STATE OF VERMONT
ENVIRONMENTAL COURT

Rivers Development, LLC	)	
(Rivers' Appeal of Municipal Denial)	)	Docket No. 7-1-05 Vtec
(Rivers' Appeal of Act 250 Denial)	)	Docket No. 68-3-07 Vtec
(Rivers' Appeal of Direct Discharge Denial)	)	Docket No. 157-7-08 Vtec

TOWN OF MORETOWN'S REPLY TO THE APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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TABLE OF CONTENTS

I. General Response **1**

II. Air Pollution Impacts (Act 250 Criterion 1 and MZR § 4.10) **3**

III. Impact on Moretown Village and Moretown School (Act 250 Criteria 5, 6, 8, 9(E)(i) and 9(K), and MZR § 5.2).. .... **5**

IV. Economic/Fiscal Impacts (Criteria 7, 8, 9(E)(i) and 9(K), and MZR §§ 3.5, 4.10, and 5.2) **11**

V. Aesthetic Impacts (Criterion 8 and MZO § 3.5, 4.10 and 5.2) **14**

1. The Town Plan and Moretown Zoning Regulations Contain Clear Written Community Standards Applicable to the Project 17
2. The Project's Aesthetic Impact on the Surrounding Mad River Valley Will be Shocking and Offensive 26
3. The Applicant Has Not Taken Generally Available Mitigation Measures 32

VI. Impacts on Historic Properties (Criterion 8 and Moretown Zoning Regulations). **35**

VII. Earth Extraction Activities (Act 250 Criterion 9(E) and MZR §§ 3.5, 4.10, and 5.2) **40**

VIII. Impact on Public Investments (Criterion 9(K) and MZR § 3.5, 4.10, and 5.2) **48**

IX. Moretown Town Plan (Criterion 10) **56**

X. Moretown Zoning Regulations **65**

XI. Conclusion **68**

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TOWN OF MORETOWN'S REPLY TO THE APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Town of Moretown Selectboard, the Moretown Planning Commission, and the Moretown School Board (collectively the "Town of Moretown") respectfully submit the following reply to the Applicant's Proposed Findings of Fact and Conclusions of Law ("Applicant's Findings") concerning the proposed Rivers Quarry ("Project"). The evidence presented during this matter's lengthy trial clearly demonstrates that the Project cannot comply with the Moretown Zoning Regulations ("MZR") or Act 250 Criteria 5, 6, 7, 8, 9(E), 9(K) or 10. The Applicant's Findings also demonstrate that the Applicant has not met its burden under either the MZR or these Act 250 criteria. The pending application should be denied.[1]

I. General Response

The Applicant's Findings make crystal clear that the Applicant has failed to produce evidence needed to meet its burdens, much less comply with the MZR and the above-listed Act 250 criteria. Simply put, this Project does not conform with the character of the area affected and other MZR requirements, nor does it meet Act 250 criteria. Most apparent is that the Applicant's Brief appears to now reject its blasting expert's recommendation (adopted at trial) that the Project be wholly reoriented and that neighbors remain indoors during blasts to

[1] The Town also adopts the Findings and Conclusions and the Reply prepared by the Neighbors related to blasting, noise, air, water, traffic, equine and aesthetic impacts.

safeguard neighbors and the public from flyrock. In addition to demonstrating the Project's danger, requiring residents to stay indoors plainly demonstrates that this project simply is not compatible with neighboring land uses and will unreasonably interfere with those adjoining land uses. More fundamentally, the Applicant's continued flip-flops on how it will orient the quarry and conduct blasting prevents any evaluation of the Applicant's plans; plans must be known to be evaluated. Indeed, the Applicant's latest flip-flop is that the Applicant will adopt its blasting expert's recommendation to direct blasts away from structures and Route100B *only* "when possible." Applicant's Findings at ¶ 284. Public safety is paramount and must be assured at all times – not just "when possible." MZR 4.10; 10 V.S.A. § 6086(a)(9)(E)(i).

Likewise, the Applicant's Brief demonstrates that it applied an incorrect AASHTO standard for sight distance at the intersection of the proposed haul road and Route 100B – an intersection laden with tourist and school bus traffic. And, the Applicant's Brief confirms that it wholly failed to analyze traffic impacts on Moretown Village, hence failing to meet burdens under MZR § 5.2 and Criteria 5 and 9(K). For example, the Applicant concedes that Moretown's sidewalks are in very poor condition, but nowhere does Rivers assess impacts on pedestrian circulation. MZR § 5.2(D)(2). The Applicant cannot demonstrate compliance with standards absent any actual analysis of the impacts.

It is also now clear that the Applicant avoided significant parts of analyses that are required to assess the Project's air and noise impacts. Rivers unjustifiably shifted its background reference point for air pollution levels when use of its initial background levels resulted in violations of air quality standards for particulates. Rivers did not assess noise impacts to the interior of the Moretown Elementary School, and its analyses of exterior noise were generic,

failed to reflect actual existing noise levels, and were based on a significantly greater-than-actual distance between Route 100B and the School. And Rivers excluded any noise generated from trucks ascending and descending the haul road's greater than 30% pitch.

Rivers similarly did not assess any impacts to recreational use of or public investment in the Mad River Corridor, did not assess any impacts to historic structures, and did not assess any uses of the Mad River itself.

The evidence presented by the Town and Neighbors demonstrates that the Project cannot comply with the applicable Act 250 criteria or the Moretown Zoning Regulations. The Rivers application should be denied.

The Town responds to specific facts and conclusions presented in the Applicant's Findings below. For facts and conclusions not specifically addressed herein, the Town rests on its initial proposed findings and conclusions.

II. Air Pollution Impacts (Act 250 Criterion 1 and MZR § 4.10)

The Applicant's testimony concerning air pollution impacts in Moretown Village is not credible or reliable. The Applicant's air expert, Mr. Guldberg, testified that he originally selected the Burlington air data as the most appropriate comparative background data for the Project in 2005. He confirmed that this decision was based on his best professional judgment at the time. But, when that same Burlington data subsequently demonstrated that the Project would, in fact, contribute to violations of EPA's NAAQS for PM 2.5, Mr. Guldberg conveniently decided to go looking for a different background level. He testified that his decision to seek a different background was based solely on the fact that the Burlington background data resulted in a

violation of the NAAQS. His testimony made clear that the switch to a new background source was a transparent effort to avoid his earlier unfavorable analysis. He simply found a new reference point with a lower background level for PM 2.5, then offered after-the-fact justifications for the convenient switch. Such intentional manipulation of the air modeling destroys its credibility.

The modeling is also not reliable because Mr. Guldberg's analysis of air pollution impacts is not based on site-specific climatology and does not consider the unique circumstances in the Mad River valley. In particular, State data prepared by the Vermont Department of Environmental Conservation demonstrates that air inversions are more common in valleys, such as the Mad River valley, than in the reference background locations of Bennington or Burlington (upon which the Applicant's analysis was based). *Exh*. Town-Cross Guldberg 1. This state data demonstrates that more frequent air inversions tend to concentrate PM 2.5 in valley locations:

> Winter inversions are common in cold-weather climates in valley areas such as Rutland, VT. Below are a couple of time-series graphs of PM2.5 hourly measurements from Burlington, Rutland and Bennington, VT from late-December 2002. Rutland is located in a valley while Burlington and Bennington are not. As the temperature drops and an inversion is created in Rutland, the PM2.5 concentrations build while they remain low in the areas (Burlington, Bennington) not affected by the inversion.

Id. By relying on data from Bennington or Burlington for background data for PM 2.5 concentrations, the Applicant's air analysis overlooks and ignores the concentrating effect of air inversions in the town of Moretown. Mr. Sanders testified that such inversions are common occurrences in and around the project area and Moretown Village, and the Applicant offered no rebuttal to his testimony. Credible state-produced data demonstrates that such inversions likely trap and substantially increase PM 2.5 concentrations in the valley.

Given the errors in the Applicant's air analysis, there is no credible evidence that the Project will not result in undue air pollution. To the contrary, the Applicant's original air analysis demonstrated that the project would contribute to a violation of the NAAQS for PM 2.5, which are designed by EPA to protect public health. Consequently, the Project violates both Criterion 1, which prohibits undue air pollution, and MZR 4.10(B)(4), which prohibits smoke, dust, dirt or noxious gases that endanger or adversely affect the health, comfort, safety, or welfare of the public. At the very least, the Applicant fails to meet its burden of proof.

III. Impact on Moretown Village and Moretown School (Act 250 Criteria 5, 6, 8, 9(E)(i) and 9(K), and MZR § 5.2).

Moretown relies on its original proposed findings for these criteria and asserts the following additional facts and conclusions. Responses to specific paragraphs in the Applicant's Proposed Findings of Fact are numbered below

Regarding the Applicant's Findings at ¶¶ 129-134: the proposed quarry will concentrate heavy truck traffic through Moretown Village. Rivers agrees that the project will generate a peak of 108 heavy truck trips. The Applicant has repeatedly stated that it intends the market for stone to be the Mad River Valley. The most direct route from the proposed project site to the Mad River Valley is through Moretown Village.

Rivers has not proffered any marketing studies or other data indicating how much stone product would be sold to the Mad River Valley market or other markets outside of the Mad River Valley. Likewise, Rivers did not proffer any replacement or interception of existing heavy traffic. To the contrary, Rivers' traffic expert expressly stated that he was not offering any such opinion. Dickinson Testimony at 17-18.

Currently, stone products enter the Mad River Valley through several routes, only one of which goes through Moretown Village. These routes include Route 100 from the north and south, Route 17 from the north, Route 100B (through Moretown Village) and several town roads. *Oman Testimony* (2/22/08); Exh. T-1 at 4-6; *Dickinson Testimony.*

Rivers' traffic expert agrees that proper methodology for assessing traffic impacts is to assume that all peak traffic will pass by the area assessed for impacts. Dickinson Testimony. Indeed, Mr. Dickinson assessed the quarry-generated traffic impact on the intersection of Routes 100 and 100B on the assumption that all quarry-generated traffic would pass through that intersection. All traffic from the Project to the intersection of Routes 100 and 100B must pass through Moretown Village. Yet, Mr. Dickinson makes the unsupported claim that only 60% of quarry-generated trucks would pass through the Village. Exh. R-5 at 5.

Beyond making this unsubstantiated claim that only 60% of trucks would pass through Moretown Village, Rivers does not assess any traffic impacts to the Village.

Regarding the Applicant's Finding at ¶ 139: Rivers' traffic expert applied the incorrect AASHTO formula for required sight distance for trucks turning north (left) out of the proposed project onto Route 100B. In the finding in question, Rivers correctly states that a truck turning north must "accelerate across the southbound lane and then continue to accelerate to stay in front of oncoming northbound traffic." Time and sight for this maneuver is especially critical because trucks turning north (left) onto Route 100B from the proposed quarry will be: (a) loaded, (b) accelerating uphill, and (c) according to VTrans, the actual average vehicle speed where the service road meets Route 100B is 58 mph – 8 mph greater than the posted 50 mph limit. Exh. T-1 at 13.

If correctly calculated, the proposed sight distance is not adequate. As explained by Michael Oman, Mr. Dickenson applied "Case B3" for crossing Route 100B instead of "Case B1" which is the AASHTO standard for left-hand turns from a minor road onto Route 100B north. *Oman Testimony* (2/22/08).

The issue here is not one of credibility, but of which AASHTO standard governs the turning maneuver from the haul road onto Route 100B. All parties agree that AASHTO standards apply. Yet Rivers' analysis is fundamentally flawed because it applies the wrong AASHTO standard. AASHTO requires, verbatim, that:

> Departure sight triangles for traffic **approaching from either the right or the left**, like those shown in Exhibit 9-50B, should be provided for left turns from the minor road onto the major road for all stop-controlled approaches. The length of the leg of the departure sight triangle along the major road **in both directions** is the recommended intersection sight distance for Case B1.

AASHTO, A Policy on Geometric Design of Highways and Streets, 2004 (emphasis added). Exh. T-1 at 13-14; *Oman Testimony* (2/22/08). Sight distances calculated under Case B3 are simply inapplicable because B3 is not for a turning maneuver, but rather, limited to travel straight through an intersection. *Oman Testimony* (2/22/08). Here, one cannot cross Route 100B. One can only turn right or left from the haul road onto Route 100B. *Id*.

Hence, Rivers' effort to apply differing sight distance standards for right (980 feet) and left (895 feet) turning maneuvers contravene AASHTO requirements. AASHTO requires a minimum sight distance of 980 feet is required for both right- and left-hand turns. *Id*. Rivers' proposed site distance of 895 feet for left-hard turns from the haul road onto Route 100B is inadequate and based on a grossly flawed misuse of the AASHTO standard.

Regarding the Applicant's Finding at ¶ 156: Rivers asserts that VTrans asserts adequate site distance at the crosswalk in front of the Moretown Elementary School. VTrans's sight distance assessment, however, is not in the context of actual Village speeds, nor in the context of the additional heavy truck traffic. It is simply a generic statement that the crosswalk sight distance is adequate under posed conditions.

Regarding the Applicant's Proposed Finding at ¶ 157: Rivers' traffic expert candidly stated that he did not assess impacts to Village intersections, including the intersections of Route 100B with the Moretown Mountain Road, Pony Farm Road, and Freeman Hill Road. Rivers is thus without evidence for its claim that impacts are not significant. Further, Rivers concedes that the intersection of Route 100B and the Moretown Mountain Road "is not an ideal intersection," but then claims that "Moretown Mountain Road is not anticipated to be a major trucking corridor for trucks leaving the quarry due to its poor quality . . . ." Applicant's Findings at ¶ 157. The claim misses the point: this Project will result in significantly more trucks (up to 108 per day) going through an extremely poorly laid out and dangerous intersection. Trucks going through that intersection (excepting those who turn onto the Moretown Mountain Road) will also go through intersections with Pony Farm Road and Freeman Hill Road. Rivers assessed none of these intersections.

