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

Re: Richard and Barbara Woodard
Land Use Permit #5W1262-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal and cross-appeal from Land Use Permit #5W1262 ("Permit") issued to Richard and Barbara Woodard pursuant to 10 V.S.A. §§ 600 l-6092 ("Act 250") to construct and operate four self-storage facilities in Waterbury Center, Vermont. Specifically, the appeal and cross-appeal concern whether Act 250 has jurisdiction over the proposed project, whether an adjoining property owner has standing to appeal the issuance of a permit, and whether the proposed project complies with 10 V.S.A. § 6086(a)(5), (8), and 9(K).

As explained more fully below, the Environmental Board ("Board") concludes that each of the above-listed issues is answered in the affirmative. Accordingly, the Board issues Land Use Permit #5W1262-EB to Richard and Barbara Woodard.

I. PROCEDURAL SUMMARY

On February 21, 1997, the District #5 Environmental Commission ("District Commission") issued the Permit together with supporting Findings of Fact, Conclusions of Law, and Order ("Order") to Richard and Barbara Woodard ("Permittees"). The Permit authorizes the Permittees to construct and operate four self-storage facilities on approximately one acre of a seven acre tract in Waterbury Center, Vermont ("Project").

On March 21, 1997, Richard Hyman filed a Motion to Alter with the District Commission. On April 10, 1997, the District Commission denied the Motion to Alter.

On May 9, 1997, Richard Hyman ("Appellant") filed an appeal with the Board contending that the District Commission erred by finding that the Project complies with 10 V.S.A. § 6086(a)(5) (traffic), (8) (aesthetics), and 9(K) (public investments) ("Criteria 5, 8, and 9(K)" respectively). Appellant also appealed the District Commission's denial of party status as to Criterion 9(K).

On May 23, 1997, Permittees filed a Motion for Declaratory Ruling on Act 250 Jurisdiction, a Motion in Opposition to Appellant's Appeal for Party Status on Criterion 9(K), and a Motion to Deny Appellant Party Status on Any Criteria. Permittees also filed what they had labeled as Exhibits A-M.

On June 18, 1997, Environmental Board ("Board") Member Steve E. Wright, the duly authorized delegate of Board Chair John T. Ewing, convened a prehearing conference.

On June 18, 1997, Lisa and Steven Winters filed a letter petitioning for party status under Criteria 5, 8, and 9(K).

On June 19, 1997, Board Member Wright issued a Prehearing Conference Report and Order ("Preheating Order"). In part, the Prehearing Order stated that Permittees' Motion for Declaratory Ruling on Act 250 Jurisdiction and Motion to Deny Appellant Party Status on Any Criteria would be treated as issues raised on cross-appeal. The Motion in Opposition to Appellant's Appeal for Party Status on Criterion 9(K) would be considered a memorandum in opposition to the party status issue raised in Appellant's notice of appeal. The Board received no written objection to the Preheating Order.

On June 30, 1997, Lisa and Steven Winters filed a memorandum withdrawing their request for party status in this appeal.

In July, 1997, Appellant and Permit-tees filed prefiled direct and rebuttal testimony and exhibits.

On August 6, 1997, Appellant and Permittees filed their objections to the prefiled testimony and exhibits ("Evidentiary Objections"). The parties also filed proposed findings of fact and conclusions of law.

On August 12, 1997, the Chair convened a second prehearing conference by telephone. The Chair announced his preliminary determinations regarding the Evidentiary Objections and the preliminary issues listed at II. l-4 below as follows:

Evidentiary Objections: The Chair sustained Appellant's objection to the Permittees' Exhibit K, a one page letter, on the basis that it is hearsay and that the alleged author of the document was not available for cross-examination at the public hearing. The Chair overruled all other evidentiary objections made by the parties. The Chair indicated that the Board would give all evidence the weight to which it is entitled. He also stressed that inflammatory and personal remarks are not admissible, will not be considered by the Board, and should not be made by the parties.

Jurisdiction: There is Act 250 jurisdiction over the proposed Project because the entire seven acre parcel is considered for purposes of

determining jurisdiction despite the fact that the Project itself will allegedly occupy less that one acre of the seven acre tract.

Party Status: Appellant is granted party status as to Criteria 5, 8, and 9(K) pursuant to Environmental Board Rules ("EBR") 14(A)(5) and 14(B)(l). He is denied party status under EBR 14(B)(2).

