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By Hand Delivery

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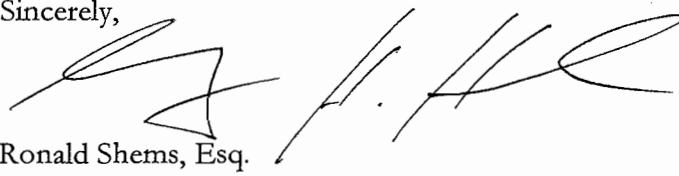
Re: In re: Rivers Development Conditional Use Appeal and Rivers Dev. Act 250 Appeal
Dockets No. 7-1-05 Vtec and 68-3-07 Vtec

Dear Ms. Fletcher:

Enclosed please find the Town of Moretown's *Opposition to Applicant's Motion to Alter* in the above-referenced dockets.

Please let me know if you have any questions.

Sincerely,



Ronald Shems, Esq.
Geoffrey H. Hand, Esq.
SHEMS DUNKIEL RAUBVOGEL & SAUNDERS PLLC

cc: Service List

Encl.

**STATE OF VERMONT
ENVIRONMENTAL COURT**

In re: Rivers Development Conditional Use Appeal)	Docket No. 7-1-05 Vtec
In re: Rivers Dev. Act 250 Appeal)	Docket No. 68-3-07 Vtec
)	

TOWN OF MORETOWN’S OPPOSITION TO APPLICANT’S MOTION TO ALTER

The Town of Moretown Selectboard, the Moretown Planning Commission, and the Moretown School Board (collectively the “Town of Moretown”) hereby oppose Rivers Development LLC’s (the “Applicant’s”) Motion to Alter the Court’s judgment in this case. The Applicant’s Motion is largely just a restatement of old arguments already considered and rejected by the Court. The Applicant also attempts to present new evidence never previously presented, and now makes arguments directly contrary to its own witnesses’ testimony at trial. The Court should not entertain these arguments.

The Court’s March 25, 2010 decision as it relates to the issues raised in the Applicant’s Motion to Alter was well-reasoned and well-supported by the facts presented at trial. The Court properly concluded, based on substantial evidence and without clear legal error – much less error resulting in manifest injustice – that the proposed industrial quarrying activity does not fit in the context of the scenic Mad River Valley and would have an unduly adverse impact on the surrounding area, and violates Moretown’s zoning ordinance and Town Plan. The Applicant clearly disagrees with this conclusion – just as it disagreed with the previous decisions from the DRB and the District Commission which reached similar conclusions. In its continuing refusal to accept what every impartial decision-maker has thus far confirmed, it now brings a scatter-shot attack on this Court’s decision, raising a litany of perceived errors. None of the Applicant’s arguments present any actual errors that would warrant a second look at, let alone suggest any

basis for, reconsideration (or reversal) of the Court's decision. For the reasons outlined below the Court should reject the Applicant's Motion to Alter.

I. Standard of Review

The standard of review for motions to alter is extremely restrictive. As this Court has explained on numerous occasions granting relief in a motion to reconsider is "an extraordinary remedy that should be used sparingly." *In re Bouldin Camp – Noble Road*, No. 278-11-06 Vtec, slip op. at 1 (Vt. Env'tl. Ct. Sept. 13, 2007) (Wright, J.). Disagreement between the moving parties and the court is not grounds for reconsideration. *In re Boutin PRD Amendment*, No. 93-4-06 Vtec, slip op. at 2 (Vt. Env'tl. Ct. May 18, 2007) (Wright, J.). Indeed, there is little room for such disagreement because evidence must be considered in the light most favorable to upholding the judgment. *Hardy v. Berisha*, 144 Vt. 130, 133 (1984); *Gregory v. Vermont Traveler, Inc.*, 140 Vt. 119, 121 (1981).

Motions to reconsider should not be used to repeat arguments that have been raised and rejected by the court in the earlier decision. *Id.* at 1. Nor should such a motion be used to present evidence that could have been presented before the initial decision was made. *Rubin v. Sterling Enters.*, 164 Vt. 582, 589(1996); *In re S. Vill. Cmtys., LLC*, No. 74-4-05 Vtec, slip op. at 2 (citing 11 Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2810.0). The limited functions of a motion for reconsideration are "to correct manifest errors of law or fact on which the decision was based, to allow the moving party to present newly discovered or previously unavailable evidence, to prevent manifest injustice, or to respond to an intervening change in the controlling law." *In re Vanishing Brook Subdivision*, No. 223-10-07 Vtec, slip op. at 4 (Vt. Env'tl. Ct. July 10, 2008) (Wright, J.) (quoting 11 Wright, Miller, & Kane, Federal

Practice and Procedure: Civil § 2810.0 (2d ed. 1995)); see also *Appeal of Van Nostrand*, Nos. 209-11-04 & 101-5-05 Vtec, slip op. at 4 (Vt. Envtl. Ct. Dec. 11, 2006) (Durkin, J.).

