

Vermont Environmental Court Decisions

2004.

ENB 2004-015.

VERMONT ENVIRONMENTAL BOARD

10 V.S.A. Ch. 151

Re: John J. Flynn Estate

Land Use Permit Amendment and #4C0790-2-EB Keystone Development Corp. Docket #831 Findings of Fact, Conclusions of Law, and Order

This proceeding involves an appeal to the Vermont Environmental Board (Board) from the issuance of Land Use Permit #4C0790-2 (Permit) by the District 4 Environmental Commission (Commission) to John J. Flynn Estate and Keystone Development Corp. (Keystone) authorizing the construction of a 148 unit multifamily residential condominium project on 40.8 acres in the City of Burlington, Vermont (Project).

I. History On May 2, 2003, the Commission issued the Permit and accompanying Findings of Fact, Conclusions of Law, and Order (Decision) On June 2, 2003, Sunset Cliff Homeowner's Association (Sunset Cliff filed an appeal with the Environmental Board (Board) from the Permit and Decision, alleging that the Commission erred in denying SCHA party status under Environmental Board Rules (EBR) 14(A) and (B) and as to its conclusions with respect to 10 V.S.A. §6086(a)(1), (4), (5), (8), (8)(A) and (10). Also on June 2, 2003 the Starr Farm Beach Camp Owners Association (SFBCOA) also appealed the Decision, alleging that the Commission erred in denying SFBCOA party status under EBR 14(A) and (B) and as to its conclusions with respect to 10 V.S.A. §6086(a)(1), (4), (5), (8), and (10). On July 10, 2003, Board Chair Patricia Moulton Powden denied a request by Sunset Cliff to stay certain activities on the project site. On October 8, 2003, the Board issued a Memorandum of Decision in which it, among other matters: 1. denied Sunset Cliff's petitions for party status on Criteria 8 (rare and irreplaceable natural areas) and 8(A) (necessary wildlife habitat);

2. granted Sunset Cliff EBR 14(B)(1) party status on Criterion 10 (local plan);

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3. denied SFBCOA's petition for party status on Criterion

8(A) (necessary wildlife habitat and endangered species); 4. decided that parties need not prefile exhibits that they may use on cross-examination. 5. held that Sunset Cliff's petition for party status on Criterion 1(G) was premature and would be therefore denied without prejudice. On January 23, 2004, the Water Resources Board issued a decision in which it determined that the Sunset Cliff Wetland shall not be reclassified from a Class Three wetland to a Class Two wetland. Re: Sunset Cliff, Inc., City of South Burlington, Docket No. WET-03-01, Administrative Determination (Jan. 23, 2004). Thus, as Criterion 1(G) protects only Class I and II wetlands under Vermont Wetland Rules, Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 72 (Dec. 8, 2000), the instant decision does not address Sunset Cliff's Criterion 1(G) claims. II. Issues The Issues in this case are: 1. Whether the Project complies with 10 V.S.A. §6086(a)(1) (water pollution) and 1(B) (waste disposal). 2. Whether the Project complies with 10 V.S.A. §6086(a)(4). 3. Whether the Project complies with 10 V.S.A. §6086(a)(5). 4. Whether the Project complies with 10 V.S.A. §6086(a)(8) (aesthetics). 5. Whether the Project complies with 10 V.S.A. §6086(a)(9)(K) (Lake Champlain, the Burlington Bicycle Path, and surrounding roads).

1 The Prehearing Order did not mention Criterion 1(B) as an issue, but it is subsumed within Criterion 1. See, In re Taft Corners Associates, Inc., 160 Vt. 583, 590- 91 (1993) (once an Act 250 criterion is noticed for appeal, issues generally within the scope of the criterion are properly before the Board); accord, In re Killington, Ltd., 159 Vt. 206 (1992); and see In re Green Peak Estates, 154 Vt. 363, 372 (1990); Re: Fred and Laura Viens, #5W1410-EB, Memorandum of Decision at 4 (Sep. 3, 2003). Criterion 1(B) was also clearly appealed by SFBCOA, and the parties have addressed it (primarily with reference to stormwater issues which are also addressed under Criterion 1 and Criterion 4), so there is no prejudice to any party in including it as an issue.

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6. Whether the Project complies with 10 V.S.A. §6086(a)(10) (Burlington City Plan).

III. Findings of Fact

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation, 167 Vt. 228,

241-42 (1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983). A. General Findings The Project 1. The Project is a Planned Residential Development consisting of 148 units of housing in 33 buildings on approximately 13 acres of upland area and open land and woods of a 40.9-acre parcel located off Starr Farm (Sunset Cliff) Road near Appletree Point in the City of Burlington, Vermont. 2. The Project is and will include a variety of buildings (two-unit, four-unit and six-unit buildings with separate one-story parking garages) 3. Approximately 27 acres of the Project site, which was historically farmland, will remain open and undeveloped. 4. The proposed development will receive services from the City of Burlington. Project location

5. The Project tract is presently open land - large fields with some copses of trees - and some forested lands on its east, south and west edges. To the Project's south and west are residential neighborhoods at Appletree Terrace, Strathmore, and Sunset Cliff; to the north, beyond a band of trees and open space, are the homes of the SFBCOA; to the east is a large residential area west of North Avenue. B. Criterion 1 - Water Pollution: Project site 6. The Project site slopes predominantly to the southwest.

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 4 7. The soils underlying the site consist of Covington silty clay in the northwest; Palatine silt loam (3-8 percent slopes) and Adams and Windsor loams sands (0-5 percent slopes), in the center and toward the northeast; and AuGres fine sandy loam everywhere else. The silty clay soils in the northwest absorb less water and have greater runoff than the sandier soils on the rest of the parcel. 8. There will be very little Project development in the northwest quadrant of the Project site. 9. The water table is higher in the south than in the northeast, where conditions are relatively dry. Historic drainage ditches, five to six feet wide, run along the west boundary and the western half of the southern boundary of the Project tract. 10. Once in operation, the Project will generate sewage, residential solid waste, and stormwater runoff. Wastewater

11. The City of Burlington has approved the connection of the proposed development to the municipal sewage system 12. The ANR Wastewater Management Division issued Potable Water Supply and Wastewater System Permit WW-4-0059-1 on February 14, 2003. Stormwater

13. The Project will disturb 13.5 acres of the 40-acre site and will create 5.5 acres of impervious surfaces. 14. The impervious surfaces of the Project will not allow stormwater to soak into the ground. 15. The Project's stormwater will be handled in a number of different ways. 16. The project's stormwater system collects and redirects

stormwater runoff from the northeast quadrant. Runoff that flows to the south will now enter the project's drainage system and be discharged further to the west. 17. Stormwater from approximately 450 linear-feet of road and one parking area will discharge into Strathmore's stormwater collection system at Nottingham Lane.

