**Vermont Environmental Court Decisions**

**1996.**

**ENB 1996-004.**

VERMONT ENVIRONMENTAL BOARD

10 V.S.A. §§ 6001-6092

Re: The Mirkwood Group and Barry Randall

#1R0780-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This decision pertains to an application to construct and operate a radio tower in Pittsford. As is explained below, the Environmental Board denies the application under both Criterion 8 (aesthetics) and Criterion 10 (local and regional plan). The proposed tower does not conform with clear community standards in the town's zoning ordinance against radio towers in the conservation district. As a result, the proposed tower does not conform with provisions in the Town Plan discouraging development in the conservation district and provisions in the Regional Plan preserving community aesthetic values.

I. BACKGROUND

On August 3, 1995, the District #1 Environmental Commission ("District Commission") issued Findings of Fact, Conclusions of Law and Final Land Use Permit Decision denying the Mirkwood Group and Barry Randall ("Appellants") permission to construct a 180 foot tall FM radio tower and a 600 square foot equipment building on the summit of Cox Mountain at an elevation of approximately 1,412 feet ("Project"). The proposed project site is east of U.S. Route 7 in Pittsford. Access to the Project is via a 4,100 foot long right-of-way up Cox Mountain.

An Act 250 permit is required for the Project pursuant to 10 V.S.A. §§ 6001(3), 6081(a) and Environmental Board Rule ("EBR") 2(A)(2) and 2(F)(1) because the Project consists of construction of improvements for commercial purposes involving more than 10 acres. In re Stokes Communication, No. 94-208, slip op. at 6-7 (Vt., July 1, 1995); In re Costello Garage, 158 Vt. 655, 656 (1992) (mem.).

On September 1, 1995, Appellants filed an appeal with the Board from the District Commission's decision ("Appeal"). The Appellants believe that the District Commission erred with respect to the following criteria of 10 V.S.A. § 6086(a): 1 (air-pollution), 1(G) (wetlands), 4 (soil erosion), 7 (municipal services), 8 (aesthetics, scenic beauty and historic sites), 9(G) (private utility services) and 10 (local and regional plan).

On September 20, 1995, the Board issued an Act 250 Notice of Prehearing Conference ("Notice") which is incorporated herein by reference and which provides in part:

Those who are not able to attend the prehearing conference should notify the Board in writing on or before October 2, 1995 of their intention to participate in this matter, the issues they intend to address and the witnesses and exhibits they intend to present. Any nonstatutory parties who do not notify the Board or appear at the prehearing conference will have waived rights to further notice of and participation in this matter.

(Emphasis original). A copy of the Notice was served upon those who had party status before the district commission and others.

Emerson Frost advised the Board in a letter filed on September 27, 1995 that he wished to participate before the Board in the Appeal, had party status before the District Commission, was concerned about nine particular issues in the Appeal, planned to present maps, photographs and standard handbooks as evidence and did not plan to present any witnesses.(FN1) On October 2, 1995, David Swift filed a letter in which he advised the Board that he had party status before the District Commission under Criteria 8 and 10, wished to participate in the Appeal, would not be able to attend the Conference, requested the opportunity to speak to issues pertaining to Criteria 4, 5, 7 and 9(G) and provided a list of potential witnesses and exhibits.(FN2) On October 2, 1995, Robert Williams filed a letter in which he advised the Board that he would not be able to attend the Conference, requested party status under Criteria 1, 8 and 8(A) and requested permission to testify during the Appeal. In a letter to the Board dated October 2, 1995, Allen M. Hitchcock requested party status under Criterion 8, indicated that he could not attend the Conference and advised that he had party status before the District Commission.

On October 3, 1995, Board Chair John T. Ewing convened a prehearing conference ("Conference") in Montpelier. The following persons attended the Conference:

Jim Hoehn, on behalf of the Appellants

Mike Carr, on behalf of the Appellants

Gary Savoie, on behalf of the Appellants

Henry M. Paynter, opponent

Emerson Frost, opponent

Margaret Flory, on behalf of opponent Paynter

During the Conference, Richard A. Pearson, Esquire, filed his appearance on behalf of Henry Paynter. Additionally, Mr. Paynter filed a petition for party status, Motion to Dismiss and Memorandum in Opposition to Request for Hearing on Appeal.(FN3)

Several nonstatutory parties who had been granted party status in this matter by the District Commission and were served a copy of the Notice by the Board did not attend the Conference and did not notify the Board in writing before the Conference of their intention to participate in the Appeal, the issues they intend to address and the witnesses and exhibits they intend to present. The Appellants asked the Chair whether or not these individuals would be allowed to participate as parties before the Board. The Chair indicated that he would take the inquiry under advisement and rule on it in the Prehearing Conference Report and Order.

On October 31, 1995, the Appellants filed an Applicant's Memorandum in Support of its Opposition to Requests for Party Status.

On November 3, 1995, Chair Ewing issued a Prehearing Conference Report and Order ("Order") which is incorporated herein by reference. The Order expressly addresses the Appellants' question regarding nonstatutory parties. It provides in pertinent part:

The Board's September 20, 1995 Act 250 Notice of Prehearing Conference ("Notice") provides in no uncertain terms: "Any nonstatutory parties who do not notify the Board or appear at the prehearing conference will have waived rights to further notice of and participation in this matter." Consequently, with respect to nonstatutory parties, the Board will not grant party status to those who neither notified the Board in writing of their intention to participate in the Appeal nor attended the Conference. Because of the clear, unambiguous language of the Notice, this determination is not contrary to the Board's conclusion in Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision at 12 (March 28, 1990).

Order, p. 2. Further, the Order states:

Those nonstatutory parties who had been granted party status in this matter by the District Commission but who neither notified the Board in writing of their intention to participate in the Appeal before the Conference nor attended the Conference shall be denied party status in the Appeal.

Id. at 3. Finally, the Order provides:

Pursuant to Board Rule 16, this Order will be binding on all parties who have received notice of the Conference, unless there is a written objection to the Order submitted to the Board on or before Wednesday, November 22, 1995 or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Id. (emphasis original). A copy of the Order was served upon those who had party status before the District Commission and others. There were no objections to the Order.