The 2006 Reporter's Notes to Rule 59 state that Rule 59(e) (motion to alter or amend judgement) was "amended for conformity with the federal rules . . ." The federal courts' application of Rule 59(e) motion is equally restrictive:

To receive reconsideration, "the moving party must demonstrate controlling law or factual matters put before the court on the underlying motion that the movant believes the court overlooked and that might reasonably be expected to alter the court's decision." *Word*, 2004 WL 434038, at *2 (quoting *Parrish v. Sollecito*, 253 F.Supp.2d 713, 715 (S.D.N.Y.2003)); see also *Williams*, 219 F.R.D. at 83; *Borochoff v. GlaxoSmithKline PLC*, No. 07 Civ. 5574, 2008 WL 3466400, at *1 (S.D.N.Y. Aug. 12, 2008) ("The major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992))). Furthermore, "[r]econsideration of a court's previous order is an 'extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" *Montanile v. Nat'l Broad. Co.*, 216 F.Supp.2d 341, 342 (S.D.N.Y.2002) (quoting *In re Health Mgmt. Sys. Inc. Sec. Litig.*, 113 F.Supp.2d 613, 614 (S.D.N.Y.2000)).

Oguejiofo v. Open Text Corp., 2010 WL 1904022, 2 (S.D.N.Y.); *Senville v. Peters*, 2006 WL 2585130, 1 (D.Vt.) ("narrow aim" of Rule 59(e) is to correct clear legal error or to prevent manifest injustice of law). The burden of establishing manifest error rests on the party moving for reconsideration. See *Oguejiofo v. Open Text Corp.*, 2010 WL 1904022 at *2. Given this strict standard of review, motions to reconsider are usually denied. *In re S. Vill. Cmtys., LLC*, No. 74-4-05 Vtec, slip op. at 2 (citing 11 Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2810.0).

II. Applicant's Motion is not a Proper Motion to Alter and should be Dismissed.

The Motion before this Court fails to meet the most basic standard for a motion to alter. The Applicant does not focus on alleged manifest errors of fact or law, but rather spends more than thirty pages generally disputing the Court's well-reasoned and well-supported conclusions on a wide range of factual issues. If there were truly a manifest error of fact or law in the Court's decision, the Applicant should have no problem identifying such clear error with specificity. It has not and cannot, because there are no such errors. Instead the Applicant has merely recycled its old arguments and thrown them back against the wall, hoping something might stick on second try. Indeed, Rivers argues that *all* of the Court's reasons for denying the permit are wrong. This type of never-ending effort to re-litigate the issues is exactly what the stringent standard of review for motions to alter is intended to protect against.

It is extremely time and resource intensive (and prejudicial) for the parties (and the Court) to again wade through this matter's extensive record to dismiss, one-by-one, the Applicant's repetitive claims. And the Applicant's approach here makes the job of responding to its general claims of "error" even more difficult by failing, in most cases, to provide any reference to the record evidence it relies on to support its arguments. Throughout its motion the Applicant alleges numerous errors of fact, yet in many instances the Applicant does not specifically cite or identify the findings or conclusions it believes must be altered, does not specifically identify how each of those individual findings or conclusions should be altered to address the error, and fails to specifically cite the evidence or pieces of evidence it believes compel such alteration. Without such specificity, the reader is left to speculate as to exactly what alterations are necessary and why, and has no way to reasonably and specifically respond to the evidence allegedly supporting the claimed error.

In a detailed and lengthy case such as this, an organized presentation of the claimed errors is critical to the parties' (and the Court's) reasonable review and response to the issues presented. *See* Act 250 Rule 31(A)(2) ("A motion to alter should number each requested alteration separately. The motion may be accompanied by a supporting memorandum of law which contains numbered sections corresponding to the motion. The supporting memorandum should state why each requested alteration is appropriate and the location in the existing record of the supporting evidence."). The Applicant's Motion entirely lacks such specificity, and neither the parties nor the Court have an obligation to search the record to find evidence alluded to, but not identified by, the Applicant. It is the Applicant's burden to identify such evidence in the first instance. *See Oguejiofo v. Open Text Corp.*, 2010 WL 1904022 at *2 ("the moving party must demonstrate controlling law or factual matters put before the court on the underlying motion that the movant believes the court overlooked and that might reasonably be expected to alter the court's decision.") (internal quotations omitted). The Applicant's Motion fails to carry this burden and must be dismissed.

