



State of Vermont
Natural Resources Board
10 Baldwin Street
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Environmental Case Notes (E-Notes)
June 20, 2019

ANNOTATIONS of VERMONT SUPREME COURT, ENVIRONMENTAL BOARD, ENVIRONMENTAL COURT and ENVIRONMENTAL DIVISION
ACT 250 DECISIONS

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Please read the decision cited and do not rely on the Environmental Case Notes annotation. Interpretations of decisions may vary.

The Superior Court, Environmental Division (formerly the Environmental Court) posts its decisions on its website, under "opinions":

<https://www.vermontjudiciary.org/GTC/environmental/default.aspx>.

The Vermont Supreme Court posts its decision on its website, under "opinions":

<http://info.libraries.vermont.gov/supct/op.html>.

Decisions of the former Environmental Board are posted on the Natural Resources Board website, at: <https://nrb.vermont.gov/decisions>

If you have any questions, comments or corrections regarding these annotations, please contact Greg Boulbol, General Counsel, at (802) 477-3566 or greg.boulbol@vermont.gov.

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I. PURPOSE OF ACT 250 / NATURE AND SCOPE OF POWERS / AUTHORITY

A. General principles

0. General

0.1 Purpose

* Act 250's enactment represented the culmination of an effort to create a process that would subject subdivisions and other large developments in Vermont to administrative review so as to ensure economic growth without environmental catastrophe. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 87 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993)(quoted in *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 5 (4/11/14)).

* "Act 250 is a land-use statute that is intended to regulate and control development so that it will not be unduly detrimental to the environment and orderly growth will be promoted." *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 7 (3/6/15) (mem.), affirming *Re: Burlington Airport Act 250 JO*, No. 42-4-13 Vtec (5/13/14).

* The underlying purpose of Act 250 is to regulate the impacts of development, not the purpose served, nor the parties benefited by the construction. *In re Vermont RSA Ltd. Partnership d/b/a 188 Vt. 262 Wireless*, 2007 VT 23, ¶9 (2007)(citing *In re Audet*, 2004 VT 30, ¶14, 176 Vt. 617 (mem.)).

* Act 250 was enacted in order to "protect and conserve the lands and the environment of the state." 1969 No. 250 (Adj.Sess.), § 1; *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002); *In re Commercial Airfield*, 170 Vt. 595, 595 (2000)(mem.); *In re Hawk Mountain Corp.*, 149 Vt. 179, 184 (1988)(citing *In re Juster Assocs.*, 136 Vt. 577, 580 (1978)); *In re Downing Act 250 Application*, No. 225-11-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment, at 6 (11/29/10).

* Purpose of Act 250 is "to insure that Vermont lands and environment are devoted to uses which are not detrimental to the public welfare and interests" of our State. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287 (1995); *In Re Chittenden SWD*, 162 Vt. 84, 91 (1994), *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990); see *In re Juster Associates*, 136 Vt. 577, 580 (1978); *In re Great Eastern Building Co.*, 132 Vt. 610, 614 (1974); *In re Preseault*, 130 Vt. 343, 347 (1972); Act No. 250, Sec. 1 (1969 Adj. Sess.); *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10).

* Act 250 is a remedial statute. *State v. Therrien*, 161 Vt. 26, 30 (1993), and see *In re Preseault*, 130 Vt. 343, 346 (1972)(statutes giving and regulating the right of appeal are remedial in nature and should receive a liberal construction in furtherance of the right of appeal); *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 13 (4/19/01) [EB #763] (remedial statutes are to be liberally construed).

* Act 250, although not applicable to all development, is broad legislation designed to preserve the state's environment. *In re Agency of Transportation*, 157 Vt. 203, 208 (1991); *In re Hawk Mountain Corp.*, 149 Vt. 179, 184 (1988).

* Legislature created the Environmental Board "in order to protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests." *In re Eastland, Inc.*, 151 Vt. 497, 499 (1989).

* Act 250 is intended, by a system of notice and hearings, to assure full consideration of land use proposals for all parcels of land. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).

* Act 250 expresses a concern for the prevention of 'usages of the lands and the environment which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont . . .'. The only usages to be permitted are those 'not unduly detrimental to the environment, (and those that) will promote the general welfare through orderly growth and development . . .'. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 520 (1975), quoting *Findings and Declaration of Intent*, 1969, No. 250 (Adj.Sess.).

* The demands and needs of the people call for consideration equal to that given our most precious woodlands. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 520 (1975).

* Although the irreplaceable character of land and the beauty of a solitudinous area is important, so too is the general welfare of the people which may beckon for another use. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 520 (1975).

* The nature and purpose of Act 250 is to protect and conserve the environment of the State and to insure that lands slated for development are devoted to uses which are not detrimental to the public welfare and interest.. *In re Great Eastern Building Co., Inc.*, 132 Vt. 610, 614 (1974); Section 1 of the Public Acts of 1969 (Adj.Sess.).

* The concern for sound and viable planned development which best serves the public interest is expressed in the ten precepts contained in 10 V.S.A. s 6086. *In re Great Eastern Building Co., Inc.*, 132 Vt. 610, 614 (1974).

* The purposes of Act 250 are broad. *In re Preseault*, 130 Vt. 343, 348 (1972).

* Principles of land management embodied in the Act 250 criteria could not be implemented through the permitting program if subsequent exemptions could remove land from the ambit of an issued permit. (citing *In re Rusin*, 162 Vt. 185, 189-90 (1994)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

0.2 Reach (see [56](#))

* Although Act 250's purposes are broad, the Legislature did not purport to reach all land use changes within the state, nor to impose the substantial administrative and financial burdens of the

Act except where values of state concern are implicated. *In re Green Crow*, 2007 VT 137 ¶ (12/14/07)(citing *In re Agency of Admin.*, 141 Vt. 68, 76 (1982) and *Comm. to Save the Bishop's House, Inc. v. Med. Ctr. Hosp. of Vt., Inc.*, 137 Vt. 142, 151 (1979)).

* The underlying purpose of Act 250 is to regulate the impacts of development, not the purpose served, nor the parties benefited by the construction. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶9 (2007), citing *In re Audet*, 2004 VT 30, ¶14, 176 Vt. 617 (mem.)

* Act 250 applies to "large-scale changes in land utilization." *In re Real Audet*, 2004 VT 30, ¶13 (4/1/04), quoting *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 153 (1979); *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).

* The determination that property is not exempt from Act 250 jurisdiction changes the essence of property. *Jipac, N.V. v. Silas*, No. 2000-424 (5/31/02).

* The fact that Act 250 applies to some but not all developments within the state does not detract from its application to projects falling within its scope. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).

* Although the purposes of Act 250 are broad, its application is not without limitation. *In re Spencer*, 152 Vt. 330, 334 (1989); *In re Agency of Administration*, 141 Vt. 68, 76 (1982).

* Act 250 was not intended to reach all land-use changes within the state, or to interfere with local land-use decisions, except when substantial changes in land use implicate values of state concern. *In re John Rusin*, 162 Vt. 185, 190 (1994); *In re Agency of Administration*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982).

* Act 250 establishes a mechanism for review of certain land use activity at the state level. *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986) ("developments"); *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).

* Act 250 is to be distinguished from the bulk of traditional zoning and subdivision legislation, which is merely state enabling legislation permitting regulation of land use on a local or regional level. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).

* Act 250 does not purport to reach all land use changes within the state. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).

* Legislature intended to involve the state in land use decisions in cases where a permanent mechanism exists for their review at the municipal level only where activity on a very major scale is planned. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 151 (1979).

* The Legislature sought to mandate a second layer of review of proposed land use decisions, imposing substantial additional administrative and financial burdens on an applicant, and possibly interfering to some extent with local control of land use decisions, only where values of state

concern are implicated through large-scale changes in land utilization. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 151 (1979).

* The purpose of Act 250 is served by a system of land use permits established by the Legislature. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).

* Board has often urged towns to take a more active role in regulating land uses within their borders. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 - 47 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. Supreme Ct.)(citing *Re: EPE Realty Corporation and Fergessen Management, Ltd*, #3W0865-EB, FCO at 43 n. 10 (11/24/04)).

0.3 Balance

* Conservation goals of Act 250 have always been balanced against economic necessity of development; off-site mitigation fees, which allow development in spite of the impact on primary agricultural soils for payment of a fee to conserve an alternate site, are an example of the sort of compromise between conservation and development that Act 250 fosters. *In re Village Assocs.*, 2010 VT 42 ¶ 17

* The legislature sought to balance the interests of developers and the environmental interests of adjoining landowners and localities. *In re Great Waters of America, Inc.*, 140 Vt. 105, 109 (1981).

* The demands and needs of the people call for consideration equal to that given our most precious woodlands. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 520 (1975).

* Although the irreplaceable character of land and the beauty of a solitudinous area is important, so too is the general welfare of the people which may beckon for another use. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 520 (1975).

* Implementation of Act 250 is a continual balance between competing interests. Goals of Act 250 have always been balanced against the economic necessity of development, resulting in a practical approach to regulation. *In re Village Assocs.*, 2010 VT 42A ¶ 17 (cited in *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Decision at 15 (7/30/14), *appeal docketed*, No. 14-352).

* Board has often urged towns to take a more active role in regulating land uses within their borders. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 - 47 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.), *citing Re: EPE Realty Corporation and Fergessen Management, Ltd*, #3W0865-EB, FCO at 43 n. 10 (11/24/04)

0.4 History

* History of Act 250. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 87 - 89 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993) .

B. Nature and scope of powers

1. General (See [302](#))

* To determine the scope of authority vested in an administrative agency by a statutory grant of power, court looks to its enabling legislation. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211 (2002).

* An agency must operate for the purposes and within the bounds authorized by its enabling legislation, or this Court will intervene. *In re Agency of Administration*, 141 Vt. 68, 75 (1982).

* Chair has authority to issue preliminary rulings. *Re: Forestdale Heights, Inc.*, #4C0329-EB (Revocation), Chair's Proposed DO at 3 (12/20/00); made final in DO (1/3/01) and Corrected Order (1/4/01).

* An administrative agency's review is limited to undertakings assigned to it by the Legislature. See, *Trybulski v. B.F. Hydro-Electric Corp.*, 112 Vt. 1 (1941). *Re: Equinox Resort Associates*, #8B0209-5-EB (MOD/Revocation at 3) (9/24/97). [EB #668M2]

* Board's powers are limited to those which expressly arise or can be necessarily implied from the Rules which it has promulgated pursuant to its authority. *Richard Roberts Group*, DR #225 (on Remand) (5/21/93) and (Reconsidered) (7/5/91). (NOTE: See *In re Richard Roberts Group*, No. 91-358 (Vt. Sup. Ct. 8/7/92) and 161 Vt. 618 (1994)).

* Act 250 does not grant the authority to adjudicate whether a party has properly followed its own procedures in authorizing an appeal to the Board. *Swain Development Corp.*, #3W0445-2-EB (MOD at 3) (7/31/89). [EB #430M]

* Board has no statutory authority to investigate alternative sites for a proposed microwave relay tower project, but has such authority in matters of shorelines, necessary wildlife habitat, endangered species, and primary agricultural soils. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]

* Commission may review all intended purposes of a proposal. *David F. Chioffi*, DR #54 (4/10/74).

1.1 Board as ultimate environmental authority

* Board is an independent regulatory body with supervisory powers over environmental matters. *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995); *In re Agency of Transportation*, 157 Vt. 203, 208-9 (1991); *In re Hawk Mountain Corp.*, 149 Vt. 179, 185 (1988).

* Act 250 itself explicitly proclaims its primacy over, without preemption of, ancillary permit and approval processes. *In re Agency of Transportation*, 157 Vt. 203, 208 (1991).

* An Act 250 permit may be denied if the Board finds an ancillary approval or permit does not satisfy the environmental criteria of § 6086(a) or was, in the words of Court, "improvidently

granted." *In re Agency of Transportation*, 157 Vt. 203, 208 (1991); quoting *In re Hawk Mountain Corp.*, 149 Vt. 179, 185 (1988).

* Board is the ultimate administrative environmental authority in Vermont. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 19- 20 (4/19/01) [EB #763], citing, *In re Hawk Mountain Corp., et al.*, 149 Vt. 179, 185 (1988), and see *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

* The Legislature empowered Board and Commissions to be watchdog with respect to the permitting processes of other State agencies; permits of other State agencies will not be accepted unless the Board is satisfied that they comply with Act 250 criteria. *Re: Hawk Mountain Corporation*, #3W0347-EB (FCO at 16) (8/21/85), *aff'd in part / rev'd in part*, *In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251]

2. Composition of Board

* By law, the Board consists of nine members. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (12/10/96). [EB #629(R)M1]

3. Concurrent and Conflicting Powers

3.1 Primary Jurisdiction

* Under the doctrine of "primary jurisdiction," courts may refrain from exercising jurisdiction when an alternative tribunal with expertise in the subject matter is available to decide the dispute. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 389 (1992).

* Courts ordinarily do not grant relief prior to an agency decision where the agency has primary jurisdiction. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 389 (1992), citing *Smith v. Highway Board*, 117 Vt. 343, 349 (1952).

* While the DJA and § 807 of the APA allow parties to seek a declaratory judgment in superior court, Rule 3(C) provides an alternative administrative remedy. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 389 (1992).

* Cases underscore the importance of prior adjudication by administrative bodies. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 389 (1992).

* "Proceedings under various declaratory judgment statutes cannot be substituted for adequate and available remedies of review ... by administrative tribunals." *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 389 (1992), quoting *In re State Aid Highway No., Peru, Vt.*, 133 Vt. 4, 8 (1974).

* Courts must consider at the outset whether another body is better suited to resolve the issues before it. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 389 (1992).

- * When properly applied, doctrine of primary jurisdiction serves as guide in determining whether court should refrain from exercising its jurisdiction until after an administrative agency has considered the issue. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 389 (1992), citing *Committee to Save the Bishop's House v. MCHV, Inc.*, 136 Vt. 213, 218 (1978).
- * The DJA, enacted in 1931, was designed to provide litigants "at an early stage of the controversy a right to petition for relief not heretofore possessed." *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 390 (1992), quoting *Gifford Memorial Hospital v. Town of Randolph*, 119 Vt. 66, 70 (1955).
- * Court may invoke discretion to dismiss DJA action another tribunal, better suited to apply the Act 250 criteria, is available to resolve the dispute. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 392 (1992).
- * Under the doctrine of primary jurisdiction, the body charged with interpreting Act 250 is the most appropriate tribunal to interpret Act 250 issues. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 392 (1992).
- * Court gives great weight to the Environmental Board's expertise in Act 250 matters. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 392 (1992); *In re Agency of Transportation*, 157 Vt. 203 (1991) (Act 250 gives "primacy over, without preemption of, ancillary permit and approval processes").
- * In challenge to the validity of Act 250, a court might be the more appropriate tribunal. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 392 (1992).
- * The only legally binding determination of Act 250 jurisdiction is that of the Environmental Board. *In Re McDonald's Corp*, 146 Vt. 380, 386 (1985); *Re: Champlain Construction Co.*, DR #214, MOD at 2 (6/5/90).
- * Doctrine primary jurisdiction is a guide to a court "in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court." *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 136 Vt. 213, 218 (1978).
- * Board has primary jurisdiction to consider jurisdictional questions pursuant to EBR 3, even though jurisdictional question was raised in Superior Court. *Re: Pike Industries*, #1R0807-EB (FCO at 2 n. 1) (6/25/98). [EB #693]
- * The Board may decide applicability of Water Quality Standards and 10 V.S.A. chapter 47, but will defer to the Water Resources Board's primary jurisdiction. *Re: Hawk Mountain and Our World Sewer Assoc.*, #3W0347-EB (MOD at 2-3)(10/30/85), *aff'd in part / rev'd in part*, *In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #273]
- *The doctrine of primary jurisdiction supports the conclusion that administrative bodies with special expertise over a matter should have jurisdiction over that matter. *In re Green Crow Corp.* 2006 Vt 14 ¶ 8.

3.2 Concurrent Jurisdiction

- * Act 250's purpose is not to supersede local regulation of land development. *In re Kiesel*, 172 Vt. 124, 135 (2000); *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986); 10 V.S.A. § 6082; *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 10 (10/8/03). [EB #831]
- * "Thus, where local regulation is in effect, a person proposing to subdivide or develop might have to gain approval both at the state and local levels . . ." *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986), quoting *Committee to Save Bishop's House, Inc. v. MCHV, Inc.*, 137 Vt. 142, 145 (1979); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 16 (5/27/04) [EB #837] (while an Act 250 requirement that clustering occur might be in conflict with local requirements, Board need not abandon Criterion 9(B)(iii)); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 10 (10/8/03). [EB #831]
- * Board is not limited by AOT regulations. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 532 (2000).
- * "Act 250 itself explicitly proclaims its primacy over, without preemption of, ancillary permit and approval processes." *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000), quoting *In re Agency of Transp.*, 157 Vt. 203, 208 (1991).
- * Under the existing statutory scheme, permit applicants must meet the requirements of Act 250 in addition to those determined by other administrative agencies. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).
- * "When Act 250 requires more stringent standards than provided in an ancillary permit process, Act 250 controls." *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000), quoting *In re Agency of Transp.*, 157 Vt. 203, 209 (1991).
- * Board need not delay its decision to accommodate concurrent state agency rulings. *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995), citing *In re Hawk Mountain*, 149 Vt. 179, 185 (1988) (Board not bound by permits of other state agencies when imposing conditions for Act 250 permits).
- * AOT condemnation statute does not conflict with Act 250. *In re Agency of Transportation*, 157 Vt. 203, 207 (1991).
- * De novo review by courts in granting zoning permits does not preclude Act 250 supervision. *In re Agency of Transportation*, 157 Vt. 203, 208 (1991).
- * Legislature provided that an Act 250 permit "shall not supersede or replace the requirements for a permit of any other state agency or municipal government." *In re Agency of Transportation*, 157 Vt. 203, 208 (1991), citing 10 V.S.A. § 6082.

- * 10 V.S.A. § 6082 “makes plain that a less stringent Act 250 permit may not substitute for a more stringent provision required elsewhere. On the other hand, a less stringent provision required elsewhere does not preclude stricter Act 250 review.” *In re Agency of Transportation*, 157 Vt. 203, 208 (1991); and see, *In re Stokes Communications Corp.*, 164 Vt. 30 (1995); *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, MOD at 4 (7/2/02). [EB #791] (Board may apply noise limitations that differ from or are stricter than EPA’s or municipality’s standards).
- * Act 250 sets up concurrent jurisdiction between the various state environmental agencies and the Board. *In re Hawk Mountain Corp.*, 149 Vt. 179, 185 (1988); 10 V.S.A. § 6082.
- * Activities that may not require other permits may still require an Act 250 permit. *In Re McDonald’s Corp.*, 146 Vt. 380, 386 (1985); *Re: Champlain Construction Co.*, DR #214, MOD at 2 (6/5/90).
- * Act 250 is to be distinguished from the bulk of traditional zoning and subdivision legislation, which is merely state enabling legislation permitting regulation of land use on a local or regional level. *Committee to Save the Bishop’s House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).
- * Act 250 supplements pre-existing legislation authorizing local zoning and subdivision control. *Committee to Save the Bishop’s House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).
- * Act 250 purports neither to reach all land use changes within the state, nor to supersede local land use control efforts. *Committee to Save the Bishop’s House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).
- * Where local regulation is in effect, a person proposing to subdivide or develop might have to gain approval both at the local and the state levels, or might need local approval only. *Committee to Save the Bishop’s House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).
- * If a project is one that Act 250 subjects to state level review, it cannot go forward without a permit from a district environmental commission. *Committee to Save the Bishop’s House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145-46 (1979).
- * Prior existence of legislation authorizing the municipalities of this state to adopt zoning and subdivision bylaws is a reason for refraining from an expansive reading of Act 250’s jurisdictional provision. *Committee to Save the Bishop’s House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 152 (1979).
- * The Legislature has explicitly precluded the possibility that an Act 250 permit might act to supersede or replace the requirements of municipal land use regulations. *Committee to Save the Bishop’s House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 152 (1979).
- * Board is not vested with concurrent jurisdiction with Commission to hear and decide the same matters. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).
- * Board has often urged towns to take a more active role in regulating land uses within their borders. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 - 47

(11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.), *citing Re: EPE Realty Corporation and Fergessen Management, Ltd*, #3W0865-EB, FCO at 43 n. 10 (11/24/04)

* Mere fact that an applicant may not have obtained all local permits does not mean that the Act 250 process must be delayed; while most applicants have historically first addressed the local process, nothing prevents an applicant from seeking and obtaining an Act 250 permit before all local permits have been received. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 10 (10/8/03). [EB #831]

* Board's jurisdiction under Criteria 1 and 1(B) is concurrent with WRB's jurisdiction over discharge to waters of state. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 13 (7/20/00); *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, MOD at 3 (9/16/98). [EB #696]

* Board has concurrent jurisdiction with Federal Aviation Administration over Act 250 aspects of telecommunications towers. *Re: Stokes Communication Corp. and Idora Tucker*, #3R0703-EB, MOD at 2 (3/10/94), *aff'd, In re Stokes Communications Corp.*, 164 Vt. 30 (1995). [EB #562R]

* Board does not have the authority to inquire into whether a planning commission properly followed its procedures. *Salvas Paving, Inc. and Jerome and Joan Salvas*, #5L1149-EB (1/20/93). [EB #559M]

* Fact that lot was exempt from State subdivision permit requirement is irrelevant as to whether there is Act 250 jurisdiction. *Re: James and Anita McGrath*, DR #248 (FCO at 3) (7/21/92).

* Superior Court has jurisdiction over claims concerning takings of land for public purposes, and Board has jurisdiction over issuance of Act 250 permits. *Re: State of Vermont Agency of Transportation*, #7C0558-2-EB (MOD/Reconsideration at 5) (5/18/90), *aff'd, In re Agency of Transportation*, 157 Vt. 203 (1991). [EB #445]

* Commissions and Board may exercise jurisdiction over State's placement of traffic signs and a traffic control program, where the statutes do not contain exclusive grants of jurisdiction to AOT and do not divest other entities of such jurisdiction. *Re: State of Vermont Agency of Transportation*, #7C0558-2-EB (MOD/Reconsideration at 8) (5/18/90), *aff'd, In re Agency of Transportation*, 157 Vt. 203 (1991). [EB #445].

* Board and Commissions have concurrent jurisdiction with the Agency of Natural Resources. *Re: Disposal Specialists, Inc.*, #2W0161-1-EB (MOD/Interlocutory at 2) (8/21/89). [EB #447M1]

* Board is not bound by approval or permits granted by other agencies. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366].

3.2.1 Deference to decisions of WRB and other agencies

* The corollary of 10 V.S.A. § 6082 is found in § 6086(d), allowing the Board to give presumptive effect to permits and approvals of state agencies and municipalities, but requiring independent Act 250 review. *In re Agency of Transportation*, 157 Vt. 203, 208 (1991).

* Reclassification of a wetland (from Class III to Class I or II) by Water Resources Board during pendency of Environmental Board case may require reconsideration of issues not presently before the EB, thus leading to inefficiencies. *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, MOD at 10 (10/8/03) [EB #831] citing *Re: George and Mary Osgood*, #7E0709-3-EB, DO at 2 (11/26/02); *Re: Ray G. & Lynda J. Colton*, #3W0405-5(Revised)-EB, MOD at 3 (10/2/02); *Re: Edward E. Buttolph Revocable Trust*, #5L1339-EB, CPR at 2 (7/20/00).

* Groundwater collection system complies with applicable health and DEC regulations under Criteria 1 and 1(B), as Board is bound by WRB decision affirming/modifying DEC permit with respect to those criteria. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 13 (7/20/00). [EB #696]

* Because the WRB appeal preceded appeal to Board, which cannot afford a different remedy, Board defers issuing decision pending outcome of WRB appeal, and any appeals from that decision. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB (9/16/98). [EB #696M]

* Board is not bound by approval or permits granted by other agencies. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

* If the plain language of the rule is ambiguous, the Court will turn to other tools of statutory construction, and also give weight to the agency's interpretation of the rule. *Slocum v. Dep't of Soc. Welfare*, 154 Vt. 474, 478 (1990)).

* Court gives "substantial deference" to an agency's interpretation of its own regulations. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 15, 196 Vt. 467.

* Court gives no deference to one agency's interpretation of a different agency's promulgated rule terms. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 24, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 15, 196 Vt. 467.

* The Court gives ANR's interpretation of "redevelopment" set out in its own regulations, "substantial deference." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 22, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 15, 196 Vt. 467.

* For the Court to disregard ANR's interpretation of "redevelopment" as excluding road maintenance activities of impervious surfaces such as coldplaning and resurfacing, the objecting parties must show that "ANR's interpretation is 'wholly irrational and unreasonable in relation to its intended purpose.'" *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 22, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re ANR Permits in Lowell Mountain*

Wind Project, 2014 VT 50, ¶ 17, 196 Vt. 467 (quoting *Town of Killington*, 2003 VT 88, ¶ 6, 176 Vt. 70).

* Court finds ANR's definition of "redevelopment" as excluding road maintenance activities of impervious surfaces, such as coldplaning and resurfacing, to be neither irrational nor unreasonable. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 22, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

3.3 Preemption issues

* Preemption of Act 250 jurisdiction depends on the facts of each case, and whether it is a matter of State as well as federal consideration. *Re: Town of Springfield Hydroelectric Project*, DR #111 (1/19/81); but see *Town of Springfield v. Vermont Environmental Board*, 521 F. Supp. 213 (D.Vt. 1981) (federal provisions pre-empt Act 250 jurisdiction)

* "Not all state and local regulations are preempted [by the ICCTA]; localbodies retain certain police powers which protect public health and safety." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir., 2005).

3.3.1 Federal constitution / laws

* "The Supremacy Clause of the United State Constitution provides that federal law shall be the supreme law of the land...any thing in the Constitution or laws of the State to the Contrary notwithstanding." Accordingly, "under the doctrine of preemption, a corollary to the Supremacy Clause, any state or municipal law that is inconsistent with federal law is without effect." *Vermont Railway, Inc. v. Town of Shelburne*, No. 2:16 – cv – 16, at 16 (D.Vt. Jun. 29, 2016)(internal quotes and citations omitted).

* "Accordingly, the fact that the Property in this case was once subject to two Act 250 permits is wholly immaterial to the question of whether the ICCTA's preemption clause covers the Railway's project." Town's waiver of preemption based on previous Act 250 permits thus fails. *Vermont Railway, Inc. v. Town of Shelburne*, No. 2:16 – cv – 16, at 24 (D.Vt. Jun. 29, 2016).

* Voluntary agreements between private parties...are not presumptively regulatory and consequently, most private contracts do not constitute the sort of regulation expressly preempted by the federal statute. Thus, private agreement between railway and State of Vermont does not waive Railways right to assert preemption against the Town of Shelburne. *Vermont Railway, Inc. v. Town of Shelburne*, No. 2:16 – cv – 16, at 24-25 (D.Vt. Jun. 29, 2016).

* The Town of Shelburne pre-construction permit places an unreasonable burden on rail transportation; thus, the ICCTA preempts the town's pre-construction regulation. *Vermont Railway, Inc. v. Town of Shelburne*, No. 2:16 – cv – 16, at 27 (D.V.T. Jun. 29, 2016).

* The ICCTA preempted pre-construction permit requirement of Act 250 with respect to transloading and storage facilities that rail carrier sought to construct on its property. *Green*

Mountain R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005).

- * The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits the State from imposing a substantial burden on religious exercise unless the regulation is the least restrictive means of furthering a compelling governmental interest. *In re Downing Act 250 Application*, No. 225-11-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment, at 10 (11/29/10).
- * Federal law preempts the Board from considering whether radio frequency radiation from a personal wireless services facility violates Act 250, where that facility complies with Federal Communications Commission Guidelines. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 5-6 (8/8/2003). [EB#734M3]
- * Federal law preempts the Board from considering whether radiofrequency interference violates Act 250. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 4 (8/8/2003). [EB#734M3]
- * US Constitution provides that "the Laws of the United States ... shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. *In re Commercial Airfield*, 170 Vt. 595, 595 (2000)(mem.).
- * The supremacy clause of the US Constitution allows for the federal preemption of state and local laws. *In re Commercial Airfield*, 170 Vt. 595, 595 (2000)(mem.).
- * Federal Aviation Act does not preempt question of whether Act 250 permit is required, but may preempt certain permit conditions such as those concerning aircraft noise or airport safety. *In re Commercial Airfield*, 170 Vt. 595, 597 (2000)(mem.), affirming *Commercial Airfield, Cornwall, Vermont*, DR #368 (1/28/99).
- * "[S]tate law is pre-empted to the extent " that it actually conflicts with federal law." *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995).
- * "[T]here is no actual conflict where a collision between two regulatory schemes is not inevitable." *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995).
- * Because there has been no showing of an inevitable collision between the Board's order and an FAA ruling, there is nothing to prevent the Board from imposing an otherwise lawful condition. *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995).
- * Board's order to require the installation of light shields on lights on radio tower does not impose a condition regardless of FAA approval. *In re Stokes Communications Corp.*, 164 Vt. 30, 37-38 (1995).
- * "The fact that . . . [developer] may have to obtain FAA approval for the light shields does not prevent the Board from exercising Act 250 jurisdiction over the tower with regard to the light shields." *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995).

- * State law may run afoul of the Supremacy Clause in two ways: the law may regulate the federal government directly or discriminate against it, or the law may conflict with an affirmative command of Congress. *ANR v. Duranleau*, 159 Vt. 233, 236 (1992).
- * Federal Disaster Relief Act did not preempt Act 250. *ANR v. Duranleau*, 159 Vt. 233, 236-37 (1992).
- * Board is not preempted from regulating the assembly, repair, or maintenance of aircraft when these activities are unconnected with the Federal Aviation Administration's air traffic control. *Re: Warplanes, Inc.*, #9A0136-1-EB (5/1/89).
- * Act 250 review is not preempted by either the Water Resources Board or the Corps of Engineers where improvements on land and waters are interrelated, and changes on the land are substantial enough to subject the project to Commission review. *Re: L.J. Aske, Jr.*, DR #105 (FCO at 2) (8/30/79).
- * The Federal Aviation Administration and the Environmental Protection Agency pre-empt state and local control over aircraft noise. *Brady Sullivan Act 250 Permit Application Appeal*, 38-4-17 Vtec Decision on Motion for Summary Judgement at 4 (1/19/2018), citing *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).
- * Court found no federal preemption over Act 250 review of a proposed heliport as the aviation noise was not the sole impact to be regulated; “instead, all impacts of a new landing site (including noise) are to be taken into account in determining the impact of a land use, and whether to allow the land use in the first place.” *Brady Sullivan Act 250 Permit Application Appeal*, 38-4-17 Vtec Decision on Motion for Summary Judgement at 9 (1/19/2018).
- * New aviation land improvements are not preempted by federal law. *Brady Sullivan Act 250 Permit Application Appeal*, 38-4-17 Vtec Decision on Motion for Summary Judgement at 9 (1/19/2018).
- * Appellant’s motion for summary judgement granted in part, as 10 V.S.A. § 6086(a)(8) cannot be interpreted to regulate aircraft operation and noise due to the Federal Aviation Act preempting state and local law. *Brady Sullivan Act 250 Permit Application Appeal*, 38-4-17 Vtec Decision on Motion for Summary Judgement at 4 (1/19/2018).
- * Court denied appellant’s motions for summary judgement in part, as it determined that it was not preempted by federal law to review potential noise impacts from a proposed private heliport under 10 V.S.A. § 6086(a)(8) because the heliport had not yet been built. “[C]onsidering noise when determining whether to permit a proposed aircraft landing site is different from attempting to regulate noise at an existing airport.” *Brady Sullivan Act 250 Permit Application Appeal*, 38-4-17 Vtec Decision on Motion for Summary Judgement at 9 (1/19/2018).

3.3.1.1 Federal use / federal lands

- * Construction to accommodate F-35A aircraft on Vermont Air National Guard base at Burlington

International Airport is not development because the construction is solely for a federal purpose. *Burlington Airport A250 JO 4-231 (F-35A Jets)*, No. 42-3-13 Vtec, Entry Order at 7 (5/13/14), *aff'd, In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 (3/6/15) (mem.).

* Jurisdiction for construction above 2500 feet is preempted with respect to construction by the federal government on federal lands. *Green Mountain Power Corp.*, DR #120, FCO at 3-4 (11/14/80).

3.3.2 Other state laws

* Act 250 review of highway use is not preempted by AOT authority or AOT regulations. *Re: OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000).

* Legislature did not intend Dept of Agriculture pesticide regulations to preempt Act 250 review of herbicide use on utility rights-of-way under Criteria 1(B) and 1(E). *N.E. Tel. & CVPS*, #2W0037-1-EB and #2W0579-EB (11/30/83). [EB #210]

* With respect to whether Act 250 applies to hydroelectric projects, Public Service Board jurisdiction must first be established. *Re: Chace Mill Hydroelectric Project*, DR #128 (FCO at 4) (4/19/82).

* Act 250 review is not preempted by either the Water Resources Board or the Corps of Engineers where improvements on land and waters are interrelated, and changes on the land are substantial enough to subject the project to Commission review. *Re: L.J. Aske, Jr.*, DR #105 (FCO at 2) (8/30/79).

3.4 Issues for judicial determination

* The adjudication of competing property rights is a legal determination within the province of the courts, not the Board. *Re: William Kalanges* #4C0593-4-EB (Revocation), FCO at 10 (1/15/04) [EB #835]; *Re: Equinox Resort Associates*, #8B0209-5-EB (MOD/Revocation at 3) (9/24/97). [EB #668M2]; *Re: Okemo Mountain Inc.*, #2S0351-7A-EB (MOD at 4) (1/9/92). [EB #527M1]

* Where adjudication of competing property claims (pending in a court of competent jurisdiction) is integral to Board's decision, Board defers to court to resolve claim before addressing issues within its authority. *Equinox Resort Associates*, #8B0209-5-EB (Revocation) (9/24/97). [EB #668M2]; see *In re Buttolph*, 147 Vt. 641, 643 (1987).

* Where permittee claimed an agreement with landowner to use land for land application of sewage, WFP would not rule on agreement's validity despite landowner's contention that agreement was no longer valid; rather, such an inquiry should be left to the courts. *Town of Royalton*, #I9416-WFP (9/22/95).

* Board has no jurisdiction to determine costs or other relief available at common law or under statute to purchasers who acquire lots created without Act 250 permit. *John W. Stevens and Bruce W. Gyles*, DR #240 (5/8/92).

* Consideration of public trust issue in revocation proceeding would be an unauthorized expansion of the jurisdiction conferred on the WFP in cases involving Act 250 permits. *Vicon Recovery Systems Inc., and Sunderland Waste Management Inc.*, #8B0301-2-WFP, MOD (4/19/91). [WFP # 2].

3.4.1 Property rights (see [1001.2](#))

* Environmental Division's jurisdiction is limited to the Act 250 application on appeal; the Court will not determine property rights. *Re: Killington Resort Parking Project*, No 173-12-13 Vtec, Entry Order at 2 (05/13/15) (citing *Re: Britting Wastewater/Water Supply Permit*, No. 259-11-07 Vtec, slip op. at 3-4 (4/7/08) (Wright, J.) ("[R]esolution of adjacent landowners' rights regarding a disputed right-of-way is beyond the jurisdiction of this Court."); *Re: Killington Village Act 250 Master Plan Application*, No. 147-10-13 Vtec, Entry Order at 2 (5/13/15).

* Environmental Court has limited subject matter jurisdiction that does not include the adjudication of private property rights. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09), *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11); *In re Guité Act 250 Jurisdictional Opinion #3-128 (Revised)*, #126-7-09 Vtec, Decision and Order at 4 (4/2/10); Clermont Terrace Site Plan and Zoning Permit Approvals, Nos. 46-2-05 Vtec & 72-4-05 Vtec, at 8 (Mar. 22, 2006) (Durkin, J.)

* Adjudication of property rights is within the purview of the superior courts, not the Board. *In re Estate of Swinington*, 169 Vt. 583, 586 (1999)(mem.); *Re: Mark and Pauline Kisiel and Thomas and Cheryl Kaminski*, #5W1151-1-EB, MOD at 5 - 6 (2/3/05); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4 / #5L0426-9-EB, FCO at 9 (10/3/03). [EB #824] (claim that covenants restrict permittee from seeking an amendment to permit is more properly brought in superior court; it cannot be brought before the Board.).

3.5 Board as plaintiff, prosecutor and judge

* The Legislature has taken care to separate the prosecutorial and adjudicatory functions of the Board, which serves in turn to maintain its integrity when functioning as an adjudicatory forum for resolving jurisdictional questions. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 212 (2002).

* Board could conduct revocation hearing and institute lawsuit seeking injunction to prohibit quarrying activities during pendency of proceedings, without impermissibly mixing adjudicatory and prosecutorial functions. *In re Crushed Rock, Inc.*, 150 Vt. 613 (1988).

* Mere fact that Board had initiated the proceeding after determining that there was sufficient cause to believe that the permit-holder had violated the permit would not create an unacceptable

risk of bias to overcome the presumption of honesty and integrity. *In re Crushed Rock, Inc.*, 150 Vt. 613, 619 (1988).

* 12 V.S.A. § 61(a), which requires disqualification where the person acting in a judicial capacity "is interested in the event of such cause or matter," must be interpreted so that the mere combination of functions does not make the adjudicator "interested" and subject to disqualification. *In re Crushed Rock, Inc.*, 150 Vt. 613, 623 (1988).

* Board has authority to seek injunctive relief in court to prevent harm and maintain status quo pending permit revocation hearing; such action does not bar Board from hearing revocation petition. *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded*, *In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306]

4. Constitutional Issues

4.1 Constitutionality of Act 250 provisions

* Condition limiting truck traffic in an Act 250 permit does not violate Commerce or Supremacy Clauses of United States Constitution. *OMYA, Inc. v. State of Vermont*, No. 01-7445, (2d. Cir. 4/25/02).

* Condition limiting truck traffic in an Act 250 permit does not deny substantive due process under the Vermont Constitution. *OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000).

* Condition limiting truck traffic in an Act 250 permit is not an impermissible moratorium or taking. *OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000).

* Condition limiting truck traffic in an Act 250 permit does not violate Common Benefits Clause of the Vermont Constitution (Equal Protection). *OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000).

* Act 250 does not, on its face, violate the First Amendment. *In re Downing Act 250 Application*, No. 225-11-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment, at 7-10 (11/29/10).

* State regulation of roads does not violate Commerce Clause, Equal Protection Clause or Supremacy Clause of US or Vermont Constitutions. *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 25-30 (5/25/99), *aff'd*, *OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00).

* Act 250 permits conditions do not cause a taking. *Killington Ltd. v. State of Vermont*, 164 Vt. 253 (1995); *Southview Associates, Ltd. v. Bongartz et al.*, 980 F.2d 84 (2d. Cir. 1992), *cert. denied*, 507 U.S. 987 (1993).

4.2 Power of Board to decide constitutional questions

- * Board has no authority to determine whether a permit condition constitutes a "taking" of property because the Board has no jurisdiction to decide constitutional issues. *Re: Maple Tree Place Associates*, #4C0775-EB (3/25/98). [EB #700M]; *Munson Earth-Moving Corporation*, #4C0986-EB (FCO at 8 n. 1) (4/4/97), *rev'd on other grounds, In re Munson Earth Moving*, No. 97-327 (Vt. 8/13/99). [EB #660]; *Re: Nehemiah Associates, Inc.*, #1R0672-1-EB (MOD at 3) (10/3/95). [EB #592M3]
- * Board is not the proper forum for deciding constitutional issues. *Westover v. Village of Barton Electrical Department*, 149 Vt. 356, 359 (1988); *Munson Earth-Moving Corporation*, #4C0986-EB (FCO at 8 n. 1) (4/4/97), *rev' on other grounds, In re Munson Earth Moving*, 169 Vt. 455 (1999) [EB #660]; *Mount Mansfield Co., Inc. (Summer Concert Series)*, DR #269 (FCO at 15) (7/22/92); *Okemo Mountain, Inc.*, #2S0351-12A-EB (MOD at 5) (9/18/90). [EB #471M1]
- * Board does not have jurisdiction to consider constitutional due process objections. *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (MOD at 5) (7/18/95), *aff'd In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995) [EB #615]; *BHL Corporation*, DR #267 (FCO at 11) (2/11/93), *aff'd, In re BHL Corp.*, 161 Vt. 487 (1994); *Great Waters of America and Francesco Galesi and Equinox Springs Corp.*, #8B0209-EB (9/27/79) [EB #116] *aff'd, In re Great Waters*, 140 Vt. 105 (1981).
- * Administrative bodies such as the Board do not have the power to declare statutes invalid. *Dept. of State Bldgs. & Vermont State Colleges*, #3R0581-4-EB (FCO at 9) (11/10/94). [EB #613]
- * *Taft Corners* ruling does not preclude relief to parties whose due process rights may have been violated due to procedural errors. *Atlantic Cellular Co.*, #3W0726-EB (2/24/94). [EB #588M2]
- * Where party had notice of hearing at least 13 days before the hearing and party had opportunity to present and rebut evidence, party's due process rights were not violated. *Atlantic Cellular Co.*, #3W0726-EB (2/24/94). [EB #588M2].
- * Act 250 does not empower the Board to decide whether issuance of a permit violates the constitution. *Okemo Mountain Inc.*, #2S0351-7A-EB (MOD at 4) (1/9/92). [EB #527M1]
- * Implications of the public trust doctrine are determined by the courts and legislature, not by Commissions and Board. *Okemo Mountain, Inc.*, #2S0351-12A-EB (MOD at 3) (9/18/90). [EB #471M1]
- * Application of the "substantial change" analysis does not constitute a deprivation of the equal protection of the law. *Hugh Sparks Gravel Pit*, DR #195 (3/2/88).
- * The Board has no jurisdiction to decide the constitutionality of the Act 250 enabling legislation. *Karlen Communications, Inc.*, #5L0437 (8/28/78). [EB #89]

4.3 Due Process

- * Board's findings concerning truck traffic impact establish a real and substantial relationship between condition limiting such traffic and public welfare, so condition is not violative of

substantive due process as arbitrary or capricious. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).

* A fair trial before an impartial decisionmaker is a basic requirement of due process, applicable to administrative agencies as well as to the courts. *ANR v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 234-235 (1997).

* A government land use decision may give rise to a substantive due process violation if the decisionmaking process is arbitrary and capricious. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 96 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Analysis of a claim of deprivation of property without due process of law commences with a determination of whether any right requiring constitutional protection in fact is involved. *In re Great Waters of America, Inc.*, 140 Vt. 105, 108 (1981).

* "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *In re Great Waters of America, Inc.*, 140 Vt. 105, 108 (1981).

* Courts have been reluctant to define with exactness the rights guaranteed by the due process clause. *In re Great Waters of America, Inc.*, 140 Vt. 105, 108 (1981).

* "Right" to personal notice is not a "liberty" or "property" entitlement protected by the Fourteenth Amendment. *In re Great Waters of America, Inc.*, 140 Vt. 105, 108 (1981).

* Appellant claims the benefit provided by the legislature while attacking its limitations. "(W)here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant ... must take the bitter with the sweet." *In re Great Waters of America, Inc.*, 140 Vt. 105, 108-09 (1981), quoting *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974).

* "Questions of fairness involving procedural rights afforded by administrative bodies must be examined when they approach due process problems of constitutional dimension. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 515 (1975), quoting *In re State Aid Highway No. 1, Peru, Vermont*, 133 Vt. 4, 9 (1974).

4.3.1 As related to a claim that regulation goes "too far"

* A government land use decision may give rise to a substantive due process violation if the decision making process is arbitrary and capricious. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 96 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993)

* Regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 96 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* A substantive due process claim premised on the theory that a regulation has gone too far is subject to both prongs of the *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) ripeness test. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 96 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* A substantive due process claim remains premature "until a final decision is made as to how the regulations will be applied" to a landowner's property. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 96 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Without such a final decision, a court cannot determine adequately the economic loss--a central factor in the inquiry--occasioned by the application of the regulatory restrictions; unless a final decision has been rendered, it remains unclear just how far the regulation goes. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 96 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* If the state provides an acceptable procedure for obtaining compensation, the state's regulatory action will generally not exceed its police powers. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 96 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Southview's substantive due process claim premised on arbitrary and capricious government conduct is subject to only the final decision prong of the *Williamson* ripeness test, not the second *Williamson* requirement -- that the plaintiff seek an available state remedy. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 96-7 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Unless a court has a final decision before it, it cannot determine whether a claimant was deprived of property and whether the government conduct was arbitrary or capricious. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 97 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

4.4 Takings

* A taking occurs only when a person has lost "all economically beneficial use of [his] land." *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000), citing *Chioffi v. City of Winooski*, 165 Vt. 37, 41(1996) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 13 (5/27/04) [EB #837] (to the extent that the land can be used in other, economically beneficial ways, no taking occurs when Criterion 9(B)(i) prohibits uses that have greater agricultural impacts).

* Mere fact that property is subject to Act 250 review does not mean that all development would be prohibited and thus property taken. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 259 (1995).

4.4.1 Facial taking

* A facial taking claim must allege that the mere adoption of land use regulations constitute a taking of the property. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000); *Killington, Ltd. v. State*, 164 Vt. 253, 261 (1995).

* To prevail on a facial taking claim, plaintiffs must show either that the regulation in question does not substantially advance a legitimate state interest or that it denies the owner all economically viable use of his land. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).

* Zoning regulations may be challenged as a taking either on their face or as applied to an owner's property. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 260-61 (1995).

* A facial challenge is ripe for judicial review upon the adoption of the regulation. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 261 (1995).

* Landowner's request for monetary relief is inconsistent with a facial challenge to the ordinance. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 261 (1995).

4.4.2 Physical taking

* The hallmarks of a physical taking are "absolute exclusivity of the occupation, and absolute deprivation of the owner's right to use and exclude others from the property." *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 259 n. 3 (1995), citing *Southview Assocs. v. Bongartz*, 980 F.2d 84, 93 (2d Cir.1992), cert. denied, 507 U.S. 987 (1993).

* Regulatory restrictions to protect bear habitat do not constitute a physical taking. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 259 n. 3 (1995).

* If a government has committed or authorized a permanent physical occupation of property, "the Takings Clause generally requires compensation." *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 92-93 (2d. Cir., 1992), cert. denied, 507 U.S. 987 (1993).

* If government action constitutes a permanent physical occupation of property, there is "a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 93 (2d. Cir., 1992), cert. denied, 507 U.S. 987 (1993).

* "Physical taking" requires courts to apply a per se rule and stands in contrast to the fact-intensive inquiry accompanying a judicial determination of whether a "regulatory taking" has occurred. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 93 (2d. Cir., 1992), cert. denied, 507 U.S. 987 (1993).

* A permanent physical occupation occurs when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 93-94 (2d. Cir., 1992), cert. denied, 507 U.S. 987 (1993).

* Because Southview has not lost the right to possess the allegedly occupied land that forms part of the deeryard, because Southview retains substantial power to control the use of the property, and because Southview's right to sell the land is by no means worthless, no physical taking has occurred. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 94 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Because Southview can construct improvements that are not subject to Act 250 jurisdiction, no physical taking has occurred. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 94 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Because no absolute, exclusive physical occupation has occurred and there has been no absolute dispossession of Southview's property rights, no physical taking has occurred. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 95 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Relatively minor, occasional, seasonal, and limited "invasion" of deer is not a physical taking. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 95 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Minor physical intrusions are not physical takings. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 95 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

4.4.3 Regulatory taking

* When the regulation is challenged as applied to the property, the focus of the claim is on how the administration of the regulation impacts the property. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 261 (1995).

* A regulatory taking--also known as inverse condemnation--occurs when the purpose of government regulation and its economic effect on the property owner render the regulation substantively equivalent to an eminent domain proceeding and, therefore, require the government to pay compensation to the property owner. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 93 n.3 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* No taking occurs when a landowner voluntarily subjects his property to a higher level of regulation. *See, Yee v. City of Escondido*, 503 U.S. 519 (1992); *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 95 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993) (because Southview voluntarily engaged in activity that subjected it to the Act 250 review process - and at the time Southview purchased the land it knew that the project would be subjected to Act 250 scrutiny - there was no government compulsion); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 14 (5/27/04) [EB #837] (because Act 250 jurisdiction attaches only to certain development or subdivision activities, applicant can choose to engage in a myriad of development activities that do not trigger Act 250 review)

4.4.3.1 Ripeness

* Whether a regulatory takings claim resulting from an Act 250 denial is ripe for litigation must be determined by a two-part test. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 257 (1995), citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); see *In re Sherman Hollow, Inc.*, 160 Vt. 627, 630 (1993) (mem.); *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 95 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Had landowner sought merely to invalidate the regulation, court might find the ripeness issue is moot. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 261 (1995).

