and new developments shall be compatible with existing historic and architectural features. The destruction of such properties may only be permitted when it is clearly demonstrated that there can be no reasonable use of the property without such action. Similarly, structural alterations that would effectively destroy the historic or architectural merit of a property shall be prohibited unless it is clearly shown that no reasonable use of the property is possible without such modification.

Policy 2: New developments shall be adequately landscaped to provide screening for adjacent historic properties.

Policy 3: The renovation, reuse, or readaptive use of historic structures should be encouraged so that the architectural and aesthetic qualities of the town center may be preserved. ...

58. Section 1.4 of the Town Plan states, concerning "Business Development," that "[t]he small scale of commercial buildings should be retained because they are more compatible with, and complimentary to, the existing built environment." Section 1.4 also states, concerning "Historic Preservation and Design Review, that "[a] survey of historic sites in Manchester reveals a rich mixture of styles in a variety of historic properties. These properties are important assets and essential building blocks which help define the character of the town center."

59. The Town Plan does not contain a "Definitions" section. The Town Plan does not define the phrase "new building" (used in Section 4.2, Policy 1) or the phrase "adequate parking" (used on Section 4.3, Policy 1).

60. The local zoning by-law applicable to the Project is the Town of Manchester, Vermont, Zoning Ordinance, adopted October 24, 1983, as amended (the Zoning Ordinance). Manchester does not have subdivision by-laws.

61. The Zoning Ordinance places the same portions of the Project Tract within the C-1 and C-3 Districts as does the Town Plan. For the commercial districts, the Zoning Ordinance contains the same maximum limits on footprints (3,000 square feet) and lot coverage (15%) as does Section 4.2 of the Town Plan except that in the C-3 District, the limit on lot coverage is 13%. See Zoning Ordinance, §§ 6.1.4(8), 8.9.5, 8.9.7, 8.9.11.
62. In implementing the 3,000 square foot footprint restriction, the Zoning Ordinance states in part that "[n]o one building shall have a footprint greater than 3,000 square feet in area, measured on the first floor thereof . . ." Zoning Ordinance at § 8.9.11.
63. The Zoning Ordinance does not contain a definition for the phrase "new building."
64. The Zoning Ordinance subjects "major development projects" to a special review process known as "major development project review." Zoning Ordinance, § 8.9. The phrase "major development project" includes new retail service development of 3,000 square feet or more, expansions of existing development of 3,000 square feet or more (including the existing building area), and "[a]ny building renovation . . . determined by the Planning Commission" to meet certain criteria. Zoning Ordinance at § 8.9.5. Major development projects are subject to the same maximum limits on footprints (3,000 square feet) and lot coverage (15 percent) as stated in Section 4.2 of the Town Plan. Zoning Ordinance § 8.9.11.
65. Pursuant to Zoning Ordinance § 8.9.5, the Planning Commission found that the Project is a "major development project."
66. The Zoning Ordinance at § 1.18 defines the term "renovation" to mean:

Any exterior structural change, rearrangement, change of location, or addition to a building, structure, or sign, other than repairs to building equipment and general maintenance.
Any interior alteration when new conditional use, or expansion of usable floor area of a permitted use, is involved.
67. The term "renovation" typically means that a significant portion of the original building remains standing.
68. The Applicant has provided testimony concerning prior Manchester zoning approvals involving renovation of existing building. The projects involved in those approvals are referred to as R.K. Miles, Inc., Manchester Wood-Clifford Pierce, and Michael Tatko. In discussing these projects, the Applicant has not stated how much of the existing buildings remained

standing following renovation or whether the existing buildings were demolished.