III. Response to Applicant's Arguments

As noted above the Applicant has presented a long list of perceived , but misplaced , grievances with the Court's decision. The Town has expended significant public resources over the past six years defending against this ill-conceived project, and while Moretown continues to strongly oppose the project, it cannot continue to match the Applicant dollar-for-dollar in its never-ending and repetitive litigation. Moretown greatly appreciates the Court's acknowledgement that this matter has been subject to substantial delay. Of course, much of that delay is due directly to the Applicant's own request to bifurcate the trial, and substantial time it took the Applicant to prepare additional evidence. The costs, delay, and resulting uncertainty

have been significant burden for the Town and its residents and the Town appreciates the Court's effort to craft a complete decision designed to bring this matter to a prompt and final resolution.

The Town briefly addresses the primary points in the Applicant's Motion that relate to the Town's interests below. It cannot, and under Rule 59(e) should not have to respond in enumerated fashion to all of the Applicant's scatter-shot of claimed errors, particularly given the Applicant's failure to fairly and specifically identify the findings and conclusions it seeks to alter and the evidence supporting its arguments for such alteration. For issues not specifically addressed herein the Town relies on its previously filed Findings of Fact and Conclusions of Law and Reply Brief, and further adopts and relies on the Neighbors' response to the Applicant's Motion. The following response addresses the issues raised by the Applicant under criterion 8, 9(E) and (10) and related provisions of the Moretown Zoning Ordinance ("MZO").

- a. The Court's Findings and Conclusions under Criterion 8 and MZO §3.5, 4.10 and 5.2 are well supported by the Record and the Applicant has failed to identify any manifest error of fact or law that would warrant reversal.

The Applicant broadly disputes the Court's conclusion that the Project will have an undue adverse impact on the scenic and natural beauty of the area around the proposed quarry. It raises several arguments, none of which suggest any clear error of fact or law or manifest injustice. First, the Applicant argues that the Court's findings and conclusions under Criterion 5, 6, and 9(K) are wrong, or are inconsistent with its conclusions under Criterion 8. It then disputes essentially all of the Court's conclusions under Criterion 8 and MZO §§ 3.5, 4.10, and 5.2. These disputes of fact and claimed inconsistencies do not form a foundation for reconsideration or reversal of the Court's decision.

- i. Criterion 5 as it Relates to Criterion 8

With respect to Criterion 5, the Applicant asserts that the Court's finding of a near doubling of heavy trucks on Route 100B and through Moretown Village is mistaken and thus should not have influenced the Court's conclusion under Criterion 8. Motion at 2, 8–10. However, there is ample record evidence of such an increase in heavy truck traffic. Rivers' traffic expert, in fact, conceded that the proposed quarry would approximately double "heavy truck traffic" on Route 100B and through Moretown Village. Transcript of Roger Dickinson Cross-Examination (Feb. 22, 2008) at 13 (Attachment B to Town of Moretown's Proposed Findings of Fact and Conclusions of Law (Mar. 27, 2009)). Importantly, in providing this estimate of a doubling of heavy truck traffic, Mr. Dickinson conceded that: (1) this heavy truck traffic would be generated by the proposed quarry, *id.* at 10–11, (2) the estimated doubling *excluded* other similar category trucks, *id.* at 11–12, and (3) that no analysis of so-called "truck intercepts" (trucks served by the proposed quarry that would otherwise travel over Rte 100B and through Moretown Village) was provided, *id.* at 15–18. This evidence is further supported by Michael Oman's testimony, the Town's traffic expert.

Moreover, Moretown agrees with the Neighbors' assertion that Rivers misconstrues and confuses the Court's findings relating to load sizes, truck sizes and truck categories.

Applying the Rule 59(e) standard, the above evidence amply supports the Court's findings and conclusions. Rivers cannot now make new arguments relating to truck categories, or now assert that truck intercepts should have been considered when it failed to present any intercept analysis. See Motion at 8. In short, Rivers' traffic claims are without merit.

ii. Criterion 6 as it Relates to Criterion 8

The Applicant also suggests that the Court's conclusion under Criterion 6 is inconsistent with its conclusions under Criterion 8 regarding aesthetic impacts on school grounds. This

argument seems to result from a misunderstanding of the Court's decision. The Court concluded that the aesthetic impact of the Project on school children and school administrators would be adverse under Criterion 8, *see* Decision at 55. It did not conclude that the aesthetic impact would be unduly adverse at the elementary school, although the Town continues to assert that it would be. The Court also then separately concluded that the impact of the Project would not result in an unreasonable burden on the municipality and the school under Criterion 6. The Town continues to dispute this conclusion as well, but there is nothing inconsistent in the Court's determination that the aesthetic impact, while adverse, would not necessarily result in an undue burden on municipal resources.