On August 13, 1997, a three-member panel of the Board ("Panel") convened a hearing in Waterbury, VT with the following parties participating: Permittees, pro se; Appellant, by Stephanie J. Kaplan, Esq. The Panel confirmed the preliminary rulings made by the Chair concerning the Evidentiary Objections and the preliminary issues listed at II. 1-4 below. It then conducted a site visit, accepted documentary and oral evidence into the record, and heard opening and closing statements regarding the issues on Appeal. After recessing the hearing, the Panel deliberated.

On August 19, 1997, the Panel issued a Recess Memorandum and Order concluding that Permittees had failed to provide sufficient evidence on which the Board could make affirmative findings regarding Criterion 8. Although a permit can be denied on this basis, the Panel exercised its discretion under EBR 20 to require that Permittees provide additional information.

On August 28, 1997, Appellant filed a Motion to Deny Application and Alter the Response Date. On September 3, 1997, the Panel issued an Order denying the Motion to Deny Application and partially granting the Motion to Alter Response Date.

On September 23, 1997, Permittees filed additional testimony and exhibits. On October 3, 1997, Appellant filed responsive evidence.

On October 8, 1997, the Panel re-convened the hearing in Waterbury, VT with the following parties participating: Permittees, pro se; Appellant, by Stephanie J. Kaplan, Esq. The Panel accepted documentary and oral evidence into the record regarding Criterion 8, including additional evidence and live testimony offered by Permittees in rebuttal of the evidence tiled by Appellant on October 3, 1997. After recessing the hearing, the Panel deliberated.

Based upon a thorough review of the record, related argument, and the proposed findings of fact and conclusions of law, the Panel issued a proposed decision on October 27, 1997 which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before November 12, 1997.

On November 12, 1997, both parties filed a request for oral argument and written objections to the proposed decision.

On November 18, 1997, the Board convened oral argument relative to the appeal with the following parties participating: Permittees, pro se; Appellant, by Stephanie J. Kaplan, Esq. The Board deliberated on November 18, 1997 and December 17, 1997. Following a thorough review of the proposed decision and the record, the Board declared the record complete and adjourned. The matter is now ready for final decision. To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. ISSUES ON APPEAL

1. Whether the amount of "involved land" connected with the Project subjects the Project to Act 250 jurisdiction.

2. If issue #1, is answered in the affirmative, whether Appellant has demonstrated party status as to Criterion 5 (traffic).

3. If issue #1 is answered in the affirmative, whether Appellant has demonstrated party status as to Criterion 8 (aesthetics).

4. If issue #1 is answered in the affirmative, whether Appellant has demonstrated party status as to Criterion 9(K) (public investments).

5. If issue #2 is answered in the affirmative, whether the Project will cause unreasonable congestion or unsafe conditions under Criterion 5 (traffic).

6. If issue #3 is answered in the affirmative, whether the Project will result in an undue adverse impact under Criterion 8 (aesthetics).

7. If issue #4 is answered in the affirmative, whether the Project will materially jeopardize the safety of, or the public's use of or access to, Route 100 under Criterion 9(K) (public investments).

III. FINDINGS OF FACT

1. On October 21, 1996; Permittees filed an application with the District Commission for an Act 250 permit to construct and operate a self-storage facility (previously identified as the "Project").

2. The Project will occupy approximately one acre ("Project Site") of a seven acre tract ("Woodard Property") owned by Permittees on Route 100 in Waterbury Center, Vermont.

3. The Project consists of four buildings housing a total of 108 self-storage units together with related driveways. The self-storage units will be leased to the public.

4. Permittees own and have operated a retail antique business on a portion of the Woodard Property since 1971. Permittees have held flea markets on the property since 1971 and conducted auctions on the Project Site since 1976. Access to the antique business is from Vermont Route 100.

5. The public will access the Project from Vermont Route 100. The entrance to the Project from Vermont Route 100 will be that which is used to access the antique business ("Project Driveway").

6. There is potential access to the Project from Lakeview Terrace via a driveway on the Woodard Property ("Residential Driveway").

7. Public access to and from the Project via the Residential Driveway will be prevented by a barrier located at the point where the Project Site narrows into the Residential Driveway. The barrier will consist of a locked, 12'-wide metal tube gate suspended from wooden posts. The posts will be painted white and will be 0.5' in diameter. The gate will be approximately 4' high. The gate will be flanked by 2' high juniper hedges. A 1' x 0.5' sign will be suspended from the gate stating "PRIVATE - Do Not Enter-."