18. Stormwater from the other parking areas will flow on the surface over vegetated filter strips prior to discharging into the Class III wetland.

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 5 19. The remainder of the Project's stormwater will be directed into a closed drainage system. The stormwater will first go into catch basins which will remove solids from the stormwater prior to its discharge into a bio-retention area with on-site treatment using a bio-retention basin; the stormwater will then be stored in a detention pond and then slowly released, using a controlled outlet detention basin, through a swale to Lake Champlain. 20. Stormwater will be held for a longer period of time on the site and released at a lesser rate, but for a longer period of time. 21. The bio-retention basin and detention pond are designed to keep the Project site's stormwater discharge at pre-development concentrations and levels. 22. Groundwater flow on the Project parcel remains virtually unchanged. 23. On January 15, 2001, ANR issued to Keystone Stormwater Discharge Permit #1-1448. C. Criterion 4 - Soil Erosion and Ability of the Soils to Hold Water: 24. The Project site is basically flat, gently sloping from northeast to southwest, with no unstable soils or streams. The development of the site envisions no large cuts or fills. 25. Surface water flow in the northeast, southeast and southwest quadrants of the Project site is generally to the southwest; surface water flow in the northwest quadrant is generally to the west. 26. The Project's stormwater system will take some of the water that flows on the surface across the site and redirect it into the Project's stormwater system. 27. Keystone's erosion control plan for the Project site includes a Construction Sequence Outline as part of the development plans. The stormwater bio-retention area and the detention pond will be used during the construction period for the control of sediment. 28. During construction, the Applicants will use silt fences in the down slope directions, temporary sediment traps at certain inlets and sediment barriers at others as the major form of erosion protection. Tree stumps will be removed from the site and transported to Burlington's Wood and Waste Depot. 29. Site work conducted between October 15 and April 15 will be done in accordance with the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites.

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Conclusions of Law, and Order Page 6 30. Permanent erosion control measures will include forebays for the removal of sediment, seeding of disturbed areas, and stone lining of the outlet swale. Wetlands on the site 31. There are no Class I or Class II wetlands on the site. 32. Three distinct Class III wetlands are found on the Project site, including an ash/dogwood wetland in the northwest quadrant, an alder wetland in the southwest quadrant, and a red maple/skunk cabbage wetland in the southeast quadrant underlain by sandy soils.

33. There are also some indications of a wetland in the northwest quadrant of the Project site, but no development is proposed for this area. 34. The red maple swamp is an area of special concern because it occurs on sandy soils, and therefore is an unusual community type in Vermont; the important parts of this wetland, however, are 200 feet from the area slated for development. 35. To maintain such a community over the time necessary for the large red maples to develop as they have, the water table has stayed relatively high on a sustained basis, even when the farm field was drained and used for hay and pasture. 36. Wetlands also provide recharge to ground water and reduce levels of contaminants in surface waters which then recharge ground water. Wetlands with sandy soils are best for ground water recharge. Drainage of wetlands lowers the water table and reduces the hydraulic head providing the force for ground water discharge. If a recharge wetland is drained, the water resources into which ground water discharges will receive less inflow, potentially changing the hydrology of a watershed. Wetland functions 37. While the specific communities of wetlands serve different functions, functional values of wetlands include water quality treatment, erosion and sedimentation control, wildlife habitat, hydrophytic vegetation, stormwater storage, open space and aesthetics. Functions of the wetlands on the Project site

2 In a January 23, 2004 decision, the Water Resources Board denied a petition filed by Sunset Cliff Home Owners Association the Board to reclassify the wetlands on the Project site from Class III to Class II. This decision has been appealed.

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 7 38. In this case, water quality treatment has special significance because of the proximity of Lake Champlain; impurities in the water run quickly into the Lake. 39. Wetlands improve water quality by removing pollutants from surface waters through three processes: sediment trapping, nutrient removal and chemical detoxification. 40. The wetlands on the Project site remove pollutants from the surface waters; they trap sediments and pollutants, removing them before they are discharged off site. 41. The alder wetland, the ash/dogwood

wetland, and the red maple/skunk cabbage swamp in three quadrants on the site store stormwater runoff from the site. Impacts on the wetlands from the Project Loss of Class III wetlands 42. The proposed development has been sited primarily on the uplands in the parcel. A small portion of the proposed development (.6 acre) is located in the wetlands and will have impacts on the wetlands in the area south of Scarlet Circle, and along the Nottingham Lane extension. 43. None of the proposed development will occur on wetland areas identified as the red maple/skunk cabbage wetland. 44. Because the Project will decrease the amount of wetlands only slightly, the decrease in ground water recharge is minimal. Decrease in water flow into wetlands 45. The source of water to sustain the red maple/skunk cabbage wetland comes from ground water, mainly offsite. 46. The amount of water flowing into the wetlands on the Project site, in particular the red maple/skunk cabbage wetland, will decrease only slightly as a result of the Project's construction. Increase in water flow and runoff; pollutants

47. The Project will result in an increase in runoff due to the increase in percentage of impervious surfaces such as paved roads and parking lots. The surface water from these impervious surfaces will contain many contaminants including oil, grease, road salts, fertilizers and pesticides. However, the Project will introduce only a

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 8 minimal increase of pollutants into the wetland over present natural amounts; most of the increase in pollutants will be treated by the Project's stormwater system. 48. Because the Project will slightly decrease the amount of wetlands on the site, the amount of area to treat contaminants will be reduced. 49. Wetlands have the ability to store flood waters. The wetlands on this property are able to temporarily store stormwater during high water events. 50. Because the Project site is relatively flat with an average cross-slope of 1.2%, and because some of the soils on the site have poor permeability and do not drain well naturally there is the potential that any excess stormwater that is not captured and redirected by the Project's subsurface drainage system may pool on the site and create areas of standing water that will impact the existing vegetation particularly in the northwest quadrant of the Project site. 51. Ground water has historically caused damage to the shoreline north of the Project site near the SFBCOA homes area. 52. Because of the stormwater system that will be installed, there will be no increase in surface water flowing into the northwest quadrant as a result of the Project's construction. 53. There is no evidence that stormwater from the Project site will flow northward in the direction of the SFBCOA homes. D. Criterion 5 - Traffic and Criterion 9 (K) - Effects on Public Investments: Interior roads and parking 54. Roads within

the development will have 22 foot wide paved surfaces with curbs and sidewalks. Roads within the proposed development are designed with turning radii sufficient for emergency vehicles. 55. The Institute for Traffic Engineers (ITE) Parking Generation at 32 (1987 2nd ed.) estimates that 148 residential condominium units need approximately 168 spaces. The Project will have 246 off street parking spaces. Off-site road improvements 56. The Project will improve sight distance at the intersection of Starr Farm Road and North Avenue by relocating the stop bar and stop sign or relocating a fence that is causing view obstruction, construct a flared right-turn lane on the eastbound approach of the intersection at North Avenue and Starr Farm Road, upgrade portions of