iii. Criterion 9(K) as it Relates to Criterion 8

The Court's findings and conclusions under Criterion 9(K) are similarly not inconsistent with its opinion under Criterion 8. The Town asserted that the Project would result in an undue adverse impact on the scenic attributes of the surrounding area, and the Court agreed, finding – based on substantial evidence – that the impact would be unduly adverse under Criterion 8. It then went on to conclude, however, that aesthetic impacts notwithstanding, the Project's impacts would not rise to the higher level of material jeopardy or material interference with the public's use and enjoyment of surrounding public investments. The Town respectfully disagrees with the Court's conclusions under Criterion 9(K), but the Court's distinct analysis of these two criteria is not clear error. A violation of Criterion 8 does not automatically lead to a violation of Criterion 9(K) – they are different standards (no undue adverse impact on aesthetics vs. material jeopardy or interference with the public's use and enjoyment). If the legislature had intended the analysis to be the same under these criteria it would have used the same standard, but it did not. The Applicant's reference to *Brattboro Chalet* does not suggest otherwise. That case, in fact,

emphasizes that the analysis under the two criteria is distinct, and implicitly acknowledges that a denial under Criterion 8 does not *automatically* compel a denial under Criterion 9(K), as the Applicant now suggests. *See Brattleboro Chalet*, No. 4C0581-EB, Findings of Fact, Conclusions of Law and Order at 11 (Vt. Env'tl. Bd. Oct. 17, 1984) (stating, after denying the project under Criterion 8, that the Board “*question(s) whether* the project could survive scrutiny under [Criterion 9(K)] as well.”) (emphasis added).

The Applicant oddly spends several paragraphs dissecting the Court’s discussion of the difference in the standard between criterion 5 and criterion 9(K). That discussion is entirely irrelevant here; regardless of whether the standard under 9(K) is described by the Court as higher or lower, it found for the Applicant on both criteria. There is no harm to the Applicant in that analysis, and certainly no manifest error of fact or law that warrants reversal of the Court’s conclusions (although the Town would be perfectly happy with the Court reversing its decision on Criterion 5 and/or 9(K)).

iv. Response Regarding Reference of the Route 100B Scenic Byway Designation

The Applicant also attacks the Court’s mention of the state Scenic Byway designation for Route 100B, suggesting that it was inappropriate for the Court to even note, as a matter of fact, that the road had been designated as a Scenic Byway. This argument mischaracterizes and misunderstands the Courts’ reference to the state scenic byway designation. The Court did not rely on the Scenic Byway designation as imposing an independent regulatory obligation, or otherwise imply that the Scenic Byway designation itself created a greater regulatory hurdle for the Rivers project, as the Applicant suggests. Rather, the Court simply acknowledged what the byway designation itself acknowledges – that this area is particularly scenic. *See e.g.*, Finding 27 (“traveling along Route 100B and that portion of the Mad River represents one of the most

beautiful highway and river traverses in our State.”), Finding 28 (“the views for a bicyclist along this section of Route 100B are picturesque, even breathtaking, especially as the highway travels close to the banks of the Mad River, which lies just east of Route 100B.”), and Finding 150 (“the area more than earns this scenic designation; it represents one of the most scenic and aesthetically charming areas that one can travel along a Vermont state highway. Testimony reviewed that the Route 100B corridor has been recognized as an especially scenic road since at least the early 1970s.”). These are all findings that stand independent of any Scenic Byway Designation. Simply stating that Route 100B has been registered as a scenic byway does not turn the byway designation into a regulatory document. And the fact that Route 100B has been designated as a scenic byway does not somehow prevent a Court from acknowledging the very scenic attributes that led to its designation. That would lead to an absurd result – artificially providing less protection for an otherwise uniquely scenic area, simply because the state has elected to recognize its scenic attributes.

The Court’s approach here follows well-established Environmental Board precedent when evaluating projects along a designated scenic byway. The Environmental Board in the *McLean* case considered a nearly identical situation, and in that case, noted the road’s designation as a scenic highway as a matter of fact, but did not reference the management plan in detail, or otherwise rely on the management document to independently prohibit the Project. *McLean Enters. Corp.*, #2S1147-1-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Env’tl. Bd. Nov. 24, 2004). Rather, it took the listing simply as further evidence of the scenic qualities of the area:

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.*

Id. at 77–78 (emphasis added). This is the exact same approach adopted by the Court in this case; it mentions the designation in Finding 149, but did not rely on the document as an independent regulatory document. It was entirely appropriate of the Court to proceed in this fashion; indeed the Court was required to give effect to this prior Environmental Board precedent. 10 V.S.A. Sec 8504(m) (“Prior decisions of the environmental board. . . . shall be given the same weight and consideration as prior decisions of the environmental court.”). The Applicant’s Motion blows this simple reference to the Scenic Byway designation far out of proportion in an effort to create an issue where none exists.