8. The posted speed limit on Vermont Route 100 in the vicinity of the Project Driveway is 40 mph. There are also signs cautioning motorists not to exceed 35 mph in the same area.

9. In the vicinity of the Project Driveway, Vermont Route 100 is a two lane, curving highway. Route 100 inclines when approaching the Project Driveway in the

northbound lane. Route 100 is relatively level and straight at the Project entrance.

10. Approximately 2/10 mile north of the Project Driveway, signs on Route 100 warn southbound motorists of turning vehicles and a school bus stop. To the south of the Project Driveway, a sign cautions northbound motorists regarding turning vehicles.

11. For the years 1991 - 1995, there were no reported accidents on Route 100 at the entrance to the Project Driveway or Lakeview Terrace, which is located to the southwest of the Project Driveway.

12. The area along Route 100 in the vicinity of the Woodard Property is moderately developed and retains many of the qualities of an historic village center, with residential scale buildings and an historic church.

13. There is a mixture of commercial and residential development along Route 100 in the vicinity of the Woodard Property. Some residences along Route 100 are being converted into businesses. Businesses in the area include retail sales and self-storage units. Among the businesses in the area is the Cold Hollow Cider Mill.

14. The Karl Suss property is located beyond the village cluster, approximately 1,000 feet to the northeast of the Project Site on Route 100. The Karl Suss building has a "footprint" in excess of 60,000 square feet. Karl Suss is best characterized as "light industry." Karl Suss is a dominant feature in the area.

15. Some of the buildings in the vicinity of the Project Site are as long as the proposed Project buildings. Because the existing buildings are typically extended farmhouses, the mass of these buildings is "broken-up" by the lines of the additions.

16. The Project Site is located in what Waterbury has designated as a commercial district.

17. Route 100 has a daily estimated traffic volume of 10,000 vehicles.

18. Lakeview Terrace has access to Vermont Route 100 to the southwest of the Project Driveway. Lakeview Terrace ends where it adjoins both the Woodard Property and the Residential Driveway to the west of the Project Site.

19. Lakeview Terrace is a residential street with less than 15 homes. Young children

live in several of the homes. One of the homes is also a day-care center. Neighborhood children play ball and ride their bicycles in the street. There is a school bus stop at the end of Lakeview Terrace.

20. Appellant owns a house at the end of Lakeview Terrace. His property adjoins a portion of the Woodard Property to the southwest of the Project Site. His property does not share a border with the Project Site. One of the tenants in Appellant's house operates an overhead door business from the property.

21. The Project Site is adjoined on the southwest property line by residential property owned by the Vests. Lakeview Terrace separates the Vest property from Appellant's property.

22. The Vermont Agency of Transportation utilizes Standard B-71 to determine the suitability of proposed new accesses onto a highway.

23. The "comer sight distance" is the minimum distance necessary to allow safe egress from a driveway onto a highway. The "stopping sight distance" is the distance required to stop at a given speed.

24. According to Standard B-71, on a highway with a posted speed limit of 35 mph, the comer sight distance must be equal to or greater than 445 feet in both directions for all drives entering the public highway unless otherwise approved by the Agency of Transportation. Pursuant to B-71, the comer sight distance "is measured from a point on the drive at least 15 feet from the edge of [the] traveled way of the adjacent roadway and measured from a height of eye of 3.5 feet on the drive to a height of 4.25 feet on the roadway." Advance warning signs are required if the comer sight distances are below the minimum stopping sight distance of 225 feet in each direction.

25. Measured from a point in the Project Driveway 3.5 feet off the ground and 15 feet from the edge of the traveled portion of Vermont Route 100, directed to a point 4.5 feet off the ground, Permittees measured the comer sight distances as 260 feet to the north and 290 feet to the south.

26. Appellant measured the sight distances from the Project Driveway as 290 feet to the north and 200 feet to the south. He estimated that the distances would decrease to 230 feet and 160 feet respectively when snowbanks obscure the line of sight.

27. Approximately 50 to 75 cars visit Permittees' antique business on a daily basis.

28. On average, persons visit their rental storage units approximately one time each month. Therefore, approximately 3-4 cars per day will use the Project Driveway in order to access a storage unit within the Project.