Rivers refused to offer any mitigation of traffic impacts to the Village or Village intersections. Rivers also refused to limit or exclude use of combination trucks. To the contrary, Mr. Rivers testified that the proposed Project intends to use some combination trucks. Combination trucks require a site distance of 980 feet at the intersection of the haul road and Route 100B. *Oman Testimony* (2/22/08).

Additional Conclusions of Law concerning Criteria 5 and 9(K) and MZR § 5.2.

Criterion 5, 10 V.S.A. § 6086(a)(5), requires that a project "Will not *cause* unreasonable congestion or unsafe conditions with respect to use of the highways ... existing or proposed." (emphasis added). The MZR reflects Criterion 5, except that the burden under the MZR is on the applicant. MZR § 5.2(C)(3).

The Vermont Supreme Court has held that:

> Criterion 5 does not require that proposed development be the principal cause or original source of traffic problems. Several causes may contribute to a particular effect or result. The Board found that the development would contribute to the 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." 1969, No. 250 (Adj.Sess.), § 1; see *In re Juster Associates,* 136 Vt. 577, 580, 396 A.2d 1382, 1384 (1978); *In re Great Eastern Building Co.,* 132 Vt. 610, 614, 326 A.2d 152, 154 (1974). Safe travel on this right of way is in the public interest. Exacerbating the existing traffic hazard by allowing additional travel on Anderson's road would be detrimental to the public interest. Thus, the Board reasonably concluded that the development did not meet criterion 5.

In re: Pilgrim Partnership, 153 Vt. 594, 596-597 (1990). *See also OMYA, Inc. v. Middlebury*, 171 Vt. 532, 534 (2000)

The Supreme Court's analysis is equally applicable to Criterion 9(K) and the MZR, except that the Applicant bears the full burden under both 9(K) and the MZR.

While not having presented an iota of evidence relating to traffic impacts to the Village or Moretown Elementary School and its bus routes,[2] the Applicant asserts that it satisfied

[2] Impacts to bus routes also trigger Criterion 6 and 9(K) and the conditional use analysis under the MZR.

applicable criteria simply because the Town did not present specific data of future accidents. The Applicant is wrong for at least two reasons. First, the applicant bears the burden of production under Criterion 5, and the full burden of proof under Criterion 9(K) and the MZR. Rivers' complete failure to present any evidence fails to meet all of these burdens.

> The Appellants also argue that the Project would also interfere with the safety of Route 131. Under Criterion 5, the Board has already determined that the increase in truck traffic is relatively insignificant compared to the already substantial truck traffic that uses Route 131. However, the Board also held that the Permittee did not produce sufficient evidence for the Board to determine whether trucks turning on to or from the access road would interfere with the safety of Route 131. In light of the same evidentiary shortcomings, the Board concludes that the Permittee's did not meet their burden of proof that the Project complies with Criterion 9(K).

Re: McLean Enterprises Corporation, #2S-1147-1-EB, FCO at 77-88 (Vt. Envtl. Bd., November 24, 2004) .

While in the present matter it is undisputed that the heavy truck traffic through Moretown Village will at least double, Dickinson Testimony (2/22/08), and, unlike the situation in *McLean,* is not "relatively insignificant," as was true in *McLean*, the Applicant's analysis of sight distance fails under 9(K) and MZR § 5.2 (C)(3) & (D)(2).

Second, Moretown did present substantial evidence on this point, all of which stands unrebutted. In particular, Rivers acknowledged its hours of operation as from 7:00 a.m. to 5:00 p.m. Applicant's Findings at ¶ 6. The school bus routes and times are in evidence. Exh. T-1 at Appendix F. The school bus schedule demonstrates that busses will be on Route 100B and that buses will be entering numerous intersections including the intersections of 100B and the haul road, 100B and Stevens Brook Road, 100B and Moretown Mountain Road, 100B and Freeman Hill Road and 100B, Pony Farm Road and 100B. *Id*. Buses will enter the intersections of Route

100B and the Moretown Mountain Road from the Moretown Mountain Road and from both directions on Route 100B. Id. The same is true for Freeman Hill Road and Pony Farm Road. *Id*. Moretown assessed the unique inadequacy and danger of these intersections. Exh. T-1 at 11-15: *Oman Testimony* (2/22/2008). And, Route 100B is narrow and dangerous through the Village, the Village curves, and the bridge south of the Village – traffic volume has long-ago outstripped that stretch of Route 100B's capacity. Exh. T-1 at 8-14 and Appendix C; *Oman Testimony* (2/22/08).

In short, during school bus transits, the proposed project will add a significant amount of heavy truck traffic at the intersections of the haul road and Route 100B where, as demonstrated above, the sight distance is inadequate, and through the several dangerous Village intersections, curves, and narrow stretches.

Mr. Rivers testified that he would not limit operations or otherwise provide mitigation during school bus transits.

IV. Economic/Fiscal Impacts (Criteria 7, 8, 9(E)(i) and 9(K), and MZR §§ 3.5, 4.10, and 5.2).

Moretown relies on its original proposed findings for analysis under this section and asserts the following additional facts:

Regarding the Applicant's Finding at ¶ 175: The Moretown Elementary School is a historic building.[3] Its front windows were specifically designed to preserve the School's historic status. Barone Testimony (12/17/2008). Moretown presented substantial evidence that it cannot

[3] Impacts to historic structures must also be assessed under Criterion 8.

afford to sound-proof the Moretown Elementary School, nor can it afford to assess impacts in anticipation of a third party's development plans. *Id*. However, the School has taken all reasonable steps within its control to limit noise and interruptions in the School. *Id*. These steps include sound-proofing the gym, scheduling music classes after all academic classes have concluded, limiting students' and others' passage through the school during teaching hours, placing tennis balls on chair legs, and carpeting the halls. *Id*.

Regarding the Applicant's Proposed Findings at ¶¶176-187: Principal Barone's testimony on the need to avoid interruptions and the impacts of traffic noise stands unrebutted. *Barone Testimony* (12/17/2008); Exh. T-5; Exh. T-6.

The Applicant did not contest the fact that interruptions adversely affect learning. The Applicant did not assess the impact of interruptions that would be caused by increasing truck traffic passing in front of the School.

The Applicant's analysis of noise impacts on the School is severely flawed for several reasons including: (a) the Applicant relied on FHWA/VTrans outdoor standard instead of ANSI standards particular to classrooms (Exh. R-9) or the FHWA/VTrans standard for school interiors; (b) FHWA standards do not account for interruptions; indeed the FHWA standard averages sound levels; (c) actual monitoring demonstrates that noise levels already peak well above the FHWA outdoors standard of 67 dBA[4] (Exh. T-3 at 3-5; Exh. T-4; Exh. T-5; Exh. T-6; Kaliski Testimony); (d) the Applicant's modeling of the FHWA standard does not reflect actual monitored conditions (*id*.); (e) the Applicant modeled school noise on the assumption that the

[4] The actual VTrans/FHWA standard is limited to outdoors and whether the potential future noise would "approach" 67 dba.

school is 100 feet from Route 100B, while the school building is actually 75 feet from Route 100B's center line and school grounds (outdoors areas available to students) border Route 100B (Exh. T-3 at 3); and (f) the Applicant did not model, monitor or otherwise assess noise impacts inside the class rooms (Exh. R-9).

The Applicant's noise expert agrees that ANSI standards are valid and appropriate. *Guldberg Testimony* (2/14/08).

Additional Conclusions of Law Concerning Act 250 Criteria 6, 7, 8 and 9(K); MZR § 5.2.

The Applicant proposes to make a bad situation worse, but offers no mitigation. Indeed, the Applicant does not even offer any specific analysis of noise impacts relevant to the Moretown Elementary School function. Exh. R-9 at 21, Table 9. The Applicant offers only FHWA formulas that could be generically applied to the School's *outdoor* areas. *Id.* at 20-22. The Applicant also attempts to justify its impacts by merely stating (and conceding) that "there is an existing problem." Applicant's Findings at 54.

The existing situation is difficult, if not already beyond the School's ability to address. *Barone Testimony* (12/17/2008). Noise levels in front of the school when a truck passes by already exceeds 70 dBA. Exh. T-3 at 5. A conversation is nearly impossible at sound levels of 65 dBA. *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002) (holding that noise levels of 65 dBA generated by highway is a significant impact requiring EIS). "'A noise level of 65 dBA or above will 'significantly' disturb outdoor speech.'" *Id.* (quoting *Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 467 (1st Cir. 1989)). Seven-second interruptions every 6 to 12 minutes at levels above 65 dBA render the School's front yard unusable for educational purposes. And

as testified by Principal Barone and Ken Kaliski (and detailed in Moretown's Findings), such noise would render Moretown's two front classrooms unusable for educational purposes. Such a burden is unreasonable.

As with Criterion 5, above, an applicant cannot make a bad situation worse. *In re: Pilgrim Partnership*, 153 Vt. at 596-597. The Applicant's burden of production under Criteria 6 and 7 requires the applicant to first demonstrate no unreasonable burden on Moretown's ability to provide educational and municipal services regardless of existing conditions. *Id*.; *In re: St. Albans WalMart*, 167 Vt. 75, 87 (1997).

Here, the Applicant's mere statement that there is an existing problem and its generic and flawed modeling limited exclusively to *outdoor* noise fail to meet its burden. The Applicant wholly fails to assess the impact of truck noise inside the school. Moretown's evidence of inside standards is unrebutted. The Applicant also fails to meet the full burden of proof imposed by Criterion 9(K) and MZR § 5.2. Simply put, the proposed Project with its resulting truck traffic is grossly incompatible with use of the Moretown Elementary School and the public investment therein.

V. Aesthetic Impacts (Criterion 8 and MZR § 3.5, 4.10 and 5.2).

The Applicant's Proposed Conclusions of Law on Criterion 8 (Aesthetics) are not supported by the evidence in this case, nor are they consistent with precedent on Criterion 8. As an initial matter, the Applicant has failed to provide any evidence of the aesthetic impact of its new quarry design. The Applicant's blasting expert recommended that the entire layout of the quarry should be "flipped" to protect the neighbors and the public. Under his recommendation the quarry will face north, not south and west.

Q. Is it – Okay. Do you understand that other experts have prepared analyses of this project –

A. Yes.

Q. -- based on these designs?

A. Yes.

Q. Do you understand that the location of the faces could affect, for example, the noise reverberation?

A. Yes, I know that.

Q. Okay. It could also affect the visual analysis?

A. Yes.

Q. Is that correct?

A. That's correct.

Q. So you're recommending that this looks a little different in order to avoid central public safety problems?

A. Right. I would shoot it that way.

Q. When you say shoot it that way, you mean the whole orientation is flipped so that you are -- the quarry's face goes to the north?

A. Yes.

Tr. 12/15/09 at 100-101 (Rath) (emphasis added).[5]

[5] An official copy of the transcript for this portion of the proceedings is attached to the Neighbors' Reply as Attachment A.

Following questioning from the Court on December 15 and 16, 2008, the Applicant stated that it was adopting its blasting expert's recommendations. But there is no evidence of what visual impact the quarry will have if its faces are "flipped," and the Applicant's Findings of Fact and Conclusions of Law makes no effort to reconcile its analysis of a prior design with the recommendations of its blasting expert, which the Applicant stated it was adopting. The Court must deny the requested permit because the Applicant has failed to meet is burden of production with respect to the new quarry design.

To the extent that the Applicant still proposes to proceed with its previous design – which is inconsistent with its Blaster's safety recommendations – the Court should conclude that the previously proposed Project will have an undue adverse aesthetic impact. First, both aesthetic experts in this case agree that the Project will have an adverse impact on the aesthetics of the area – a fact the Applicant now concedes in its proposed Conclusions of Law.[6] This determination of an adverse impact requires the Court to consider the second prong of the Quechee analysis – whether the project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area; whether the project is offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area; and whether the Applicant has failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings

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[6] *See* Applicant's Findings at 69 ("Rivers does not dispute that the Project's impact can be considered adverse.")

1. *The Town Plan and Moretown Zoning Regulations Contain Clear Written Community Standards Applicable to the Project*

The Applicant argues that there are no clear, written community standards that apply to the Project. This position takes an unreasonably narrow view of the definition of clear, written community standards and overlooks provisions of the Town Plan and the zoning ordinance that, as documented in the Town's Findings, clearly apply in this instance.

The Applicant concedes in its brief that some resources are "identified for specific protection in the Moretown Town Plan," including the Route 100B corridor. Applicant's Findings at 70. The natural resources section of the plan stresses the scenic importance of Route 100B and the Mad River:

> Two areas, in particular, are of critical importance to the Town's rural character and scenic landscape. These are:
>
> ∉ Route 100B/Mad River Corridor: The drive along the length of Route 100B is among the most beautiful in Vermont. The meandering river, board flood plains, rolling hills and deep gorges combine to create a stunning landscape.

Moretown Town Plan (Exh. R-33 at 31). In order to protect and preserve these qualities of the Route 100B/Mad River Corridor, the Land Use Policy #5 specifically provides:

> Development within the Route 100B corridor should be compatible with the existing character of the area, as defined by the open, agrarian landscape with scattered residential and agricultural buildings.

