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

RE: Burlington Broadcasters, Inc. d/b/a WIZN; Charlotte Volunteer Fire & Rescue; & John Lane — Land Use Permit Application #4C1004R-EB

MEMORANDUM OF DECISION ON GROUP 2 PRELIMINARY ISSUES

This Memorandum of Decision addresses the second group of preliminary issues identified in the April 18, 2003 Prehearing Conference Report and Order (PCRO). Terms defined in the PCRO are used herein without definition.

I. PROCEDURAL HISTORY

On June 4, 1999 the District #4 Environmental Commission (Commission) issued Land Use Permit (LUP) #4C1004R (Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Reconsidered Decision) to Burlington Broadcasters, Inc. d/b/a WIZN (BBI), Charlotte Volunteer Fire and Rescue Services, Inc. (CVFRS), and John Lane (collectively, Permittees). The Permit authorizes a previously constructed 199-foot communication and broadcast tower and an equipment building (Project). The Project is located on 17 acres of land on the northwest side of Pease Mountain, off Church Road in Charlotte, Vermont. The tower currently contains broadcast antennae used by WIZN and CVFRS, as well as four antennae presently used and maintained by Verizon. Verizon's use of the tower is authorized under Land Use Permit #4C0901.

On July 2, 1999, Mary Beth Freeman, Graeme Freeman, Elaine Ittleman, Dr. Frank Ittleman (Freeman et al.) and Citizens for Appropriate Siting of Telecommunications Facilities (CCAPTF) (Freeman et al. and CCAPTF hereinafter collectively referred to as Appellants) filed an appeal with the Vermont Environmental Board (Board) from the Permit and the Reconsidered Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A. Sections 6086(a)(1), (9)(K), (10) and with respect to its rulings on party status. Appellants' July 2, 1999 appeal incorporates by reference their previously filed appeal dated July 6, 1998 of the Commission's initial decision dated June 5, 1998 (1998 Decision). On July 14, 1999, Verizon filed a cross-appeal pertaining to the Project, wherein it contests the Commission's denial of Verizon's party status in the #4C1004R proceeding. Verizon's cross-appeal supersedes a Notice of Appeal filed on July 6, 1998 relative to the Commission's 1998 Decision.

The issuance of the Permit by the Commission vested jurisdiction with the Board to hear several other appeals that were filed in June and July of 1998 (Other 1998 Appeals). The Other 1998 Appeals were held in abeyance pending the Commission's proceedings on Motions to Alter and Reconsider the Commission's Decision. The Other 1998 Appeals include an appeal filed by Charlotte Congregational Church (CCC), an appeal filed by BBI, and an appeal filed by the Charlotte Central School Board (CCSB). Also pending on the Board's Docket are Declaratory Rulings #322 and #323, each of which appeals

Jurisdictional Opinion # 4-116, dated March 29, 1996, which pertains to the Project.

As a result of the issuance of the Permit on June 4, 1999, BBI's appeal of the Commission's June 5, 1998 Decision became moot. Verizon affirmatively superseded its July 6, 1998 appeal with its appeal of Land Use Permit #4C1004R filed on July 14, 1999 and so its July 6, 1998 appeal is also moot. Both of the appeals referenced in this paragraph have been dismissed.

Also as a consequence of the Commission's issuance of the 1998 Decision and Land Use Permit #4C1004R, the appeals filed by CCSB and CCC on July 13, 1998 and July 10, 1998, respectively, are moot.

Freeman et al. consolidated the claims set forth in their 1998 Appeals with those being pursued in their Notice of Appeal dated July 2, 1999, and have accordingly preserved any arguments raised in the former appeal to the extent now applicable.

There was also a revocation proceeding relative to a Permit #4C0901 issued to Steve Korwan d/b/a Contel Cellular, to which Verizon is a successor in interest. The Board dismissed the revocation petition on August 7, 2000.

On April 10, 2003, Chair Moulton Powden convened a prehearing conference. At the prehearing conference, the parties agreed that the two declaratory rulings should remain continued awaiting resolution of this appeal. During the prehearing conference, Chair Moulton Powden made verbal party status rulings and also established additional party status issues to be decided as preliminary issues following filings by the parties and potential parties, all of which are set forth in the PCRO. Among other things, the PCRO also identified two sets of preliminary issues, the Group 1 Preliminary Issues, and the Group 2 Preliminary Issues.