On November 14, 1995, Mr. Paynter filed a Response to Opposition to Requests for Party Status under 14 (B)1(b) and a Memorandum in Support of Motion to Dismiss and Response to Opposition to Requests for Party Status. Also on November 14, 1995, Mr. Frost filed a memorandum in response to Appellants' memorandum in opposition to Mr. Frost's request for party status. On November 15, 1995, Mr. Swift filed a memorandum regarding issues two and three above.

On December 13, 1995, Chair Ewing issued a Chair's Ruling on Preliminary Issues ("Ruling") which is incorporated herein by reference. Regarding party status, the Ruling provides:

2. Frost is granted party status under Criterion 8 (aesthetics) pursuant to EBR 14(B)(1)(a) and Criteria 1 (air pollution) and 8 (aesthetics) pursuant to EBR 14(B)(1)(b).

3. Swift is granted party status under Criteria 8 (aesthetics) and 10 (town plan) pursuant to EBR 14(B)(1)(a) and Criteria 4 (soil erosion and runoff), 7 (municipal services) and 9(G) (private utilities) under EBR 14(B)(1)(b).

4. Williams is granted party status under Criteria 1(G) (wetlands) and 8 (aesthetics) pursuant to EBR 14(A)(3).

5. Hitchcock is granted party status under Criteria 8 (aesthetics) and 10 (local and regional plans) pursuant to EBR 14(B)(1)(a).

6. Paynter is granted party status under Criteria 8 (aesthetics) and 10 (local and regional plans) pursuant to EBR 14(B)(1)(a) and (b) and Criterion 4 (soil erosion and runoff) pursuant to EBR 14 (B)(1)(b).

7. Pursuant to EBR 16, this ruling shall become final unless a written objection to it, in whole or in part specifically setting forth the grounds for objection, is filed with the Board on or before Thursday, December 28, 1995, in which

case the matters objected to will be decided by the full Board. The filing deadlines set forth in Section V of the Board's November 3, 1995 Prehearing Conference Report and Order shall not be automatically stayed or otherwise altered by the filing of an objection in accordance with this paragraph.

Id. at 5 (emphasis original). A copy of the Ruling was served upon those who had party status before the District Commission and others. There were no objections to it.

During January and February, 1996, the parties filed witness and exhibit lists, prefiled evidence, objections to prefiled evidence and proposed findings of fact and conclusions of law.

On February 12, 1996, Chair Ewing convened a second prehearing conference ("Second Conference"). The following parties participated in the Second Conference:

The Mirkwood Group by Tim Hoehn, Mike Carr and Gary Savoie;

Emerson Frost;

Allen Hitchcock;

Henry Paynter by Richard Pearson, Esquire; and

David Swift.

During the Second Conference, the parties agreed to postpone the scheduled February 14, 1996 merits hearing to March 6, 1996. On February 15, 1996, Chair Ewing issued a Second Prehearing Conference Report and Order which is incorporated herein by reference.

On February 20, 1996, Mr. Pearson, on behalf of the parties, filed a joint site visit itinerary.

On February 26, 1996, Messrs. Frost and Swift filed supplemental rebuttal testimony, and Mr. Swift filed revised proposed findings of fact and conclusions of law. On March 1, 1996, the Appellants filed Rebuttal to the supplemental rebuttal testimony filed by Messrs. Frost and Swift.

On March 4, 1996, Chair Ewing convened a third prehearing conference (Third Conference"). The following parties participated in the Third Conference:

The Mirkwood Group by Mike Carr and Gary Savoie;

Emerson Frost;

Allen Hitchcock;

Robert Williams;

Henry Paynter by Richard Pearson, Esquire; and

David Swift.

During the Third Conference, Chair Ewing and the participants addressed the site visit itinerary, evidentiary objections and agreed on a merits hearing schedule.

On March 6, 1996, the Board convened a merits hearing. The following parties participated:

The Mirkwood Group by Tim Hoehn, Mike Carr and Gary Savoie;

Emerson Frost;

Allen Hitchcock;

David Swift;

Robert Williams; and

Henry Paynter by Richard Pearson, Esquire.

At the outset of the hearing, the Board affirmed Chair Ewing's March 4, 1996 evidentiary determinations. Further, the parties were asked whether they objected to a site visit which was not attended by each Board Member hearing the Appeal. There were no objections. The Board heard testimony and cross-examination, after which the parties gave closing arguments. The Board then recessed and conducted a deliberative session.

On March 8, 1996, the Board issued a Memorandum of Decision on Preliminary Issues ("Memorandum") which is incorporated herein by reference. The Board ordered the Appellants to file supplemental information regarding the Project's potential contribution to soil erosion at the site and the capacity of the Project Site's soils to hold water. Further, the Board scheduled a reconvened hearing and rescheduled site visit for April 3, 1996 if the Appellants filed the supplemental information no later than mid-March. The parties were given ten calendar days after the Soils Plan was submitted to respond with rebuttal testimony and/or exhibits. On April 19, 1996, the Appellants filed a CL Survey of Existing Traveled Log Road Cox Mountain and a supporting statement of Landmark Associates ("Survey"). Consequently, the Board was compelled to reschedule its reconvened hearing and rescheduled site visit for May 8, 1996.

On April 30, 1996, Mr. Paynter filed a Renewed Motion to Dismiss.(FN4) In this motion, Mr. Paynter asserts that the Appellants' application is fatally flawed because it was not signed by Richard Bloomer, who from May 12, 1994 to August 11, 1994 and from February 8, 1995 to the present, was and is the owner of a deeded right-of-way which

crosses the Tower Site.

On April 30, 1996, Mr. Paynter also filed a Motion to Admit Additional Testimony based on Newly Discovered Evidence.

On April 30, 1996, Messrs. Paynter and Swift filed supplemental rebuttal testimony and exhibit lists in response to the Survey.

On May 1, 1996, Mr. Williams filed a letter regarding the location of the Project and his property's boundary lines.

On May 2, 1996, Chair Ewing issued a Second Chair's Ruling on Preliminary Issues ("Second Ruling") which is incorporated herein by reference. A copy of the Second Ruling was served upon those who had party status before the District Commission and others. There were no objections to it.

In the Second Ruling, Chair Ewing granted Mr. Paynter's motion to admit additional evidence declaring that the Board "will receive additional evidence pertaining to the status of the Mirkwood FCC application. . . . " Second Ruling, p.