Id. at 68. Policy #3 of the Plan's Natural and Cultural Resources policies similarly provides that "[n]ew development should be accommodated in a manner that maintains and enhances the town's scenic resources and working landscape." *Id*. at 34. In the Town Plan, the "working landscape" is "defined by the productive use of land *for farming and forestry*." *Id*. at

21(emphasis added). The definition of working landscape does not include quarrying. *See also*, Town's Findings at ¶¶ 179 to 200 (describing character of the area).[7] The language in the Town Plan is supported by the recent Route 100B Vermont Byway Corridor Management Plan. *See* Exh. T-9. This designation helps define the "character of the area" and both reaffirms and confirms the corridor's scenic, historic, recreational, and cultural significance, as well as the importance the community places on maintaining the scenic integrity of the roadway.[8]

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[7] The Court has previously concluded that Policy #5 is not "mandatory" under Criterion 10; however, the policy still clearly provides a specific policy intended to preserve the aesthetic attributes of this important scenic resources under Criterion 8. It is also important to stress that the Environmental Board has specifically distinguished the standard for applying provisions of a town plan under Criterion 10 and Criterion 8:

> The Board notes that, although the analysis for both Criterion 8 and Criterion 10 may rely upon language in a town plan, the requirements are different. As discussed later, under Criterion 10 the Board has historically required that in order to give regulatory effect to language in the town plan, the language must be sufficiently clear to prohibit a project. The Board also may refer to zoning ordinances to clarify an ambiguity in the town plan. However, under Criterion 8 the Board has not historically required the same degree of mandatory language.

Re: McLean Enterprises Corporation, #2S-1147-1-EB, FCO at 56 (November 24, 2004). Like the provisions considered by the Board in *McLean,* the provisions of the Moretown Town Plan specifically "identify scenic resources that the community considered to be of special importance." *Id.* at 55 *(citing Re: Town of Barre,* #5W1167-EB, Findings of Fact, Conclusions of Law, and Order (Jun. 2, 1994).

[8] To be clear, the Town does not argue that the scenic byway designation establishes specific clear, written community standards applicable to the Project, but rather argues that the time, effort, and public resources invested in the designation provide additional evidence of the importance and scenic attributes of this widely-used public resource. The Environmental Board confronted a similar situation in *McLean* where Route 131 was designated as a scenic road. The Board in that case explained that the designation could not establish a clear, written community standard, but emphasized that the "process that the citizens of the Town of Cavendish went through to designate Route 131 as a scenic road is nevertheless still evidence of its scenic beauty and unique resources that are worthy of protection." *McLean* at 58, fn. 4.

In *Re: McLean Enterprises Corporation*, #2S-1147-1-EB, (November 24, 2004), the Environmental Board concluded that similar language in the Cavendish Town Plan was enforceable under Criterion 8:

> *Policy #11 of the Cavendish Town Plan states: "Development should not detract from the historic character and aesthetic qualities of the village centers." Town Plan at 34. This provision is applicable because it is intended to preserve the aesthetics of the village centers.*

Id. at 56. While the Board found that this language expressed the clear policy of "preserving the character of the villages" it concluded, based on the facts before it, that the Project would not detract from the historic character and aesthetic qualities of the village center. *Id.* at 56-57.

In this case, the Moretown Town Plan and zoning regulations are clearly designed similarly to protect the character and scenic attributes of Route 100B. And, unlike in *McLean*, the Project here will impact and detract from those scenic attributes. The Applicant admits that the Project will have visual and acoustic impacts "within the Route 100B corridor." And the evidence in this case clearly confirms that these impacts will not be "compatible" with the recognized scenic character of this area. *See* Town's Findings at ¶¶ 179-302.

The Applicant argues that this standard should not be applied to the project because the quarry itself is not located in the Route 100B corridor. *See* Applicant's Findings at 71. This argument is directly contrary to the evidence in this case. The Project site is clearly located directly on Route 100B and heavy trucks will exit and enter the facility from the scenic byway. *See* Applicant's Findings at ¶¶ 1 and 11 ("ninety-three acre parcel of land located in the Town of Moretown along the northerly side of Route 100B"). Moreover, the plain language of the Town Plan does not restrict the "corridor" to only those areas within 300 feet of the floodplain. The

Plan provides that "most" – but not all – of the Corridor's defining features are located within a broad corridor defined by a distance of 300 feet east and west of the 100 year floodplain. *Moretown Town Plan* (Exh. R-33 at 31). As the Applicant's aesthetic witness T.J. Boyle testified on cross-examination, the scenic attributes of the corridor are defined by the valley and surrounding hillsides, which stretch from ridgeline to ridgeline. *Cross-examination of T.J. Boyle* (2/19/2008). And the proposed project will be visible within this scenic viewscape. *See* Town's Findings at ¶¶201-243. The clear, written community standards identified above therefore apply to the Project, and neither Mr. Boyle nor the Applicant has offered evidence of how the project "maintains and enhances the scenic qualities of resources." There is also no evidence that the project is compatible with the existing rural, agricultural character of the area. In fact, Mr. Boyle testified on cross-examination that the project is inconsistent with the existing land uses – a conclusion supported by the evidence submitted by the town and neighbors.

The Applicant also incorrectly asserts that Route 100B and the ridgelines of Cobb Hill and the Northfield Range are the *only* resources identified for scenic protection in the Town Plan. Applicant's Findings at 70. In fact, the Town Plan does clearly identify other specific resources as important scenic resources, and clearly establishes written standards that are applicable to the Project.

First, the Town Plan emphasizes the importance of prohibiting development on steep slopes in order to protect the scenic attributes of those resources:

> Development on slopes may adversely impact the town's scenic landscape. Development on steep slopes, particularly at higher elevations, tends to stand out from many vantage points in town, diminishing the scenic feature formed by a forested background.

Moretown Town Plan (Exh. R-33 at 24). The Plan goes on specifically to prohibit development on slopes in excess of 25%. *Id.* (Exh. R-33 at 68). This prohibition is among the specific land use policies in Chapter 7 that are intended "to regulate land development in *order to protect the town's important natural, cultural and scenic resources* while allowing diverse land uses in appropriate locations and strike a balance between community and individual interests." *Id.* (emphasis added). To provide adequate notice to everyone in Moretown, the Town Plan specifically identifies these steep slopes on Map 4-4 attached to the Plan.

The effort to protect steep slopes in Moretown is well-documented and entirely consistent with the history and development of the Quechee test. It has been the law of this State for more than twenty-five years that steeply sloping areas are considered highly sensitive from a visual perspective and therefore receive heightened protection under Act 250 and the Quechee analysis. In developing the *Quechee* standards in 1985, the Environmental Board emphasized that "certain types of land forms are especially sensitive to change, because these land forms tend to be visible from a wide area or they are seen by large numbers of people. These sensitive areas include ridgelines, *steep slopes,* shorelines and floodplains." The Board concluded that special attention should be given "in assessing whether the scenic qualities of these sites will be maintained." *Re: Quechee Lakes Corp.,* #3W041 1-EC and # 3WO439-EB, (November 4, 1985). This project is located in just such a sensitive location. There is no dispute that the Project is located on very steeply sloping land. In many places the slopes are far greater than 25%, reaching for 40 to 60 % in many locations. *See* Town's Findings at ¶¶ 410-416. On the southern edge of the quarry, the site sharply drops off towards Route 100B, which creates an open view from Route 100B to the final quarry face. *See* Town's Findings at ¶¶ 410-416; Exh. R-4(e) (sheet 1 of 7).

There is also no dispute that the Project will be visible to large numbers of people. The Applicant concedes that at least 45 feet of the quarry face – a height equal to a four story building – will be visible from the scenic Route 100B corridor. The Town's aesthetic analysis indicates that an even greater amount of the face will likely be visible from this important community resource. And as the Applicant itself argues, Route 100B is a popular and well-traveled public highway. More than 3400 vehicles – much of which is tourist traffic -- travel the scenic roadway each day and recreational use is extensive. *See* Rivers' Findings at ¶ 145. The project will convert the portions of the scenic forested ridgeline visible to people traveling north along this section of Route 100B into a man-made industrial viewscape. The quarry and its artificially blasted and terraced rock-face will standout as a large scar across the ridgeline in the center of the view from Route 100B. The Town Plan also identifies specific "scenic roads," including the Moretown Common Road and the Project will also be visible from this designated scenic resource. Exh. R-33 at 30-32; map 5-8.. Mr. Raphael's analysis indicates that the quarry floor may be visible from portions of the road or adjacent homes. Mr. Boyle acknowledged on the stand that something was "amiss" in his analysis of the visibility of the Project and conceded that his exhibits were not reliable, but even those simulations indicate that at least 80 feet of the quarry face will be visible from the Common Road. In one particularly scenic location the quarry face will appear directly between the foreground view and a majestic view of Camel's Hump in the background. *See* Exh. T-7 at 43, Attachment 1 at Photograph I.

The development of these steep slopes leads to the exact problem the prohibition in the Moretown Town Plan is intended to protect against – it results in an undue adverse aesthetic impact which "tends to stand out from many vantage points in town, diminishing the scenic

features formed by the forested background." *Moretown Town Plan* (Exh. R-33 at 24). If the clear prohibition of development on steep slopes established by Land Use Policy #7 does not rise to the level of a clear written community standard, no provision could.[9]

Other portions of the Town Plan similarly establish clear, written community standards applicable to the Project. These standards include specific aesthetic standards applicable to earth extraction activities such as the activity proposed here. *Moretown Town Plan* (Exh. R-33 at 35). The Plan specifically and unambiguously requires the DRB, or this Court on appeal, to ensure that the extraction of mineral resources "does not permanently scar" the landscape. *Id.* As discussed further below under Criterion 10, the Project will result in a permanent scar on the landscape, thereby also violating this clear, written community standard.

Finally, the Town Plan and Zoning Regulations also establish clear, written community standards that apply to the Project's acoustic impacts. First, the Town Plan states:

> Development Review Board shall, through the conditional use process, ensure that the extraction of gravel and other mineral resources does not permanently scar the landscape, adversely impact ground water or surface waters, *or unreasonably impact adjacent neighbors.*

[9] The Environmental Board also considered a steep slopes provision in the *McLean* case, however in that case, the Town Plan protected steep slopes based *solely* on erosion concerns. *McLean* at 57. Here the prohibition on development on steep slopes is both more stringent than the provision considered in *McLean,* and is clearly tied to both erosion *and* aesthetic concerns. *See Moretown Town Plan* (Exh. R-33 at 24, 68). The Applicant concedes that the steep slopes provision of the Town plan pertains to visual impacts and concerns. Applicant's Brief at ¶ 338. Under the Board's reasoning in *McLean*, this prohibition rises to the level of a community standard intended to protect aesthetic resources. *See McLean* at 57.

Id. (emphasis added). This standard is further supported by other provisions of the Town Plan that specifically prohibit conditional uses in the AG-RES district that would *adversely* impact adjacent properties:

> [I]t is important that non-agricultural and non-residential uses, such as light industry, do not *adversely* impact neighboring properties

Moretown Town Plan (Exh. R-33 at 66) (emphasis added). And these statements in the Town Plan are bolstered by explicit noise provisions in the Moretown Zoning Regulations:

> No noise shall be permitted which is excessive at the property line or is incompatible with the reasonable use of the surrounding area. Excessive noise shall be considered a sound pressure level that exceeds 70 decibels at the property line on a regular and recurring basis.

Moretown Zoning Regulation (Exh. R-34 at §4.10(B)(1)).

The Applicant argues that these standards do not apply to the Project because they are standards of "general applicability." Applicant's Findings at 71. That position is both factually and legally incorrect. First, the standards in the Town Plan are not "generally applicable"; they apply to the exact type of activity proposed here (earth extraction) and apply specifically to the district in which the Project is proposed (AG-RES). Furthermore, the Environmental Board has previously concluded that language similar to these provisions does in fact rise to the level of a clear, written community noise standard. In *Re: McLean Enterprises Corporation*, #2S1147-1-EB, Findings of Fact, Conclusions of Law and Order at 58 (Vt. Envtl. Bd., November 24, 2004), the Board concluded that following provision was a clear written community standard:

> The extraction of earth resources must not result in a nuisance to neighboring property owners through noise or dust, nor be a burden on public services.

In *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 10 (Vt. Envtl. Bd., April 19, 2001), the Board similarly concluded that the following provision was a clear written community standard:

> The extraction and processing of minerals or earth resources should not have an adverse environmental impact resulting in inconvenience to or burden on neighboring property owners, nor represent a burden on municipal facilities.

As in the current case, the provisions in *Mclean* and *Cersosimo* were directly applicable to earth resource extraction activities. And in each of those cases, the Board concluded that a standard of 50 dBA was the appropriate standard to ensure that the quarry activity did not create an "adverse environmental impact" or a "nuisance" on neighboring properties. The same standard is appropriate here where the Town Plan prohibits "adverse" impacts on neighbors and also requires that the project "does not . . . unreasonably impact adjacent neighbors." *Moretown Town Plan* at 35, 66. In fact, the standards here are more stringent than the provisions at issue in *Mclean* and *Cersosimo.* The plan at issue in *Cersosimo* provided only that the earth extraction activity "should" not have an adverse impact on neighbors. *Cersosimo* at 15. The Moretown Town Plan expressly prohibits *adverse* impacts in the AG-RES district, and requires a determination that the project *does not* unreasonably impact adjacent neighbors.

Evidence provided by the noise expert for the Town and Neighbors demonstrates that this standard will be violated at several adjacent homes. And, importantly, that same evidence also shows that noise from the project will also be above both the 50 dBA and the 55 dBA standards at areas of frequent human use, including along the Mad River itself. Town's Findings at ¶¶ 232, 295, 395; *Kaliski Testimony* (12/17/08); Exh. T-2 at 24-25. The evidence of these impacts is

undisputed. The Applicant made an affirmative determination not to model the full acoustic impact of the Project by excluding any analysis of trucks travelling up and down the Project haul road. The Town and the Neighbors did model trucks on the haul road together with other project activities, and that modeling unequivocally demonstrates regular and reoccurring noise levels above both 50 and 55 dBA at residences and along the Mad River resulting from Project operations. The Project cannot meet the clear written community noise standards in the Town Plan and Zoning Regulations.