4.4.3.1.1 Final decision

* A regulatory takings claim resulting from an Act 250 denial requires the plaintiff to have obtained a final decision regarding the application of the government regulations to plaintiff's property. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 257 (1995), citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 95 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993); see also *In re Pelham North, Inc.*, 154 Vt. 651, 652 (1990) (mem.) (Environmental Board's decision voiding land use permit is not ripe until Board finally disposes of subject matter).

* Because the Board did not unconditionally deny either application to log in bear habitat area or its application to build a snowmaking pond on adjacent land, applicant prematurely asked the superior court to speculate as to whether viable economic and productive use of its property has been denied. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 258 (1995).

* Until Commission and Board have had an opportunity to rule on an application addressing mitigation measures and to determine conclusively the extent to which development will be permitted in the area, the superior court is without jurisdiction to review takings claim. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 260 (1995.)

* "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 262 (1995), citing *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986).

* Constitutional claim of temporary taking of its property during application procedure is not ripe for review until applicant has received a final decision regarding governmental regulation of its property. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 630 (1993).

* Board's rejection of Southview's 33-unit subdivision proposal in no way precludes Southview from submitting another proposal, and it is "not clear whether the [Board will] deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 98 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Although the Board has applied Act 250 to the one particular subdivision proposal in question, it has yet to provide "a final, definitive position regarding how it will apply the regulations at issue to

the particular land in question." *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 98 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

4.4.3.1.1.1

Futility

* Previous decisions by Board and this Court do not render any additional administrative proceedings futile. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 258 (1995), citing *Southview Assocs. v. Bongartz*, 980 F.2d 84, 99 (2d Cir.1992), *cert. denied*, 507 U.S. 987 (1993) (developer's futility argument dismissed because the Board had left the door open to less intrusive development of the property).

* Takings plaintiff has "heavy burden" of showing that compliance with local ordinances would be futile. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 259 (1995).

4.4.3.1.2

Utilizing state compensation process

* A regulatory takings claim resulting from an Act 250 denial requires the plaintiff to have utilized state procedures for obtaining just compensation. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 257 (1995), citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 95 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* An "as-applied" challenge is not ripe for review until the property owner has sought administrative relief through government procedures. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 261 (1995).

* *Williamson* requires an owner to seek compensation from the state, prior to asserting a regulatory taking claim, if the state has a "reasonable, certain and adequate provision for obtaining compensation." *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 99 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

* Because Vermont provides a route whereby Southview may seek compensation in its courts, (the Vermont Constitution provides that "whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money" Vt. Const. ch. 1, art. 2.), its takings claim fails the second Williamson prong. *Southview Associates, Ltd., et al v. Bongartz, et al.*, 980 F.2d 84, 100 (2d. Cir., 1992), *cert. denied*, 507 U.S. 987 (1993).

4.4.3.1.3

Exhausting administrative remedies

* To have a ripe takings claim against Town, landowner must first exhaust all of its administrative remedies, including zoning variance procedures. *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 262 (1995).

4.4.3.2

"Reasonable investment-backed expectations"

* A primary question in any takings inquiry is whether state regulation of land use has interfered with a landowner's "reasonable investment-backed expectations" *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 13 (5/27/04) [EB #837]

* Applicant's expectations are colored by the fact that Act 250's criteria have been in existence for over 30 years, and applicant entered into project with full knowledge of Criterion 9(B)'s requirements and prohibitions. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 13 (5/27/04) [EB #837], citing, *Ruckelshaus v. Monsanto*, 467 U.S. 985, 1006 - 07 (1984) (whether expectations are reasonable will depend on the claimant's knowledge of the facts and law at the time the investment was made), and *Southview Associates, Ltd. v. Bongartz et al.*, 980 F.2d 84, 107 (2d. Cir. 1992), *cert. denied*, 507 U.S. 987 (1993)

4.5 Equal Protection

* Courts have consistently upheld less than comprehensive legislation out of a recognition that, for reasons of pragmatism or administrative convenience, the legislature may choose to address problems incrementally. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 534 (2000).

* The fact that Act 250 does not apply to all in-state developments or out-of-state enterprises does not render it constitutionally infirm. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 534 (2000).

* To trigger equal protection analysis, person must be treated differently from other similarly situated class members or be singled out under Act 250 for a purpose "wholly fanciful or arbitrary." *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 534 (2000).

* Where basis of alleged discrimination is that a permit application was opposed rather than unopposed, because this classification does not involve a fundamental right or suspect class, discrimination is constitutional provided it has a reasonable relationship to a legitimate public purpose. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 628 (1993); see *Choquette v. Perrault*, 153 Vt. 45, 52 (1989).

* Applicant's claim of discrimination, in violation of Chapter I, Article 7 of the Vermont Constitution, fails where Board's actions have a rational relationship to a legitimate purpose. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 628 (1993).

C. District Commissions and the Board

* To administer the regulations and plans provided for by the Act a statewide Environmental Board was created. *In re Preseault*, 130 Vt. 343, 344 (1972).

* Below the Environmental Board are seven District Environmental Commissions which are charged with the enforcement of the Act at the local level. *In re Preseault*, 130 Vt. 343, 344 (1972).

5. District Commissions

* The role of the District Commission is not just to select which alternative plans are the most

preferable. The District Commission also is responsible for assessing the impacts of the project and adding permit conditions as necessary. *In re Lathrop L.P.*, 2015 VT 49, ¶ 108.

* Environmental Court has no general supervisory role with respect to municipalities, ANR, District Commissions, or District Coordinators. Rather, it is the Natural Resources Board that is authorized to adopt rules of procedure for the District Commissions, 10 V.S.A. § 6025(a), and it is the Land Use Panel that is authorized to adopt substantive rules in relation to Act 250. *In re: Guite Act 250 Jurisdictional Opinion*, No. 265-11-08 Vtec, Decision and Order On Motion to Reopen and for Clarification of Scope of Remand at 3 (3/25/09).

* District Environmental Commissioners are not “parties” to the appeals brought before the Environmental Court, and are not NRB “employees.” *In re: JLD Wal*Mart Act 250 LU Permit (Altered)*, No. 116-6-08 Vtec, Motion to Dismiss VNRC’s First Question on Appeal; No. 2 at 2 (10/10/08).

* Below the Environmental Board are seven District Environmental Commissions which are charged with the enforcement of the Act at the local level. *In re Preseault*, 130 Vt. 343, 344 (1972).

6. Delegation or Surrender of Powers

* The public trust requires that a state agency or department head may not delegate authority or duties that are "discretionary or quasi-judicial in character, or which require the exercise of judgment," absent a statute expressly permitting such delegation. *ANR v. Henry et al.*, 161 Vt. 556, 558 (1994), quoting *In re Buttolph*, 141 Vt. 601, 604-05 (1982).

7. Implied Powers

* The exercise of the police power is justified if there is a reasonable relationship between the agency action and the legislative ends sought and if the agency action is premised on an appropriate overriding public interest. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 58 n. 5 (2/22/01). [EB #758]

8. Independent Review; Compliance with Other Statutes

* To achieve far-reaching goals of Act 250, Board has authority to conduct an independent review of the environmental impact of proposed projects and is not limited to the considerations listed in Title 10. *In re Hawk Mountain Corp.*, 149 Vt. 179, 184 (1988); see 10 V.S.A. § 6086(a)(1).

* Under the Vermont APA and Vermont Rules of Evidence, the Board need not take official notice of Vermont law. *Howe Center, Ltd.*, #1R0770-EB (FCO at 35) (5/4/95). [EB #614]

* Act 233 does not reference or repeal Act 250, and thus does not exempt a project from Criterion 8 review under. *Dept. of State Bldgs. & Vermont State Colleges*, #3R0581-4-EB (FCO at 9) (11/10/94). [EB #613].

* The Board does not have the authority to inquire into whether a planning commission properly followed its procedures. *Salvas Paving, Inc. and Jerome and Joan Salvas*, #5L1149-EB (1/20/93). [EB #559M]

* Board is not bound by approval or permits granted by other agencies. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

D. Authority

*"The district commission's authority 'is limited to considering permit applications in the context of [Act 250's] ten statutory criteria and either approving or denying the application,' as well as amending permits." *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 7 (Vt. Oct. 1, 2016) (citing *In re Treetop Dev. Co. Act 250 Dev.*, 2016 VT 20, ¶ 14 __Vt.__ 143 A.3d 1086).

* It is the role of the District Commission to adjudicate Act 250 permit applications under the ten criteria. The Act 250 process also guarantees public notice and the opportunity for interested parties to participate and present evidence on the criteria. *In re Lathrop L.P.*, 2015 VT 49, ¶ 103 (citations omitted).

* To determine the scope of authority vested in an administrative agency by a statutory grant of power, court looks to its enabling legislation. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211 (2002).

* As a public administrative body, Board has only that adjudicatory authority conferred on it by statute. *In re Estate of Swington*, 169 Vt. 583, 586 (1999)(mem.).

* Board's jurisdiction is limited to construction and application of Act 250 and Board rules. *In re Estate of Swington*, 169 Vt. 583, 586 (1999)(mem.).

9. Authority of District Commissions to decide Act 250 matters

* When the Court or district commissions do not "receive sufficient evidence to allow it to render full findings and conclusions on all Act 250 criteria implicated" in the project on appeal, Act 250 Rule 21 (D) authorizes the commission and the Court to "make findings and legal conclusions as far as the evidence presented allow" instead of simply rejecting the pending application. *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 25 (8/6/14).

* Petition for abandonment of a permit must be initiated in the Commission. *Re: Nextel WIP Lease Corporation d/b/a Nextel Partners and Charles Andrews*, #3W0876-EB, RO at 3 (1/21/03) [EB # 815]; *Re: Rutland Gas & Oil Co. d/b/a Rutland Fuel Company*, DR #410, DO at 3 (7/19/02); see, EBR 38(B)(2).

* Commissions have jurisdiction over complete applications; they do not have jurisdiction over applications which have been deemed by the Coordinator to be incomplete. *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 4 (1/16/03). [EB #820]

* EBR 51(B) requires Commission, not Coordinator, to rule that it intends to issue a permit without convening hearing unless a request for a hearing is received by a certain date. *Norman P. Kelley*, #5W0961-3-EB, FCO at 8 (3/12/02). [EB #794]

* Commission lacks authority to issue a JO. *Re: Stratton Corporation*, #2W0519-17(Revised)-EB, DO at 5 (1/10/01).

* Under Act 250, the Legislature intended that Commissions and Board review all major construction in the State whether by private developers, the State, or municipalities. *Town of Wilmington*, DR #258 (FCO at 14) (6/30/92); *Sterling College*, DR #259 (FCO at 5) (3/27/92).

* Commission has no authority to convene a hearing to review permittee's alleged non-compliance with permit conditions because enforcement authority is vested with the Board. *Raponda Landing Corp.*, #2W0604-3-EB (10/4/88). [EB #371M] *But see* 10 VSA 6083(g).

9.1 Subject matter jurisdiction (see [1001](#))

9.1.1 Advisory or hypothetical opinions (see [226.1](#))

* Once the Commission determines that a person is eligible for party status based on a particularized interests, it is not allowed to then provide an advisory opinion on whether the person is eligible for party status as an adjoining landowner. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 6 (1/28/11).

10. Authority of Board to decide Act 250 matters

* As a public administrative body, Board has only that adjudicatory authority conferred on it by statute. *In re Estate of Swington*, 169 Vt. 583, 586 (1999)(mem.); *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590 (1993).

* Board's jurisdiction is limited to construction and application of Act 250 and Board rules. *In re Estate of Swington*, 169 Vt. 583, 586 (1999)(mem.).

* The courts may intervene where Board exceeds the bounds of its enabling legislation. *In re Taft Corners Associates, Inc.*, 60 Vt. 583, 590 (1993).

* It is the uneasy duty of the Environmental Board to consider all elements set forth in the statutes, weigh them and make an impartial decision. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 520-21 (1975).

* To administer the regulations and plans provided for by the Act a statewide Environmental Board was created. *In re Preseault*, 130 Vt. 343, 344 (1972).

10.1 Subject matter jurisdiction (see [1001](#))

- * Filing deadlines set forth in the rules or statute cannot be waived by the district commissions or by this Court in a de novo appeal. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 16 (7/30/10), citing *Re: Bernard Carrier*, Application # #7R0639-1-EB, Memorandum of Decision, at 3 (Vt. Envtl. Bd. Oct. 20, 1999) (dismissing as untimely a motion to alter that was filed one day after the deadline because the Board “cannot waive the filing deadline set forth in [the Act 250 Rules]”).
- * Court lacks subject matter jurisdiction to consider impacts of proposed developments when permit amendment authorized subdivision but no development at this time. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09), *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).
- * Environmental Court declines to consider possible future developments’ impact on traffic in area where future developments not yet permitted, may occur at undetermined time in future, and Commission may impose additional traffic conditions upon future developments. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 40 (1/20/10).
- * Possible harm from future development can be addressed in future permit proceedings; court has no jurisdiction to address such future possible concerns in present proceeding. *In re: Costco Act 250 Permit Amendment*, #143-7-09 Vtec, Entry Order at 2 (6/23/09).
- * Board cannot decide jurisdictional question not presented in appeal from permit denial. *Re: Central Vermont Public Service Corp. and Verizon New England (Guilford)*, #2W1154-1-EB, MOD on Motions to Alter (12/19/2003). [EB#821]
- * Because of 10 V.S.A. § 6089(c), claim of Board's lack of subject-matter jurisdiction must be raised before Board and may not be raised for the first time in the Supreme Court. *In re Denio*, 158 Vt.230, 234 (1992); but see *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 8 (1974) (court found "extraordinary circumstances" to allow review without preservation of issue below).
- * Where notice to parties was inadequate (if not nonexistent), Board was without jurisdiction to determine the rights of parties in DR proceeding. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 136 Vt. 213, 216 (1978).
- * Subject matter jurisdiction - a tribunal's authority to decide the question presented - can be reviewed at any time that a matter is pending. *Central Vermont Public Service Corporation*, DR #401, FCO at 5 (4/2/02); *Pompy Farms Crushed Stone, Inc.*, DR #235M, MOD at 4 (8/14/91); *Greg Gallagher*, #7R0607-EB and #7R0607-1-EB, MOD at 1 (7/6/89). [EB #402M]; but see, *In Re Denio*, 158 Vt. 230, 234 (1992); *Putney Paper Company, Inc.*, #2W0436-7-EB (FCO at 9) (11/3/95). [EB #621] (subject matter jurisdiction cannot be raised for the first time on appeal to the Supreme Court).

* Whether a parcel of land falls within the “jurisdiction” of Act 250 does not involve an inquiry into the authority of the decision-maker over the subject matter or the parties. *Central Vermont Public Service Corporation*, DR #401, FCO at 10 (4/2/02).

* Analysis of when a judgment may be attacked collaterally because the forum which renders it does not have jurisdiction over the subject matter or the parties. *Central Vermont Public Service Corporation*, DR #401, FCO at 5 - 7 (4/2/02).

* WFP has no authority to address zoning-related issues. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 5 (9/9/99).

* The Board is the only State entity with the authority to issue DRs regarding jurisdiction, and therefore cannot be estopped from making such determinations. *Andrew and Helen Orzel*, DR #140 (FCO at 3) (1/6/83), *aff'd*, *In re Andrew and Helen Orzel*, 145 Vt. 355 (1985).

10.1.1 Advisory or hypothetical opinions (see [226.1](#))

* It is a general jurisdictional prerequisite that a court exercise its power to resolve only real disputes--"cases and controversies"--as opposed to issuing advisory or hypothetical opinions. *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 391 (1992), citing *Gifford Memorial Hospital v. Town of Randolph*, 119 Vt. 66, 70 (1955).

* It is not the Board's function to outline for petitioners activities which would or would not require permits. *In re Orzel*, 145 Vt. 355, 360 (1985).

* Environmental Court is constitutionally limited to only entertain “actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.” *In re Marcelino Waste Facility*, No. 44-2-07 Vtec, Additional Decision on Motion to Reconsider Dismissal, at 4 (3/21/09) (Durkin, J.) (quoting *Parker v. Town of Milton*, 169 Vt. 74, 77 (1999)).

* Environmental Court declines to consider possible future developments’ impact on traffic in area where future developments not yet permitted, may occur at undetermined time in future, and Commission may impose additional traffic conditions upon future developments. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 40 (1/20/10).

* Considering impact, if any, that proposed future development may have on another person’s easement interests now would be mere speculation and advisory in nature; such an advisory consideration would be improper. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 7 (12/1/09)(citing *In re 232511 Investments, Ltd.*, 2006 VT 27, ¶19, 179 Vt. 409), *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).

* Possible harm from future development at can be addressed in future permit proceedings; court has no jurisdiction to address such future possible concerns in present proceeding. *In re: Costco Act 250 Permit Amendment*, #143-7-09 Vtec, Entry Order at 2 (6/23/09).

* Board does not design projects for applicants nor does it provide advisory opinions on what hypothetical elements of design would receive the Board's approval; an applicant must design its own project. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration), FCO at 11 (8/14/97) [EB #666], citing *Herbert and Patricia Clark*, 1R0785-EB, FCO at 37 (4/3/97).

* DR before administrative board is like declaratory judgment action in court and therefore there must be an actual controversy to confer jurisdiction; hypothetical controversy will not confer jurisdiction. *Lawrence and Darlene McDonough*, DR #306 (12/22/95).

10.1.2 Failure to meet filing deadlines; timeliness of appeal (see [504](#), [552.4](#), [1007](#))

* Filing deadlines set forth in the rules or statute cannot be waived by the district commissions or by this Court in a de novo appeal. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 16 (7/30/10), citing *Re: Bernard Carrier*, Application # #7R0639-1-EB, Memorandum of Decision, at 3 (Vt. Env'tl. Bd. Oct. 20, 1999) (dismissing as untimely a motion to alter that was filed one day after the deadline because the Board "cannot waive the filing deadline set forth in [the Act 250 Rules]").

10.2 Board as an appellate body (see [505](#))

* In appeal, Board's jurisdiction is limited by the scope of the proceedings below. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 591 (1993).

* Board has no jurisdiction to decide issues regarding criteria that were not before Commission and not ruled upon by it. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 591 (1993); *In re Vermont Gas Systems*, 150 Vt. 34, 40 (1988); *In re Juster Assoc.*, 136 Vt. 577, 581 (1978) (because initial consideration of a land use proposal is a function assigned by the Legislature to Commission. the Board lacked authority to entertain the application not heard by Commission); *Re: JCR Realty, Inc.*, DR #426, MOD at 6 (5/7/04); *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680] (Initial consideration of a land use proposal is assigned by the legislature to Commissions; Board has no authority to decide issues that were not ruled upon by Commission); *Re: MBL Associates*, #4C0948-1-EB, (5/4/98); *Stratton Corporation*, #2W0519-9R3-EB (1/15/98); and see *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/23/92). [EB #471M5]; *J. P. Carrara & Sons, Inc.*, #1R0589-EB (4/23/92). [EB #498M]; *Edwin & Avis Smith*, #6F0391-EB (1/16/91). [EB #398M] (See *In re Application of George F. Adams and Co.*, 134 Vt. 172 (1976)).

* Board acts as a quasi-judicial appellate body, to hear appeals from commission decisions. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).

* Board may act only consistent with its role as an appellate body. *In Re Juster Associates*, 136 Vt. 577, 580-81 (1978) (Board cannot hear initial proposal to develop new lands not considered by Commission); *Re: JCR Realty, Inc.*, DR #426, MOD at 6 (5/7/04); *In re State Highway No. 1, Peru, Vermont*, 133 Vt. 4, 8 (1974).

- * Board cannot, under the guise of permit enforcement, subvert the protective scheme ordained by the Legislature in Act 250 by bypassing Commission review. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).
- * Board's continuing authority over its permits may include supervision of the uses and conditions imposed by the permit, but it does not extend to considering a request to develop new land. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).
- * Board is not vested with concurrent jurisdiction with Commission to hear and decide the same matters. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).
- * 10 V.S.A. § 6007(c) provides that jurisdictional questions must first be presented to District Coordinator; only after Coordinator has ruled, may the matter be brought to Board through a Petition for DR. *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 4 (7/17/02). [EB #809]
- * Board lacks authority to consider extent of involved land in permit appeal because JOs ruling on the issue were never appealed. *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, MOD (2/9/01). [EB #767]
- * Board lacks authority to hear appeals from Commission decisions that are, in effect, JOs, because commissions are not authorized to issue JOs. *Re: Stratton Corporation*, #2W0519-17(Revised)-EB, DO at 5 (1/10/01).
- * Appeal seeking a permit amendment was remanded to Commission as it had not ruled on the merits of the application in the first instance. *MBL Associates*, #4C0948-1-EB (5/4/98). [EB #705]
- * If a person lacks standing to bring an appeal, then Board lacks jurisdiction to consider the merits of that appeal. *Estate of John A. Swinington*, #9A192-4-EB, CPR at 7 (2/9/98), *aff'd In re Estate of John Swinington*, 169 Vt. 583 (1999). [#699M1]
- * Where Board denied appellant party status, and no other person had filed a timely appeal, appellant could not be called as Board's own witness, since Board lacked requisite jurisdiction to continue review of project. *Springfield Hospital*, #2S0776-2-EB (8/14/97), *appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]
- * Coordinator's JO regarding a waste management facility, like all JOs, is appealable only to the Board and not to the Waste Facility Panel. *Putney Paper Company, Inc.*, DR #335 (FCO at 5) (5/29/97).
- * Board has no jurisdiction over timber harvesting activities where Commission did not include the harvested lands within the scope of permit. *Keith Van Buskirk*, DR #302 (FCO at 7) (8/15/95).
- * Appeal from a Commission decision shall go to the Board unless an exception to Board jurisdiction exists or the parties otherwise object. *Putney Paper Company, Inc.*, #2W0436-7-EB (FCO at 7) (11/3/95). [EB #621]

* While Board conducts hearings *de novo*, it is an appellate body, and to allow reconsideration request to be heard initially by Board would subvert its function as such. *Re: Okemo Mountain, Inc.*, #2S0351-12A-EB, MOD at 1 (7/23/92). [EB #471M5]

* Board cannot consider co-applicancy issue until Commission has notified all potential parties and considered issue with all parties participating. *John Litwhiler and H.A. Manosh*, #5L1006-EB (1/15/91). [EB #451]

* Board may not consider a permit amendment appeal without a prior hearing at Commission. *Allie Ring*, #6L0169-1-EB (6/23/89 and 7/19/89) [EB #440].

* No provision exists for submitting new evidence to the Board while by-passing Commission hearings. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

10.3 Transfer of jurisdiction / jurisdiction in one forum at a time

* "Kotz stands for the proposition that once an appeal is taken, the trial court cannot reconsider or amend the decision appealed without the matter being remanded. Unlike in kotz, here we are asked to consider a separate matter- the permit amendment application- not to reconsider or alter the decision on appeal. While this application may involve the same stormwater system that is the subject of a current appeal, that fact does not deprive this Court of subject matter jurisdiction. Costco Stormwater Permit Amendment, No. 84-7-15 Vtec (Vt. Super. Ct. Env'tl. Div. July 29, 2016)(internal citations omitted).

* V.R.A.P. 4 provides an exception to the general rule that the filing of an appeal removes jurisdiction from the lower tribunal. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 2 (2/25/03), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04).

* "The issuance of a permit by a district commission is not automatically stayed upon appeal of that decision. Rather, this Court is vested with the discretion to issue a stay of the permit when 'it is necessary to preserve the rights of the parties.'" *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, EO on Motion to Stay at 1 (7/1/11) (citing V.R.E.C.P 5(e); V.R.C.P. 62(d)(2)).

* "It is not clear that a district environmental commission can take actions in connection with conditions included in a state land use permit when the issuance of the permit is on appeal before this Court, even if the permit itself is not stayed." *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, EO on Motion to Stay at 2 (7/1/11).

* Jurisdiction over a matter cannot be both in the Board and the Commission simultaneously. *Re: Nextel WIP Lease Corporation d/b/a Nextel Partners and Charles Andrews*, #3W0876-EB, RO at 3 (1/21/03) [EB #815]; see *Kotz v. Kotz*, 134 Vt. 36, 38 (1975), and see, *Re: Town of Milton*, #4C0046-5, MOD at 4 (1/14/00). [EB #746]

* Where a permit is pending before Commission on a Motion to Alter, Board is without jurisdiction to hear a Motion to Stay the permit. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 3 (8/5/99). [EB# 739].

* When an appeal from a lower tribunal is taken, jurisdiction is transferred to the appellate body, and in the absence of remand, the lower tribunal is divested of jurisdiction as to all matters within the scope of the appeal. *Kotz v. Kotz*, 134 Vt. 36, 38 (1975); and see, *Re: Central Vermont Public Service Corporation*, DR #412, RO at 2 (9/19/02) (Board must remand matter to give Coordinator jurisdiction to issue JO); *Town of Milton*, #4C0046-5 MOD at 4 (4/14/00). [EB #746] (Board will not remand a part of case back to Commission because Board and Commission would then simultaneously have jurisdiction over the same matter); and see, *Leo A. and Theresa A. Gauthier and Robert Miller*, #4C0842-EB (MOD at 1) (12/10/90). [EB #495M] (economy of public resources favors denying a motion to limit the scope of appeal or to remand jurisdiction for various criteria which would result in two Act 250 tribunals reviewing the same project at the same time).

* Board is reluctant to intervene in commission proceedings until Commission has completed its review of the application. *William Dibbern*, #5R0194-1-EB (FCO at 4) (7/16/81). [EB #158]; *In re Developers Diversified Ltd.* (1980). [EB# 129]; *In re Blair Family Trust*, (1979). [EB #121]

10.4 Duty of the Board

* It is the uneasy duty of the Environmental Board to consider all elements set forth in the statutes, weigh them and make an impartial decision. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 520-21 (1975).

* The Board and district commissions are charged to protect and conserve the lands and environment of the state. 1969 Vt. Laws, No. 250, §1 (Adj. Sess.); *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 7 (6/17/04) [EB #828]

11. Retention of Jurisdiction

* By permit condition, Commission has authority to retain jurisdiction over a project and impose additional conditions. *Pilgrim Partnership, Stephen Van Esen, and Green Mountain Coffee Roasters, Inc.*, #5W0894-6/5W1156-6B-EB (FCO at 18) (1/28/99). [EB #709]

* Board lacked jurisdiction over extension requests where Board did not specifically reserve the right to retain jurisdiction. *Mt. Mansfield Company*, #5L1125-10-EB (MOD at 5) (7/29/97). [EB #612M3]

* Board has authority to review proposed changes to a project without the need for amendment proceedings before Commission, because the project remained essentially the same. *Liberty Oak Corporation*, #3W0496-EB (motion for reconsideration) (FCO at 2) (7/14/88). [EB #323]

* Board has authority to reconsider matter because it had specifically retained jurisdiction during the original decision on appeal. *Okemo Mountain*, #2W0351-8-EB (FCO at 5) (4/24/87). [EB #336]; *Juster Associates*, #1R0048-1-EB, Motion for Reconsideration at 2 (7/9/80). [EB #101]

12. Collateral attacks on

* Appellant did not timely appeal, and Court will not entertain collateral attacks with regard to "mere errors or irregularities in the exercise of jurisdiction." *In re Alpen Associates*, 147 Vt. 647 (1986).

II. STATUTES

20. Statutory Construction

*The Vermont Supreme Court applies "the same principles of construction to the rules governing Act 250 that we do to other statutes." *In re SP Land Co., LLC Act 250 Land Use Permit Amendment*, 2011 T 104, ¶ 23 ---A.3d--- (Vt 2011) (citing *In re CVPS/Verizon Act 250 Land Use Permit Numbers 7C1252 and 760677-2*, 2009 VT 71, ¶ 14, 186 Vt. 289, 9980 A.2d 256).

* In construing land use regulations, uncertainty or ambiguity must be decided in favor of the property owner. *ANR v. Handy Family Ent.*, 163 Vt. 476, 481 (1995); *In re Vitale*, 151 Vt. 580, 584 (1989); *In re Lou R. Vitale*, 151 Vt. 580, 584 (1989) see also *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 152 (1979) (legislation in derogation of common law property rights will be strictly construed).

* Act 250 is a remedial statute. *State v. Therrien*, 161 Vt. 26, 30 (1993).

* Remedial statutes are to be liberally construed to effectuate their purpose, *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 391 (1992) (discussing Declaratory Judgment Act); and see, *In re Preseault*, 130 Vt. 343, 346 (1972) (statutes giving and regulating the right of appeal are remedial in nature and should receive a liberal construction in furtherance of the right of appeal); *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 12 (4/19/01). [EB #763]

* Canons of statutory construction "are routinely discarded when they do not further a statute's remedial purposes." . *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386, 391 (1992), quoting *Clymer v. Webster*, 156 Vt. 614, 625 (1991).

* Statutes giving and regulating the right of appeal are remedial in nature and should receive a liberal construction in furtherance of the right of appeal. *In re Preseault*, 130 Vt. 343, 346 (1972).

20.1 Legislative Intent

* Objective in construing a statute is to give effect to the Legislature's intent. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211 (2002); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 84 (1997); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995); *ANR v. Handy Family Ent.*, 163 Vt. 476, 481 (1995); *In re Southview Associates*, 153 Vt. 171, 175 (1989); *In re Spencer*, 152 Vt. 330, 336 (1989); *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 152 (1979); *In Re Presault*, 130 Vt. 343, 346 (1972); *Morningside Drive Extension*, DR #367, MOD at 3 (9/9/98); *Vermont Egg Farms, Inc.*, DR #317 FCO at 7(6/14/96).

- * Although rules of statutory construction may be helpful in interpreting the meaning of statutes, they are secondary to the primary objective of giving effect to the intent of the legislature. *In Re Wal-Mart Stores, Inc.*, 167 Vt. 75, 84 (1997).
- * Court is guided in its construction of legislative schemes by its attempt to discern the legislative intent, as evidenced by the plain meaning of the statute. *In re Vitale*, 151 Vt. 580, 583 (1989); see *In re Spear Street Assoc.*, 145 Vt. 496, 499 (1985).
- * The intention of the Legislature is to be ascertained from a consideration of the whole act and its component parts, the subject matter and its effect and ramifications. *In re Great Eastern Building Co., Inc.*, 132 Vt. 610, 614 (1974); *In re Preseault*, 130 Vt. 343, 347 (1972).
- * A statute is to be so construed as to carry out the intent of the legislature, though such construction may seem contrary to the letter of the statute. *In re Preseault*, 130 Vt. 343, 348 (1972).
- * Paramount goal in construing statutory language is to implement the intent of the drafters. *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 7 (4/11/14).
- * The judiciary's primary goal when construing a statute is to effect the drafters' intent. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 14 (8/15/2017), citing *In re Spring Brook Farm Found., Inc.*, 164 Vt. 282, 285 (1995).

20.2 Words of the statute

- * To read into § 6001(3)(A)(ii) a phrase that is not there is to ignore an oft-cited rule of statutory construction: that is, to presume that statutory drafting is done in a purposeful and advised manner. *Snowstone LLC*, JO Appeal #2-308, 151-11-17 Vtec., Revised Bifurcated Merits Decision (2/21/19). See *State v. Richland*, 2015 VT 126, ¶6, 200 Vt. 401 ("We start with the plain language of the statute, and if the meaning is clear, we will enforce it according to its terms... In doing so, we 'presume that all language in a statute was drafted advisedly, and that the plain ordinary meaning of the language used was intended.'") (quoting in part *Comm. to Save Bishop's House, Inc. v. Med. Ctr. Hosp. of Vermont, Inc.*, 137 Vt. 142, 153 (1979))
- * Plain meaning must yield where it conflicts with legislative intent. *In re MacIntyre Fuels, Inc., and Vermont Agency of Transportation*, 2003 VT 59 ¶ 7 (6/30/03)(mem.)(reversing *Re: MacIntyre Fuels, Inc., and Vermont Agency of Transportation*, Declaratory Ruling #402, FCO at 8 (Altered) (5/21/02)).
- * Where the language of the statute is clear, the Legislature's intent must be ascertained from the words of the statute itself. *In re Spencer*, 152 Vt. 330, 336 (1989).
- * "Where the legislature's intent can be ascertained from the plain meaning of the statute, we interpret the statute according to the words the Legislature used." *Rueger v. NRB*, 2012 VT 33, ¶ 7 (4/26/12) (citing *Herald Assoc., Inc. v. Dean*, 174 Vt. 350, 354 (2002)).

* Environmental Court's primary goal is to give effect to legislative intent, looking first to the plain language of the statute to determine intent. *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 7 (4/11/14)(citing *Colwell v. Allstate Ins. Co.*, 2003 VT 5, ¶ 7).

* The court will first look to the plain language of the statute to reveal the drafters' intent. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 14 (8/15/2017), citing *In re Spring Brook Farm Found., Inc.*, 164 Vt. 282, 285 (1995).

20.2.1 Meaning of words in statute

* Court will apply the plain and ordinary meaning of statutory terms, and will "presume that the Legislature adds and removes statutory language advisedly." *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 19 (3/6/15) (mem.) (quoting *Tarrant v. Dep't of Taxes*, 169 Vt. 189, 196-97 (1999)), affirming *Re: Burlington Airport Act 250 JO*, No. 42-4-13 Vtec (5/13/14).

* Plain meaning must yield where it conflicts with legislative intent. *In re MacIntyre Fuels, Inc., and Vermont Agency of Transportation*, 2003 VT 59 ¶ 7 (6/30/03)(mem.)(reversing *Re: MacIntyre Fuels, Inc., and Vermont Agency of Transportation*, Declaratory Ruling #402, FCO at 8 (Altered) (5/21/02)).

* "[W]hen the meaning of a statute is plain and unambiguous on its face, it must be enforced according to its express terms." *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995), quoting *In re Burlington Hous. Auth.*, 143 Vt. 80, 83 (1983).

* Court must enforce Act 250 according to its terms. *In re Spencer*, 152 Vt. 330, 337 (1989); *Vermont Egg Farms, Inc.*, DR #317, FCO at 8 (6/14/96) (if the meaning of the statute is plain on its face, the Board enforces the statute according to its express terms).

* Under the statutory construction rule of ejusdem generis, when words of a specific nature are followed by words of a general nature, the latter are held to include things similar in character to the preceding specific named item. *Richard Bouffard*, #4C0647-6-EB, FCO at 10 (10/23/00). [EB #755]

20.2.2 Statutory definitions

* In determining the meaning of terms used in a statute, one looks first to the statutory definitions; when, however, such terms are not defined, they "are to be given their plain and commonly accepted meaning," *Vincent v. State Retirement Board*, 148 Vt. 531, 535 -36 (1987); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 64 n.10 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 3 (6/12/03), aff'd, 2006 VT 8 (V.S.Ct); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 10 n2 (12/31/02); *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 12 (4/19/01). [EB #763]; *Richard Bouffard*, #4C0647-6-EB, FCO at 10 (10/23/00). [EB #755]; *Vermont Egg Farms, Inc.*, DR #317(6/14/96).

20.2.3 Plain meaning

* Ordinarily, courts rely on the plain meaning of words because they presume that such words show the underlying intent. *ANR v. Handy Family Ent.*, 163 Vt. 476, 481 (1995).

* When meaning of statute is plain on its face, it must be enforced according to its terms. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995); *ANR v. Henry et al.*, 161 Vt. 556, 559 (1994); *In re Burlington Housing Authority*, 143 Vt. 80, 83 (1983); *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 4 (6/12/03), *aff'd*, 2006 VT 8 (V.S.Ct); and see, *In re Spencer*, 152 Vt. 330, 336 (1989) (where the language of the statute is clear, the Legislature's intent must be ascertained from the words of the statute itself); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 16-17(12/31/02); *Re: Vermont Egg Farms, Inc.*, DR #317, FCO at 8 (6/14/96), citing *Burlington Electric Dept. v. Vermont Dept. of Taxes*, 154 Vt. 332, 335-36 (1990).

* Court must construe statute consistent with its plain meaning as well as " 'the subject matter, its effects and consequences, and the reason and spirit of the law.' " *In re Denio*, 158 Vt.230, 236 (1992).

* In interpreting agency regulations, "the primary rule is to give language its plain, ordinary meaning." *In re Barlow*, 160 Vt. 513, 521 (1993), quoting *Slocum v. Department of Social Welfare*, 154 Vt. 474, 478 (1990); *In re Eastland, Inc.*, 151 Vt. 497, 499 (1989).

* Starting point must be with the plain meaning of the statutory words in question themselves. *In re Agency of Administration*, 141 Vt. 68, 81 (1982).

* It is assumed that the plain and ordinary meaning of statutory language was intended by the legislature. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶12 (6/26/03); *In re Handy*, 171 Vt. 336, 341(2000); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995); *In re Spencer*, 152 Vt. 330, 336 (1989) *State v. Young*, 143 Vt. 413, 415 (1983) ("[I]n the absence of compelling reasons to hold otherwise, it is assumed that the plain and ordinary meaning of statutory language was intended by the legislature"); *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 153 (1979); *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 3 (6/12/03), *aff'd*, 2006 VT 8 (V.S.Ct); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 10 n.2 and 16 - 17 (12/31/02); *Re: Vermont Egg Farms, Inc.*, DR #317, FCO at 8 (6/14/96), citing *Bisson v. Ward*, 160 Vt. 343, 348 (1993).

* "The plain, ordinary meaning of the word 'may' indicates that a statute is permissive, not mandatory." *Re: S-S Corporation / Housing Developments* DR #421, MOD at 7 (6/12/03), *aff'd* 2006 VT 8 (V.S.Ct), quoting *Town of Calais v. County Road Commissioners*, 173 Vt. 620, ___ (2002), 795 A.2d 1267, 1768 (2002), citing, *In re D.L.*, 164 Vt. 223, 234 (1995); *Dover Town Sch. Dist. v. Simon*, 162 Vt. 630, 631 (1994) (mem.) *And see, Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, Declaratory Ruling #406, FCO at 16 (Dec. 31, 2002) (use of the word "may" implies guidance not mandate).

* "Where the legislature's intent can be ascertained from the plain meaning of the statute, we

interpret the statute according to the words the Legislature used." *Rueger v. NRB*, 2012 VT 33, ¶ 7 (4/26/12) (citing *Herald Assoc., Inc. v. Dean*, 174 Vt. 350, 354 (2002)).

* By their plain language, neither 10 V.S.A. § 6081(w)(1) nor 10 V.S.A. § 6007(c) state or infer that a person must acquire a jurisdictional opinion before making changes that could require an Act 250 permit, or acquire a jurisdictional opinion before making changes that could be exempt under 10 V.S.A. § 6081(w)(1). *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 14 (8/15/2017).

20.2.4 Same/different/omitted words or provisions

* Where the Legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the Legislature did so advisedly. *In re Munson Earth Moving Corp.*, 169 Vt. 455, 465 (1999); *In re Spencer*, 152 Vt. 330, 340(1989) (existence of remedy in one part of statute demonstrates a legislative intent not to provide for such a remedy where similar express provision is absent in another part).

* "When the same words are used in different sections of the same statute they will bear the same meaning throughout, unless it is apparent that another meaning was intended." *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 18 (12/31/02), quoting *Billings v. Billings*, 114 Vt. 512, 517 (1946).

* A general rule of statutory construction is that the use of certain words in one instance by the legislature, and different words in another instance, indicates that different results were intended. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 56 (2/22/01). [EB #758]

20.2.5 Surplusage not assumed

* When construing statute, Court presumes language is inserted advisedly with intent that it be given meaning and force, and that the Legislature did not intend to create surplusage. *In re Munson Earth Moving Corp.*, 169 Vt. 455, 465 (1999); *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 153 (1979); *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 11 (10/20/05), *aff'd*, *In re Vermont Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); *Re: Richard and Elinor Huntley*, DR #419, MOD at 9 (7/3/03); *rev'd* on other grounds, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

* "[i]n construing a statute, every part of the statute must be considered, and every word ... given effect if possible." *In re Eastland, Inc.*, 151 Vt. 497, 499 (1989), quoting *State v. Stevens*, 137 Vt. 473, 481 (1979); *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 11 (10/20/05), *aff'd*, *In re Vermont Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); *Re: Richard and Elinor Huntley*, DR #419, MOD at 9 (7/3/03), *rev'd* on other grounds, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

* Board cannot read its statute in a manner that results in inclusion of useless surplusage. *Catamount Slate, Inc. et al.*, DR #389, MOD at 10 (2/25/02), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (Vt.S.Ct. 2/13/04).

* Language in a statute is presumed to be inserted for a purpose. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 12 (4/19/01) [EB #763]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 56 (2/22/01). [EB #758]

20.2.6 Words not read in isolation

* The words of a statute are not to be read in isolation, but rather in the context and structure of the statute as a whole. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211-12 (2002); and see *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 84 (1997.)

* Board must read statutory provisions not in isolation but as parts of one law. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 7 (6/12/03), *aff'd*, 2006 VT 8 (V.S.Ct).

20.3 Specific rules of statutory construction

* Although rules of statutory construction may be helpful in interpreting the meaning of statutes, they are secondary to the primary objective of giving effect to the intent of the legislature. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 84 (1997).

20.3.1 Avoiding unjust/absurd/unreasonable/ineffective/irrational results

* Court cannot interpret statute in a manner that would cause “identical construction to be treated differently” based solely on the use or purpose of the construction because this would lead to an irrational consequence. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶9 (2007), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007), citing *Braun v. Bd. of Dental Exam'rs*, 167 Vt. 110, 117 (1997)

* Statutes should be construed to avoid absurd or irrational results. *In re Real Audet*, 2004 VT 30, ¶14 (4/1/04); *In re McShinsky*, 153 Vt. 586, 591 (1990); *ANR v. Henry et al.*, 161 Vt. 556, 560 (1994); *In re Southview Assocs.*, 153 Vt. 171, 175 (1989); *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 8 (6/12/03), *aff'd*, 2006 VT 8 (V.S.Ct); *Richard Bouffard*, #4C0647-6-EB, FCO at 10 (10/23/00). [EB #755]

* Court must avoid construction that would render statute ineffective or irrational. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287 (1995).

* Court will construe statute to avoid unreasonable result. *ANR v. Godnick*, 162 Vt. 588, 596 (1994); *ANR v. Riendeau*, 157 Vt. 615, 620 (1991); *In re Crushed Rock, Inc.*, 150 Vt. 613, 623 (1988); *In re Preseault*, 130 Vt. 343, 348 (1972).

*Courts are to avoid statutory interpretation that would “produce irrational and absurd results.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 18, Decisions on Motion for Summary Judgement (Oct. 11, 2017). *State v. Wainwright*, 2013 VT 120, ¶ 6, 195 Vt. 370 (quoting *In re Jones*, 2009 VT 113, ¶ 7, 187 Vt. 1).

*The Court favors interpretations of statutes that further fair, rational consequences, and presumes that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences. *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 4 (03/19/14)(citing *Wesco, Inc. v. Sorrell*, 2004 VT 102, 177 (2004)).

20.3.2 Reason and spirit of the law

* In determining the Legislature's intent, court examines the whole statute as well as its parts, considering its subject matter, its effect and consequences, and the reason and spirit of the law." *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211 (2002); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 84 (1997).

* Court must construe statute consistent with the subject matter, its effects and consequences, and the reason and spirit of the law. *In re Denio*, 158 Vt.230, 236 (1992); *In re Preseault*, 130 Vt. 343, 347 (1972).

20.3.3 Harmonizing conflicting provisions

* Court strives to avoid conflict when construing statutes and administrative rules on the same subject matter. *In re Green Crow Corp.*, 2007 VT 137 ¶ 17 (12/14/07).

* Where two statutory provisions conflict, interpretations that harmonize and give effect to both are favored. *ANR v. Henry et al.*, 161 Vt. 556, 559 (1994); *ANR v. Holland*, 159 Vt. 21, 23 (1992); *ANR v. Riendeau*, 157 Vt. 615, 620 (1991); *In re Preseault*, 130 Vt. 343, 348 (1972); *Morningside Drive Extension*, DR #367, MOD at 3 (9/9/98).

* Court must look to the entirety of a permit and attempt to harmonize its constituent parts. *In re: Maggio*, No. 166-7-06 Vtec, Decision at 7 (4/20/2007); citing *Davis v. Hunt*, 167 Vt. 263, 267 (1997), citing *Lemioux v. Tri-State Lotto Comm’n*, 164 Vt. 110, 113 (1995).

20.3.4 Look to whole act and its subject matter

* In determining the Legislature's intent, court examines the whole statute as well as its parts, considering its subject matter, its effect and consequences, and the reason and spirit of the law." *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211 (2002); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 84 (1997).

* The words of a statute are not to be read in isolation, but rather in the context and structure of the statute as a whole. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211-12 (2002).

* The intention and true meaning of the legislature are to be ascertained from a consideration of the whole and every part of the act, the subject matter and its effect and consequences. *In re Preseault*, 130 Vt. 343, 347 (1972).

* Court must interpret statute as a whole, looking to the reason and spirit of the law and its consequences and effects to reach a fair and rational result. *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 7 (4/11/14).

* Courts are instructed to read statutes within the context of the entire statutory scheme. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 14 (8/15/2017), citing *Blundon v. Town of Stamford*, 154 Vt. 227, 230 (1990) (further citation omitted).

20.3.5 Presumption against implied repeal or amendment

* Presumption against implied repeal of one statute by another. *ANR v. Henry et al.*, 161 Vt. 556, 559 (1994); *ANR v. Riendeau*, 157 Vt. 615, 620 (1991).

20.3.6 Statutes addressing same/similar subjects

* Statutes *in pari materia* are to be construed with reference to each other as parts of one system. *In re Preseault*, 130 Vt. 343, 346 (1972).

* Court must construe Act 250 with the APA. *In re Preseault*, 130 Vt. 343, 346 (1972).

* Act 250 states the provisions of the APA shall govern unless otherwise stated. *In re Preseault*, 130 Vt. 343, 346 (1972).

* Statutes relating to the same subject should be construed together and in harmony if possible. *Morningside Drive Extension*, DR #367, MOD at 3 (9/9/98); *Vermont Agency of Transportation v. Nazza*, 161 Vt. 564, 565 (1993).

20.3.7 Time of adoption

*When two statutory provisions address the same subject and both are in conflict, the most recent provision prevails. *Morningside Drive Extension*, DR #367, MOD at 3 (9/9/98); *Looker v. City of Rutland*, 144 Vt. 344, 347 (1984); *Montgomery v. Brinver Corp*, 142 Vt. 461, 463-4 (1983).

20.3.8 Specific vs. general statutes

*Where two statutory provisions deal with the same subject matter, and one is general and the other specific, the more specific provision is to be given effect. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 53 (6/07/05) [EB #853], citing *State v. Jarvis*, 146 Vt. 636, 638 (1986) [EB #485]; *Chester Pasho*, #3W0635-EB, FCO at 5 (6/11/91).

21. Resort to Legislative history

* Legislative history is helpful in construing a statute where it clearly shows the intent of the legislature. *In re Killington, Ltd.*, 159 Vt. 206, 216 (1992).

* Court is guided by legislative history when it is available. *ANR v. Riendeau*, 157 Vt. 615, 621 (1991).

* Vermont has limited legislative history; unlike Congress, Vermont has no committee reports that explain the thoughts behind the laws that come out of the various House or Senate Committees. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 4 n.1 (6/12/03, *aff'd*, 2006 VT 8 (V.S.Ct)).

* One must tread carefully when determining whether the legislative history that has been provided is complete and, if complete, controlling. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 4 n.1 (6/12/03), *aff'd*, 2006 VT 8 (V.S.Ct).

21.1 When permitted

* Where the plain language is not clear, the Court endeavors to give effect to the legislative intent by looking at legislative history, circumstances of enactment, and the legislative policy the statute was designed to implement. *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 9 (8/3/06).