29. Permittees propose to allow patrons to access their self-storage units 24 hours per day, seven days per week. Allowing patrons to access the units at night will be out of character with the residential nature of the surrounding property.

30. The Project Site is an open field surrounded on three sides by existing or permitted development.

31. The two self storage buildings occupying the southwest half of the Project Site will each measure 24' x 90'. The two buildings to the northeast will each measure 24' x 150' ("Buildings #1-#4" in a northeast direction).

32. All four buildings will have pitched roofs. Buildings #1 and #4 are 18' high at the ridge lines; Buildings #2 and #3 are 22' high at the ridge lines.

33. Each building will have 3' high cupolas with copper weather vanes.

34. A gable roof will extend the length of one side of both Building #2 and Building #3 creating useable space on the second storey of those buildings. The Permittees will maintain the second storey space exclusively for their personal use, including the storage of lumber, supplies, excess inventory, and other materials associated with their antique business.

35. The buildings' roofs will be charcoal black. They will be made of 1" vertical ridged metal.

36. The exterior of the buildings will be covered with 4" seagull grey, vinyl, horizontal, simulated clapboard siding. The buildings will have white, wood trim.

37. A series of 8' wide, seagull grey, vinyl "roll-up" doors will line each side of the buildings.

38. Windows on Buildings #2 and #3 will be approximately 4' x 5', double hung, double pane with insulated grates.

39. Permittees propose to install five 45 watt motion-sensor lights and thirteen 40 watt lights on the exterior of the buildings.

40. All of the lights will be installed in the soffits and will point directly down at the ground below.

41. Permittees propose to install three of the five motion-sensor lights on Building #1; two of these lights would be on the long, southwest side of Building #1. The other two motion-sensing lights will be installed on the short, northwest end of Building #2 and the short, southeast end of Building #3.

42. The thirteen 40 watt lights will be illuminated from dusk'until dawn. Their use will be controlled by an automatic timer. They will be recessed "can" lights.

43. Permittees will plant 2' high jumpers at each comer of every building. The jumpers can be expected to grow to approximately 3' in height.

44. Permittees will build 24' wide driveways between each building and around the circumference of the four buildings. The driveways will be constructed of sand, covered by 10" of riverbank gravel, covered by 6" of commercial crushed driveway gravel.

45. Persons wishing to access the Project business office will park in areas currently used by patrons of the antique business. Patrons of the Project will park near their storage units in order to access them. No new parking lots will be created.

46. There will be limited visibility of the Project from Route 100.

47. The long, southwest side of Building #1 and, potentially, the rooflines of Buildings #2-4 will be visible from the Lakeview Terrace neighborhood.

48. The proposed lighting for the Project and the headlights of automobiles on the Project driveways will be visible from the Lakeview Terrace neighborhood. This will be out of character with the residential nature of the neighborhood.

49. The view of the Project from Lakeview Terrace will be partially obscured by existing, predominantly deciduous, plants.

50. Permittees propose to plant twenty 6' tall white pine trees parallel to the southwest property line of the Project Site.

51. Under optimum conditions, white pine trees grow an average of approximately one foot taller per year.

52. Nursery-grown trees have a higher survivability rate than transplanted field-grown trees.

53. Any plantings made parallel to the southwest property line of the Project Site will compete with existing vegetation for sunlight and nutrients from the soil.

54. Pine trees are sun-seeking trees that lose their lower branches as they grow taller. This trait would decrease the effectiveness of planting a monoculture of white pines as a screen between the residences on Lakeview Terrace and the Project.

55. Permittees' proposal to plant an essentially straight row of one species parallel to the southwest property line of the Project Site would not provide adequate screening of the Project for the residents of the Lakeview Terrace neighborhood.

56. Permittees' proposal to plant an essentially straight row of one species parallel to the southwest property line of the Project Site would not soften the aesthetic impact that the long, southwest side of Building # 1 will have on the Lakeview Terrace neighborhood.

57. A variety of vegetation, such as white pine, arborvitae, spruce, and red cedar, planted in a staggered, non-linear fashion between Building #1 and the southwest property line would provide an effective screen and would soften the aesthetic impact of the Buildings.

58. At least 25 trees will need to be planted to provide effective screening.

59. Many of the neighboring homes and the antique business building have simulated wood siding or other non-wood exteriors.

60. The Agency of Natural Resources has published a guidebook entitled Vermont's Scenic Landscapes - A Guide to Growth and Change based on the work of a citizen's advisory committee. The committee developed standards for assessing and avoiding aesthetic impacts on Vermont villages and rural areas.