2. *The Project's Aesthetic Impact on the Surrounding Mad River Valley Will be Shocking and Offensive*

The Applicant's Proposed Findings of Fact and Conclusions of law also do not disturb the clear and convincing evidence in this case that demonstrates that this Project's cumulative aesthetic impacts will be shocking and offensive in this small, scenic, rural river valley. The Environmental Board has consistently found that a project is shocking and offensive when it is "so out of character with its surroundings that is significantly diminishes the aesthetic qualities of the area." *Re: Southwestern Vermont Healthcare Corporations,* #8B0537-EB, (Vt. Envtl. Bd., February 22, 2001); *Re: OMYA, inc. and Foster Brothers Farm, inc.,* #9A0107-2EB, (Vt. Envtl. Bd., May 25, 1999), *aff'd, OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000); *Re: Lawrence White,* #1R0391-8-EB, (Vt. Envtl. Bd., April 16, 1998); *Re: George, Mary and Rene Boissoneault,* #6F0499-EB, (Vt. Envtl. Bd., January 29, 1998); *H.A. Manosh* #5L0918-EB (Vt. Envtl. Bd., August 8, 1988). The evaluation of a particular project's impact on the area must necessarily take into account all of the project's myriad aesthetic impacts and consider whether, as a whole, the project shocks and offends the average person. With respect to quarries, this

comprehensive assessment must consider the all of the visual and acoustic components of the Project as well as the character of the surrounding area. *See H.A. Manosh* at 23.[10]

In its brief, the Applicant strains mightily to avoid the conclusion that this Project's aesthetic impacts are shocking and offensive by dividing, compartmentalizing, or simply ignoring many of the Project's myriad aesthetic impacts. Rivers essentially asks this court to consider independently whether the Project's visual impacts are shocking and offensive, then asks the Court to set those impacts aside and separately consider the acoustic impact of some portions of the Project. This artificial effort to minimize the full *aesthetic* impact of the project is both inappropriate and unavailing. The average person living in, recreating in, or travelling through this narrow, scenic, rural river valley will experience all of these industrial impacts together, and the totality of the Project's impacts will clearly be so out of character with the area as to shock and offend. As the Environmental Board explained in a similar situation in the *H.A. Manosh* case:

> the Board's sensibilities are offended by the gravel pit operation. The project, when viewed within the context of the peaceful, rural Cady's Falls Valley, is offensive by virtue of the visual and aural assault which it would create upon both the residents of and the visitors to the area. The intrusion of an industrial operation into this area is so totally out of character with its surroundings and so significantly diminishes the scenic qualities of the area that it is offensive.

H.A. Manosh at 23.

Such is the case here. Mr. Raphael was the only aesthetic expert to present a comprehensive review of this project's combined aesthetic impact on the scenic qualities of the

[10] This standard is similarly reflected by the MZR conditional use criteria, MZR § 5.2.

Mad River Valley; his conclusion that the combined impact of the Project will be shocking and offensive is both well supported and unchallenged by any other expert.

The Applicant also apparently hopes it can make some significant aesthetic impacts disappear by simply ignoring them. For example, the Applicant's aesthetic expert did not consider or provide any exhibits on the visual impact of the facility's nearly 100-foot wide access road, or the significant blasting necessary to construct the entrance. Tr. 2/19/2008 at 198-199 (Boyle). Portions of the access road will traverse slopes in excess of 35%, and because of the grade, significant clearing, cut, and fill is required simply to construct the road. Exh. R-4(e) (sheet EC-3). The road will be visible from Route 100B, and from across the valley. With more than 50 heavy trucks traveling up and down the road each day, there is no question that this wide, sloping, industrial drive-way will significantly alter the appearance of this narrow scenic river valley. In *Re: McLean Enterprises Corporation*, #2S-1147-1-EB, (Vt. Envtl. Bd., November 24, 2004), the Board found that a similar hillside quarry was shocking and offensive in large part because of the project's steep access road. The views of both the quarry face, the quarry service road along its perimeter, and the Project's wide access road in this case will likewise be shocking and offensive when viewed from the scenic Route 100B byway.

The Applicant also did not bother to model the noise resulting from trucks traveling up and down the steep access road. The Applicant's plans call for up to 54 trucks to travel up and down the access road on a nearly continuous basis throughout the workday in the spring, summer and fall – the seasons of extensive use of the Mad River Corridor. But, if you believe the Applicant, these trucks will apparently make no noise; that is what Rivers ask this Court to believe. The Applicant offers no explanation for this glaring omission in its analysis and its

silence on the point is deafening. But the rationale for the omission is self-evident, even if unspoken: the Applicant knew it was impossible to meet the noise standards if it included trucks in its noise analysis, so it simply tried to make them "disappear." As a result, the only evidence on the acoustic impact of trucks traveling the haul road comes from the Town and Neighbors' expert analysis. That analysis shows clear and uncontroverted violations of the Board's established noise levels for residences and areas of frequent human uses. *See* Town's Findings at ¶¶ 232, 295, 394-395; Neighbors' Findings at ¶¶ 164, 185-188, 220; *Kaliski Testimony* (12/17/08); Exh. T-2 at 24-25.

Not only does the Applicant ask this Court to ignore the acoustic impacts of its trucks, it also, remarkably, asks the Court to ignore clear and consistently applied precedent on appropriate noise limits. As the Board explained in the *McLean* case, the Board regularly applies a 55 dBA Lmax standard to determine when acoustic impacts are unduly adverse or shocking and offensive, and will adjust that standard lower in some cases where town plans contain more protective standards:

> In *Barre Granite*, the Board set a maximum allowable noise level for when noise is unduly adverse at 55 dBA Lmax at any residence or outdoor area of frequent use and 70 dBA Lmax at the property boundary. Since *Barre Granite,* the Board has continued to utilize the dBA Lmax as a standard, although on occasion it has made minor modifications to the allowable Lmax level based on the particular facts and circumstances of a case.
>
> For example in *Cersosimo*, the Board set a standard of 50 dBA Lmax at any residence or outdoor area of frequent human use because of specific language in the town plan that stated noise from quarries should not be an inconvenience or burden to neighbors.

McLean at 42; *See also*, *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R141 5-EB, Findings of Fact, Conclusions of Law, and Order at 42–43 (Vt. Envtl. Bd., June 7, 2005) (noting that noise above 55 dBA is *per se* shocking and offensive under the *Barre Granite* standard):

Confronted with uncontroverted evidence demonstrating that the Project will violate both the 50 and the higher 55 dBA Lmax standard, the Applicant now asks this Court to simply throw out this well-developed standard and methodology. Applicant's Findings at 77-79. The permittee in *McLean* sought similar relief when it was unable to meet the standard, and the Board in that case clearly rejected the permittee's invitation to create a new relative standard. *Id.* at 65. The Court should also reject the Applicant's effort here to fashion a new standard simply to justify this particular project.[11] The circumstances the Applicant confronts here are not unique, and are of its own making.

[11] The Board explained in *McLean* that:

> Given the complex and technical field of environmental acoustics, the Board will defer a major overhaul of its noise rulings until it has the opportunity to address it through rulemaking after hearing from a panel of experts and other interested parties.

Id. at 66 The Board did indicate that it might consider some different relative standard if it was provided specific types of evidence that would allow it to better fashion such a standard to the circumstances of a particular case. *Id.* at 66, fn. 5. The Applicant's noise expert has not presented any testimony or other evidence in this proceeding arguing for, or even explaining how the Court could craft such a standard in this case. Nor did the Applicant provide the type of information that the Board acknowledged would be necessary for such an exercise. *See id.* To the extent that the Applicant suddenly argues for the first time in its Reply that some specific new standard is more appropriate, the Court should reject that request as untimely and both factually and legally unfounded. It would be fundamentally unfair for the Applicant's attorneys to suggest some new standard in their final filing without providing expert testimony to support the new standard, or otherwise disclosing the suggested standard before or during trial.

The Applicant also seeks to defend this Project by relying on Public Service Board cases. Applicant's Findings at 72-73. Such reliance is both misplaced and unavailing. The Public Service Board's evaluation of a particular project's impacts proceeds under a different statutory scheme. Its distinct analysis is not applicable to Act 250 cases. Under 30 V.S.A § 248, the PSB is only required to "give due consideration" to Act 250 criteria, including Criterion 8. 30 V.S.A. § 248(b)(5). And unlike in Act 250 cases, the Public Service Board is explicitly required by statute to balance such consideration against a project's larger "public good." 30 V.S.A. § 248. With respect to aesthetic impacts, the Board achieves this balance, in part through its "consideration" of the Quechee factors, but it does not apply that test in the same manner as the Environmental Court. The Board has previously explained that it uses the Quechee analysis "for guidance," but has made clear that its analysis "does not end with the results of the Quechee test." *Petitions of VELCO and GMP*, Docket 6860, Order at 80 (Vt. Public Service Board, January 28, 2005):

> Instead, our assessment of whether a particular project will have an "undue" adverse effect on aesthetics and scenic or natural beauty is "significantly informed by overall societal benefits of the project."

Id. (*quoting In re Northern Loop Project*, Docket 6792, Order at 28 (Vt. Public Service Board, July 17, 2003)). The societal benefits balancing test on which the Public Service Board relies does not have a corollary in Act 250 and this Project must be judged under Act 250, not Section 248.

The Applicant's odd attempt to justify the Project under a different statutory scheme instead of Act 250 is telling; it implicitly acknowledges that the Project would never pass muster under the Environmental Board or Environmental Court's aesthetic analysis. The Court should

not accept the Applicant's invitation to apply the Public Service Board's distinct section 248 precedent in these proceedings.

3. *The Applicant Has not Taken Generally Available Mitigation Measures*

As noted above, the Applicant has essentially conceded that it cannot satisfy the noise limits and other aesthetic standards for quarry projects in Vermont. It first asks the Court to just throw out the standards and create a special standard for this particular project. Applicant's Findings at 77-78. Alternatively, it suggests that it be given the opportunity to come up with some other hypothetical, but completely undescribed and thus far undisclosed mitigation measures, which might enable it to comply with the applicable noise standards. Applicant's Findings at 79. The Court should not accept this after-the-fact offer to develop additional mitigation measures for several reasons. First, the uncontested evidence before the Court clearly shows that the Project cannot meet the 50 or 55 dBA standard. Second the Applicant's burden here includes its obligation to present specific mitigation measures demonstrating that it could actually comply. It has failed to do so. In the absence of such specific evidence the Court must deny the Project. *See Pike Industries, Inc. and Inez Lemieux,* #5R1415-EB, Findings of Fact, Conclusions of Law and Order at 46 (Vt. Envtl. Bd, June 7, 2005) (Board may not issue a permit if permittee clearly cannot comply with permit conditions). In the *Pike* case, the Board explained that it could not issue a permit unless "credible evidence [is] presented to the Board, based upon modeling or other experience, that predicts that a project will be able to meet such

requirements." *Id.* There is no such evidence here. The only evidence before the Court demonstrates that the Project will violate the noise standards on a regular and reoccurring basis.[12]

Moreover, if there actually are other reasonable measures to further mitigate the noise impact of the Project, the Applicant has an obligation under this third prong of the Quechee test to disclose those measures as a part of it proposal, and allow parties to examine them. If, as the Applicant now argues, such measures exist but have not been proposed for implementation, the Court must deny the Project under Criterion 8. *See In re Times & Seasons, LLC,* 2008 VT 7, ¶¶ 9&10 (Permit must be denied where "applicant failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the project with its surroundings.").

What Applicant proposes is a classic condition subsequent scenario, which is impermissible and illegal. *See Norman R. Smith, Inc. and Killington, Ltd.*, #1R0593-1-EB (9/21/90) and *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (9/21/90), *aff'd*, *In re Killington, Ltd.*, 159 Vt. 206 (1992) (holding that the Board must make positive findings before issuing permit and cannot issue permit based upon incomplete information that is conditional upon future efforts to comply with the law); and *Berlin Associates*, #5W0584-9-EB

[12] The Applicant speculates in briefing, without any evidentiary support, that the Project might be able to meet the standard on some occasions because there are some "situations where dump trucks enter quarry haul roads under less than full acceleration." Applicant's Findings at 79. This speculative suggestion misses the point. First, compliance with the standard cannot be the *exception*; the question is whether the Applicant has provided credible evidence demonstrating that this project will consistently comply with the standard; not whether it might be able to occasionally comply with the standard in "some situations." And, more importantly, the Applicant's "less than full acceleration" argument is entirely divorced from the specific circumstances here. The quarry access road is designed on an extremely steep slope; there is no reasonable basis to assert that trucks will be able to climb the access road *without* accelerating.

(4/24/90) (holding that Act 250 does not authorize issuance of permit contingent upon future study that might prove compliance with criteria after final decision is issued).

The Applicant has steadfastly refused over the past five years to address the Town's and the Neighbors' concerns related to noise impacts. Now, faced with clear, convincing, and undisputed evidence that its project activities will violate the applicable noise standards, the Applicant asks the Court's permission to come up with some additional measures after the trial is complete and the evidence is closed. The Court should not entertain this invitation. The Applicant's predicament is of its own making. It chose a location with an extremely steep access road, thereby requiring trucks to accelerate in order to climb the grade and use engines breaks to descend, and it also chose the narrow river valley location, which, as the modeling demonstrates, clearly amplifies the noise created on its surrounding steep slopes. More importantly, the Applicant could have addressed its clear violation of Environmental Board standards much earlier in these proceedings by actually modeling the full scope of its activities (including trucks on the haul road), then adjusting its plans accordingly to try to stay within the established limits. The Applicant chose not to do so previously. The Court cannot and should not grant it a conditional permit now based on vague promises do to something. Such a conditional approval would be fundamentally unfair to the Town and the Neighbors who must bear the impact of the Project. The Court must deny the Project for failure to timely identify and implement reasonable mitigation measure to address the Project's acoustic impacts.