69. Over time, the Applicant has evolved its description of the proposal concerning the Big A and Fleming Buildings. In the Applicant's materials as submitted to the District Commission, the Applicant described this proposal as replacement of those buildings with "new buildings." See, for example, Exhibit A8, Project Description. Now, in rebuttal testimony filed with the Environmental Board, the Applicant describes this proposal as "renovation" and "redevelopment" and claims that Buildings C and D will not be "new buildings." See, for example, Exhibit A42, rebuttal testimony of Kirk Moore.
70. The Chair of the Town of Manchester Planning Commission has given the Board an opinion that the Project conforms with the Town Plan. The Chair acknowledges that the Project does not conform to the footprint limit of 3,000 square feet but believes that this limit need not be applied to "good" developers and "good" projects.
71. The Zoning Ordinance at § 8.4.10 contains requirements for minimum number of off-street parking spaces. Under the Zoning Ordinance, the required minimum number of spaces for the Project is 113.
72. On September 1, 1993, the Town of Manchester Zoning Board of Adjustment issued findings of fact and conclusions of law #93-08-136 to Charles Fleming, concluding that the Fleming Building is a pre-existing retail structure and that, although the Zoning Ordinance would require 48 parking spaces, the Building's existing 20 parking spaces were "grandfathered."
73. The lot coverage of the Project is approximately 20 percent.
74. The Project does not include a fast-food restaurant, or a drive-through restaurant or bank, or similar business.
75. The following have the ability to serve the Project without undue impacts: municipal water and sewer system, police and fire departments, emergency medical services, school system, waste disposal system, or public utility services.
76. Stormwater runoff from the Project will place no additional demand on the Town's stormwater drainage system over the demand presently placed on that system by the Project Tract.

Regional Plan

77. The applicable regional plan is the Bennington Regional Plan, adopted February 20, 1992, as amended January 21, 1993 (the Regional Plan).
78. Among others, the Regional Plan provides the following in § 7.6, "Policies and Actions":

1. New development should be concentrated in and around established growth centers; scattered development which is remote and little relationship to existing settlement patterns should be avoided.
2. A variety of residential, **commercial**, industrial, and cultural and recreational uses, at relatively high densities, is appropriate in urban centers. Public investments in infrastructure and public services, and private development activities, should seek to support the development or redevelopment of urban centers rather than the creation of new concentrations of development. Development from urban centers should not sprawl into surrounding rural areas. ...
6. Important historic sites, structures, and districts should be preserved. New development in historic areas should be architecturally compatible with its surroundings. The adaptive reuse of historic buildings is encouraged, and renovation work should maintain the architectural integrity of historic structures. ...
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 an architectural and landscape design plan that complements the surrounding environment. ...

Adequate parking and loading spaces must be provided, and should be located and/or screened so as not to be prominently visible from streets or

neighboring residential areas.

- Provision should be made for safe and efficient vehicular ingress and egress; access onto roads where steep grades exist or within 400 feet of a major intersection should be avoided. Adjacent commercial developments should use combined cuts and connect parking lots internally whenever possible.

79. The Project will be located within the commercial core of Manchester, an area designated by the Regional Plan as an urban center and an established growth center.

V. CONCLUSIONS OF LAW

A. **Burden of Proof**

The burden of proof generally is considered to include both the burden of production and the burden of persuasion. In Act 250 the burden of production means the burden of producing sufficient evidence on which to make positive findings under the criteria. The burden of persuasion refers to the burden of persuading the Board that certain facts are true. Re: Killington, Ltd. and International Paper Realty Corp., #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990). See also In re. Quechee Lakes Corn., 154 Vt. 543, 553-54 (1990).

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

B. **Criterion 8 (Historic Sites)**

Before issuing a permit, the Board must find that the Project "[w]ill not have an undue adverse effect ... historic sites" 10 V.S.A. § 6086(a)(8). The term "historic site" is defined as follows:

[A]ny site, structure, district or archeological landmark which has been officially included in the National Register of Historic Places and/or the state register of historic places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.

In accordance with Re: Middlebury College, #9A0177-EB, Findings of Fact, Conclusions of Law and Order at 9-10 (Jan. 26, 1990), the Board will follow a three-stage analysis of the historic sites criterion: (a) whether the Project site is or contains an historic site; (b) whether the Project will have an adverse effect on the historic site; and (c) whether any such adverse effect will be undue.

Prior to commencing this analysis, the Board notes an argument by the Applicant that the State would be without jurisdiction under Act 250 to protect allegedly historic sites if the Applicant were not joining all of the sites together in this application. The Board rejects this argument because it implies that a lower standard should be applied to this application or otherwise there will be no protection of the sites. The Board will apply Criterion 8 (historic sites) to the Project in the same manner as it would any other project.

Further, the Board advises the Applicant, H.B. Partners, and Mr. Hauben that Act 250 may apply to any construction of improvements for commercial or industrial purposes on the subject parcels owned by the Applicant and H.B. Partners, or by entities under Mr. Hauben's control on the other, contiguous parcels which form the Project Tract. This is because, through the Applicant and H.B. Partners, Mr. Hauben owns or controls a contiguous tract of land exceeding an acre in size in a town without subdivision by-laws. See 10 V.S.A. § 6001(3), Environmental Board Rule (EBR) 2(A)(2); In re Stokes Communication Corp., No. 94-208, slip op. (Vt., July 1, 1995); In re Costello Garage, 158 Vt. 655 (1992) (mem.).