IV. CONCLUSIONS OF LAW

A. Scope of Review

When a party appeals from a district commission determination, the Board provides a "de novo hearing on all findings requested by any party that tiles an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the de novo review of a district commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or permit conditions issued by the District Commission concerning the issues on appeal. Rather, it must regard the Permit and Order as evidence offered by the parties.

B. Jurisdiction

Whether or not Act 250 jurisdiction exists "calls into question the power of the Board to regulate [a proposed project] and may be raised by anyone at any time." Re: Greg Gallagher, #7R0607-EB and #7R0607-1-EB, Memorandum of Decision at 1 (July 6, 1989)[EB #402M] (on remand from Vermont Supreme Court which required that Board hold a hearing to determine whether Act 250 jurisdiction existed, 150 Vt. 50 (1988), Board found that applicant was not precluded from raising issue of jurisdiction at the prehearing conference held in connection with the appeal to the Board even though applicant had not raised the issue at the district commission level or in a notice of appeal). See also 10 V.S.A. § 6089(d) (an appeal from the district commission is allowed "for any 'reason"). Cf. In re Denio, 158 Vt. 230,236 (1992) (appellants had duty to raise jurisdictional issue in proceeding before the Board and cannot raise it for the first time in a Supreme Court appeal). The person claiming an exemption from Act 250 jurisdiction carries the burden of proof. Cf. Re: Weston Island Ventures, Declaratory Ruling #169 at 5 (June 3, 1985) (citing Bluto v. Employment Security, 135 Vt. 205 (1977)). The burden of proof consists of both the burden of producing sufficient evidence and the burden of persuasion. Re: Pratt's Propane, Findings of Fact, Conclusions of Law, and Order #3R0486-EB at 4-6 (Jan, 27, 1987)[EB #311].

Pursuant to 10 V.S.A. § 6081(a), no person may commence development without an Act 250 permit. "Development" is defined as the construction of improvements for a commercial purpose where the tract of involved land is "more that one acre." EBR 2(A). In towns with both permanent zoning and subdivision bylaws, jurisdiction applies only if the tract of involved land is greater than ten acres, unless the town chooses to have jurisdiction attach to development on more than one acre. Id. No party contests that, in Waterbury, Vermont, Act 250 jurisdiction attaches to projects on land in excess of one

acre. "Involved land" includes "the *entire tract or tracts of land* upon which construction of improvements for commercial ... purposes occurs." EBR 2(F)(1) (emphasis supplied). See, e.g., Charles and Barbara Bickford, #5 W 1186-EB, Findings of Fact, Conclusions of Law, and Order at 25 (May 22, 1995), aff'd, Memorandum of Decision at 8 (Sept. 12, 1995)[EB #595] (where proposed project was to be conducted on 26 acres of a 192 acre parcel, entire 192 acres were "involved land" for purposes of Act 250 jurisdiction). Cf. In re Stokes Communications Corp., 164 Vt. 30 (1995) (in a town with permanent zoning and subdivision bylaws, where applicant leased one-acre parcel from owner of 92 acre parcel, entire 92 acres were considered "involved land" for purpose of determining whether 10 acre jurisdictional threshold was met).

The Project will utilize approximately one-acre+/- of a seven-acre parcel owned by the Permittees. The Board must consider the entire seven acres to be "involved land" for purposes of determining whether there is Act 250 jurisdiction. Therefore, because the involved land exceeds one acre, the Board concludes that there is Act 250 jurisdiction over the Project.

C. **Party Status**

"[P]arty status decisions by district commissions may be challenged by appeal or cross-appeal." Re: Gary Savoie d/b/a/ WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Oct. 11,1995)[EB #632]. See also Re: Spring brook Farm Foundation, Inc., #2S0985-EB, Memorandum of Decision at 7 (July 18, 1995)[EB #615]. A person denied party status at the commission level is deemed to be a party in the Board appeal for the purpose of deciding party status. Id. The Board considers the issue of party status de novo. Id. If the Board denies party status on a criterion, the appeal or cross-appeal is dismissed as to that criterion. Id. Conversely, the Board "will proceed with substantive review on any criteria concerning which it determines that the appellant qualities for party status." Re: Gary Savoie, supra at 7.