VI. <u>Impacts on Historic Properties (Criterion 8 and Moretown Zoning Regulations).</u>

Rivers' proposed findings plainly demonstrate that the Applicant has failed to meet its burden of production under Criterion 8 (Historic Resources). The Applicant argues that it has met its burden simply by "establishing that the quarry tract is not, and contains no, historic sites." Applicant's Findings at 81. This artificially limited analysis of the Project's impacts does not, and cannot, meet the Applicant's burden of production. Under Criterion 8, the Applicant must provide sufficient evidence for this Court to find that the proposed Project will not have undue adverse effects on historic sites. *See Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, FCO at 27 (5/18/01). Though the party opposing the Project has the burden of proof, the Applicant's failure to meet its burden of production can result in denial of the permit. *See id.* The Applicant cannot meet its burden here – it offered no testimony from any witnesses describing the extent of the Project's impacts on historic resources; in fact, the Applicant didn't even bother to identify all of the historic resources within the viewshed of the Project or along Route 100B.[13]

Act 250 case law has long required developers of major industrial quarrying operations to assess the impacts of truck traffic on historic properties. *See Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, Findings of Fact, Conclusions of Law and Order, at 44 (May 25,

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[13] The Applicant apparently believes that the Town in the first instance should bear the burden and expense of producing an analysis of the Project's impacts on historic resources. That position misstates the proper allocation of the burden of production here. The Town is committed to protecting its historic resources, but will not spend Town resources conducting analyses for the Applicant, analyses that the Applicant must produce in order to meet its burden of production to initially establish an absence of undue adverse impact.

1999). In *OMYA,* the Environmental Board expressly concluded that the analysis of "undue adverse effects" on historic resources applies to areas beyond the project site. *In Re: OMYA* at 43. The Board did not limit its scope of inquiry to the specific project site – as the Applicant attempts to do here – but recognized that the proposed trucking increase would impact historic sites along the travel route. *Id.* at 39. In *OMYA,* the Applicant was seeking to double its permitted truck trips from 85 round-trips to 170 round-trips. The requested increase of 85 round trips (or 170 single trips) would have added 18% more truck traffic to the existing number of trucks already traveling through the town of Brandon. The former Environmental Board rejected the requested increase, and found that the "substantial" increase requested by *OMYA* would have an undue adverse impact on the historic resources in the area. *OMYA* at 15, 20, 41-42. As the Board explained:

> The addition of 170 daily truck trips as proposed by OMYA will not be in harmony with the character of Brandon. There already is a substantial volume of truck traffic driving through Brandon. The traffic is not yet the distinguishing feature of the town. Bandon still retains its essential character, even with the existing traffic, although there are signs that certain aspects of its historic character are degraded. The addition of 170 daily truck trips would tip the balance in defining the character of Brandon by overwhelming the village with truck traffic. If this were to happen, then the historic value of the Brandon Village Historic District will be eroded and this historic resource would be devalued to the detriment of the state of Vermont.

Id. at 42. Based on this finding, the Board denied the requested increase, and conditioned approval on only a 30 round-trip increase, or only a 6% increase in existing truck traffic. *See id.* at 43. The percentage increase in heavy truck traffic proposed by the Applicant here is far greater than the 6% increase ultimately accepted by the Board in *OMYA.* The Applicant's traffic expert concedes that the Project will more than double the amount of heavy truck traffic

traveling through Moretown.[14] *See* Town's Findings at ¶¶ 58-59, 310; Dickinson Testimony (2/22/08). As in *OMYA*, the evidence presented here demonstrates that such an increase in truck traffic would have both an adverse and undue adverse impact on the historic resources in town, including, among other resources, the school and the town hall. This two-fold increase is far beyond the 6% increase ultimately allowed in *OMYA,* and such a dramatic increase will similarly overwhelm the Town and degrade and erode the important historic resources in Moretown.[15]

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[14] The Applicant's argument that it is proposing a smaller total number of truck trips than were proposed in *OMYA* is irrelevant and unavailing. *See* Applicant's Findings at 75. The important question is a relative one – that is, by how much does the Applicant propose to increase the existing heavy truck traffic levels in Moretown compared to the existing conditions? On a relative basis, the Applicant's proposed increase in truck trips is substantially greater than the amount proposed in *OMYA* (doubling of heavy truck traffic in this case vs. the 18% increase proposed by OMYA and the 6% ultimately accepted by the Board).

[15] The Environmental Board established the following standards for determining whether a project has an adverse and undue adverse impact:

> In evaluating adverse effect on a site, it is central to determine whether a proposed project is in harmony or fits with the historic context of the site. Important guidelines in evaluating this fit include: (1) whether there will be physical destruction, damage, or alteration of those qualities which make the site historic, such as an existing structure, landscape, or setting; and (2) whether the proposed project will have other effects on the historic structure, landscape, or setting which are incongruous or incompatible with the site's historic qualities, including, but not limited to, such effects as isolation of an historic structure from its historic setting, new property uses, or new visual, audible or atmospheric elements.
>
> * * *
>
> The "undue" quality of an effect on an historic site can be judged in several different ways. A positive conclusion on any one of the following guidelines can lead to a determination that an adverse effect is undue:
>
> > a. The failure of an applicant to take generally available mitigating steps which a reasonable person would take to preserve the character of the historic site.

The Applicant has failed to provide *any* analysis of its Project's impacts on the numerous historic resources throughout the valley, including structures that are immediately adjacent to Route 100B, and historic structures with views of the Project. As a result, the Court does not have sufficient evidence to reach a positive conclusion on this criterion. And the evidence that is available demonstrates that the Project will have an undue adverse impact. Several historic structures located along the scenic Route 100B corridor will have direct views of the quarry face. Town's Findings at ¶ 320. The Applicant did not consider the impact, even though its expert acknowledged that consideration of views from historic structures is important. *Id.* at ¶¶ 318-319.

As described above, the undisputed evidence also demonstrates that the Project will double heavy truck traffic through the village. We do not know what impact such an increase in loaded heavy trucks may have on the structural integrity of the numerous historic structures located along Route 100B. However, the evidence clearly demonstrates that such an increase will overwhelm the defining historic character of the Village. And the evidence similarly demonstrates that the Project will have an undue adverse impact on specific historic resources.

> b. Interference on the part of the proposed project with the ability of the public to interpret or appreciate the historic qualities of the site.
>
> c. Cumulative effects on the historic qualities of the site by the various components of a proposed project which, when taken together, are so significant that they create an unacceptable impact.
>
> d. Violation of a clear, written community standard which is intended to preserve the historic qualities of the site.

Re: Middleburv College, #9AO177-EB, Findings of Fact, Conclusions of Law and Order at 10 (Vt. Envtl. Bd., Jan. 26, 1990).

The Town has presented acoustic analysis of the Project's impact on the School, which is a listed historic resource, and that analysis demonstrates that the Project will substantially interfere with, and undermine the historic use of, that facility as an elementary school. Town's Findings at ¶¶ 132-157.

The Applicant also has not suggested any mitigation measures to address these impacts. Such reasonable measures may be available, had the Applicant bothered to analyze the issue, including, for example, requiring vegetative screening for historic properties with views of the quarry face, or further limiting the number of trucks that could travel through the village on any single day. Rivers' refusal to consider this issue and its failure to implement reasonable measures further demonstrates that the Project's impacts are unduly adverse. *See Re: Middleburv College* at 10 (failure to implement reasonable mitigation measure constitutes undue adverse impact).

As the Board noted in *OMYA,* "[a] fundamental purpose of Act 250 is to support the value that villages be attractive places to live and work, and that the quality of life in these villages not be unduly eroded." *Re: OMYA,* at 44. The evidence here demonstrates that this Project will degrade the quality of life in Moretown and erode the historic qualities of the Town and its listed or eligible resources. Applicant has provided *no* evidence to the contrary. Rather it plainly hopes to simply ignore the issue by artificially limiting its analysis to the 93-acre Project site. That effort falls far short of the Applicant obligations under Criterion 8 with respect to historic resources. The permit must be denied.

VII. Earth Extraction Activities (Act 250 Criterion 9(E) and MZR §§ 3.5, 4.10, and 5.2)

The Town adopts the Neighbors' arguments and reply on 9(E) and adds the following additional responses concerning 9(E) and relevant provisions of the Moretown Zoning Regulations.

Criterion 9(E) requires consideration of the operations of the facility as well as its reclamation. The Applicant must prove that it can operate the facility without unduly harming the environment or surrounding land uses. As the Board explained in *Barre Granite:*

> The Board considers Criterion 9(E) to include and go beyond aesthetic impacts, to encompass interference with enjoyment of the land and to seek to prevent such interference from becoming undue. *Re: John and Marion Gross d/b/a John Gross Sand and Gravel,* #5W1198-EB Findings of Fact, Conclusions of Law, and Order at 16 (April 27, 1995) Therefore, any specific effects demonstrated under other criteria (i.e. air, noise, or water pollution) may also be raised under 9(E) if the Project involves earth resources. Second, extraction Projects must have a "site rehabilitation plan" for restoring the disturbed land after extraction. This plan should include reclaiming the land and also preparing it for another use.

In re: Barre Granite Quarries, LLC William and Margaret Dyott, #7C1079 (Revised)-EB Findings of Fact, Conclusions of Law, and Order at 88 (Vt. Envtl. Bd., Dec. 8, 2000).

The Moretown Zoning Regulations similarly require the Applicant to prove that the Project will not pose a hazard to public health or safety, or otherwise have an undue adverse effect on neighboring properties and uses. MZR § 3.5(C). *See also* MZR § 5.2 (conditional use criteria). The Applicant cannot meet these standards.

First, with respect to blasting, the Applicant argues that it has presented testimony demonstrating that the Project can be blasted in a safe manner. Applicant's Findings at ¶¶ 275-302. However, at trial, the Applicant's blasting expert stated that the Project must be fundamentally reconfigured to allow safe blasting. The Applicant's blasting program and its

proposed findings on this point simply are not credible. Rivers' position on how this quarry will be blasted is entirely unclear and continually changing. If it has adopted Mr. Rath's recommendations, there is no other evidence concerning the impact of this redesigned quarry. Town Findings at ¶¶ 39-57 and discussion on pages 15-19 (describing absence of evidence). If Rivers has not redesigned the quarry to adopt its blast expert's safety recommendations, there is no evidence upon which to conclude that the original quarry design can be operated safely.

On the stand, the Applicant's blasting expert stated his opinion that the quarry faces should be directed away from the public to ensure the safety of residents and people traveling on Route 100B. Tr. 12/15/08 at 97 (Rath).[16] He acknowledged that this recommendation was inconsistent with the proposed plans, and so he recommended "flipping" the entire quarry so that the face was directed to the north, away from residents and Route 100B. *Id.* at 100-102. His recommendation for using a "sinking cut shot" and thereby reorienting the working face away from the public was based on his recent experience with unexpected flyrock in Lebanon, New Hampshire. *Id.* at 98-99.

And, in contrast to the Applicant's suggestion, Mr. Rath did, in fact, express significant safety concerns related to blasting at the facility as it was depicted on the plans submitted to the Court. He testified that he would be concerned about public safety impacts within 1500 feet of the quarry face. *Id.* at 77, 99. Route 100B is only 800 feet from the Phase 1 face, and residences

[16] The Town transcribed portions of Mr. Rath testimony in its initial findings. An official transcript of this testimony is now available and is attached to the Neighbors' Reply as Attachment A. The transcriptions of Mr. Rath's testimony in the Town's initial findings are not different from the final official transcript in any material manner. For ease of reference the quotations set out on pages 11-14 of the Town's Brief are, in order of appearance, located on pages 61-62, 97-98, 102-103, 101, and page 151-152 of the official transcript.

are similarly close. *Id.* at 104. Mr. Rath even went so far as to suggest that neighboring residents should remain inside their homes to ensure their safety during blasts:

> Q. Now the woods we're talking about here is Ms. Holden's property that borders the Rivers Quarry. Is it your testimony that you would like to control Ms. Holden's position on her property when you're conducting a blast?
>
> A. I would ask to be -- for her to be inside, as a -- as a matter of, you know, safety.
>
> Q. As a safety precaution, it's your professional opinion that Ms. Holden should be restricted to her -- the inside of her residence during your blasts?
>
> A. I would ask her to be undercover, just as a matter of course.

Tr. 12/15/08 at 77 (Rath).[17] He redesigned the faces of the quarry specifically to address this public safety impact. *Id.* at 98, 102-103. He also suggested reorienting the quarry face away from Route 100B so that the highway would not have to be closed during blasting. *Id.* at 73-74. Mr. Rath did not provide any testimony as to whether or not Route 100B would need to be closed if the Applicant did not reorient the faces, but he implied that it would need to be closed if the Applicant blasted on faces directed toward the road. *Id.* And, the Applicant's site plan (and now its proposed findings) calls for blasting on faces oriented towards Route 100B and neighbors.