In addition, the Applicant did not object to admission of the byway designation into evidence in this proceeding – it stipulated to its admission and has waived any argument that it is not proper evidence in this proceeding.

The Applicant also glosses over important language in the scenic byway statute itself. The statute does not state, as the Applicant suggests, that a byway designation cannot be referenced by the Environmental Court. Rather, it provides that “nothing in this chapter shall preclude the rights of a landowner from developing property adjacent to a designated scenic road, *so long as the development is in accordance with the existing law or ordinance.*” 19 V.S.A. § 2505 (emphasis added). The Applicant would have the Court entirely disregard this second clause. In fact, it almost argues in its Motion that the project must be approved *because of the scenic byway designation.* See Motion at 7 (referencing portions of the byway manual that

emphasize the importance of maintaining access to “resource-based industries *where they exist*”) (emphasis added).¹

The Court’s decision in this case actually reflects a perfect application of section 19 V.S.A § 2505; the proposed development is not otherwise in accordance with existing law or the Moretown Zoning Ordinance and Town Plan, and the Court has properly denied the Project relying on those other regulations. In so doing, it also appropriately mentioned in passing that the very scenic attributes protected by Act 250 and the MZO and Town Plan also support the designation of Route 100B as a scenic resource.

Finally, and importantly, the Applicant’s argument confuses and conflates the Court’s mention of the state scenic byway designation with the Court’s reference and reliance on the Town’s designation of Route 100B as a scenic corridor in the Town Plan. These are two legally distinct designations. The Town has a clear prerogative to identify and protect important scenic resources in the Town, wholly separate from the state program for designating state-wide scenic byways. Indeed, in the long line of cases applying the *Quechee* test, the Environmental Board has expressly encouraged towns to make the effort to identify and protect the important scenic resources in their communities. *See e.g., Re: Town of Barre, #5W1167-EB, Findings of Fact, Conclusions of Law, and Order (June 2, 1994):*

In adopting the first standard in the *Quechee* analysis, the Board intended to encourage towns to identify scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road, for example. These designations would assist the district commissions and the board in determining the scenic value of specific resources to a town, and would guide applicants as they design their projects.

¹ In an extremely strained reading of the byway manual, the Applicant appears to suggest that its *yet to be approved use* is somehow now already an *existing use* that must be protected under the byway manual. That interpretation defies logic and every basic principle of land use planning and law.

Id. at 21.

Here Moretown has done just that with the important Mad River/Route 100B corridor and, as the Court correctly notes, a portion of the project is located within that scenic corridor and the noises and activity originating from the quarry will be felt, and are out of place, within the scenic corridor. The Court's conclusion that the proposed quarry's activity would shock and offend the average person is well supported by the record, and the Applicant has failed to identify any clear error of fact or law or manifest injustice that warrants reversal of these findings and conclusions².

- i. The Court's conclusions of law under Criterion 8 and MZO §3.5, §4.10, and §5.2 are well supported and are entirely consistent with prior case law.

The Applicant also levels a broadside attack on the Court's conclusions related to aesthetic impacts under Criterion 8, and its conclusions regarding impacts on the character of the

² The Town today received a copy of a letter from the Agency of Transportation (AOT), regarding the Scenic Byway designation, which was filed with the Court on June 3, 2010. AOT's letter likewise misconstrues the Court's reference to scenic byway designation, and appears to be based, at best, on limited knowledge of this case. AOT nowhere references the Town Plan's scenic corridor designation or relevant provisions of the MZO. Nor does AOT appear to be informed of prior Environmental Board precedent making similar reference to a scenic byway designation in the *McLean* case more than six years ago. The Agency's amorphous and undefined concerns over the "impact" of this Court's mention of the scenic byway designation ring somewhat hollow; the Town is not aware of any impact on the scenic byway program resulting from the Environmental Board's similar reference to a designation six years ago. Further, AOT made no attempt to contact the Town regarding this issue. Had AOT provided that simple courtesy, it would have determined that Moretown's (and the Court's) use of the scenic byway designation is entirely in keeping with the Town Plan and the local planning prerogatives mentioned in AOT's letter (as well as prior environmental board precedent), and is similarly entirely consistent with Moretown's efforts to foster economic growth consistent with all aspects of the byway designation. Further, perceived program issues should be addressed through the program and not through a letter to a Court with the potential for a host of unintended and uninformed consequences in this six-year matter. Counsel for AOT confirmed that the counsel for the Applicant has communicated with AOT about this issue. The Town hopes in the future that the Agency will attempt to gain a more complete and balance picture of a matter before seeking to file similar comments.