On April 17, 2003, BBI filed Motions to Dismiss Mary Beth Freeman, CCAPTF, and CCC. On the same date, Appellants filed a Motion to Recuse Board Member Christopher Roy, Esq. This motion currently remains under advisement.

On April 25, 2003, Verizon filed an objection to the merits hearing date. On April 29, 2003, Appellants, Verizon and CCC filed petitions for party status. The Board deliberated on these motions and petitions on May 21, 2003 and issued a Memorandum of Decision on them on June 6, 2003.

On June 18, 2003, the Charlotte School Board filed a letter seeking to enter a late appearance. BBI objected to this request on June 27, 2003.

Briefs on the Group 1 Preliminary Issues were filed in early July. The Board deliberated on July 16, 2003. On August 8, 2003, the Board issued a Memorandum of Decision on the Group 1 Preliminary Issues and the late appearance by the Charlotte School Board. The Chair issued a Preliminary Ruling on the same date, ruling that certain filings were unauthorized and would not be considered by the Board.

On September 8, 2003, BBI filed a Motion to Alter the August 8, 2003 Memorandum of Decision. The Motion contained a request that the Board undertake rulemaking. Reply briefs were filed by Appellants and by the Charlotte Congregational Church. The Board deliberated on the Motion to Alter and discussed the request for rulemaking on September 17, 2003.

On September 26, 2003, the Board issued a Memorandum of Decision denying the Motion to Alter, and a Memorandum to Parties denying the request for rulemaking.

The Group 2 Preliminary Issues were briefed in September and the Board deliberated on them on October 15, 2003.

II. ISSUES

This decision addresses the Group 2 Preliminary Issues, which are:

1. Does the evidentiary test for scientific evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), apply to proceedings before the Environmental Board?

2. What Town or Regional Plans and community standards will be applied as part of the Board's review of the Project's compliance with Criteria 10 and 8 respectfully? (Stated otherwise, what date will be used to assess compliance?)

III. DISCUSSION

A. Does *Daubert* Apply?

The question is whether the test for admitting scientific evidence established by the United States Supreme Court in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), applies in Board proceedings, or more specifically, whether it applies in this contested case. The Board has declined to apply *Daubert* in at least one prior case. *Re: Bull's Eye Sporting Center*, #5W0743-3-EB, Findings of Fact, Conclusions of Law, and Order at 3-4 (Apr. 4, 2003). As set forth below, the Board finds no reason to alter this precedent.

The Vermont Rules of Evidence (VRE) are generally applicable in Board and other administrative proceedings. 3 V.S.A. § 810(1); EBR 17(A). The Administrative Procedures Act (APA) provides, in relevant part, that:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. . . .

3 V.S.A. § 810(1). The APA, therefore, authorizes the Board to apply a more liberal evidentiary standard than the trial courts in certain cases. *See, In re White*, 172 Vt. 335, 348 (2002)(holding that agencies have more latitude than courts to consider different types of evidence)(citing 3 V.S.A. § 810(1) and *In re Quechee Lakes Corp.*, 154 Vt. 543, 552, 580 A.2d 957, 962 (1990)); *see also, In re: New England Telephone and Telegraph Co.*, 135 Vt. 527, 536 ("The Board is not bound to the strict relevancy standards of a trial court when ruling whether to hear evidence.")(citing *Vermont Electric Power Co. v. Bandel*, 135 Vt. 141, 375 A.2d 975, 982 (1977)).

Prior to *Daubert*, most trial courts would not admit scientific opinion into evidence unless the scientific technique on which the opinion was based was "generally accepted" as reliable in the scientific community. *See, Frye v. United States,* 54 App.D.C. 46, 47, 293 F. 1013, 1129-1130 (1923). This was known as the *Frye* test, which was applied by most trial courts outside of Vermont[1] even after the Federal Rules of Evidence were adopted.

In the unanimous portion of the *Daubert* decision, the Court held that *Frye* had been superseded by the Federal Rules of Evidence (FRE) with respect to the admissibility of expert opinion. *Daubert*, 509 U.S. at 586-587. Specifically, the Court found that *Frye* had been superseded by FRE 702, which allows an expert witness to give opinion testimony if (1) the witness is qualified as an expert, and (2) the expert's knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." FRE 702. Vermont's rule on expert opinion, VRE 702, is identical to FRE 702. The Vermont Supreme Court adopted *Daubert* because the rules are identical. *State v. Streich*, 163 Vt. 331, 342 (1995).