The Applicant's efforts to wriggle out from Mr. Rath's damaging testimony are unavailing, and only render the Applicant's proposal more confusing and even more unreliable. When pressed by the Applicant's attorney to attempt to reconcile his opinion with the actual designs presented by the Applicant, Mr. Rath tried to explain that it *might* be possible to adopt

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[17] The fact that the blasting expert would require the neighbors to stay inside their homes during blasting events plainly demonstrates that this Project is not compatible with the surrounding uses and will have an unreasonable impact on those uses. It therefore clearly violates Criterion 9(E) and sections 3.5, 4.10, and 5.2 of the Moretown Zoning Regulations.

his safety recommendations and still end up with the quarry as depicted on the submitted plans. However, Mr. Rath did not state how that could work, and immediately after that, on re-cross, he twice conceded that the proposed plans and his recommendations are flatly inconsistent:

> Q. Okay. Let me -- Let me break it up a little bit. Do you see the Sheet 2 of 7?
>
> A. Yes.
>
> Q. Does that show a final build-out of Phase 1?
>
> A. Yes.
>
> Q. Are you going to end up, at the end of Phase 1, with what's depicted on that plan?
>
> A. Well, it depends on whether or not they want to leave this -- these benches in here.
>
> Q. The benches you're pointing to are depicted on the plan?
>
> A. Yes.
>
> Q. So can you elaborate your answer there? What -- You're saying no, you won't end up with what's depicted on –
>
> A. Well, the orientation is going to be different because you're going to be shooting this way. That was the whole point.
>
> Q. So –
>
> A. You're going to back out this way.
>
> Q. So let me make this very simple. The plan depicts something, does it not?
>
> A. Yes.
>
> Q. You're not going to end up with what's depicted on the plan if you do what you suggest; is that right?
>
> A. You -- You could leave those benches there doing it even that way, but I would say no.

Q. The answer to my question is no?

A. Okay, no.

Id. at 147; *see also id.* at 151-152 (acknowledging that there are no plans depicting the progress of the new quarry design he just proposed). This final position was consistent with his original acknowledgement on cross-examination that his recommendation differed from the plans presented by the Applicant. *Id.* at 103. In short, the Applicant's plan is a mess.

The Applicant's actions during and after the hearings only further confuse the situation. During the hearing, and in response to questions from the Court, the Applicant twice stated that it was adopting Mr. Rath's recommendations. And the Court affirmatively stated that, because Mr. Rath was the Applicant's witness, it would assume the Applicant was accepting his recommendation unless the Applicant indicated otherwise. The Applicant did not at any point reject Mr. Rath's safety recommendations. Yet, now, in its brief, the Applicant asserts for the first time, and without detail, that it will only direct blasts away from the public and adjacent residents "when possible." Applicant's Findings at ¶ 284. There is no evidence in the record concerning the safety of this re-revised blast plan. We do not know when or how often blasts will be oriented toward the public or away from the public. If fact, it's not clear that blasts will ever actually be oriented away from the public. And, most importantly, we have no idea whether such a proposal will be safe or not.

Mr. Rath testified that it was his professional opinion that the face of the quarry should not point toward the neighbors or the public.

> Q. I'm just going to make sure I understand this. It's your professional recommendation to Mr. Rivers, that the face of the quarry does not point towards neighbors or the public; is that correct?
>
> A. Yeah, that's what I would like to see.

Tr. 12/15/08 at 97 (Rath). To accomplish this, he recommended flipping the entire quarry so that it was directed to the north:

> Q. When you say shoot it that way, you mean the whole orientation is flipped so that you are -- the quarry's face goes to the north?
>
> A. Yes.

Id. at 101.

Now in the Applicant's findings there is no mention of the "sinking cut shot" or the "flipped" orientation recommended by Mr. Rath – recommendations which formed the basis of his testimony regarding the proposed Project's safety. The parties and the Court are left without any clear evidence explaining how the facility will be blasted and operated, and there is no evidence demonstrating that operations of this facility will be safe if blasts are directed away from the public, if at all, only when possible. This absence of information is particularly troubling given the proximity of the blast zone to residents and Route 100B. Route 100B is only 800 feet from the Phase 1 blast zone. Given the serious safety concerns, and the absolute lack of evidence on the safety of the facility (or indeed any clear evidence on what exactly the Applicant is proposing), the Court must deny the Project.

The Applicant's evidence concerning reclamation is similarly inadequate. Criterion 9(E) requires the Applicant to produce a reclamation plan that ensures that the site will be left in a state suitable for future development. 10 V.S.A § 6086(a)(9)(E). The MZR authorizes the Court

to impose a surety requirement sufficient to ensure reclamation of the site. MZR § 3.5(E). And, as discussed below, the Town Plan required the Applicant to produce a plan which avoids any permanent scars on the landscape. The Applicant cannot meet these standards.

The Applicant's "reclamation plan" essentially consists of just one thing: placing soil and re-seeding the quarry floor. Applicant's Findings at ¶¶ 309-312. It has proposed no reclamation measures for the quarry access road, has not committed to reclaim the quarry faces, and most important, Applicant has no plans to remove, reclaim, stabilize or even maintain its huge stormwater detention ponds after the life of the Project. Instead, the Applicant plans to simply abandon the pond, leaving a massive 1.1 million gallon man-made pond on a denuded landscape approximately 800 feet above the Mad River. To fund its "reclamation" activities, the Applicant proposed to save one nickel for every ton of stone it sells, up to a maximum amount of $50,000. This proposal does not constitute an adequate reclamation plan.

The Applicant bears the burden of establishing that its proposed plan and its funding mechanism are adequate. But it has provided almost no information on the plan or its funding mechanism. There is no detail concerning how the Applicant's proposed funding mechanism will be implemented and managed. In fact, the *only* reference to the supposed "reclamation fund" was in a one-sentence supplemental discovery response read into the record by the Applicant's consultant Mr. McCain on re-direct examination. That is the sum total of the evidence on this point. And the Applicant has not provided any expert testimony suggesting that its maximum contribution of $50,000 is adequate to actually accomplish even the very modest effort to re-soil and re-seed the quarry floor. It certainly is not adequate to prevent a permanent scar on the landscape, or remove or maintain the massive stormwater ponds.

The Environmental Board rejected a similarly inadequate reclamation plan in *McLean:*

> The Board has several concerns about the Permittee's Reclamation Plan. First, since the funding mechanism does not require a significant contribution up front, there would be little to no money available to implement the Reclamation Plan should the Permittee abandon the Project after only a few years of extraction.
>
> Second, the Reclamation Plan only generally proposes covering the North Quarry hole with soil and creating a flat terrace around the perimeter of the South Quarry which will be full of water. The North Quarry hole and South Quarry terraced area would then be seeded and trees would be planted. The Reclamation Plan provides little to no detail on how the area would be graded, what would become of the infiltration basin and stormwater controls, the access road area and hillside quarry, refueling area and the buildings. Therefore, because the Reclamation Plan contains insufficient detail and the Project would cause undue impacts to the enjoyment of land, the Board concludes that the Project does not comply with Criterion 9(E).

McLean at 76. For the same reasons, the Court should reject the Applicant's meager and ill-defined plans here. As in *McLean*, the Applicant does not propose to put any money into its reclamation fund up front. If the Applicant abandons the site for some reason, there is no assurance that there will be sufficient funding available to reclaim the site. And, just as in *McLean*, the Applicant here has no detail on what would become of the huge stormwater pond it proposes to construct on the steep mountain sides of the Mad River Valley. None of the Applicant's experts could explain what the long-term plan was for this sizable man-made pond. Left abandoned with no oversight or maintenance (as the Applicant proposes), such a significant structure would likely become a serious public safety hazard. Without any proposal to remove, or stabilize and maintain, this facility, the Applicant's alleged "reclamation plan" is plainly inadequate on its face. *McLean* at 76.

The theme in the Applicant's approach to this project is unfortunately consistent and self-evident: it intends to extract maximum value from this parcel of land and then abandon the site,

leaving the neighbors and the residents of Moretown to bear the long-term burden of the Project's blasting, visual, water, and public safety impacts. The Court should deny the permit for failure to satisfy Criterion 9(E) and relevant provisions of the Moretown Zoning Regulations.

VIII. Impact on Public Investments (Criterion 9(K) and MZR § 3.5, 4.10, and 5.2)

The Town provides the following additional discussion concerning impacts on public investments in response to the Applicant's proposed findings and conclusions

As noted in the Town's original Proposed Findings of Fact and Conclusion of Law, the Applicant in this case has presented little, if any, evidence with respect to the Project's potential impact on public investments. The Applicant's Proposed Findings and Conclusions only further emphasize this point: it offers only five findings concerning the Project's impacts on public investments, none of which actually assert that the Project will not impact any public investments. *See* Applicant's Findings at ¶¶ 321-325. This absence of findings confirms what was clear at trial – the Applicant has offered no evidence to meet its burden of establishing that the Project will not unreasonably endanger the public investment in those resources or materially interfere with the public's use and enjoyment of the resources. In fact, the Applicant's "aesthetic" expert failed to consider the Project's impact on the extensive and numerous recreational uses in the Mad River Valley around the Project area. He did not consider the impact on the recreational use of Route 100B, including bikers and walkers, nor did he consider the impact on recreational users of the Mad River, including fly fishermen, and individuals canoeing or kayaking on the river. Nor did nor any of the Applicant's other expert or lay witnesses provide testimony on this issue.

The Applicant does concede that Route 100B is a public resource adjacent to the Project which must be evaluated under 9(K).[18] Applicant's Findings at ¶322. Yet the Applicant offers *no* findings regarding the Project's impact on the public use of this resource, which as the testimony offered by the Town and the Neighbors clearly establishes is extensive. *See* Town's Findings at ¶¶ 326-368. Even the Applicant's traffic assessment wholly fails to consider the Project's impact on recreational users along Route 100B. The only mention of recreational uses in the entire report is the passing reference on page 8, which notes only that "a review of the foregoing accident history also indicates that although VT 100B is a popular bicycle route in the summer months, none of the above accidents involved bicyclists or pedestrians." Exh. R-5 at 8. This limited reference constitutes the sum total of the Applicant's discussion of recreational impacts – it does not even attempt to offer an evaluation of what impact the Project's substantial additional heavy truck traffic may have on such uses in the future. This limited discussion simply does not satisfy the Applicant's burden under 9(K), and it certainly does not rebut the substantial evidence offered by the Town and Neighbors. That evidence demonstrates that Route 100B is one of the most popular and important recreational bike routes in central Vermont, and further demonstrates that the Project will materially jeopardize or interfere with the function, safety, or efficiency, and the public's use or enjoyment of this resource. The Town presented numerous lay and professional witnesses who testified that the Project's impacts would cause them to stop

[18] Route 100B and the Mad River are only two of several 9(K) resources that this Project would adversely and unreasonably affect. Other resources include the Moretown Elementary School and Town Hall, and municipal recreation fields. Those resources are discussed in Town's Findings at ¶¶ 362-368; Exh. T-7 at 38-39.

riding their bikes, stop bicycle tours, stop walking in the Village, and stop fishing or swimming in the river. Town's Findings at ¶¶ 339-341. The Applicant did not rebut any of this testimony.[19]

The undisputed evidence in this case also demonstrates that the Project will materially jeopardize and interfere with the public's use or enjoyment of the Mad River. Rivers' aesthetic expert (and other expert and lay witnesses) did not consider the potential views of the quarry from the river, despite the fact that his own viewshed map clearly shows that extensive sections of the River south of the Project will have views of the quarry face. *See T.J. Boyle Report* at Attachment A (Exh. R-8, Att. A).[20] Mr. Raphael did specifically evaluate the views of the quarry from the river and concluded that the scar of the quarry face would be visible from significant and popular stretches of the River. Town's Findings at ¶ 255. Similarly, the Town's noise analysis demonstrates that project noise levels would be above the 55dBA level along portions of the Mad River, which Mr. Byrne testified was a popular fishing location (he further

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[19] The Applicant's only response to this extensive and compelling testimony is found in its Finding ¶ 325, in which the Applicant alleges that "most" of the Town's witnesses were unreliable because they "acknowledged" never reading any part of River's application and that their "opinions were based solely on the exaggerated descriptions of the Project provided by the Town's Attorney." Applicant's Findings at ¶ 325. This hyperbole is wholly unsupported by the record here. In fact, the Applicant did not bother to cross-examine most of the lay witnesses who testified regarding the impacts of the Project on their use of Route 100B and the Mad River. Nor did the Applicant ever establish that the witnesses' understanding of the Project impacts were in any way "exaggerated." The Applicant cannot resolve its complete failure to respond to these significant concerns through such an unsubstantiated, after-the-fact, allegation.

[20] The site visit confirmed that the quarry face would be visible from the bank of the river at a popular fishing hole adjacent to Route 100B. Mr. McCain, the Applicant's consultant, acknowledged to the Court while standing on the river bank that the quarry face would be visible from that popular public point on the river. *See* Hendrickson Affidavit, Attached to Neighbors' Motion for Partial Summary Judgment (11/1/2007). Mr. McCain did not dispute making this statement.

testified that he and others would stop using this area for fishing if industrial quarry noise was audible in that location). Town's Findings at ¶ 466; *Testimony of Jack Byrne* (2/21/08).

This noise analysis is undisputed as the Applicant simply decided to exclude all trucks on the haul road from its noise analysis, despite the fact that its own noise expert acknowledged that noise resulting from trucks traveling up and down the haul road was an important component of the Project's impact. *Guldberg Cross-Examination* (2/14/2008) and (12/16/08) (conceding during testimony on air impacts from trucks on haul road that *noise impacts* from trucks was also a relevant impact that should be considered). Mr. Kaliski's undisputed analysis shows that project noise, including trucks on the haul road, will result in regular and reoccurring violations of the 55 dBA standard – the standard the Environmental Board has set for determining whether an acoustic impact will be "shocking and offensive." *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R141 5-EB, Findings of Fact, Conclusions of Law, and Order at 42–43 (Vt. Envtl. Bd., June 7, 2005) (noting that noise above 55 dBA is *per se* shocking and offensive under the *Barre Granite* standard). ANR has recognized the Mad River as a significant statewide recreational resource, *see Moretown Town Plan* (Exh. R-33 at 25). The weight of the evidence demonstrates that the Project will materially interfere with the use and enjoyment of this facility.