The Board will now analyze the Project's compliance with Criterion 8 (historic sites).

1. Historic Site

Under 10 V.S.A. § 6001(12), three ways exist for a structure, site, or district to be an "historic site": (a) listing on the National Register of Historic Places, (b) listing on the state register of historic places, and (c) a conclusion of the Board or district commission based on the testimony of the Advisory Council. Middlebury, supra at 9. An affirmative conclusion on any one of them means that a structure, site, or district is an "historic site." The Board will examine each of them in turn.

a. National Register

As found above, neither the Project Tract nor any building on it is listed on the National Register of Historic Places. Moreover, while the Depot District appears eligible for inclusion on that register, no party has contended that the Depot District is actually on it.

b. State Register

As we **stated** recently in Re: New England Kurn Hattin Homes, #2W0082-4-EB, Memorandum of Decision at 4-5 (June 14, 1995), a structure, site, or district which is 'on the state register is an "historic site," and the Board and district commissions have no discretion to declare otherwise.

Listing on the state register is a question of fact. Usually there is no dispute: Either a structure has been listed on the state register or it has not been listed. However, this case appears unique in that the parties dispute whether the structures on the Project Tract have been listed on that register. Compare the testimony of **Townsend** Anderson and Eric Gilbertson (Exhibits A2, A3, and A41) with that of **Thomas** Keefe (Exhibits S1 and S11).

It is up to the Board, as the trier of fact, to resolve factual disputes. ~~Doachen ossipracat 554-55~~ structures on the Project Tract, the Board believes it need not do so because, under the third part of the "historic sites" definition (see subsection c, immediately below), the Board independently concludes that those structures constitute historic sites.

However; as stated in the above findings of fact, the Board is persuaded that the Big A and Fleming Buildings are not on the state register. The Board therefore concludes that those buildings are not conferred "historic site" status by state register listing.

The Board also suggests that listing on the state register should not be subject to factual dispute. The Advisory Council and the Division therefore may wish to take steps to reduce the possibility of such dispute.

c. Advisory Council

The third part of **10** V.S.A. § 6001(12) allows the Board or district commissions to declare a site, structure, or district to be an "historic site" even if it has not been listed on the national or state registers. The statute provides, however, that such as declaration must be relate to a site, structure, or district "established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant."

Accordingly, under the third part of the "historic site" definition, the Board and district **commissions** must examine the testimony of the Advisory Council to determine whether such testimony establishes a site, structure, or district as historically **significant**.

This examination is different from a situation involving a state register listing because, in making the examination, the Board and district **commissions**

are not bound by the opinion provided by the Council. Instead, as with any witness, the Board and district commissions may believe all of the Council's testimony, none of it, or some of it. Quechee, supra at 554-55. Thus, in the absence of a register listing, the Board or district commissions may find that the facts presented in the Council's testimony establish a structure, site, or district to be or not to be historically significant, notwithstanding an opposite conclusion drawn by the Council.

In examining the Council's testimony in this case, the Board has been confronted with a unique situation: official Council evidence, through the testimony of the State Historic Preservation Officer (Mr. Anderson) and the Director of the Historic Preservation (Mr. Gilbertson), has been supplied by the Applicant; and conflicting evidence, through the testimony of the current Chair of the Council (Mr. Keefe), has been supplied by the Sparkmans.

The Board therefore must determine which testimony is that of the Advisory Council, because it is the Council's testimony which the Board must examine under the third part of the historic site definition.

The Board concludes that the testimony of the Advisory Council in this case is the official evidence supplied through the testimony of the Preservation Officer and the Director. The Chair of the Council cannot, in this matter, represent the Council because he did not participate in Council discussions on the matter due to his representation of the Sparkmans. However, to the extent the testimony of the Chair brings to light evidence relevant to assessing the testimony of the Preservation Officer and the Director and the official conclusions of the Council, the Board may consider such evidence.