* If the statutory language is unclear or ambiguous, the Board may consider the legislative history of Act 250 in order to ascertain the intent of the legislature. *Vermont Egg Farms, Inc.*, DR #317 (6/14/96).

21.2 When not permitted

* When the meaning of a statute is plain and unambiguous on its face, it must be enforced according to its express terms without resort to construction. *In re Burlington Housing Auth.*, 143 Vt. 80, 83 (1983); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 12 n.10 (5/27/04) [EB #837]; *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 16-17(12/31/02); *Re: Vermont Egg Farms, Inc.*, DR #317, FCO at 8 (6/14/96), *citing Burlington Electric Dept. v. Vermont Dept. of Taxes*, 154 Vt. 332, 335-36 (1990).

* When statutory language is clear and straightforward, resort to legislative history is neither necessary nor appropriate. *In re Margaret Susan P.*, 169 Vt. 252, 263 (1999) (only where statutory language is "unclear and ambiguous" may legislative history be used to determine legislative intent); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 12 n.10 (5/27/04) [EB #837]; *Hitchcock Clinic, Inc. v. Mackie*, 160 Vt. 610, 611 (1993); *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 4 n.1 (6/12/03), *aff'd*, 2006 VT 8 (V.S.Ct); *Catamount Slate, Inc. et al.*, DR #389, MOD at 3 (9/20/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (Vt.S.Ct. 2/13/04).

* If a court deems a legislative enactment to be clear, it need not and should not attempt to determine legislative intent from legislative history. *South Village Communities, LLC*, 74-4-05 Vtec, Decision on Appellee-Applicant's Motion to Reconsider and Amend at 3 (09/14/2006) (citing *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 223 (1979)).

21.3 Legislative statements

* Court reviews legislative history, including testimony of specific witnesses at committee hearing, in determining legislative intent of statute. *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 15 (8/3/06).

* The fact that the Legislature refrained from adopting the restrictive language urged by one legislator and instead explicitly selected words of broad reach indicates that it had no intention of adopting legislator's preferred meaning. *In re Eastland, Inc.*, 151 Vt. 497, 501 (1989).

* "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1978); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 15 n.12 (5/27/04) [EB #837]; *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 4 n.1 (6/12/03), *aff'd*, 2006 VT 8 (V.S.Ct); *Catamount Slate, Inc. et al.*, DR #389, MOD at 9 (7/27/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04), citing *State of Vermont v. Brinegar*, 379 F. Supp. 606, 611 (D. Vt. 1974); and see, *United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statue is not necessarily what motivates scores of others to enact it.")

* Transcribed discussion between members of legislative committee and witness is not "established truths, facts, or pronouncements that do not change from case to case but apply universally." "[T]he remarks of a witness at a committee hearing are accorded little weight in determining the intent of the legislature in enacting a statute." *State v. Madison*, 163 Vt. 360, 373 (1995); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 15 n.12 (5/27/04) [EB #837]; *Nextel Communications*, DR #362 (11/18/98); *but see, In re MacIntyre Fuels, Inc., and Vermont Agency of Transportation*, 2003 VT 59 ¶¶ 9-10 (6/30/03)(mem.)(using such remarks to establish legislative intent).

22. Construction (see [828.6.1](#))

* Where a statute is said to be susceptible of more than one meaning, and an agency seeks to define it, we will consult not only the bare statutory language, but will seek out the interpretation intended by the statute's drafters to assure that the statute is being construed, rather than constructed anew. *In re Agency of Administration*, 141 Vt. 68, 75 (1982).

* Remarks by a state employee cannot color court's construction of legal language. *In re Orzel*, 145 Vt. 355, 361 (1985); *In re Agency of Administration*, 141 Vt. 68, 80 (1982).

23. Guidance from federal law

* When state rule is based on federal rule or law, the policies and rationales underlying the federal statute provide guidance for construction of the state rule. *In re Pyramid Co.*, 141 Vt. 293, 301 (1982).

* Board declines to adopt federal definitions which conflict with Vermont law and EBRs. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 7 n. 3 (11//25/03), *aff'd*, 2006 VT 8 (V.S.Ct.); EBR 2(M)

24. Amendments to Statute (see [28.1.1](#))

* One exception to this general rule is when a legislature clearly intends a statute to affect substantive rights. [Northwood AMC Corp. v. Am. Motors Corp., 139 Vt. 145, 148 \(1980\)](#) (“We have early held that, absent the ‘most clear and unequivocal language,’ a statute affecting legally existing rights should not be construed retrospectively.”). *In re Leverenz*, Act 250 Jurisdictional Opinion (#6-010), No. 123-10-15 VTEC, 2016 WL 6776338 (Vt.Super. Sep. 30, 2016)

* The 2006 amendment to § 6001(15) merely clarifies that forested land is not automatically eliminated from analysis of whether primary agricultural soils exist. *In re Village Assocs.*, 2010 VT 42 ¶ 20.

* General Assembly did not intend that 10 V.S.A. § 6081(d) (an amendment to the statute) be applied retroactively. *Town of Springfield*, DR #232, FCO at 8 (12/26/90).

* Permit applications are not affected by amendments to Act 250 which are passed after such applications are filed. *Domestic Capital Corp.*, DR #30 (8/21/73).

24.1 By implication

* Where Legislature has demonstrated that it knows how to provide explicitly for the requested action, Court is reluctant to imply such an action without legislative authority. *Daniels v. Vermont Center for Crime Victims Services*, 173 Vt. 521, 790 A.2d 376, 379 (2001), citing *In re Spencer*, 152 Vt. 330, 340 (1989) (under Act 250, automatic issuance of permit in one part of statute and absence of same provision in another part of the statute shows that Legislature did not intend automatic issuance in the latter); *Longe v. Boise Cascade Corp., et al.*, 171 Vt. 214, 223 (2000); *State v. LeBlanc*, 171 Vt. 88, 92 (2000). Cited in *Re: Richard and Elinor Huntley*, DR #419, MOD at 14 (7/3/03), *rev'd on other grounds*, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

* Amendments of statutes by implication are not favored. *Catamount Slate, Inc. et al.*, DR #389, MOD at 8 n.3 (7/27/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

25. Retrospective application of statutes

* One exception to this general rule (a statute will normally not be applied retroactively if doing so would adversely affect the substantive rights of a party) is when a legislature clearly intends a statute to affect substantive rights. [*Northwood AMC Corp. v. Am. Motors Corp.*, 139 Vt. 145, 148 \(1980\)](#) (“We have early held that, absent the ‘most clear and unequivocal language,’ a statute affecting legally existing rights should not be construed retrospectively.”). *In re Leverenz Act 250 Jurisdictional Opinion* (#6-010), No. 123-10-15 VTEC, 2016 WL 6776338, at *6 (Vt.Super. Sep. 30, 2016).

* Another way statutes may be applied retroactively is if they are merely procedural or remedial, and have no impact on substantive rights. *Smiley v. State*, 2015 VT 42, ¶ 17, 198 Vt. 529

* Vermont statutory law and case law normally prohibit retrospective application of new and amended statutes. *ANR v. Godnick*, 162 Vt. 588, 594 (1994).

* Retrospective laws are “those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.” *ANR v. Godnick*, 162 Vt. 588, 595 (1994) citing *Carpenter v. Vermont DMV*, 143 Vt. 329, 333 (1983).

* A statute is not retrospective when it merely relates to prior facts or transactions but does not change their legal effect. *ANR v. Godnick*, 162 Vt. 588, 595 (1994).

* A statute is not applied retrospectively or retroactively if the triggering event occurs after the statute is effective. *ANR v. Godnick*, 162 Vt. 588, 595 (1994).

* Statutory changes that are procedural in nature, as opposed to those that affect preexisting rights and obligations, may be applied retrospectively. *ANR v. Godnick*, 162 Vt. 588, 595-96 (1994).

* 1 V.S.A. § 213 provides that acts of the general assembly, except those relating to competency of witnesses, practice in court or amendments of process or pleading shall not affect suits begun or pending at the time of passage. *In re Preseault*, 132 Vt. 471, 474 (1974).

* Appellee’s application was submitted in November of 2013 but in June of 2014 Act 250 criterion 5 was amended and expanded to include criteria 5(A) and 5(B). The court held in favor of appellee that they need only show compliance with former criterion 5 because they submitted a “full and complete” application prior to June 2014 which vested in the former criterion 5, even though they revised their application later. *Diverging Diamond Interchange Act 250 and SW Permits*, Nos. 50-6-16 Vtec, 169-12-16 Vtec, slip op. at 58–61 (Vt. Super. Ct. Envtl. Div. June 1, 2018) (Walsh, J.). **May be appealed.**

25.1 Law in effect at commencement of proceedings (see [572](#))

* The law which is in effect on the date a proceeding before the Board is commenced is the law of the case for purposes of Act 250 proceedings. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 5 (5/10/04) [EB #843]; *Re: Swedish Ski Club of Vermont Land Trust*, DR

#411, FCO at 7 (1/16/03); *Barre City School District*, #5W1160-Reconsideration-EB, FCO at 14 (1/30/95); *Waterbury Shopping Village*, #5W1068-EB, MOD at 2 (1/26/90); *Raymond and Lois Ross*, #2W0716-EB, MOD at 2 - 3 (11/2/87), *aff'd*, *In re Ross*, 151 Vt. 54 (1989); *see also Re: Crushed Rock, Inc. and Pike Industries, Inc.*, #1R0489-4-EB, FCO at 37 - 39 (2/18/94) (disapproving *Re: J.P. Carrara & Sons, Inc.*, #1R0589-EB, MOD at 1-2 (9/28/87)).

25.1.1 Change in law during proceedings

* Board will apply changes in the law which occur during pendency of a case where the change benefits the applicant or has the effect of making the application of Act 250 to a particular applicant or project less onerous or restrictive. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 5 (5/10/04) [EB #843]; *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 16 (10/3//03) [EB #824]; *Re: Swedish Ski Club of Vermont Land Trust*, DR #411, FCO at 7 (1/16/03); *Re: Juster Development Company*, #1R0048-8-EB, FCO at 27 (12/19/88) ("Town plan amendments made after the date of an Act 250 application, and which benefit an applicant, are properly included as part of the town plan for Act 250 purposes"); and *see*, by analogy, 1 V.S.A. § 214(c) (allowing imposition of a reduced penalty or punishment in an amended statute).

26. Legislative Responses to Court decisions

* When the Legislature wishes to respond to an Act 250 Supreme Court decision with which it disagrees, it generally does so clearly. *Re: Richard and Elinor Huntley*, DR #419, MOD at 11 n.8 (7/3/03), *rev'd* on other grounds, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

27. Other Statutes

27.1 Administrative Procedures Act (APA)

27.2 Open Meeting Law

* Public Records Act exemption for quasi-judicial deliberations and the Open Meeting Law both recognize "the basic principal that . . . judicial officers may not be compelled to testify regarding their mental processes used in formulating official judgments or the reasons that motivate them in their official acts." *Rueger v. NRB*, 2012 VT 33, ¶ 10 (4/26/12) (citing *State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727, 735 (W. Va. 2000)).

27.3 Public Records Act

* "In conducting our analysis, we are mindful that the [Public Records Act] represents 'a strong policy favoring access to public documents and records.' ... To this end, we construe exemptions in the PRA 'strictly against the custodians of records, and resolve any doubts in favor of disclosure.'" *Rueger v. NRB*, 2012 VT 33, ¶ 7 (4/26/12) (citing *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 10).

* Communications between Commission members and NRB staff regarding whether to recuse are exempt from disclosure as records of quasi-judicial deliberations. *Rueger v. NRB*, 2012 VT 33, ¶ 8

(4/26/12).

III. RULES AND RULEMAKING

30. General

* An administrative agency's rule-making authority cannot support an expansive interpretation of its own powers. *In re Vermont Gas Systems, Inc.*, 150 Vt. 34, 39 (1988).

* Board need not establish precedent applicable to all cases only by rule pursuant to 3 V.S.A. Ch. 25. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 3 (2/25/03), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04); and see *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 12 n. 5. (12/31/02).

* Petition for DR is not treated as a petition for the adoption of rules because the petition for DR did not raise questions of general applicability beyond the scope of the immediate parties. *Developer's Diversified Realty Corporation (Berlin Mall Wal*Mart)*, DR #364, MOD (9/10/98).

* Board declined to initiate rulemaking regarding radio frequency interference and radio frequency radiation under Criteria 1 and 8. Instead, the Board adopted two sets of guidelines: (i) "Guide to Requesting a JO for Communications Facilities" and "Communications Facility JO Request Form"; and (ii) "Guide to Schedule B for Communications Facility" and "Act 250 Application for Communications Facility." *Petition for Rulemaking by Edward H. Stokes* (10/9/96).

30.1 Force and effect of law

* Rules promulgated by an agency to govern its affairs have "the force and effect of law." *In re Conway*, 152 Vt. 526, 529 (1989); *Committee to Save the Bishop's House v. MCHV, Inc.*, 136 Vt. 213, 216 (1978).

31. Construction

* In interpreting regulations, overall goal is to discern the intent of the drafters. *Conservation Law Foundation, et al. v. Burke*, 162 Vt.115, 121 (1994); *In re Verburg*, 159 Vt. 161, 164 (1992).

* When interpreting regulations, regulations must be viewed as a whole. *Conservation Law Foundation, et al. v. Burke*, 162 Vt.115, 121 (1994); *In re Verburg*, 159 Vt. 161, 165-66 (1992)

* In interpreting agency regulations, "the primary rule is to give language its plain, ordinary meaning." *In re Barlow*, 160 Vt. 513, 521 (1993), quoting *Slocum v. Department of Social Welfare*, 154 Vt. 474, 478 (1990); accord, *In re Vitale*, 151 Vt. 580, 584 (1989).

* Court approaches regulatory construction analysis "by applying the rules of statutory construction, with the overall goal of discerning the intent of the drafters." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 16, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re Williston Inn Grp.*, 2008 VT 47, ¶ 14, 183 Vt. 621 (citations omitted).

* When possible, Court discerns legislative intent based on the rule's plain language. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 16, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re Williston Inn Grp.*, 2008 VT 47, ¶ 14, 183 Vt. 621 (citing *Slocum v. Dep't of Soc. Welfare*, 154 Vt. 474, 478 (1990)).

* Where the plain language of one subsection of a regulation "is insufficient guidance to ascertain [the drafters'] intent" the court will "look beyond the language of a particular section standing alone to the whole [rule], the subject matter, its effects and consequences, and the reason and spirit of the law." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 16, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *State v. Thompson*, 174 Vt. 172, 175 (2002) (citing *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 84 (1997)).

* If the plain language of the rule is ambiguous, the Court will turn to other tools of statutory construction, and also give weight to the agency's interpretation of the rule. *Slocum v. Dep't of Soc. Welfare*, 154 Vt. 474, 478 (1990)).

* "[C]ourts interpret regulations according to their plain language." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 12, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re CVPS/Verizon Act 250 Land Use Permit*, Nos. 7C1252 & 7C0677-2, 2009 VT 71, ¶ 26, 186 Vt. 289.

* "We adopt a [regulatory] construction that implements the ordinance's legislative purpose and, in any event, will apply common sense." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 25, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re Grp. Five Investments CU Permit*, 2014 VT 14, ¶ 23, 195 Vt. 625 (quoting *In re Lashins*, 174 Vt. 467, 469 (2002) (mem.)).

32. Administrative Interpretation of Rules (see [828.6.2](#))

* The Vermont Supreme Court has consistently deferred to the Board's interpretations of Act 250 and Board rules. *In re Ochs*, 2006 VT 122, ¶8 (Vt. Sup. Ct. 11/27/06); *In re Appeal of S-S Corporation / Rooney Housing Developments*, 2006 VT 8, ¶5 (2006), citing *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 79 (1997). Accord, *In re Woodford Packers, Inc.*, 175 Vt. 579, 580, 2003 VT 60 ¶4 (2003); *In re Nehemiah Assocs, Inc.* 168 Vt. 288, 292 (1998); and see *In re Eastland, Inc.* 151 Vt. 497, 499 (1989).

* Board is empowered to interpret its own Rules. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 3 n.3 (2/5/04), *aff'd*, 2006 VT 8 (V.S.Ct), citing, *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 4 (2003)

* *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 4 (2003) (Court gives deference to the Board's "interpretations of Act 250 and its own rules, and to the Board's specialized knowledge in the environmental field.")

* If the plain language of the rule is ambiguous, the Court will turn to other tools of statutory construction, and also give weight to the agency's interpretation of the rule. *Slocum v. Dep't of Soc. Welfare*, 154 Vt. 474, 478 (1990)).

* “[Nothing in the Stormwater Management Rule] 16-3 Vt. Code. R. § 505:18-309(d)(2) states that an application is incomplete until notice is provided. Rather, the rule states that notice should be given *after* the application is deemed complete, indicating that completeness precedes notice. The rule does not specify a timeline between determining that an application is complete, and giving notice.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 12, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court gives “substantial deference” to an agency's interpretation of its own regulations. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 15, 196 Vt. 467.

* Court gives no deference to one agency's interpretation of a different agency's promulgated rule terms. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 24, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 15, 196 Vt. 467.

* The Court gives ANR's interpretation of “redevelopment” set out in its own regulations, “substantial deference.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 22, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 15, 196 Vt. 467.

* For the Court to disregard ANR's interpretation of “redevelopment” as excluding road maintenance activities of impervious surfaces such as coldplaning and resurfacing, the objecting parties must show that “ANR's interpretation is ‘wholly irrational and unreasonable in relation to its intended purpose.’” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 22, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 17, 196 Vt. 467 (quoting *Town of Killington*, 2003 VT 88, ¶ 6, 176 Vt. 70).

* Court finds ANR's definition of “redevelopment” as excluding road maintenance activities of impervious surfaces, such as coldplaning and resurfacing, to be neither irrational nor unreasonable. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 22, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* “Courts assume that all language in a regulation was inserted for a purpose, and must not be rendered irrelevant or surplusage.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 23, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re Miller*, 2009 VT 36, ¶ 14, 185 Vt. 550 (citations omitted).

32.1 Consistency with enabling statute

* An agency rule must be reasonably related to the intent of the enabling legislation. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211 (2002); *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 638 (1984); *Re: Alexander D. McEwing and McEwing Services, LLC*, DR #417, MOD at 4 (4/18/03), appeal dism. No. 2003-218 (Vt. S. Ct. 8/25/03).

* An administrative agency's rule-making authority cannot support an expansive interpretation of its own powers. *In re Vermont Gas Systems, Inc.*, 150 Vt. 34, 39 (1988).

* An administrative agency may not use its rule-making authority to enlarge a restrictive grant of jurisdiction from the legislature. *In re Agency of Administration*, 141 Vt. 68, 76 (1982).

* An administrative rule does not violate its enabling statute so long as the substantive requirements of the statute are not compromised by its language. *In re Agency of Administration*, 141 Vt. 68, 81 (1982).

* An administrative rule should not be interpreted in a way that is inconsistent with its enabling statute, or in any way produces an unreasonable result. *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 12 (11/9/07) (citing *Lemieux v. Tri-State Lotto Comm'n*, 164 Vt. 110 (1995)).

*Administrative bodies may not interpret their rules in a way that compromises the substantive requirements of their enabling statutes. *Town of Williston Road Improvements*, (DR # 381) (1/13/00).

“We must read the sections of the regulatory scheme in context and the entire scheme in pari materia.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 17, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *Richards v. Nowicki*, 172 Vt. 142, 149 (2001) (citation omitted).

32.2 Avoiding irrational interpretations

* An administrative rule should not be interpreted in a way that is inconsistent with its enabling statute, or in any way produces an unreasonable result. *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 12 (11/9/07) (citing *Lemieux v. Tri-State Lotto Comm'n*, 164 Vt. 110 (1995)).

* Board must avoid an interpretation of an EBR which would be irrational. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 3 n.3 (2/5/04), *aff'd*, 2006 VT 8 (V.S.Ct).

“We adopt a [regulatory] construction that implements the ordinance's legislative purpose and, in any event, will apply common sense.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 25, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re Grp. Five Investments CU Permit*, 2014 VT 14, ¶ 23, 195 Vt. 625 (quoting *In re Lashins*, 174 Vt. 467, 469 (2002) (mem.)).

33. Amendment, Effect of

34. Authority

* An administrative body may promulgate only those rules within the scope of its legislative grant of authority. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 210-11 (2002); *In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982) (agency cannot use its rule-making authority to exceed or compromise its statutory purpose).

35. Adoption

35.1 When required / not required (rule vs. practice or procedure)

* An agency is not required to adopt rules or regulations to carry out what its authorizing statute specifically directs it to do. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶13 (6/26/03).

* "There is no bright line between exempt procedures and those rules requiring adoption pursuant to rulemaking requirements." *In re Woodford Packers, Inc.*, 2003 VT 60 ¶16 (6/26/03).

* "Where an administrative agency's policy is challenged due to a failure to enact that policy pursuant to VAPA, we must discern whether the policy is a "rule" subject to the rulemaking procedures of VAPA or whether that policy is a "practice" that is exempt from those procedures." *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 14 (6/26/03).

* A rule is defined in 3 V.S.A § 801(b)(9) as "each agency statement of general applicability which implements, interprets, or prescribes law or policy; or practice which has been adopted in the manner provided by sections 836-844 of this title." *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 14 (6/26/03).

* A "practice" is defined as "a substantive or procedural requirement of an agency, affecting one or more persons who are not employees of the agency, which is used by the agency in the discharge of its powers and duties. The term includes all such requirements, regardless of whether they are stated in writing." *In re Packers, Inc.*, 2003 VT 60 ¶14 (6/26/03); 3 VSA § 801(b)(7).

* A practice is exempt from rulemaking requirements unless an interested person requests that an agency officially "adopt a procedure describing an existing practice." 3 V.S.A.. § 831(b); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 14 (6/26/03).

* ANR's decision to utilize fluvial geomorphology to determine the presence of a floodway did not constitute the creation of a rule consisting of an "agency statement of general applicability which implements, interprets, or prescribes law or policy." 3 V.S.A. § 801(b)(9); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 15 (6/26/03).

* While ANR's change in methodology in this case diverged from previous floodway assessments, this change did not alter any preexisting rule. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 15 (6/26/03).

* The statutory authority enabling the Secretary of ANR to determine floodways and floodway fringes does not compel the determination be made by rules promulgated pursuant to VAPA. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 17 (6/26/03).

* Standardless alteration of ANR's practice of determining floodways may give rise to a violation of due process if arbitrarily and capriciously applied, but in the matter before us the Environmental Board's finding that the Secretary's application of fluvial geomorphology was soundly grounded and supported by the evidence was not error. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 17 (6/26/03).

36. Validity (see [828.1](#))

* An administrative body may promulgate only those rules within the scope of its legislative grant of authority. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 210-11 (2002); *In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982) (agency cannot use its rule-making authority to exceed or compromise its statutory purpose).

* An administrative agency's rule-making authority cannot support an expansive interpretation of its own powers. *In re Vermont Gas Systems, Inc.*, 150 Vt. 34, 39 (1988).

* "So long as the substantive requirements of the enabling statute are not compromised, the regulations are valid." *In re H.A. Manosh Corp.*, 147 Vt. 367, 370 (1986), quoting *In re Orzel*, 145 Vt. 355, 361 (1985); *In re Agency of Administration*, 141 Vt. 68, 74 (1982); *Central Vermont Public Service Corporation*, DR #401, FCO at 7 (4/2/02).

* "Where an agency's enabling legislation authorizes it to promulgate rules and regulations to carry out its statutory responsibilities, the validity of those rules and the interpretations which the agency gives to them, will be upheld if they are reasonably related to the purposes of the enabling legislation." *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 638 (1984); *Committee to Save the Bishop's House, Inc. v. MCHV, Inc.*, 137 Vt. 142, 150 (1979); *Stonybrook Condominium Owners Association*, DR #385, FCO at 13 (5/18/01).

* Duly adopted regulations have the force and effect of law. *Central Vermont Public Service Corporation*, DR #401, FCO at 7 (4/2/02).

36.1. Ratification by Legislature

* EBRs promulgated prior to 1985 must be given "the same effect as ... any law passed by the Legislature in the first instance. It has effectively become part of the Act 250 legislative scheme codified at chapter 151 of Title 10." *In re Spencer*, 152 Vt. 330, 336 (1989); and see *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995).

* In 1985, the Legislature, "in unambiguous terms," ratified all Board rules relating to administration of Act 250, including EBR 2(G). *In re Barlow*, 160 Vt. 513, 520 (1993); *In re Spencer*, 152 Vt. 330, 336 (1989); see 1985, No. 52, §5, and see *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995); *In re Gerald Costello Garage*, 158 Vt. 655 (1992).

* Board rules ratified by the Legislature have the same effect as would any law passed by the Legislature in the first instance. ." *In re Spencer*, 152 Vt. 330, 336 - 37 (1989).

37. Binding effect on Board

* Board is required to follow both the standards established by the Legislature and the procedures which it has itself adopted in order to carry out its statutory mandate. *In re Killington, Ltd.*, 159 Vt. 206, 210 (1992).

* "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures; this is so even where the internal procedures are possibly more rigorous than otherwise would be required." *In re Conway*, 152 Vt. 526, 529 (1989), quoting *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

* Board, empowered to promulgate rules to govern its affairs, is likewise bound by those rules which shall have the force and effect of law regardless of what it may perceive to be the necessity for immediate action. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 136 Vt. 213, 216 (1978).

38. Power of Board to rule on its rules

* The Board cannot hear a challenge to its rules. *Central Vermont Public Service Corporation*, DR #401, FCO at 7 n.6 (4/2/02.)

39. As means to establish general precedent (see [469](#))

* Board need not establish precedent applicable to all cases only by rule pursuant to 3 V.S.A. Ch. 25. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 3 (2/25/03), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04); *ard see Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 12 n. 5. (12/31/02).

IV. JURISDICTION OF ACT 250 (whether an activity is subject to Act 250)

A. General

50. General

* A challenge to Act 250 jurisdiction is not a challenge to subject-matter jurisdiction because it does not involve a question of whether the case was adjudicated in the proper forum. *Land Use Panel v. Donald Dorr, et al.*, 2015 VT 1 ¶ 14 (1/9/15).

* The Board's application of Act 250 to a specific project is entitled to a presumption of validity. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 283 (1995); *In re Burlington Hous. Auth.*, 143 Vt. 80, 83 (1983).

- * Plain language of Act 250 and EBRs proceeds from the premise that the proper starting point for determining Act 250 jurisdiction is the actual use of the land, not necessarily the overall purpose of a development scheme. *In re BHL Corp.*, 161 Vt. 487, 490 (1994).
- * Act 250 requires a focus on the impact of the land use, not the nature of the institutional activity. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287 (1995); *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 639 (1984); see *In re BHL Corp.*, 161 Vt. 487, 490-91 (1994) (approving Board's premise that proper starting point for determining Act 250 jurisdiction is actual use of land).
- * "In numerous cases, [the Supreme Court has] recognized the specialized expertise of the Board in determining whether it has jurisdiction over a particular development proposal." *In re John Rusin*, 162 Vt. 185, 188 (1994), quoting *In re Denio*, 158 Vt. 230, 235 (1992); *In re H.A. Manosh Corp.*, 147 Vt. 367, 370 (1986) (the Court will "defer to the Board's expertise").
- * Resolution of question of what qualifies as "large scale development," as a matter of statutory interpretation, is committed to the Board as the agency charged with the responsibility to execute the Act and deemed to have expertise in that regard. *In re BHL Corp.*, 161 Vt. 487, 491 (1994), citing *In re Killington, Ltd.*, 159 Vt. 206, 210 (1992).
- * Court does not invite Board to arbitrarily expand its jurisdiction. *In re Vitale*, 151 Vt. 580, 584 (1989); *In re Agency of Administration*, 141 Vt. 68, 76 (1982).
- * Board jurisdiction extends only over the impact of large scale development on criteria. *In re Agency of Administration*, 141 Vt. 68, 93 (1982).
- * Act 250 requires that a Land Use Permit be obtained prior to the commencement of construction on a development or prior to commencement of development. 10 V.S.A. § 6081(a). *Re: Peter and Carla Ochs*, DR #437, FCO at 7 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06).
- * The preliminary point in each case is the determination of Act 250 jurisdiction to review the project. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 146 (1979).
- * Fact that lot was exempt from State subdivision permit requirement is irrelevant as to whether there is Act 250 jurisdiction. *James and Anita McGrath*, DR #248, FCO at 3 (7/21/92).
- * Under Act 250, the Legislature intended that Commissions and Board review all major construction in the State whether by private developers, the State, or municipalities. *Town of Wilmington*, DR #258, FCO at 14 (6/30/92); *Sterling College*, DR #259, FCO at 5 (3/27/92).
- * The issuance of a permit by Commission does not necessarily mean that Act 250 jurisdiction exists. *Greg Gallagher*, #7R0607-EB and #7R0607-1-EB, MOD at 1 (7/6/89) [EB #402M]; but see *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993) (attachment of Act 250 jurisdiction became final due to landowner's failure to challenge jurisdiction at time permit conditioning use of property was issued, or to appeal permit.)
- * Where Act 250 jurisdiction exists, the project must be reviewed under all 10 Act 250 criteria.

White Sands Realty Co., #3W0360, FCO at 3 (10/19/81) [EB #156]; *Richard Salzman*, DR #79 (6/2/77).

* The Board may assert jurisdiction where the permittee is accountable for all activities within the project area and the Board has retained jurisdiction over final plans. *Justgold*, DR #61 (8/15/74).

51. When triggered

* Act 250 requires a state land use permit prior to the commencement of development. 10 V.S.A. § 6081(a); *In re Real Audet*, 2004 VT 30, ¶ 6 (4/1/04), *affirming Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 5 (12/5/02); *Re: Peter and Carla Ochs*, DR #437, FCO at 7 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06); but note: *In re Real Audet*, 2004 VT 30, ¶ 12 - ¶ 14 (4/1/04) (while a change in use of land triggers Act 250 jurisdiction, if that use is abandoned, and if it causes no physical change to the land or other lasting impact, the Board may find that no further Act 250 jurisdiction continues).

* The issue of Act 250 jurisdiction is determined at the commencement of the project. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993); *In re Vermont Gas Systems, Inc.*, 150 Vt. 34, 38 (1988) (Act 250 jurisdiction does not attach until construction is about to commence), citing, *In re Agency of Administration*, 141 Vt. 68, 78-9 (1982); 10 V.S.A. § 6081.

* Land use changes subject to the Act 250 permit requirement include, among other things, "construction on a subdivision or development" or "the commencement of development." *In re Spencer*, 152 Vt. 330, 334-35 (1989).

* Act 250 jurisdiction is triggered when "the activity [is] about to impinge on the land" and attaches to "activity which has achieved such finality of design that construction can be said to be ready to commence." *In re Agency of Administration*, 141 Vt. 68, 78-79 (1982), cited in *In re Real Audet*, 2004 VT 30, ¶16 (4/1/04); see, *In Re Wildcat Construction*, 160 Vt. 631, 632 (1993), *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988).

* If the jurisdiction of Act 250 were invoked every time a spadeful of earth turned on state-owned property in apparent conformance with a proposal from a government planning group, the burden on state agencies to fulfill the requirements of the Act would be impossible to meet. *In re Agency of Administration*, 141 Vt. 68, 88 (1982).

* Act 250 jurisdiction over a parcel of land is "determined at the commencement of the project." (citing *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* In this specific case, "Act 250 jurisdiction is triggered if: (1) there has been construction of improvements (2) on more than 10 acres of land (3) for a commercial purpose." *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 8 (8/15/2017).

52. How jurisdictional questions are decided (see [Part IX](#))

* A challenge to the jurisdiction of Act 250 over an activity must be pursued through the proper administrative route, which the legislature has established in 10 V.S.A. § 6007(c). *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 4 (7/17/02). [EB #809]

* Act 250 Rule 3 allows requests for jurisdictional opinions only as to “whether an activity constitutes a development or a subdivision” subject to Act 250 jurisdiction, not as to whether an activity subject to Act 250 jurisdiction should encompass additional elements or corresponding impacts. That is a question properly raised within the review of the application itself and in related appeals of any resulting determinations. *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 6 (5/09/13).

53. Concession of Jurisdiction

* There is no concession of jurisdiction if it is coerced. *In re Barlow*, 160 Vt. 513, 518 (1993).

* Where DR petition has been filed and landowner voluntarily obtains permit and then moves to dismiss petition as moot, Board conditions dismissal on implied concession, by virtue of landowners obtaining permit, that jurisdiction over parcel exists. *P&H Senesac, Inc.* DR #376, DO at 3 - 5 (6/22/00).

* There is no bar to applicant’s concession of jurisdiction by voluntarily submitting application, as Board and Commissions are empowered to review projects under Act 250. *Killington Ltd*, #1R0835-EB (Master Plan), MOD at 6 (10/22/99).

* Public utility concedes jurisdiction and Board’s findings support a conclusion that jurisdiction exists and existed at the time construction commenced. *CVPS Corporation / Roxbury*, DR #373 (5/27/99).

53.1 Via issuance of permit

* Attachment of Act 250 jurisdiction became final due to landowner's failure to challenge jurisdiction at time permit conditioning use of property was issued, or to appeal permit. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993).

54. Subsequent Events, Effect on jurisdiction (see [111.4](#))

* Act 250 Rule 2(B)(3) directs that a “subdivision shall cease to exist if it is found . . . to have been retracted or revised below jurisdictional levels at any time prior to the construction of improvements on the subdivision.” *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Decision on Motion for Summary Judgment at 8 (10/1/09).

* Abandonment results in a cessation of jurisdiction. *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Decision on Motion for Summary Judgment at 8 (10/1/09), citing *In re Audet*, 2004 VT 30, ¶13, 175 Vt. 617; see also *In re Rustin*, 162 Vt. 185, 187–88 (1994) (noting that when abandonment is determined, the jurisdiction that arose from the underlying permit ceases).

- * Act 250 jurisdiction over sand and gravel extraction project dissolves when the project's permit expires and where tract has been reclaimed under 10 V.S.A. § 6086(a)(9)(E)(ii). *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004), reversing *Re: Richard and Elinor Huntley*, DR #419, MOD (7/3/03).
- * Where talc mine was not in compliance at time of permit expiration and material changes were made without permit amendment, jurisdiction does not expire with the permit. *Re: Hamm Mine*, No. 271-11-06 Vtec, Decision on Appellant's Motion for Summary Judgment at 12-13 (9/27/07)(distinguishing *In re Huntley*, 2004 VT 115); see also, *In re: Hamm Mine Act 250 Jurisdiction*, Decision and Order (5/15/08), *aff'd*, 2009 VT 88 (mem.); *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 26 (2/16/2017)(successful reclamation is a prerequisite for the expiration of an earth extraction permit).
- * Once Act 250 jurisdiction is triggered and a permit obtained, subsequent events will not lift such jurisdiction, nor can jurisdiction be waived. *In Re John Rusin*, 162 Vt.185, 189 (1994), affirming, *Re: John Rusin*, #8B0393-EB, FCO at 5 (6/10/93). [EB#560]; *In Re Wildcat Construction*, 160 Vt. 631, 632 (1993), affirming, *Re: Wildcat Construction Co., Inc.*, #6F0283-1-EB (11/4/91). [EB#458]; *Re: Richard and Elinor Huntley*, DR #419, MOD at 4 - 7 (7/3/03), (includes a summary of case law from the Vermont Supreme Court and Board), *rev'd*, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004) (distinguishing prior Vermont Supreme Court case law); *Re: McDonald's Corporation*, #1R0477-5-EB, MOD at 6 (5/3/00). [EB#747]; *Nelson Lyford*, DR #341 (FCO at 27) (12/24/97 (but see [111.4](#)); *Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB (7/12/96). [EB #651M1]; *Bernard and Suzanne Carrier*, DR #246 (FCO at 26) (12/7/95); *Charles and Barbara Bickford*, #5W1186-EB (FCO at 25) (5/22/95). [EB#595]; *City of Barre Sludge Management Program*, DR #284 (FCO at 13-14) (10/11/94); *U.S. Quarried Slate Products, Inc.*, DR #279 and #283 (FCO at 18) (10/1/93); [EB # 560]; *Richard Farnham*, DR #250 (FCO at 7) (7/17/92); *John Stevens and Bruce Gyles*, DR #240 (FCO at 16) (5/8/92).
- * Jurisdiction triggered over road does not dissolve because, despite the adjustments to the plan originally permitted, there has been no change in the amount of land involved or the character of its intended use. *In re John Rusin*, 162 Vt. 185, 189 (1994).
- * Once jurisdiction attaches, and a permit conditioning land use is issued, that permit and its conditions will remain in force even if the town subsequently adopts zoning bylaws that would have preempted Act 250 jurisdiction from attaching had the project commenced on the date of adoption. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993).
- * Landowner's failure to challenge the continued enforceability of the permit at the time the bylaws were adopted, or question permit's validity until five years after it was issued, estops landowner from retroactively challenging the continued Act 250 jurisdiction. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993), citing *In re Denio*, 158 Vt. 230, 234 (1992).
- * Act 250 jurisdiction over a talc mine continues, even when reclamation has been completed and the mineral extraction permit has expired, if the permittee failed to comply with permit conditions. *In re: Hamm Mine*, No. 271-11-06 Vtec, Decision and Order at 9 (5/15/08), *aff'd*, 2009 VT 88 (mem.).

- * When Coordinator is aware of a permittee's non-compliance with certain conditions of an original permit, a jurisdictional opinion concluding that the project had been completed and reclaimed as planned does not constitute a de facto approval of the alternate development plan. *In re: Hamm Mine*, No. 271-11-06 Vtec, Decision and Order at 10 (5/15/08) (distinguishing *In re Appeal of Tekran Partners*, 2005 VT 92), *aff'd*, 2009 VT 88 (mem.).
- * Failure by permittee to satisfy permit conditions, to take corrective measures, and to disclose such failures to his successor in title preclude him from claiming that the District Commission and the Land Use Panel of the Natural Resources Board are estopped from asserting Act 250 jurisdiction over the property. *In re: Hamm Mine*, No. 271-11-06 Vtec, Decision and Order at 11 (5/1/08), *aff'd*, 2009 VT 88 (mem.).
- * When the Legislature wishes to terminate Act 250 jurisdiction, it knows how to do it. 10 V.S.A. § 6086(e); *Re: Richard and Elinor Huntley*, DR #419, MOD at 14 (7/3/03), *rev'd*, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).
- * Last sentence of 10 V.S.A. § 6086(e) states that no one should read into § 6086(e) any legislative intent to lift jurisdiction over developments other than temporary construction for films, television programs, or advertisements. *Re: Richard and Elinor Huntley*, DR #419, MOD at 14 (7/3/03), *rev'd*, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).
- * Once Act 250 jurisdiction has attached, it does not "detach" from a parcel unless the permit has expired (*In re Huntley*, 2004 VT 115, ¶12; 177 Vt. 596, 5999 (2004)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).
- * Once Act 250 jurisdiction has attached, it does not "detach" from a parcel unless the proposed activity is governed by an alternative statutory scheme giving another state agency exclusive jurisdiction of it (*Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec (8/3/06)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 11(2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).
- * Salt storage shed is still subject to Act 250 jurisdiction (after application for shed was withdrawn) because PRS was issued regarding shed, was unchallenged and became final and binding. *Re: Green Mountain Railroad*, #2W0038-3B-EB, FCO at 8 (3/22/02). [EB #797]
- * Where town's land use permit preceded legislation that would have exempted the town from obtaining a permit, permit remained in force. *Town of Springfield*, DR #232 (12/26/90).
- * Subsequent adoption by a municipality of permanent zoning and subdivision bylaws does not obviate the jurisdiction of Act 250 over permitted projects of less than 10 acres. *Ernest A. Pomerleau*, DR #137 (6/18/82); *William S. Noyes*, DR #75 (6/10/76).
- * Permit applications are not affected by amendments to Act 250 which are passed after such applications are filed. *Domestic Capital Corp.*, DR #30 (8/21/73).

54.1 Justification for not dissolving jurisdiction

* To retroactively divest the Board of its jurisdiction by automatically dissolving all Act 250 permits in existence when a town adopts bylaws would frustrate the purposes of the protection afforded by Act 250. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993).

* To automatically dissolve all Act 250 permits in existence when a town adopts bylaws would place the projects formerly regulated under Act 250 in an administrative limbo between dissolved Act 250 jurisdiction and the application of the newly enacted regulations, *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632-33 (1993).

* To automatically dissolve all Act 250 permits in existence when a town adopts bylaws would be inconsistent with the legislature's scheme of control over development. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993).

55. What is subject to Act 250 jurisdiction; the scope or extent of "permitted project"

*Entire "tract" is presumptively within the scope of any permit issued, but Court must next determine whether a particular parcel has a sufficient nexus to the project. No nexus found where conditions imposed on project result in little impact to adjoining parcel. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 15 and FN 11 (2/16/2017).

*The key case in determining the scope of a "permitted project" is *In re Stonybrook*, no. 382, Findings of Fact, Conclusions of Law, and Order, at 17 (Vt. Env'tl. Bd., May 18, 2001). The rule from that case states, a permitted project (ie, the land subject to Act 250 permit) is the tract of land, governed by the Land Use Permit, on which construction occurs, except in those instances in which the Permittee establishes that only a smaller portion of its tract has a nexus to, or is actually impacted or affected by such construction. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 12-13 (2/16/2017)(internal quotations omitted).

*Stonybrook analysis applies equally to the scope of an original Act 250 permit and the scope of an Act 250 permit amendment. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 14 (2/16/2017)

*Several Environmental Board and Environmental Court decisions (In re Okemo Realty, In Re Lefgren, and Bethel Mills) use the concept of involved land, however the Supreme Court clarified that "involved land" is relevant when there is a dispute over the triggering of Act 250 jurisdiction, but that *Stonybrook* governs the scope of a permitted project. This does not necessarily invalidate them as precedents, however, because the analysis in these cases is functionally similar to the analysis under *Stonybrook*. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 13, FN8 (2/16/2017).

* If land is within the scope of a permitted project, it is "encumbered" by the permit, and any substantial/material changes to that land require an Act 250 permit amendment. If it is not, the land is not encumbered" by the permit, and changes to the land only require an Act 250 permit if they independently trigger Act 250 jurisdiction. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 13 (2/16/2017).

- * Where Middlebury College plans to lease a forty-acre portion of land to a developer who will enjoy exclusive control and possession of all lands needed in its proposed multi-level residential retirement community, it would be "absurd" to include the College's remaining 344± acres in the permit's encumbrance. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 27-28 (2/15/08), aff'd, *In re Eastview at Middlebury, Inc.*, 2009 VT 98, ¶15-18(quoted *Stonybrook Condominium Owner's Association*, Declaratory Ruling #385, FCO at 17-18 (Vt. Env'tl. Bd. May 18, 2001)).
- * Narrowing the scope of a permitted project requires a permit amendment and is a decision for Commission, not Coordinator. *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, Finding of Fact, Conclusion of Law, and Order at 43 (2/4/02). [EB#767]
- * A "permitted project" is the tract of land, governed by the Land Use Permit, on which the construction occurs, except in those instances in which the Permittee establishes that only a smaller portion of its tract has a nexus to, or is actually impacted or affected by, such construction. *Stonybrook Condominium Owners Association*, DR #385, FCO at 9 - 18 (5/18/01).
- * Once a parcel of land is brought within an Act 250 project for any reason, it is entitled to all of the protections that Act 250 affords, not only those which arise out of the reason it was initially included. *Stonybrook Condominium Owners Association*, DR #385, FCO at 20 n.13 (5/18/01).
- * A person cannot include land into the consideration of and calculations for a proposed project in order to satisfy a local regulatory body, but then argue that that very same land should not be brought within the definition of "permitted project" for purposes of EBR 34(A). The land is either a part of the project or it is not. *Stonybrook Condominium Owners Association*, DR #385, FCO at 20 (5/18/01), citing, *Re: Richard and Napoleon LaBrecque*, #6G0217-EB, FCO at 2 (11/17/80).
- * Review of project does not extend to offsite use and distribution of project's commercial product (compost). *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 10-12 (9/9/99).
- * Jurisdiction does not attach to a project (and the project site does not become involved land of an adjacent permitted development) solely because it may create an effect on an adjacent permitted site. *Pizzagalli Properties (Burger King)*, DR #361, Chair's Preliminary Ruling at 7(6/8/98), Board's Order (6/15/98).
- * Project proponent is not required to obtain a land use permit where no independent grounds for jurisdiction exist, and cannot be required to seek an amendment to a neighbor's permit by virtue of construction on the proponent's property. *Pizzagalli Properties (Burger King)*, DR #361, Chair's Preliminary Ruling (6/8/98), Board's Order (6/15/98).
- * Jurisdiction extends only to lands owned or controlled by co-applicants, and thus permit conditions do not bind a lot (not owned by a co-applicant) subdivided before the issuance of permit. *TOFR Bayside Associates*, DR #158 (9/26/84).

56. What Act 250 regulates / relevant inquiries (see [0.2](#))

- * The underlying purpose of Act 250 is to regulate the impacts of development, not the purpose served, nor the parties benefited by the construction. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶9 (2007), citing *In re Audet*, 2004 VT 30, ¶14, 176 Vt. 617 (mem.)
- * Act 250 regulates construction and land use. *In re Real Audet*, 2004 VT 30, ¶ 13 (2004). *Re: Peter and Carla Ochs*, DR #437, FCO at 11 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06).
- * Act 250 regulates land use regardless of identity of the person or institution conducting the use. *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 639 (1984); *Re: Peter and Carla Ochs*, DR #437, FCO at 11 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06)(for purposes of an Act 250 analysis, who owns the land is less an issue than how the land is being used), citing *Re: S-S Corporation/Rooney Housing Developments*, DR #421, MOD at 4 - 5 (2/5/04), *aff'd*, 2006 VT 8 (V.S.Ct); (Board is empowered to regulate property based upon its use, not the identity or the specific characteristics or attributes of its users), citing *Vermont Baptist Convention v. Burlington Zoning Board*, 159 Vt. 28, 31 (1992); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, FCO at 26 n.9 (5/4/04) [EB #831] (fact that project homes will be rented is not a relevant inquiry under Act 250); *Sterling College*, DR #259, FCO at 4 - 5 (3/27/92).
- * Although the purposes of Act 250 are broad, the Legislature in passing the Act did not purport to reach all land use changes within the state, nor to impose the substantial administrative and financial burdens of the Act, or interfere with local control of land use decisions, except where values of state concern are implicated through large scale changes in land utilization. *In re Agency of Administration*, 141 Vt. 68, 75 (1982).
- * Act 250 was a philosophic compromise between a desire to protect and control all the lands and environment of the state of Vermont, and the need to avoid an administrative nightmare. *In re Agency of Administration*, 141 Vt. 68, 75 (1982)
- * Act 250 establishes a mechanism for review of certain land use activity at the state level. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).
- * Act 250 does not purport to reach all land use changes within the state. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145 (1979).
- * Legislature intended to involve the state in land use decisions in cases where a permanent mechanism exists for their review at the municipal level only where activity on a very major scale is planned. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 151 (1979)
- * The Legislature sought to mandate a second layer of review of proposed land use decisions, imposing substantial additional administrative and financial burdens on an applicant, and possibly interfering to some extent with local control of land use decisions, only where values of state concern are implicated through large-scale changes in land utilization. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 151 (1979).

*Whether a business is a large- or small-scale commercial enterprise is not relevant to Act 250 jurisdiction. *In re: Eric and Geraldine Cota*, No. 2005-120 (unpublished mem.)(Vt. 2006)(citing *In re: Audet*, 2004 Vt 30, ¶ 11, 176 Vt. 617 (mem.)).

57. Simultaneous pursuit of permit and jurisdictional determination

* Person may apply for a permit while pursuing a jurisdictional claim that they do not need one. *In re Barlow*, 160 Vt. 513, 519 (1993); *Re: Vermont RSA Limited Partnership*, DR #441, MOD at 2 (1/25/05).

* While Board often holds DR Petitions in abeyance while a party pursues a permit as an alternative to contesting jurisdiction, where opponents object and seek resolution of jurisdictional issue before application proceeds, efficiencies indicate that Board should proceed to hear DR. *Re: Vermont RSA Limited Partnership*, DR #441, MOD at 2 -3 (1/25/05), noting *Re: Security Self Storage, Inc.*, DR #386, CO at 2 (10/2/00); *Re: Rutland Public Schools*, DR #414, CO (12/17/02); *Burlington Broadcasters, Inc.*, DR #322 and *NYNEX Mobile*, DR #323, CO at 2 (8/13/96).