The Applicant argues that the Mad River is not "adjacent to" the Project, and therefore need not be considered in the Court's analysis. Applicant's Findings at 97-98. The suggestion that this important recreational resource should not be considered under 9(K) in this instance is not supported by the facts or by the former Environmental Board's precedent. It is well established that the term "adjacent to" is a relative terms that depends upon the context and scale of the Project. *L & S Associates*, #2W0434-8-EB (6/2/93). The former Environmental Board has

previously concluded that Criterion 9(K) requires consideration of impacts on river resources where earth extraction activities will be visible and audible from the river. *See H.A. Manosh*, #5L0918-EB, FCO at 21 (8/8/88) (Lands along the Lamoille River, Kenfield Brook, and Terrill Gorge, used extensively by the public for fishing, canoeing, and swimming, are a public investment.); *McLean* at 77-78 (Black River considered an adjacent public facility under 9(K) despite being located across Route 131 from the proposed quarry); *see also*, *In re McShinsky*, 153 Vt. 586, 593 (1990) (Under criterion 9(K), White River qualifies as public lands and public's enjoyment of the river would be significantly diminished if campground were allowed.). Confronting a similar gravel pit operation in *H.A. Manosh,* the Environmental Board concluded that the noise from the pit interfered with the public enjoyment of a scenic valley and fishing in the nearby Lamoille River.

> While public access to the gorge will not be directly blocked by the project, the aesthetically pleasing experience of visiting the gorge will be substantially diminished by the noise, dust, fumes and general industrial atmosphere created by the gravel pit and the high volume of gravel trucks. The peacefulness of fishing along the Lamoille River will be similarly disturbed by the pit operation.

H.A. Manosh at 21. As in *H.A. Manosh,* this Project's impacts on the recreational uses of the river (and Route 100B) must also be considered. And as was the case in *Manosh*, the undisputed evidence here demonstrates that the Project will materially interfere with the recreational use and enjoyment of this scenic narrow river valley. The Applicant has failed to consider these impacts, and the only evidence in the record on this issue demonstrates that the Project will materially jeopardize or interfere with the function, safety, or efficiency, and the public's use or enjoyment of this important resource.

The Environmental Board explained in both *Manosh* and *McLean* that an evaluation of a project's impacts under 9(K) must take into account the context of the surrounding area. *H.A. Manosh* at 21; *McLean* at 77-78. In *McLean* the Court confronted the visual and acoustic impacts of a quarry located along a designated Scenic Byway. In that case, the Board explained that the scenic byway designation, while not establishing separate standards, nevertheless informed the Board's analysis of the project's impact, and demonstrated that the scenic qualities of the area were "worthy of extra protection:"

> The Appellants also argue that the Project would interfere with the public's ability to use and enjoy Route 131. There is no question that the access road and hillside quarry would impact the special scenic qualities that led to Route 131's designation as a Scenic Highway. Although the designation of Route 131 as a Scenic Highway does not specifically limit development outside of the right-of-way, common sense demands that the Board look beyond the shoulder of the road to the scenic hillsides surrounding the road. Route 131 was designated a Scenic Highway because of the beautiful landscape that surrounds it, not because of any special attributes of its shoulder. Therefore, although the designation of Route 131 does not specifically limit development outside of the right-of-way, the Board views the designation as evidence of Route 131's special scenic qualities that are worthy of extra protection.
>
> Under Criterion 9(K), the question is whether the Project "materially jeopardizes or interferes ... with the public's use and enjoyment..." of the resource. There is no question that the Project would detrimentally impact the scenic qualities of Route 131. In fact, the Board has already ruled under Criterion 8 that the Project would have an undue adverse impact because of the visual impact to viewers, including those from the vantage point of Route 131. Given the scenic qualities of Route 131 that have received a special designation from the State, the Board holds that, at a minimum, the Permittee must satisfy the aesthetic protections in Criterion 8 in order to comply with Criterion 9(K). Since the Permittee did not satisfy Criterion 8, the Board concludes that the Project would materially interfere with the public's use and enjoyment of Route 131.
>
> The Appellants also argue that the Project would also interfere with the safety of Route 131. Under Criterion 5, the Board has already determined that the increase in truck traffic is relatively insignificant compared to the already substantial truck traffic that uses Route 131. However, the Board also held that the Permittee did

> not produce sufficient evidence for the Board to determine whether trucks turning on to or from the access road would interfere with the safety of Route 131. In light of the same evidentiary shortcomings, the Board concludes that the Permittee's did not meet their burden of proof that the Project complies with Criterion 9(K).

McLean at 77-78. Each part of the Board's analysis in *McLean* is relevant here: Route 100B is a designated Scenic Highway; as the management plan makes clear, it is the scenic attributes of the river and its surrounding hillsides that qualify the area as unique and beautiful. Route 100B Management Plan (Exh. T-9). And, as in *McLean,* the face of the quarry and its steep access road will be visible from Route 100B on the scenic forested hillsides of the Mad River Valley. *See* Town's Findings at ¶¶ 201-243 In fact the aesthetic impacts here are even more significant than in *McLean* as the acoustic impact of the quarry will also be clearly audible along the scenic byway and will violate the "shocking and offensive" dBA standard on large, popular stretches of the Mad River. The Applicant cannot satisfy Criterion 8, and the Project must also be denied under Criterion 9(K).

The Board's discussion of impacts on traffic and public safety in *McLean* are also relevant here. As described above, the Applicant has failed to provide sufficient evidence that its vehicles can access the highway in a safe manner. *See* traffic discussion, *supra* at Part III In fact, the Applicant clearly used the wrong standards in attempting to determine the necessary sight distance, thereby leaving all of the traveling public (including school busses) open to serious danger along this hill section of Route 100B. *Id.* And as discussed further above, the Applicant also failed to present evidence on the potential impacts on public investments in the Village of Moretown itself – including the Elementary School, Municipal Offices, and an extensive

recreational complex including two playgrounds, soccer fields, tennis courts, a baseball diamond, hiking and nature trails, and a Town forest.

In *McLean*, the Board also determined that the proposed quarry would materially jeopardize or interfere with the public's use and enjoyment of the Black River because the Applicant's erosion control plan "lacks specificity concerning, amongst other things, the phasing of construction activities. . ." *McLean* at 77. That same problem also arises here. As described in more detail in the Neighbor's Brief and Reply, as well as in the Town's Findings at ¶ 426, the Applicant does not know when it will construct the proposed stormwater pond upon which its water expert's testimony relies. And more importantly, the Applicant has now proposed a new blasting plan and quarry orientation, which both its blasting expert and water expert acknowledge is completely inconsistent with its planned location for the alleged stormwater pond. *Town Cross-examination of Rath* (12/15/08); *Town Cross-examination of Nelson* (1/16/09). Mr. Nelson, the Applicant's water quality expert, testified that his erosion control and peak flow analysis depended upon construction of the stormwater pond, and that he had done no analysis in the absence of such a facility, and that he did not know when the pond would be constructed. *Town Cross-examination of Nelson* (1/16/09). Without such evidence, the Applicant cannot establish that the Project's water pollution impacts will not materially jeopardize or interfere with the public's use or enjoyment of the Mad River. *See McLean* at 77.

In short, the Applicant has not provided sufficient information for the Court to make a positive determination under Criterion 9(K) or the Moretown Zoning Regulations. The Project should be denied.

IX. Moretown Town Plan (Criterion 10)

The Town of Moretown stands on its previous Findings of Fact and Conclusions of Law with respect to Criterion 10, and offers the following limited responses to issues raised by the Applicant in its Proposed Findings and Conclusions.

The majority of Applicant's argument on Criterion 10 simply rehashes its pre-trial motion concerning whether quarrying is allowed in the AG-RES district. Applicant's Findings at 104-106. The Court has already concluded that quarrying activities which involve crushing are not "*per se*" prohibited in this area of Moretown; the question that remains is whether the Project can be accomplished in a manner that conforms to the other relevant provisions of the Town Plan, Act 250, and the local zoning ordinance. As the Court explained at the time, "[w]hether this specific Quarry complies with the applicable use provisions remains at issue for trial." *Appeal of Rivers Development, LLC*, Dkt. #s 7-1-05 Vtec & 68-3-07 Vtec, Decision on Rivers' Initial Motions (Corrected) at 8 (Vt. Envtl. Ct. Jan. 18, 2008) ("Decision on Rivers' MSJ").

Nevertheless, Rivers essentially argues that because quarrying is not prohibited, the particular quarry it proposes here must be allowed under the Town Plan. That argument misses the mark. Just because the Town Plan contemplates some limited earth extraction activities does not mean that Rivers' significant industrial quarry operation is appropriate or allowable in this particular location. The evidence submitted at trial shows that it is not, as outlined above and extensively in the Town and the Neighbors' initial briefs.

The Applicant also argues that Land Use Policy #5 is not sufficiently specific or mandatory to be applied under Criterion 10. Applicant's Findings at 105-106. The Court has already concluded that this provision is not "mandatory" under Criterion 10. However, as

discussed above, the language does rise to the level of a clear, written community standard, and should be applied through Criterion 8, as the relevant inquiry under that criterion is different from the analysis under Criterion 10. *Re: McLean Enterprises Corporation*, #2S-1147-1-EB, FCO at 56 (November 24, 2004). In short, the Project's heavy industrial impacts – including visual, acoustic, public safety and traffic impacts – are not compatible with the scenic, agricultural, and rural Route 100B corridor.

Next, the Applicant seeks to avoid application of the specific and mandatory language in the Town Plan that prohibits earth extraction projects that "permanently scar the landscape" or "unreasonably impact adjacent neighbors." *Moretown Town Plan* (Exh. R-33 at 35). Rivers argues that the term "permanently scar" is too vague or ambiguous to be reasonably applied. This argument must be rejected under the "law of the case" doctrine. The Court has already determined that this provision of the Town Plan is sufficiently specific to be applied to the Project. In its decision on the Neighbors' Motion for Summary Judgment, the Court concluded that that provision applied to the Project, but found that there were disputed issues of material fact regarding the impact of the exposed quarry face. *Appeal of Rivers Development, LLC*, Dkts. 7-1-05 Vtec & 68-3-07 Vtec, Decision on Neighbors' Motion for Summary Judgment (Corrected) at 8 (Vt. Envtl. Ct. Jan. 18, 2008) ("Decision on Neighbors' MSJ") (noting that provision applied to the Project and that the only material fact in dispute is "whether there is sufficient exposure of rock face to constitute a permanent scar.").

Rivers did not dispute that this provision was specific and mandatory under Criterion 10 in response to the Neighbors' motion (in which the Town joined). It has waived the argument, and cannot now ask the Court reconsider its previous decision:

> It is a rule of general application that a decision in a case ... of last resort is the law of that case on the points presented throughout all the subsequent proceedings therein, and no question then necessarily involved and decided will be reconsidered by the Court in the same case on a state of facts not different in legal effect. ... [T]he result [of reversing former decisions in the same case] would be mischievous because if all such questions are to be regarded as still open for discussion and revision in the same cause, there would be no end to the litigation until the ability of the parties or the ingenuity of their counsel were exhausted.

Perkins v. Vermont Hydro-Electric Corp., 106 Vt. 367, 415-16 (1934) (quoting *Barclay v. Wetmore & Morse Granite Co.,* 94 Vt. 227, 230 (1920); *see also, Coty v. Ramsey Assocs., Inc.,* 154 Vt. 168, 171 (1990) (describing "law of the case" doctrine).

Even if the Court were to reconsider its prior determinations, Rivers' reliance on *In re: Appeal of JAM Golf* is also misplaced. In *JAM Golf*, the Vermont Supreme Court concluded that a provision of the South Burlington zoning ordinance which sought to "protect important natural resources including streams, wetlands, scenic views, wildlife habitats and special features such as mature maple groves or unique geologic features" was ambiguous and unenforceable. *In re: Appeal of JAM Golf, LLC,* 2008 VT 110, ¶12. The Court concluded that the term "protect" was ambiguous because it did not provide any standard as to what was necessary for protection of the habitat: "[t]he language of the regulations offers no guidance as to what degree of preservation short of destruction is acceptable under the statute." *Id.* at ¶ 14.

The provision at issue here does not suffer from such ambiguity: the Town plan expressly prohibits *all* earth extraction activities that permanently scar the landscape. The absolute prohibition on such scars is clear and express: "the DRB shall . . . ensure that the extraction of gravel and other mineral resources *does not* permanently scar the landscape . . . ". Nor are the terms "permanent" or "scar" unreasonably vague; those terms are both subject to simple

concepts of statutory construction. Indeed, the Vermont Supreme Court has previously emphasized that a term is not automatically ambiguous just because it is undefined. Terms that are not specifically defined are simply given their "plain and commonly accepted meaning." *See Vincent v. State Retirement Board*, 48 Vt. 531, 535-36, 536 A.2d 925, 928 (1987). The Merriam-Webster online dictionary defines "permanent" as "continuing or enduring without fundamental or marked change," and defines "scar" as "a bare place on the side of a mountain." The proposed Project here will unquestionably result in a continuing or enduring bare place on the mountain side. The Applicant is creating a 17+ acre hole in the side of a mountain and has no reclamation plan to re-vegetate or otherwise cover the face of the quarry and its benches or its access road. The face of the quarry, its benches, and the nearly 100-foot-wide access road will be permanently visible from the Route 100B corridor and the scenic Moretown Common Road.[21]

In an attempt to avoid the self-evident conclusion that the Project is not consistent with this provision of the Plan, the Applicant cites irrelevant case law to suggest that the specific mandatory language should be applied loosely, rather than literally. In particular, the Applicant cites *In re: Miller*, 170 Vt. 64, 69 (1999), which concluded that an "adverse effects test must be reasonably applied." Applicant's Findings at 106-107. The requirement that earth extraction projects do not permanently scar the landscape is not an "adverse effects test" similar to the one at issue in *Miller*. In contrast to questions that require some subjective evaluation of adversity,

[21] The Project similarly violates the Plan's provisions that require that earth extraction projects not "unreasonably impact adjacent neighbors." As discussed in detail above under Criterion 8, the evidence in this case demonstrates that the Project will violate recognized noise levels of 50 dBA Lmax (as well as the 55 dBA Lmax standard), which the Board has previously applied under Town Plan language similar to the language here.

this provision of the Town Plan is clear and objective. Simply put, it is a strict prohibition on permanent scars resulting from earth extraction projects.