Based on examination of the testimony of the Advisory Council, the Board has found above that:

- a. The Depot District is eligible for inclusion on the national register of historic places, was surveyed as a state register district in 1987, and is an historic residential and commercial neighborhood which presently retains its historic integrity.
- b. The Citron Building and the Iamb and Miller Houses are part of the Depot District and are on the Vermont Historic Sites and Structures Survey. They are eligible for inclusion on the state register of historic places. The Iamb and Miller Houses were built around 1880 and are consistent with the historic design of the Depot District.
- c. The Walker House is on the Vermont Historic Sites and Structures Survey and is eligible for inclusion on the state register of historic places. The Walker House was built in 1905 and has historic significance.

- d. The Big A and Fleming Buildings are not historically significant.

Accordingly, the Board concludes that the Depot District, the Citron Building, and the Walker, Iamb, and Miller Houses are historic sites. The Board further concludes that the Big A and Fleming Buildings are not such sites.

Because of these conclusions, the Board will continue the analysis of Criterion 8 (historic sites) with regard to the Depot District, Citron Building, and Iamb, Miller, and Walker Houses, and will not continue the analysis with respect to the Big A and Fleming Buildings.

2. Adverse Effect on Historic Site

If an historic site under 10 V.S.A. § 6001(12) is present, then the Board or district commission must next determine whether a development or subdivision proposes an adverse effect on the historic site.

In contrast to the determination of whether an historic site is present, the Board and district commissions are not bound in determining “adverse effect” by any register listing and are not required to base any findings and conclusions on the testimony of the Advisory Council. Instead, the determination of “adverse effect” is solely within the province of the Board or district commission, based on the evidence presented. See 10 V.S.A. § 6086(a); Kurn Hattin, supra at 5.

In Middlebury College, we announced that, in determining “adverse effect,” it is central to determine whether a project is in harmony with or fits within the historic context of the site. Two guidelines in evaluating this “fit” include:

- (a) whether there will be physical destruction, damage, or alteration of those qualities which make the site historic, such as an existing structure, landscape, or setting; and
- (b) whether the proposed project will have other effects on the historic structure, landscape or setting which are incongruous or incompatible with the site’s historic qualities, including, but not limited to, such effects as the isolation of the historic structure from its historic setting, new property uses, or new visual, audible, or atmospheric elements.

Middlebury College, supra at 10.

Based on the foregoing findings of fact, the Board reaches the following conclusions regarding adverse effect on historic sites:

- a. The historic context of the Depot District will be adversely affected by the Project’s proposals with the respect to the Citron Building and the Iamb

and Miller Houses. These proposals include alteration of historic qualities (the joining of the Lamb and Miller Houses) and the introduction and accentuation of incompatible property uses (change of Lamb and Miller Houses to commercial use, increase in vehicular traffic, and replacement of green space with a parking area).

- b. For the same reasons, the proposals with respect to the Citron Building and the Lamb and the Miller Houses will adversely affect not only the Depot District but also those structures individually.
- c. The relocation of the Walker House will adversely affect the House's historic context because it will be removed from that context. However, such relocation does not affect the Depot District because the House is not part of the District.

3. Undue Adverse Effect on Historic Site

If the Board or district commission concludes that a proposed project will have an adverse effect on an historic site, the third and final step is to determine whether such effect is "undue."

Similar to the determination of "adverse effect," the determination of "undue" is solely within the province of the Board or district commission, based on the evidence presented. See 10 V.S.A. § 6086(a); Kurn Hattin, supra at 5.

In Middlebury College, we announced consideration of four factors in determining "undue"?

- a. The failure of an applicant to take generally available mitigating steps which a reasonable person would take to preserve the character of the historic site.
- b. Interference on the part of the proposed project with the ability of the public to interpret or appreciate the historic qualities of the site.
- c. Cumulative effects on historic qualities of the site by the various components of a proposed project which, when taken together, are so significant that they create an unacceptable impact.
- d. Violation of a clear, written community standard which is intended to preserve the historic qualities of the site.

An affirmative conclusion on any one of these factors is sufficient to support a conclusion that an adverse effect is undue. Middlebury College, supra at 10. The Board will review each factor in turn.

a . Mitigating Steps

With regard to the Citron Building and the Iamb and Miller Houses, the Applicant proposes various mitigating steps as delineated in Findings 27, 45 through 47, and SO, above. The Board concludes that, in the context of this case, the Applicant has not failed to take generally available steps to mitigate the effects of its proposals on these structures.

Concerning the Walker House, the Board concludes that the Applicant's proposal to restore the House on a site not far from its present location will constitute adequate mitigation for the effect of relocation, if conditioned as discussed below. In reaching this conclusion, the Board is persuaded by the following, each of which is essential to the conclusion: (a) the significant loss of historical context for the Walker House which has already occurred; (b) the fact that the House is not within the Depot District; and (c) the Board's belief that the historic significance of the House does not rise to a level at which no relocation is acceptable.