area and adjoining land uses under the MZO. The Applicant first disputes the Court’s conclusion that the Project does not “fit” the character of the area. It claims that the Town Plan supports mining in the area and based on that single citation appears to suggest that the Project’s aesthetic impact should not be considered adverse. Motion at 16 (asserting that “even the question of ‘fit’ is not so easily answered”). This claim is somewhat remarkable given that: (1) the Applicant’s own aesthetic expert conceded on cross-examination that the Project did not fit the surrounding area, *Town Cross-examination of T.J Boyle (2/19/06)*, and (2) the Applicant itself conceded that the Project’s impacts *were, in fact, adverse* in its initial brief. *Applicant’s Findings of Fact* at 69 (“The Applicant does not dispute that the Project’s impacts can be considered adverse”). The Applicant cannot change its mind now. The Court’s conclusion on this point rests on well-supported – indeed undisputed – record evidence; the decision needs no alteration.

The Applicant also critiques the Court’s reliance on *Brattleboro Chalet* and its discussion of the concept of “fit” under that decision and other *Quechee* cases. This argument is misplaced; the Court’s analysis of the Project’s “fit” is well-grounded in prior Environmental Board decisions, including the *Quechee* decision itself. *See Re: Quechee Lakes Corp.*, Nos 3W0411-EB and 3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Env’tl. Bd. Nov. 4, 1985). As the Court acknowledged in its decision, the Board in *Quechee* stressed that the concept of “fit” is the foundation for the entire Criterion 8 analysis. *Id.* (“In judging the impact of a proposed project on the values described in Criterion 8, the cornerstone is the question: Will the proposed project be in harmony with its surroundings—will it “fit” the context within which it will be located?”). The question of whether a project “fits” the context of the area is not therefore somehow artificially restricted to the first step in the *Quechee* test; rather it is *the* question the *Quechee* analysis is designed to help evaluate. Following this analysis, the

Court properly concluded, based on substantial evidence, that the proposed industrial quarry will be incompatible with the surrounding scenic river valley and will not fit with the context in which it is proposed.

The Applicant's repetitive arguments regarding the second step of the *Quechee* test deserve little attention. The Court properly noted that the scenic corridor designation in the Town Plan establishes a clear written community standard and that the Project would be heard and felt within the corridor and would contradict the very scenic attributes protected by that provision of the Town Plan. The Applicant's claims concerning the State Scenic Byway designation are addressed above, and the Town relies on its original briefing for responses to the Applicant's other arguments concerning clear, written community standards, as they are simply the same arguments already presented and previously rejected by the Court.

With respect to the shocking and offensive analysis, the Applicant presents several rhetorical questions, and then complains that it is "unable to see" how industrial quarry noises could possibly shock and offend the average person. Motion at 18–19. Argumentative, rhetorical questions do not meet the Applicant's burden under Rule 59(e). Rivers must provide specific evidence of a manifest error of fact or law. It has not and cannot do so. The Court's opinion that the Project would shock and offend the average person is well supported by the record here. The Court conducted numerous site visits to experience first-hand the scenic attributes of the area; it listened to extensive testimony over numerous days of trial from aesthetic experts, local residents, and individuals that use the scenic Route 100B/ Mad River corridor, and it properly assessed those witnesses' testimony and weighed their credibility on this point. Based on that evidence, the Court properly concluded that the overall aesthetic impact of

the project, including acoustic impacts, would be so out of character with the surrounding scenic area as to shock and offend the average person.

In response to this conclusion, the Applicant cites *Mclean*, apparently arguing that because the quarry in *Mclean* was not shocking and offensive, the Applicant's quarry cannot be shocking and offensive. One must struggle to find any trace of logic in this claimed analogy. A determination of whether a project is shocking and offensive is necessarily both project and context specific and the Environmental Board's conclusions in *Mclean* do not in any way compel an alteration in the Court's site and project specific conclusions here.³

The Court's conclusion under the shocking and offensive standard is not "an extreme departure" from prior cases, as the Applicant argues, nor does the decision in anyway suggest that all quarries proposed in populated areas where a quarry does not exist will be denied. This is mere hyperbole. As noted above, the Court's analysis here was entirely specific to the facts and evidence presented regarding this particular project and its context. Those facts demonstrated that the project would result in extremely intensive, industrial quarrying activity adjacent to an identified scenic corridor and in close proximity to numerous farms, residences, and recreational and scenic resources without an adequate buffer. It is this proposal – not generic future proposals – that the Court properly found would be shocking and offensive.