---

[1] Vermont is one of a minority of jurisdictions that did not apply *Frye*. *State v. Streich*, 163 Vt. 331, 342 (1995).

In the rest of *Daubert*, the majority held that scientific evidence must be both relevant and reliable. *Daubert*, 509 U.S. at 589-92. The *Daubert* Court offered four "non-controlling factors," some or all of which might be used to determine whether a given scientific technique or theory is reliable: testing, peer review, error rates, and acceptability in the relevant scientific community. *Daubert*, 509 U.S. at 593-594. *Daubert* also held that the trial judge must make a preliminary determination, pursuant to Rule 104(a), whether expert testimony is admissible. *Daubert*, 509 U.S. at 592-593; *see also, id.* at 591-592 ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.").

The Board's evidentiary rulings are governed by the APA, as described above. *See*, 3 V.S.A. § 810(1); EBR 17(A). Thus, the Board certainly looks to whether proffered scientific evidence is relevant in determining whether it is admissible. 3 V.S.A. § 810(1); VRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." VRE 401. In the context of Board proceedings, relevant evidence would include evidence that has bearing on an issue on appeal, for instance.

Proof concerning the reliability of scientific evidence, including proof under the *Daubert* factors, may also be relevant. *See*, *Daubert*, 509 U.S. at 593-594 (to determine reliability, court may look to four non-controlling factors: testing, peer review, error rates, and acceptability in the relevant scientific community). However, as set forth below, the Board declines to hold a preliminary evidentiary hearing to determine whether proffered scientific evidence is reliable.

Elaborating on the trial court's "gatekeeping" function, the U.S. Supreme Court held that "the trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate" the basis for expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). The Court also pointed out that expert testimony often rests upon experience that is foreign to the jury. *Id.* (citation omitted). Like *Kumho, Daubert* was an appeal from a jury trial. In the instant case the Board is the trier of fact, so keeping unreliable evidence from a jury is not a concern. *See, Gentile v. Nevada State Bar*, 501 U.S. 1030, 1077 (1991)(prejudice rarely a concern "where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are assumed to be able to discount or disregard it.").

There are other procedural tools available to address scientific reliability issues besides holding a preliminary *Daubert* hearing. As the *Daubert* Court noted, "Vigorous cross-examination, presentation of contrary evidence, and careful [application of] the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 at 596

(referring to evidence that would have failed the old, 'generally accepted by the relevant scientific community' test). The Board can admit relevant scientific evidence and gauge its reliability appropriately without applying *Daubert*'s gatekeeping function with respect to reliability. Also, gauging reliability without holding a preliminary hearing provides greater administrative efficiency.

The Vermont Supreme Court has held that administrative agencies have "greater latitude than courts in the nature of evidence that they may consider." *In re White*, 172 Vt. at 348 (citing 3 V.S.A. § 810(1); *In re Quechee Lakes Corp.*, 154 Vt. 543, 552, 580 A.2d 957, 962 (1990)). The Board's gatekeeping function is more limited than a trial court's, given the Board's role as factfinder and the more liberal application of the VRE through the APA.

For these reasons, *Daubert* does not apply in this contested case.

B. Which Town or Regional Plan and Community Standards Apply?

The parties have asked the Board to determine as a preliminary issue which town and regional plans apply to gauge compliance with Criterion 10, and which could apply as sources of clear, written community standards to gauge compliance with Criterion 8(aesthetics). BBI urges the Board to apply the plans and standards in place in 1986, when it applied for local zoning approval, for both Criterion 10 and 8. Appellants counter that the plans and standards in effect in 1996 should apply, because these were in effect at the time that BBI filed its application for Act 250 approval. The Board addresses these issues in turn.

1. Applicable Plans and Zoning under Criterion 10

It is undisputed that BBI applied for a zoning permit in 1986, when the 1984 Charlotte Town Plan and March 1986 Charlotte Zoning Regulations were in effect. It is also undisputed that BBI filed its Act 250 application in 1996, when the 1995 Charlotte Town Plan and 1995 Charlotte Zoning Regulations were in effect. The question is which town plan and zoning regulations should apply to determine compliance with Criterion 10.