The Board's conclusion that restoration is adequate mitigation is conditional because the Applicant has not submitted to the Board a site plan for the relocation or any details concerning restoration, placement of the Walker House on the Torrey Tract, or the continued preservation, following relocation, of the Walker House as an historic structure. Such information is necessary to ensure that the restoration will continue in the future to mitigate the relocation's adverse effect on the ability of the public to appreciate and interpret the historic nature of the Walker House. Therefore, if the Board were to issue a permit, it would include the following condition:

Prior to construction, the Permittee shall submit a proposal to the District #8 Commission, which includes at least the following:

- (1) A detailed site plan showing the proposed location of the Walker House on the Torrey Tract.
- (2) A detailed statement of how the Walker House will be restored and of how the restoration and proposed location on the Torrey Tract will affect the public's ability to appreciate or interpret the historic nature of the Walker House.
- (3) A proposal for future use and management of the Walker House sufficient to ensure that the House will continue to be preserved as an historic structure.

Construction may not commence until written approval of the proposal by the District Commission.

It is necessary to require approval of this proposal prior to construction because the proposal must be in place prior to a critical part of the Project, the relocation of the Walker House.

b. Interference with Public Interpretation or Appreciation

With respect to the Citron Building and the Lamb and Miller Houses, the Board concludes that, with the mitigating steps proposed by the Applicant, the Project's proposals for these structures will not unduly interfere with the public's interpretation or appreciation of the historic qualities of the structures or of the Depot District.

Regarding the Walker House, the Board concludes that, with the mitigating steps proposed by the Applicant and the condition discussed above, the interference with public interpretation or appreciation will not be undue. In reaching this conclusion, the Board is persuaded by the same essential items discussed above under "Mitigating Steps."

c. Cumulative Effects

Based on the foregoing findings of fact, and with the mitigating steps proposed by the Applicant for the Citron Building, and the Walker, Lamb, and Miller Houses, and the condition discussed above, the Board concludes that the Project will not have cumulative effects on the historic qualities of the Depot District or on any of the structures individually which, when taken together, create an unacceptable impact.

d. Community Standard

The Board concludes that the following, which are quoted in the findings of fact, constitute community standards regarding historic sites: Sections 4.2(2) and 5.6 of the Town Plan and Section 7.6(8) of the Regional Plan.

Based on the foregoing findings of fact, the Board concludes that the Project's proposals concerning the Citron Building and the Lamb and Miller Houses comply with these community standards as they apply to these structures individually and to the Depot District.

The Board also concludes that, with the condition discussed above, the relocation of the Walker House complies with the standards. However, regarding the Town Plan, this determination is a close question because the Town Plan requires that historic sites "shall be preserved" and bars "structural alterations that

would effectively destroy the historic or architectural merit” of a site unless “no reasonable use of the property is possible without such modification.” Based on the same essential items cited under “Mitigating Steps,” above, the Board concludes that the restoration measures proposed by the Applicant preserve the Walker House. Moreover, the relocation and restoration do not “effectively destroy” the House’s historic merit.

Based on and subject to the foregoing, the Board concludes that the Project will not have an undue adverse effect on historic sites.

C. Criterion 8 (Aesthetics, Scenic Beauty)

Before issuing a permit, the Board must find that the Project “[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics” 10 V.S.A. § 6086(a)(1). The Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will **have** an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corn., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (Jan. 13, 1986).

1. Adverse Effect

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

Based on the foregoing findings of fact, and the conclusions of law under Criterion 8 (historic sites), the Board concludes that the Project will have an adverse aesthetic effect on the Depot District through the intensification of commercial use, increase in vehicular traffic, and replacement of green space with parking area.

The Board also concludes that the Project will not otherwise have an adverse aesthetic effect. In particular, the Project will not have an adverse aesthetic effect on the Routes 11/30 corridor because that corridor already possesses a high level of commercial development and experiences heavy vehicular use. In this regard, the Board does not believe that the increase in traffic caused by the Project will be great enough to have an adverse *aesthetic*

impact.

2. Undue Adverse Effect

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

- a. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
- b. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?
- c. Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Quechee at 19-20.