58. Act 250 Disclosure Statements (see [555](#))

59. Activities taken while Declaratory Ruling petition is pending (see [501.5](#))

* Developer acted at its own risk when it went forward with construction with full knowledge that Act 250 jurisdiction had been placed at issue in a declaratory ruling proceeding before Board. *In re McDonald's Corp*, 146 Vt. 380, 386 (1985).

B. Development

71. General

*Whether a business is a large- or small-scale commercial enterprise is not relevant to Act 250 jurisdiction. *In re: Eric and Geraldine Cota*, No. 2005-120 (unpublished mem.)(Vt. 2006)(citing *In re: Audet*, 2004 Vt 30, ¶ 11, 176 Vt. 617 (mem.)).

* Definition of "development" in 10 V.S.A. § 6001(3) does not preclude Board from parsing a given project into distinct activities that may be subject to Act 250 jurisdiction. *In re BHL Corp.*, 161 Vt. 487, 491 (1994).

* Act 250 carefully defines what may be covered by the term "development" for purposes of Act 250 jurisdiction, and certain activities are specifically excepted from this definition. *In re Vitale*, 151 Vt. 580, 584 (1989).

* To exclude a church from Act 250 simply because of its evangelical services would not be justified on environmental grounds. *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 639 (1984).

* Act 250 speaks to land use, not the particular institutional activity associated with land use. *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 639 (1984).

* Construction of improvements including relocation of existing railroad tracks, three large fuel storage tanks, fuel piping and pumping equipment, upgrade of gravel driveway, and installation of 30' x 36' canopy for truck fueling station, does not constitute development, because legislature intended to exempt such railroad-related projects from Act 250. *In re MacIntyre Fuels, Inc., and Vermont Agency of Transportation*, 2003 VT 59 ¶¶ 9-14 (6/30/03)(mem.)(reversing *Re: MacIntyre Fuels, Inc., and Vermont Agency of Transportation*, Declaratory Ruling #402, FCO at 8 (Altered) (5/21/02)).

* Act 250 jurisdiction over a parcel of land is “determined at the commencement of the project.” *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07)(citing *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993)), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* "Development" is defined, in part, as “the construction of improvements for commercial or industrial purposes” on one acre or involving ten acres, depending on whether the municipality where the construction occurs has adopted permanent zoning and subdivision bylaws. 10 V.S.A. § 6001(3)(A)(i) and (ii). *Re: Peter and Carla Ochs*, DR #437, FCO at 7 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06); *Mark and Nubia Fuller and Peter G. Hack*, DR #403 & #404, FCO at 3 (3/21/02).

* "Development" or the "commencement of development" requires an Act 250 permit. 10 V.S.A. § 6081(a). *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 5 (12/5/02), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04).

* Subdivision provisions are more specific and control when activities potentially fall under either “development” or “subdivision” definitions. *Mark and Nubia Fuller and Peter G. Hack*, DR #403 & #404, FCO at 5 (3/21/02).

* Where commercial project met any of the listed definitions of "development" in EBR 2(A)(1) through 2(A)(8), EBR 2(A)(6) is irrelevant. *Investors Corporation of Vermont*, DR #249 (FCO at 4) (12/31/91).

* Definitions of "development" and "subdivision" are separate and distinct; definition of “development” is not limited to any particular time frame; whereas the definition of “subdivision” is limited to those "created within any continuous period of five years." *Harold Jacobs, E.P.E. Corp.*, DR #210 (FCO at 2) (9/28/89).

71.1 “Commencement of Development”

* Development, which is commenced but then abandoned and which does not effectuate a change in land use, is not subject to Act 250 jurisdiction. *In re Real Audet*, 2004 VT 30, ¶12 (4/1/04).

* A construction plan is considered development when it is "so settled in intention and purpose that it can be called ready to commence" and contingencies such as ability to secure financing, service of markets, and general economic conditions do not mitigate against such a conclusion. *In re Agency of Administration*, 141 Vt. 68, 82 (1982); *Vermont Gas Systems, Inc.*, #4C0609-EB (FCO at 9)

(11/22/85), *rev'd*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]

* Act 250 jurisdiction over a parcel of land is "determined at the commencement of the project." *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07)(citing *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993)), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* "Development" or the "commencement of development" requires an Act 250 permit. 10 V.S.A. § 6081(a). *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 5 (12/5/02), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04).

* For a project to be "development" subject to Act 250, there must be plans for construction that are sufficiently concrete such that construction is ready to commence. Where applicant's plans meet this test for only a portion of larger tract, the requirement is met and jurisdiction is conferred over all involved land. *Rockwell Park Associates*, #5W0772-5 (FCO at 30) (8/9/93). [EB #509]

71.2 Cases

* Construction for siting F-35A aircraft on National Guard base at Burlington International Airport does not constitute development because it is solely for a federal purpose. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 19 ¶ 10 (3/6/15) (mem.), affirming *Re: Burlington Airport Act 250 JO*, No. 42-4-13 Vtec (5/13/14).

* Continued use and operation of gravel pit off a State highway constitutes development. *Missisquoi Mining and Minerals*, DR #148 (MOD at 1) (11/7/84).

* Installation of two microwave dishes is "development". *Karlen Communications, Inc.*, #5L0437 (FCO at 4) (8/28/78). [EB #89]

* A sanitary landfill is a development. *Town of Charlotte*, DR #76 (FCO at 1) (9/8/76).

* The creation of a right-of-way and the improvements proposed to it for the purpose of providing access to parcels of land to be offered for sale is a development. *Westfield Associates*, DR #66 (9/12/74).

* The creation of a right-of-way to provide access to subdivided lots and common area does not constitute development. *Andresen*, DR #55 (5/1/74).

* The construction of a bridge constitutes development. *Lamoille County Snow Packers*, DR #41 (12/28/73).

* The reconstruction of a bridge and associated stream and channel work does not constitute a development or subdivision. *Stuart L. Richards*, DR #23 (8/8/73).

* An underground gas transmission line constitutes a "development." *Vermont Gas Systems, Inc.*,

DR #F (3/10/71).

72. Above 2500 Feet

* Construction of improvements for industrial or commercial activity, including logging, above 2,500 feet is development, but construction of improvement for logging purposes below the elevation of 2,500 feet is explicitly excluded from the term 'development.' *In re Green Crow Corp.*, 2007 VT 137 ¶ 10 (12/14/07).

* Demolition of an existing house located above 2,500 feet in elevation comprises the initiation of development and therefore constitutes development because 1) demolition activities over 2,500 feet constitute development for the purposes of Act 250, as "any construction activity, no matter how minute, triggers Act 250 jurisdiction"; and 2) pursuant to Rule 2(C)(3), "construction of improvements means any physical action on a project site which initiates development." *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 7 (7/24/08) (quoting *In re Audet*, 176 Vt. 617, 619-20; Act 250 Rule 2(C)(3)); see also *Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* Act 250 permit required for state project over 2,500 feet because Board rule defines development to include construction "for any purpose" above 2,500 feet, and Vermont Supreme Court has held that Board rule was ratified by the legislature in 1985, despite fact that the statute limits jurisdiction above 2,500 feet to construction for "commercial, industrial or residential use." *Re: Vermont Association of Snow Travelers (VAST)*, DR #430, MOD (6/7/05).

* Jurisdiction for construction above 2500 feet is preempted with respect to construction by the federal government on federal lands. *Green Mountain Power Corp.*, DR #120 (FCO at 4)(11/14/80).

* Normal maintenance, replacement or reconstruction of an existing shelter and footpaths for hikers above 2,500 feet do not require a permit. *Footpaths Above 2,500 Feet*, DR #69 (FCO at 1) (10/8/75).

* The construction of a microwave repeater above a 2,500 foot elevation constitutes a development. *Eastern Microwave, Inc.*, DR #57 (FCO at 1) (7/8/74).

* The construction of logging roads and harvesting of timber above 2,500 feet is development and requires a permit even if the area was logged prior to Act 250. *International Paper Co.*, DR #58 (FCO at 2) (6/26/74).

* Trail relocation or any other significant improvement above 2,500 feet is development for commercial, residential, or industrial purposes. *Green Mountain Club, Inc.*, DR #M (7/12/71).

73. "Commencement of Construction"

* Act 250 jurisdiction does not attach until construction is about to commence. *In re Vermont Gas Systems, Inc.*, 150 Vt. 34, 38 (1988), citing 10 V.S.A. §§ 6001(3), 6081(a); *In re Agency of Administration*, 141 Vt. 68, 78 (1982); *Re: McLean Enterprises Corp.*, DR #428, FCO at 6 (7/22/05);

Re: Aaron and Sons, Inc., Declaratory Ruling #359, FCO at 9 (10/29/98)

* Act 250 jurisdiction over a parcel of land is “determined at the commencement of the project.” *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07)(citing *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993)), *aff’d*, 2007-156 (Vt. S. Ct. 3/13/09).

* Determining whether the ‘commencement of construction’ constitutes development subject to Act 250 involves “a highly fact-specific inquiry and analysis.” *Re: Johnson Lumber Company*, DR #263, FCO at 12 (7/10/97)

* Although a project constitutes a "pre-existing use," there is no reason to take a commencement of construction case out of context of the Board Rules; therefore, the definition of "commencement of construction" should apply. *Central Vt. Public Service Corp.*, DR #B (11/12/70).

73.1 Effect of

* Commencement of construction on a project subject to Act 250 triggers jurisdiction, which does not dissolve based on subsequent events. *In Re Wildcat Construction Co.* 160 Vt. 631 (1993); 10 V.S.A. § 6081(a); *U.S. Quarried Slate Products, Inc.*, DR #279 and 283 (FCO at 18) (10/1/93).

* Once Act 250 jurisdiction is triggered by construction, it is irrelevant whether or not that construction, if undertaken by someone other than the original developer, would have triggered jurisdiction. The fact that there has already been construction at the site precludes the independent jurisdictional assessment of the project. *Richard Farnham*, DR #250 (FCO at 6) (7/17/92).

73.2 What constitutes “commencement”

* Act 250 jurisdiction is triggered "only when the activity was about to impinge on the land" and attaches only to "activity which has achieved such finality of design that construction can be said to be ready to commence." *In Re Vermont Gas Systems*, 150 Vt. 34, 39 (1988), reversing *Vermont Gas Systems, Inc.*, #4C0609-EB (1/30/86); *In re Agency of Administration*, 141 Vt. 68, 78-79 and 82 (1982), reversing *State Buildings Division*, DR #121 (FCO at 13) (10/29/80); *Aaron & Sons, Inc.*, DR #359 (FCO at 9) (10/29/98); *Johnson Lumber Co.*, DR #263 (FCO at 11) (7/10/97); *Rinkers Communications and Atlantic Cellular Co.*, DR # 314 (FCO at 10-11) (5/23/96); *Lawrence and Darlene McDonough*, DR # 306, (MOD at 4) (12/22/95); *Richard Farnham*, DR #250 (FCO at 6) (7/17/92).

* To trigger Act 250 jurisdiction, a "plan" must be so settled in intention and purpose that it can be called ready to commence. *In re Agency of Administration*, 141 Vt. 68, 82 (1982).

* Board will not conclude based on inference alone that an activity constitutes the commencement of construction. *Aaron & Sons, Inc.*, DR #359 (FCO at 12) (10/29/98).

* Determining whether the “commencement of construction” constitutes development subject to Act 250 involves “a highly fact-specific inquiry and analysis.” *Re: Johnson Lumber Company*, DR #263, FCO at 12 (7/10/97) (forest products company did not commence construction where it cut a skidding road and clear cut a portion of its property in furtherance of its overall timber management

philosophy); but see *Luce Hill Partnership*, #5L1055-EB, FCO at 8 (7/7/92) [EB #501] (“false logging” to prepare land for subdivision)

* Demolition for a project involving more than 10 acres of land is land clearance preparatory to new construction and constitutes commencement of construction and is thus subject to Act 250 jurisdiction. *State Buildings Division*, DR #121 (FCO at 13) (10/29/80), *rev'd*, *In re Agency of Administration*, 141 Vt. 68 (1982); *Medical Center Hospital of Vermont*, DR #85 (FCO at 4) (11/8/77), *rev'd*, *Committee to Save Bishop's House v. MCHV, Inc.*, 136 Vt. 213 (1978).

* The acquisition of property by purchase, gift, inheritance, or condemnation is not the commencement of construction or the construction of improvements. *Agency of Transportation*, DR #107 (FCO at 2) (9/13/79).

73.3 Review of land as it existed prior to construction

* When development is proposed for a tract of land devoted to farming, only those portions of the land “that support the development shall be subject to regulation...” and permits “shall not impose conditions on other portions” (citing 10 V.S.A. § 6001(3)(E)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 10 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* Board and commission policy of reviewing applications based upon status of site before any construction, whether or not construction has already commenced, is based upon statutory mandate which requires permit prior to development activity. *Bernard & Suzanne Carrier*, #7R0639-EB (12/17/90). [EB #435M]

* Where applicants had cleared and excavated site before seeking Act 250 permit, review for compliance is based upon site’s status as it existed before construction commenced. *Bernard & Suzanne Carrier*, #7R0639-EB (10/5/90 [EB #435]; *Luce Hill Partnership*, #5L1055-EB (7/7/92). [EB #501]

73.4 Demolition as

* Demolition of building is not inconsistent with future use of the site for a number of purposes other than a state office building, or, indeed, with no future use of the site at all. *In re Agency of Administration*, 141 Vt. 68, 91 (1982).

* Demolition of an existing house located above 2,500 feet in elevation comprises the initiation of development and therefore constitutes development because 1) demolition activities over 2,500 feet constitute development for the purposes of Act 250, as “any construction activity, no matter how minute, triggers Act 250 jurisdiction”; and 2) pursuant to Rule 2(C)(3), “construction of improvements means any physical action on a project site which initiates development.” *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 7 (7/24/08) (quoting *In re Audet*, 176 Vt. 617, 619-20; Act 250 Rule 2(C)(3)); see also *Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

73.5 Cases

- * Electric utility's staking to mark potential sites for electric line poles is not "commencement of construction" because the pole locations are subject to change, and there is not "such finality of design that construction can be said to be ready to commence." *Washington Electric Cooperative*, DR #379 (FCO at 10) (8/19/99).
- * Placement of fill on the subject tract "improved" or added value to the subject tract and therefore constituted the construction of an improvement. *Aaron & Sons, Inc.*, DR #359 (FCO at 11) (10/29/98).
- * Draining of quarry pit, cutting of trees, removal of stumps, and improvement to access road constitute commencement of construction under EBR 2(C). *U.S. Quarried Slate Products, Inc.*, DR #279 and 283 (FCO at 20) (10/1/93).
- * Logging operations related to plans to develop or subdivide the property are subject to Act 250 jurisdiction. *Capital Heights Associates*, DR #167 (FCO at 4) (3/27/85).
- * Substantial improvements involving widening and general improvements to a road constitute commencement of construction. However, subsequent minimal widening and the addition of gravel is not a "substantial change". *Peter Guille, Jr.*, DR #129 (FCO at 3) (3/5/82).
- * Using a logging road right-of-way to test drill for diamonds does not constitute a development as long as the drilling is of an exploratory nature. *Prospecting Geophysics, Ltd.*, DR #39 (12/12/73).
- * Construction of a right-of-way for the purpose of dividing land into two or more parcels for sale or lease constitutes a development. *Breakwater Associates, Ltd.*, DR #29 (9/15/73).

74. Construction of Improvements

- * There is no *de minimis* exception to whether a "development" has occurred. *In re Real Audet*, 2004 VT 30, ¶10 (4/1/04), *affirming, Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 2 (2/25/03), *citing Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB, FCO at 28 (12/18/97) [EB #682]; and see, *Conservation Law Foundation, et al. v. Burke*, 162 Vt. 115, 121 (1994) (Court has declined to read a *de minimis* exception into an air pollution control regulation) *citing In re Cumberland Farms*, 151 Vt. 59, 64 (1989) (Court has declined to read a *de minimis* exception into a zoning ordinance or the zoning enabling statute): *but see* Act 250 Rule 2(C)(3)(c).
- * Under Act 250 and the EBRs, any construction activity, no matter minute, triggers Act 250 jurisdiction. *In re Real Audet*, 2004 VT 30, ¶11 (4/1/04), *affirming, Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 2 (2/25/03).

- * "Construction of improvements" is a deliberately limited term; definition in Board's rule, which extends the term to "any activity," is overbroad. *In re Agency of Administration*, 141 Vt. 68, 93 (1982).
- * EBR 2(D) defines "construction of improvements" as "any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A)." *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 5 (12/5/02), *aff'd In re Real Audet*, 2004 VT 30 (4/1/04).
- * "Construction of improvements" includes any physical disturbance on a project tract. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 5 (12/5/02), *aff'd In re Real Audet*, 2004 VT 30 (4/1/04); *Re: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon*, #1R0426-2-EB, FCO at 27-28 (12/18/97) [EB #682] ("There is no de minimis exception in the Act 250 statute, the EBRs, or Board precedent."), and see, *Conservation Law Foundation, et al. v. Burke*, 162 Vt. 115, 121 (1994) (Court has declined to read a de minimis exception into an air pollution control regulation) citing *In re Cumberland Farms*, 151 Vt. 59, 64 (1989) (Court has declined to read a de minimis exception into a zoning ordinance or the zoning enabling statute); *but see* Act 250 Rule 2(C)(3)(c).
- * The "construction of improvements" is any physical action on a project site which initiates development for any purpose. *Re: Harold Rock*, DR #372 (12/23/98); *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB (FCO at 28) (12/18/97). [EB #682]; *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR #340 (FCO at 9) (7/11/97).
- * Mere use of land is not "construction of improvements" *Re: Harold Rock*, DR #372 (12/23/98) (junkyard).
- * "Construction of improvements" is a deliberately limited term which cannot be extended to include any activity that initiates any use of land. *Aaron & Sons, Inc.*, DR #359 (FCO at 9 - 11) (10/29/98).
- * "Construction of improvements" means "any physical change to a project site," except certain preliminary activities, or de minimus construction with "no potential for significant adverse impact" under any Act 250 criteria. Act 250 Rule 2(C)(3). *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 9 (8/15/2017).
- * Act 250 "de minimus" exception to "Construction of Improvements" places burden of proof on the party seeking the de minimus determination. Seeking party must demonstrate that such construction "(i) is de minimis and (ii) will have no potential for significant adverse impact under any of the criteria of 10 V.S.A. § 6086(a)(1) through (10) directly attributable to such construction or to any activity associated with such construction." Act 250 Rule 2(C)(3)(c). *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 11 (8/15/2017).

74.1 Repair / routine maintenance

- * The removal an existing telecommunications tower and construction of a new tower to provide the additional structural strength necessary to support new antennas not presently installed does not constitute the "repair and routine maintenance" of the existing tower. *Nextel Communications*,

DR #362 (FCO at 20) (11/18/98).

* Repair or routine maintenance does not alter an existing development but prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear. *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR #340 (FCO at 9) (7/11/97); *In Re Vt. Agency of Transportation (Rock Ledges)* DR #296 (FCO at 10) (3/28/97).

* The following activities are not repair or routine maintenance: new pavement, guardrail placement; upgrade to an historic condition; widening a road surface, laying a sub-base and gravel road surface; and replacing leach fields with a different sewage disposal system for a correctional facility. *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR #340 (FCO at 9) (7/11/97); and see *Costantino Antique Business*, DR #262 (7/30/93); *Town of Wilmington*, DR #258 (6/30/92)(citing the following cases: *Town of Wilmington*, DR #258 (6/30/92); *Town Hwy #37, Middlesex*, DR #156 (12/19/84); *Windsor Correctional Facility*, DR # 151 (5/9/84)).

* The following work is repair or routine maintenance: restoration of an eroded logging road, including cleaning out existing water bars, installing ditches alongside the road, installing a culvert, installing silt fences and hay bales, removing 20-30 stumps, and removing ledge outcroppings. *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR #340 (FCO at 9) (7/11/97); and see *In Re Vt. Agency of Transportation (Rock Ledges)* DR #296 (FCO at 10) (3/28/97).

* Repair and routine maintenance refers to activities that “prevent alteration that has occurred or would otherwise occur through normal wear and tear,” rather than activities altering an existing development. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 10 (8/15/2017), citing *Rock Ledges*, DR No. 296, at 10 (Mar. 28, 1997).

* “Repair and routine maintenance of an existing development does not constitute the construction of improvements for Act 250 purposes.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 10 (8/15/2017), citing *In re Vt. Agency of Transportation (Rock Ledges)*, DR No. 296 Findings of Fact, Conclusions of Law, and Order (3d. Rev.), at 10 (Vt. Envtl.

Bd. Mar. 28, 1997); *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR No. 340 Findings of Fact, Conclusions of Law, and Order, at 9 (Vt. Envtl. Bd. July 11, 1997).

74.2 Demolition as

* Demolition does not constitute the "construction of improvements" unless it is the first step in a proven development project. *In re Agency of Administration*, 141 Vt. 68, 93 (1982).

74.3 Cases

* Act 250 defines "development" as "the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws." 10 V.S.A. § 6001(3). *ANR v. Duranleau*, 159 Vt. 233, 237 (1992).

- * When development is proposed for a tract of land devoted to farming, only those portions of the land "that support the development shall be subject to regulation..." and permits "shall not impose conditions on other portions" (citing 10 V.S.A. § 6001(3)(E)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 10 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).
- * Placement of fill added value to tract and constitutes the construction of an improvement. *Aaron & Sons, Inc.*, DR #359, FCO at 11 (10/29/98).
- * Gravel pit constitutes construction of improvements. *Norwich Associates, Inc.*, DR #275, FCO at 11 (4/3/96)
- * Land application of sludge does not constitute construction of improvements or development. *City of Barre Sludge Management Program*, DR #284, FCO at 9 (10/11/94).
- * Land application of domestic septage is not construction of improvements. *Donna Caplan*, DR #252, FCO at 6 (5/18/94).
- * The installation of groundwater monitoring wells or the injection or incorporation of septage into the ground is not the first step in a development project. *Donna Caplan*, DR #252, FCO at 6 (5/18/94).
- * Rule 2(D) does not state that exploratory work approved under the minor application process does not constitute construction of improvements needing a permit. *U.S. Quarried Slate Products, Inc.*, DR #279 and 283, FCO/Reconsidered at 20 (10/1/93).
- * Demolition of mobile home; installation of municipal sewer, water, and electric utilities; and installation of slab foundation, constitute permanent improvement to the land and therefore meet the definition of "construction of improvements." *Richard Farnham*, DR #250, FCO at 5 (7/17/92).
- * Construction of "headnotes" for cable installation meets the definition of development if they are constructed on more than the jurisdictional threshold in acreage. *Grassroots Cable Systems of Vermont, Inc.*, DR #254, FCO at 4 (3/12/92).
- * The acquisition of property by purchase, gift, inheritance, or condemnation is not the commencement of construction or the construction of improvements. *Agency of Transportation*, DR #107 (FCO at 2) (9/13/79).
- * If observable improvements occurred prior to June 1, 1970, Act 250 jurisdiction will be found only if proposed improvements substantially change the exempt development, or are a development by themselves. *Vermont Marble Co.*, DR #101 (FCO at 3) (12/13/78).
- * Construction of improvements for commercial purposes on a used car sales lot constitutes a development. *Clifford Cerro*, DR #100 (11/17/78).
- * The continued use of a temporary parking lot, does not constitute a "development" or a substantial change. *Medical Center Hospital of Vermont*, DR #92 (10/10/78).

- * The proposed construction of a communications facility for revenue producing purposes, constitutes a development. *Department of Corrections*, DR #93 (FCO at 4) (8/15/78).
- * The establishment of a right-of-way not useable by automobiles and requiring no physical change to the involved tract of land is not a development. *Petition of Buckley*, DR #71 (11/12/75).
- * The proposed expansion by 50 percent of cottages and adjacent restaurant, restroom, changing and parking facilities, and sewage disposal system constitute a development. *Franklin and Madeline Skinner*, DR #70 (10/27/74).
- * The creation of a right-of-way to provide access to subdivided lots and common area does not constitute development. *Kare and John Andresen*, DR #55 (5/1/74).

75. Land

- * A person cannot include land into the consideration of and calculations for a proposed project in order to satisfy a local regulatory body, but then argue that very same land should not be brought within the definition of "permitted project" for purposes of EBR 34(A). The land is either a part of the project or it is not. *Stonybrook Condominium Owners Association*, DR #385, FCO at 20 (5/18/01)(citing *Re: Richard and Napoleon LaBrecque*, #6G0217-EB, FCO at 2 (11/17/80)).
- * Jurisdiction is based upon the amount of land that actually will be involved in the overall project, an area that may be less than or may exceed the land area within the perimeter of the planning area for that project. *Rutland State Airport*, DR #127, FCO at 3 (8/31/81).
- * Determining whether an Act 250 permit is needed depends on recitations of acreage contained in the owner's recorded deeds. If land records indicate that acreage exceeds 1 acre, a permit is required despite the petitioner's assertion that the parcel contains less acreage than the deeds indicate. *Ray Carbonell*, DR #114 (4/29/80).
- * The governing factor in determining applicability of a development is the size of the actual tract or tracts of land upon which the development will occur. *Agency of Environmental Conservation*, DR #P (9/17/71).

75.1. Tract(s)

- * "In determining amount of land involved for jurisdictional purposes, 'the area of the entire tract or tracts of involved land owned or controlled by a person will be used.' " *In re Stokes Communications Corp.*, 164 Vt. 30, 36 (1995), citing EBR 2(A)(2).
- * "EBR 2(F)(2) and (3) pertain to tracts which are physically separate from the improved tract. Rule 2(F)(1) addresses the size of the tract upon which the improvements are located." *In re Stokes Communications Corp.*, 164 Vt. 30, 36 (1995).

* Contiguous parcels held in common ownership are involved land under Rule 2(F)(1)). *In re Stokes Communications Corp.*, 164 Vt. 30, 37 (1995);

* When development is proposed for a tract of land devoted to farming, only those portions of the land “that support the development shall be subject to regulation...” and permits “shall not impose conditions on other portions” (citing 10 V.S.A. § 6001(3)(E)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 10 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* All contiguous parcels owned by the same EBR 2(H) “person” are part of the project “tract.” *Re: McLean Enterprises Corp.*, DR #428, FCO at 6 (7/22/05); *Re: West River Acres, Inc, et al.*, Declaratory Ruling #398, Findings of Fact, Conclusions of Law, and Order (3/21/02); *see* EBR 2(U).

* EBR 2(U) defines “tract” as “one or more physically contiguous parcels of land owned or controlled by the same person or persons.” *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 7 (12/5/02), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04).

* Parcel falls within the definition of “tract,” as it is owned by landowner; and the Company and landowner, who is the Company's sole shareholder and president, are the same “person” for purposes of Act 250 jurisdiction. EBR 2(H)(1), referring to 10 V.S.A. § 6001(14)(A)(i). *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 8 (12/5/02), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04); *see also*, *State of Vermont Environmental Board v. Levi Chickering*, 155 Vt. 308 (1990); *Salvas Paving, Inc., Salvas Paving, Inc.*, DR #229, FCO at 7-8 (6/20/91).

* “Tract” of land includes all contiguous land in common ownership regardless of functional relationship between tracts and whether tracts were purchased separately. *West River Acres, Inc./ Winchester Stables, Inc./ Nicholas Mercede*, DR #398, FCO at 9 (3/21/02).

* When determining whether Act 250 applies to commercial and industrial projects, the entire tract or tracts of land upon which the development or improvement occurs will be counted. *Richard and Barbara Woodard*, #5W1262-EB (12/18/97). [EB #676]; *James and Anita McGrath*, DR #248 (7/21/92); *McDonald's Corporation*, DR #136 (10/26/82), *aff'd*, *In re McDonald's Corp.*, 146 Vt. 380 (1985); *Dufresne-Henry Engineers*, DR #I (3/24/71).

* Permit will not be required for the sale of a separate noncontiguous parcel of land where the owner is selling the entire parcel and no subdivision of land or alteration of the parcel's boundaries has occurred. When a landowner's predecessor in interest acquired a number of separate, noncontiguous parcels of land in a single deed it did not acquire one “tract” for the purpose of Act 250 jurisdiction. *New England Land Associates*, DR #175 (8/7/86).

75.1.1 Minimum acreage required for jurisdiction

* “Pursuant to 10 V.S.A. § 6081, in towns with permanent zoning and subdivision bylaws, construction of improvements for commercial purposes on a tract or tracts of land, owned or controlled by a person, involving more than ten acres of land requires an Act 250 permit.” *In re Stokes Communications Corp.*, 164 Vt. 30, 35-36 (1995) citing 10 V.S.A. § 6001(3) (defining

development); *In re McDonald's Corp*, 146 Vt. 380, 382 (1985); *Committee to Save the Bishop's House, Inc. v. MCHV*, 137 Vt. 142, 151 (1979).

* Project which is less than one acre in a one-acre town does not trigger jurisdiction. *Guy E. Nido, Inc.*, DR # 399, FCO at 6 & 7 (1/17/02).

* Leasing less than 10 acres of a greater than 10-acre tract does not defeat jurisdiction if the development is in fact on a tract of greater than 10 acres owned by a person, even if the owner is not the lessor-developer. *U.S. Quarried Slate Products, Inc.*, DR #279 and 283 (MOD) (3/4/93).

75.1.2 Contiguous

* When construed a "tract of land" for jurisdictional purposes Board may include all contiguous land in common ownership, regardless of the functional relationship between the parcels. *In re Stokes Communications Corp.*, 164 Vt. 30, 36 (1995); *In re Gerald Costello Garage*, 158 Vt. 655, 656 (1992) (mem.).

* Two contiguous parcels were a "tract" within the meaning of the phrase "tract or tracts of land of more than one acre owned or controlled by a person." EBR 2(A)(2); *In re Gerald Costello Garage*, 158 Vt. 655 (1992).

*Land is not "involved" merely because it is under the same ownership as, and is contiguous with, land already under Act 250 jurisdiction. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6 (4/9/06), Appellant's Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc.*, No. 243-11-05 Vtec Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

*Land is "involved" where it acts as a buffer between residential and industrial zones and is contiguous with a parcel already under Act 250 jurisdiction. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6-7 (4/9/06), Appellant's Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc.*, No. 243-11-05 Vtec Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

*Adjacent residential parcel, acquired after Act 250 jurisdiction was triggered, is involved land because it bears a relationship to commercial lumber yard that is likely to have substantial impact on aesthetic values. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6 (4/9/06), Appellant's Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc.*, No. 243-11-05 Vtec Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

* Non-contiguous parcels owned by family had no commercial improvements, were not used as part of Project's operation, and will not impact Act 250-protected values; thus, such parcels are not involved land. *West River Acres, Inc./ Winchester Stables, Inc./ Nicholas Mercede*, DR #398, FCO at 10 (3/21/02).

* Where two lots form a contiguous land mass owned by the same person, such lots constitute one tract. *Keith Van Buskirk*, DR #302 (8/15/95); *Larry and Diane Brown*, #5W1175-EB & #5W1175-1-EB (3/17/94). [EB #591M1]

- * A trail should not be treated the same as a town highway for purpose of determining whether land on either side of the trail is contiguous. *Keith Van Buskirk*, DR #302, FCO at 6 (8/15/95).
- * Where land was acquired in two deeds but is now one contiguous piece of land, the entire acreage is considered one tract; but note that purchase of two lots from two sellers does not merge lots and buyer can sell each lot separately without having created a subdivision. *New England Land Associates*, DR #289, FCO at 6 (5/26/94); *Gerald Costello Garage*, DR #243 at 3 (7/2/91), *aff'd*, *In re Gerald Costello Garage*, 158 Vt. 655 (1992).
- * If a proposed project is located on a contiguous land mass of the requisite size, the "tract" requirement of the definition of development is met. *Gerald Costello Garage*, DR #243 (7/2/91), *aff'd*, *In re Gerald Costello Garage*, 158 Vt. 655 (1992).
- * Parcels are "involved land" for purposes of defining "development" where a single tract of two parcels exists upon which construction will occur. *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]
- * Unless proposed activities involve more than one of the contiguous parcels, the activities on one of the parcels will not require review of activities on another contiguous parcel. *Peter Guille, Jr.*, DR #129 (3/5/82).
- * Petitioner's controlling interest in a corporation which owns property abutting a 39,600 square foot parcel on which a mini-mart is to be constructed renders the area of both parcels to be in excess of one acre, and therefore a permit is required when the property is located in a municipality without permanent zoning and subdivision regulations. *Ned H. Pettingill*, DR #W (5/18/72).

75.1.3. "Owned or Controlled" (see [78.3.2](#) and [109](#))

- * A determination of "involved land" will be made by the Board *de novo* as the facts exist at the time of the proceedings, and here co-applicant no longer owned or controlled the project site. *Chester and Donna Brileya*, #1R0580-EB (5/1/86). [EB #286]

75.1.3.1 Owned

- * Thirty-year lease provides lessor with limited ownership interests. *In re Stokes Communications Corp.*, 164 Vt. 30, 37 (1995).
- * Board may not disregard record owner's ownership interests, simply because lessor as the developer also maintained an interest in the parcel. *In re Stokes Communications Corp.*, 164 Vt. 30, 37 (1995); see *In re Spencer*, 152 Vt. 330, 337-38 (1989) (rejecting argument that jointly owned parcel was separate and distinct from individually owned parcel for jurisdictional purposes).
- * Any conveyance of an interest in real estate must be in writing, signed by a person having authority to make such a conveyance; oral representations that purport to convey an interest in real estate merely create a tenancy at will, at best, and otherwise have no force or effect recognized by

our laws. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 19 (7/2/10), citing 27 V.S.A. §§301 and 302; see also *Rutland County Nat'l Bank v. Sawyer*, 113 Vt. 485 (1944); *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520 (mem.)

* Jurisdiction does not attach to land that permittee does not own. *In re Guité Act 250 Jurisdictional Opinion #3-128 (Revised)*, #126-7-09 Vtec, Decision and Order at 5 (4/2/10).

*Land is not "involved" merely because it is under the same ownership as, and is contiguous with, land already under Act 250 jurisdiction. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6 (4/9/06), Appellant's Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc*, No. 243-11-05 Vtec Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

*Land is "involved" where it acts as a buffer between residential and industrial zones and is contiguous with a parcel already under Act 250 jurisdiction. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6-7 (4/9/06), Appellant's Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc*, No. 243-11-05 Vtec Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

*Adjacent residential parcel, acquired after Act 250 jurisdiction was triggered, is involved land because it bears a relationship to commercial lumber yard that is likely to have substantial impact on aesthetic values. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6 (4/9/06), Appellant's Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc*, No. 243-11-05 Vtec Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

* Although Vermont law presumes that owner of a parcel of land abutting highway owns to highway's centerline, Board finds express deed descriptions and survey to be sufficient rebutting evidence. *Guy E. Nido, Inc.*, DR # 399, FCO at 6 & 7 (1/17/02).

* Parcel owned by a third party is involved land where commercial quarrying activity commenced before the parcel was subdivided off from the project tract. *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, DR #396, FCO (12/28/01).

* Commencement of construction does not occur until after petitioner has relinquished all ownership and control of lots, and therefore contiguous unconveyed lots of subdivision are not involved land. *Jesse T. Billings Residuary Trust*, DR # 355 (7/22/98).

* If an applicant does not own or control a project's involved land, then there is no basis for Act 250 jurisdiction to attach or run with the land, and the Act 250 hearing process must cease until such time as the applicant either owns or controls a project's involved land. *Sugarbush Resort Holdings, Inc.*, #5W1045-EB (Interlocutory) (8/12/97). [EB #679]

* Where adjacent projects are not commonly owned, managed or funded, or do not share facilities, such projects are not one development. *Lake Realty, Inc.*, #9A0175-EB (10/20/89). [EB #437]

* Land will be "involved" in a development project simply by being held in the ownership of the developer or by being included within the planning area for the project. *Rutland State Airport*, DR #127, FCO at 3 (8/31/81).

* Reducing the size of involved land by divesting interest in the property through a bona fide third party transaction avoids jurisdiction over the project as of the date of the conveyance. *Lemery*, DR #65 (6/11/75).

* Ownership or control through rights of easement of more than one acre of land and an intended use for commercial development requires a permit under Act 250. *John C. Maccone*, DR #43 (1/7/74).

75.1.3.2 Controlled (see [109](#))

*A legal determination of what constitutes an arm's length transaction has often governed whether a person "controls" more than the jurisdictional limit on acreage for purposes of determining Act 250 governance. In the case at hand, Snowstone's proposal exhibits no control, domination or governance by Snowstone over the Savages' property or anything other than the 0.93-acre portion to be conveyed. The same is true of Mr. and Mrs. Savage: they will have no control, ownership, or governance over either Snowstone or the property once it is conveyed. We therefore conclude that the parties' revised Contract represents an arm's length transaction and that, based upon the credible facts presented, it cannot be said that either party will own, control, or govern the other, or the property that they will separately own. *Snowstone LLC*, JO Appeal #2-308, 151-11-17 Vtec., Revised Bifurcated Merits Decision (2/21/19).

* A developer can exercise control over land for Act 250 purposes through, for example, a purchase and sale agreement; a lease agreement, as in *In re Sugarbush Resort Holding, Inc.*, No. 5W1045-15-EB, slip op. at 8-9 (Vt. Envtl. Bd. Aug. 12, 1997); or a perpetual easement, as in *Wesco, Inc. & Jacob & Harmke Verburg*, DR #304 (Vt. Envtl. Bd. Dec. 7, 1995). It is less clear whether a contractual arrangement like the Rental Agreement results in "control" for Act 250 jurisdictional purposes. With the analogous guidance provided by our Supreme Court in their *Ochs* decision, we conclude that the Resort alone does not exercise sufficient control over the Rental Homes to meet the definition of a "person" that exercises control over the Rental Homes for the purposes of Act 250 jurisdiction. *Mt. Top Inn & Resort Jurisdictional Opinion Appeal*, 2018 Vt. Super. LEXIS 53, *20 (Vt. Super. Ct. August 22, 2018)

* Facts that constitute "control" over a tract of land for purposes of a "development " under EBR 2(A)(1)(b) (formerly EBR 2(A)(2)). *In re Vitale*, 151 Vt. 580 (1989).

* In the first instance, the meaning of the word "controlled" as used by the Board is a question of fact for determination by the Board. *In re Vitale*, 151 Vt. 580, 583 (1989).

* The dictionary defines the term "control" as: "To exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern." *In re Vitale*, 151 Vt. 580, 584 (1989), citing Black's Law Dictionary 298 (5th ed. 1979); see also Webster's New Collegiate Dictionary 245 (1981) ("control: . . . to exercise restraining or directing influence over").

* Ability to affect use of property by means of access, standing alone, is not enough to confer

control. *Northern Ski Works, Inc.*, DR #281 (10/18/93).

*Where a corporation transfers lots to shareholders, such transfer will not be considered to be a true conveyance, where such corporation is not a legitimate, separate entity from its shareholders, and where the transferee shareholders controlled the corporation. *Harland Miller III*, DR #253 (5/13/92).

* Purchase and sale agreements regarding real property give purchaser sufficient control over the property to give rise to Act 250 jurisdiction. *John Mitchell General Contractor, Inc.*, DR #203 (6/30/89).

* Where petitioner purchases .99 acre of a 1.57 acre parcel, erects a commercial building on the .99 acre, and then acquires the remaining .58 acre soon thereafter, the project requires an Act 250 permit as being a "development". Petitioner "controlled" the entire 1.57 acres at the time the project was being built, and Petitioner's claim that the .58 acre was not "involved" land was an attempt to avoid Act 250 jurisdiction, which violates the intent of the act. *Lou R. Vitale*, DR #183 (6/26/87), *aff'd, In re Lou R. Vitale*, 151 Vt. 580 (1989).

* Parcel was "involved land" due to "control" by property owner of adjacent lands through corporate ownership and due to location of wells. *Eugene Ettlinger*, #2W0543-EB (12/8/82). [EB #191]

* Ownership or control through rights of easement of more than one acre of land and an intended use for commercial development requires a permit under Act 250. *John C. Macone*, DR #43 (1/7/74).

* Petitioner's controlling interest in a corporation which owns property abutting a 39,600 square foot parcel on which a mini-mart is to be constructed renders the area of both parcels to be in excess of one acre, and therefore a permit is required when the property is located in a municipality without permanent zoning and subdivision regulations. *Ned H. Pettingill*, DR #W (5/18/72).

75.1.3.3 Effect of lease

* Thirty-year lease provides lessor with limited ownership interests. *In re Stokes Communications Corp.*, 164 Vt. 30, 37 (1995)

* Entirety of lot's acreage is included in computation of requisite acreage, even if lease only applies to portion of lot. *In re Stokes Communications Corp.*, 164 Vt. 30, 36 - 37 (1995) (where applicant leased one-acre parcel from the owner of 92 acre parcel, the entire 92 acres were considered "involved land"); *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 7 (12/5/02), *aff'd, In re Real Audet*, 2004 VT 30 (4/1/04); *U.S. Quarried Slate Products, Inc.*, DR #279 and 283, MOD at 3 (3/4/93) (leasing less than 10 acres of a greater than 10-acre tract does not defeat jurisdiction if the development is in fact on a tract of greater than 10 acres owned by a person, even if the owner is not the lessor-developer), citing, *Salvas Paving, Inc.*, DR #229, FCO at 5 (6/20/91).

* In determining whether crops are “principally produced *on the farm*,” 10 V.S.A. § 6001(22)(E), lands leased by a farmer are part of the “farm,” if the farmer *controls* all aspects of cultivation on those leased lands (*In re Vitale*, 151 Vt. 580, 584 (1989), citing Black's Law Dictionary 298 (5th ed. 1979); *In re Eastland, Inc.*, 151 Vt. 497, 499-500 (1989)) and if the lease is an “arms-length” transaction and not merely a mechanism or scheme to allow the farmer to include produce from other growers within his “farm.” *Re: Peter and Carla Ochs*, DR #437, FCO at 9 - 11 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06) (for purposes of an Act 250 analysis in this case, who owns the land is less an issue than how the land is being used), citing *Re: S-S Corporation/Rooney Housing Developments*, DR #421, MOD at 4 - 5 (2/5/04), *aff'd*, 2006 VT 8 (V.S.Ct); citing *Vermont Baptist Convention v. Burlington Zoning Board*, 159 Vt. 28, 31 (1992); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, FCO at 26 n.9 (5/4/04).

* In perpetuity leases of real property can have the same effect as fee conveyances and where application to transfer was prior to the time of the Act 250 application, the applicants will not be considered to be the owners of the leasehold lots nor be found to control the land for purposes of Act 250. *Shelburne Farms Resources, Inc.*, #4C0660-EB (9/8/87). [EB #310]

* Generally, an agreement to lease part of a proposed project does not insulate the leased premises from consideration as part of a larger development project. *Rutland State Airport*, DR #127 (8/31/81).

* Where improvements are made on more than 10 acres, owned by a municipality but leased to the federal government, the improvements will be deemed for federal purposes and do not constitute construction for municipal purposes. *Vermont National Guard*, DR #134 (7/20/82).

* The filling of a tract is an improvement, but not for a commercial purpose if the owner did not have a contract or agreement to sell or lease the tract for a commercial purpose, with the improvement of the parcel being a condition precedent to the contract. *Ryan/Donahue*, DR #52 (FCO at 1) (4/3/74).

75.1.4. “Person” (see [78.3.3](#) and [110](#))

*As noted above, § 6001(14)(A)(iii) applies to subdivisions, and not developments. For this reason, in *Jesse T. Billings Residuary Tr.*, the former Environmental Board stated that it is “not appropriate” to use the definition of a person in § 6001(14)(A)(iii) for developments. DR No. 355, slip op. at 11 (Jul. 22, 1998). Rule 2(C)(1)(a) purports, however, to do just that. We therefore conclude that we are unable to apply Rule 2(C)(1)(a) because it would impermissibly expand Act 250 jurisdiction beyond what the Legislature has authorized. Alternatively, even if Rule 2(C)(1)(a) applies, the Resort and Rental Home owners do not qualify as a “person” under the Rule. *Mt. Top Inn & Resort Jurisdictional Opinion Appeal*, 2018 Vt. Super. LEXIS 53, *20 (Vt. Super. Ct. August 22, 2018)

* “Since Rule 2(C)(1)(a) includes as a person ‘any other beneficial interest derived from the development of the land,’ the rule’s definition encompasses a trust for one’s minor children, absent evidence to the contrary. This is because any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support.” *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 15.

* "Spencer and wife" do not comprise a separate "person" from "Spencer and Vargas" or Spencer, himself; *In re Spencer*, 152 Vt. 330, 337 - 339 (1989); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 9 n.1 (12/31/02); *Re: John W. Stevens and Bruce Gyles*, DR #240, FCO at 11 (5/8/92); *Re: Marcel and Stella Roberts*, DR #265, FCO at 10 (5/11/93).

* Two corporations, each of which has the same Board of Directors, are the same "person." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 9 (11//25/03), *aff'd*, 2006 VT 8 (V.S.Ct).

* For purposes of "development," "person" does not include an individual's "parents and children as included in Rule 2(C)(1)(b) for "person" for purposed of subdivision. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment FN9 at 10 (9/11/09).

* Application of the 10 V.S.A. § 6001(14)(A)(iii) definition of person regarding development is not appropriate as the section is applicable only to subdivision activity. *Jesse T. Billings Residuary Trust*, DR # 355, FCO at 11 (7/22/98).

*Relationship between the petitioner and the owners of the tract was such that the owners controlled the activities of the petitioner and therefore could not be deemed separate persons. *Salvas Paving, Inc.*, DR #229 (FCO at 7) (6/20/91).

* Where two contiguous tracts of land, each owned by separate subsidiaries of an out-of-state corporation, were not owned by the same "person," the tracts of land did not form a single tract of land for purposes of the definition of "development." *Disposal Specialists, Inc.*, DR #209 (4/4/89).

75.1.4.1 Tenants by the entirety / husband and wife

* "[T]enants by the entirety are viewed as being individually vested, under a legal fiction, with title to the whole estate." *In re Spencer*, 152 Vt. 330, 339 (1989), quoting *Bellows Falls Trust Co. v. Gibbs*, 148 Vt. 633, 633 (1987) (mem.).

* Although tenants by the entirety may not dispose of nor encumber a share of the subject property without the joinder of the other spouse, absolute ownership and control by an individual is not required for Act 250 jurisdiction. *In re Spencer*, 152 Vt. 330, 339 (1989).

* Spencer's interest in the property held jointly with his wife is an ownership interest sufficient enough in magnitude to allow aggregation of that interest with his other property interests for Act 250 purposes. *In re Spencer*, 152 Vt. 330, 339 (1989).

75.1.4.2 Joint venture

* A joint venture is a relationship between parties "to engage in and carry out a single business venture for joint profit without any actual partnership or corporate designation." *Vermont Environmental Board v. Chickering*, 155 Vt. 308, 317 (1990); *Re: Green Mountain Habitat for*

Humanity, Inc., and Burlington Housing Authority, DR #406, FCO at 8 (12/31/02).

* A joint venture is not a legal or commercial entity, distinct from the individual acts of its separate members. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 9 n.1 (12/31/02).

* A joint venture requires “an agreement to share in profits and losses, joint control or right to control, and joint proprietary interest in the subject matter and a community of interest in the performance of the common purposes.” *Mountain Top Inn & Resort*, JO (#1-391), No. 23-3-17 Vtec, Entry Order on Motion to Compel at 4 (11/2/2017), *citing Winey v. William E. Daily, Inc.*, 161 Vt. 129, 140 (1993) (citations omitted).

* *Winey v. Daily* does not rely upon a specific measure of the shared profits and losses to ascertain a joint venture. *Mountain Top Inn & Resort*, JO (#1-391), No. 23-3-17 Vtec, Entry Order on Motion to Compel at 4 (11/2/2017).

* Court finds that the specific fees received by the Resort for the rental of the individual homes are not relevant to the issue of whether there is a joint venture between the Resort and the private home owners, nor relevant to the jurisdictional issues raised in this appeal. *Mountain Top Inn & Resort*, JO (#1-391), No. 23-3-17 Vtec, Entry Order on Motion to Compel at 4 (11/2/2017).