1. Further, Chair Ewing refused to include Mr. Williams' May 1, 1996 letter into evidence. He stated:

Mr. Williams' letter, a copy of which is attached hereto, does not comply with the November 3, 1995 Prehearing Conference Report and Order. Therefore, it shall not be included in the evidentiary record. However, the letter shall be kept in the procedural record and such record will reflect that a copy of the Board's April 24, 1996 Notice of Reconvened Public Hearing was sent to Mr. Williams at his New Jersey address and Board staff left a telephone message regarding the reconvened hearing at Mr. Williams' Florida telephone number.

Id. Finally, Chair Ewing explicitly limited the evidentiary scope of the May 8, reconvened merits hearing. He stated:

The parties may present evidence to the Board from 9:30 a.m. to 11:00 a.m pertaining only to the status of the Mirkwood FCC application and the Soils Plan. The Applicants shall, collectively, have 45 minutes, and the parties in opposition to the Application shall, collectively, have 45 minutes.

Second Ruling, p.1. On May 8, 1996, the Board reconvened its merits hearing. The following parties participated:

The Mirkwood Group by Tim Hoehn, Mike Carr and Gary Savoie;

Emerson Frost;

Allen Hitchcock;

David Swift;

Robert Williams; and

Henry Paynter by Richard Pearson, Esquire.

At the outset of the reconvened hearing, the Board affirmed Chair Ewing's Second Ruling. The Board refused to accept into evidence a letter filed by Mr. Bloomer with the Board on May 7, 1996 principally regarding a right-of-way owned by Mr. Bloomer ("Bloomer Letter"). Mr. Bloomer did not attend the reconvened hearing. The Board heard testimony and oral argument then conducted a site visit. Thereafter, the Board recessed and conducted a second deliberative session.

In a letter dated May 14, 1996, Mr. Bloomer wrote the Board's General Counsel regarding the Bloomer Letter.

On May 20, the Board advised the parties that it would deliberate on June 12, 1996.

The Board conducted a third deliberative session on June 12, 1996.

On July 9, 1996, Mr. Bloomer filed another letter regarding the Bloomer Letter.

On July 17, 1996, Chair Ewing advised the parties that the Board would deliberate again on July 31, 1996. Further, Chair Ewing stated that the Board's decision in the Appeal would address the Bloomer Letter.

On July 22, 1996, Mr. Bloomer filed yet another letter regarding the Bloomer Letter.

On July 22, 1996, Chair Ewing responded to Mr. Bloomer's July 22, 1996 letter.

On July 23, 1996, Mr. Paynter filed an Objection to Consideration of the Bloomer Letters as set forth in the Chairman's July 17, 1996 Status Memo.

The Board conducted its final deliberation on July 31, 1996. 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.

On August 1, 1996, Mr. Williams filed a letter regarding the Bloomer Letter.

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. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. ISSUE

Whether or not the Project complies with the following criteria of 10 V.S.A. § 6068(a): 1 (air-pollution), 1(G) (wetlands), 4 (soil erosion), 7 (municipal services), 8 (aesthetics, scenic beauty and historic sites), 9(G) (private utility services) and 10 (conformance with local and regional plan).

III. FINDINGS OF FACT

1. The Project will be located entirely in Pittsford ("Town").

2. The Project will consist of the construction, maintenance, and operation of a 180 foot tall FM radio tower, 600 square foot service building, access trail and power line on Cox Mountain in Pittsford.

3. The tower and service building will be located at an elevation of approximately 1,360 to 1,400 feet above sea level, close to the summit of Cox Mountain on lands owned by Barry Randall ("Tower Site").

4. The tower will have three sides. Each side of the tower will be about 41 inches wide.

5. The tower will be made of galvanized metal which will weather to a dull gray.

6. The tower will not be illuminated.

7. The door to the service building will be illuminated by a motion activated light which will project downward.

8. The service building will be 20 feet long, thirty feet wide, ten feet tall and earthtone in color.

9. The service building will house transmitter equipment, a 20 Kw propane generator and some related equipment. Additionally, the service building will contain a fire suppression system.

10. The Mirkwood Group will lease approximately one acre of the Tower Site from Mr. Randall in order to construct, maintain and operate the tower and service building.

11. Access to the Tower Site will be via a logging trail approximately 4,100 feet in length which traverses from the westerly side of Sugar Hollow Road up the east side of up Cox Mountain ("Access Trail").

12. For a significant portion of it length, the Access Trail occurs within a fifty foot wide "strip" of land which traverses from the westerly side of Sugar Hollow Road up the east side of up Cox Mountain and is more particularly described in a Right of Way Exchange by and between Jesse D. Billings, Jr. and Lillian T. Billings and Sugar Hollow Corporation dated May 1, 1981 ("Right-of Way").

13. Approximately 900 feet of the Access Trail does not occur within the boundaries of the Right-of-Way.

14. Power will be supplied to the Tower Site via an aerial power line which will be no more than 4,500 feet long and supported by approximately 19-22 utility poles installed about 150 feet apart in a "criss-cross" pattern along the Right-of-Way ("Power Line").

15. The utility poles which support the aerial power line will be no higher than 35 feet.

16. The Power Line is entirely within the Right-of-Way.

17. A propane fired 20Kw emergency generator is the only potential source of post-construction air pollution associated with the Project. This generator will be activated when the Power Line is inoperative.

18. During Project construction, dust will be controlled by the application of water, calcium chloride or wood chips to impacted areas.

19. There are no Class One, Two or Three wetlands, as defined by the Vermont Wetland Rules, at the Tower Site or on the Access Trail.

20. The Project will not impact, directly or indirectly, any Class One, Two or Three wetlands, as defined by the Vermont Wetland Rules.

21. The Access Trail leaves Sugar House Hill at an approximate elevation of above sea level of 740 feet. The Access Trail passes within about 30 feet of the Tower Site at an elevation of approximately 1,370 feet above sea level.

22. The average width of the Access Trail is approximately ten feet. Its average slope is somewhere between 15% and 18%. The slope of the Access Trail exceeds 20% over a significant portion of its length.

23. Some trees located adjacent to the Access Trail will be trimmed or otherwise reduced to enable heavy machinery to travel up and down the Access Trail.