Appellant has three methods by which he can attempt to establish party status -- EBR 14(A)(5), EBR 14(B)(l), and EBR 14(B)(2). Pursuant to EBR 14(A)(5), Appellant is entitled to party status if he is an adjoining property owner and can "demonstrate[] that the proposed development ... may have a direct effect on [his] property under" Criteria 5, 8, and/or 9(K). Similarly, EBR l-:(B)(l) authorizes the Board to grant party status if Appellant adequately demonstrates that the "proposed development ... may affect [his] interest under" Criteria 5, 8, and /or 9(K). The burden of proof is on Appellant. Whether or not Appellant has party status is solely within the Board's discretion. E.g., EBR 14(B)(1); Re: Northern Development Enterprises, #5W0901-R-5-EB, Memorandum of Decision at 7 (Aug. 21,1995)[EB #627]

EBR 14(B)(2) provides that Appellant may be granted party status to the extent that he adequately demonstrates that his "participation will materially assist the [B]oard. . by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant" to the criteria at issue.

> The Board considers several factors when determining whether or not a party status petitioner should be granted party status pursuant to EBR 14(B)(2). They are: the petitioner's expertise regarding the matters at issue; complexity of the matters at issue; the public's general understanding of the matters at issue; relevancy of the proffered testimony, if any; and the Board's familiarity with the subject matters at issue. Re: Putney Paper Co.. Inc., Declaratory Ruling #305 at 6 (October 30, 1995) citing Re: Pico Peak Ski Resort. Inc., [#1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order] at 10 [(March 2, 1995)[EB #622]].

Re: Map Tree Place Associates, #4C0775-EB (Interlocutory Appeal), Memorandum of Decision and Order at 7-8 (Oct. 11, 1996)[EB #657].

The Board concludes that Appellant, an adjoining property owner, has demonstrated that the Project may affect his interests and, therefore, the Board grants Appellant party status as to Criteria 5, 8, and 9(K) under EBR 14(A)(5) and 14(B)(1). The individual and collective expertise of the Board and the relative simplicity of the issues in this case preclude the need for material assistance. Thus, the Board declines to grant Appellant party status as to any criteria under EBR 14(B)(2).

D. Criterion 5 (traffic)

Before issuing a permit, the Board must find that the Project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to the use of highways ...." 10 V.S.A. § 6086(a)(5) (traffic).

> Criterion 5 does not require that proposed development be the principal cause or the original source of traffic problems. Several causes may contribute to a particular effect or result. The Board found[, in an application involving access to a warehouse,] that the development would contribute to [an] existing traffic problem. It would be absurd to permit a hazardous condition to become more hazardous.

One purpose of Act 250 is to insure that "lands and environment

> are devoted to uses which are not detrimental to the public welfare and interests." Safe travel ... is in the public interest. Exacerbating [an] existing traffic hazard by allowing additional travel on [a] road would be detrimental to the public interest.

In re Pilgrim Partnership, 153 Vt. 594, 596-97 (1990) (citations omitted) (affirming Board decision that proposed project did not satisfy Criterion 5).

A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created. 10 V.S.A. $6087(b). The burden of proof is on Appellant under Criterion 5, id. § 6088(b), but Permittees must provide sufficient information on which the Board can make affirmative findings.

Individuals will access their self-storage units via the Project Driveway, the driveway currently used by patrons of Permittees' antique business. Signs along Route 100 warn motorists of turning vehicles in the vicinity of the Driveway entrance. Although Route 100 is a heavily traveled roadway, no vehicular accidents were reported between 1991 and 1995 at the entrance to the Project Driveway or Lakeview Terrace. Appellant has failed to prove that the addition of 3-4 cars per day will cause "unreasonable congestion or unsafe conditions" along Route 100.

The parties have provided conflicting sight distance measurements. Although comparison to B-71 standards can be helpful in evaluating a proposed project's conformity with Criterion 5, the standards are not dispositive in Act 250 proceedings. Cf. In re Wal*Mart Stores, Inc. and The St. Albans Group, Supreme Court Docket No. 95-398, slip op. at 10 (Aug. 29, 1997)("Under Criterion 5, the Board must make its own determination as to the nature of the area and the level of service appropriate for that area."). For the reasons stated in the preceding paragraph, the Board concludes that the evidence provided concerning sight distances is not dispositive in this case. The Boards conclusion would have been different if the evidence had supported a finding that a greater number of cars would visit the Project on a daily basis. Accordingly, the Board concludes that the Project will not violate Criterion 5.