With respect to mitigation, the Applicant turns to its continuing theme that the Court should ignore the evidence presented at trial and just give it a permit with "appropriate operational conditions" (what exactly those conditions should be in this case, the Applicant does

³ Moreover, as the Town and the Neighbors have repeatedly emphasized, the Applicant in this case, like the Applicant in *Mclean*, has not met its burden of proof concerning the Project's potential aesthetic impacts. Here the Applicant has firmly and continuously refused to present any modeling or other evidence of the Project's complete acoustic impacts, including trucks traveling up and down the haul road.

not say). Motion at 23–24. Remarkably, the Applicant’s Motion does not actually point to any specific evidence that would indicate that it could mitigate the undue adverse impacts identified by the Court. Without pointing to a specific error of fact or law, there is no basis for modifying the Court’s conclusion that there are no “further mitigation efforts that could sufficiently offset the quarry’s impacts.” That conclusion, like the Court’s other conclusions, is well supported by the record. And yet, despite the utter lack of evidence in the record indicating that the Applicant could actually mitigate these impacts, the Applicant simply asserts that it is somehow entitled to a permit with conditions. It cites no case law supporting this novel “permit entitlement” argument because there is none. Indeed, the Applicant’s argument on this issue directly conflicts with Environmental Board precedent, and should be rejected. *McLean* at 62 (“it is contrary to common sense and could result in irreparable environmental harm to grant a permit authorizing a project with permit conditions which alleviate the undue adverse impacts, if the evidence indicates the Permittee cannot comply with the conditions.”).

The Applicant also asserts in this portion of its Motion that the Court denied the Project “simply because quarry noise is not present prior to the quarry or because quarry noise is different from existing noises.” Motion at 23. This argument mischaracterizes the Court’s decision (and also ignores Rivers’ own failure to assess the significant impact of noise from trucks on the haul road). While the absence of any on-going quarry or other industrial activities in the area certainly – and appropriately – played a role in the Court’s analysis, the project was not denied “simply” because of this fact. Rather, as is quite clearly spelled out in the Court’s decision, the Project was denied because, among other things, its impacts as a whole on the surrounding area would be so significantly out of character with the expected scenic nature of the area as to shock and offend the average person, and also, because the Project cannot meet clear

standards established for noise limits in prior Board cases, as well as those specifically adopted in the Moretown Zoning Ordinance. The Court's conclusions on these aesthetic and zoning ordinance issues are well supported by the record, and the Applicant cannot meet its burden under Rule 59(e) to establish any clear error or manifest injustice.

- b. The Court's Findings and Conclusions under Criterion 9(E) and §§ 3.5 and 4.10 of the MZO are well supported by the Record and the Applicant has failed to identify any manifest error of fact or law that would warrant reversal.

Rivers' blasting arguments are perhaps the clearest example of why its motion to alter is a mere effort to reargue and fails under Rule 59(e). Prompted by the proposed project design (namely quarry faces above and directed toward Route 100B and neighboring properties), Rivers' own blasting expert recommended that people within 1500 feet of the quarry remain indoors during blasting because of his concern related to potential flyrock dangers. Finding 171. The record evidence on this point stands without contradiction, and the Court properly relied on this uncontroverted evidence to conclude that the Project would result in an unduly harmful impact on area land uses and development. Now in its Motion to Alter, the Applicant spends several pages trying to dispute and disown its witnesses' testimony on this point. Motion at 24-31. The facts here are simple and undisputed: the land uses on neighboring properties include transportation, farming, homes, horse-riding facilities, bicycling, running, and the numerous other outdoor uses in this scenic area. The restriction proposed by the Applicant's experts to ensure safe operation of this project would significantly intrude upon and interfere with not only the surrounding neighborhood homes and residential uses, but also members of the public walking, biking, running or otherwise traveling on Route 100B near the quarry (which is less than 800 feet from the quarry face). See Finding 20 (Quarry operations "about 760 feet from the edge of Route 100B."); see also, *Town's Proposed Finding #457*. Running indoors upon a blast

warning (even if a horseback rider or cyclist could find shelter) is anathema to all of these surrounding uses. To reargue this issue defies common sense, much less the evidence on which the Court properly based its findings and conclusions. Put simply, the proposed quarry is incompatible with the surrounding uses in the area. It does not fit.

The Applicant's argument that the Court has created a wholly different standard by requiring a "no fly-rock guarantee" is also incorrect. The standard is no different in this case than in other quarry cases. The Applicant had the burden of demonstrating that the Project would not result in an unduly harmful impact on area land uses and development. It simply failed to meet that burden. Rivers' effort to simply reframe its arguments compels denial of its Rule 59(e) Motion.