In cases in which the applicant has not obtained an earlier zoning permit, compliance with Criterion 10 is gauged at the time the Act 250 application is filed. *See, e.g., In re Ross*, 151 Vt. 54, 58-59 (1989)(rights in town plan do not

vest with filing of incomplete Act 250 application); *In re Preseault*, 132 Vt. 471, 474 (1974)(where no prior zoning permit, applicant's rights vest in town plan in effect at time Act 250 application is filed); *Re: Peter Tsimortos*, #2W1127-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 29, 2003)(applying town plan in force at time Act 250 application was filed, in case involving no prior zoning process). Even where an applicant has obtained a zoning permit before applying for Act 250 approval, the applicant may choose to have the district commission or Board apply the town plan in effect at the time the Act 250 application was filed. *See, e.g.*, *Re: Fred and Laura Viens*, #5W1410-EB, Memorandum of Decision (Sept. 3, 2003)(applicant may waive any claim to vested rights in prior town plan, and choose to have application reviewed under later town plan). In this case there is no dispute that BBI applied for and obtained a local zoning permit before applying for an Act 250 permit, and BBI seeks review under the plan in effect at the time its zoning application was filed.

Zoning bylaws are relevant under Criterion 10 only where applicable provisions of the town plan are ambiguous, and then, only to the extent that those bylaws implement and are consistent with those provisions. 10 V.S.A. § 6086(a)(10). The Vermont Supreme Court has held that "where . . . a developer diligently pursues a proposal through the local and state permitting processes before seeking an Act 250 permit, conformance under § 6086(a)(10) is to be measured with regard to zoning laws in effect at the time of a proper zoning permit application." *In re Molgano*, 163 Vt. 25, 33 (1994). BBI applied for a zoning permit in 1986, when the 1984 Charlotte Town Plan and the March 1986 Charlotte Zoning Regulations were in effect. No party claims that BBI did not pursue that zoning permit with due diligence, therefore, the March 1986 Charlotte Zoning Regulations can be applied to construe any material ambiguity in the applicable town plan.

The next question is which town plan should apply where a zoning permit has been issued before the Act 250 application was filed. No Vermont Supreme Court case has addressed this issue. However, the Court's reasoning in *Molgano* is instructive.

In *Molgano*, the Court held that the Board had to apply the zoning bylaws that were in effect when the applicant filed its zoning application, based on the vested rights rule and the purpose of Criterion 10. *Molgano*, 163 Vt. at 32-33(citations omitted). The vested rights rule is grounded on the principle that the intervening adoption of a new town plan or zoning bylaw "is, by itself, ineffective to derail proceedings validly brought and pursued in good faith to implement rights available under previous law." *Id*. at 32 (citing *In re Preseault,* 132 Vt. 471, 474 (1974)(project's nonconformance with a town plan adopted after a developer had applied for an Act 250 permit could not be the basis of a permit denial); *In re*

Taft Corners Assocs., 160 Vt. 583, 593--94, 632 A.2d 649, 655 (1993) (rights vested in town plan in effect at time of original Act 250 umbrella permit where no zoning permit); *cf. In re Ross,* 151 Vt. 54, 57-58, 557 A.2d 490, 492 (1989) (where no zoning regulations, and amendment to town plan pending, Act 250 application must be complete for rights under old plan to vest; new applications must comply with new plans)); *see also, Smith v. Winhall*, 140 Vt. 178 (1981)(adopting vested rights rule in zoning context based in part on 1 V.S.A. § 213)).

The Court in *Molgano* relied on *Preseault*, which applied the vested rights rule to hold, in effect, that the municipal plan in force at the time the Act 250 application was filed should be applied under Criterion 10. *Preseault*, 132 Vt. at 474 (citing 1 V.S.A. § 213, and cited in *Molgano*, 163 Vt. at 32). As in *Ross* and *Tsimortos*, the developer in *Preseault* did not obtain a zoning permit before applying for Act 250 approval. Nevertheless, the *Molgano* Court held that "the *Preseault* reasoning can be effectuated only if we go back to the beginning of the development process at the town level." *Molgano*, 163 Vt. at 32 (citation omitted).

The *Molgano* Court held that the purpose of Criterion 10 supported applying the earlier zoning laws. *Molgano*, 163 Vt. at 32. After noting that the statute is silent on when conformance with Criterion 10 should be measured, the Court stated that: "Since the purpose of that section is to ensure consistency with local planning and zoning, the logical interpretation is to measure conformance at the time of the local processes." *Id*.