E. **Criterion** 8 **(aesthetics)**

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, historic sites or rare and irreplaceable natural areas." 10 V.S.A. § 6086(a)(8) (aesthetics). The burden of proof is on the Appellant under Criterion 8, id. § 6088(b), but Permittees must provide

sufficient information for the Board to make affirmative findings. See, e.g., Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 19 (June 12, 1997)[EB #65 1 R] and cases cited therein.

1. Adverse

The Board relies upon a two part test to determine whether a project satisfies Criterion 8. First, it determines whether the proposed project will have an adverse effect under Criterion 8. Id. See also Re: James E. Hand and John R. Hand, d/b/a/ Hand Motors and East Dorset Partnership, #8B0444-6-EB(Revised), Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1996)[EB #629R]; Re: Ouechee Lakes Corp., #3 W0411-EB and #3 W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985)[EB #241].

> [T]he 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.

Hand, supra at 25.

In the present case, the area surrounding the Project Site retains many of the qualities of an historic Vermont village. The proposed buildings are of a scale and mass that generally exceeds that of other buildings in the vicinity. The Karl Suss building, which is located beyond the village cluster, is the only other large, industrial facility in the area. The other buildings in the area are residential in scale. Buildings in the area that are as long as the Project buildings are typically extended farmhouses whose mass is "broken-up." Although the Project's visibility from Route 100 is limited, residents of Lakeview Terrace will be able to see the long, unbroken side of Building #1. In addition, the proposed Project lighting and the headlights of automobiles on the Project's driveways will be visible from neighboring homes.

Appellant has sustained his burden of proof as to this first inquiry under Criterion 8. The Board concludes that the Project is out of character with its surroundings. Therefore, the Project will have an adverse effect under Criterion 8.

2. **"Undue"**

Because the Board determines that the Project will have an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is "undue." Id. The Board will conclude that the adverse effect is undue if it reaches a positive finding with respect to any one of the following factors:

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

2. Have Permittees failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?

3. 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?

See Black River, supra at 19-20; Quechee Lakes, supra at 19-20.

a. Written Community Aesthetic Standard

The parties offered no evidence of a written community aesthetic standard relevant to Waterbury, Vermont. Although Appellant offered evidence concerning a guidebook published by the Agency of Natural Resources, the Board concludes that it is not evidence of a written community aesthetic standard for the community in which the Project is located. No evidence was provided that Waterbury has adopted the standards set forth in the guidebook or relied upon them to draft some other statement of community standard. Therefore, the Board cannot conclude that the Project will violate a written, community aesthetic **standard.**

b. Generally Available Mitigating Steps

Permittees have added details to the proposed buildings to harmonize them with their surroundings. For example, the exteriors will be covered with narrow, horizontal, simulated clapboard siding. There will be small cupolas with weather vanes along the buildings' ridge lines. A gate along the Residential Driveway will prevent patrons of the Project from accessing their storage units via Lakeview Terrace.

Permittees propose to plant twenty 6' white pine trees parallel to the southwest

property line of the Project Site. The Findings above reveal that a variety of vegetation planted in a staggered, non-linear fashion between Building #1 and the southwest property line is necessary to ***screen*** the Project from the homes on Lakeview Terrace and to soften the Project's aesthetic impact. The Board has also found that a minimum of 25 plants is necessary to provide adequate screening. The mere fact that 25 trees are necessary demonstrates that Permittees must replace any tree that dies. The Board concludes that, ***as proposed by the Permittees, the*** Project does not take generally available mitigating steps that a reasonable person would take to improve the Project's harmony with its surroundings. The Board concludes, however, that Board Permit Condition #14 alleviates this aspect of the Project's undue adverse effect.'

In addition, Permittees propose that the Project will be accessible to individuals renting storage units on a twenty-four hour basis. The proposed lighting for the Project and the headlights of automobiles on the Project driveways will be visible from Lakeview Terrace. The Board has found that these aspects of the Project would be out of character with the residential nature of the Lakeview Terrace neighborhood. The Board concludes that, ***as proposed by the Permittees, the*** Project does not take generally available mitigating steps that a reasonable person would take to improve the Project's harmony with its surroundings. The Board concludes, however, that Board Permit Conditions # 10, #I 1, and #15 alleviate this aspect of the Project's undue adverse effect.'