It is this project, its design, and context that are significantly different here, not the standard. The Town has reviewed other quarry cases and has not found any in which the Applicant's own blasting expert affirmatively recommended that neighbors and other members of the public within 1,500 feet of the quarry seek shelter inside before every blast. And it was the blaster's own concern about the design of *this* quarry and *its* particular orientation and proximity to surrounding homes and Route 100B which led him to suggest redirecting all of the blasts (which the Court properly rejected as an impossible and un-credible measure in Finding #173). Indeed, it was this same concern with the location, orientation, and proximity of *this particular quarry and its design* which led the blaster to recommend indoor restrictions in the surrounding area in order to address his own concerns about the potential fly-rock danger. And, in express acknowledgment of Mr. Rath's concerns about fly-rock danger, the Applicant proposed in its briefs to address this concern by redirecting blasts away from the neighbors and Route 100B "when possible." See *Applicant's Proposed Findings of Fact and Conclusions of*

Law at Finding #284 (“Rivers has agreed to orient blasts so that the rock face is directed away from residences in Phase I when possible”) and page 93 (“in many instances the blast can be oriented such that the Quarry faces will be directed away from structures”) (March 27, 2009).

With this insufficient, illogical, and physically impossible proposal now rejected by the Court, the Applicant has suddenly changed its tune to downplay the previously acknowledged danger associated with fly-rock. It seeks to re-characterize Mr. Rath’s testimony and suggests that it is sufficient to just prove by a mere preponderance of the evidence that fly-rock won’t leave the Applicant’s property. The Applicant’s effort to re-characterize Mr. Rath’s testimony years after it was offered is unavailing. His testimony regarding necessary restrictions on all outdoor activity within 1500 feet of the quarry stands undisputed. The Court’s conclusion that the Project will have an unduly harmful impact on area land uses under 9(E), and will have an undue adverse impact on neighboring properties and uses under the MZO, are well supported by this and other evidence. The Applicant has not pointed to any evidence or law that would compel reconsideration or reversal of this conclusion under Rule 59(e).

c. Criterion 10

The Applicant also disputes all of the Court’s conclusions under Criterion 10. In short, the Applicant argues that it is somehow “entitled” to an Act 250 permit and conditional use approval simply because the Town Plan does not prohibit *all* quarry activity in the AG-RES district. This is a consistent theme throughout the Applicant’s Motion (as it was throughout the trial and initial briefing), and the Court has already properly rejected the argument. The logical fallacy of this “entitlement” claim is self-evident. Conditional uses are not permitted uses; they must meet the appropriate standards, and this particular project, based on its particular facts,

cannot do so. The Town addressed this argument in its Reply Brief on page 56, and refers the Court to that brief for its response so as to not further repeat arguments.

The Applicant also asserts that the Court has not identified the provisions of the Town Plan it believes the Project does not conform to. But the Court's Decision does specifically identify, and evaluate, the relevant provisions, both in its discussion under Criterion 10, and elsewhere in the Decision. Findings 221, 222, and 223 identify specific provisions with which the Project is incompatible, and the Court discusses the inconsistency with these provisions throughout its decision. *See Decision* at 56 (describing incompatibility with scenic corridor provisions in the Town Plan); and 71 (describing incompatibility with scenic corridor provisions, and provisions prohibiting undue adverse impact on the use and enjoyment of neighboring properties). The Project is also inconsistent with other portions of the Town Plan not specifically mentioned in the Court's discussion of Criterion 10, including the definition of the AG-RES district, which states that: "it is important that non-agricultural and non-residential uses, such as light industry, not *adversely* impact neighboring properties." Moretown Town Plan (Exh. R-33 at 66) (emphasis added).⁴ The Court has already properly concluded that the Project will not only adversely impact neighboring properties, but will in fact have an undue adverse impact on, and unduly harm, such land uses.

The Town relies on its initial briefs to address the Applicant's other claims concerning Town Plan issues, as those arguments merely repeat the Applicant's prior arguments.

⁴ The Town also maintains that that the Project will not comply with other portions of the Town Plan, including the Steep Slopes provision and does not waive any argument concerning compliance with the other provisions identified in its filings in this case.

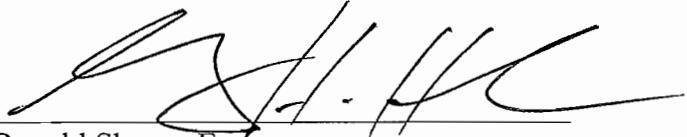
Conclusion

For the reasons outlined above, the Town of Moretown respectfully requests that the Court deny the Applicant's Motion to Alter the Court's March 25, 2010 decision.

Dated at Burlington, Vermont this 4th day of June, 2010.

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STATE OF VERMONT
ENVIRONMENTAL COURT

In re: Rivers Development Conditional Use Appeal)
In re: Rivers Dev. Act 250 Appeal)

)
Docket No. 7-1-05 Vtec
Docket No. 68-3-07 Vtec
)

CERTIFICATE OF SERVICE

I, Anna Viel, hereby certify that I sent a copy of the Town of Moretown's *Opposition to Applicant's Motion to Alter* to the following service list by U.S. Mail, postage prepaid, on this 4th day of June, 2010.

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