In sum, *Molgano* held that where the applicant "diligently pursues" a local permit before seeking an Act 250 permit, compliance with Criterion 10 is gauged at the time the local zoning application is filed. *Molgano*, 163 Vt. at 32-33. While *Molgano* did not rule on the town or regional plan issue, its reasoning applies with equal force to determine which plan should apply under Criterion 10. *See also In re Taft Corners Assocs., Inc.*, 171 Vt. 135, 141-142 (2000)(noting that *Molgano* held that "conformance with a town plan, an Act 250 requirement, should be measured as of the start of the development process in the town for consistency of local zoning or subdivision review with Act 250 review"); *In re Russell*, Nos. 1999-418, 2002-019 & 2002-102 (Oct. 15, 2003)(mem.)(stating that *Molgano* held that "conformance with a town plan under Act 250 must be measured with regard to zoning laws in effect at the time of a proper zoning permit application").

Appellants and the Town of Charlotte cite recent Board decisions in *Re: Fred and Laura Viens*, #5W1410-EB, Memorandum of Decision (Sept. 2003)

and *Re: Peter Tsimortos*, #2W1127-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 29, 2003) as supporting application of the town plan in effect at the time that the Act 250 application was filed. However, neither case addresses the issue presented here. In *Tsimortos*, the applicant sought application of an earlier town plan, but had not applied for or obtained an earlier zoning permit. In other words, there was no prior zoning application. In *Viens*, there had been an earlier zoning application and permit, but the applicants waived their vested rights argument and requested application of a subsequent, more favorable, town plan. *Viens*, Memorandum of Decision at 5-6. In both cases the Board correctly pointed out that *Molgano* did not directly address the question of which town plan should apply, because the only question presented in *Molgano* was which set of zoning bylaws should apply to interpret the town plan under Criterion 10. *See*, *Tsimortos*, Findings, Conclusions and Order at 13-14; *Viens*, Memorandum of Decision at 5. But neither *Tsimortos* nor *Viens* requires a different result in this case.

Appellants and the Town of Charlotte also contend that there was some lack of due diligence in BBI's pursuit of an Act 250 permit. As set forth above, *Molgano* requires only that an applicant pursue other state and local permits with due diligence before applying for an Act 250 permit. *Molgano*, 163 Vt. at 33. Whether or how an applicant pursued the subsequent Act 250 permit is not relevant, since the applicant's rights vest at the time of the prior zoning application. Also, this is not a case in which an applicant sought to avoid subsequent zoning or town plan restrictions by submitting an incomplete application before those restrictions took effect. *See, e.g., Ross*, 151 Vt. at 59 ("the orderly processes of town government are frustrated when a landowner can easily avoid regulatory requirements by submitting a request for a permit based on partial and insufficient information"). It is undisputed that BBI pursued its zoning permit with due diligence. Therefore, the applicant does not stand to benefit unfairly from application of the earlier zoning ordinance and town plan under Criterion 10.[2]

2. Clear, Written Community Standard

---

[2] This assumes, of course, that no substantial or material change was made to the Project after it obtained its zoning permit. An applicant's rights cannot vest in the earlier plans and zoning with respect to substantial or material changes made to the Project after the zoning permit was obtained. Any substantial or material change to the project after it received a zoning permit would be reviewed under the plans and zoning bylaws in effect at the time the Act 250 application for those changes was filed.

The second part of this issue is which town plan and zoning bylaws should be applied as the sources of clear, written community standards under Criterion 8(aesthetics). The Board routinely looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists and should be applied in the review of the aesthetic impacts of a project. *Re: Hannaford Brothers Co. and Southland Enterprises, Inc.,* #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 21 (Altered)(Nov. 27, 2002)(citing *Re: Raymond and Centhy Duff,* #5W0952-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 29, 1998); *Re: Herbert and Patricia Clark*, Application #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 35 - 37 (Apr. 3, 1997); *Re: Thomas W. Bryant and John P. Skinner* at 22; *and see Nile and Julie Duppstadt & John and Deborah Alden*, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order at 34 (Apr. 30, 1999) (town plan can be an authoritative source of clear community aesthetic standards, and it is therefore appropriate for the Board to rely upon such a Plan "in determining whether [a] Project violates the community standard.")).

Molgano, discussed above, was decided on Criterion 10, not Criterion 8. The *Molgano* Court specifically stated that the reason an applicant's rights should vest at the time the local process begins is that the purpose of Criterion 10 "is to ensure consistency with local planning and zoning." *Molgano*, at 32. *Molgano* did not address the clear, written community standard or Criterion 8.