Rivers also argues that the "permanent scar" provision is impractical and should not be enforced in this case because River's operation is *just too big to reclaim.* Applicant's Findings at 106. This argument concedes that there is, in fact, a scar which violates the plan, and asks the Court to legislate a special exception for the Project. There is no special exception in the prohibition for huge industrial quarries. The prohibition on permanent scars establishes the same standard for every earth extraction project in town, and the level of reclamation is, of course, necessarily proportional to the extent of disturbance caused by the Project. Everyone knows it takes more effort to clean up a bigger mess. Exempting large industrial quarrying operations from this prohibition because they made a bigger mess would be unfair, and would lead to absurd results, encouraging only large projects which allegedly cannot be "practically or economically" reclaimed. Such a loophole would eviscerate the Town's intentional efforts to preserve its scenic and natural resources. The Applicant could have proposed a smaller facility, or a different design, which could be reclaimed in an economically viable manner. Instead it elected to pursue a project that maximizes the Applicant's economic interests, while at the same time sacrificing the public resources that will permanently bear the burdens of the facility after it is abandoned. The Applicant should not be rewarded for that choice by receiving a pass on its clean-up obligations.

Finally, the Applicant argues that the steep slopes provision of the Town Plan should not be applied to its facility. This issue has been thoroughly briefed by the parties. The Town stands

on its previous briefing, and responds here to only to a few findings and arguments advanced by the Applicant in order to ensure that the record is clear, should this matter result in an appeal.

First, Rivers continues to assert that the provisions in the Town Plan regarding development on steep slopes are inconsistent and unenforceable. Applicant's Findings at 103 (citing *JAM Golf*, 2009 VT at ¶ 17). The Town maintains that there is no inconsistency between the general, introductory discussion of steep slope issues in Chapter Four, and the express prohibition on all development on slopes in excess of 25% established in Land Use Policy #7. It is not uncommon for Town Plans to include general discussions of particular concerns, present background information on those concerns, and then, based on that information, set specific enforceable policies for the Town. That is exactly what the Town Plan here does. In fact, the Town Plan itself is very clear in its structure. On page 3, under "organization and format" the Plan states:

> Chapters two through seven address a variety of topics, including the Town's population, housing, transportation, natural resource and cultural resources, and land use. *These chapters including background information related to each topic, and were appropriate projections or anticipated changes and planning considerations. The end of each chapter sets forth related goals, policies and specific tasks and strategies.*

Moretown Town Plan (Exh. R-33 at 3) (emphasis added). With respect to enforceable standards under Criterion 10, the Plan is also very clear:

> One of the 10 Criteria that projects must meet to comply with Act 250 is that the development should be in conformance with the town plan. In the case of Moretown, conformance should be determined by whether the proposed development is consistent with *specific policies listed at the end of chapters 2-7.* If a project is not consistent with a *specific policy*, it should be determined to be not in conformance with the plan.

Moretown Town Plan (Exh. R-33 at 72) (emphasis added). Thus, as outlined in the Plan, each chapter first provides "background information" on particular issues, and then sets out "specific policies" at the end of the relevant chapters to establish standards that should be enforced through Criterion 10.

The Town's Planning for steep slopes follows this clear, logical structure. In Chapter 4, the Town Plan introduces and provides "background information" on steep slope issues. Part of this background information includes summarizing the Natural Resource Conservation Service classifications and recommendations for development on steep slopes. As part of its summary of the NRCS findings, the Town Plan explains that "generally, slopes in excess of 25% should not be developed and clearing for agriculture and forest should be conducted with careful attention to erosion control and stormwater management." *Moretown Town Plan* (Exh. R-33 at 24). This background summary of NRCS recommendations does not, and under the plain language of the plan, clearly was not intended to, set any specific policy for the Town. It is merely background information. The specific policies adopted by the Town are not set out in its background discussion – they are enumerated in the "policy" section at the end of the chapter related to land use development. Those policies clearly and unambiguously provide that "development on slopes in excess of 25% shall be prohibited." *Id.* at 68. This prohibition is not inconsistent with the general summary the Town provides of NRCS recommendations – in fact, the final policy is clearly informed by the NRCS recommendation that such development should "generally" be avoided.

The Applicant cites *JAM Golf* to support its claim that the Town's steep slope prohibition cannot be enforced. In that case, the Supreme Court concluded that when "multiple general

policies in a plan are in conflict, and the plan provides insufficient guidance as to how the competing interests must be balanced, the competing policies become unenforceable." While this is a correct statement of the Court's holding in *JAM Golf*, Rivers' application of that case here is misplaced. First, as noted above, there is no "conflict" or inconsistency in the Town's steep slope policy or other Plan provisions. Furthermore, even if there were such a general conflict, the Moretown Town Plan provides clear guidance on how to balance these allegedly conflicting provisions. River's interpretation of *JAM Golf* overlooks or ignores the Court's important warning that potentially competing policies *only* become unenforceable *when the plan fails to provide a means of balancing conflicting policies*. *Id.* In defining its purpose, the Town Plan here states: "The *policies* set forth in this plan address a wide range of topics and are designed to serve as the town's unambiguous position during the Act 250 and other review processes." *Moretown Town Plan* (Exh. R-33 at 2) (emphasis added). And as noted above, the Plan then unequivocally states that conformance under Criterion 10 "should be determined by whether the proposed development is consistent with *specific policies listed at the end of chapters 2-7." Moretown Town Plan* (Exh. R-33 at 72) (emphasis added). Thus, even if there were some conflict between the general background discussion on page 24 and the specific policy established at the end of Chapter 7, the internal balance in the plan is clear: specific policies listed at the end of chapters 2-7 must be afforded priority over other statements under Criterion 10. The Town maintains its position that Land Use Policy #7 is clear, mandatory, and unambiguous, and that it prohibits the Project.

The Applicant also argues that Land Use Policy #7 is not applicable because it plans to "remove the steep slopes." Applicant's Findings at 108. This assertion is not correct. It is

undisputed that portions of the development – including the access road, and the service road – will be constructed on steep slopes. *See* Town's Findings at ¶¶ 413-417. Moreover, even if the Project were to "remove" some slopes, the evidence here still demonstrates that the Project will result in the exact types of impacts the steep slope prohibition was intended to protect against, including soil erosion, stormwater runoff, and aesthetic impacts. Town's Findings at ¶¶ 179-302; Neighbors' Findings at ¶¶ 250-482.

Finally, the Applicant's arguments regarding steep slopes at the Moretown Landfill are completely irrelevant. The situation in the Moretown Landfill is wholly distinct from the situation here. The Town's ability to regulate development at the Moretown Landfill is substantially limited by state law. Under Title 24, the Town's authority to regulate landfill-related development is restricted to: "location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements, *and only to the extent that regulations do not have the effect of interfering with the intended functional use*." 24 V.S.A. § 4413(a) (emphasis added). Quarrying at the landfill is necessary to its continued functional use; the landfill cannot be expanded without some removal of rock to create a new cell. Town regulation such as the Town Plan's steep slopes policy is applicable to the proposed Rivers development, but does not apply to landfills. Indeed, the Town's zoning regulations identify quarrying activities at the landfill as a permitted use exempt from conditional use regulation. Moretown Zoning Regulations, App. C (2006); *see also* Applicant's Opp. to Town's Motion for Judg. at n. 6 & Exh. 13. As a result, the fact that the steep slopes provision of the Town Plan was not raised or evaluated in the

Moretown Landfill case does not provide any guidance with respect to the application of the same prohibition in this case.

X. <u>Moretown Zoning Regulations</u>

The Town stands by its initial Findings with respect to its analysis under the Moretown Zoning Regulations, and also adopts the Neighbors' Findings and Reply with respect to impacts under the zoning regulations. The responses above in this Reply address the Project's inability to comply with certain specific components of the MZR; the Town offers the following additional responses to several general arguments raised by the Applicant concerning application of the zoning regulations.

First, the Applicant uses legal arguments to avoid the greater (and obvious) conclusion that the proposed Project fails to conform with the character of the area affected in numerous respects detailed in the Town's Findings, herein, and in the DRB decision denying Rivers' permit. *See* Exh. Town Cross-14.

Second, the Applicant makes the broad argument that the Court must read the term "undue" into certain provisions of the MZR that prohibit a range of "adverse" impacts, including section 5.2 and section 4.10(A). *See* Applicant's Findings at 81-82. Citing *In Re Walker*, 156 Vt. 639 (1991), Rivers argues that the term "adverse impact" is equivalent to "undue adverse impact" when used in a conditional use standard. This is a clear misstatement of law. As outlined in the Town's and the Neighbors' initial Findings, neither *Walker* nor *In re Miller,* 170 Vt. 64, 69 (1999), stand for the proposition that the term "undue" must be read into conditional use standards. Those cases emphasize that an adverse impact must be either substantial or

material for a conditional use application to be denied. Rivers seeks to further expand this case by equating "substantial" or "material" adverse impacts with "undue adverse impacts." That goes too far; the terms are distinct, and the Town clearly knew the difference between the terms, electing to use "adverse" in some provisions and "undue adverse" in other. *In re: Miller Conditional Use Application (After Remand)*, Docket No. 59-3-07 Vtec at 8 (Vt. Envtl Ct., Nov. 5, 2007) (internal citation omitted) (stating that when interpreting zoning regulations, the "goal is to affect the intent of the drafters, as evidenced by the plain text of the regulation. Where the meaning is clear, [the Court] must enforce the Regulation according to its terms. . . . .").

The Court may not deny a project under § 5.2 for *de minimis* adverse impacts, but it need not find that such impacts rise to the level of "undue adverse" to conclude that the Project violates the Moretown Zoning Regulations. And as described extensively in the Town's filings, the evidence here demonstrates that the Project will have a substantial and material adverse impact under §§ 5.2 and 4.10(A) (as well as violating other provisions of the MZR).[22]

Third, the Applicant also argues that sections 4.10(A), (B)(3), and (B)(4) of the MZR are vague and standardless and therefore cannot be enforced. Applicant's Findings at 96-97 (citing *JAM GOLF,* 2008 VT 110). This argument stretches the recent *JAM Golf* to the extreme and is clearly unreasonable. Sections 4.10(A) and (B) of the MZR provide specific "performance standards" applicable to all activities in the Town of Moretown. They focus on protecting the public health, safety and welfare of the residents of Moretown, and as such, embody the most traditional municipal police powers.

[22] While the distinction in these standards is important, the evidence in this case demonstrates that Project would violate the conditional use standards even if they were interpreted to mean "undue adverse impacts."

Section 4.10(A) provides:

> No land or structure in any zoning district shall be used or occupied in any manner so as to create dangerous, injurious or noxious conditions that adversely affect the reasonable use of adjoining or nearby properties.

Section 4.10(B)(3) provides:

> No fire, explosive, or safety hazard shall be permitted which significant endangers properties owners or which results in significantly increase burden on municipal facilities.

Section 4.10(B)4) provides:

> No smoke, dust, dirt, or noxious gases which endanger or adversely affect the health, comfort, safety, or welfare of the public or neighboring property owners, or which causes damage to property, business, or vegetation shall be permitted.

These clear public health, safety, and welfare performance standards are in no way similar to the vague provision the Vermont Supreme Court struck down in *JAM Golf*. *See JAM Golf,* 2008 VT 110, ¶9-10 and discussion of this case *supra* at page 58.

The Applicant seems to interpret *JAM Golf* as an opportunity to claim that *any* grant of discretion to a decision-maker is standardless and therefore unenforceable. That position finds no foundation in case law or common sense. Providing decision-makers discretion to determine when a particular project's impacts rise to the level of creating a danger to public health or safety does not make such standards unconstitutional. Indeed, Act 250 itself contains similar clauses. *See* 10 V.S.A. §6086 (a)(1)(E) ("a permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, *and will not endanger the health, safety, or welfare of the public or of adjoining landowners."*) (emphasis added). As the Vermont Supreme Court recently explained, a grant of

discretion does not automatically infer ambiguity or otherwise demonstrate that a standard is unenforceable:

> As we have noted, some Board determinations are inherently fact-based and do not easily fall within "inflexible definitions." *In re Rusin,* 162 Vt. at 190, 643 A.2d at 1212. We will not equate a grant of agency discretion with ambiguity, nor will we afford to appellant a presumption of ambiguity where the outcome of a determination depends to some extent upon agency discretion that has been conferred by statute.

In re S-S Corporation/Rooney Housing Developments, 2006 VT 8 ¶ 13, 179 Vt. 302, 307, 896 A.2d 67, 72 (upholding the Board's interpretation of the term "unit" in the absence of statutory definition for the term.). The Applicant would apparently have this Court strike down every provision of law based on common law public health, safety, and welfare standards. That argument goes too far. The Applicant's desperate effort to escape these clear provisions should be rejected. The evidence demonstrates that the Applicant cannot comply with these clear standards.

XI. Conclusion

For the reasons outlined above and in the Town's initial Proposed Findings of Fact and Conclusions of Law, the Town of Moretown respectfully requests that the Court deny the pending application. The evidence demonstrates that the proposed Project cannot comply with the Moretown Zoning Regulations or Act 250 Criteria 5, 6, 7, 8, 9(e), 9(k) or 10.

April 27, 2009 Town of Moretown

by: __/s/______________________

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