24. Exposed rock ledge occurs over some portions of the Access Trail.

25. Soils along the Access Trail are predominantly a mixture of Farmington-Nellis and Marlow-Peru-Lyman associations.

26. Two wet areas occur along the Access Trail.

27. Several water bars currently located along the Access Trail have failed due to improper maintenance, excessive run-off, improper location or a combination of these factors.

28. As the slope of the Access Trail increases, the velocity of water travelling along it ("Runoff") increases. As the velocity of Runoff increases, its erosive power and ability to carry sediments increases.

29. The Appellants will locate additional water bars and culverts along the Access Trail prior to construction. As a result, ten water bars and two culverts will occur along the Access Trail prior to construction and will remain in place after construction is complete.

30. A small stream crosses the Access Trail shortly after it leaves Sugar House Road.

31. Construction of the Project will take three weeks.

32. To help prevent unreasonable erosion along the Access Trail during construction of the Project, the Appellants will place haybales at the outflow point of nine waterbars.

33. A semicircle of haybales will be located on the easterly side of the Tower Site to protect against excessive runoff during construction and subsequent maintenance of the tower and service building.

34. The tower will be transported in pieces over the Access Trail to the Tower Site by heavy machinery. Building materials employed in the construction of the service building will be transported over the Access Trail by heavy machinery. Heavy machinery will also carry workers and tower support elements such as guys and anchors over the Access Trail to the Tower Site. Such an intense use of the Access Trail will degrade the trail and create the potential for water sheeting and other damaging erosion events along the Access Trail both during and after construction.

35. After the Access Trail is upgraded to facilitate construction of the Project, the Access Trail will be maintained only to a level needed to provide access to the Tower Site for maintenance and monitoring activities.

36. The Project will not burden the Town's water and sewer, school, fire and rescue or other municipal or governmental services.

37. The Tower Site is located in the Town's Conservation II District.

38. Cox Mountain is an undeveloped, wooded mountain. It is frequented by hikers, hunters and other outdoor enthusiasts. Trees surrounding the Tower Site are about 40-50 feet high.

39. Cox Mountain is visible from many locations in and around the Town including, but not limited to, numerous residential properties, industrial sites, busy travel corridors, waterways and the adjoining properties of David Swift, Henry Paynter, Allen Hitchcock and Robert and Lucretia Williams.

40. Cox Mountain stands alone. It does not appear to visually merge or blend with adjacent or nearby landscape.

41. Cox Mountain is a well known physical landmark.

42. The tower will be constructed in sections. The tower will be supported by three sets of guy wires anchored within the Tower Site. A 100 foot by 100 foot area at the Tower Site will be cleared of trees and graded. A "Rock Tooth" will be attached to a bulldozer to smooth and rip the rock surfaces at the Tower Site. The tower foundations and deadman pads will be drilled into the rock surface with a rock auger drilling rig.

43. Some trees located adjacent to the Access Trail will be trimmed or otherwise reduced to accommodate installation and maintenance of the Power Line.

44. The Power Line will only be used by the Appellants for the Project.

45. At the time a complete Act 250 application for the Project was filed, the Comprehensive Plan for the Town of Pittsford, Vermont, adopted 8/31/88 and amended 6/26/89, ("Town Plan"), the Pittsford, Vermont Zoning Regulations, approved 8/18/89, ("Zoning Ordinance") and the Rutland Regional Plan, adopted 11/5/94, ("Regional Plan") were duly adopted and in effect.

46. The Zoning Ordinance provides:

COMMERCIAL PURPOSE OR COMMERCIAL USES: Any use of land or buildings for the purpose of selling at retail or wholesale a product, good or service . . . .

Zoning Ordinance, 1.8.5. at 3.(FN5)

47. The Zoning Ordinance includes a statement of purpose relating to the Town's conservation district. The Zoning Ordinance provides in relevant part:

The development of [conservation district lands] should be discouraged due to unfavorable slopes, shallow or otherwise fragile soil conditions and unique scenic value. These areas play a positive role in the ecology of the Town and are important sources for the Town's water systems. . . Likewise, the Town should provide for adequate safeguards to protect higher elevations and stream banks from deterioration or destruction through development.

Zoning Ordinance, 5.1.1. at 26.

48. The Zoning Ordinance includes a provision specifically restricting the types of uses permitted in the Town's conservation district. The Zoning Ordinance provides in relevant part:

The following uses, and no others, except as provided otherwise in these Regulations, shall be permitted within the Conservation District.

(a) Single-family detached dwellings.

(b) Agricultural.

(c) Forestry.

Zoning Ordinance, 5.1.3. at 27.

49. The Zoning Ordinance includes a provision relating to permitted uses in the Town's conservation district. The Zoning Ordinance provides in relevant part:

(e) Height. Building height in the Conservation District shall not exceed thirty-five (35) feet.

Zoning Ordinance, 5.1.4(e). at 27.

50. The Town Plan, in describing land use districts within the Town, states the following with respect to the conservation district:

Development of certain areas of the Town should be discouraged due to unfavorable slopes and soil conditions and unique scenic value. These areas play a positive role in the ecology of the Town.

Town Plan at 8.

51. The Regional Plan provides in relevant part:

Goal 2: To provide wireless communications address for all parts of the region.

Policy 1: Support establishment of wireless transmission facilities, consistent with community aesthetic values.

Regional Plan at 19.

52. In June, 1994, the Pittsford Zoning Board of Adjustment granted Richard and Lillian Rohe and the Mirkwood Group a variance from the provisions of the Zoning Ordinance as such provisions apply to construction and operation of a proposed broadcast facility on the summit of Cox Mountain ("Variance").

IV. BURDEN OF PROOF

The burden of proof includes 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 (September 21, 1990). The allocation of the burden of proof to opponents of a project relieves the applicant of the "risk of non-persuasion," and means that in the absence of evidence on an issue, or where the evidence is indecisive, the issue must be decided in the applicant's favor. In re Denio, 158 Vt. 230 (1992).

Under 10 V.S.A. § 6088(a), Appellants have the Burden of proof under all of the criteria at issue except Criterion 8 under which the opponents carry the burden of proof. However, as with all criteria, the Appellants must provide sufficient information on Criterion 8 for the Board to make affirmative findings. Re Pratt's Propane, #3R0486-EB, Memorandum of Decision at 5 (January 27, 1987).