The purpose of the clear, written community standard requirement, on the other hand, is "to encourage towns to identify scenic resources . . . of special importance [such as] a wooded shoreline, a high ridge, or a scenic back road," which would help "the district commissions and board in determining the scenic value of specific resources to a town, and would guide applicants as they design their projects." *Re: Town of Barre*, #5W1167-EB, Findings of Fact, Conclusions of Law, and Order at 21 (June 2, 1994)(quoted in *Hannaford*, Findings, Conclusions and Order at 21). This is very different from ensuring consistency with local planning and zoning. Also, commencement of the local zoning process is particularly significant under Criterion 10, and it has no comparable significance under Criterion 8. Clear, written community aesthetic standards are not necessarily limited to zoning ordinances or town or regional plans.

The Board has addressed this issue before. In *Northshore Development*, the Board ruled that it would consider evidence of clear, written community standards in effect at the time that the Act 250 application is filed. *Re: Northshore Development, Inc.*, #4C0626-5-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Dec. 29, 1988). The clear, written community standard at

issue in *Northshore* was a 35-foot height limit which was added to the zoning ordinance after the applicant applied for its zoning permit and before the applicant applied for its Act 250 permit. Although *Northshore* was issued prior to *Molgano*, *Molgano* was limited to Criterion 10 and does not govern which clear, written community standard to apply under Criterion 8.

The Board notes that it remains to be determined whether any clear, written community standard exists in this matter. Nevertheless, for purposes of ruling on this preliminary legal issue, the Board holds that the parties may offer evidence of any such standard if it was in effect at the time that BBI filed its complete Act 250 application.

IV. ORDER

1. The Board will not apply the evidentiary test for scientific evidence established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) in this proceeding.

2. The Town or Regional Plan, and zoning regulations if applicable, in effect at the time that BBI filed a complete zoning application for the Project, as set forth herein, apply to gauge compliance with Criterion 10.

3. The Town and Regional Plan and zoning regulations, and any other applicable standard, in effect at the time that BBI filed a complete Act 250 application for the Project apply as sources of clear, written community standards under Criterion 8(aesthetics).

DATED at Montpelier, Vermont this 25th day of November, 2003.

ENVIRONMENTAL BOARD*

/s/ Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Donald Marsh
Patricia Nowak**
Alice Olenick
Jean Richardson***

* Board Member Christopher Roy did not participate in this decision because the Motion to Recuse remains pending.

** Board Member Patricia Nowak was unable to attend the Board's deliberations on November 12, 2003, but has reviewed and joins in the Board's decision.

** Board Member Jean Richardson DISSENTS IN PART, as follows:

I must dissent from the part of the Board's decision concerning Criterion 10, Part III(B). I would apply the town plan in effect at the time that BBI filed a complete Act 250 application.

I start from the general proposition found in the Vermont Supreme Court decision in *In re Ross,* 151 Vt. 59 (1989), that an Act 250 applicant's rights vest in the town plan only upon the filing of a complete Act 250 application. Although *Ross* did not involve a prior zoning application, and looked to whether a developer's rights vested with the filing of an Act 250 application that addressed only two criteria, I would construe it to apply in the instant case for the reasons set forth below.

While the Court's decision in *In re Molgano*, 163 Vt. 25 (1994), states that zoning regulations in effect at the time that a person commences the local

zoning process should be applied within the Act 250 context, that case is of limited applicability here.

Molgano states that, "where, as here, a developer diligently pursues a proposal through the local and state permitting processes before seeking an Act 250 permit, conformance with a town plan under § 6086(a)(10) is to be measured with regard *to zoning laws* in effect at the time of a proper zoning permit application." *Id.* at 33 (emphasis added).[1]

I understand the basis for the majority's decision to determine Criterion 10 under the 1984 Town Plan to be a desire to implement the consistency required by *Molgano*, 163 Vt. at 32. It is apparent to me, however, that the consistency that the *Molgano* Court was advocating is consistency between the *zoning regulations* applied by the town in its local zoning process and the *zoning regulations* applied by the Board in the Act 250 process, not consistency between those zoning regulations and the town plan. Put simply, *Molgano* does not require the Board to apply the earlier town plan.