75.1.4.2.1 Profit

* The word "profit" that is not limited to financial gain from sales alone. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 10 (12/31/02).

* "Profit" can be found in avoided or shared costs. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 10 (12/31/02).

75.1.4.3 Trust

* “Since Rule 2(C)(1)(a) includes as a person ‘any other beneficial interest derived from the development of the land,’ the rule’s definition encompasses a trust for one’s minor children, absent evidence to the contrary. This is because any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support.” *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 15.

75.2. Involved Land

* Doctrine of “involved land” applies only to determinations of jurisdiction, not to scope of permit or permitted project. *In re Eastview at Middlebury, Inc.*, 2009 VT 98, ¶13; McCullough Crushing Inc. Act 250 Exp., No. 3-1-10, Altered Decision on the Merits at 12-13 (2/16/2017).

* The Environmental Board Rule 2(F) provides four methods for counting "involved land." *In re Real Audet*, 2004 VT 30, ¶ 6 (4/1/04).

* For “involvement,” there is no requirement of a functional relationship between two contiguous parcels of land in common ownership, where commercial construction has commenced on one of the parcels. *In re Gerald Costello Garage*, 158 Vt. 655 (1992).

* EBR 2(F)(1), defining "involved land," omits the criterion of a functional relationship between contiguous parcels of land. *In re Gerald Costello Garage*, 158 Vt. 655 (1992).

* Former EBR 2(F) ("involved land") goes beyond mere interpretation or implementation of the statute, and compromises the substantive requirements of Act 250. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 151 (1979).

* Restricting the term "involved land" to the acreage actually used in the construction of improvements ignores the distinction between construction on more than one acre of land and construction involving more than 10 acres. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 152 (1979).

* Land is "involved" within the meaning of 10 V.S.A. § 6001(3) only where it is incident to the use within the meaning of that section, or where it bears some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially increased by reason of that relationship. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 153 (1979).

* In computing the amount of land involved in a "development," land shall be included which is incident to the use, such as lawns, parking areas, roadways, leaching fields, and accessory buildings. *City of Burlington*, DR #125 (3/11/81).

* A tract of land is "involved" in the development only if substantial development activity related to the plan has occurred or will occur during the period of Act 250 review, or the tract bears some relationship to the land actually used in the construction of improvements such that there is a demonstrable likelihood that impact on Act 250 criteria will occur. *State Buildings Division*, DR #121 (10/29/80), *rev'd*, *In re Agency of Administration*, 141 Vt. 68 (1982).

* When development is proposed for a tract of land devoted to farming, only those portions of the land “that support the development shall be subject to regulation...” and permits “shall not impose conditions on other portions” (citing 10 V.S.A. § 6001(3)(E)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 10 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* Land is not “involved” merely because it is under the same ownership as, and is contiguous with, land already under Act 250 jurisdiction. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6 (4/9/06), Appellant’s Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc.*, No. 243-11-05 Vtec Decision on Appellant’s Motion to Alter or Reconsider (7/18/06).

* Land is “involved” where it acts as a buffer between residential and industrial zones and is contiguous with a parcel already under Act 250 jurisdiction. *Re: Bethel Mills, Inc.*, No. 243-11-05

Vtec, Decision at 6-7 (4/9/06), Appellant's Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc.*, No. 243-11-05 Vtec Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

*Adjacent residential parcel, acquired after Act 250 jurisdiction was triggered, is involved land because it bears a relationship to commercial lumber yard that is likely to have substantial impact on aesthetic values. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6 (4/9/06), Appellant's Motion to Alter or Reconsider denied, *Re Bethel Mills, Inc.*, No. 243-11-05 Vtec Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

75.2.1 Entire tract

* "Tract" of land includes all contiguous land in common ownership regardless of functional relationship between tracts and whether tracts were purchased separately. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 26 (2/15/08), citing *In re Gerald Costello Garage*, 158 Vt. 655 (1992); *West River Acres, Inc./ Winchester Stables, Inc./ Nicholas Mercede*, DR #398, FCO at 9 (3/21/02).

* The entire tract of "involved land" is used to determine the acreage of a project. *In re Real Audet*, 2004 VT 30, ¶ 6 (4/1/04); *In re Stokes Communications Corp.*, 164 Vt. 30, 36 (1995) ("In determining amount of land involved for jurisdictional purposes, 'the area of the entire tract or tracts of involved land owned or controlled by a person will be used.' " thus, entire 92 acre tract is involved, even when project is only on one acre (of the 92 acres) of leased land), citing EBR 2(A)(2).

* When development is proposed for a tract of land devoted to farming, only those portions of the land "that support the development shall be subject to regulation..." and permits "shall not impose conditions on other portions" (citing 10 V.S.A. § 6001(3)(E)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 10 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* "Tract" of land includes all contiguous land in common ownership regardless of functional relationship between tracts and whether tracts were purchased separately. *West River Acres, Inc./ Winchester Stables, Inc./ Nicholas Mercede*, DR #398, FCO at 9 (3/21/02).

* A project's involved land is the entire tract and not just the amount of acreage consumed by a project. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]; *Salvas Paving, Inc.*, DR #229 (6/20/91); *G. S. Blodgett*, DR #122 (5/18/81); and see, *Stonybrook Condominium Owners Association*, DR #385, FCO at 15- 17 (5/18/01) and cases cited therein.

* Jurisdiction is based upon the amount of land that actually will be involved in the overall project, an area that may be less than or may exceed the land area within the perimeter of the planning area for that project. *Rutland State Airport*, DR #127, FCO at 3 (8/31/81).

* Entire 270-acre tract upon which the Range is situated is held to be "involved land" for purposes of initially determining Act 250 jurisdiction, despite the Range itself comprising less than 10 acres. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 9 (8/15/2017).

75.2.2 "Incident to the Use"

- * There is no *de minimis* exception to whether a "development" has occurred. *In re Real Audet*, 2004 VT 30, ¶ 10 (4/1/04), *affirming*. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 2 (2/25/03); noting *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB, FCO at 28 (12/18/97), and see, *Conservation Law Foundation, et al. v. Burke*, 162 Vt. 115, 121 (1994) (Court has declined to read a *de minimis* exception into an air pollution control regulation) citing *In re Cumberland Farms*, 151 Vt. 59, 64 (1989) (Court has declined to read a *de minimis* exception into a zoning ordinance or the zoning enabling statute); *but see* Act 250 Rule 2(C)(3)(c).

- * Under Act 250 and the EBRs, any construction activity, no matter minute, triggers Act 250 jurisdiction. *In re Real Audet*, 2004 VT 30, ¶ 11 (4/1/04), *affirming*. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 2 (2/25/03).

- * Restricting the term "involved land" to the acreage actually used in the construction of improvements is inconsistent with the concept of land that is "incident to the use," which land is required to be included in computing the amount of land involved. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 152-153 (1979)

- * The Legislature did not intend to limit the concept of land which is incident to the use to the enumerated examples. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 153 (1979)

- * Commercial purpose (business use) of parcel not found where vehicle storage that occurred was, at most, only temporary, intermittent, incidental and peripheral to business enterprise. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 8-9 (12/5/02), *aff'd with different analysis*, *In re Real Audet*, 2004 VT 30 (4/1/04).

- * Use of parcel is not for business purposes if purpose of use was to annoy. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 9 (12/5/02), *aff'd with different analysis*, *In re Real Audet*, 2004 VT 30 (4/1/04).

- * Noncontiguous parcel owned by permittee, within 5-mile radius of junkyard, is "involved land" under both current and prior definitions because parcel is used for storage and sale of vehicles and salvage materials and is part of the same business. *Re: Guilford Cabins*, DR #392, FCO (12/19/01).

- * Land on which compost produced by a project will be used is not "involved land." *City of Montpelier and Ellery E. & Jennifer D. Packard*, #F9711-WFP, MOD at 10 (9/9/99). [WFP #35]

- * Area farms onto which sludge is to be spread are not incident to sewage plant upgrade. *City of Barre Sludge Management Program*, DR #284 (10/11/94).

* An access right-of-way added involved land to a project, but only as incident to the use. A utility right-of-way did not add any involved land. *Rinkers Communications and Atlantic Cellular Company*, DR #314 (5/23/96).

* The closure of portions of Okemo Mountain Road in connection with the New England Game Fair constitute involved land because the closure is incident to the use of the Lodge. *Okemo Mountain, Inc.*, #2S0351-7A-EB (8/31/92). [EB #527]

* Farm will not be considered to be land incident to the use of a storage bunker which is being constructed to store sludge from the plant where no physical change or alteration occurs. *Town of Windsor*, DR #255 (7/30/92).

75.2.3 When acquired

* When applicants propose a material change to a permitted project, adjacent, after-acquired property “need not automatically be deemed ‘involved land’ when a permit amendment is sought.” *In re: Lefgren Act 250 Appeal (JO #3-109 & 3-110)(incomplete application determination)*, No. 28-2-07, 240-11-07 Vtec, Decision and Order at 8 (4/15/08).

* “Tract” of land includes all commonly owned contiguous land, regardless of whether tracts were purchased separately. *West River Acres, Inc./ Winchester Stables, Inc./ Nicholas Mercede*, DR #398, FCO at 9 (3/21/02).

* Contiguous parcel is not considered involved land where (i) current appeal was from a renewal application; (ii) applicant acquired contiguous parcel almost two decades after the original permit was issued; (iii) renewal application concerned project which was only a portion of subdivision; and (iv) applicant proposed no activity on the contiguous parcel. *Okemo Realty*, #900033-2-EB (5/2/96). [EB #580]

75.2.4. State, county and municipal projects

See old EBR 2(V)(2) and new EBR 2(C)(14) and their reference to 1 VSA 126 for the definition of “municipality”

* Siting of F-35A on National Guard base at Burlington International Airport was not for a state purpose because project was not undertaken by the state and was not intended for use by the state. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 15 (3/6/15) (mem.), affirming *Re: Burlington Airport Act 250 JO*, No. 42-4-13 Vtec (5/13/14).

* Fact that crushed rock was eventually used in a municipal road repair project does not mean that activities at site were not for a private commercial purpose (the sale of crushed rock).. *ANR v. Duranleau*, 159 Vt. 233, 238 (1992)

* State development projects (such as highway projects) involving more than ten acres of land require a Act 250 Land Use Permit. *In re Agency of Transportation*, 157 Vt. 203, 207 (1991); 10 V.S.A.

§ 6001(3).

* "Development" for municipal or state purposes. *In re Agency of Administration*, 141 Vt. 68 (1982).

* VAST trails organized for a public purpose pursuant to the Vermont Trails System Act exist for a state purpose under Act 250. *Re: Vermont Association of Snow Travelers (VAST)*, DR #430, FCO at 9 (3/11/05).

* "Involved land" for state, county and municipal projects means **only** land that is physically disturbed by the project. *Re: Town of Barre Millstone Hill West Bike Path*, DR #440, MOD at 3 (1/3/05); *Re: Town of Williston Road Improvements*, DR # 381, FCO at 7 (1/13/00); *accord, Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 5 (1/16/07). *But note ENote 266.1 (portions of a town project that cross already permitted lands are subject to material change review, even if the project disturbs less than 10 acres)*

* With regard to state, county and municipal projects, EBR 2(F) does not provide a basis for asserting Act 250 jurisdiction independent of 10 V.S.A. § 6001(3). The Board will no longer follow decisions that have suggested otherwise, e.g., *Village of Ludlow. Town of Williston Road Improvements*, DR # 381 (1/13/00).

* Language in EBR 2(F)(3) requiring that "all land involved in the entire project" be counted when proposed improvements are part of a larger plan or undertaking may only be interpreted to mean that all land *physically* involved in the project is counted. *Town of Williston Road Improvements*, DR # 381, (1/13/00).

* EBR 2(F)(3) may not be applied to any state, county or municipal project that physically disturbs ten acres or less. *Town of Williston Road Improvements*, DR # 381 (1/13/00).

* Various municipal projects on a single site, completed over 35 years, do not constitute development as part of a sufficiently detailed and contemplatively noticed plan. *Re: Jericho Corners Elementary School*, DR #285, FCO at 9 (12/9/1994).

* There are essentially three types of lands counted in determining how much acreage is involved with a municipal project: land within the project construction limits; land within five miles which is "incident to the use" because it will be change as part of the project; and those lands referred to in *former* EBR 2(F)(3). *Village of Cambridge Water System*, DR #272 (9/15/93).

* Lands involved in municipal water system re-construction projects include land disturbed in the construction of new wells, land within construction limits for new pipelines, and lands disturbed in the construction of new access roads. Isolation zones and wellhead protection areas are not involved land. *Village of Cambridge Water System*, DR #272 (9/15/93).

* For municipal and State projects, the term "incident to the use" applies only to land which is physically changed or altered because of a proposed project. *Town of Windsor*, DR #255 (7/30/92).

* Where a town selectboard, with voter sanction on a year-by-year basis, has an active, ongoing

road improvement plan, and where the road projects listed in such road improvement plan have been physically implemented, such road improvement plan is a "plan." *Town of Wilmington*, DR #258 (6/30/92).

* Not all road improvements listed in a road improvement plan are necessarily subject to Act 250 jurisdiction. *Town of Wilmington*, DR #258 (6/30/92).

* Lands involved in municipal water system re-construction projects include land disturbed in the construction of new wells, land within construction limits for new pipelines, and lands disturbed in the construction of new access roads. Isolation zones and wellhead protection areas are not involved land. *Village of Waterbury Water Commissioners*, DR #227 (2/5/91).

* Act 250 permit was not required prior to the temporary storage of sludge, where permit was already issued for related project. *Town of Springfield*, DR #232 (12/26/90).

* The legislative history of Act 250 indicates a deliberative difference in the statutory definition of development for municipal and State projects from those of commercial and industrial projects. *City of Montpelier*, DR #220 (7/13/90).

* Areas of privately owned driveways or lawns; off-site trimming areas for utility easement; drainage area; the repair of water lines outside of project area; or areas to be used for disposal of project waste, will not be considered involved land for municipal road reconstruction project. *City of Montpelier*, DR #220 (7/13/90).

* In municipal road reconstruction project, involved land is limited to acreage that will some how be changed (versus temporarily used) as a result of the project. *City of Montpelier*, DR #220 (7/13/90).

* No Act 250 jurisdiction attached to a proposed municipal road reconstruction where the actual construction would take place on less than 8.9 acres of land. *City of Montpelier*, DR #220 (7/13/90).

* When making decision involving changes to development in existence before June 1, 1970, the Board looks first to whether the proposed changes themselves constitute a development and second, to whether the proposed changes constitute a substantial change to pre-existing development. Each of these two grounds for jurisdiction are separate and independent. *Village of Ludlow*, DR #212 (12/29/89), *overruled by Town of Williston Road Improvements*, DR # 381 (1/13/00).

* Jurisdiction triggered where proposed changes to an existing sewage treatment facility would include tract upon which the construction would occur the acres of existing sewer line. *Village of Ludlow*, DR #212 (12/29/89).

* Where petitioner's sewer line project consisted of an underground gravity line connecting with an existing City system, only the pre-existing sewer lines could be considered incident to the use of the new line. *Town of Rutland*, DR #207 (5/5/89).

* Land is not incident to the use of a State, county, or municipal project unless it will somehow be

changed because of the project. *Town of Rutland*, DR #207 (5/5/89); *City of Burlington Resource Recovery Project*, DR #125 (3/11/81).

* Disposal of ash at a landfill does not come under the definition of "development for a municipal purpose" because the landfill is neither owned nor exclusively controlled by the municipality. *Browning Ferris Industries of Vermont, Inc.*, DR #188 (10/11/88).

* Improvements to a portion of a town highway by private parties to allow access to private residential lands is not construction for municipal purposes. *Town Highway #37, Middlesex*, DR #156 (12/19/84).

* Improvements to State highway corridors which may be separate projects but similar in scope should be presented as a single proposal for Act 250 review. *Agency of Transportation*, DR #153 (6/28/84).

* "Development" includes municipal projects completed in stages as part of a plan or larger undertaking which exceeds 10 acres in total. *Rutland Sewage Treatment Plant*, DR #146 (2/10/84).

* A landfill adjacent to a resource recovery facility is "involved land" because it is incidental to the use of the adjacent development for municipal purposes. *Rutland Sewage Treatment Plant*, DR #146 (2/10/84); *City of Burlington*, DR #125 (3/11/81).

* Construction to connect two separate systems on eight acres of land which will feed an updated treatment plant does not require a land use permit. *Berlin-Montpelier Sewer Project*, DR #142 (3/3/83).

* Where the State proposes to construct a facility, which will occupy no more than 7 acres of a 99.1 acre parcel, the whole of the larger parcel is not considered "involved" land. *Woodside Juvenile Rehabilitation Center*, DR #139 (1/26/83).

* Where a public project is to be completed in stages according to a plan, all of the land actually involved in the entire project must be included for the purpose of determining Act 250 jurisdiction. *Rutland State Airport*, DR #127, FCO at 3 (8/31/81); *State Buildings Division*, DR #121 (10/29/80), *rev'd, In re Agency of Administration*, 141 Vt. 68 (1982).

* Where improvements are made on more than 10 acres, owned by a municipality but leased to the federal government, the improvements will be deemed for federal purposes and do not constitute construction for municipal purposes. *Vermont National Guard*, DR #134 (7/20/82).

* Construction of improvements for municipal or State use, if on less than 10 acres of land including areas that are incidental to the use of such land, does not trigger Act 250 jurisdiction. *Church Street Project*, DR #102 (1/29/79); *Court Street Highway Project*, DR #84 (10/18/77).

* Where a petitioner fails to prove that a municipal project undertaken to fill 4.5 acres involves more than 10 acres, and further fails to show that future extension or continuation of the project would involve land in excess of 10 acres, the project is not subject to the permit requirement of Act

250. *Oulette*, DR #46 (1/23/74).

* The construction of highway improvements by a municipality on ~3/10 of a mile of public road which will necessitate further improvements along the highway's entire 1.8 mile length involves more than 10 acres of land and requires an Act 250 permit. *State Aid Highway No. 1*, DR #37 (10/24/73), vacated, *State Aid Highway No. 1, Peru*, 133 Vt. 4 (1974).

* Regarding State highway projects, hearings held after June 1, 1970 subject the project to the requirements of Act 250. *Brookfield*, DR #21 (7/25/73).

* In the case of municipal projects, the governing factor in determining applicability of a development is the actual land area utilized for a project. *Agency of Environmental Conservation*, DR #P (9/17/71).

75.2.5 Cases

* The court granted NRB's motion to strike the Court's conclusion regarding the applicability of the term "involved land" in a "one-acre town" in *Snowstone, LLC* Act 250 JO Appeal (#2-308), No. 151-11-17 Vtec., Bifurcated Merits Decision (11/27/18). Because the Court concluded both that the project's area will occur on less than one acre and that the Savages and Snowstone should not be considered the same "person" for the purposes of Act 250 jurisdiction, our conclusion regarding the term "involved land" is unnecessary and not dispositive. See *State v. Jewett*, 148 Vt. 324, 332 (1987) ("By motion for reargument the parties have brought to our attention the discussion of an issue in the original opinion which was unnecessary to the disposition of the cause. Accordingly, we have recalled the opinion and deleted reference to this issue.") *Snowstone, LLC* JO #2-308, #151-11-17 Vtec., Entry Order on Limited Motion to Alter (2/21/19).

* Distinguishing the jurisdictional triggers of § 6001(3)(A)(i)-(iii) regarding *In re Stokes Commc'n Corp.*, 164 Vt. 30 (1995) and *Snowstone, LLC* Act 250 JO Appeal (#2-308): We note that the Stokes precedent is not particularly helpful here [*Snowstone*]. In Stokes, a telecommunications tower operator leased a one-acre parcel from the owner of a 93-acre parcel and sited a 300-foot telecommunications tower on the leased land. Stokes challenged the Act 250 jurisdiction over the tower project, asserting that jurisdiction did not attach, since the tower was located on a leased parcel containing less than ten acres of land. Additionally, the Town of Randolph, where the tower was sited, had adopted permanent zoning and subdivision bylaws, thereby making it a "ten-acre town" for Act 250 jurisdictional purposes. The Supreme Court rejected Stokes' assertions, concluding that the entire tract of land must be considered for jurisdictional purposes, since the owner retained an ownership interest and control over the entire tract. *Snowstone LLC*, JO Appeal #2-308, 151-11-17 Vtec., Revised Bifurcated Merits Decision, FN 4 (2/21/19) (citing Stokes, 164 Vt. at 36-7.)

* Where Middlebury College plans to lease a forty-acre portion of land to a developer who will enjoy exclusive control and possession of all lands needed in its proposed multi-level residential retirement community, it would be "absurd" to include the College's remaining 344± acres in the permit's encumbrance. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the

Merits at 27-28 (2/15/08), quoting *Stonybrook Condominium Owner's Association*, Declaratory Ruling #385, FCO at 17-18 (Vt. Env'tl. Bd. May 18, 2001).

* Summary decision denied where undisputed facts insufficient to determine whether recreational trails project was for state or commercial purpose. *Re: Vermont Association of Snow Travelers (VAST)*, DR#430, MOD at 4 (7/30/04).

* Non-contiguous parcels owned by family had no commercial improvements, were not used as part of Project's operation, and will not impact Act 250-protected values; thus, such parcels are not involved land. *West River Acres, Inc./ Winchester Stables, Inc./ Nicholas Mercede*, DR #398, FCO at 10 (3/21/02).

* Board considered changes in use that had occurred beyond the permitted Raptor Center Project because many of the physical improvements, such as parking lot, toilets, and gift shop, were associated with VINS other educational programs and not to the original permitted Center. *Vermont Institute of Natural Science*, DR #352 (FCO at 28-29) (2/11/99).

* Act of Congress establishes sufficient intent that involved land be conveyed to the applicant even though the Act is not a purchase and sale agreement. *Sugarbush Resort Holdings, Inc.*, #5W1045-EB (Interlocutory) (8/12/97). [EB #679]

* The construction of a replacement tower was not the first stage in a plan to construct a higher tower such that when the height of the initial tower was extended, the amount of involved land was determined at the time of the extension construction. A sequence of events, by itself, does not imply the existence of a plan. *Rinkers Communications and Atlantic Cellular Company*, DR #314 (5/23/96).

* Contiguous parcel is not considered involved land where (i) current appeal was from a renewal application; (ii) applicant acquired contiguous parcel almost two decades after the original permit was issued; (iii) renewal application concerned project which was only a portion of subdivision; and (iv) applicant proposed no activity on the contiguous parcel. *Okemo Realty*, #900033-2-EB (5/2/96). [EB #580]

* Petitioners' use of a perpetual easement did not sever the easement area from the tract, and the easement's conveyance would not constitute the creation and conveyance of either a lot in fee simple or a leasehold conveyance. *Wesco, Inc. and Jacob & Harmke Verburg*, DR #304 (12/7/95).

* Utility rights-of-way are not "involved land", and the acreage of the rights-of-way is not included in computing the amount of land involved in the construction. *Grassroots Cable Systems of Vermont, Inc.*, DR #254 (3/12/92).

* Nine non-contiguous parcels and one contiguous parcel did not satisfy definition of involved land, but where tenth parcel was contiguous to proposed landfill, was owned by the same entity as the proposed landfill site, and would be supplying water to the proposed operation, the definitions of involved land and incident to the use were met. *Disposal Specialists, Inc.*, DR #209 (4/4/89).

76. “One-Acre” / “Ten-Acre” Towns: valid adoption of bylaws

* Where municipality has permanent zoning and subdivision bylaws, permit is only required for commercial development in excess of ten acres; in a municipality without valid permanent zoning and subdivision bylaws, jurisdiction is triggered by commercial development on one acre or more. *In re McDonald's Corp*, 146 Vt. 380, 382 (1985), affirming *McDonald's Corporation*, DR #136 (10/26/82).

* City's subdivision regulations which do not comply with the provisions of the Vermont Planning and Development Act, 24 V.S.A. ch. 117, are void. *In re McDonald's Corp*, 146 Vt. 380, 384 (1985), affirming *McDonald's Corporation*, DR #136 (10/26/82).

* Board has often urged towns to take a more active role in regulating land uses within their borders. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 - 47 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.), *citing Re: EPE Realty Corporation and Fergessen Management, Ltd*, #3W0865-EB, FCO at 43 n. 10 (11/24/04)

* A municipality is a ten acre municipality only if it has adopted both a zoning bylaw and a subdivision bylaw. *Applewood Corporation Dummerston Management*, DR #325 (9/28/96).

* Town's failure to follow statute (title 24) in adoption of subdivision bylaw means that no bylaw exists for Act 250 purposes, and town is therefore a “one-acre town.” *Applewood Corporation Dummerston Management*, DR #325, FCO at 9 - 12 (9/28/96).

* Both Commissions and Board have authority to decide whether a municipality has adopted subdivision bylaws and to declare a municipal ordinance involved. *McDonald's Corporation*, DR #136 (10/26/82), *aff'd, In re McDonald's Corp.*, 146 Vt. 380 (1985).

* Subsequent adoption by a municipality of permanent zoning and subdivision bylaws does not obviate the jurisdiction of Act 250 over permitted projects of less than 10 acres. *Ernest A. Pomerleau*, DR #137 (6/18/82); *William S. Noyes*, DR #75 (6/10/76).

* Where the total "controlled land" exceeds one acre, petitioner needs a permit to construct commercial improvements within a municipality which has not adopted permanent zoning and subdivision bylaws. *Stanmar, Inc.*, DR #X (6/19/72).

* Less than 10 acre project in a "ten acre town" does not invoke jurisdiction. *Champlain Water District*, DR #G (3/10/71); *Jericho-Underhill Water District*, DR #C (3/10/71).

77. “Purpose”

77.1 “Commercial Purpose”

77.1.1 General

- * "Commercial purpose" is defined as "the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value." *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995), affirming *Spring Brook Farm Foundation, Inc.*, DR #290 (5/20/94) (not-for-profit foundation can engage in an exchange of services within the meaning of "commercial purpose"); EBR 2(L); *Re: McLean Enterprises Corp.*, DR #428, FCO at 7 (7/22/05).
- * A commercial dwelling is included within the concept of a commercial or industrial purpose. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995), affirming *Spring Brook Farm Foundation, Inc.*, DR #290 (5/20/94).
- * EBR 2(L) does not require a direct exchange between a provider and recipient of services. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995), affirming *Spring Brook Farm Foundation, Inc.*, DR #290 (5/20/94).
- * Definition of "commercial purpose" in EBR 2(L) permits Board to parse a project into distinct activities that may be subject to Act 250 jurisdiction. *In re BHL Corp.*, 161 Vt. 487, 491 (1994), affirming. *BHL Corporation*, DR #267 (FCO at 9) (2/11/93) (sale and exchange of goods for services constitute activities undertaken for a commercial purpose or "development"); and see *C. Donald Mohr*, DR #182 (FCO at 4) (5/27/87).
- * Fact that crushed rock was eventually used in a municipal road repair project does not mean that activities at site were not for a private commercial purpose (the sale of crushed rock). *ANR v. Duranleau*, 159 Vt. 233, 238 (1992).
- * Donations and contributions, although not required, cause church to be a "commercial purpose" under EBR 2(L). *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 639 (1984).
- * To exclude a church from Act 250 simply because of its evangelical services would not be justified on environmental grounds. *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 639 (1984).
- * Storing and maintaining equipment at a site, even when such equipment is only used off-site, is a commercial purpose. *Land Use Panel v. Sheldon*, No. 188-9-05 Vtec, Decision at 9 (7/28/06), citing *In re Appeal of Cota*, No. 2005-120 (Vt. Sup. Ct. 3/29/06) (unpublished memorandum) (storage of excavation materials and maintenance of business office)
- * Payment of rent creates a "commercial purpose." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 7 (11/25/03), *aff'd*, 2006 VT 8 (V.S.Ct); EBR 2(M).
- * Commencement of construction of improvements based on inference alone, where there is no settled plan for property, and insufficient information to conclude that the subject tract was being used as a solid waste site, is not for a commercial purpose. *Aaron & Sons, Inc.*, DR #359 (FCO at 11) (10/29/98).
- * Exchange of value between the developer and the State of Vermont creates a commercial purpose. *Unifirst Corporation*, DR #348 (FCO at 15) (1/30/98).

* The legislative history of Act 250 indicates a deliberative difference in the statutory definition of development for municipal and State projects from those of commercial and industrial projects. *City of Montpelier*, DR #220 (FCO at 7) (7/13/90).

* It is the *commercial nature of the activity*, not the person conducting the activity or benefitting there from, that triggers Act 250 jurisdiction. *C. Donald Mohr*, DR #182 (FCO at 5) (5/27/87).

* "The issue of whether the Range would operate in the absence of donations is one of several possible determinative factors as to whether the Range has a commercial purpose." *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 2-3 (9/29/2017).

* "[A]pplication of the rules defining commercial purpose and commercial dwellings should focus on the actual use of the land and the impact of that use, and not necessarily the nature of the institution carrying out the use or the overall purpose of the development scheme." *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 19 (8/15/2017), citing *In re S-S Corp./Rooney Hous. Developments*, 2006 VT 8, ¶ 16, 179 Vt. 302 (citing *In re Spring Brook Farm Found.*, 164 Vt. 282, 287 (1995); *In re BHL Corp.*, 161 Vt. 487, 490 (1994)).

* "[N]onprofits are not exempt from Act 250 jurisdiction because the Act is more concerned with how land is used than who is using the land. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 20 (8/15/2017), citing *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286–87 (1995).

*"Regardless of the source, contributions will satisfy the de facto exchange analysis for the commercial purposes requirement if the organization relies on them to provide the service." *In re Laberge Shooting Range*, 2018 VT 84, ¶ 24.

77.1.2 "Exchange"

* The "exchange" element of the commercial purpose test for determining Act 250 jurisdiction incorporates projects (even those built by not-for-profit corporations) where a third person pays the provider of the facility goods or services for the benefit of another. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 283 (1995).

* Donations and contributions convey the concept of giving; "a person cannot be required to give a donation in exchange for some consideration [because] by its very definition a gift is a voluntary transfer without consideration." *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995), quoting *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 639 (1984).

* By using the word "exchange" in EBR 2(L), the Board intended to separate development for use by others from development for personal use. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287 (1995).

* Funding distinctions are irrelevant to land use. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287 (1995).

- * Nonprofit uses are not exempt from Act 250 jurisdiction. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287 (1995); *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 640 (1984).
- * Exchange need not be limited to monetary transfers. *In re BHL Corp.*, 161 Vt. 487 (1994).
- * Personal use of quarry product by owner of that product involves no exchange with others; it does not fall within definition of "commercial purpose." *Re: McLean Enterprises Corporation*, DR #428, MOD at 6 (10/13/05), citing EBR 2(L).
- * "The issue of whether the Range would operate in the absence of donations is one of several possible determinative factors as to whether the Range has a commercial purpose." *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 2-3 (9/29/2017).
- * Providing goods or facilities to others in exchange for something of value is the "crucial element" for whether there is a commercial purpose. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 20 (8/15/2017), quoting *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287–88 (1995).
- * Whether the Range has a commercial purpose depends upon whether it is publicly available because of donations from the public, or whether those donations are incidental, and the Range would be available regardless of donations. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 20 (8/15/2017).

77.1.3 Cases

- * Landowner's provision of shale to others in exchange for money and use of excavation equipment is a "commercial purpose." *In re BHL Corp.*, 161 Vt. 487 (1994) 161 Vt. at 491, 641 A.2d at 773-74.
- * Landowner's provision of crushed rock to the town in exchange for money and an enlarged business site is a "commercial purpose." *ANR v. Duranleau*, 159 Vt. 233, 237-38 (1992).
- * A church's provision of a sanctuary to its members in exchange for donations is a "commercial purpose." *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 639-40 (1984).
- * Personal use of quarry product by owner of that product involves no exchange with others; it does not fall within definition of "commercial purpose." *Re: McLean Enterprises Corporation*, DR #428, MOD at 6 (10/13/05), citing EBR 2(L).
- * Construction of garage for maintenance and storage of heavy equipment and vehicles used in excavation and landscaping business constitutes development. *Re: Eric and Geraldine Cota*, DR 425, FCO (2/23/05), *aff'd Vt. Sup. Ct. Three Judge Panel, Docket # 2005-120, March Term, 2006*.
- * Summary decision denied where undisputed facts insufficient to determine whether recreational

trails project was for state or commercial purpose. *Re: Vermont Association of Snow Travelers (VAST)*, DR#430, MOD at 4 (7/30/04).

* Payment of rent creates a "commercial purpose." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 7 (11/25/03), *aff'd* 2006 VT 8 (V.S.Ct); EBR 2(M).

* A school is a "commercial" establishment. *Re: Scott Farm, Inc.*, DR #413, FCO at 6 (1/16/03).

* Where project was construction in existing residence, construction was not for a commercial purpose, because the construction would not make the personal residence into a commercial dwelling notwithstanding that homeowners might, in the future, operate a bed-and-breakfast. *Newton and Virginia Brosius*, DR #308, FCO at 3 (12/7/95).

* Extraction and removal of 56 truckloads of shale from a site is not a "minuscule" amount. *C. Donald Mohr*, DR #182, FCO at 4 (5/27/87).

* A landowner's intention to use his property for residential purposes and his choice to forego monetary payment by a third party for removal of earth resources from his property do not necessarily remove his extraction activities from Act 250 jurisdiction. *BHL Corporation*, DR #267, FCO at 9 (2/11/93), *aff'd*, *In re BHL Corp.*, 161 Vt. 487 (1994); *and see*, *C. Donald Mohr*, DR #182, FCO at 4 (5/27/87).

* Construction of an art studio and a pole barn used for storing art materials and personal property is not for a commercial purpose under Act 250. *Michael Singer*, DR #257 (FCO at 3) (4/13/92).

* Site of paving business is a development where improvements have been constructed for commercial purposes. *Salvas Paving, Inc.*, DR #229 (FCO at 5) (6/20/91).

* Act 250 applies to gravel pits. *Champlain Construction Co.*, DR #214M (MOD at 2) (10/2/90).

* The construction of a fish ladder is not itself a commercial improvement because it will not contribute to the generation or transmission of electricity and thus it is not a development subject to Act 250 jurisdiction. *New England Power Co.*, DR #95 (10/30/78).

* Construction of a communications facility on an existing radio tower for revenue producing purposes, constitutes a development. *Department of Corrections*, DR #93 (FCO at 4) (8/15/78).

* The filling of a tract is an improvement, but not for a commercial purpose if the owner did not have a contract or agreement to sell or lease the tract for a commercial purpose, with the improvement of the parcel being a condition precedent to the contract. *Ryan/Donahue*, DR #52 (FCO at 1) (4/3/74).

* The addition of a gasoline service facility which does not increase the size of a ski resort's operations is not a commercial development. *Okemo Mountain, Inc.*, DR #49 (Preliminary Ruling at 1) (2/22/74); *Magic Mountain Corp.*, DR #47 (2/1/74); *The Fayston Co.*, DR #44 (1/21/74).

* The construction of a ski chalet constitutes "development". *Swiss Ski Club of New York, Inc.*, DR #Z (7/5/72).

* Housing at an educational facility constitutes a development for commercial purposes. *Kurn Hattin Homes*, DR #U (5/12/72).

* The construction of two single-family dwellings to be used as model homes constitutes "development." *Land-Tech Corp.*, DR #Q (10/27/71).

77.2 "Industrial Purpose"

77.2.1 General

* Industrial purpose is not defined by Act 250 or the Board's rule, and therefore, common use dictionary definitions have been used. The adjective "industrial" means "of or relating to industry." The noun "industrial" means "a company engaged in industrial production or service." *Unifirst Corporation*, DR #348 (FCO at 16) (1/30/98).

* The legislative history of Act 250 indicates a deliberative difference in the statutory definition of development for municipal and State projects from those of commercial and industrial projects. *City of Montpelier*, DR #220 (FCO at 7) (7/13/90).

77.2.2 Cases

* Construction of pollution abatement facility was for an industrial purpose since facility would remediate groundwater contamination caused by an industrial facility's operation. *Unifirst Corporation*, DR #348 (FCO at 16) (1/30/98).

78. Housing

78.1. General

* The renovation of a sugar house for residential use constitutes a development. *Snowfall, Inc.*, DR #138 (FCO at 3-4) (3/3/83).

* The addition of a small one-bedroom house for non-commercial purposes next to the office of an existing motel does not constitute development. *Stowe Motel*, DR #48 (2/16/74).

78.2. Commercial Dwellings

* EBR 2(M) does not require a direct exchange between a provider and recipient of services. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995), affirming *Spring Brook Farm Foundation, Inc.*, DR #290, FCO at 7 (5/20/94).

* Not-for-profit foundation and student dormitory project is an exchange of services within the meaning of "commercial purpose". *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282 (1995),

affirming *Spring Brook Farm Foundation, Inc.*, DR #290, FCO at 7 (5/20/94).

* There is no such distinction in EBR 2(M) between commercial dwellings which have short-term residents and those that have long-term residents. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 3 n.3 (2/5/04), *aff'd* 2006 VT 8 (V.S.Ct.).

* Definition of a "commercial dwelling" is not intended to cover a home occupied by a single family, nuclear or extended." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 7 (11//25/03), *aff'd* 2006 VT 8 (V.S.Ct); EBR 2(M).

78.3. Housing Projects

* "Residential care homes" or "group homes" with ten or more units constitute a "housing project." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 8 (11//25/03), *aff'd* 2006 VT 8 (V.S.Ct).

* The development of housing units, on separate tracts of land within a five mile radius of each other, constitutes the construction of a "housing project". *Trono Construction Co., Inc.*, DR #149 (FCO at 3) (5/23/84), *aff'd*, *In re DR #149 Trono Construction Co.*, 146 Vt. 591 (1986)(*cited in Town of Wilmington*, DR #258, FCO at 10 (6/30/92 and; *Re: Lake Realty*, #9A0175-EB, FCO at 6 (10/20/89) [EB #437]); *Burlington Housing Authority*, DR #124 (5/20/81), *aff'd*, *In re Burlington Housing Authority*, 143 Vt. 80 (1983).

* Two housing projects constitute a single "development" when common sense criteria, such as common ownership or management, common funding, shared facilities and contiguity in time of development, are present. *In re Trono Construction Co.*, 146 Vt. 591 (1986); distinguished in *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO (12/31/02).

* Contiguity in time of development may be considered by the Board, in conjunction with petitioner's retained common ownership, in ruling that second housing project requires Act 250 approval. *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986), distinguished in *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO (12/31/02).

* Proposal to construct thirty-five new units of low income housing falls squarely within the definition of "development" as set forth in 10 V.S.A. § 6001(3), and the Board's order requiring a permit prior to building the units was proper. *In re Burlington Housing Auth.*, 143 Vt. 80, 83 (1983); distinguished in *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO (12/31/02).

* Only certain factors that must be present to create jurisdiction over housing units: the construction of ten or more housing units, on land owned or controlled by a person, within five miles and five years of each other. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 16-17 (12/31/02).

* Because, in terms of their environmental impact on the Act 250 criteria, there may be no

difference between a residential subdivision and an equal number of single family housing units on tracts of common land, there is no reason to treat subdivisions and housing unit developments differently for jurisdictional purposes. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 18-19 (12/31/02).

* The proposed construction of a housing facility constitutes a development because it provides more than 10 dwelling units. *Marlboro College*, DR #24 (7/26/73); *Burke Mountain Academy*, DR #6 (4/18/73).

78.3.1 Housing units

* Each bedroom within a "residential care homes" or "group homes" is a "housing unit." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 8 - 9 (11//25/03), aff'd 2006 VT 8 (V.S.Ct).

* Motor lodge with 10 or more units constitutes a "housing project" and therefore is a "development". *Brattleboro Chalet Motor Lodge, Inc.*, #4C0481-2-EB (10/17/84). [EB #231] Permit amended (FCO at 3) (1/14/85). [EB #246]

* Proposed construction of college dormitories constitutes a development because it provides more than ten dwelling units. *Re: Marlboro College*, DR #24 (7/26/73); *Burke Mountain Academy*, DR #6 (4/18/73).

78.3.2 Owned or controlled (see [75.1.3](#) and [109](#))

* Any conveyance of an interest in real estate must be in writing, signed by a person having authority to make such a conveyance; oral representations that purport to convey an interest in real estate merely create a tenancy at will, at best, and otherwise have no force or effect recognized by our laws. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 19 (7/2/10), citing 27 V.S.A. §§301 and 302; see also *Rutland County Nat'l Bank v. Sawyer*, 113 Vt. 485 (1944); *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520 (mem.)

* BHA owns the 2.3-acre parcel where the Project is located; by virtue of its Agreement with BHA, Habitat exercises control over the parcel. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 8 (12/31/02); see, *In re Eastland, Inc.*, 151 Vt. 497 (1989); *In re Lou R. Vitale*, 151 Vt. 580 (1989).

78.3.3 Person (see [75.1.4](#) and [110](#))

* "Since Rule 2(C)(1)(a) includes as a person 'any other beneficial interest derived from the development of the land,' the rule's definition encompasses a trust for one's minor children, absent evidence to the contrary. This is because any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support." *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 15.

* "Spencer and wife" do not comprise a separate "person" from "Spencer and Vargas" or Spencer,

himself; *In re Spencer*, 152 Vt. 330, 337-339 (1989); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 9 n.1 (12/31/02); *Re: John W. Stevens and Bruce Gyles*, DR #240, FCO at 11 (5/8/92); *Re: Marcel and Stella Roberts*, DR #265, FCO at 10 (5/11/93).

* Two corporations, each of which has the same Board of Directors, are the same "person." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 9 (11//25/03), *aff'd* 2006 VT 8 (V.S.Ct).

78.3.3.1 Joint venture

* A joint venture is a relationship between parties "to engage in and carry out a single business venture for joint profit without any actual partnership or corporate designation." *Vermont Environmental Board v. Chickering*, 155 Vt. 308, 317 (1990); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 8 (12/31/02).

* A joint venture is not a legal or commercial entity, distinct from the individual acts of its separate members. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 9 n.1 (12/31/02).

78.3.3.1.1 Profit

* The word "profit" that is not limited to financial gain from sales alone. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 10 (12/31/02).

* "Profit" can be found in avoided or shared costs. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 10 (12/31/02).

78.3.3.2 Trust

* "Since Rule 2(C)(1)(a) includes as a person 'any other beneficial interest derived from the development of the land,' the rule's definition encompasses a trust for one's minor children, absent evidence to the contrary. This is because any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support." *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 15.

78.3.4 Involved land

* The "involved land" language which pertains to commercial or industrial construction "involving" more than ten acres, 10 V.S.A. § 6001(3)(A)(i), does not apply to the definition of "development" which pertains to housing units. 10 V.S.A. § 6001(3)(A)(iv). *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 11 (12/31/02), citing *Re: Burlington Housing Authority*, DR #124, FCO at 3 (5/20/81), *aff'd*, *In re Burlington Housing Authority*, 143 Vt. 80, 83 (1983).

* Parcels which are actually built upon are "involved" in the development, whatever the

interrelationship among such parcels might be. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 11 (12/31/02), citing *Re: Burlington Housing Authority*, DR #124, FCO at 3 (5/20/81), *aff'd, In re Burlington Housing Authority*, 143 Vt. 80, 83 (1983).

* There is a distinction between the way the term "involved land" is used for commercial or industrial development and the way it is used for housing projects. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 12 (12/31/02).

* The requirement that the development must *involve* parcels which comprise more than 10 acres of land does not exist for jurisdiction over housing projects; rather, the *number of units* is the primary concern, not the acreage on which they sit, either collectively or individually. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 13 (12/31/02).

* Every house sits on its own parcel or parcels of "involved land," and the only question is whether any point on such a parcel is within five miles of other parcels. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 11 (12/31/02).

* Since housing unit development is a different animal, one which is not included within the legislature's "commercial or industrial purposes" category, the definition in Rule 2(F)(1) is inapposite. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 14 (12/31/02).

78.3.5 Five year period

* Definition of "development" is not limited to any particular time frame; whereas definition of "subdivision" is limited to those "created within any continuous period of five years." *Harold Jacobs, E.P.E. Corp.*, DR #210, FCO at 2 (9/28/89). But note 1990 amendments to housing projects definition; *and see, Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO (12/31/02); *Bradford Moore / S.D.L. Enterprises, Inc.*, DR #205, FCO (4/24/90); *Richard Farnham*, DR #250, FCO (7/17/92).

78.3.6 "Single project" requirement / "common sense criteria" linkage

* Two housing projects constitute a single "development" when commonsense criteria, such as common ownership or management, common funding, shared facilities and contiguity in time of development, are present. *In re Trono Construction Co.*, 146 Vt. 591 (1986); distinguished in *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO (12/31/02).

* Contiguity in time of development may be considered by the Board, in conjunction with petitioner's retained common ownership, in ruling that second housing project requires Act 250 approval. *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986), distinguished in *Re: Green Mountain*

Habitat for Humanity, Inc., and Burlington Housing Authority, DR #406, FCO (12/31/02).

* A "single project" argument asks whether housing projects on separate tracts "are so closely related as to constitute a single 'development' for purposes of Act 250." *In re Trono Construction Co.*, 146 Vt. 591, 592 (1986), affirming *Re: Trono Construction Co., Inc.*, DR #149, FCO (5/23/84); distinguished in *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 14 (12/31/02).

* Where there is no operational relationship between housing units on separate tracts, contiguity in time of development or ownership or management is sufficient to support jurisdiction. *In Re Burlington Housing Authority*, 143 Vt. 80 (1983); *Trono Construction Co., Inc.*, DR #149 (FCO at 3) (5/23/84), *aff'd*, *In re DR #149 Trono Construction Co.*, 146 Vt. 591 (1986).

* Single project requirement is no longer necessary. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO (12/31/02, distinguishing *In Re Burlington Housing Authority*, 143 Vt. 80 (1983); *Trono Construction Co., Inc.*, DR #149 (FCO at 3) (5/23/84), *aff'd*, *In re DR #149 Trono Construction Co.*, 146 Vt. 591 (1986).

* Plain language of 10 V.S.A. § 6001(3)(A)(iv) contains no requirement that housing units on different parcels must be linked together as a single project before jurisdiction will be triggered. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 16-17(12/31/02).

* Plain language of the 1990 amendment supercedes the "common-sense criteria" originally enumerated in Board's 1981 *Burlington Housing Authority* decision; thus, it is no longer necessary to apply such criteria when determining jurisdiction over housing projects.. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 16-19 (12/31/02).

* The 1990 legislative amendment to definition of housing unit to add a "five year" requirement allows Board to undertake a new analysis of § 6001(3)(A)(iv), free from the language of earlier Court or Board decisions. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 14 n.7 (12/31/02).

* Board considers several factors in determining whether scattered housing units constitute a "housing project": common funding, common ownership or management, shared utilities, and contiguity of time of development. *William Dibbern*, #5R0194-1-EB (FCO at 5) (7/16/81). [EB #158]

78.3.7 Cases

* Creation of at least 16 dwelling units within a five-mile radius on tracts which person owns or controls is subject to Act 250 jurisdiction. *Harold Jacobs, E.P.E. Corp.*, DR #210, FCO at 2 (9/28/89).

* The proposed construction of an eight-unit apartment complex does not constitute a housing project. *Douglas Bahrenberg*, DR #5 (4/18/73).

* The construction of a two-wing addition of ~ 34-37 beds and service areas to a nursing home does

not constitute a housing project. *Brookside Nursing Home, Inc.*, DR #4 (4/18/73).

* The conversion of an existing building for use as an elderly home where construction will be confined to the interior does not constitute a "housing project". *Shelburne Home for the Elderly*, DR #V (5/12/72).

* The construction of a condominium constitutes a "housing project" even though it is an exempt subdivision under the Board of Health regulations. *Thompsonburg, Inc.*, DR #R (11/10/71).

* An elderly housing project which upon completion will be sold to a State housing authority does not constitute a development for State purposes. *Pizzagalli Construction Co.*, DR #A (9/9/70).

78.4 In Designated Downtowns

79. [Reserved]

80. Fissionable Source Materials

81. Oil / Natural Gas Drilling

* Test drilling which consists of core boring, clearing survey lines and roads, and driving drillings into sites does not constitute "development." (Note: This holding was superseded by a 1982 amendment to 10 V.S.A.