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 9 the unimproved sections of Sunset Cliff Road to City standards, connect to sidewalks on Nottingham Lane, connect to and pay for Burlington's construction of sidewalks on Starr Farm Road, add three speed humps on Starr Farm Road within the 25 mph school zone, install a stop sign and stop bar at the Staniford Road/North Avenue intersection, install raised tinted crosswalks at each intersection, including the Nottingham Lane extension within the proposed development and pay up to \$15,000 toward traffic calming improvements on adjacent streets. Intersections and off-project road use 57. Sight distances from the project's accesses with Starr Farm Road and Staniford Road exceed the Vermont Agency of Transportation's recommendation. 58. Project traffic is estimated to be 908 trip ends³ per day. There will be 70 AM peak hour trip ends and 85 PM peak hour trip ends. 59. It is estimated that 70 % of the traffic exiting the Project will use Starr Farm Road and 30% will use Nottingham Road. 60. Traffic levels generated by the proposed development can be absorbed by the existing street network if the proposed improvements to mitigate additional traffic volume are implemented. 61. The Burlington bike path crosses Starr Farm Road northeast of the Project. Currently vehicles are not required to stop at this intersection; vehicles instead rely on the bike path users to stop and make sure it is clear to pass. The Project does not include an changes to the bike path intersection. E. Criterion 8 (aesthetics) Project buildings, streets and infrastructure 62. The proposed development will include 30 buildings with a mix of 6-unit buildings, 4-unit buildings and 2 or 4-unit town house buildings. 63. The Project buildings will be wood-frame construction with clapboard exteriors, double-hung windows and asphalt shingle roofs. The architectural style,

3 A "trip end" is defined as one vehicle either entering or exiting a given location. Therefore, one car entering the Project and then exiting the Project would constitute two "trip ends." See, Old Vermonter Wood Products and

Richard Atwood, #5W1305-EB, Findings of Fact, Conclusions of Law, and Order at 8 (Aug. 19, 1999).

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 10 colors and material of the Project buildings are similar to the houses and other buildings in the existing residential neighborhood. 64. None of the building heights will exceed 35 feet. 65. The smaller buildings are located on the outer portions of the Project site with the larger buildings located in the interior. 66. The massing and footprints of the buildings are similar to those found in the surrounding neighborhoods.

67. The Project's design departs from the New North End development pattern of grid cross streets established in adjacent neighborhoods to the east. 68 The Strathmore neighbor to the Project's south does not follow a standard grid street model; it incorporates curved streets and circles. Thus, the Project's street patterns are similar to those in the development immediately to its south. 69. The Project will have an urban streetscape cross-section with curbs and traditional sidewalks leading from the streets to the individual front doorways of each residential unit. 70. Street lighting will be the City of Burlington's standard 175-watt metal halide fixture. The parking lots will have shielded 70-watt metal halide fixtures on 16- foot poles, and the garage buildings will have 50 watt downcast lighting mounted 8 feet high. 71. Gas, electric and telephone services will be placed underground. Service meters will be enclosed in cabinets attached to the buildings. Trash dumpsters will be located at the rear of the garages and be partially enclosed. 72. The Project will have only standard City of Burlington street signs.

73. The Project's density is less than that allowed in the zoning ordinance. Context 74. The site of the proposed development is surrounded by established residential neighborhoods, roughly bounded by Starr Farm Road, North Avenue, Lake Champlain, and the Strathmore development. The area is almost exclusively residential land use.

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 11 75. The character of the community is predominantly older one story homes and newer two story homes, most of which are single family homes; where there are multi-family developments, they are typically two story homes with space between them. 76. Although there are no other buildings in the area that are six-unit multifamily residences, and most of the area's housing is single family housing, the density, use, mass, and scale of the proposed development is similar, although not identical, to the context of the surrounding neighborhood, in particular, the condominium phase of the

nearby Strathmore development. Open space 77. Unlike the grid development pattern that currently exists in the area, this Project concentrates the buildings on a portion of the total parcel, and the Project will preserve 67% of the site in an undeveloped natural state as open space. Buffers, screening and landscaping 78. A buffer of existing trees and vegetation will screen portions of the proposed development from the adjacent Sunset Cliff Road.

79. The northeast quadrant of the parcel area, where much of the Project's development will occur, is heavily wooded, with pines, maples and other trees. Woods will also be cut to construct the proposed stormwater pond, pool, and community building. 80. The Project's landscaping plan includes the planting of 325 new trees and 1,195 new shrubs. Street trees will consist of red oaks on the inside of the loop, Freeman maples on the outside of the loop, and Princeton elms on the extension of Nottingham Lane. 81. The parking areas will be screened from the interior roads with junipers, and each building will have several flowering shrubs and trees installed. The parking areas are not visible from Sunset Cliff Road. 82. The areas proposed for retention of trees will be protected by a snow fence during construction to prevent root damage. 83. The Project's Tree Resource Plan provides for a 50-foot no-cut zone around the perimeter of the property. For management purposes, the subject parcel has been divided into four (4) stands.

Map Area 1 is located in the northwest portion of the site and will be managed as open space; it will be brush hogged a minimum of once per year.

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Map Area 2 is located east of Map Area 1 and north of the Project; this two-acre area will be managed as a noise and visual barrier. Dead and dying trees outside of the 50-foot no-cut zone will be removed to allow for additional growth of shade-tolerant and desirable species. Map Area 3, located on the eastern edge of the parcel and south of the Project, and Map Area 4, in the southwestern portion of the site, will be managed for timber production and aesthetics.

84. To control noise, construction of the Project will be limited to the hours between 7:00 a.m. and 5:30 p.m. Monday through Saturday. F. Criterion 10: City of Burlington Plan 85. The City of Burlington has a Municipal Development Plan (City Plan), duly adopted in 2001. 86. Section I of the City Plan, Land Use Plan, includes the following language: Policies

Protect natural areas from harmful and incompatible development, and maintain the integrity of natural systems. Conserve and strengthen residential neighborhoods.