Concerning the first factor, the Board concludes that the following, which are quoted in the findings of fact, constitute community standards regarding aesthetics: Section 4.2(3) and (7), and portions of Section 4.3 regarding landscaping and screening, of the Town Plan; and portions of Section 7.6(8) of the Regional Plan concerning intensity of commercial development, design complementing the environment, and screening.

Based on the foregoing findings of fact, and the conclusions of law under Criterion 8 (historic sites), the Board concludes that the Project's adverse effect on the Depot District does not violate the community standards enumerated above and is not offensive or shocking to the average person. The Board also concludes that the Applicant has taken generally available mitigating steps.

Based on and subject to the foregoing, the Project complies with Criterion 8 (aesthetics).

D. Criterion 10 (Local and Regional Plans)

Prior to issuing a permit, the Board must find that the Project "[i]s in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24."

At issue in this case are the Project's conformance with the Town and

Regional Plans. The Board examines each in turn.

1. Manchester Town Plan

a. General

In this case, much legal argument has concerned the relationship of the Town Plan and the Zoning Ordinance. This argument centers on the Supreme Court decision in In re Frank A. Molgano, Jr., 5 Vt. Law Week 314, _ Vt. _ (Nov. 10, 1994). In the decision, the Court reversed this Board's determination that zoning by-laws are not relevant to interpreting town plans.

In the matter presently on appeal to the Board, the District #8 Commission interpreted Molgano as specifying that "the regulations [zoning bylaws] control the plan." It then made determinations regarding the Project's conformance with "renovation" and "footprint" provisions contained in the Zoning Ordinance.

The Board concludes that the District Commission erroneously construed the Molnano decision's discussion of the relationship of town plans and zoning ordinances. In that discussion, the Court stated that the Town Plan provisions on which the Board relied in that case were "at best, ambiguous" It then cited various zoning cases on the relationship between zoning by-laws and town plans. Importantly, based on its examination of these zoning cases, the Court went on to conclude as follows:

Because the Boards interpretation would effectively give non-regulatory abstractions in the Town Plan the legal force of zoning by laws, we agree **with Molgano that the Board erred as a matter of law in concluding that the Town's zoning bylaws were not germane to the meaning Of the Town Plan.**

Molgano, 5 Vt. Law Week at 315 (emphasis added).

Following this conclusion, the Court goes on to cite with approval its prior decision in In re Green Peak Estates, 154 Vt. 363 (1990), in which it affirmed the Board's denial of an application based on what the Court refers to as a "specific policy" in a regional plan. Molgano, 5 Vt. Law Week at 315.

The essential holding of Molgano, therefore, on the relationship of town plans and zoning by-laws, is that the by-laws are germane to interpreting ambiguous provisions of a town plan. The Court retained, and cited with approval, a prior Court ruling stating that a specific policy in a plan is sufficient grounds for denial. At no point did the Court state that, **in Act 250 proceedings**, zoning by-laws control or override the specific policies in a town plan.

Accordingly, under the Molgano decision, the Board and District Commissions must first determine whether town plan provisions at issue are ambiguous or are specific policies. If the provisions are ambiguous, then the Board and District Commissions should next examine the relevant zoning by-laws for provisions which resolve the ambiguity. However, if the provisions are specific policies, then they should be applied to the proposed project without reference to the zoning by-laws.

To hold otherwise would be contrary to statute. In Act 250, the General Assembly specified that the Board and District Commissions cannot issue a permit without finding conformance with the local "plan." 10 V.S.A. § 6086(a)(10) (emphasis added). The General Assembly could have used the words "zoning by-laws," or "plan as implemented by zoning by-laws," but it did not do so. The legislature is presumed to use its words advisedly. Trombley v. Bellow Falls Union High School, 160 Vt. 101, 104 (1993). Thus, the General Assembly has directed the Board and District Commissions to determine conformance with the town plan, not with the zoning by-laws.

Moreover, town plans are significant statements of community goals and policies regarding future land use, arrived at through an extensive public process. See 24 V.S.A. §§ 4382, 4384. The law requires not only that planning commissions hold one public hearing but also that they actively solicit local citizen participation through informal working sessions. 24 V.S.A. § 4384(a), (d). But the public process does not end with the planning commission. Instead, the planning commission is required to submit the plan to the town's legislative body, which itself must hold at least one hearing and, in towns with populations over 2500, not less than two public hearings. Should the legislative body decide to make substantial changes in the plan, it must hold an additional hearing or hearings. 24 V.S.A. 4385(a).