§ 6001(3).) *Humble Oil and Refinery Co., Inc.*, DR #AA (12/8/72).

82. Auction of lots -- § 6001a

* See 10 V.S.A. § 6001a

83. Radioactive Waste, Low-Level

83.1. Disposal Facility

83.2. Generation of

84. Telecommunications Towers -- § 6001c

* The words "any support structure" mean "any support structure," whether it is new or a replacement. *Nextel Communications*, DR #362 (11/18/98).

* If the legislature had intended to exempt in-kind replacement of towers it could have accorded all existing towers "pre-existing" status such that only a substantial change would trigger jurisdiction. *Nextel Communications*, DR #362 (11/18/98).

* The removal an existing telecommunications tower and construction of a new tower to provide the additional structural strength necessary to support new antennas not presently installed does

not constitute the "repair and routine maintenance" of the existing tower. *Nextel Communications*, DR #362 (11/18/98).

85. Road Rule

Note: the Road Rule was repealed by Act 40, Sec. 14 (2001)

* Legislature repealed Road Rule thereby eliminating jurisdiction over roadways providing access to lots. *Mark and Nubia Fuller and Peter G. Hack*, DR #403 & #404, FCO at 4 (3/21/02).

* By repealing the Road Rule, Legislature intended that construction of a road in and of itself is not "development" sufficient to trigger Act 250 review, where road is for purpose of accessing two or more lots in a "subdivision." *Mark and Nubia Fuller and Peter G. Hack*, DR #403 & #404, FCO at 4 (3/21/02).

Cases decided prior to 2001 repeal of Road Rule

* Construction of a shared access road, over a thousand feet in length, did not trigger Act 250 jurisdiction because part of the road was a shared driveway, and not a "road" for purposes of the Road Rule. *ANR v. Short*, 165 Vt. 277 (1996).

* A reasonable measure of discretion inheres in the determination of what qualifies as a road. *ANR v. Short*, 165 Vt. 277, 281 (1996); *In re Rusin*, 162 Vt. 185, 190 (1994).

* Fact that road may be poorly built does not mean that it is not a road for Road Rule purposes. *ANR v. Short*, 165 Vt. 277, 281 (1996).

* Absent compelling indication of error, we must accept this interpretation of the road rule by the Board, the administrative agency responsible for implementation of Act 250 administrative regulations. *In re John Rusin*, 162 Vt. 185, 189 (1994).

Road rule ratified by Legislature. *In re Spencer*, 152 Vt. 330, 336-37 (1989).

* Sales of lots were not "development," even if construction of significant road improvements was required to upgrade the roads to conditions suitable for adequate year-round access to a residential subdivision. *In re Patten Corp. Northeast*, 152 Vt. 644, 645 (1989).

* Where road was already within a permitted subdivision, deciding whether construction/improvement of road itself triggered jurisdiction would serve no purpose and be only an academic exercise. *Hiddenwood Subdivision*, DR #378, FCO at 12 (1/12/00).

* Permit was required for residential subdivision where road exceeding 800 feet provided access to lots in conjunction with sale of the lots. *Morningside Drive Extension*, DR #367, FCO (2/17/00).

* Road rule imposes jurisdiction on the subject road and the lands which the said road accesses.

Morningside Drive Extension, DR #367, FCO at 13 (2/17/00); *R. Brownson Spencer II*, #1R0576-EB, FCO at 5 (3/10/87), *aff'd*, *In re R. Brownson Spencer II*, 152 Vt. 330 (1989). [EB #278]

* Where changes to logging road were repair or routine maintenance, not the construction of improvements, there was no Act 250 jurisdiction under the road rule. *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR #340 (7/11/97).

* A right-of-way that serves a single lot is a driveway, not a road. *David Enman (St. George Property)*, DR #326 (12/23/96).

* Road improvements were attributable to the petitioner and not for a municipal purpose. *Bernard and Suzanne Carrier*, DR #246 (12/7/95).

* Board declines to enunciate a standard for determining the length of a cul-de-sac under the road rule. *Virginia and Robert Kenney*, DR #295 (10/27/94).

* If an advisory opinion (including a project review sheet) has been issued regarding a cul-de-sac, the method used in the opinion to calculate the length of the cul-de-sac should continue to apply to the particular cul-de-sac and should not be revisited. *Virginia and Robert Kenney*, DR #295 (10/27/94).

* Without evidence of a proposed sale or lease of land incidental to the construction of a road of over a mile in length, the Board cannot conclude that it is development. *BHL Corporation*, DR #267 (2/11/93), *aff'd*, *In re BHL Corp.*, 161 Vt. 487 (1994).

* Where developer received a permit for a subdivision and constructed a road to serve that subdivision prior to the adoption of the "road rule," and the permit was abandoned, the developer must obtain a permit for the road prior to its use in conjunction with any new subdivision subject to Act 250. *Everdale Ridge Corp.*, DR #215 (1/7/92).

* Fact that road serving five lot industrial/commercial subdivision does not provide access to more than five parcels and is less than 800 feet in length is irrelevant to existence of a development. *Investors Corporation of Vermont*, DR #249 (12/31/91).

* A 781' access road across a four lot subdivision would not trigger Act 250 jurisdiction where a 216' private driveway would not be included in the calculation. *Scott Burns*, DR #236 (4/3/91).

* Permit was required for residential subdivision where road exceeding 800 feet provided access to more than five lots prior to sale of the lots. *Charles Christolini*, DR #208 (3/19/90).

* An Act 250 permit is required where construction of improvements to roads are necessary for lot owners to gain access to their residential lots. *Patten Corporation Northeast*, DR #186 (3/2/88), *rev'd*, *In re Patten Corporation Northeast*, 152 Vt. 644 (8/24/89); *Dr. Bernard Barney*, DR #82 (10/11/77).

* Roadwork for subdivision, although in excess of 800 feet, was not "development" because the

road provided access to other existing year-round residences and benefitted all other properties in the area. *J. Graham Goldsmith*, #4C0685-EB(10/8/87). [EB #341]

* Act 250 jurisdiction exists over a development which consists of road improvements that are designed for the commercial purpose of selling lots, rather than as a residential driveway. *R. Brownson Spencer II*, #1R0576-EB (3/10/87), *aff'd, In re R. Brownson Spencer II*, 152 Vt. 330 (1989). [EB #278]

* Jurisdiction exists because the road, which is over 800 feet in length, is built incidental to the sale or lease of land more than 10 acres in size. *R. Brownson Spencer II*, #1R0576-EB (3/10/87), *aff'd, In re R. Brownson Spencer II*, 152 Vt. 330 (1989). [EB #278]

* Where a road improvement subject to Act 250 jurisdiction serves all subdivision properties at the time of construction, all those properties are "involved land". *R. Brownson Spencer II*, #1R0576-EB (3/10/87), *aff'd, In re R. Brownson Spencer II*, 152 Vt. 330 (1989). [EB #278]

* Road improvements on 3000 feet of road on more than one acre of land in a town without permanent zoning and subdivision laws is "development". *Elizabeth Aaronsohn*, #8B0291-EB (1/26/83). [EB #185]

* The construction of a 2,500 foot driveway to provide access to 134 acres for which the owners have filed a subdivision plan, improved the road, and sold lots pursuant to that plan constitutes a development. *Mr. & Mrs. Ronald Iverson*, DR #133 (5/28/82).

* Where the construction of a right-of-way to a landowner's driveway is not a road 800 feet in length, and the proposed construction of an intersecting driveway does not constitute a road, but rather a driveway serving a single residential dwelling, and the "roads" in question do not total 800 feet in length or more, or serve more than five parcels, Act 250 does not apply. *Allen Petrie*, DR #130 (2/25/82).

* The reconstruction and relocation of a roadway within an exempted subdivision is not a substantial change and does not require a land use permit, but the extension of a road from an exempt portion to a non-exempt portion of a tract of land is a development. *Sun Valley Farm*, DR #87 (11/23/77).

* Roads exceeding 800' in length, improved for logging, farming, or forestry purposes, may not be subsequently used to provide access to or within a tract of land incidental to the sale or lease of land without first obtaining an Act 250 permit. Roads which provide access to more than five parcels, or exceed 800' in length, constitute a "development". *Agency of Environmental Conservation*, DR #83 (10/13/77).

* The establishment of a right-of-way not presently useable by automobiles and requiring no physical change to the involved tract of land is not a development. *Petition of Buckley*, DR #71 (11/12/75).

* The improvement by a private corporation of a town road upon completion constitutes

development for commercial purposes. *Gibou Valley Co.*, DR #67 (9/16/75).

* The creation of a right-of-way and the improvements proposed to it for the purpose of providing access to parcels of land to be offered for sale is a development. *Westfield Associates*, DR #66 (9/12/74).

* The creation of a right-of-way to provide access to subdivided lots and common area does not constitute development. *Andresen*, DR #55 (5/1/74).

* Commission may include a review of all intended purposes of a proposed 800 foot access road designed to serve an eight lot subdivision. *David F. Chioffi*, DR #54 (4/10/74).

* A road constructed by a municipality for the purpose of access to timber lands owned by private parties is not a development if the specifications for the road are those usually required for logging and forestry purposes and the selectmen of the town fix the length of time the right-of-way may be used to the period during which the road is used to remove the lumber. *Creation of Right-of-Way*, DR #45 (1/26/74).

86. Exemptions

* The burden of proof to establish an exemption to Act 250 is on the party claiming the exemption. *In re Ochs*, 2006 VT 122, ¶12 (Vt. Sup. Ct. 11/27/06), affirming *Re: Peter and Carla Ochs*, DR #437, FCO at 8 (7/22/05)(citing *United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967)); *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 5-6 (4/11/14); *Champlain Construction Co.*, DR #214 (6/5/90); *L. W. Haynes, Inc.*, DR #192 (9/25/87)

* An exemption is to be read narrowly and only applied when the facts clearly support its application. *In re Ochs*, 2006 VT 122, ¶12 (Vt. Sup. Ct. 11/27/06), affirming *Re: Peter and Carla Ochs*, DR #437, FCO (7/22/05).

* The determination that property is not exempt from Act 250 jurisdiction changes the essence of property. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002).

* Act 250 carefully defines what may be covered by the term "development" for purposes of Act 250 jurisdiction, and certain activities are specifically excepted from this definition. *In re Vitale*, 151 Vt. 580, 584 (1989); and see *Woodside Juvenile Rehabilitation*, DR 139, FCO at 5 (1/26/83)(when the General Assembly intends to create an exemption from Act 250, does so expressly), citing 10 V.S.A. 6001(3); *In re State Buildings Division*, DR #121 (10/2980); *Burlington Electric Department*, DR 119 (9/1/80).

* Because a development is exempt at one time does not mean it will always be exempt. *In re Orzel* 145 Vt. 355 (1985).

* Certain land uses are expressly excluded from Act 250; neither religious nor other non-profit uses are excluded. *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 640 (1984).

* Even exempt activities will trigger jurisdiction if they are part of a plan to develop. *Re: McLean Enterprises Corp.*, DR #428, FCO at 6 n.2 (7/22/05), citing *Re: Luce Hill Partnership*, #5L1055-EB, FCO at 8 (7/7/92) (logging which is consistent with clearing land in preparation for creating subdivision triggers Act 250 review); and see, *Re: Capital Heights Associates and Snowfall, Inc.*, DR #167, FCO at 3 (3/27/85); *Re: Agency of Environmental Conservation*, DR #83 (10/13/77)(conversion of logging road to subdivision access road requires Act 250 review).

* Installation of cable transmission lines on poles or underground within existing utility right-of-way falls under exemption. *Grassroots Cable Systems of Vermont, Inc.*, DR #254 (3/12/92).

* Where town's land use permit preceded legislation that would have exempted the town from obtaining a permit, permit remained in force. *Town of Springfield*, DR #232 (12/26/90).

86.1. Farming

* The burden of proof to establish that a project meets the farming exemption is on the party claiming the exemption. *In re Ochs*, 2006 VT 122, ¶12 (Vt. Sup. Ct. 11/27/06), affirming *Re: Peter and Carla Ochs*, DR #437, FCO at 8 (7/22/05)(citing *United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967)); *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 5-6 (4/11/14).

* The farming exemption, like all exemptions, is to be read narrowly and only applied when the facts clearly support its application. *In re Ochs*, 2006 VT 122, ¶12 (Vt. Sup. Ct. 11/27/06), affirming *Re: Peter and Carla Ochs*, DR #437, FCO (7/22/05)(quoted in *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 5-6 (4/11/14));

* In determining whether crops are “principally produced *on the farm*,” 10 V.S.A. § 6001(22)(E), lands leased by a farmer are part of the “farm,” if the farmer *controls* all aspects of cultivation on those leased lands and if the lease is an arms-length transaction and not merely a ruse or mechanism or scheme to allow the farmer to include produce from other growers within his farm. *In re Ochs*, 2006 VT 122, ¶¶14 - 17 (Vt. Sup. Ct. 11/27/06), affirming *Re: Peter and Carla Ochs*, DR #437, FCO at 9 - 11 (7/22/05), citing *In re Vitale*, 151 Vt. 580, 584 (1989) and Black's Law Dictionary 298 (5th ed. 1979) and *In re Eastland, Inc.*, 151 Vt. 497, 499-500 (1989))

* Merely attaching a stable to a house does not convert a residential development to an agricultural use. *In re Stowe Club Highlands*, 166 Vt. 33, 35 (1996).

*A permit amendment is required for farming that would otherwise be exempt, because the property is already subject to an Act 250 permit. *In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* While the farming exemption from Act 250 serves an important function in preserving individual farms and Vermont's strong farming tradition, it is not an unlimited exemption, especially when the land has been sold subject to an Act 250 permit binding successors. *In re Eustance*, No. 13-1-06 Vtec, Decision at 12 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

*Appellants must apply for Act 250 approval of the as-built and any further proposed development on their property, both because the expressed terms of the existing permit required it and because the property is already subject to Act 250 jurisdiction, so that the so-called farming exemption does not divest it of jurisdiction. *In re Eustance*, No. 13-1-06 Vtec, Decision at 15 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

*An amendment is required for an alpaca farm in permitted subdivision where existing permit condition requires the landowner to obtain a permit amendment prior to construction. *In re Eustance*, No. 13-1-06 Vtec, Decision at 9 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

*Statute limiting Act 250 jurisdiction over land used for farming, 10 V.S.A. §6001(3)(E), only applies when a portion of farm property is proposed for development, not when a portion of permitted project is proposed for farming. *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* For purposes of an Act 250 analysis in this case, who owns the land is less an issue than how the land is being used), *Re: Peter and Carla Ochs*, DR #437, FCO at 9 - 11 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122, ¶¶14 - 17 (Vt. Sup. Ct. 11/27/06), citing *Re: S-S Corporation/Rooney Housing Developments*, DR #421, MOD at 4 - 5 (2/5/04), citing *Vermont Baptist Convention v. Burlington Zoning Board*, 159 Vt. 28, 31 (1992); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, FCO at 26 n.9 (5/4/04).

* Certain developments are exempt from Act 250, including "The construction of improvements for farming ... purposes below the elevation of 2500 feet." 10 V.S.A. § 6001(3)(D)(i). *In re Ochs*, 2006 VT 122, ¶11 (Vt. Sup. Ct. 11/27/06), affirming *Re: Peter and Carla Ochs*, DR #437, FCO at 7 (7/22/05).

* To qualify for the farming exemption, operation must meet the definition of "farming" in 10 V.S.A. § 6001(22): *Re: Peter and Carla Ochs*, DR #437, FCO at 7 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06).

* The burden of proving that this Project fits within the farming exemption is on the farmer. *Re: Peter and Carla Ochs*, DR #437, FCO at 8 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06); citing *United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967) (party seeking the benefit of a statutory exemption bears both the burdens of production and persuasion).

* The farming exemption, like all exemptions, is to be read narrowly and only found to apply when the facts clearly support the exemption's application. *Re: Peter and Carla Ochs*, DR #437, FCO at 8 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06)(citing *Re: Richard and Marion D. Josselyn*, DR # 333, FCO at 6 (2/28/97); *Re: WAJA, Inc.*, Declaratory Ruling # 162, FCO at 3 (10/10/84))(cited in *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 5-6 (4/11/14)).

* Every claim to the exemption must be justified. *Re: Peter and Carla Ochs*, DR #437, FCO at 8 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06); quoting *Re: Scott Farm*, DR # 413,

FCO at 13 (1/16/03) (dissent), comparing, *Commercial Airfield, Cornwall, Vermont*, DR # 368, FCO (1/28/99).

* "The on-site storage, preparation and sale of agricultural products principally produced on the farm" falls within the definition of "farming." 10 V.S.A. § 6001(22)(E); *Re: Peter and Carla Ochs*, DR #437, FCO at 9 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06).

* Where 51% of apples processed at farm were grown on the home farm (the others being grown at other orchards,) apples met the principally produced test of 10 V.S.A. § 6001(22)(E) exemption. *Re: Peter and Carla Ochs*, DR #437, FCO at 11 - 14 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122 (Vt. Sup. Ct. 11/27/06); citing test established in *Re: Scott Farm, Inc*, DR #413, FCO at 8 (1/16/03); and see, *Re: Richard and Marion D. Josselyn*, DR #333, FCO at 5 - 6 (2/28/97).

* "A farm is still a farm - and exempt from Act 250 - whether it uses two or twenty trucks or tractors, or whether it has seven or 700,000 chickens." *Re: Peter and Carla Ochs*, DR #437, FCO at 15 (7/22/05), *aff'd*, *In re Ochs*, 2006 VT 122, ¶17 (Vt. Sup. Ct. 11/27/06); citing *Re: Vermont Egg Farms, Inc.*, Declaratory Ruling #317, FCO (6/14/96).

* In determining whether whiskey is "principally produced" on the farm, water counts as an ingredient that is not produced on the farm. *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 8-12 (4/11/14).

* It is the ingredients that go into making the product, not the composition of the final product, that is the relevant inquiry for determining whether an agricultural product is principally produced on the farm. *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 5 (4/11/14).

* For a culinary school on a farm, the "principally produced" requirement of the agricultural exemption, 10 V.S.A. § 6001(22)(E), can be satisfied if the majority of the weight or volume of the ingredients in the finished product comes from the farm. *Re: Scott Farm, Inc*, DR #413, FCO at 8 (1/16/03).

* Even if the primary ingredient in the finished product does not come from the farm, as long as most of the ingredients do, the product, and, more importantly, the process by which it is made, fits the "farming" exemption of the statute. *Re: Scott Farm, Inc*, DR #413, FCO at 8-9 (1/16/03).

* Because the students will cultivate horticultural and orchard crops, and "agricultural products principally produced" on the farm, 10 V.S.A. § 6001(22)(E), will be cultivated, stored, prepared and sold a culinary school at a farm is exempt as "farming." *Re: Scott Farm, Inc*, DR #413, FCO at 10 (1/16/03).

* School's farming activities can be exempt from Act 250 jurisdiction, as long as its students are principally engaged in activities which fall within the exemptions. *Re: Scott Farm, Inc*, DR #413, FCO at 10 (1/16/03), citing *Sterling College*, DR #259, FCO (3/27/92).

* Provisions of the "farming purposes" exemption and the definition of "farming," 10 V.S.A. § 6001(22), are clear and unambiguous and should be enforced according to their express terms. *Re: Scott Farm, Inc*, DR #413, FCO at 10 n. 3 (1/16/03); *Re: Richard and Marion D. Josselyn*, DR #333, FCO at 5 (2/28/97); *Vermont Egg Farms, Inc.*, DR #317, FCO at 7 - 8 (6/14/96).

*The construction of improvements for the provision of commercial crop dusting and aircraft maintenance services is not exempt from the definition of development as farming, logging or forestry. *Commercial Airfield, Cornwall, Vermont*, DR #368 (1/28/99).

* Farming encompasses the cultivation or other use of land for the growing of Christmas trees and horticultural crops, the operation of greenhouses, and the on-site storage, preparation, and sale of agricultural products principally produced on a farm. *Richard and Marion D. Josselyn*, DR #333 (2/28/97).

* Farming, even large farming, below the elevation of 2500 feet is not "development." *Vermont Egg Farms, Inc.*, DR #317 (6/14/96).

* Spreading of sludge is not exempt "farming" if no construction for farming purposes occurs. *Town of Windsor*, DR #255 (7/30/92).

*Construction of a shed to store equipment used in the conduct of farming operations by a college is for farming purposes and is not "development" under Act 250, despite the fact that such college teaches students, for which it receives tuition. *Sterling College*, DR #259 (3/27/92).

Cases decided before the 1985 adoption of the definition of "farming" in 10 V.S.A. § 6001(22):

* "Construction for farming purposes" is expressly excluded from the land use permit requirement imposed on other "developments". *WAJA, Inc.*, DR #162 (8/3/84).

* The Legislature did not intend to exempt all "agricultural" construction from the land use permit requirements. *WAJA, Inc.*, DR #162 (8/3/84).

* "Farming" means the cultivation of land and the production of agricultural products, either food or forage crops. *WAJA, Inc.*, DR #162 (8/3/84).

* Where a substantial portion of a proposed veal farm will be dedicated to land cultivation, i.e., pasture land, crop land, or for tree production, the operation is "farming." *WAJA, Inc.*, DR #162 (8/3/84).

* The raising of fish for direct human consumption is "farming", but the raising of fish for other purposes is not "farming". *Waterland*, DR #113 (3/27/80); *Nathan and Mary Epstein*, DR #78 (4/27/77) (for the purpose of commercial wholesale and retail sale).

* A milk reload station project does not constitute construction for farming purposes. *Paul and Helen Blair*, DR #S (12/16/71).

* The portion of a horse training facility that involved the raising, feeding, and management of more than four horses as well as the training, showing or providing of instructions in riding did meet the requirements of 10 V.S.A. § 6001(22)(G); the other portions require a permit. *Re: GMHA Horse Facility Expansion*, JO#3-127 at 5 (10/30/08).

86.2. Logging / Forestry

* Logging at elevations below 2500 feet is explicitly excluded from the definition of development. *In re Green Crow Corp.*, 2007 VT 137 ¶ 13 (12/14/07).

* Logging below the elevation of 2500 feet is not "development." *Re: McLean Enterprises Corp.*, DR #428, FCO at 6 (7/22/05); *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR #340 (7/11/97)(logging roads). But note that "false logging" is not exempt. *Luce Hill Partnership*, #5L1055-EB, FCO at 8 (7/7/92) [EB #501] and other cases, *infra this note*.

* Forest products company did not commence construction where it cut a skidding road and clear cut a portion of its property in furtherance of its overall timber management philosophy. *Johnson Lumber Co.*, DR #263 (7/10/97).

* The logging exclusion does not prohibit Act 250 jurisdiction over the cutting of trees but only states that logging is not "development" for the purposes of Act 250 jurisdiction. *Keith Van Buskirk*, DR #302 (8/15/95).

* Where a permittee has represented that tree cutting or logging will not take place as part of a permitted project, the Board can impose conditions when granting Act 250 permits, and the logging exclusion does not apply. *Keith Van Buskirk*, DR #302 (8/15/95).

* *False logging*: eight acres were logged before application but were consistent with clearing land in preparation for creating subdivision. *Luce Hill Partnership*, #5L1055-EB, FCO at 8 (7/7/92). [EB #501]; and see *Re: McLean Enterprises Corp.*, DR #428, FCO at 6 n.2 (7/22/05) (even exempt activities will trigger jurisdiction if they are part of a plan to develop), citing *Re: Capital Heights Associates and Snowfall, Inc.*, DR #167, FCO at 3 (3/27/85); *Re: Agency of Environmental Conservation*, DR #83 (10/13/77)(conversion of logging road to subdivision access road requires Act 250 review).

* Logging activities require an Act 250 permit and are not exempt if not conducted as a *bona fide* logging operation. *Luce Hill Partnership*, #5L1055-EB, FCO at 8 (7/7/92). [EB #501]; *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]; *J.P. Carrara & Sons, Inc.*, #1R0589-EB (2/17/88). [EB #337]; *Capital Heights Associates*, DR #167 (3/27/85).

* The construction of a logging road and the conduct of logging operations on a tract of land is exempt from Act 250 if any future development or subdivision of the parcel is not associated with the logging operation. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]; *J.P. Carrara & Sons, Inc.*, #1R0589-EB (2/17/88). [EB #337]; *Capital Heights Associates*, DR #167 (3/27/85).

- * The Board cannot impose conditions on a timber cutting project on public lands below elevation of 2500 feet. *Department of Forest, Parks and Recreation, #1R0488-EB (1/11/84)*. [EB #211]
- * A road constructed by a municipality for the purpose of access to timber lands owned by private parties is not a development if the specifications for the road are those usually required for logging and forestry purposes. *Creation of Right-of-Way, DR #45 (1/26/74)*.
- * The construction of a commercial sawmill for industrial purposes is not exempt under Act 250. *Jerry Nelson, DR #40 (12/20/73)*.

86.3. Slate Quarries

- * The finality of given to quarry registrations may be different from that afforded to other JOs. *In re Catamount Slate, Inc., 2004 VT 14 (V.S.Ct.2/13/04)*, reversing *Catamount Slate, Inc. et al., DR #389, MOD at 7-9 (7/27/01)*.
- * In determining exemption for slate quarry pits on tract of land, question is not whether some relationship can be found between pits; question is whether there is any *legally significant* relationship - for purposes of § 6081 exemption - between pits. *Catamount Slate, Inc. et al., DR #389, MOD at 2 (2/25/02), rev'd on other grounds, In re Catamount Slate, Inc., 2004 VT 14 (V.S.Ct.2/13/04)*.
- * Were any of the other pits physical extensions or expansions of exempt pit, then those pits would be also exempt. *Catamount Slate, Inc. et al., DR #389, MOD at 2 (2/25/02), rev'd on other grounds, In re Catamount Slate, Inc., 2004 VT 14 (V.S.Ct.2/13/04)*.
- * Extraction of slate from any pit is not *always* for a commercial purpose. *Catamount Slate, Inc. et al., DR #389, MOD at 9 (2/25/02), rev'd on other grounds, In re Catamount Slate, Inc., 2004 VT 14 (V.S.Ct.2/13/04)*.
- * Under the slate quarry exemption statute, only the owners of the quarry land, mineral rights, or slate quarry leasehold rights may seek the exemption. *Madeline W. Walker and Estate of Roland J. Walker (Slate Quarry), DR #356, FCO at 8 (1/17/02)*.
- * Only a duly registered quarry can avail itself of the non-abandonment status afforded by 10 V.S.A. § 6081(j). *Madeline W. Walker and Estate of Roland J. Walker (Slate Quarry), DR #356, FCO at 8 (1/17/02)*.
- * As party seeking the benefit of the slate quarry exemption, quarry bears burdens of production and persuasion that exemption applies. *Catamount Slate, Inc. et al., DR #389, FCO at 9 (12/20/01), rev'd on other grounds, In re Catamount Slate, Inc., 2004 VT 14 (V.S.Ct.2/13/04)*.
- * Elements of the slate quarry exemption statute. *Catamount Slate, Inc. et al., DR #389, FCO at 9-10 (12/20/01), rev'd on other grounds, In re Catamount Slate, Inc., 2004 VT 14 (V.S.Ct.2/13/04)*.

- * Since definition of slate quarry is tied to particular quarry pit or hole, Board must look at each individual hole to determine if it meets slate quarry exemption. *Catamount Slate, Inc. et al.*, DR #389, FCO at 10 (12/20/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).
- * In analyzing slate quarry exemption, Board cannot consider entire tract; finding an exempt pit on tract does not mean that entire tract is exempt. *Catamount Slate, Inc. et al.*, DR #389, FCO at 10 (12/20/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).
- * Under 10 V.S.A. § 6081(I)(3), party who wants a final determination concerning slate quarry exemption must follow process established by 10 V.S.A. § 6007(c). *Catamount Slate, Inc. et al.*, DR #389, MOD at 3 (9/20/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).
- * Although there is Act 250 jurisdiction over a new building constructed at a slate quarry, there is no jurisdiction over the "ancillary activities" associated with the building. *David Camara and Camara Slate*, DR #366 (4/29/99).
- * Pre-existing slate quarry holes, and ancillary activities associated with those quarry holes, are exempt from Act 250 review, and Board has no jurisdiction to assess the impacts associated with such activity. *Northeast Developers*, DR #342 (10/28/97).
- * Quarry holes which are exempt as pre-existing development are not abandoned even if they have been "held in reserve" and not used since 1970. *Northeast Developers*, DR #342 (10/28/97).
- * Board concluded there was no Act 250 jurisdiction over a slate quarry where petitioner failed to present justiciable issues and to demonstrate standing to file the petition. *Vermont Structural Slate Co.*, DR #347 (8/14/97); *Camara Slate Quarry*, DR #345 (8/13/97).
- * Petitioners did not challenge Coordinator's JO, and Board dismissed proceeding regarding hazardous road conditions near slate quarry. *Fonte Slate Quarry*, DR #331 (11/20/96).

86.4. Pre-Existing Development (see [130](#))

- * Development built before June 1, 1970 is a "preexisting development" and is thereby exempt from Act 250 jurisdiction absent a substantial change. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶18 (2007), citing 10 V.S.A. § 6081(b).
- * Operation that pre-existed law's enactment is exempted generally from the requirement of obtaining Act 250 land use permit. *In re R.E. Tucker, Inc*, 149 Vt. 551, 552 (1988); 10 V.S.A. § 6081(b).
- * Because a development is exempt at one time does not mean it will always be exempt. *In re Orzel* 145 Vt. 355 (1985).
- * Although Act 250 permit requirements do not, per 10 V.S.A. § 6081(b) and Rule 2(C)(8), apply to any "pre-existing development" - *i.e.*, any development not in existence on June 1, 1970, or any

development commenced before June 1, 1970, and completed by March 1, 1971- Act 250 jurisdiction does attach to a “pre-existing development” that is subsequently proposed for substantial change. *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 5-6 (7/24/08); *see also Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* Board declines to inquire as to the level of connection between a project situated on lands of a preexisting development and such preexisting development; Board declines to inquire whether such project would, standing alone, be a “development” under 10 V.S.A. § 6001(3); Board applies “substantial change” test to such projects, because to not do so would cause the concept of “preexisting developments” and the protection afforded preexisting developments by 10 V.S.A. § 6081(b) to have no meaning. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 11 (10/20/05), *aff’d*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007).

* To establish that project is exempt as a preexisting development, Petitioner must demonstrate that it was in existence before, and has not been abandoned since, June 1, 1970. *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, FCO at 15 (8/04/05), *reversed and remanded on other grounds*, *In re Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102 (9/13/07)(mem.); *Re: Champlain Marble Corp. (Fisk Quarry)*, DR #319, FCO (10/2/96).

* If there is no pre-existing development, then the Board has no basis to determine whether a project is a substantial change to a pre-existing development. *David Enman (St. George Property)*, DR #326 (12/23/96).

* In determining whether a development built before June 1, 1970 is “pre-existing” the Board analyzes whether, if the entire development were built today, it would meet the jurisdictional prerequisites for the definition of development. *Robert and Barbara Barlow*, DR #222 (12/26/90).

* A development may be an exempt pre-existing development and may continue operating without a permit as such only to the extent that the activities remain the same or increase solely because of an expansion inherent to the development itself. *Browning Ferris Industries of Vermont, Inc.*, DR #188 (10/11/88); *Clifford's Loam and Gravel, Inc.*, DR #90 (11/6/78); *Phyllis B. Morris*, DR #99 (10/11/78).

* Improvements which existed on land prior to June 1, 1970 are exempt from Act 250. *Windham Foundation Inc.*, DR #97 (10/11/78).

86.4.1 Burden of Proof (see [552.5.2](#))

* Once a project is determined to fall within the exemption for preexisting development (10 V.S.A. § 6081(b)), the burden shifts to the proponents of jurisdiction to demonstrate that the project represents a substantial change to the preexisting development. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶10 (2007).

* The burden shifts between parties in cases where there is a claim of the exemption for preexisting development (10 V.S.A. § 6081(b)); the burden is on the proponents of jurisdiction to show that, if built today, the project would be a "development;" if this burden is met, the burden shifts to the opponent to show that the development is pre-existing; if this burden is met, the burden shifts back to the proponents of jurisdiction to demonstrate that the project represents a substantial change to the preexisting development. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, DR 441, FCO at 5 -7 (10/20/05), *In re Hale Mountain Fish & Game Club*, DR 435, MOD at 2-4 (9/24/04)), aff'd 2007 VT 23 #10 (mem.).

* To establish that project is exempt as a preexisting development, Petitioner must demonstrate that it was in existence before, and has not been abandoned since, June 1, 1970. *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, FCO at 15 (8/04/05), reversed and remanded on other grounds, *In re Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102 (9/13/07)(mem.); *Re: Champlain Marble Corp. (Fisk Quarry)*, DR #319, FCO (10/2/96).

86.4.2 Continuous use / abandonment

* Plant is pre-existing where it was built prior to 1970 and has been in continuous commercial use. *Kelly Green Recycling Facility*, DR #293 (8/24/94).

* To qualify for exemption as a pre-existing development, one must establish that the particular land use has not been abandoned. *U.S. Quarried Slate Products, Inc.*, DR #279 and #283 (10/1/93) (20-30 year lapse in use of a quarry pit constitutes abandonment); *Village of Cambridge Water System*, DR #272 (9/15/93).

* Where a gravel pit operation predates the enactment of Act 250 and has been in continuous use, jurisdiction will exist only if the owner proposes a "substantial change" to the operation. *Albert Nadeau*, DR #141 (6/23/83).

86.4.3 Cases

* If the legislature had intended to exempt in-kind replacement of towers it could have accorded all existing towers "pre-existing" status such that only a substantial change would trigger jurisdiction. *Nextel Communications*, DR #362 (11/18/98).

* A logging road built between 1994 and 1996 is not a pre-existing development. *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR #340 (7/11/97).

* As of certain date, pre-existing unlined landfill ceased to be a pre-existing development such that thereafter any construction of improvements, or any substantial or material change, required an Act 250 permit. *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (10/15/96). [WFP #24].

* Even though quarry had been in operation prior to June 1, 1970 and not subsequently abandoned, blasting and use of heavy equipment had ceased since June 1, 1970 and therefore constituted aspects of the quarry's operation that had been abandoned. *Champlain Marble Corp. (Fisk Quarry)*,

DR #319 (10/2/96).

* Gravel extraction operation constitutes a pre-existing development because of previous levels of gravel extraction. *Norwich Associates, Inc.*, DR #275 (4/3/96).

* Permit not required for construction and improvements to existing school building. *Jericho Corners Elementary School*, DR #285 (12/9/94).

* A wastewater treatment plant will not constitute a pre-existing development, even though construction of the plant was completed in 1965, where the plant involved less than ten acres of land when it was built. *Town of Windsor*, DR #255 (7/30/92).

* Where a gravel pit involved expansion from one extraction area to another area along the same gravel vein, with one area having been excavated prior to June 1, 1970 and the other afterwards, and these two areas were separated by a residential right-of-way (ROW), the two extraction areas constituted one pre-existing development since ROW did not constitute a sufficient intervening ownership interest as to cause the new extraction area to be a substantial change. *Robert and Barbara Barlow*, DR #234 (9/20/91), *aff'd, In re Barlow*, 160 Vt. 513 (1993). (Facts are distinguishable from *Weston Island Ventures*, DR #169 (6/3/85)).

* Existing municipal street should not be considered a pre-existing development for the purpose of determining jurisdiction. *City of Montpelier*, DR #220 (7/13/90).

* Where commercial gravel operations were performed in a gravel pit prior to the effective date of Act 250, and those operations have continued to the present, the gravel operations on that property constitute a pre-existing development. *Weston Island Ventures*, DR #169 (6/3/85).

* A road in existence prior to June 1, 1970, subsequently proposed to serve an eight lot subdivision, is a pre-existing use and is thus exempt from Act 250. *Lawrence Fownes Project*, DR #74 (4/14/76).

* Regarding State highway projects, hearings held after June 1, 1970 subject the project to Act 250. *Brookfield*, DR #21 (7/25/73).

* Because personal equities outweigh any possible environmental damage, a mobile home project did pre-exist Act 250. *George L. Goodrich*, DR #T (12/29/71).

* A water project for which planning began in 1965 does not constitute a pre-existing use. *Vergennes-Panton Water District*, DR #N (8/1/71).

* A golf course did pre-exist Act 250 when the only activity prior to June 1, 1970 consisted of a contract, a town permit, and an architect's confirmation of the design and supervision of the construction. *Quechee Lakes Corp.*, DR #L (7/21/71).

86.4.4 Other

* Act 250 speaks to land use, not the particular institutional activity associated with land use. *In re*

Baptist Fellowship of Randolph, 144 Vt. 636, 639 (1984).

* Certain land uses are expressly excluded from Act 250; neither religious nor other non-profit uses are excluded. *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 640 (1984).

86.4.5 Extent of exemption's umbrella

* Board declines to inquire as to the level of connection between a project situated on lands of a preexisting development and such preexisting development; Board declines to inquire whether such project would, standing alone, be a "development" under 10 V.S.A. § 6001(3); Board applies "substantial change" test to such projects, because to not do so would cause the concept of "preexisting developments" and the protection afforded preexisting developments by 10 V.S.A. § 6081(b) to have no meaning. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 11 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007).

86.5 Electric generation or transmission facility

* Legislature intended that Public Service Board, not Act 250, review Section 248 projects, even where energy project constitutes a substantial and material change to Act 250 permitted project. *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 7-15 (8/3/06); *followed*, *Woodchip Power Plant*, No. 91-4-06, Decision and Order (1/30/07); *distinguished in*, *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 - 4 (1/16/07) (bike paths constructed by state/town).

See [122.1.1](#)

C. Subdivisions

106. General

* Act 250 specifically imposes the responsibility for compliance with respect to subdivided land on the seller. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002), citing 10 V.S.A. § 6081(a).

* Important policy is directly undermined when sellers are able to evade Act 250 review of lands intended to be covered by the statute. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002).

* Legislative intent behind requiring Act 250 disclosure statement was to prevent a sale of subdivided land without a required Act 250 permit. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002).

* An Act 250 permit is required for the sale or offer for sale of any interest in a subdivision. *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 11 (11/9/07) (citing 10 V.S.A. § 6081(a)).

* Because a "subdivision" is a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into 10 or more lots within a defined geographical area and within any continuous period of five years, unless at least ten lots have been

created within a five-year period, the project falls outside of the definition of “subdivision.” *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 11 (11/9/07).

* The definition of subdivision excludes lots created to be conveyed to a qualified holder of conservation rights and interest. *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 11 (11/9/07).

* Under 10 V.S.A. § 6001(19), “subdivision” is defined, *inter alia*, as a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided into six or more lots for the purpose of resale, within a continuous period of five years, in municipalities like Waterbury and Duxbury which have not adopted both permanent zoning and subdivision bylaws. *Mark and Nubia Fuller and Peter G. Hack*, DR #403 & #404, FCO at 3 (3/21/02).

* Subdivision provisions are more specific and control when activities potentially fall under either “development” or “subdivision” definitions. *Mark and Nubia Fuller and Peter G. Hack*, DR #403 & #404, FCO at 5 (3/21/02).

* Under Act 250, the definition of "subdivision" refers only to dividing land but makes no reference to construction. *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]

* Under Act 250, the effects of the subdivision on the natural resources of the property are reviewed, assuming that any allowable activities may take place on the lots. *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]

* The definition of "development" and "subdivision" are separate and distinct because the definition of “development” is not limited to any particular time frame; whereas the definition of “subdivision” is limited to those created within any continuous period of five years. *Harold Jacobs, E.P.E. Corp.*, DR #210 (9/28/89).

* Applicants are entitled to merits hearing on the aesthetic effects of bridge construction incident to the sale of lots, regardless of whether lots to be served by the bridge may be later be sold by parties other than applicant. Once an application is deemed complete, it is irrelevant for Act 250 purposes that there are possible future actions involving sale of the lots in question. *Gar Anderson*, #5L0922-EB (12/8/87). [EB #363]

* A permit granted for development on a tract of land does not authorize subsequent subdivision of the property. *Stuart Richards*, DR #17 (7/22/73).

107. Which law applies

* Subdivision provisions are more specific and control when activities potentially fall under either “development” or “subdivision” definitions. *Mark and Nubia Fuller and Peter G. Hack*, DR #403 & #404, FCO at 5 (3/21/02).

* The definition of "subdivision" to be applied to phase I is the definition existing at the time the subdivision was created, and not the definition of "subdivision" as amended in 1987. *Black Willow Farm*, DR #202 (6/30/89).

108. Tract(s) (see [75.1](#))

109. "Owned or controlled" (see [75.1.3](#) and [78.3.2](#))

* The definition of "subdivision" makes clear that it applies to any subdivided land "owned or controlled" by a person. *Environmental Board v. Levi Chickering*, 155 Vt. 308, 313 (1990).

109.1 Owned

* Once a sales contract is signed, buyer is equitable owner of the parcel, giving buyer certain rights in the land. *In re Eastland, Inc.*, 151 Vt. 497, 500 (1989).

* Where seller receives no tangible benefit from the subdivision; where subdivision costs seller nothing; and its sole purpose is to enable buyer to escape the burdens of Act 250, buyer's status as equitable owner confers upon it sufficient control over subdivision. *In re Eastland, Inc.*, 151 Vt. 497, 500 (1989).

* Any conveyance of an interest in real estate must be in writing, signed by a person having authority to make such a conveyance; oral representations that purport to convey an interest in real estate merely create a tenancy at will, at best, and otherwise have no force or effect recognized by our laws. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 19 (7/2/10), citing 27 V.S.A. §§301 and 302; see also *Rutland County Nat'l Bank v. Sawyer*, 113 Vt. 485 (1944); *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520 (mem.)

* Jurisdiction does not attach to land that permittee does not own. *In re Guité Act 250 Jurisdictional Opinion #3-128 (Revised)*, #126-7-09 Vtec, Decision and Order at 5 (4/2/10).

109.2 Controlled

* "Control" does not establish a test measuring only percentage of ownership in fact. *Environmental Board v. Levi Chickering*, 155 Vt. 308, 313 n.3 (1990); 10 V.S.A. § 6001(19).

* Under 10 V.S.A. § 6001(19) control and ownership are independent criteria. *Environmental Board v. Levi Chickering*, 155 Vt. 308, 313 (1990).

* No particular degree of stockholding in an owning corporations is necessary as proof of control of the property if defendant's activities by themselves prove that he controlled the property. *Environmental Board v. Levi Chickering*, 155 Vt. 308, 315 (1990).

* Control of a corporation is not limited to cases in which the person alleged to control holds a majority of the stock of the company. *Environmental Board v. Levi Chickering*, 155 Vt. 308, 315 (1990).

- * Question of control must be viewed with regard to the general proposition that "a court will disregard the fiction of a corporation's separate identity whenever the concept is asserted in an endeavor to circumvent a statute and defeat legislative policy." *Environmental Board v. Levi Chickering*, 155 Vt. 308, 316 (1990).
- * Control of the subdivision for purposes of § 6001(19) is not conclusively determined by whether defendant derived any personal financial gain from the corporations he allegedly controlled or whether his activities indicated that he was a joint venturer with the stockholders of any of those corporations. *Environmental Board v. Levi Chickering*, 155 Vt. 308, 316 (1990).
- * Where petitioner exerted direct control over the creation and sale of a subdivision he possessed enough of the attributes of ownership to be deemed to have "controlled" the land. *In re Eastland, Inc.*, 151 Vt. 497 (1989), affirming *Eastland, Inc.*, DR #177 (6/16/87).
- * One need not own a parcel to bring it within subdivision Act 250 jurisdiction; one need only exercise sufficient control over a parcel at the time of the subdivision. *In re Eastland, Inc.*, 151 Vt. 497(1989), affirming *Eastland, Inc.*, DR #177 (6/16/87).
- * The meaning of "controlled" in 10 V.S.A. § 6001(19) is not entirely plain. *In re Eastland, Inc.*, 151 Vt. 497, 499 (1989), affirming *Eastland, Inc.*, DR #177 (6/16/87).
- * The definition of the verb "control" in Black's Law Dictionary: "To exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern." Black's Law Dictionary 298 (5th ed. 1979). *In re Eastland, Inc.*, 151 Vt. 497, 499 - 500 (1989), affirming *Eastland, Inc.*, DR #177 (6/16/87).
- * Making arrangements with the surveyor, choosing the number of subdivisions to create, directing where the survey lines should be drawn, and paying for the survey are indicia of "control" over a subdivision. *In re Eastland, Inc.*, 151 Vt. 497, 500 (1989), affirming *Eastland, Inc.*, DR #177 (6/16/87).
- * The Board may consider whether other individuals and entities besides the person who actually created the subdivision controlled the subdivision's creation. *Jipac, N.V.*, DR #301 (12/24/97)
- * The issue of control is much broader than simply determining who is the legal owner of a corporation. The meaning of the word controlled is a question of fact for determination by the Board, and must be viewed with regard to the general proposition that a court will disregard a corporation's separate identity whenever it is asserted in an endeavor to circumvent a statute and defeat legislative policy. *Jipac, N.V.*, DR #301 (12/24/97).
- * Functional control was exercised over a subdivision's creation where there was no evidence regarding the ownership of various corporations, where such corporations were represented under identical broad power-of-attorneys, and numerous real estate transaction occurred under the direction of a single person. *Jipac, N.V.*, DR #301 (12/24/97).
- * Buyer who makes an offer contingent on the division of a parcel and who arranges and pays for

the survey and division of that parcel, controls that parcel for the purposes of applying the definition of subdivision. *Northern Ski Works, Inc.*, DR #281 (10/18/93).

* Petitioners created other lots within the same environmental district within five years of the division of subject tract, and therefore an Act 250 permit was and is required. *John W. Stevens and Bruce W. Gyles*, DR #240 (5/8/92).

110. "Person" (see [75.1.4](#) and [78.3.3](#))

* As noted above, § 6001(14)(A)(iii) applies to subdivisions, and not developments. For this reason, in *Jesse T. Billings Residuary Tr.*, the former Environmental Board stated that it is "not appropriate" to use the definition of a person in § 6001(14)(A)(iii) for developments. DR No. 355, slip op. at 11 (Jul. 22, 1998). Rule 2(C)(1)(a) purports, however, to do just that. We therefore conclude that we are unable to apply Rule 2(C)(1)(a) because it would impermissibly expand Act 250 jurisdiction beyond what the Legislature has authorized. *Mt. Top Inn & Resort Jurisdictional Opinion Appeal*, 2018 Vt. Super. LEXIS 53, *20 (Vt. Super. Ct. August 22, 2018)

* "An Act 250 permit is required before a 'person' can sell any interest in a subdivision, commence construction on a subdivision or development, or commence development." *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 7 (citing 10 V.S.A. § 6081(a)).

* 10 V.S.A. §6001(14)(A) was "intended to broaden the definition of a 'person' owning or controlling land to include those who may not be mentioned specifically in the conveyance, but who may nevertheless derive some benefit from partition or division of the land." *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 8, quoting *In re Spencer*, 152 Vt. 330, 339, 566 A.2d 959, 964 (1989).

* Broad reading of 10 V.S.A. §6001(14)(A) is "consistent with the Legislature's express finding that " 'to ensure appropriate Act 250 review, it is necessary to treat persons with an affiliation for profit, consideration, or some other beneficial interest derived from the partition or division of land as a single person for the purpose of determining whether a particular conveyance is subject to Act 250 jurisdiction.' " *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 8, quoting *In re Spencer*, 152 Vt. 330, 339, 566 A.2d 959, 964 (1989) (quoting 1987, No. 64, § 1).

* A trust established with minor children as the beneficiaries is for their benefit, and because parents are financially responsible for their minor children, "any financial benefit to the children inures to the benefit of the parents." *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 14.

* Burden of proving that a relative is not the same "person" is on the individual. *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 15.

* "The mere fact that the Trust for the minor children is irrevocable does not alter its beneficial impact on the parents." *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 16.

* "Person" includes corporations; corporation's separate identity will be disregarded whenever the concept is asserted in an endeavor to circumvent statute. *Environmental Board v. Levi Chickering*,

155 Vt. 308 (1990).

* Question of control of corporation is not conclusively determined by whether person derives personal financial gain from corporation. *Environmental Board v. Levi Chickering*, 155 Vt. 308 (1990).