Encourage mixed-use development patterns, at a variety of urban densities... City Plan at I - 2 87. Section II of the City Plan, Natural Environment, includes the following language: Policies

Work toward a sustainable relationship with the natural environment Protect its natural resources from degradation, including: air, water, soils, plant and animal life, agricultural lands, forests, geologic features, and scenic areas

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Protect and preserve natural areas and open spaces of local, regional and statewide significance for the benefit of future generations

City Plan at II-1

Natural areas are discrete areas of particular sensitivity that are recognized for their highly significant natural functions and values. These areas must be protected from the impact of development. The Burlington Conservation Board, an advisory board to the Burlington Planning Commission, has established criteria to identify Natural Areas of Local Significance. These criteria are:

wetlands as defined by the Federal Wetland Delineation Manual significant natural areas identified by the Vermont Natural Heritage Program undeveloped lands over one acre in size, with good or high potential agricultural soils sustainable forest community land containing critical habitat for migratory waterfowl, fish, and other wildlife shorelines of surface waters, to include the Winooski River, Lake Champlain, wetlands, tributaries, and natural drainage ways geological features of regional and state significance migration corridors that link natural communities outstanding natural features unique to Burlington any established natural site that provides valuable resources for education or has exceptional natural beauty

City Plan at II-8 - 9 88. Section III of the City Plan, Built Environment, includes the following language: Policies

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Retain its moderate scale and urban form in its most densely developed areas, while creating opportunities for increased densities. Conserve the existing elements and design characteristics of its neighborhoods, and maintain neighborhood proportions of scale and mass. Encourage new land uses and housing designs that serve changing demographics and benefit from new technologies where

appropriate.

City Plan at III-1 89. In Section IX of the City Plan, Housing Plan, the Plan's Vision Statement "envision[s] Burlington as a city where ... all people have access to safe, decent and affordable housing and [t]he designs of new housing blends in with the city's built and natural surroundings...." Plan at IX-1 90. The City's housing Policies include:

Encourage a healthier regional balance of affordable housing in each community, proximate to jobs and affording mobility and choice to low income residents. Support the development of additional housing opportunities within the city, with concentrations of higher density housing within neighborhood activity centers, the downtown and institutional core campuses. Support and implement programs to preserve and upgrade the existing housing stock to ensure that residents do not live in substandard conditions. Enforce ordinances, such as inclusionary zoning and minimum housing, which promote housing opportunities, safety, and affordability. City Plan at IX-1 91. The Project is concentrated appropriately on wooded areas of the site and will provide a large amount of open space and wooded areas. 92. The Burlington Open Space Protection Plan (October 2000) is incorporated into the City Plan by reference. Plan at I - 8 93. The goals of the Open Space Plan are stated as follows:

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1. Protect and preserve natural areas and open spaces of local, regional, and statewide significance for the benefit of future generations.

2. Maintain and improve the integrity of natural and recreational systems within the City.

o Protect, maintain, and enhance the City's urban forest, including both large patches of woods and wooded corridors/treebelts that provide places of refuge and travel corridors for wildlife and people.

o Protect the shorelines and waters of Lake Champlain, the Winooski River, and other water sources from damage and degradation.

o Preserve scenic viewpoints and viewsheds.

o Increase the number and quality of small urban open spaces, especially in underserved neighborhoods of the city.

o Guide development into the city center and neighborhood activity centers.

3. Ensure long-term stewardship and appropriate public access to natural areas and open space, including improved opportunities for pedestrian access and interaction throughout the City.

Open space protection in Burlington embraces the reality that not all lands can or even should be protected from development. As a regional growth center, Burlington must find a balance between conservation and continued development that addresses the needs of the City's diverse population - present and future. By encouraging and accommodating more development, and at higher densities than in surrounding communities, Burlington can also play a very important role in protecting open space and working lands throughout the region. The important thing is to make smart choices based on understanding the resources important to the community's future, and how they work together as part of a more complex system. 94. The Project site is not identified as an "open space" on the Open Space Plan's map, entitled "Geography of Open Space." 95. The Project is not within an area listed as a "Significant Natural Area" in the Plan at I-9, nor is it located within areas of the City which appear on City Plan maps entitled: "Significant Natural Areas and Open Space," "Vermont Natural Heritage Sites," or "Wetlands."

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 16 Chittenden County Regional Plan 96. The Chittenden County Regional Planning Commission adopted the Chittenden County Regional Plan (Regional Plan) in 2001. 97. The Regional Plan establishes Planning Areas within Chittenden County. 98. The City of Burlington is within the Metropolitan Planning Area 99. The Regional Plan states: "The [Regional Planning] Commission encourages development of new businesses and housing options in the Metropolitan Planning Area. The area should contain the county's largest buildings and highest residential densities. Municipal plans and bylaws determine the best exact locations for new housing, industry, infrastructure, services and other uses within the Metropolitan Planning Areas." Regional Plan at 3.15 100. The Regional Plan states:

The Goals of the Metropolitan Planning Area are as follows: Goal 1. The Metropolitan Planning Area should receive the highest densities of residents and employees for the region; Goal 2. A Metropolitan Planning Area should have a mix of residential and commercial land uses within one-quarter mile of each other; Goal 3. Industrial property should be mixed with commercial and residential uses separated by buffers as appropriate; Goal 4. The Metropolitan Planning Area should provide a full array of land uses including heavy industry and protected natural areas, cultural facilities, educational institutions, and commercial uses, open recreation areas, and residential

properties in a range of densities and sizes; Goal 5. The best locations for new housing, industry, infrastructure, services and other uses within the Metropolitan Planning Area should be determined by municipal plans and bylaws; Goal 6. An appropriate mix of automotive, rail, ferry, bicycle, pedestrian and other transportation options should provide access to the different land uses; Goal 7. The Metropolitan Planning Area should receive a high priority for investments in public sewer, and water infrastructure.

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 17 101. Because the Project has fewer than 200 units, the Regional Plan does not consider it to have a substantial regional impact. Regional Plan at 9.3.

IV. Conclusions of Law A. Criterion 1 (water pollution) and Criterion 1(B) (waste disposal)

Before issuing a permit, the Board must find that the proposed project will not result in undue water pollution. 10 V.S.A. §6086(a)(1); In re Hawk Mountain Corp., 149 Vt. 179, 182 (1988); Re: Barre Granite Quarries, LLC, and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 67 (Dec. 8, 2000). Criterion 1(B) requires demonstration that project complies with applicable Health Department and DEC regulations regarding disposal of wastes and that project will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells. Barre Granite Quarries, supra, at 71 (12/8/00)[EB# 739]; Re: Unifirst Corporation and Williamstown School District, #5R0072-2-EB(Altered), Findings of Fact, Conclusions of Law, and Order at 19 (July 20, 2000). The burden of proof⁴ for all aspects of Criterion 1 is on the applicant. 10 V.S.A. §6088(a); In re Wildlife Wonderland, Inc., 133 Vt. 507, 511 (1975), In re Barker Sargent Corp., 132 Vt. 42, 46 (1973); Re: Barre Granite, supra, at 67. There is no clear definition of what constitutes "undue" pollution; decisions are fact-specific and are often more instructive about what is not "undue," than what is. Re: Barre Granite, supra, at 68, citing Re: Herbert and Patricia Clark, #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 31 (Apr. 3, 1997); Mark and Pauline Kisiel, #5W1270-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 7, 1998), rev'd on other grounds, In re Kisiel, 172 Vt. 124 (2000); Re: City of Montpelier and Ellery E. & Jennifer D. Packard, #5W0840-6-WFP, Findings of Fact, Conclusions of Law, and Order at 21 (May 22, 2000); [EB #453R]; Brattleboro Chalet Motor Lodge,