V. BLOOMER LETTER

Mr. Bloomer owns property which adjoins Mr. Randall's property. Mr. Bloomer was granted party status by the District Commission under Criterion 8 pursuant to EBR 14(A). Even though Mr. Bloomer is an adjoining property owner with party status below, he is not a statutory party in the Appeal. See In re Cabot Creamery Cooperative, Inc., No. 94-589 (Vt. July 14, 1995); In Re Wildlife Wonderland, Inc., 133 Vt. 507 at 518 (1975). Instead, Mr. Bloomer is a permissive party in the Appeal. Id.

Mr. Bloomer did not comply with the Notice. He failed to notify the Board in writing on or before October 2, 1995 of his intention to participate in the Appeal, the issues he intended to address and the witnesses and exhibits he intended to present.

Mr. Bloomer did not object to the Order which provided in relevant part:

The Board's September 20, 1995 Act 250 Notice of Prehearing Conference ("Notice") provides in no uncertain terms: "Any nonstatutory parties who do not notify the Board or appear at the prehearing conference will have waived rights to further notice of and participation in this matter." Consequently, with respect to nonstatutory parties, the Board will not grant party status to those who neither notified the Board in writing of their intention to participate in the Appeal nor attended the Conference. Because of the clear, unambiguous language of the Notice, this determination is not contrary to the Board's conclusion in Re: Finard-Zamias Associates, #1R0661-EB, Memorandum

of Decision at 12 (March 28, 1990).

Order, p. 2.

Despite ample opportunity to do so, Mr. Bloomer did not evidence any interest in the Appeal at any time prior to filing the Bloomer Letter.

The Bloomer Letter was filed on May 7, 1996. Contrary to EBR 12, Mr. Bloomer did not serve a copy of it upon "the attorneys or other representatives of record for all parties and upon all parties who have appeared for themselves." Board staff distributed a copy of the Bloomer Letter during the hearing to those who requested such a copy.

The Bloomer Letter was filed 18 days after Mirkwood filed the Survey. The parties did not have any time to consider the Bloomer Letter before the hearing.

The evidentiary scope of the May 8, 1996 hearing was limited to the status of Mirkwood's FCC application and the Soils Plan. The Bloomer Letter did not address matters within the evidentiary scope of the hearing.

Mr. Bloomer did not attend the May 8, 1996 hearing. The Bloomer Letter is hearsay. See V.R.E. 801 (1983 & Supp. 1995). The Board may, at its discretion, admit such evidence to: "ascertain facts not reasonably susceptible of proof . . . if such evidence is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." 10 V.S.A. § 810 (1995). Nothing in the Bloomer Letter relative to the status of Mirkwood's FCC application or the Soils Plan is not otherwise reasonably susceptible of proof.

Based upon the foregoing, the Board will not admit the Bloomer Letter into evidence.

On May 14, July 9, and July 22, Mr. Bloomer filed correspondence with the Board regarding the Bloomer Letter. On July 23, 1996, Mr. Paynter filed an objection regarding the Bloomer Letter. On August 1, 1996, Mr. Williams filed correspondence regarding the Bloomer letter. The Board will not consider these filings. The Board has previously stated:

The Board does not allow parties, without a strong showing of good cause to the contrary, to file pleadings that are not authorized by Act 250, the Board's Rules or order of the Board. An "open ended" filing policy would severely impair the Board's ability to manage each case and its overall docket. Filing deadlines and limitations put some predictability in the Board's process and enable the Board to process each case efficiently.

Northern Development Enterprises, #5W0901-R-5-EB, Memorandum of Decision at 8 (August 21, 1995).

VI. CONCLUSIONS OF LAW

A. CRITERION 1 (AIR POLLUTION)

Before granting a permit, the Board must find that a project "will not result in undue . . . air pollution." 10 V.S.A. §6086(a)(1). The Board has treated a variety of substances or elements as air pollution. Air pollutants have included dust, smoke, odors, vehicle emissions, noise, paint fumes, fly ash, saw dust and chemical vapors.

The opponents have briefly discussed whether radio frequency radiation ("RFR") generated by the Project constitutes air pollution under Criterion 1.(FN6) The District Commission conducted its Criterion 1 analysis, in part, based upon the assumption that RFR is air pollution. However, the Board has not yet determined whether or not RFR is air pollution under Criterion 1. The Board will not make such a determination in the Appeal where the question was not thoroughly addressed by the parties.

Construction of the Project may result in minor amounts of dust, noise or vehicle emissions. Even this is unlikely. Mr. Savoie, an expert in telecommunications engineering, testified that this Project will not produce any air pollution. His testimony is credible. The opponents have not presented credible evidence to the contrary.

Therefore, the Board finds that the Project complies with Criterion 1.

B. 1(G) (WETLANDS)

The Board will issue a permit "whenever it is demonstrated by the applicant, in addition to other criteria, that the development or subdivision will not violate the rules of the water resources board, as adopted under section 905(9) of this title relating to significant wetlands." 10 V.S.A § 6086(a)(1)(G). The Appellants have established that the Project will not impact any wetlands. As a result, the Appellants have demonstrated that the Project will not violate the rules of the Water Resources Board relating to significant wetlands.

Therefore, the Board finds that the Project complies with Criterion 1(G).

C. CRITERION 4 (SOIL EROSION)

Before granting a permit, the Board must find that a project "will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result." 10 V.S.A. §6086(a)(4).

There is substantial evidence that unrestricted use of the

access road to construct the Project will cause unreasonable soil erosion during the construction period. The Access Trail is relatively steep. It is somewhat wet. Bedrock occurs at the surface of the Access Trail in some areas. Heavy vehicles passing over the Access Trail during Project construction will erode or otherwise damage the Access Trail and cause water sheeting and other runoff related activities to occur along the Access Trail. Without the significant safeguards set forth below, the Project would cause unreasonable soil erosion along the Access Trail. However, the Board is convinced that if construction is carefully carried out and subsequently maintained in accordance with a narrowly tailored construction plan such erosion will be avoided. Thus, if the Board were to issue a permit for the Project, the permit would include, among others, the following conditions:

Construction of an access road and power line to the Tower site shall satisfy all applicable requirements of the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites ("Handbook") as determined by the District #1 Environmental Commission Coordinator ("Coordinator").