* Question of control must be viewed with regard to the general proposition that "a court will disregard the fiction of a corporation's separate identity whenever the concept is asserted in an endeavor to circumvent a statute and defeat legislative policy." *Environmental Board v. Levi Chickering*, 155 Vt. 308, 316 (1990).

"[A] single property may be acquired and owned jointly although title is taken in the name of only one of the coadventurers." *Environmental Board v. Levi Chickering*, 155 Vt. 308, 318 (1990), quoting *Mislosky v. Wilhelm*, 130 Vt. 63, 69 (1971).

* The statutory assumption that there is an affiliation between a parent and a child is rebutted by proof that sons would receive no benefit from parents' subdivision. *In re Baldwin*, No. 255-12-09 Vtec, Decision and Order at 16 (5/06/10).

* The definition of "person" specifically includes an individual's parents but this presumption is rebuttable. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 8 (9/11/09).

* For purposes of "development," "person" does not include an individual's "parents and children as included in Rule 2(C)(1)(b) for "person" for purposed of subdivision. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment FN9 at 10 (9/11/09).

* For purposes of determining who is a "person" who controls a subdivision, a parent who sets up Trust to benefit his children benefits from his children's benefiting from the Trust. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment (9/11/09).

* For the purposes of subdivisions, subdivisions are attributable to individuals and entities affiliated with each other for profit. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment (9/11/09).

* It is necessary to treat persons with an affiliation for profit, consideration, or some other beneficial interest derived from the partition or division of land as a single person for the purpose of determining whether a particular conveyance is subject to Act 250 jurisdiction because ownership interests are aggregated under Act 250, and that absolute ownership and control by an individual is not required for Act 250 jurisdiction. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 6 (9/11/09).

* Agent to Development Company in an advisory role and as Attorney who derives a fee for his services, but does not hold equity is not attributed Development Company's subdivisions. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment FN9 at 7-8 (9/11/09).

- * Beneficiaries of Trust that owns development companies are individuals affiliated for a beneficial interest derived from the partition or division of land. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 7 (9/11/09).
- * Even if LLC has not created any subdivided lots or housing units at this time, subdivided lots and housing units created by entities and individuals affiliated with LLC may be attributable to LLC if certain conditions are met. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 4 (9/11/09).
- * Two corporations, each of which has the same Board of Directors, are the same "person." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, FCO at 9 (11/25/03), aff'd 2006 VT 8 (V.S.Ct).
- * Parties to sale of pre-existing lots in an arm's length transaction, were not one "person." *Jesse T. Billings Residuary Trust*, DR # 355, FCO at 9-10 (7/22/98).
- * An individual may be attributed lots if one of the following two statements is true: (a) the individual partitioned or divided the relevant land into lots (or plans to do so), or (b) the individual is affiliated with another individual who partitioned or divided the relevant land into lots (or plans to do so), provided that the affiliation is for profit, consideration, or beneficial interest derived from the partition or division. *Marcel and Stella Roberts*, DR #265 (FCO at 10) (5/11/93); *Marcel Roberts and Noel Lussier*, DR #239 (FCO at 5) (5/11/93); *Geoffrey Wilcock and Judith Burns*, DR #224 (FCO at 9) (2/8/91).
- * Where the owner of a tract of land has an agreement with another person to divide the tract and sell a portion to that other person, and both parties appear to be getting profit, consideration, and beneficial interest from the division of the tract, such facts indicate that such individuals may constitute one person. *Marcel and Stella Roberts*, DR #265 (FCO at 10) (5/11/93); *U.S. Quarried Slate Products, Inc., Scotch Hill Leasing Corporation, Genier Slate Quarry*, DR #279M (MOD at 4) (3/4/93); *John W. Stevens and Bruce W. Gyles*, DR #240 (FCO at 11) (5/8/92); *John Mitchell General Contractor*, DR #203, (FCO at 8) (6/30/89).
- * A person will not be considered to have partitioned or divided subdivision lots by selling them individually without change if the subdivisions were already created before such person purchased a group of those lots, and such person was never affiliated with the persons responsible for creating such subdivisions. *T.P.I.R. Associates, Inc.*, DR #273 (11/24/92).
- * Petitioners and their real estate company were one "person," in exercising control over the subdivision of a tract into nine lots before purchase from the seller. *John W. Stevens and Bruce W. Gyles*, DR #240 (FCO at 11) (5/8/92).
- * Subdivision requiring an Act 250 permit was created where developer created several lots and then with his knowledge and permission, a potential purchaser retained surveyor to further subdivide one of the lots prior to purchase. *Everdale Ridge Corp.*, DR #215 (1/7/92).

* Individual not deemed a "person" here affiliation for project was not from the division of land into lots. *John Mitchell General Contractor, Inc.*, DR #203 (FCO at 8) (6/30/89).

110.1 Joint venture (see [75.1.4.2](#))

"A joint venture ... is a special relationship between two or more parties to engage in and carry out a single business venture for joint profit without any actual partnership or corporate designation." *Environmental Board v. Levi Chickering*, 155 Vt. 308, 317 (1990).

"[A] single property may be acquired and owned jointly although title is taken in the name of only one of the coadventurers." *Environmental Board v. Levi Chickering*, 155 Vt. 308, 318 (1990), quoting *Mislosky v. Wilhelm*, 130 Vt. 63, 69 (1971).

110.1.1 Profit (see [75.1.4.2.1](#))

* The statutory assumption that there is an affiliation between a parent and a child is rebutted by proof that sons would receive no benefit from parents' subdivision. *In re Baldwin*, No. 255-12-09 Vtec, Decision and Order at 16 (5/06/10).

* The definition of "person" specifically includes an individual's parents but this presumption is rebuttable. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 8 (9/11/09).

* For purposes of "development," "person" does not include an individual's "parents and children as included in Rule 2(C)(1)(b) for "person" for purposed of subdivision. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment FN9 at 10 (9/11/09).

* For purposes of determining who is a "person" who controls a subdivision, a parent who sets up Trust to benefit his children benefits from his children's benefiting from the Trust. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment (9/11/09).

* For the purposes of subdivisions, subdivisions are attributable to individuals and entities affiliated with each other for profit. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment (9/11/09).

* It is necessary to treat persons with an affiliation for profit, consideration, or some other beneficial interest derived from the partition or division of land as a single person for the purpose of determining whether a particular conveyance is subject to Act 250 jurisdiction because ownership interests are aggregated under Act 250, and that absolute ownership and control by an individual is not required for Act 250 jurisdiction. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 6 (9/11/09).

* Agent to Development Company in an advisory role and as Attorney who derives a fee for his services, but does not hold equity is not attributed Development Company's subdivisions. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment FN9 at 7-8 (9/11/09).

* Beneficiaries of Trust that owns development companies are individuals affiliated for a beneficial interest derived from the partition or division of land. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 7 (9/11/09).

* Even if LLC has not created any subdivided lots or housing units at this time, subdivided lots and housing units created by entities and individuals affiliated with LLC may be attributable to LLC if certain conditions are met. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 4 (9/11/09).

110.2 Trust

* A trust established with minor children as the beneficiaries is for their benefit, and because parents are financially responsible for their minor children, “any financial benefit to the children inures to the benefit of the parents.” *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 14.

“Since Rule 2(C)(I)(a) includes as a person ‘any other beneficial interest derived from the development of the land,’ the rule’s definition encompasses a trust for one’s minor children, absent evidence to the contrary. This is because any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support.” *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 15.

* “The mere fact that the Trust for the minor children is irrevocable does not alter its beneficial impact on the parents.” *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 16.

110.3 Burden of proof

* Burden of proving that a relative is not the same “person” is on the individual. *In re Shenandoah LLC, et al.*, 2011 VT 68, ¶ 15.

111. Creation of

* A subdivision proposal that is withdrawn prior to the construction of improvements does not amount to the creation of lots. *In re Baldwin*, No. 255-12-09 Vtec, Decision and Order at 16 (5/06/10).

* Act 250 Rule 2(B)(2) provides that a subdivision will be considered to have been created as of the occurrence of the earliest of any of the four events listed in Act 250 Rule 2(B)(1). *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 12 (11/9/07).

* Act 250 jurisdiction is triggered upon occurrence of any event constituting "subdivision" within the meaning 10 V.S.A. ' 6001(19). *Re: Swedish Ski Club of Vermont Land Trust*, DR #411, FCO at 6 (1/16/03).

* The purchase of land which is merged with adjoining residential land, not resulting in the creation of an additional discrete lot and upon which no development will occur, does not create a new lot. *Richard Kemmer*, DR #118 (7/10/80).

* When further subdivision of a developer's property would trigger Act 250 jurisdiction, the developer may transfer the property in question without creating a "subdivision" provided that: 1) the land in question is transferred with a deed covenant prohibiting residential or commercial development on the land and restricting its use to agricultural and other uses accessory to a homestead; and 2) the land conveyed is merged with other property owned by the grantee under one deed to create one entire lot in his name rather than two discrete parcels. *Richard Kemmer*, DR #118 (7/10/80).

111.1 Intent to subdivide

* Because a "subdivision" is a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into 10 or more lots within a defined geographical area and within any continuous period of five years, unless at least ten lots have been created within a five-year period, the project falls outside of the definition of "subdivision." *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 11 (11/9/07).

* Act 250 Rule 2(B)(2)(a) provides that a person's intention to create a subdivision may be inferred from the existence of a plot plan, the person's statements to financial agents or potential purchasers, or other similar evidence. *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 13 (11/9/07).

* Subdivision was not created when lot was sold prior to intent to commence subdivision construction. *Donald I. Gurney*, #2S0923-EB (11/2/93). [EB #579]

* An Act 250 permit is not required for phase I of the project because there is insufficient evidence to indicate that at the time of the phase I subdivision the permittee intended to further subdivide the remainder lot (now phase II). *Black Willow Farm*, DR #202 (6/30/89).

* Rule 2(B), which interprets the statutory definition of "subdivision," by grounding whether a subdivision has occurred based on a person's "intent," does not exceed the Board's statutory authority to promulgate rules. A person's intent to create a subdivision may be inferred in a number of ways, and the list provided in Rule 2(B)(1) is not inclusive. "Intent" cannot be established merely by an inference or drawn from a chronology of events. *Black Willow Farm*, DR #202 (6/30/89).

111.2 Sale / offer for sale

* Act 250 specifically imposes the responsibility for compliance with respect to subdivided land on the seller. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002), citing 10 V.S.A. § 6081(a).

* Important policy is directly undermined when sellers are able to evade Act 250 review of lands intended to be covered by the statute. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002).

* Legislative intent behind requiring Act 250 disclosure statement was to prevent a sale of subdivided land without a required Act 250 permit. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002).

* A lot reservation procedure whereby prospective purchasers will be provided an opportunity to make known to the petitioner their interest in a specified lot at a stated price constitutes an offer for sale and requires a permit. *The Stowe Corporation*, DR #72 (12/10/75).

* Pursuant to a plot plan dividing a tract of land into 10 or more lots, the sale of two lots which occurred before the effective date of Rule 2(B)(1) constitutes a subdivision. *Costes*, DR #63 (2/7/75).

111.3 Filing of plot plan

* Merely filing a plot plan and receiving sketch plan approval from the DRB for a proposed subdivision is only the first step in receiving final approval for a subdivision and therefore does not amount to the creation of lots for the purpose of resale under Act 250. *In re Baldwin Property*, No. 255-12-09 Vtec, Decision and Order at 12 (5/06/10).

* With the filing of a plot plan, landowner created a "subdivision," thereby triggering jurisdiction over project. *Re: Swedish Ski Club of Vermont Land Trust*, DR #411, FCO at 6 (1/16/03).

111.4 "Uncreation" of (divestiture of jurisdiction over) (see [54](#))

* Act 250 Rule 2(B)(3) directs that a "subdivision shall cease to exist if it is found . . . to have been retracted or revised below jurisdictional levels at any time prior to the construction of improvements on the subdivision." *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Decision on Motion for Summary Judgment at 8 (10/1/09).

* A subdivision proposal that has been withdrawn prior to the construction of improvements does not amount to the creation of lots. *In re Baldwin*, No. 255-12-09 Vtec, Decision and Order at 12 (5/06/10).

* Board Rule 2(B)(3) allows for relief from jurisdiction. *In re Real Audet*, 2004 VT 30, ¶15 (4/1/04).

* Cessation of jurisdiction over subdivisions discussed. *Re: Richard and Elinor Huntley*, DR #419, MOD at 12 - 13 (7/3/03), rev'd on other grounds, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004) (Board decision notes that the result in *Re: Nelson Lyford*, DR #341, FCO at 27 (12/24/97) (landowner cannot "withdraw" his project and avoid Act 250 jurisdiction, when jurisdiction over the project had already been triggered by subdivision) might be different under EBR 2(B)(3) (added 2003).

* When the Legislature wishes to terminate Act 250 jurisdiction, it knows how to do it. 10 V.S.A. § 6086(e); *Re: Richard and Elinor Huntley*, DR #419, MOD at 14 (7/3/03), rev'd, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

* EBR 2(B)(3) (eff. 1/15/03) provides that, in certain circumstances, jurisdiction which has attached to a subdivision will cease to exist. *Re: Swedish Ski Club of Vermont Land Trust*, DR #411, FCO at 6 (1/16/03).

* Where no improvements have been constructed on the property, offer for the sale of the property

has been terminated, and landowner has filed in Town Land Records a revised plot plan which reconfigures subdivision to contain number of lots below jurisdictional threshold, and which supersedes, retracts and rescinds all prior subdivision plans Act 250 jurisdiction is divested. *Re: Swedish Ski Club of Vermont Land Trust*, DR #411, FCO at 6 - 7 (1/16/03).

112. Partitioned or divided

* If affiliated owners agree to the creation of lots via a final plat approval of a partition subdivision as opposed to a court-ordered partition, the resulting lots are necessarily included in each of the owners' respective lot counts. *In re Baldwin Property*, No. 255-12-09 Vtec, Decision and Order at 11 (5/06/10).

* A river bisecting a parcel does not automatically create two lots. *Liberty Transportation, Inc.* DR #394 FCO at 7 (9/20/01).

* A person will not be considered to have partitioned or divided subdivision lots by selling them individually without change if the subdivisions were already created before such person purchased a group of those lots, and such person was never affiliated with the persons responsible for creating such subdivisions. *T.P.I.R. Associates, Inc.*, DR #273 (11/24/92).

* A permit is not required for the sale of a portion of a parcel of land which previously had been divided by a town highway because the road already separates the land and therefore the sale will not affect a statutory subdivision. *Maida Z. Maxham*, DR #196 (1/14/88).

* The granting of a right-of-way for ingress and egress by third parties does not create a subdivision of the land into two or more lots where the estate interest of the parcel remains undivided. *Green Mountain Properties*, DR #53 (4/10/74).

112.1 Further subdivision of a lot

* The further subdivision of one of nine lots created ten lots from the tract for which an Act 250 permit was and is required. *John W. Stevens and Bruce W. Gyles*, DR #240 (5/8/92).

113. Parcel or lot

113.1 Definition of

* There is no definition for the term "parcel" in Act 250 or the Board's rule, and unless the context demands otherwise, the word "parcel" is synonymous with the word "lot" as defined. *Nelson Lyford*, DR #341 (12/24/97).

* In determining whether lots on a tract, which were all created by April 1985, constitute a subdivision for Act 250 purposes, the Board will apply the definition of subdivision in existence prior to July 1, 1987. *Harland Miller III*, DR #253 (5/13/92).

* Lots in excess of ten acres which were conveyed in 1980 are exempt from Act 250 jurisdiction

under the pre-1984 definition of lots. Lots of ten or more acres created prior to July 1, 1984 but not conveyed until after July 1, 1984 are not exempt under the pre-1984 definition of lots. *Harland Miller III*, DR #253 (5/13/92).

* A Petitioner bears the burden of proof and must persuade the Board that the pre 1984 definition of lot applies. *Harland Miller III*, DR #253 (5/13/92).

113.2 Number of lots required to trigger jurisdiction

* 2001 Vermont Legislature reduced subdivision jurisdictional threshold from ten to six lots in certain municipalities. *Mark and Nubia Fuller and Peter G. Hack*, DR #403 & #404, FCO at 4 (3/21/02).

113.3 Computation of number of lots

* Lots from parents' subdivision are not attributable to sons where sons will receive no benefit from that subdivision. *In re Baldwin Property*, No. 255-12-09 Vtec, Decision and Order at 16 (5/06/10).

* Subdividing one lot into two creates two new lots, not one new lot. *In re Shenandoah, LLC, et al.*, #245-10-08, Decision on Motion for Summary Judgment at 7 (9/11/09).

* In determining how many lots were created, the Board looked to the language of the deed whether the lots conveyed were identical to the lots created by the petitioner, whether the conveyed lots had merged prior to their conveyance, and the deed descriptions used to convey the newly created lots. *Nelson Lyford*, DR #341 (12/24/97).

* Where buyer acquires two parcels separately, buyer does not partition or divide them if it sells them in the exact same configuration in which it acquired them. *New England Land Associates*, DR #289, FCO at 6 (5/26/94).

* Subdivision requiring an Act 250 permit was created where developer created several lots and then with his knowledge and permission, a potential purchaser retained surveyor to further subdivide one of the lots prior to purchase. *Everdale Ridge Corp.*, DR #215 (1/7/92).

* Where land use permit authorized a 5 lot subdivision, an amendment to the permit allowing an additional 32 lots applied both to the new lots and to the original 5 lots. *Poquette & Bruley, Inc.*, DR #233 (1/9/91).

* Phase I and II of a residential subdivision were really one project with enough lots together to trigger Act 250 jurisdiction, and the Permittee controlled additional lots within the appropriate geographical area at the time Phase I's 9 lots were created to exceed the 10 lot jurisdictional threshold. *Black Willow Farm*, DR #202 (6/30/89).

* When a "person" offers for sale 10 or more lots which have been partitioned or subdivided within the past five years within a five mile radius of or within Commission's jurisdictional area, all lots, or portions thereof, will be counted as affected lots for purposes of the ten-lot threshold if they were

not conveyed before July 1, 1987, even if the un-conveyed lots had been permitted under the Environmental Protection Rules. *Marble Realty, Inc.*, DR #194 (10/8/87).

113.4 Prior exempt lots

* Act 250 jurisdiction over exempt lots does not attach to subdivision which was physically undeveloped prior to the sale of lots. *In re Patten Corp. Northeast*, 152 Vt. 644 (1989.)

114. Area: five miles / commission jurisdiction

* Phase I and II of a residential subdivision were really one project with enough lots together to trigger Act 250 jurisdiction, and the Permittee controlled additional lots within the appropriate geographical area at the time Phase I's 9 lots were created to exceed the 10 lot jurisdictional threshold. *Black Willow Farm*, DR #202 (6/30/89).

115. Time: continuous period of five years

* Act 250 Rule 2(B)(1) contains the provisions for determining how to count the statutory continuous five-year period. The period begins with the *latest* of any of the four events: (1) the filing of a plot plan in the town records after the issuance of any required local or state approval; (2) the issuance of a municipal subdivision or zoning permit; (3) the issuance of a state subdivision permit or a state water supply and wastewater disposal permit; or (4) in the absence of the any of the first three, the legal conveyance of a lot. *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 12 (11/9/07).

* Act 250 Rule 2(B)(2) provides that a subdivision will be considered to have been created as of the occurrence of the earliest of any of the four events listed in Act 250 Rule 2(B)(1). *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 12 (11/9/07).

* In determining whether the project is a subdivision, Board determines whether lots were created within a continuous period of five years in relation to the project. *Nelson Lyford*, DR #341 (12/24/97).

* Neither denial of Act 250 permit nor lapse of five years since triggering of jurisdiction by petitioners' predecessor in interest caused jurisdiction over nine lot subdivision to be divested where petitioners' predecessor in interest created more than 10 lots within five year period triggering Act 250 jurisdiction. *Bernard and Suzanne Carrier*, DR #246 (12/7/95).

116. "Commencement of construction" on

* Forest products company did not commence construction on a subdivision without an Act 250 permit where its plan for a residential development was not so settled in intention and purpose that it could be called ready to commence. *Johnson Lumber Co.*, DR #263 (7/10/97).

* Act 250 contemplates that subdivision will be reviewed for compliance with criteria and

potentially become subject to permit conditions regardless of whether construction is ready to commence. *Rockwell Park Associates, #5W0772-5 (8/9/93)*. [EB #509]

117. Pre-existing subdivisions

* Subdivision was pre-existing because it was exempt under the regulations of the Department of Health in effect on January 21, 1970. *Jesse T. Billings Residuary Trust, DR # 355 (7/22/98)*; *Hanley Lane Construction Co., Inc., DR #313 (6/12/96)*.

* If there is no pre-existing subdivision, then the Board has no basis to determine whether a project is a substantial change to a pre-existing subdivision. *David Enman (St. George Property), DR #326 (12/23/96)*.

* A subdivision is deemed to have pre-existed Act 250 where the developer filed a map of the proposed development prior to June 1, 1970. *Reese Heights Development, DR #11 (5/1/73)*.

* Subdividers who were not required to obtain a permit by virtue of the grandfather clause of the Vermont Board of Health subdivision regulations may apply for an Act 250 permit for improvements to the subdivision. If the permit is denied, the subdivider will not be penalized and the applicant's subdivision plan will be allowed to stand. DR #E (3/10/71).

D. Power and Communication Lines and Facilities (121-135)

Note: former EBR Appendix A is now EBR 2(T).

121. General

* Electric utility's staking to mark potential sites for electric line poles is not "commencement of construction" because the pole locations are subject to change, and there is not "such finality of design that construction can be said to be ready to commence." *Washington Electric Cooperative, DR #379 (FCO at 10) (8/19/99)*.

* Whether public utility provided notice is not an issue for the Board to consider in the context of a DR proceeding because it does not involve the *applicability* of EBR A-3(d) to the Project, rather, it concerns whether the utility *complied with* a requirement of EBR A-3(d) and, therefore, may be an appropriate consideration in the context of an enforcement action. *CVPS Corporation / Roxbury, DR #373 (5/27/99)*.

122. Jurisdiction

* Electrical distribution lines are exempt from amendment jurisdiction under Rule 34(A), even where there is an express permit condition requiring a permit amendment, unless original jurisdiction is triggered under Rule 70. *Re: CVPS/Verizon, 2009 VT 71, ¶ 28 (Vt. Sup. Ct.), reversing Nos. 18-1-07, 19-1-07 Vtec, Decision and Order on Motion for Summary Judgment at 6 (8/13/07), Judgment Order (9/10/07)*.

- * Public utility conceded jurisdiction and Board's findings support a conclusion that jurisdiction exists and existed at the time construction commenced. *CVPS Corporation / Roxbury*, DR #373 (5/27/99).
- * A ten foot high radio support structure erected on a fifteen foot high building does not constitute the construction of a support structure which will extend vertically 20 feet or more such that no permit is required. *Stokes Communication Corporation*, DR #357 (8/20/98).
- * Construction of a receiving site for a cable television system requires a permit where the site exceeds the jurisdictional acreage threshold. *Grassroots Cable Systems of Vermont, Inc.*, DR #254 (3/12/92).
- * EBR Appendix A does not apply to a gas transmission project but only to "facilities," which include electricity and communications equipment. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd, In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]
- * Improvements which are related to hydroelectric project but not directly involved in power generation are neither exempt from Act 250 jurisdiction *Town of Springfield Hydroelectric Project*, DR #111 (1/19/81); but see *Town of Springfield v. Vermont Environmental Board*, 521 F. Supp. 213 (D.Vt. 1981) (federal provisions pre-empt Act 250 jurisdiction)
- * Installation of two microwave dishes is "development". *Karlen Communications, Inc.*, #5L0437 (8/28/78). [EB #89]
- * A 4,000 foot transmission line, begun before Rules were adopted exempting such facilities, is a development in a one-acre town. *Vermont Electric Cooperative, Inc.*, DR #O (9/8/71).

122.1 Exemptions

- * Because segment of power line will be underground, is under 2500' of elevation, and not in a natural area, scenic area, or scenic corridor, and because the land will be reseeded upon completion of installation, the segment is exempt under EBR Appendix A. *Washington Electric Cooperative*, DR #379 (8/19/99).
- * Installation of cable television cable on poles and underground within existing utility rights-of-way falls under the exemptions of EBR Appendix A. *Grassroots Cable Systems of Vermont, Inc.*, DR #254 (3/12/92).
- * The construction of a fish ladder, undertaken by a power company at a facility operated for commercial purposes is not itself a commercial improvement and will not in any way contribute to the generation or transmission of electricity at a pre-existing hydroelectric project. *New England Power Co.*, DR #95 (10/30/78).

122.1.1

Subject to other laws / preemption

- * Once Act 250 jurisdiction has attached, it does not “detach” from a parcel unless the proposed activity is governed by an alternative statutory scheme giving another state agency exclusive jurisdiction of it *In re Eustance*, No. 13-1-06 Vtec, Decision at 11(2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09); *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec (8/3/06).
- * Legislature intended that Public Service Board, not Act 250, review Section 248 projects, even where energy project constitutes a substantial and material change to a permitted project. *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 7-15 (8/3/06); *followed, Woodchip Power Plant*, No. 91-4-06, Decision and Order (1/30/07); *distinguished in, Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 - 4 (1/16/07) (bike paths constructed by state/town).
- * Although hydroelectric project is a development for municipal purposes, it is exempt from Act 250 jurisdiction because it is an electric generation or transmission facility which requires a certificate of public good. *Town of Springfield Hydroelectric Project*, DR #111, FCO at 3 (1/19/81); and see *Town of Springfield v. Vermont Environmental Board*, 521 F. Supp. 213 (D.Vt. 1981) (federal provisions pre-empt Act 250 jurisdiction).
- * Exemption for an “electric generation or transmission facility which requires a certificate of public good under section 248 of Title 30,” 10 V.S.A. § 6001(3), extends only to “those physical improvements and development activities that are directly related to the construction and operation of the generating facility.” *Town of Springfield Hydroelectric Project*, DR #111, FCO at 3 (1/19/81), citing *In re Burlington Electric Department*, DR #119 (10/8/80); No. 715, 1971 Op. Atty. Gen. 167; but see *Town of Springfield v. Vermont Environmental Board*, 521 F. Supp. 213 (D.Vt. 1981) (federal provisions pre-empt Act 250 jurisdiction).
- * Improvements which are related to hydroelectric project but not directly involved in power generation are not preempted under the Federal Power Act. *Town of Springfield Hydroelectric Project*, DR #111 (1/19/81); but see *Town of Springfield v. Vermont Environmental Board*, 521 F. Supp. 213 (D.Vt. 1981) (federal provisions pre-empt Act 250 jurisdiction).
- * Although Generating Plant is a development for municipal purposes, physical improvements and development activities that directly relate to the construction and operation of the generating facility are exempt from Act 250 jurisdiction. *Burlington Electric Dept.*, DR #119 (10/8/80).
- * With respect to power generating facilities, chip harvesting, logging, and other off-site wood procurement activities are not directly related to the construction and operation of facility, and are thus not exempt from Act 250. *Burlington Electric Dept.*, DR #119 (10/8/80).

123. Pre-existing facilities

- * Power line in existence prior to passage of Act 250 satisfies exemption in EBR Appendix A because the relocation of the pole is not necessary for the completion of the project; clearing activities in order to relocate pole do not cause line segment to lose its exemption. *Washington Electric*

Cooperative, DR #379 (8/19/99).

E. Changes to pre-existing projects which may trigger jurisdiction

* Court affirms Board's decision not to treat a cell tower in a church as an initial development but rather in terms of whether it is a substantial change to a preexisting development. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶¶7, 10 (2007) (upholding Board's decision that cell tower in a church bell tower is not a substantial change to the church and is therefore exempt from Act 250 jurisdiction).

* Court cannot interpret statute in a manner that would cause "identical construction to be treated differently" based solely on the use or purpose of the construction because this would lead to an irrational consequence. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶9 (2007), citing *Braun v. Bd. of Dental Exam'rs*, 167 Vt. 110, 117 (1997).

* Because a development is exempt at one time does not mean it will always be exempt. *In re Orzel*, 145 Vt. 355, 361 (1985).

130. Substantial Change

* A substantial change to a preexisting development requires an Act 250 permit. *In re Big Rock Gravel, LLC, Act 250 Jurisdictional Opinion*, No. 174-8-09 Vtec, Decision and Order, at 7 (10/29/10).

* "Substantial change" test for 250 jurisdiction is not the same as "substantial construction toward completion of the project" test for abandonment. *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Entry Regarding Motion at 3 (10/13/09).

* A "substantial change" is defined as "any change in a development or subdivision which may result in significant impact with respect to any of the [ten] criteria." EBR 2(G); *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 592 (1993); *In re Barlow*, 160 Vt. 513, 520 (1993); *In re H.A. Manosh Corp.*, 147 Vt. 367, 369 (1986) *In re Orzel*, 145 Vt. 355, 360-61 (1985) (approving this definition); *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 6 (7/24/08)(citing *In re: Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102, ¶ 4) see also *Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08)); *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 7 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, FCO at 16 (8/04/05), reversed and remanded on other grounds, *In re Hale Mountain Fish and Game Club, Inc.*, 2007-102 (9/13/07)(mem.).

* Use of the word "may" in the rule is significant; the *potential* for significant impact on a criterion is all that is required to find a "substantial change." *In re Barlow*, 160 Vt. 513, 521-22 (1993);

* "Vermont does not recognize a distinction between positive and adverse impacts for the Act 250 criteria. Rather, for Act 250 jurisdiction, whether an action is a substantial change to a pre-existing development is determined by 'potential impacts as long as they are significant.'" *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 9 (7/24/08) (quoting *In re: Hale Mountain Fish and Game Club, Inc.*, 2007

VT 102, ¶ 4); *see also Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08); *superceded* effective July 10, 2009 by amendment to Act 250 Rule 2(C)(7)(defining “substantial change”).

* If a change to a pre-existing development is “substantial,” it implicates Act 250 and is subject to the requirement that no development change be conducted until after an Act 250 land use permit is obtained. *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 6 (7/24/08) (citing Act 250 Rule 34(B)); *see also Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* If new equipment results in a "substantial" or "material" change, a new permit would be required. *In re R.E. Tucker, Inc*, 149 Vt. 551, 557 (1988).

* Because a substantial change in development may have occurred, fact that there was a commercial operation in existence as of the enactment of Act 250 is not sufficient to preclude the requiring of a permit for continued operation. *In re Orzel*, 145 Vt. 355, 359 (1985); 10 V.S.A. § 6081(b).

* A permit is required for any substantial change in a pre-existing development. *In re Orzel*, 145 Vt. 355, 361 (1985); 10 V.S.A. § 6081(b); *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 7 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007).

* To find that the representation by the Agency's inspector prevents the Board from ever finding that petitioners need a permit fails to give meaning to the "substantial change" language of the statute. *In re Orzel*, 145 Vt. 355, 361 (1985).

* Because a development is exempt at one time does not mean it will always be exempt. *In re Orzel*, 145 Vt. 355, 361 (1985).

* When a party wishes to make any “material or substantial” change to the permitted project, a permit amendment is required. *In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09); *In re Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 5 (1/16/07); (citing former EBR 34(A)).

* There is no presumption that a substantial change either has or has not occurred since the enactment of Act 250. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 7 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007), quoting *Re: Raleigh B. Palmer, Isle La Motte Gravel Pit*, DR #424, FCO at 7 (11/4/04), quoting *Re: Lake Champagne Campground*, DR #377, CPR at 4 (2/2/00).

* Substantial change to pre-existing development is a separate and independent ground for jurisdiction. *Robert and Barbara Barlow*, DR #222 (12/26/90); *see also Village of Ludlow*, DR #212 (12/29/89)).

* Regarding changes to a development in existence before June 1970, question is: first, do the proposed changes themselves constitute a development and second, are the proposed changes a substantial change to such pre-existing development. *Robert and Barbara Barlow*, DR #222

(12/26/90); see also *Village of Ludlow*, DR #212 (12/29/89); *Vermont Marble Co.*, DR #101 (FCO at 3) (12/13/78).

* Board did not conduct substantial change analysis to determine whether two curb cuts to a public road constitute a substantial change. *Pizzagalli Properties and Town of Colchester*, DR #374 (5/20/99).

* An expansion of pre-existing utility system is reviewed under substantial change analysis, which should be conducted through a "master permit" process examining system-wide impacts. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]

* Changes to pre-existing development do not automatically trigger Act 250 jurisdiction. *Jack and Ruth Eckerd Foundation Youth Camp*, DR #98 (10/16/78).

* "Changes in extraction rates, truck traffic, the type or amount of equipment being used, and similar factors ...constitute an expansion of preexisting nonconforming sand and gravel extraction operation" produces a "substantial change" requiring an Act 250 Permit or amendment. *Dorr et al Earth Extraction Appeal*, No. 124-9-13 Vtec, Decision on Cross-Motions for Partial Summary Judgment at 7 (10/10/14)(DRB appeal)(citing *In re Barlow*, 160 Vt. 513, 522-23 (1993)).

* The analysis for what constitutes a material change as proposed for an already permitted project requiring a permit amendment is similar to the analysis used for a substantial change—"there must be a cognizable change that will have a significant impact on a finding or condition or may result in significant adverse impact on any of the [applicable] Act 250 criteria." *Costco Act 250 Permit Amend JO 157-12-16 Vtec MSJ* at 7 (Dec. 8, 2017), citing *In re Request for Jurisdictional Op. re: Changes in Physical Structures & Use at Burlington Int'l Airport for F-35A*, 2015 VT 41, ¶ 25, 198 Vt. 510 (quoting what is now codified as Act 250 Rule 2(C)(6)).

130.1 Validity of two-part substantial change test

* Court has repeatedly upheld the Board's two-pronged substantial-change test, under which the Board first determines whether a cognizable change to the preexisting development will result from the project, and, if so, whether it has the potential for significant impact under one or more of the Act 250 criteria enumerated in 10 V.S.A. § 6086(a). *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶10 (2007); *Sec'y, Vt. Agency of Natural Res. v. Earth Const., Inc.*, 165 Vt. 160, 164 (1996); *In re Barlow*, 160 Vt. 513, 521-22 (1993); *In re Greg Gallagher*, 150 Vt. 50, 51 (1988); *In re H.A. Manosh Corp.*, 147 Vt. 367, 369 (1986).

* The Supreme Court has affirmed a two-part inquiry to resolve whether an action constitutes a "substantial change." The inquiry involves a determination as to "whether there has been a cognizable physical change to the preexisting development, and if so, whether the change has the potential for significant impact under one or more of the ten Act 250 criteria." *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 21 (3/6/15) (mem.), affirming *Re: Burlington Airport Act 250 JO*, No. 42-4-13 Vtec (5/13/14); *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07

Vtec, Revised Decision on Motion for Summary Judgment at 6 (7/24/08) (quoting *In re: Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102, ¶ 4)(also citing *Sec'y, Vt. Agency of Nat. Res. v. Earth Constr., Inc.*, 165 Vt, 160, 164 (1996); *In re H.A. Manosh Corp.*, 147 Vt. 367, 369-70 (1986)); see also *Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* Court upholds the validity of EBR 2(G) ("substantial change"). *In re Barlow*, 160 Vt. 513, 520 (1993); *In re H.A. Manosh Corp.*, 147 Vt. 367, 369 (1986); *In re Orzel*, 145 Vt. 355, 360 (1985).

* Board's definition of substantial change does not negate or undermine the legislature's intent; it simply defines the parameters of the statutory exemption afforded pre-existing uses. *In re H.A. Manosh Corp.*, 147 Vt. 367, 369 (1986).

130.2 Burden of Proof (see [552.5.3](#))

* Once a project is determined to fall within the exemption for preexisting development (10 V.S.A. §6081(b)), the burden shifts to the proponents of jurisdiction to demonstrate that the project represents a substantial change to the preexisting development. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶10 (2007).

* Even though Board made no findings concerning pre-1970 levels of emission and did not engage in the type of comparative analysis required by statute, evidence supported Board's determination regarding increased levels of emission, and evidence necessarily implied an increase over and above that which was present in 1969. *In re H.A. Manosh Corp.*, 147 Vt. 367, 370 (1986).

* The party claiming the exemption has the burden of proving that the project existed prior to June 1, 1970 and that it was not abandoned. *In re Big Rock Gravel, LLC, Act 250 Jurisdictional Opinion*, No. 174-8-09 Vtec, Decision and Order, at 7-8 (10/29/10).

130.3. Extent of jurisdiction resulting from change (scope of project subject to Act 250)

* Jurisdiction attaches only to substantial changes to pre-existing fish and game club that were discrete and could be differentiated from project as a whole. *In re Hale Mountain Fish and Game Club, Inc.*, 2009 VT 10 ¶12 (2009)(mem.).

* Substantial change that permeates entire project creates Act 250 jurisdiction over entire project. *In re Hale Mountain Fish and Game Club, Inc.*, 2009 VT 10 ¶12 (2/2/09) (mem.); *In re Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102 ¶5 (9/13/07)(mem.)(citing *Re: Black River Valley Rod & Gun Club, Inc.*, 1997 WL 453353, at *10 (Vt. Env't'l Bd. 1997)).

* An individual project purchased and separated from a pre-existing subdivision may constitute a substantial change to the pre-existing subdivision, however, Act 250 jurisdiction does not necessarily extend over the un conveyed remaining lots of the pre-existing subdivision. *Jesse T. Billings Residuary Trust*, DR # 355 (7/22/98).

* Jurisdiction does not attach to the project (and the project site does not become involved land of

an adjacent permitted development) solely because the project may create an effect on the adjacent permitted site. *Pizzagalli Properties (Burger King)*, DR #361, Chair's Preliminary Ruling (6/8/98), Board's Order (6/15/98).

* If current activities requiring a permit for substantial change can be differentiated from pre-existing activities and their impact, *only* current activities and impacts must have an Act 250 permit; if the activities cannot be distinguished, then the entire operation and all of its impacts require an Act 250 permit. *Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB(FCO/Altered at 14) (6/12/97). [EB #651R;] *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (10/15/96). [WFP #24]

* Increase of landfill's loading rate from 15,000 tons to between 28,000 and 33,000 tons was a substantial change and an Act 250 permit was and is required for the entire unlined landfill's operation, and not just for the incremental increase. *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (10/15/96). [WFP #24].

* Project was part of a larger undertaking; thus, additional land was subject to jurisdiction as involved land of a substantial change to a pre-existing subdivision. *Hanley Lane Construction Co., Inc.*, DR #313 (6/12/96).

* In the context of substantial change, an application need only be filed *for the change itself*, unless it permeates the entire operation. *Twin State Sand & Gravel, Inc.*, #3W0711-EB (Prehearing Conference Report & Order) (5/20/93). [EB #576] (citing *In re R.E. Tucker, Inc.*, 149 Vt. 551, 553 (1988)); *and see C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (Unlined Landfill Facility), FCO at 28 - 32 (10/15/96). [WFP #24], and cases cited therein: *Ronald E. Tucker*, DR #165, FCO (2/27/85), *aff'd*, *In re R.E. Tucker, Inc.*, 149 Vt. 551, 553 (1988); *Re: Champlain Construction Co.*, DR #214, FCO at 9 (9/14/92); *Re: H.A. Manosh Corp.*, DR #164, FCO (4/17/85); *Robert and Barbara Barlow*, DR #234, FCO (9/20/91), *aff'd In re Barlow*, 160 Vt. 513 (1993), and *see Re: Vermont RSA Limited Partnership*, DR #441, FCO at 11 (10/20/05), *aff'd, In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007).

* If certain activities constitute a substantial change, then Board will determine whether just those activities or the entire operation must be reviewed. *Champlain Construction Co.*, DR #214M (10/2/90).

* Future gas main extensions, which may number in the thousands, do not each require a permit review. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd, In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]

* When a land use permit is required for a substantially changed pre-existing development, Commission review should not extend to the entire gravel pit operation, but rather should be limited to the substantial changes identified by the Board. *Ronald E. Tucker*, DR #165 (2/27/85).

130.4 Elements of

* Elements of two-part substantial change test are: (1) whether there has been a cognizable change

to the preexisting development, and (2) whether that change has the potential for significant adverse impact under one or more Act 250 criteria. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 (3/6/15) (mem.), affirming *Re: Burlington Airport Act 250 JO*, No. 42-4-13 Vtec (5/13/14); *In re Greg Gallagher*, 150 Vt. 50, 51 (1988); *In re Vermont Gas Systems, Inc.*, 150 Vt. 34, 37 (1988); *In re H.A. Manosh Corp.*, 147 Vt. 367, 369-70 (1986); *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 7 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); *Re: Vermont Association of Snow Travelers (VAST)*, DR #430, FCO at 12 (3/11/05); *Stonybrook Condominium Owners Association*, DR #385, FCO at 9 (5/18/01); *McDonald's Corporation*, #1R0477-5-EB, MOD at 7-9 (5/3/00)[EB #747]; *Hiddenwood Subdivision*, DR #378, FCO at 9 (1/12/00); *Ronald L. Saldi, Sr.*, DR #365, FCO at 13 (12/24/98); *Re: Champlain Marble Corp. (Fisk Quarry)*, DR #319, FCO at 10 (10/2/96), citing *Re: L.W. Haynes*, DR #192, FCO at 7 (9/5/87), *aff'd*, *In re Haynes*, 150 Vt. 572 (1988); *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]; *Kelly Green Recycling Facility*, DR #293 (8/24/94); *Re: Robert and Barbara Barlow*, DR #234, FCO at 3 (9/20/91); *Agency of Transportation*, DR #153 (6/28/84).

* Use of the word “may” in the rule is significant; the *potential* for significant impact on a criterion is all that is required to find a “substantial change.” *In re Barlow*, 160 Vt. 513, 521-22 (1993);

* Substantial change analysis does not involve an evaluation of the acreage of involved land. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]; *Windsor Correctional Center*, DR #151 (5/9/84).

* Change in use of involved lands is not a substantial change where there is not a reasonably identifiable potential for a significant impact with respect to any of the Act 250 criteria. *Albert Nadeau*, DR #141 (6/23/83); *Phyllis B. Morris*, DR #99 (10/11/78); but see, *Three Green Doors*, DR #3 (4/24/73) (increased use).

130.4.1

Cognizable Change

* A cognizable change is a physical change or a change in use. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 22 (3/6/15) (mem.), affirming *Re: Burlington Airport Act 250 JO*, No. 42-4-13 Vtec (5/13/14)(citing *In re Vt. RSA Ltd. P'ship.*, 2007 VT 23 ¶ 11 (mem.)).

* Without establishing a prior extraction rate, it cannot be determined whether future operation will constitute a substantial change. *In re R.E. Tucker, Inc.*, 149 Vt. 551, 554 (1988); *In re Orzel*, 145 Vt. 355, 359 (1985).

* If new equipment results in a "substantial" or "material" change, a new permit would be required, *In re R.E. Tucker, Inc.*, 149 Vt. 551, 557 (1988).

* Board cannot determine whether some activity constitutes a substantial change to a pre-existing operation unless it is made aware of what that activity is. *In re Orzel*, 145 Vt. 355, 359 (1985).

* When the Environmental Court considers whether there has been a cognizable physical change to

a preexisting development, the suggestion that the new structures will be more environmentally friendly and of less aesthetic impact does not factor into the Court's analysis. *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 6 (7/24/08)(citing *In re: Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102, ¶14)(quoting *Sec'y, Vt. Agency of Nat. Res. v. Earth Constr., Inc.*, 165 Vt, 160, 164 (1996); *In re H.A. Manosh Corp.*, 147 Vt. 367, 369-70 (1986)); see also *Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* A "cognizable" change is a physical change. *Developer's Diversified Realty Corp.*, DRs #364,371, and 375 (3/25/99); *Ronald L. Saldi, Sr.*, DR #365, FCO at 13 (12/24/98); Re: Village of Ludlow, DR #212, FCO (12/29/89) see, *Sugarbush Resort Holdings, Inc.*, DR #328, FCO (2/27/97); Re: David Enman (St. George Property), DR #326, FCO (12/23/96); *Lincoln Haynes Gravel Pit*, DR #192 (10/7/87), *aff'd*, *Lincoln W. Haynes*, 150 Vt. 572 (1988).

130.4.1.1 Maintenance, replacement, non-physical changes

* In-kind replacement of existing equipment with substantially similar equipment is not a cognizable change. *F.W. Whitcomb Const.Co.*, DR #408, FCO at 10 (12/19/02).

* Clearing of trees and vegetative growth resulting from Petitioner's successful forest management plan implemented after June 1, 1970 is not a cognizable, physical change to a preexisting, hillside rifle range development. *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, FCO (8/04/05), MOD (10/17/05), reversed and remanded on other grounds, *In re Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102 (9/13/07)(mem.).

* Repair or routine maintenance is not a cognizable change to, and does not alter, a pre-existing development. *Vermont Agency of Transportation (Rock Ledges)*, DR #296 (Third Revision) (3/28/97); *but see, Agency of Transportation*, DR #153 (6/28/84).

* Temporary sludge storage did not constitute a substantial change where it did not involve any physical change to the composting facility. *Town of Springfield*, DR #232 (12/26/90).

* Demolition and replacement are not substantial changes. *Greg Gallagher*, #7R0607-EB and #7R0607-1-EB (11/16/89). [EB #402]

* A conversion from rental cabins to condominiums and a change in ownership that does not involve physical change to the unit, will not result in a substantial change to a pre-existing development. *Greg Gallagher*, #7 *

* No "change" occurs when there is installation of replacement gas mains of similar capacity in the same trench now occupied by the pre-existing gas main. *Vermont Gas Systems, Inc.*, #4C0609-EB (1/30/86), *rev'd and orders vacated*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #285]

* Maintenance and repair activities for gas transmission lines are not substantial change. In kind replacement of distribution mains constitutes ordinary repair, and any new service connections to a pre-existing distribution main are an integral part of the development and are not "changes."

Vermont Gas Systems, Inc., #4C0609-EB (11/22/85), *rev'd*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]

* Replacing a failed sewage disposal system serving a shopping mall is not a substantial change requiring review but, it does require an amendment to the original permit. *Juster Associates*, DR #86 (11/28/77), *vacated*, *In re Juster Associates*, 136 Vt. 577 (1978).

* The replacement of a manufacturing facility destroyed by fire is not a substantial change, but the expansion of the replacement to accommodate added work force is. *Montgomery Schoolhouse, Inc.*, DR #32 (10/3/73).

130.4.1.2 Reasonably expected expansions

* A ruling of substantial change cannot be based simply on expansion of the extraction area in a gravel/sand pit operation. *John Gross Sand and Gravel*, DR #280 (Supplementary) (7/28/94); *Dale E. Percy, Inc.*, DR #251 (3/26/92); *Clifford's Loam and Gravel, Inc.*, DR #90 (11/6/78).

* Additions to a pre-existing project that are an integral part of and reasonably within one's expectations for the project do not constitute substantial change. (See DR #155). *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267].

130.4.2 Potential for significant impact

* Use of the word “may” in the rule is significant; the *potential* for significant impact on a criterion is all that is required to find a “substantial change.” *In re Barlow*, 160 Vt. 513, 521-22 (1993);

Increased extraction at gravel pit had potential for significant impacts under Criteria 1 (water pollution), 4 (erosion), 5 (traffic), 8 (aesthetics) and 9E (earth extraction). *In re Big Rock Gravel, LLC, Act 250 Jurisdictional Opinion*, No. 174-8-09 Vtec, Decision and Order, at 10 (10/29/10).

* The District Coordinator, and the Environmental Court in a *de novo* appeal, “may find jurisdiction based on potential impacts as long as they are significant.” *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 6 (7/24/08) (quoting *In re: Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102, ¶ 4); *see also Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* Board’s conclusion that a person has party status is a finding that he has an interest under a criterion that may be affected by the proceeding; it is not, however, the equivalent of a finding that the Project may have an effect on that interest. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 8 n.2 (10/20/05), *aff’d*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007).

* Motion for summary decision denied where undisputed facts are insufficient to determine whether physical change to permitted project has potential to cause significant Act 250 impact. *Re: George E. Benson, Sr. and Janice Benson*, DR#432, MOD at 6-7 (8/6/04).