⁴ The burden of proof generally is considered to include both the burden of production and the burden of persuasion. In Act 250, the burden of production means the burden of producing sufficient evidence on which to make positive

findings under the criteria. The burden of persuasion refers to the burden of persuading the Board that certain facts are true. Re: Killington, Ltd. and International Paper Realty Corp., #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990). The statute, 10 V.S.A. § 6088(a), places the burden of proof as to certain criteria on certain parties. However, as to all criteria, Keystone must provide sufficient information for the Board to make affirmative findings. Killington, supra, at 21.

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 18 Inc., #4C0581-EB, FCO at 6 (Oct. 17, 1984). With respect to pollution, "undue" is not a relative term, and should not be defined only in relation to other projects or by weighing the public benefits against the risks. Re: Upper Valley Regional Landfill, #3R0609-EB, Findings of Fact, Conclusions of Law, and Order at 32 - 33 (Nov. 12, 1991) The Board is not limited to an analysis of the Criterion 1 subcriteria when determining whether or not a project complies with Criterion 1. Re: Barre Granite, supra, at 68, citing In re Hawk Mountain Corp., 149 Vt. 179, 184 (1988). In making the determination of whether or not the proposed project will result in undue water pollution, the Board shall at least consider:

[T]he elevation of the land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable health and environmental conservation department regulations. 10 V.S.A. §6086 (a)(1); Re: Barre Granite, supra, at 68 - 69. Keystone has obtained a Department of Environmental Conservation (DEC) Wastewater System and Potable Water Supply Permit WW-4-0059 (Feb. 14, 2003) and a DEC Stormwater Discharge Permit 1-1448 (Jan. 19, 2001) Keystone has also introduced evidence that it will handle its stormwater through a retention system. The DEC permits create presumptions that the project complies with Criterion 1 and Criterion 1(B), applicable regulations governing waste disposal, and stormwater. 10 V.S.A. §6086(d); EBR 19(E); In re Hawk Mountain Corp., 149 Vt. 179, 182 (1988); see Nile and Julie Duppsstadt, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Apr. 30, 1999) (DEC Stormwater Discharge Permit creates a rebuttable presumption that stormwater can be disposed of without resulting in undue water pollution); 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 at 22 - 23 (Aug. 19, 1996) (DEC wastewater permit creates presumption of compliance with Criterion 1(B)). Permits introduced by an applicant are subject to rebuttal by a project's opponents. Herbert and Patricia Clark, #1R0785-EB, Findings of Fact, Conclusions

of Law, and Order at 25 - 27 (Apr. 3, 1997) (presumption of compliance created by DEC waste water/water permits may be rebutted: (1) by showing, by a preponderance of evidence, that project is likely to result in undue water pollution; or (2) by showing that project does not comply with applicable DEC regulations and that such noncompliance will result in, or substantially increase risk of, undue water pollution.) In re Hawk Mountain Corp., 149 Vt. at 186; In re Wildlife Wonderland, Inc., 133 Vt. 507, 511 (1975) (upon introduction of rebuttal evidence allowing a rational inference that system did not

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 19 comply with DEC regulations, and thus was likely to result in undue water pollution, presumption disappeared, and burden of proof of compliance with regulations returned to applicant). The question then, is whether the opponents to the Project, Sunset Cliff and SFBCOA, have introduced evidence sufficient to rebut the presumptions established by the DEC permits.

The Board concludes that Sunset Cliff and SFBCOA have not presented such evidence. Sunset Cliff's and SFBCOA's principal witnesses did not attempt to specifically rebut the DEC permits; they did not offer any scientific or engineering studies or quantitative analysis on this subject, nor did they comment on the efficacy of Keystone's stormwater retention system. Their primary arguments were that the Project will create more stormwater because of its impervious surfaces, that the some runoff will not be captured by the Project's stormwater system but will drain onto soils that are poorly equipped to deal with it, that wetlands play a critical role in handling stormwater run-off and its pollutants, and that the Project will decrease the wetlands on the Project site, both through construction disturbance and reduced recharge. Because the Project site drains westerly and southwesterly, and SFBCOA lies to the north, separated by Sunset Cliff Road, the Board cannot conclude that the Project's stormwater flow (which will all be in a southwesterly direction) will have any impact on SFBCOA. Thus the rate of stormwater release will not adversely affect SFBCOA. Further, the evidence indicates that the vast majority of the Project's runoff will be handled by the retention area and pond, the Project will not negatively impact the wetlands on the Project site. Nor will the Project divert significant amounts of water that presently flows into the red maple-skunk cabbage wetland, as this wetland is fed by groundwater, not surface water. The Environmental Board has previously ruled that unless the stormwater system results in or substantially increases the risk of undue water pollution, the presumption is not rebutted. See Swain Dev. Corp. and Philip Mans, #3 W0445-2-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 10, 1990). Sunset Cliff and SFBCOA offered

no factual evidence that the stormwater system will result in harm or substantially increase the risk of undue water pollution. See Roger Loomis d/b/a Green Mountain Archery Range, #1R0426-2-EB Findings of Fact, Conclusions of Law, and Order (Dec. 18, 1997). The Board therefore concludes that the Project satisfies Criteria 1 and 1(B). B. Criterion 4 (erosion)

Under Criterion 4, the Board will issue a permit if the Project "[w]ill 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). At a minimum, Criterion 4 requires an erosion control plan specific to the Project site. Re: Pittsford

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 20 Enterprises, LLP, and Joan Kelley, #1R0877-EB, Findings of Fact, Conclusions of Law, and Order at 23 (Dec. 31, 2002). The burden of proving compliance with Criterion 4 is on Keystone. 10 V.S.A. §6088(a); In re Wildlife Wonderland, Inc., supra, at 511.

A DEC stormwater discharge permit establishes presumption that project has adequate permanent and temporary erosion control measures. Nile and Julie Dupstadt, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order at 31 (Apr. 30, 1999). As noted, Keystone has DEC Stormwater Discharge Permit 1-1448 (Jan. 19, 2001). The Project has an erosion control plan and, as noted, Keystone has presented its retention system as a means to address stormwater created by the Project which supports Keystone's position that the Project will not decrease the land's ability to hold water. For the reasons stated as to Criteria 1 and 1(B), the Board concludes that the Project complies with Criterion 4.