This position was adopted by this Board in our recent decision in *Re: Fred and Laura Viens*:

> *Molgano* does *not* hold that a project is governed by the *town plan* that was in effect at the time the local zoning process was initiated. The case simply states that, when a town plan is ambiguous and the Board considers a municipality's zoning regulations to assist in its interpretation, the *zoning regulations* in effect when the local process began must govern, not regulations adopted at a later date.
>
> The question of whether the Board must apply a *town plan* in existence at the time that a local process is commenced was neither presented nor answered by *Molgano.*

---

[1] I do not read the Court's decision in *In re Taft Corners Assocs., Inc,* 171 Vt. 135, 141 - 142 (2000), to have expanded *Molgano* to require the application of *town plans* in effect at the time the local process is commenced, as opposed to the *zoning regulations* which are used to interpret ambiguous plans.

Re: Fred and Laura Viens, #5W1410, Memorandum of Decision at 5 (Sep. 3, 2003) (emphasis added); *see also*, *Re: Peter S. Tsimortos,* #2W1127-EB, Findings of Fact, Conclusions of Law, and Order at 13-14 (Aug. 29, 2003)(noting that *Molgano's* holding is limited to zoning regulations). The Board's decision today, while distinguishable from both *Viens* and *Tsimortos*, is inconsistent with these recent decisions.

Thus, I find no support within the statute or case precedent for the majority position. I also believe that three policy reasons require a different result.

First, I fear that we are creating new law under circumstances which do not demand this action. I fear that the majority's decision today will discourage towns from adjusting to changing times through the adoption of new Plans, as circumstances warrant. And I hesitate to proceed down a path that might eventually lead us to hold that conformance with *all* Act 250 criteria will be measured - for reasons of "consistency" - with reference to the standards that were in existence as to the time of the commencement of the local process, even if that process began, as here, many years before an Act 250 application is filed.[2]

Second, were we to find the 1995 Charlotte Town Plan to be ambiguous, *Molgano* instructs us to look to Charlotte's zoning ordinances as they existed at the time that BBI began the local zoning process in 1984. But two considerations give me pause.

1. We have not yet made a determination that any ambiguity exists in the Town Plan; and yet the majority skips over this necessary prerequisite to our consideration of the zoning ordinances, and, assuming some need for consistency, jumps to the conclusion that we should apply the 1984 Plan. I see

---

[2] This fear is not merely speculative. In the case of *Allen Brook Investments, LLC and Raymond Beaudry,* Land Use Permit Application #4C1110-EB, which is presently pending before the Board, the applicant has advanced the argument that his rights to seek an agricultural mitigation agreement under Criterion 9(B), 10 V.S.A. § 6086(a)(9)(B), should vest as they existed prior to the Board's decision in *Southwestern Vermont Health Care Corp*., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001), because it began the local zoning process in 1996.

no basis for this in the case law from the Court, nor do I see any pressing imperative to grant this vested right prior to the filing of a complete Act 250 application.

2. While perhaps not applicable to this matter, as this case was commenced prior to the recent legislative amendments to Criterion 10, I am also of the opinion that *Molgano* appears to have been superseded by these amendments, which read:

> (10) Is in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24. In making this finding, if the board or district commission finds applicable provisions of the town plan to be *ambiguous*, the board or district commission, *for interpretive purposes, shall consider bylaws, but only to the extent that they implement* and are consistent *with those provisions,* and need not consider any other evidence.

10 V.S.A. § 6086(a)(10), as amended by Act No. 40, § 6 (eff. July 1, 2001)(emphasis added).

Zoning bylaws that precede the adoption of a town plan cannot "implement" such a plan, unless the town plan provisions on which those bylaws are based were simply readopted, or, as the Court has recently concluded, if such bylaws are "readopted" by implication. *See, In re John A. Russell Corporation and Crushed Rock, Inc*, 14 Vt.L.W. 316, 2003, 2003 Vt. 93, ¶21 (Oct. 15, 2003). Given the legislature's specific instructions as to which zoning regulations may be used for interpretive purposes, I cannot understand why the Board insists upon extending *Molgano's* reach, where such an extension is not required either by statute or case precedent, and, indeed, appears to be prohibited.

Lastly, I believe that it is not rational to apply a Charlotte Town Plan that is almost twenty years old, especially as the Board holds in this decision that conformance under Criterion 8 will be measured, if necessary, with reference to the 1995 Town Plan. I can see only confusion with the application of two different Plans, eleven years apart.