This extensive public process indicates that a town plan represents a public compact concerning its future, an agreement arrived at after significant citizen involvement, negotiation, and give-and-take.

The General Assembly has given the result of this planning process regulatory effect in Act 250. Clearly, then, the intention of the legislature is to make effective the compact between town officials and citizens that forms the municipal plan.

The legislature has charged the Board and District Commissions with ensuring that a project conforms with the town plan. They have not so charged the municipal planning commission or legislative body. In crafting zoning by-laws, these bodies are merely to "implement" the plan and the by-laws "need not" be controlled by the plan. 24 V.S.A. § 4401(a); Kalakowski v. John A. Russell Corp., 137 Vt. 219, 225 (1979).

The only municipal entity charged with determining town plan conformance is a development review board created under 24 V.S.A. § 4401(d). Such a board may undertake “local Act 250 review” of projects subject to Act 250, and may issue findings of fact and conclusions of law concerning, among other things, whether a proposed development or subdivision “[i]s in conformance with the plan of the municipality” 24 V.S.A. § 4449; see also 24 V.S.A. Chapter 36 (municipal **APA**). Before the Board and District Commissions, such findings and conclusions create a rebuttable presumption of compliance or non-compliance with Criterion 10. 10 V.S.A. § 6086(d).

Thus, the provisions concerning development review boards confirm that the General Assembly intends to ensure that town plans - not zoning by-laws - are applied to projects subject to Act 250, and that the Board and District Commissions are to make the final determination in ensuring town plan conformance.

The Board and District Commissions are state commissions which make decisions on permit applications in a quasi-judicial capacity under the “contested case” provisions of Vermont’s Administrative Procedure Act (**APA**). 10 V.S.A. §§ 6085(a), 6089(a)(4); 3 V.S.A. § 814. The **APA** requires the issuance of findings of fact and conclusions of law based on the evidence and argument presented by parties at hearings during which parties may conduct cross-examination. 3 V.S.A. §§ 809-812. The rules of evidence apply and ex parte communications are prohibited. 3 V.S.A. § 810(1), 813.

Accordingly, by specifying that the Board and District Commissions determine conformance with local plans, the General Assembly ensured that the public compact reached in town plans would be enforced for projects subject to Act 250 by independent tribunals which use court-like procedures to make decisions based on the evidence. The Moleano decision must be interpreted in light of this intent. Even after Molgano, the focus of the Board and District Commissions must be on ensuring conformance with the plan, with the zoning by-law available only as a tool for resolving ambiguities in that plan.

Based on the foregoing, the Board examines the Project’s conformance with the provisions of the **Town Plan**.

b. Footprint and Lot Coverage

In this case, the following Town Plan provision for the commercial district has generated the most argument:

The 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%**. Exceptions to

this policy may be made only in the case of such essential services as full service grocery stores, post offices, government buildings, hospitals, and residential buildings.

Town Plan, § 4.2(1) (emphasis added).

This provision constitutes a specific policy of the Town Plan. An ordinary person of common intelligence would understand that the provision does not allow a new building to be constructed if its floor area (on the first floor) is greater than 3,000 square feet. Such a person would also understand that the provision prohibits projects which propose a maximum building coverage to land area greater than 15 percent.

The Project does not conform to this provision for two separate and independent reasons. First and foremost, the Project includes the construction of two new buildings in the relevant district: Buildings C and D. Each of these buildings alone exceeds the 3,000 square-foot limit in the Town Plan.

Second, the Project, taken as a whole, proposes a maximum building coverage to land area of over 20 percent, while the Plan limits such coverage to 15 percent.

It also must be noted that the Project falls into none of the “essential service” categories listed as the only exceptions to this provision.

Both the Applicant and the Planning Commission argue against applying this provision to the Project. Turning first to the Applicant’s claims, it argues that the Town Plan is ambiguous because the phrase “new building” is not defined. Thus, the Applicant contends, the Board should look to the Zoning Ordinance and, under that ordinance, Buildings C and D constitute “renovations” of the Big A and Fleming Buildings rather than “new buildings.”

The Applicant’s arguments are without merit. The phrase “new building” in the Town Plan is not ambiguous. The lack of ambiguity is particularly clear in this case, in which the Applicant proposes to demolish the Big A and Fleming Buildings and to construct Buildings C and D on different locations within the parcels which hold the to-be demolished buildings. Not one part of the Big A and Fleming Buildings will be used in Buildings C and D.