C. Criterion 5 (traffic) and Criterion 9(K)(public investments) 1. Criterion 5

Under Act 250, the Board must find that the Project will not cause unreasonable congestion or unsafe conditions with respect to the use of highways, waterways, railways, airports and airways, and other means of transportation existing or proposed. 10 V.S.A. §6086(a)(5). In re Agency of Transportation, 157 Vt. 203, 207 (1991); Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc., #8B0301-7-WFP, Findings of Fact, Conclusions of Law, and Order at 28 (May 16, 2000).

The burden of proof is on a party opposing the application with respect to Criterion 5. 10 V.S.A. §6088(b); Casella Waste Management, Inc., supra, at 28; Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law and Order at 32 (May 25, 1999),

aff'd, *OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000). The applicant, however, has the burden of producing sufficient evidence for the Board to make positive findings as to Criterion 5. 10 V.S.A. '6088(b); *Casella Waste Management, Inc.*, supra, at 28; Re: Richard and Barbara Woodard, #5L01267-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Dec. 18, 1997). The Board may not deny an application solely for failure to comply with Criterion 5. The Board may, however, impose reasonable conditions to alleviate unacceptable impacts under the criterion. 10 V.S.A. §6087(b); *Casella Waste Management, Inc.*, supra, at 28.

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Keystone has also introduced evidence that the Project complies with Criterion 5, thereby meeting its burden of production. Keystone has also agreed to a series of road and traffic improvements to ameliorate any negative traffic congestion impacts from the Project.

SFBCOA suggested stop signs at the bike path intersections and a left turn lane and delayed signal at the intersection of Starr Farm Road and North Avenue. The Board finds these proposals to be unnecessary. If the improvements proposed by Keystone are implemented, the Board concludes that the Project will comply with Criterion 5. 2. Criterion 9(K)

Criterion 9(K) states that

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands." 10 V.S.A. '6086(a)(9)(K). The burden of proof under Criterion 9(K) is on Keystone. 10 V.S.A. §6088(a). The Board conducts two separate inquiries under Criterion 9(K) with respect to impacts on public facilities. First, the Board examines whether the proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency, or safety of such facilities, or (b) the public's use

or enjoyment of or access to such facilities. Re: *Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2W0694-1-EB, Findings of Fact, Conclusions of Law, and Order at 43 (Dec. 21, 2000); Re: *Munson Earth Moving Corp.*, #4C0986-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Apr. 4, 1997), rev'd on other grounds, In re *Munson Earth Moving Corp.*, No. 97-327 (Vt. Aug. 13, 1999); Re: *Swain Development Co.*, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 22 The main concern under Criterion 9(K) in this case is the impact on Lake Champlain and on efficiency and safety concerns on the area's roads and intersections, in particular, those at Sunset Cliff Road, Starr Farm Road, and the Burlington bike path. There is no question that these are public facilities. Re: *Northshore Development, Inc.*, #4C0626-5-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Dec. 29, 1988). While the inquiry under Criterion 9(K), at least as to roads, is similar to that conducted under Criterion 5, it is not the same:

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 a public facility's function, safety, or efficiency, or the public's use or enjoyment of or access to such facilities. Because public facilities include public highways, traffic conditions on those highways may be 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. and Philip Mans*, #3W0445-2-EB, Findings of Fact and Conclusions of Law, and Order at 34 (Aug. 10, 1990), cited in, Re: *The Van Sicklen Limited Partnership*, #4C1013R-EB, Memorandum of Decision at 8 (Jun. 8, 2001), and Re: *Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, Findings of Fact, Conclusions of Law, and Order at 23 (Dec. 31, 2002).

For the reasons stated above under Criteria 1, 1(B), 4 and 5, the Board concludes that Keystone has met its burden of

proof under Criterion 9(K). The Board concludes that this Project does not necessarily or unreasonably endanger public investment in Lake Champlain or in the adjacent public roadways, and does not materially jeopardize or interfere with the function, efficiency or safety of the roadways, or the public's use of enjoyment of access to the Lake or the roadways. D. Criterion 8 (aesthetics) Under Criterion 8, before issuing a permit, the Board must find the proposed Project will not have an undue adverse effect on the scenic or natural beauty of the

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 23 area, aesthetics, historic sites or rare or irreplaceable natural areas. 10 V.S.A. §6086(a)(8). The burden of proof under Criterion 8 is on those who oppose the Project, 10 V.S.A. §6088(b), In re Denio, 158 Vt.230, 236 (1992); In re McShinsky, 153 Vt. 586, 589 (1990); 10 V.S.A. § 6088(b), but Keystone, as the applicant for the permit, must provide sufficient information for the Board to make affirmative findings. Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 13 - 26 (Apr. 9, 2002); Re: Southwestern Vermont Health Care Corp., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Feb. 22, 2001); Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997) and cases cited therein. And see, e.g., Re: Herndon and Deborah Foster, #5R0891-8B-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Jun. 2, 1997) (even when there is no opposing party or evidence in opposition with respect to Criterion 8, an applicant will not automatically prevail in the aesthetics issue).

1. Adverse Effect The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 13 - 26 (Apr. 9, 2002). 5 First, it determines whether the project will have an adverse effect under Criterion 8. 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 at 24-25 (Aug. 19, 1996), citing Re: Quechee Lakes Corp., #3W0411-EB and #3W0439- EB, Findings of Fact, Conclusions of Law, and Order at 17 -19 (Nov. 4, 1985).

[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.

5 See, In re Denio, 158 Vt. 230, 239 (1992) (for aesthetics determination, the Board uses a two-step analysis in which it first determines whether the proposed project would have an adverse aesthetic impact and then looks at whether that impact would be undue); In re McShinsky, 153 Vt. 586, 591 (1990).