While the Board concludes that the Project *as proposed* has an undue adverse affect under Criterion 8, permit conditions can alleviate this affect such that the Board can make an affirmative finding. The Board concludes that the Project, as conditioned, will include generally available mitigating measures that would be taken by a reasonable person to improve the Project's harmony with its surroundings.

The Board may impose permit conditions to alleviate adverse effects that would otherwise be caused by the Project and that, if not alleviated, would require a conclusion that a project does not comply with Criterion 8. 10 V.S.A. $6086(c); Black River, supra, at 18-21; Bickford, supra, at 24. Although Permittees bear the responsibility of designing the Project, the Board's conditions are permissible modifications of the Permittees' plans. E.g., Hand, supra at 27; Re: J. Philip Gerbode, #6F0396R-EB-1, Findings of Fact, Conclusions of Law and Order at 22 (Jan. 29, 1992)[EB#486].

See footnote 1 above.

c. **Offensive or Shocking**

The Project is located in a moderately developed neighborhood of mixed commercial and residential uses. The view of the Project from Route 100 is limited. The landscaping proposed by Permittees would not adequately screen the Project from the view of the residents of Lakeview Terrace. The Board concludes that the sight of large, industrial-type buildings, and the glare of the proposed Project lighting and headlights from cars on the Project's driveways are offensive because they would be out of character with the residential nature of the Lakeview Terrace neighborhood. Similarly, the Board concludes that twenty-four hour operation of the Project, as proposed by the Permittees, would be offensive under Criterion 8. The Board concludes, however, that Board Permit Conditions #10, #11, #14, and #15 alleviate these offensive aspects of the Project.

The Board concludes that the Project, as conditioned, will be out of character with its surroundings, but not shockingly or offensively so. The Project as permitted will not offend the sensibilities of the average person nor significantly diminish the scenic value of the area.

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Appellant has failed to sustain his burden of proof as to this second inquiry under Criterion 8. Although the Project will have an adverse effect on the aesthetics of the area, such effect is not undue. Therefore, the Board concludes that the Project, as conditioned, will not have an undue adverse effect on aesthetics in violation of Criterion 8.

F. **Criterion 9(K) (public investments)**

Before issuing a permit, the Board must find that the Project will not materially jeopardize the safety of, or the public's use of or access to, Route 100. 10 V.S.A. § 6086(a)(9)(K) (public investments). The burden of proof is on Permittees under Criterion 9(K). Id. § 6088(a). The Board interprets the inquiry required of it under Criterion 9(K)

> to be different from that under Criterion 5 concerning unsafe traffic conditions. Under Criterion 5, the Board looks to see whether a proposed project will create traffic conditions which are unsafe or traffic congestion which is unreasonable. The Board may not deny a project simply because such conditions are present. In contrast, under Criterion 9(K), the Board examines whether a proposed project will materially jeopardize or interfere with .. the public's use or enjoyment of or access to [public] facilities. Because public facilities include public highways. traffic

conditions on those highways may he examined under Criterion 9(K), and if material jeopardy or interference will be created, the proposed project may be denied. Thus, the inquiry into traffic safety under Criterion 9(K) involves a higher threshold of material jeopardy or material interference, which is absent from the language of Criterion 5. This conclusion is consistent with the fact that a proposed project may not be denied under Criterion 5 but may be denied under Criterion 9(K).

Re: Swain Development Corp., #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33-34 (Aug. 10, 1990)[EB #430].

For the reasons articulated above in the Board's analysis under Criterion 5, the Board concludes that the Project will not materially jeopardize the safety of, or the public's use of or access to, Route 100. Therefore, the Project will not violate Criterion (9)(K).

V. ORDER

1. The Project's involved land exceeds the one acre threshold and, therefore, the Project is subject to Act 250 jurisdiction.

2. The Appellant is granted party status as to Criteria 5, 8, and 9(K) pursuant to EBR 14(A)(5) and 14(B)(1). The Appellant is denied party status as to all criteria under EBR 14(B)(2).

3. Land Use Permit #5 W1262-EB is hereby issued.

4. Jurisdiction is hereby returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont this 18th day of December, 1997.

ENVIRONMENTAL BOARD*

John T. Ewing, Chair
Arthur Gibb
Marcy Harding
Samuel Lloyd
William Martinez
Robert H. Opel
Robert G. Page, M.D.

* Board member Rebecca M. Nawrath did not participate in this appeal.

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