Post-construction condition of the access road and power line to the Tower Site shall, at all times, satisfy all applicable requirements of the Handbook as determined by the Coordinator.

Construction of the access road and power line to the Tower Site may only take place between May 1 and December 1.

The Appellants shall provide the District Commission with a $30,000 performance bond issued by a bonding or surety company approved by the District Commission or by the Appellants with security acceptable to the District Commission. The Bond shall insure that construction and maintenance of the access road and power line to the Tower Site comply with the Handbook as determined by the District Commission. The Bond shall run for a term to be fixed by the District Commission. The Bond's term may be extended by the District Commission with the consent of the Appellants. If construction or maintenance of the access road and power line to the Tower Site does not, at any time during the term of the bond, satisfy all applicable requirements of the Handbook, as determined by the Coordinator, the bond shall be forfeited to the District Commission. Upon receipt of the bond proceeds upon forfeiture, the District Commission shall cause the construction or maintenance, as applicable, of the access road and power line to the Tower Site to satisfy all applicable requirements of the Handbook or otherwise dispose of the bond proceeds in a manner agreed upon by the Appellants and the District Commission.

The Appellants shall provide the District Commission copies of documents, the originals having been recorded amongst the Town's land records, necessary to conclusively demonstrate, to the District Commission's satisfaction, that Appellants have an ownership interest in the lands over which the Access Trail traverses sufficient to afford the Appellants and their agents and contractors the right and authority to construct, maintain and operate the 180 foot tall FM radio tower, 600 square foot service building, access trail and power line which comprise the Project in accordance with the terms and conditions of this permit for the life of this permit.

The Board concludes that the Project, if carried out in accordance with the foregoing conditions, will comply with Criterion 4.

D. 7 (MUNICIPAL SERVICES)

Before granting a permit, the Board must find that a project "will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services." 10 V.S.A. §6086(a)(7). The Appellants have demonstrated the Project will not impose a burden on local services. The opponents have presented no credible evidence to the contrary.

Therefore, the Board finds that the Project complies with Criterion 7.

E. 8 (AESTHETICS, SCENIC BEAUTY AND HISTORIC SITES)

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

1. Adverse Effect

If a project "fits" its context, it will not have an adverse effect. In making this evaluation, the Board examines a number of factors including the nature of the project's surroundings, the compatibility of the project's design with those surroundings and locations from which the project can be seen. Id. at 18.

The Project will be placed on an undeveloped and unmarred forested mountaintop. The Project will stand out on the skyline. It will be the highest skyline interruption visible from Pittsford and surrounding communities. It will draw

the attention of persons observing Cox Mountain. The Project will detract from the picturesque context in which it will be located.

The Project will introduce a cleared area, modern structures and a power line into a wooded area frequented by hikers, hunters and other outdoor enthusiasts.

The Board concludes that the Project does not "fit" its surroundings. Consequently, the Project will have an adverse effect on aesthetics and natural beauty.

2. Undue

The Board analyzes three factors to determine whether a project's adverse effects are undue. The Board concludes that a project's adverse effects are undue if the Board reaches a positive conclusion with respect to any one of the following factors:

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

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

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

Quechee Lakes, supra, at 19-20.

a. Clear Written Community Standard

The Zoning Ordinance contains a clear, written community standard regarding aesthetics and natural beauty. First, it notes the Town policy regarding development in the Town's conservation district:

Statements of Purpose: The development of [conservation district lands] should be discouraged due to unfavorable slopes, shallow or otherwise fragile soil conditions and unique scenic value. These areas play a positive role in the ecology of the Town and are important sources for the Town's water systems. . . Likewise, the Town should provide for adequate safeguards to protect higher elevations and stream banks from deterioration or destruction through development.

Zoning Ordinance, 5.1.1. at 26. Second, it specifically limits the type of uses which will be permitted in the Town's conservation district:

Permitted Uses: The following uses, and no others, except as provided otherwise in these Regulations, shall be permitted within the Conservation District.

(a) Single-family detached dwellings.

(b) Agricultural.

(c) Forestry.

Id., 5.1.3. at 27 (emphasis added). Third, it clearly restricts the aesthetic intrusiveness of any residential use in the conservation district. Zoning Ordinance, 5.1.4. at 27. With respect to skyline intrusions, it states:

(e) Height. Building height in the Conservation District shall not exceed thirty-five (35) feet.

Zoning Ordinance, 5.1.4(e). at 27 (emphasis added).

This combination of traditional agrarian activities and dispersed single family detached dwellings of limited height is designed to foster a picturesque, rural landscape with traditional sustainable uses occurring on a human scale and in a manner that does not overwhelm or interrupt the landscape.

Together, the forgoing provisions of the Zoning Ordinance evidence a clear, written community standard against development of conservation district lands with any use other than single family detached dwellings, forestry or agriculture -- particularly those which interrupt the skyline -- to protect the unique scenic value of such lands. The Board concludes that the Project will violate this clear, written community standard.

The Project's adverse effect is undue. Therefore, the Project does not conform with Criterion 8.

Because the Board's analysis of the Zoning Ordinance has led to a negative conclusion regarding Criterion 8, the Board will not, in the context of its Criterion 8 analysis, review the Town Plan nor any other Town ordinance, regulation, provision, etc. to determine if other relevant clear, written community standards exist.

b. Offensive or Shocking

The Board viewed the Tower Site from a variety of locations during the Site Visit. The Project will be visible from an extensive area in and surrounding the Town. The Project will be an aesthetic intrusion to those viewing Cox Mountain and the adjacent skyline. However, it will neither dominate nor substantially diminish the scenic beauty of Cox Mountain, adjacent mountaintops, the skyline vista of which Cox Mountain is a part, the landscape surrounding Cox Mountain or other nearby elements of aesthetic or

scenic beauty. As a consequence, the Board concludes that the Project does not offend the Board's sensibilities and is not shocking.

c. Mitigation

The Appellants have not taken all generally available mitigating steps which a reasonable person would take to mitigate the adverse aesthetic effects of the Project. They have not reduced the height of the Tower below 180 feet. They have not determined conclusively that Cox Mountain, located in the Town's conservation district, is the only available site for the Tower.