Because Section 4.2(1) is not ambiguous, the Board need not look to the Zoning Ordinance. However, even if the Board were to review that ordinance, it would see that the provisions of the ordinance either do not provide guidance or do not support the Applicant’s claim. For example, the Zoning Ordinance does not define the phrase “new buildings.”

Further, the definition of “renovation” contained in the Zoning Ordinance does not apply to the Project. This definition applies only to an “exterior structural change; rearrangement, change of location, or addition” to a building. The demolition of the Big A and Fleming Buildings is not a mere change to the exterior of, or an ‘addition to, those buildings because the buildings will be destroyed. The demolition also cannot be considered a “rearrangement” or “change of location” because no significant part - in fact, no single part - of the Big A and Fleming Buildings will be used in Buildings C and D.

Calling the destruction of buildings “renovation” is thus a misuse of the definition in the Zoning Ordinance and of the English language. But even if the Board were to assume that such destruction constitutes “renovation,” the findings of fact demonstrate that the Project, under “major development review,” would still be subject to the same limits on footprint and lot coverage. Thus, to the extent the Zoning Ordinance provides any guidance concerning Section 4.2(1) of the Town Plan, it confirms that the Project does not conform to that section.

Turning to the Planning Commission, that commission contends in essence that Section 4.2(1) of the Town Plan should not be applied to the Project because it is a good project proposed by a good developer.

Many aspects of the Project represent sound land use. But Section 4.2(1) possesses no exception for “good” projects. If the Planning Commission seeks to create such an exception - or any exception which would allow the Project or similar developments - it must propose to amend the Town Plan through the public process set out in statute. 24 V.S.A. §§ 4384(d), 4385(a). To create an exception without going through that process represents a breach of the public compact reflected in the Town Plan.

Moreover, the identity of the developer is immaterial. Neither Section 4.2(1) nor any other section of the Town Plan distinguishes among developers. The Town Plan must be applied in the same manner to all developers regardless of identity.

Based on the foregoing, the Project does not conform to Section 4.2(1) of the Town Plan.

c. Adequate Parking

Section 4.3 of the Town Plan requires that developments provide “adequate” on-site parking. The Town Plan does not state how much parking is “adequate.” Moreover, an ordinary person of common intelligence reasonably would find the word “adequate” susceptible to more than one interpretation. Accordingly, Section 4.3 of the Town Plan is ambiguous.

In view of this ambiguity, the Board looks to the Zoning Ordinance for assistance in resolving the ambiguity. This does not mean a general review of compliance with the Zoning Ordinance but rather an examination to see if there are provisions in the Zoning Ordinance which address the same subject matter. In this case, under Section 8.4.10 of the Zoning Ordinance, the required minimum number of spaces for the Project is 113. Thus, the Board must conclude that, under the Town Plan, “adequate” parking for the Project is 113 spaces. Since the Project will provide only 85 spaces, the Project is not in conformance with the Town Plan.

The Applicant argues that it may provide less than the required parking spaces because the Fleming Building possesses a “grandfathered” deficit of 28 spaces. However, the Applicant proposes to destroy the Fleming Building and therefore will destroy the attendant deficit along with the building.

d. Historic Sites

Based on the foregoing findings of fact, and the conclusions of law under Criterion 8 (historic sites), the Board concludes that the Project conforms with the historic sites provisions of the Town Plan.

e. Other Provisions

Based on the foregoing findings of fact, the Board concludes that the Project conforms with all provisions of the Town Plan not specifically discussed above in these conclusions of law.

2. Bennington County 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, 10 V.S.A. chapter 159, and 30 V.S.A. 3 248, 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 also concludes that the Project conforms to the Regional Plan. In this regard, the Board notes that the Regional Plan, like the Town Plan, contains a provision that parking be "adequate." However, unlike the Town Plan, no clarification exists concerning how much parking is adequate under the Regional Plan, and for this reason the Board reaches a different result as to "parking" under the Regional Plan.

VI. ORDER

1. As conditioned, above, the Project will not have an undue adverse effect on aesthetics or historic sites.
2. The Project conforms to the applicable regional plan.
3. The Project does not conform to the applicable local plan.
4. Application #8B0500 is denied.
5. Land Use Permit #8B0500 is void.

Dated at Montpelier, Vermont this 29th day of September, 1995.

ENVIRONMENTAL BOARD


John T. Ewing, Chair
Rebecca J. Day
John M. Farmer
Arthur Gibb
Marcy Harding
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