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 24 Hand, supra, at 25, citing, Quechee Lakes, supra, at 18. In other words, if a project "fits" its context, it will not have an adverse effect. Re: Talon Hill Gun Club and John Swington, #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (June 7, 1995).

a. The context of the Project

To determine whether the Project is adverse in terms of aesthetics - whether it will "fit" context of area where it will be located - the Board first must determine what that context is. Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5- EB, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 9, 2002); The Van Sicklen Limited Partnership, #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 36 (Mar. 8, 2002). 6 There are two possible ways to consider the context of this Project. The first would be to view the Project within the 40-acre undeveloped parcel for which it is proposed, the second is to consider the Project within the larger framework of Burlington's New North End residential area. The Board concludes that the latter context is the more appropriate one in which to review this Project. The Project is surrounded by residential housing, development which has progressed steadily over the years,⁷ housing which has changed the Point from woods and open farm fields to a series of residential street and homes. While there is some undeveloped land to the north of the Project and Sunset Cliff Road, to the Project's south and west are the Appletree Terrace and Strathmore neighborhoods and to its east is a large residential area west of North Avenue. Other than the Project site itself, the area is almost exclusively in residential use. Thus, the context of the area in which this Project must be judged is one of substantial residential development.

b. The impact of the Project on its context

6 The determination of the Project's context is one that is crucial to the Criterion 8 analysis in this case, as if the Project "fits" its context, then the Project is then, by definition, not adverse, and the Board's inquiry under Criterion 8 ends. Re: Hannaford Brothers Co. and

Southland Enterprises, Inc., #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 9, 2002); Re: Talon Hill Gun Club and John Swingleton, supra. 7 The Burlington Open Space Protection Plan (October 2000) includes a series of aerial photographs of Appletree Point from 1962 to 1998 which document the gradual residential development of the Point.

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Does the Project "fit" its context or is it adverse to that context? Does the Project's density and design fit within the context of the single family homes in the area?

Assessing the impacts of a project is a fact-specific inquiry. On the one hand, the Board has found that a project would have an adverse impact on aesthetics because size and density of its units would differ from surrounding structures. Brewster River Land Co., LLC., #5L1348-EB, Findings of Facts, Conclusions of Law, and Order at 15 (Feb. 22, 2001). On the other hand, the Board has found that a large-scale residential development in a rural area (on Dorset Street in South Burlington along the Shelburne Town line) would not have undue adverse effect. Re: MBL Associates, #4C0948-EB (Altered), Findings of Fact, Conclusions of Law, and Order (Jan. 30, 1996), aff'd, In re MBL Associates, Inc., 166 Vt. 606 (1997).

Board precedent notes that application of Criterion 8 does not guarantee that views of the landscape will not change: Criterion 8 was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from his or her property will remain the same forever. Change must and will come, and criterion #8 will not be an impediment. Criterion #8 was intended to insure that as development does occur, reasonable consideration will be given to the visual impacts on neighboring landowners, the local community, and on the specific scenic resources of Vermont. Re: Okemo Mountain Inc., #2W5051-8-EB, Findings of Fact, Conclusions of Law and Order at 9 (Dec. 18, 1986), cited in Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Apr. 9, 2002); The Van Sicklen Limited Partnership, #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 36 (Mar. 8, 2002); Southwestern Vermont Health Care Corp., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Feb. 22, 2001); Main Street Landing Company and City of Burlington, #4C1068-EB, Findings of Fact, Conclusions of Law, and Order at 17- 18 (Nov. 20, 2001); Green Meadows Center LLC, The Community Alliance, and SEVCA, #2W0694-1-EB, Findings of Fact, Conclusions of Law, and Order at 31 (Dec, 21, 2000).

The Project will consist of 30 buildings; some will be 6-unit buildings, some 4-unit buildings and some 2 or 4-unit town house buildings. The buildings will be wood-frame construction with clapboard exteriors, double-hung windows and asphalt shingle roofs. In their architectural style, colors and material, the Project buildings will be similar to the houses and other buildings in the existing neighborhood, and no Project building will be taller than 35 feet. The character of the existing neighborhood community is predominantly one of older one story homes and newer two story homes, most of which are single family

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 26 homes; where there are multi-family developments, they are typically two story with a significant amount of space between them. Although there are no other buildings in the area that are six-unit multifamily residences, and most of the area's housing is single family housing, the density,⁸ use,⁹ mass, and scale of the proposed Project is similar, although not identical, to the context of the surrounding neighborhood, in particular, the condominium phase of the nearby Strathmore development. The massing and footprints of the buildings are similar to those found in the surrounding neighborhoods. Perhaps the greatest divergence from the some of the surrounding neighborhoods appears in the design of the Project's streets. The Project's street design, with Nottingham Lane leading east into Scarlet Circle, departs from the predominant New North End pattern of grid cross streets as appears in the adjacent neighborhood to the east. However, the Strathmore neighbor to the Project's south does not follow a standard grid model; it incorporates curved streets and circles. Thus, the Project's streets conform to those in the development immediately to its south. Considering all of the relevant elements of the Project, the Board concludes that it fits its context. It is thus not adverse to that context, and this concludes the Board's Criterion 8 analysis; no further consideration under the Quechee Lakes test is required. Re: Hannaford Brothers Co. and Southland Enterprises, Inc., supra; Re: Talon Hill Gun Club and John Swingleton, supra. The Project complies with Criterion 8 (aesthetics). E. Criterion 10 (Burlington City Plan and Chittenden County Regional Plan)

Before issuing a permit, the Board must find that the Project is in conformance with "any duly adopted local or regional plan(s) or capital program under Chapter 117 of Title 24." 10 V.S.A. §6086(a)(10). The burden of proof is on Keystone. 10 V.S.A. §6088(a).

⁸ The Project's density is less than that allowed in the zoning ordinance. Finding of Fact 73. ⁹ Sunset Cliff notes that, while most of the existing homes are owner-occupied, it is possible that the Project homes will be rented. This is not a relevant inquiry under Act 250. See, Re: S-S

Corporation/Rooney Housing Developments, Declaratory Ruling #421, Memorandum of Decision at 4 - 5 (Feb. 5, 2004), citing Vermont Baptist Convention v. Burlington Zoning Board, 159 Vt. 28, 31 (1992).

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There are two inquiries that the Board must make in its evaluation of whether a project conforms to a Town Plan. The Board asks two separate questions: Is the language in the town plan mandatory or does it merely provide guidance? And, are the town plan's provisions specific or ambiguous?

1. Mandatory vs. guidance language

Town plans (24 V.S.A. Ch. 117) are intended to provide a town's citizens with policy direction and goals for land use development based on an intimate understanding of the town's natural resources. Town plans provide the framework upon which the zoning regulations are built. They do not typically contain words or phrases such as "prohibited" or "shall not be allowed." Thus, while they indicate the direction that a town wants to take in terms of its development, town plans often do not set absolute, stark restrictions or prohibitions on development in a town. See John A. Russell Corporation and Crushed Rock, Inc., Land Use Permit Application #1R0489-6, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1999), citing, Kalakowski v. John A. Russell Corp., 137 Vt. 219, 225 (1979); Casella Waste Management Inc., #8B0301-7-WFP, Findings of Fact, Conclusions of Law, and Order at 41 (May 18, 2000).