F. 9(G) (PRIVATE UTILITY SERVICES)

The Board will make a positive finding under Criterion 9(G) with respect to a development which relies on privately owned utility services when an applicant demonstrates that the privately owned utility services are in conformity with a capital program or plan of the municipality involved or adequate surety is provided to the municipality and conditioned to protect the municipality in the event that the municipality is required to assume the responsibility for the services. 10 V.S.A § 6086(9)(G).

The Power Line will be privately owned. It will be used solely for the Project. Although the Appellants have not demonstrated that they will provide any surety, conditioned or otherwise, to protect the Town in the event that it is required to assume responsibility for the Power Line, no such surety is needed. The Appellants have stipulated that the Power Line will be used solely for the Project if the Board were to issue a permit for the Project.

If the Board were to issue a permit for the Project, the Board would condition such permit to ensure that the Appellants' voluntary limitation would be satisfied at all times during the life of the permit. The condition would provide:

The Power Line shall not be used for any purpose other than to provide electric power to the communications tower and equipment shelter approved herein. Except for the communications tower and equipment shelter, no building, structure, improvement, or other land use may, at any time, be connected to, or served by, the Power Line. The Power Line shall not be used for the benefit of any persons other than the Appellants, their successors and/or assigns.

If the Project was constructed and operated in accordance with such a condition, the Board concludes that the Project complies with Criterion 9(G).

G. 10 (LOCAL AND REGIONAL PLAN)

Prior to issuing a permit, the Board must find that a project "[i]s in conformance with any duly adopted local or regional plan or capital program under chapter 117 of title 24." 10 V.S.A § 6086(10). The Town has a duly adopted Town Plan. The Board will consider whether the Project is in conformance with such plan.

The Board's town plan analysis under Criterion 10 is conducted in accordance with the Vermont Supreme Court's decision in In re Frank A. Molgano, Jr., 5 Vt. Law Week 314 (Nov. 10, 1994). See also, Re: Manchester Commons Associates, #8B0500-EB, Findings of Fact, Conclusions of Law, and Order at 29 (September 29, 1995).

The essential holding of Molgano is that zoning by-laws are germane to interpreting ambiguous provisions of a town plan. Re: Manchester Commons, supra, at 27. Molgano does not stand for the proposition that zoning by-laws control or override the specific policies of a town plan in an Act 250 proceeding. Id. Thus, the Board first determines whether the town plan provisions at issue are specific policies or ambiguous. If such provisions are specific policies, they are applied to the proposed project without any reference to the zoning by-laws. However, if such provisions are ambiguous, the Board next examines the relevant zoning by-laws for provisions which help the Board construe the town plan provisions at issue and thereby resolve their ambiguity. Re: Manchester Commons, supra, at 32. 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 addressed by the town plan provisions at issue. Id. If the Board determines that the town plan provisions at issue are ambiguous and there are no relevant zoning by-laws, the Board will attempt to construe the town plan provisions at issue by further consideration of the town plan. Cf. Re: Donald and Gary Thomas, #2S0993-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 20, 1995).

When is a town or regional plan provision a specific policy such that it must be applied by the Board? Several of the cases in which the Board has wrestled with this question since Molgano are discussed below.

In Re: Leonard and Rose Lemieux, #3R0717-EB, Findings of Fact, Conclusions of Law, and Order (March 1, 1995) the Board determined that, when considered collectively, the following provisions of the Chelsea Municipal Development Plan constituted a specific policy -- promotion of conservation and preservation of Chelsea's scenic resources:

Chelsea should actively protect its aesthetic heritage and its most important views.

The Town should promote conservation and preservation of

Chelsea's wooded hilltops and scenic resources.

Id. at 11.

In Manchester Commons, the Board determined that the following provision of the Manchester Town Plan constituted a specific policy -- prohibition of projects which propose a maximum building coverage to land area greater than 15 percent:

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.

Re: Manchester Commons, supra, at 29 and 30. In doing so, the Board noted: "An ordinary person of ordinary 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." Id. at 30. By contrast, the Board determined that the following provision of the Manchester Town Plan was ambiguous:

Commercial development shall meet minimum design considerations, including. . . provision of adequate on site parking, storage, and loading areas. . . .

Re: Manchester Commons, supra, at 31. With respect to this particular provision, the Board stated: "an ordinary person of common intelligence reasonably would find the word `adequate' susceptible to more than one interpretation." Id.

In Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order (October 11, 1995) the Board determined that the following provision of the Windham Regional Plan constituted a specific policy -- encourage the use of existing communications sites and discourage the construction of new communications facilities in favor of using existing facilities:

Encourage the maintenance of a telecommunications system and related equipment in the Region that allows use of the most up-to-date sending and receiving equipment by residents and businesses.

Discourage the development of new sites for transmission and receiving stations in favor of utilizing existing facilities.

Id. at 25 and 26. In doing so, the Board noted: "Based on these policies, an ordinary person of common intelligence would understand that a new radio tower does not conform to the Regional Plan if existing towers provide reasonable alternatives." Re: Savoie and Bemis, supra, at 26

In Re: Ronald Carpenter, #8B0124-6-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 17, 1995), the Board determined that the following provisions of the Dorset Town Plan, when considered apart from other related provisions of the Dorset Town Plan, tended toward being specific policies:

Define the limits of the Village Commercial areas, and provide detailed performance standards through an amendment to the zoning by-law.

Permit and encourage the combination of commercial and residential uses in the Village Commercial Areas, permitting both residential and commercial business and professional uses of a service nature compatible with residential use.

Id. at 16.

In Re: Donald and Gary Thomas, supra, the Board determined that the following provisions of the Cavendish Town Plan, when considered collectively, constituted a specific policy -- to concentrate business and industry in areas serviced by town water and sewer:

To encourage business and industrial growth in areas adjacent to where business and industry now exist and where village water and sewer are available.

Commercial development has historically centered in and around the villages and is encouraged to occur in these areas because of Town water and sewer.

Id. at 10.

The Appellants argue that only those provisions of a town plan which clearly prohibit or allow a land use can be considered specific policies. The Board rejects this contention. Most town plan provisions do not contain direct authorizations or prohibitions. They are couched in terms of guidelines, directions and goals. If the Board were to adopt the Appellants' position, most town plan provisions would be ambiguous, and the significance of town plans in Act 250 proceedings would be reduced. As the Board stated in Manchester Commons:

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 the zoning by-laws but it did not do so. . . . Thus, the General Assembly has directed the Board and

District Commissions to determine conformance with the town plan, not with 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 2,500, not less than two public hearings. . . .