But despite the fact that town plans are often couched in "abstract and advisory" language, *id.*, and see *Molgano*, 163 Vt. at 31 (referring to the "nonregulatory abstractions in town plans), Act 250 requires that projects comply with a "local or regional plan," if one or both exist. 10 V.S.A. §6086(a)(10). The Board is therefore obliged by the language of the law itself to give regulatory effect to a document which, because its purpose is otherwise, is often not written in regulatory language.¹⁰

This does not mean that, where a town plan uses ineffectual language, the Board will nevertheless read that language to prohibit a project. The Board has not done that in the past and will not do so here. See, *Re: The Van Sicklen Limited Partnership*, #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 55 (Mar. 8, 2002) (phrases such as "strongly encourages" and "should focus its efforts to encourage" indicate nonmandatory elements of a town plan); *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action,*

#2W0694-1-EB, Findings of Fact, Conclusions of Law, and Order at 42 (Dec. 21, 2000) (while words such as "direct," "encourage", "promote," and "review" in town or regional plans may provide guidance in the interpretation of such Plans and may be used to bolster more

10 To do otherwise would be comparable to ignoring Criterion 10's requirement that a project conform to town and regional plans, something which the Board cannot do. *State v. Stevens*, 137 Vt. 473, 481 (1979) (in construing a statute, every part of the statute must be considered, and every word, clause, and sentence given effect if possible); *State v. Racine*, 133 Vt. 111, 114 (1974) (presumption that all language is inserted in a statute advisedly).

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 28 specific policies in such plans, they do not, by themselves, constitute a mandate). And see, *The Mirkwood Group and Barry Randall*, *supra*, at 29; *Ronald Carpenter*, #8B0124-6-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Oct. 17, 1995); *Horizon Development Corp.*, #4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Aug. 21, 1992). Compare, *Re: Southwestern Vermont Health Care Corp.*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 54 (Feb. 22, 2001) (use of the phrase "shall be protected" in town plan is mandatory). The first question presented, therefore, is whether the Burlington City Plan uses "nonprohibitory" language such that the Plan provides merely guidance to the Board's consideration of Criterion 10. The City Plan uses a mix of words and phrases, some, such as "protect," "must protect," and "preserve," more mandatory than others, e.g. "encourage" and "support." In this particular case, because the Board can conclude that the Project complies with the City Plan, it is not necessary to delve further into the nature of the words in the Plan. 2. Specific vs. ambiguous provisions in a Town Plan If a Town Plan's provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. 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. *Re: The Mirkwood Group and Barry Randall*, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996).

If a town plan's provisions are general in nature or ambiguous, the Court's *Molgano* decision instructs the Board to examine relevant zoning regulations to attempt to resolve the ambiguity. This does not mean that the Board conducts a general review of a project for its compliance

with the zoning regulations, but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc., #2W0813-3 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Apr. 19, 2001); Re: Fair Haven Housing Limited Partnership and McDonald's Corporation, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996), aff'd, In re Fair Haven Housing Limited Partnership and McDonald's Corporation, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished). The Board finds the words used in the City Plan to be sufficiently specific and unambiguous such that an inquiry into the Burlington zoning ordinances is not necessary. Again, as the Board concludes that the Project meets the applicable

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 29 provisions of the City Plan, a more in depth examination of those provisions would accomplish little.

Conclusions as to Criterion 10 Burlington City Plan The Project is not within an area listed as a "Significant Natural Area" in the City Plan (City Plan at I-9), nor is it located within areas of the City which appear on City Plan maps entitled: "Significant Natural Areas and Open Space," "Vermont Natural Heritage Sites," or "Wetlands." The Project will not negatively impact Class III wetlands or any natural areas or resources.

The Project is located in an area zoned for residential development. It will not negatively impact existing neighborhoods. The Project does not conflict with the elements and design characteristics of the existing neighborhoods in the New North End of Burlington; the Project maintains neighborhood proportions of scale and mass. The Project's density meets the City's requirements.

The Project meets the City's policy of supporting "the development of additional housing opportunities within the city, with concentrations of higher density housing within neighborhood activity centers" and "programs to preserve and upgrade the existing housing stock to ensure that residents do not live in substandard conditions." The Project site is not identified as an "open space" on the Open Space Plan's map, entitled "Geography of Open Space." The Project is concentrated appropriately on wooded areas of the site and will provide a large amount of open space and wooded areas. The Project meets the requirements of the City Plan Chittenden County Regional Plan The Project is located in the City of Burlington, which is within the Metropolitan Planning Area, as designated by the Chittenden County Regional Plan. The Project conforms to the provisions of the Regional Plan that encourages the

"highest residential densities" within the Metropolitan Planning Area. The Regional Plan recognizes that the "best locations for new housing, industry, infrastructure, services and other uses within the Metropolitan Planning Area should be determined by municipal plans and bylaws." The Project has received City approval. As the Board recently wrote in Re: Peter S. Tsimortos, #2W1127-EB, Findings of Fact, Conclusions of Law, and Order at 24 (Apr. 13, 2004):

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 30

Case precedent states that where local and regional plans conflict, the regional plan controls only if it is demonstrated that the project under consideration would have a substantial regional impact. In re Green Peak Estates, 154 Vt. 363, 368 (1990); 24 V.S.A. §4348(h)(2); Richard Provencher, #8B0389-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Oct. 19, 1988) (when conflict exists between town and regional plan, 24 V.S.A. §4348 provides that the regional plan applies to the extent that it is not in conflict with the local plan, in which case the regional plan will apply if project has substantial regional impacts; if project does not have substantial regional impacts, town plan, not regional plan, applies)

Even if the Board were to assume that there is a conflict between the City Plan and the Regional Plan in this case (and it does not), the Regional Plan would only apply if the Project has regional impacts. By its own terms, the Regional Plan considers the Project not to have such impacts.

The Project complies with the Regional Plan. The Project complies with Criterion 10.

Re: John J. Flynn Estate and Keystone Development Corp. Land Use Permit #4C0790-2-EB Findings of Fact, Conclusions of Law, and Order Page 31 V. Order 1. The Project complies with 10 V.S.A. §§6086(a)(1), (1)(B), (4), (5), (8)(aesthetics), (9)(K) and (10). 2. Land Use Permit #4C0790-2-EB is issued. 3. Jurisdiction is returned to the District 4 Environmental Commission. Dated at Montpelier, Vermont this 4th day of May 2004.

ENVIRONMENTAL BOARD /s/Patricia Moulton
Powden____ Patricia Moulton Powden, Chair * Samuel
Lloyd Donald Marsh W. William Martinez Patricia A.
Nowak Alice Olenick Richard C. Pembroke, Sr. Jean
Richardson Christopher D. Roy

* Board Member Lloyd was not present for the April 21, 2004 deliberations, but he has read and concurs with this decision.