This extensive public process indicates that the 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.

Re: Manchester Commons, supra, at 28.

Upon review of the foregoing Board decisions, in particular Manchester Commons, the Board concludes that a provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding.

A. TOWN PLAN -- SPECIFIC POLICIES OR AMBIGUOUS

The Town Plan, in describing land use districts, states the following with respect to the conservation district:

Development of certain areas of the Town should be discouraged due to unfavorable slopes and soil conditions and unique scenic value.

Town Plan at 8.

The town plan provision at issue pertains to the area or district in which the project is located -- conservation district. Further, the provision is intended to guide or proscribe conduct or land use within the district in which the project is located -- it discourages development in the conservation district. However, the provision is not sufficiently clear to guide the conduct of an average person, using common sense and understanding.(FN7)

The provision could be a blanket authorization. Perhaps it means that all development is allowed in the conservation district even though no development is necessarily encouraged to occur therein. The provision could be generally permissive. Perhaps it means that development may not occur in areas which have all of the following characteristics: unique scenic value, unfavorable slopes and unfavorable soils. By contrast, the provision could be generally restrictive. Perhaps it means that development may not occur in areas which have any one of the following characteristics: unique scenic value, unfavorable slopes or unfavorable soils. Finally, the provision could be a blanket prohibition. Perhaps it means that no development is allowed in the conservation district due to the unfavorable slopes, unfavorable soil conditions and unique scenic values which are associated with every area located therein. Each of the forgoing interpretations could be adopted by an average person, using common sense and understanding. Therefore, the provision is not sufficiently clear to guide the conduct of such a person.

The Board concludes that the town plan provision at issue, in and of itself, is ambiguous.

B. TOWN PLAN -- ZONING ORDINANCE

Because the Town Plan provision at issue is ambiguous, the Board will look to the Zoning Ordinance for assistance in resolving this ambiguity. Subsections 5.1.1., 5.1.3. and 5.1.4. of the Zoning Ordinance relate to the same subject matter as that which is addressed by the Town Plan provision at issue.

Section 5.1.3. of the Zoning Ordinance clearly states what types of development are and are not allowed in the Town's conservation district. Section 5.1.3. provides:

Permitted Uses: The following uses, and no others, except as provided otherwise in these Regulations, shall be permitted within the Conservation District.

(a) Single-family detached dwellings.

(b) Agricultural.

(c) Forestry.

Id., 5.1.3. at 27 (emphasis added).

Additionally, as noted earlier Section 5.1.4. of the Zoning Ordinance indicates the maximum extent of any skyline intrusions located in the Town's conservation district. Section 5.1.4. provides:

(e) Height. Building height in the Conservation District

shall not exceed thirty-five (35) feet.

Zoning Ordinance, 5.1.4(e). at 27 (emphasis added).

The foregoing sections of the Zoning Ordinance clarify the Town Plan provision at issue. The Board concludes that the Town Plan provision at issue allows three uses only, and radio towers are not among them. Thus, the Board determines that the Project does not conform with the Town Plan.(FN8)

C. 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. § 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.

The Regional Plan contains the following policy which relates to radio towers:

Policy 1: Support establishment of wireless transmission facilities, consistent with community aesthetic values.

Regional Plan at 19. The foregoing policy is not in conflict with provisions of the Town Plan.

The Regional Plan policy adopts as its implementing standard "community aesthetic values."

The Board has concluded above under Criterion 8 (aesthetics) and Criterion 10 (town plan) that when subsections 5.1.1., 5.1.3. and 5.1.4. of the Zoning Ordinance are considered collectively, they evince a clear, written community standard against the development of any use other than single family detached dwellings, forestry or agriculture in the conservation district -- particularly those which interrupt the skyline -- to protect the unique scenic value of lands located therein. This clear, written community standard is a community aesthetic value as contemplated by the provision of the Regional Plan at issue. Thus, the Board concludes that under this provision the Project is prohibited in the conservation district. Consequently, the Project is not in conformance with the Regional Plan.

VI. ORDER

Application #1R0780-EB is denied.

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

ENVIRONMENTAL BOARD

s/s John E

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John Ewing, Chairman

Arthur Gibb*

Robert Page, M.D.

Samuel Lloyd

Marcy Harding

Rebecca Nawrath

Steve Wright

Rebecca Day

William Martinez*

*Board members Gibb and Martinez dissent from the Board's conclusions under Criterion 10. They would conclude that the Project is in conformance with both the Town and Regional Plans because of the variance granted by the Pittsford Board of Zoning Adjustment, which was not appealed. Otherwise, Board members Gibb and Martinez concur with the Board's decision.

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Footnotes

1. On October 31, 1995, Mr. Frost filed a letter supplementing his September 27, 1995 party status request.

2. On November 15, 1995, Mr. Swift filed a petition supplementing his October 3, 1995 party status request.

3. On November 2, 1995, Mr. Paynter filed a memorandum supplementing his October 3, 1995 party status request.

4. The Renewed Motion to Dismiss is hereby denied.

5. Citations to the Zoning Ordinance shall be in the form of three numbers each followed by a period. The first number references the Article. The second number references the

Section and the third number references the Subsection.

6. The opponents did not address any form of air pollution, alleged or otherwise, except RFR.

7. The term "discourage" and similar language have been found by the Board to be clear and unambiguous when accompanied by further guidelines as in Savoie, Thomas and Lemieux. Here, however, the term "discourage" stands alone without substantial clarification.

8. Contrary to Appellants' arguments, the Board evaluates the Project for conformance with the Town Plan independent of the analysis conducted and conclusions reached by the Pittsford Board of Zoning Adjustment in conjunction with the Variance. As the Board noted in Manchester Commons: "The only municipal entity charged with determining town plan conformance is a development review board created under 24 V.S.A. §4401(d)." Re: Manchester Commons., supra, at 29 (emphasis added).

The Board's decision regarding the Project's conformance with the Town Plan does not, expressly or implicitly, relate to the validity or invalidity of the Variance.