- * By defining "substantial changes" to include changes that *may* result in significant impact, the plain language of EBR 2(G) does not limit Act 250 jurisdiction to only changes that produce actual impact on the statutory criteria. *In re Barlow*, 160 Vt. 513, 521-22 (1993), distinguishing *In re H.A. Manosh Corp.*, 147 Vt. 367, 370 (1986).
- * A finding of significant impacts is necessary if the requirement of "substantial change" is not to be illusory. *In re Barlow*, 160 Vt. 513, 522 (1993).
- * Determination as to whether there is a potential significant impact is inextricably fact-bound, not susceptible to the application of preset definitional rules, and within the Board's area of expertise and enjoy a presumption of validity. *In re Barlow*, 160 Vt. 513, 522 (1993); *In re Killington, Ltd.*, 159 Vt. 206 (1992).
- * Consideration of second element - the potential for significant impact with respect to Act 250 criteria - does not require an in-depth review of possible impacts, but simply a determination that significant impacts may occur. *Stonybrook Condominium Owners Association*, DR #385, FCO at 8 (5/18/01); citing, *Re: Village of Ludlow*, DR #212, FCO at 9 (12/29/89), quoting *Re: City of Montpelier*, DR #190, FCO at 7 (9/6/88).
- * The determination of potential significant impact is inextricably fact bound and not susceptible to the application of preset definitional rules. *Vermont Agency of Transportation (Rock Ledges)*, DR #296 (Third Revision) (3/28/97). *Peter Guille, Jr.*, DR #129 (3/5/82) (changes must be reviewed on case-by-case basis).
- * With respect to identifying the potential for significant impacts, the question is not whether the impacts will occur, but whether they may occur. *Norwich Associates, Inc.*, DR #275 (4/3/96).
- * Only *potential* for impact needs to exist. *Robert and Barbara Barlow*, DR #234 (9/20/91), *aff'd*, *In re Barlow*, 160 Vt. 513, 521-22 (1993).
- * In determining the likelihood of impacts for jurisdictional purposes, the Board does not qualitatively or quantitatively evaluate the extent of those impacts. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]
- * Impacts are relevant when determining if there has been a material change, if land is "involved," or if there has been a substantial change to a pre-existing development requiring an application for an amendment of an existing permit, even if the impact itself may not require jurisdiction. Act 250 Rule 2(c)(5)(a), 2(c)(7). *Mountain Top Inn & Resort*, JO (#1-391), No. 23-3-17 Vtec, Entry Order on Motion to Compel at 4-5 (11/2/2017).

130.5 Cases

130.5.1 Residential Subdivisions, Housing Projects, etc.

- * A reconfiguration of lots, by itself, is insufficient to establish a material or substantial change; the

reconfiguration must have significant impact on one of the ten criteria. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 592-93 (1993).

* Demolition of existing house and construction of a new house in its place are “undoubtedly cognizable changes to the pre-existing development,” when the existing development is being wholly replaced with structures that are nearly double in size.” *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 6 (7/24/08); *see also Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* Demolition of a house located above 2,500 feet in elevation and on a precipitous ridgeline had the potential to significantly impact several Act 250 criteria, including air and water quality; soil erosion; and adverse effects on the scenic beauty of the area. *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 8 (7/24/08); *see also Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* Connecting a new house to a sewer line and installing a replacement wastewater disposal system results in a cognizable change to a property. *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 9 (7/24/08); *see also Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* Razing an old farmhouse in a subdivision is a substantial change. *Stonybrook Condominium Owners Association*, DR #385, FCO at 8 (5/18/01).

* Installation of mobile homes similar to those in neighborhood on lots of a previously permitted subdivision was not a cognizable change, and thus not a substantial change. *Ronald L. Saldi, Sr.*, DR #365 (12/24/98).

* Petitioner’s sale of lots as originally defined in the 1947 plat to a single purchaser does not constitute a cognizable change to the pre-existing subdivision. *Jesse T. Billings Residuary Trust*, DR # 355 (7/22/98).

* Driveway 1000 feet in length was substantial change to two existing subdivision permits due to potential for significant impacts under Criteria 1(B), (4), and (8). *David Enman (St. George Property)*, DR #326 (12/23/96).

* Replacement of fence along 25-foot right-of-way, cleaning and re-seeding grass drainage swale, placement of 9 x 25 foot gravel strip, and placement of mesh to stabilize embankment were cognizable physical changes, but not substantial changes. *Clearwater Realty*, DR #318 (9/27/96).

* The following were substantial changes to a pre-existing subdivision: construction of multiple buildings with multiple units as opposed to pre-existing single-family residential dwellings; conversion of two acres of open space into a nine-unit residential project; and the construction of new structures which cross pre-existing boundary lines. *Hanley Lane Construction Co., Inc.*, DR #313 (6/12/96).

* Changes to applicant's project are not substantial changes because they do not pose the potential

for significant impact under any of the 10 Act 250 Criteria.. *Realty Resources Chartered & Bradford Housing Assoc.*, #3R0678-EB (2/17/94). [EB #546M1]

* Tree-cutting did not require a permit amendment as a substantial change where no physical change to a previously permitted subdivision had occurred. *Robert Blair and CS Architecture*, DR #241 (4/29/92).

* Demolition and replacement of cabins are not substantial changes. *Greg Gallagher*, #7R0607-EB and #7R0607-1-EB (11/16/89). [EB #402] See, *In re Greg Gallagher*, 150 Vt. 50 (1988)

* Construction of a pond on two adjoining parcels within a pre-existing subdivision is consistent with residential uses of the premises and is not a substantial change. *Viewmont Subdivision*, DR #155 (10/17/84).

* Construction of multi-family housing units on parcels restricted to residential use constitutes an addition and expansion of the existing approved subdivision, which is a substantial change. *Construction Management, Inc.*, DR #117 (7/11/80).

* The reconstruction and relocation of a roadway within an exempted subdivision is not a substantial change to the pre-existing subdivision, but the extension of a road from an exempt portion to a non-exempt portion of a tract of land is a development and requires a permit. *Sun Valley Farm*, DR #87 (11/23/77).

* The construction of apartment houses on a tract of land for which there was a pre-existing subdivision does not constitute a substantial change. *Walter Urie*, DR #80 (6/3/77).

* The conversion of buildings used for warehouse and storage into housing units for the elderly does not constitute a substantial change. *Tessier-Duff*, DR #73 (3/1/76).

130.5.2 Skiing and Other Recreation

* Cutting trees in a buffer zone at a commercial shooting range is a substantial change because of potential impacts on Criterion 8 (aesthetics - noise). *Bull's Eye Sporting Center (Altered) and David and Nancy Brooks, Wendell and Janice Brooks*, #5W0743-2-EB (Revocation), FCO at 11- 12 (6/23/00). [EB #742]

* Physical changes at project tract in connection with permitted Project, such as the provision of picnic tables and vending machines, while cognizable changes, did not and would not have a significant impact on the ten Act 250 criteria. *Vermont Institute of Natural Science*, DR #352 (2/11/99).

* Proposed ferry service from previously permitted sailing center is a substantial change or material change where previous permit contemplated the impacts of sail-powered boats and not diesel-powered ferry. *Tudhope Sailing Center*, DR #270 (4/29/93).

* A substantial change does not exist where neither change in construction or use of a water

diversion structure is proposed. *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]

* Improvements to the lands and structures of a pre-existing wilderness camp triggers jurisdiction only if changes are substantial. *Jack and Ruth Eckerd Foundation Youth Camp*, DR #98 (10/16/78).

* The addition of paddle tennis courts and the removal of stumps and limbs for a cross-country ski trail in an existing development are not substantial changes. *Derrybush Associates*, DR #81 (9/16/77).

* Renovation of a farm house for use as a warming hut is not a substantial change. *Lamoille County Snow Packers*, DR #42 (12/28/73).

* Construction of a golf pro shop by a country club is not a substantial change. *Mt. Anthony Country Club*, DR #38 (11/23/73).

* Installation of rope tow on ski trail is a substantial change. *Mount Snow Development Corp*, DR #27 (9/4/73).

* The replacement of an 800 person-per-hour chair lift with a 1,500 person-per-hour chair lift is a substantial change, because it significantly increases the uphill lift capacity at the resort and involves the improvement of land for commercial purposes. *Pico Peak Ski Resort, Inc.*, DR #13 (5/1/73).

* The construction of an indoor riding ring as part of the expansion of a riding school constitutes a substantial change. *The Pine Cobble School, Inc.*, DR #9 (5/1/73).

* An Act 250 permit is not required for changes at a shooting range if a jurisdictional opinion determines that the range has been operating before 2006, it has an ANR-approved lead management plan, and “the changes are designed to improve safety, reduce noise, or reduce impacts on air or water quality.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 13 (8/15/2017).

130.5.3 Roads, Transportation and Signs

* While removal of or alteration to median and side rock ledges along Interstates 89 and 91 was a cognizable change to a pre-existing development, it lacked the potential for impacts under Act 250 criteria, and is thus not a substantial change. *Vermont Agency of Transportation (Rock Ledges)*, DR #296 (11/2/98).

* Changes make road considerably more evident, accessible, and inviting to the public and have potential for significant impact, are substantial changes. *Sugarbush Resort Holdings, Inc.*, DR #328 (2/27/97).

* State road reconstruction involves physical change but impacts are not potentially significant enough to impact Act 250 criteria. *Vermont Agency of Transportation (Route 73)*, DR #298 (5/9/95).

- * Added equipment and compressor, scope and extent of road construction, constitute material and substantial changes because they have the potential for significant impact under at least 4 criteria. *Montpelier Broadcasting Inc.*, #5W0396-EB (2/17/94). [EB #571]
- * Where improvements of a pre-existing private road exceeding 800 feet in length are normal maintenance and repair, the road has not been substantially changed. *Productions, Ltd.*, DR #168 (4/10/85).
- * Roads upgraded beyond their historic conditions in anticipation of development or as a result of flood may require an Act 250 permit. *Productions, Ltd.*, DR #168 (4/10/85).
- * Substantial improvements to town highways which are made to allow normal vehicular access to newly subdivided lands may constitute development. *Town Highway #37, Middlesex*, DR #156 (12/19/84).
- * Routine repair and maintenance of a pre-existing State highway does not constitute a substantial change, but resurfacing, restoration, and rehabilitation goes well beyond ordinary highway maintenance and thus constitutes a substantial change. *Agency of Transportation*, DR #153 (6/28/84).
- * Placement of additional gravel and minimal widening of two logging roads are not substantial changes, but other widening and general improvements are. *Peter Guille, Jr.*, DR #129 (3/5/82).
- * The continued use of a temporary parking lot, if used within certain agreed conditions, is not a § 6001(3) development or a substantial change. *Medical Center Hospital of Vermont*, DR #92 (10/10/78).
- * The construction of a temporary parking lot is a substantial change. *Medical Center Hospital of Vermont*, DR #88 (1/19/78), *rev'd, Committee to Save Bishop's House v. Vermont Medical Center*, 137 Vt. 142 (1979).
- * The reconstruction and relocation of a roadway within an exempted subdivision is not a substantial change to the pre-existing subdivision. *Sun Valley Farm*, DR #87 (11/23/77).
- * The extension of a road from an exempt portion to a non-exempt portion of a tract of land is a development and requires a permit. *Sun Valley Farm*, DR #87 (11/23/77).
- * Construction to extend a road to create four one-acre residential lots within an existing subdivision is not a substantial change. *Stratton Corp.*, DR #22 (8/2/73).
- * A State project instituted for the purpose of installing culverts and performing routine maintenance along a four mile stretch of an access road is not a substantial change. *Dept. of Fish and Game*, DR #2 (4/19/73).

130.5.4 Waste Treatment, Pollution, Landfills, Solid Waste Transfer Stations, etc.

- * Operation of leachate collection and recirculation system during the period of physical change to pre-existing development resulted in uncontrolled discharges of leachate which had the potential for and resulted in significant impacts. *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (10/15/96). [WFP #24]
- * Increased reliance on truck traffic for a hazardous waste site is cognizable change but does not have the potential for significant impacts under any Act 250 criteria. *Kelly Green Recycling Facility*, DR #293 (8/24/94).
- * Because changes at recycling facility have the potential of creating significant impacts under several Act 250 criteria, the recycling facility constitutes a substantial change. *Cassella Waste Management, Inc.*, DR #244 (2/7/92).
- * Temporary sludge storage is not a substantial change, where it does not involve any physical change to the composting facility. *Town of Springfield*, DR #232 (12/26/90).
- * Proposed changes to existing sewer system had potential for significant impacts on Act 250 criteria such that they are substantial changes. *Village of Ludlow*, DR #212 (12/29/89).
- * Changes to sewer line will have significant impact where the added traffic and noise during construction will be significant and where the added capacity will encourage growth and additional hookups. *Village of Ludlow*, DR #212 (12/29/89).
- * Physical construction and a 300% increase in solid waste disposed at a landfill constitute a substantial change as they raise the potential for significant impacts. *Browning Ferris Industries of Vermont, Inc.*, DR #188 (10/11/88); *Clifford's Loam and Gravel, Inc.*, DR #90 (11/6/78); *Phyllis B. Morris*, DR #99 (10/11/78).
- * The installation of sewer line connecting a pre-existing facility to a municipal treatment system constitutes a substantial change, as the sewer line constitutes a new construction with potential impacts. *Windsor Correctional Center*, DR #151 (5/9/84).
- * Once a pre-existing facility meets all Act 250 jurisdictional requirements (except the requirement that the project not be completed on or before March 1, 1971), analysis shifts to Rule 2(G), and the amount of acreage involved in the change itself is not determinative. *Windsor Correctional Center*, DR #151 (5/9/84).
- * Although replacing a failed sewage disposal system is not a substantial change, it does require an amendment to the original permit. *Juster Associates*, DR #86 (11/28/77), *vacated, In re Juster Associates*, 136 Vt. 577 (1978).

130.5.5 Commercial and Industrial

- * A reconfiguration of lots, by itself, is insufficient to establish a material or substantial change; the reconfiguration must have significant impact on one of the ten criteria. *In re Taft Corners Associates*,

Inc., 160 Vt. 583, 592-93 (1993).

* Although modification of winter storage locations for camping units, changes in utility services provided at camper unit sites, a decrease in the number of camping sites, and the addition of arborvitae and changes to trees in a campground were all cognizable, the changes did not have the potential to impact significantly on one or more of the ten Act 250 criteria, and therefore, did not constitute substantial changes. *Lake Champagne Campground*, DR #377, FCO at 16 -21 (3/22/01). [D.R. 377]

* Repainting a building's exterior is a cognizable change. *McDonald's Corporation*, #1R0477-5-EB, MOD at 9 (5/3/00). [EB #747]

* Although the exterior changes to a department store are cognizable changes, such changes do not have the potential to impact significantly on one or more of the ten Act 250 criteria. *Developer's Diversified Realty Corp.*, DRs #364, 371, and 375 (3/25/99).

* The change in tenant and the parking lot and access changes are not substantial changes in a permitted project. *Developer's Diversified Realty Corp.*, DRs #364, 371, and 375 (3/25/99).

* Construction of a breezeway connecting the front and back of an inn and restaurant building is not a substantial change. *EGZ Associates*, DR #354 (8/20/98).

* Groundwater pollution treatment facility was a cognizable change to prior permits which had the potential for significant impacts. *Unifirst Corporation*, DR #348 (1/30/98).

* Soil screening operation represents a cognizable change, but does not have potential to significantly impact Act 250 criteria. *Howe Center Limited*, DR #300 (6/23/95).

* Change to recycling operation from a manufacturing plant is not a cognizable change. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]; *Kelly Green Recycling Facility*, DR #293 (8/24/94).

* Although the replacement of a pre-existing commercial building which was destroyed by fire is a cognizable physical change, it does not have the potential for significant impacts under the Act 250 criteria. *James and Anita McGrath*, DR #248 (7/21/92).

* In a "ten-acre" town, the construction of an office building on the site of a pre-existing motel development involving less than ten acres is not a development or a substantial change because the building is a change only to the land upon which the motel is built, not to the motel itself. *Budget Motor Inn*, DR #179 (3/24/87).

* Where the installation of underground storage tanks at a pre-existing truck stop may result in a significant impact on one or more of Act 250 criteria, a permit is required. *Spaulding's Fuels*, DR #172 (6/10/82).

* The establishment of a business activity and subsequent addition to original structure triggered

Act 250 whether considered as commercial development or as a substantial change to a pre-existing development. *Ray Carbonell*, DR #114 (4/29/80).

* Conversion of a lumberyard operation to a railroad reconstruction and equipment sales business, and the addition of a coal sales and delivery business, is not a substantial change because the project will not result in any significant impacts. However, the addition of a used truck sales business does constitute a substantial change under Criterion (8). *Robert Varney*, DR #110 (2/20/80).

* Where a town has no permanent zoning and subdivision regulations, the construction on more than one acre of land of floating docks and finger piers off a pre-existing crib/dock constitutes a substantial change, and an improvement for commercial or industrial purposes. *L.J. Aske, Jr.*, DR #105 (8/30/79).

* The addition of a barn to pre-existing structures is not a substantial change where there is no reasonable potential for significant impact on any of the criteria. *Windham Foundation, Inc.*, DR #97 (10/11/78).

* Replacing a failed sewage disposal system serving a shopping mall is not a substantial change requiring review but, it does require an amendment to the original permit. *Juster Associates*, DR #86 (11/28/77), *vacated, In re Juster Associates*, 136 Vt. 577 (1978).

* The addition of an 8,000 square foot office space to an existing 125,000 square foot paper manufacturing facility does not constitute a substantial change. *Boise Cascade*, DR #56 (6/12/74).

* The addition of a gasoline dispensing facility to a racing track does not expand or enlarge the existing enterprise and is thus not a substantial change. *Green Mountain Racing Corp.*, DR #50 (2/26/74).

* The addition of a gasoline service facility to a ski resort is not a development for commercial purposes and does not constitute a substantial change. *Okemo Mountain, Inc.*, DR #49 (2/22/74); *Magic Mountain Corp.*, DR #47 (2/1/74); *The Fayston Co.*, DR #44 (1/21/74).

* The construction of an office space and truck garage as additions to two existing buildings does not constitute a substantial change. *Maxham Supply Co.*, DR #36 (10/31/73).

* The expansion of a grocery store for additional bottle storage does not constitute a substantial change. *The Village Square Co.*, DR #35 (10/31/73).

* The replacement of a manufacturing facility destroyed by fire is not a substantial change, but the expansion of the replacement to accommodate added work force is. *Montgomery Schoolhouse, Inc.*, DR #32 (10/3/73).

* The addition of a building to house a boiler for a manufacturing plant is not a substantial change; however, incremental improvements to a facility might, in the aggregate, constitute a substantial change in the future. *Goodyear Tire and Rubber Co.*, DR #34 (9/26/73).

- * The addition of a building for lumber manufacturing to a rough mill at a lumber plant does not constitute a substantial change subject to the provision that the mill submit a list and description of all construction performed at the site since June 1, 1970. *Cersosimo Lumber Co.*, DR #33 (9/26/73).
- * The establishment of a redemption center for bottles in a barn does not constitute a development or a substantial change. *Omer Brosseau*, DR #28 (8/31/73).
- * The addition of a lumber storage shed to a lumber business does not constitute a substantial change. *Britton Lumber Co., Inc.*, DR #25 (7/31/73).
- * The addition of an efficiency apartment to an existing motel is not a substantial change. *The Yodler*, DR #20 (7/16/73).
- * The construction of an 800 square foot addition to an insurance office building is a substantial change to the structure. *New Hampshire Insurance Co.*, DR #19 (6/27/73).
- * The addition of a 6,000 square foot drug store to a shopping plaza is a substantial change. *City Drug Store*, DR #15 (6/20/73).
- * A proposed addition to an office building constitutes a substantial change where the improvement is for commercial purposes and a substantial impact may occur. *Robert J. Dufresne*, DR #16 (6/13/73).
- * The proposed extension of an existing storage shed connected to a grocery store does not constitute a substantial change. *Maple Corner Store*, DR #14 (6/11/73).
- * The addition of two bays totaling 900 square feet to an existing garage facility does not constitute a substantial change. *Raymond McCoy*, DR #12 (6/2/73).
- * The renovation of a restaurant which neither increases seating capacity nor occupancy of the facility, and will result in no change in the use of the facility, is not a substantial change. *The Shed*, DR #10 (5/6/73).
- * A 704 square foot addition to an existing motor lodge, with the capability of accommodating ~ 40 additional persons, constitutes a substantial change. *Stanley Corp.*, DR #7 (5/6/73).
- * The proposed addition of a 4,020 square foot sporting goods shop to an existing hardware store is a substantial change because there is significant increase in square footage and there will be a significant increase in the number of persons using the facility. *Demars Hardware*, DR #8 (4/30/73).
- * The addition of a deck to a restaurant constitutes a substantial change where the addition will increase the number of patrons using the facility. *Three Green Doors*, DR #3 (4/24/73).
- * Installation of woodworking shop in an existing structure is not a substantial change. *Landry &*

Boston, DR #1 (4/19/73).

* The addition of a new mill to a commercial-industrial facility does not constitute a substantial change. *Bell-Gates Lumber Corp.*, DR #CC (4/4/73).

130.5.6 Quarries, Gravel Pits, Asphalt Plants, etc.

* Findings support the Board's conclusion that petitioners' operation of the gravel pit constitutes a substantial change to the development, as defined in the regulatory framework. *In re Barlow*, 160 Vt. 513, 523 (1993).

* § 6081(b) applies to gravel pit operations. *In re L.W. Haynes, Inc.*, 150 Vt. 572, 574 (1988); *In re H.A. Manosh Corp.*, 147 Vt. 367 (1986); *In re Orzel*, 145 Vt. 355 (1985).

* Without establishing a prior extraction rate, it cannot be determined whether future operation will constitute a substantial change. *In re R.E. Tucker, Inc*, 149 Vt. 551, 554 (1988); *In re Orzel*, 145 Vt. 355, 359 (1985).

* So long as pit owner does not exceed its historic extraction rate, that factor does not contribute to an expansion of the nonconforming use. *In re R.E. Tucker, Inc*, 149 Vt. 551, 555 (1988).

* Extracting at or below the historic rate is not a change in the development. *In re R.E. Tucker, Inc*, 149 Vt. 551, 555 (1988); *In re H.A. Manosh Corp.*, 147 Vt. 367, 370 (1986) (Board must first find a cognizable change and then determine whether the change impacts on the criteria listed in 10 V.S.A. § 6086).

* Absent the new equipment and other additions, pit owner may operate as a pre-existing use without a new permit. *In re R.E. Tucker, Inc*, 149 Vt. 551, 555 (1988); *In re H.A. Manosh Corp.*, 147 Vt. 367, 370 (1986).

* When a land use permit is required for a substantially changed pre-existing development, Commission review should not extend to the entire gravel pit operation, but rather should be limited to the substantial changes identified by the Board. *In re R.E. Tucker, Inc*, 149 Vt. 551(1988), affirming *Ronald E. Tucker*, DR #165 (2/27/85).

* Changes instituted at pit, which resulted in significant increase in the amount of dust generated at the site and an increase in the level of noise in neighboring properties, satisfy the second prong of the Board's two-part test under Rule 2(G). *In re H.A. Manosh Corp.*, 147 Vt. 367, 370 (1986).

* A finding that there are no specific plans for the continued operation of the gravel pit fairly and reasonably supports Board's conclusion that it cannot be determined whether future operation will constitute a substantial change. *In re Orzel*, 145 Vt. 355, 359 (1985).

* Substantial increase in use of pit, followed by near dormancy, if not abandonment, from 1978 – 1999, followed by substantial increase since 2000 constitutes substantial change. *In re Big Rock Gravel, LLC, Act 250 Jurisdictional Opinion*, No. 174-8-09 Vtec, Decision and Order, at 9 (10/29/10).

- * No cognizable change where quarry deepens extraction to depth below water table where operation already entails dewatering (although present quarrying is above water table) and discharge pursuant to discharge permit which will not need altering. *F.W. Whitcomb Const.Co.*, DR #408, FCO at 11 (12/19/02).
- * Non-contiguous areas of excavation are considered as separate and distinct pits for the purposes of determining whether there has been a substantial change to a pre-existing gravel extraction operation. *Thomas Howrigan Gravel Extraction*, DR #358 (8/30/99).
- * Because two formerly active gravel pits had been abandoned and therefore did not retain their pre-existing status, an Act 250 permit was required before further extraction operations could commence at those locations. *Thomas Howrigan Gravel Extraction*, DR #358 (8/30/99).
- * Where owners failed to produce evidence on rate of gravel extraction for the years 1975-1991, Board could not conclude that there had not been a substantial change to the pre-existing operations. *Thomas Howrigan Gravel Extraction*, DR #358 (8/30/99).
- * The addition of a rock crusher at gravel pit constituted a substantial change. *Thomas Howrigan Gravel Extraction*, DR #358 (8/30/99).
- * Even if the combined 1998 rate of extraction from three distinct gravel pits was compared with the historic annual rate of extraction for *all* pits on the subject property, the Board would conclude that there had been a substantial change to the historic operations at those three pits. *Thomas Howrigan Gravel Extraction*, DR #358 (8/30/99).
- * Increase in noise, dust, and traffic flow, and impact on vegetation and aquatic organisms, cause proposed operations to have a significant potential impact. *Champlain Marble Corp. (Fisk Quarry)*, DR #319 (10/2/96); *John Gross Sand and Gravel*, DR #280 (7/28/93).
- * With respect to the "change" issue, the term change includes an increase in the extraction rate and a change from sporadic to daily operation. *Norwich Associates, Inc.*, DR #275, FCO at 13 (4/3/96); *Robert and Barbara Barlow*, DR #234 (9/20/91), *aff'd, In re Barlow*, 160 Vt. 513 (1993).
- * A ruling of substantial change cannot be based simply on expansion of the extraction area in a gravel/sand pit operation. *John Gross Sand and Gravel*, DR #280 (Supplementary) (7/28/94).
- * Addition of rock splitter to permitted quarry operation deemed a substantial and material change. *J.P. Carrara & Sons*, #1R0589-3-EB (2/2/94). [EB #554]
- * Cognizable physical changes have occurred with respect to the use of a crusher and the construction of a new access road and associated destruction of a berm. *John Gross Sand and Gravel*, DR #280 (7/28/93).
- * Contiguous expansion of the excavation area of a gravel pit within a pre-existing tract extraction area while following a gravel vein is not a change, provided that the excavation operation is

expanded and operated in essentially the same manner as it was before June 1, 1970. *Dale E. Percy, Inc.*, DR #251 (3/26/92).

* Permit not required for pre-existing gravel pit where extraction rate does not have potential for significant impacts, and future extraction rates will not exceed set limit. *Dale E. Percy, Inc.*, DR #251 (3/26/92).

* Where an increase in tree cutting is a natural outgrowth of a gravel pit excavation area expansion, such tree cutting is not a cognizable change. *Dale E. Percy, Inc.*, DR #251 (3/26/92).

* Substantial change in a gravel pit operation occurs when there is an increase of more than 10 percent per cent over the pre-1970 extraction rates accompanied by the potential for significant impacts. 10 V.S.A. §6081(b); *In re Dale E. Percy*, DR #251, FCO at 6 (3/26/92), citing *Re: H.A. Manosh*, DR #163, FCO at 6 n.2 (8/2984)), *aff'd on other grounds, In re Manosh Corp.*, 147 Vt. 367, 369-70 (1986)); *see also, Re: Barlow*, DR #234, FCOO at 10 (9/20/91), *aff'd on other grounds, In re Barlow*, 160 Vt. 513 (1993). *RE: Champlain Marble Corp. (Fisk Quarry)*, DR # 319, FCO (10/2/96)

* No substantial change would occur where petitioners did not propose an increase in gravel extraction above pre-1970s rate, did not plan to change the nature of the operation or the type of machines used at the site, and did not plan to make any change that would result in a significant impact. *Robert and Barbara Barlow*, DR #222 (12/26/90).

* There must be evidence of a regular and constant commercial operation of a gravel pit prior to 1970 for a gravel extraction operation to qualify as an exempt pre-existing development. *Rick Harootunian*, DR #198 (3/2/88).

* The addition of a gravel crusher in 1987 and the increase of the extraction rate resulted in significant impacts, which constituted a "significant change" requiring a permit. *Rick Harootunian*, DR #198 (3/2/88).

* Gravel operation which includes significant alterations to land, including the construction of an access road, for the commercial purpose of the sale of gravel, is a "development." *Hugh Sparks Gravel Pit*, DR #195 (3/2/88).

*A permit for a pre-existing commercial gravel extraction operation is required as a substantial change where the operation was converted from an intermittent to a permanent one, and other changes, not attributable to the natural operation of the pit at its pre-1970 levels, resulted in significant impacts. *Lincoln Haynes Gravel Pit*, DR #192 (9/25/87), *aff'd, Lincoln W. Haynes*, 150 Vt. 572 (1988).

* Resumption of extractions at pre-existing gravel pit is a substantial change because significant impacts would result from major increase in rates of extraction over the historical rates, where there was a long period of time that had elapsed when there was no activity at the site. *Orzel Gravel Pit*, DR #174 (10/2/86).

* Addition of mechanized equipment and dramatic increase in extraction rate from a pre-existing

gravel pit is a substantial change. *H.A. Manosh Corp.*, DR #164 (4/17/85), *aff'd, In re H.A. Manosh Corp.*, 147 Vt. 367 (1986).

* If construction of improvements or a substantial change in the gravel pit operation results in a significant impact, Act 250 review would be appropriate. *Weston Island Ventures*, DR #169 (6/3/85).

* An extraction area opened after June 1, 1970, which is a substantial distance from other pre-existing extraction areas and is separated from the remainder of the property by a State highway, is a substantial change of the pre-existing gravel pit. *Weston Island Ventures*, DR #169 (6/3/85).

* Installation of an alternative access roadway, excavation of settling lagoons, withdrawal of water from an adjacent river, installation of a gravel wash plan, and installation of a truck scale and scale house within the premises of a pre-existing gravel pit constitute a substantial change. *Ronald E. Tucker*, DR #165 (2/27/85), *aff'd In re R.E. Tucker, Inc.*, 149 Vt. 551(1988).

* A non-significant increase in the volume of extraction from pre-existing gravel pits will not trigger Act 250 jurisdiction. *Howard A. Manosh*, DR #163 (8/1/84).

* Continued extraction from a pre-existing gravel pit in a manner consistent with the history of past operations on the site may occur without prior issuance of an Act 250. *Howard A. Manosh*, DR #163 (8/1/84).

* Significantly increased extraction rate at pre-existing gravel pit, use of the pit in a manner inconsistent with past history, or other change to the nature of the operation might constitute a substantial change. *Howard A. Manosh*, DR #163 (8/1/84).

* An increase in the extraction rate from a gravel pit of more than 10 percent in excess of the pre-existing range could be a substantial change if accompanied by other potential impacts to the Act 250 criteria. *Howard A. Manosh*, DR #163, FCO at 6 n.2 (8/1/84)(cited in *Dale E. Percy, Inc.*, DR #251 (3/26/92)).

* Act 250 jurisdiction might be asserted over changes in a pre-existing gravel operation for the following reasons: 1) acquisition and removal of gravel on additional land; 2) opening a new area a substantial distance from the pre-existing area; 3) the addition of a stone-crusher; or 4) removal of gravel in or across a stream or body of public waterway, or across a public highway. *Albert Nadeau*, DR #141 (6/23/83).

* Reopening of a gravel pit, improvements of a road, and addition of sand and gravel do not constitute substantial changes where these activities have not resulted in impacts. *Robert Varney*, DR #110 (2/20/80).

* For pre-existing quarry operations, Act 250 jurisdiction is triggered only if proposed improvements will either substantially change the exempt development, or are a development by themselves. *Vermont Marble Co.*, DR #101 (12/13/78).

* It is possible that the pre-existing gravel operation has not been changed even though it is

apparent that the gradual expansion of the area directly involved is causing greater environmental impact. *Clifford's Loam and Gravel, Inc.*, DR #90 (11/6/78).

* When a pre-existing gravel pit operation is expanded and operated in essentially the same manner as it was prior to the effective date of Act 250, and the existing impacts including noise, dust, and traffic will be increased as the operation expands, Act 250 jurisdiction will be triggered only where substantial changes occur in such an operation. *Clifford's Loam and Gravel, Inc.*, DR #90 (11/6/78).

* Act 250 jurisdiction might be asserted over changes in a pre-existing gravel operation for the following reasons: 1) acquisition and removal of gravel on additional land; 2) opening a new area a substantial distance from the pre-existing area; 3) changing the nature of the operation as might occur by the addition of a stone-crusher; or 4) removal of gravel in or across a stream or body of public waterway, or across a public highway. *Clifford's Loam and Gravel, Inc.*, DR #90 (11/6/78).

* The reopening of a gravel pit for commercial purposes on more than 10 acres of land, after the use was discontinued prior to the effective date of Act 250, constitutes a substantial change and requires a permit. *James F. McCullough*, DR #18 (6/27/73).

*“Some level of dust and noise is to be expected from an operating rock quarry and the various pieces of equipment and trucks that service it. In addition, it should be the reasonable expectation of anyone moving to or living adjacent to an existing rock quarry to experience environmental impacts, such as dust and noise.” *NE Materials Group, LLC et al Act 250*, No. 75-6-17 Vtec., at 31 (2018). **May be appealed**

130.5.7

Communications Towers and Lines

* Added equipment and compressor, scope and extent of road construction, constitute material and substantial changes because they have the potential for significant impact under at least 4 criteria. *Montpelier Broadcasting Inc.*, #5W0396-EB (2/17/94). [EB #571]

* The addition of two microwave dishes to an existing television tower constitutes a substantial change to a pre-existing use. *Karlen Communications, Inc.*, DR #89 (1/11/78).

* The installation of a transmitter tower as part of a plan to expand the broadcasting range of a college radio station does not constitute a substantial change. *Goddard College*, DR #51 (3/13/74).

* The addition of two attachments to a tower, each ~ 30 inches in size, does not constitute a substantial change where there are no substantial impacts. *Vermont Electric Power Co.*, DR #26 (8/8/73).

130.5.8

Municipal projects

* Proposed improvements to village water system that included less than 9 1/2 acres of involved land and increased system's capacity by less than 10% could not be considered a substantial change. *Village of Waterbury Water Commissioners*, DR #227 (2/5/91).

* Municipal improvements to a pre-existing water and sewer system constitute a substantial change where significant impacts to the environmental criteria may occur. Unforeseeable changes which did not originally require a permit may bring the project within Act 250 jurisdiction if the changes have significant impacts. *City of Montpelier Water System Improvements*, DR #190 (9/6/88).

* Municipal improvements to a pre-existing water and sewer system do not constitute a substantial change where there is new sewer line and new water line construction but where there will be no significant impacts. *City of Montpelier Water System Improvements*, DR #190 (6/25/87).

*The Board declines to assert jurisdiction over the development under Criterion 9(A), since the municipality already undertakes extensive review of growth impacts in its local planning process. *City of Montpelier Water System Improvements*, DR #190 (6/25/87).

130.5.9 Miscellaneous

* Conversion of a pre-existing commercial facility to a residential treatment center for alcohol or drug dependent adolescents, does not constitute a substantial change where only interior renovations are proposed and no substantial impacts will occur. *Esprit, Inc.*, DR #181 (6/3/87).

* Proposal to install gas transmission lines, three regulator stations, 211 miles of distribution mains, and service connections to an existing system will represent a substantial change requiring a permit because the new construction may result in impacts. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd, In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]

* Excavation of a pond, filling of a pre-existing pond, equipment storage on premises, and construction of a 650 foot long perimeter fence are substantial changes which raise the potential for impacts. *S.G. Phillips Corp.*, DR #152 (5/29/84).

* Construction involving the demolition of a structure and an additional 150 parking spaces is considered a substantial change. *Medical Center Hospital of Vermont*, DR #85 (11/8/77), *rev'd, Committee to Save Bishop's House v. Vermont Medical Center*, 136 Vt. 213 (1978).

* The installation of a storm portico on an existing building does not constitute a substantial change. *Department of Forests and Parks*, DR #60 (7/30/74).

* The storing of junk motor vehicles in proper disposal areas does not constitute a substantial change. *Dept. of Highways*, DR #K (6/8/71).

V. PARTY STATUS / FRIENDS OF THE COMMISSION / STANDING

A. General

141. General

*Under 10 V.S.A. § 6085(c)(1)(E), any adjoining property owner or other person who has a

particularized interest protected by Act 250 that may be affected by an act or decision by a district commission in entitled to party status. The following must be shown: (1) a specified interest protected by Act 250 that is particular to the movant, not a general policy concern shared by the general public, the proposed project may adversely affect their particularized interest, and a causal connection including an offer of proof to show that th potential impact is more than mere speculation and theory. *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake’s request for party Status, at 2-3 (3/17/2017); *Gingras Act 250 Amended Permit*, No. 22-3-15 Vtec, Decision on Motion for Party Status, at 4 (8/21/2015) (citing *In re Pion Sand & Gravel Pit*, No. 245- 12-09 Vtec, slip op. at 7)

* To obtain party status, person must first show that they have a specified interest protected by Act 250 that is particular to the person, not a general policy concern shared with the general public; second, person must demonstrate a causal connection between the proposed project’s potential adverse impacts and the person’s particularized interests. *Gingras Act 250 Amended Permit*, No. 22-3-15 Vtec, Decision on Motion for Party Status, at 4 (8/21/2015); *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 4 (2/4/15); *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 7 (7/2/10); *In re Big Spruce Road Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 6 (4/21/10)(Durkin, J.); *In re Champlain Marina, Inc. Dock Expansion*, No. 28-2-09 Vtec, Decision on Multiple Motions at 5–6 (7/31/09)(Durkin, J.).

* Rulings of administrative agencies on party status in Act 250 proceedings "are infused with a presumption of validity and cannot be overcome unless clear and convincing evidence is presented." *In Re Chittenden SWD*, 162 Vt. 84, 90 (1994), quoting *In re Great E. Bldg. Co.*, 132 Vt. 610, 612 (1974).

* “Party status” allows those to whom it is granted to “secure standing to participate in the district commission proceedings and appeal the district commission determination on a permit application.” *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, Decision on Motion for Party Status at 3 (7/1/11) (citing 10 V.S.A. §§ 6085(c)(1), 8504(d)(1)).

* Party status allows people to “appeal the issuance of a state land use permit, and raise issues under particular Act 250 criteria in the subsequent appeal, if they are ‘aggrieved person[s],’ provided that they meet three additional requirements: (1) they were granted party status as to the criteria by the district commission; (2) they ‘participated’ in the district commission proceedings; and (3) they retained party status as to the criteria at the end of the district commission proceedings. 10 V.S.A. § 8504(a), (d)(1). In other words, an ‘[aggrieved] person may only appeal those issues under the criteria with respect to which the person was granted [final] party status.” *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, Decision on Motion for Party Status at 3 (7/1/11) (citing 10 V.S.A. § 8504(a), (d)(1)).

* 10 V.S.A. § 6085(c)(l)(E) makes no distinction between the two categories of persons - "other persons" or "adjoining property owners" - who might be able to qualify for party status. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 5 (1/28/11).

* Standing may be conferred where plaintiffs establishes that they “use” the area that may be affected and will therefore “directly” experience an alleged lessening of the “aesthetic and recreational values” of an area. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 26 (02/14/14)(citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

* To attain party status, Appellants must show that they have a particularized interest protected by Act 250 that may be affected by the District Commission’s decision to grant the permit. 10 V.S.A. § 6085(c)(1)(E). *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 1 (3/14/2018)

* “Once granted party status under a given Criterion, the scope of that status generally extends to the full reach of that Criterion, unless the District Commission or this Court on appeal specifically carves out a part of that Criterion under which the party does not have party status.” *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 6 (2/8/2018), citing *In re Rinker’s, Inc.*, No. 302-12-08 Vtec, slip op. at 2–4 (Vt. Envtl. Ct. Sep. 17, 2009) (Wright, J.).

141.1 Difference between “party status” and “standing”

* “Party status” is a designation used when new parties seek to join an action initiated by another, but “standing” is the proper analysis when parties wish to appeal, or their right to do so is being challenged. *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions FN1 at 1 (2/2/10)(citing *In re Putney Paper Company, Inc.*, DR #335, FCO at 5–6 (5/29/97)); *In re Marcelino Waste Facility*, No. 44-2-07 Vtec, at 2 (11/6/07) (Durkin, J.); *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec at 1, FN2 (3/17/2017).

* Standing and party status are not the same but once determination of party status has been made, particularly using “aggrieved person” and “particularized interest” the analyses are similar, perhaps identical. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 29 (1/20/10).

* The distinction between standing and party status is slight: a person who wishes to initiate an appeal or declaratory ruling request must demonstrate *standing* to do so, whereas the question of *party status* arises when a person wishes to be a party to a proceeding initiated by someone else. *Agency of Transportation (Bennington Bypass)*, DR #349 (11/12/97); *Putney Paper Company, Inc.*, DR #335 (5/29/97).

142. “Party” and “interested party”

* “The Court cannot adjudicate a party status challenge when that party has never asserted that they have status to participate in this appeal.” *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 23 (8/6/14).

* 10 V.S.A. §6085(c)(l)(E) makes no distinction between the two categories of persons - “other

persons" or "adjoining property owners - who might be able to qualify for party status. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 5 (1/28/11).

* Prior to January 31, 2005, Act 250 distinguished between adjoining property owners, who were considered to be parties by right who could request a hearing on an Act 250 application, and other parties, who were allowed to participate only by permission of the Environmental Board. See 10 V.S.A. § 6035(a), (c)(I) (2003); EBR 14(A), (B) *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 5 n.3 (1/28/11).

* An appellant has party status under an Act 250 Criterion if he alleges an injury to a "particularized interest" protected by that Criterion, "attributable to" the decision on appeal, that "can be redressed" in the proceeding. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 5 (5/1/08), *aff'd in part / rev'd in part*, *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08), quoting 10 V.S.A. § 8502(7) (defining "person aggrieved").

* Person whose interest in a permit was contingent upon its rights in land subject to the permit, loses that interest upon loss of those rights. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.).

* Person who lost its interest in a permit had no standing to appeal the Commission's grant of the permit amendment to another person. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.).

* Party status considerations show the need to interpret the statute in a way that recognizes the impact on an affected party, rather than only the physical site of the development activity. *In re Killington, Ltd.*, 159 Vt. 206, 213 (1992).

* It is reasonable for neighboring landowners to rely upon the terms and conditions of a permit, or at least to rely on their right to be heard on an application to amend the permit. *In re Eustance*, No. 13-1-06 Vtec, Decision at 12 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* A person's participatory "rights" are defined with reference to those criteria on which he holds party status. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 5 - 6 (7/10/03) [EB #831], citing *Re: Berlin Corners Associates*, DR #62, Order at 2 (9/12/74) (persons may participate as parties only with regard to those issues upon which they are admitted as parties); *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD at 6 (5/22/01) (if the Board grants party status, it "will proceed with substantive review on any criteria concerning which it determines that the appellant qualifies for party status"), citing *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, FCO at 7 (10/11/95); and see, *In re Green Peak Estates*, 154 Vt. 363, 372-73 (1990) (once an appeal has been filed with the Board, there is no need for other parties who had party status at Commission level to file a cross-appeal in order to have party status before the Board; such parties are entitled to participate on those issues in which they have party status, regardless of whether they filed a cross-appeal); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518 (1975); *In re Preseault*, 130 Vt. 343, 348 (1972) (parties who had an interest in the

original proceeding may participate as proper parties at the second set of hearings).

* Petition for party status denied where petition fails to state how party's interests under the criteria might be directly affected and differ from those of the general public. *Re: Okemo Limited Liability Company*, #2S0351-34-EB, MOD (1/7/05).

* Term "interested party" includes those who would qualify for party status in Act 250 proceedings, namely statutory parties as well as a party with an identifiable stake in the proceedings. *Costantino Antique Business*, DR #262 (7/30/93).

* The term "party" includes persons who have requested and been denied party status by Commission. *Swain Development Corp.*, #3W0445-2-EB (7/31/89). [EB #430M]

* When the parties who obtained preliminary party status appeal a denial of final party status, they must have availed themselves of the opportunity to participate in order to preserve their right to appeal to this Court. *In re North East Materials Group, LLC*, Decision on Motion for Party Status 35-3-13 Vtec at 4 (8/21/13).

*The appellant's interest protected by one of the Act 250 criteria must be particularized; general policy concerns shared with the general public are not a sufficient basis for individual party status. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 5 (3/13/13) (citing *In re Pion Sand & Gravel Pit*, No. 245-12-09 Vtec, slip op. at 7) (Vt. Super. Ct. Env'tl. Div. July 2, 2010)(Durkin, J.); *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 5 (2/13/15).

* Movants may be entitled to interested person status to participate in the appeal of other appellants in this case, despite their failure to prove entitlement to party status as appellants. Interested person status requires a showing of the reasonable possibility of harm to a particularized interest just as appellant party status does, but interested person status does not require participation in the proceedings below. *In re North East Materials Group, LLC*, Decision on Motion for Party Status 35-3-13 Vtec at 5 (8/21/13).

142.1 Particularized Interest

*Moving party must demonstrate that the proposed project may adversely affect their particularized interest, but no additional requirement to show adverse impact is worse than pre-existing impact. *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake's request for party Status, at 3 (3/17/2017).

* Although an interest is particularized if it is specific to the appellant rather than a general policy concern shared with the public, an interest may still be particularized even if it is shared with multiple members of the general public so long as it is specific to the party and not merely an interest in "the common rights of all persons." *Gingras Act 250 Amended Permit*, No. 22-3-15 Vtec, Decision on Motion for Party Status, at 4 (8/21/2015) (citing *In re Pion Sand & Gravel Pit*, No. 245-12-09 Vtec, slip op. at 7 (Vt. Super. Ct. Env'tl. Div. July 2, 2010) (Durkin, J.)); *Agri-Mark, Inc*, No. 122-8-14 Vtec, Decision on Motion, at 3 (5/20/15).

- * Regularly traveling a route impacted by a project is sufficient for provisional standing if the fact is uncontroverted and thus construed in a light most favorable to the impacted party. *Killington Resort Parking Project Act 250 Amendment*, No. 173-12-13 Vtec., Decision on Motion to Deny Party Status at 7 (8/5/14).
- * Regular use of the roads for business interests is not enough to establish a particularized interest under Criterion 5 if the interest regarding the impact is more likely based on speculation. *Killington Resort Parking Project Act 250 Amendment*, No. 173-12-13 Vtec., Decision on Motion to Deny Party Status at 8-9 (8/5/14).
- * Party status based on Criterion 8 is denied if an assertion by the impacted parties that a “project might be seen from their respective properties or that they will experience some other aesthetic impact has not been made.” *Killington Resort Parking Project Act 250 Amendment*, No. 173-12-13 Vtec., Decision on Motion to Deny Party Status at 10 (8/5/14).
- * Party status under Criterion 9 (K) related to traffic will be denied if a “reasonable possibility of harm to an interest related to traffic under Criterion 9(K) that is particular to them, rather than an interest shared with the general public” is not demonstrated. *Killington Resort Parking Project Act 250 Amendment*, No. 173-12-13 Vtec., Decision on Motion to Deny Party Status at 11 (8/5/14).
- * Risk of soil erosion or dangerous or unhealthy conditions on or near a property can be alleged to show a particularized interest protected by criterion 4. *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 12 (8/6/14).
- * A showing of particularized interest in traffic conditions can be demonstrated by traveling the roads in the immediate vicinity of the proposed project regularly. *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 14 (8/6/14).
- * Use of natural resource for recreation and aesthetic purposes, such as paddling, observing wildlife, and enjoying the natural beauty of the river, can constitute a particularized interest in that resource. *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 5 (2/4/15)(citing *In re Bennington Wal Mart*, No. 158-10-11 Vtec, slip-op. at 11).
- * Use of a river that flows across a property for recreation and birdwatching constitutes a particularized interest. *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 7 (2/4/15).
- * Regular use of a walk to access the “school, post office, or downtown locations or for exercise, recreation, and social interaction constitutes a particularized interest in that area.” *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 8 (2/4/15).
- * The test used is the same as that applied in a standing analysis. “The Court asks whether the interests alleged are specific to the Appellant or are generalized concerns shared by members of the general public.” *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, Decision on Motion for Party Status at 6 (7/1/11) (citing *In re Pion Sand & Gravel Pit*, No. 245-12-09 Vtec, slip op. at 7) (Vt. Super. Ct. Envtl. Div. July 2, 2010) (Durkin, J.)); *In re Champlain Marina Inc., Dock Expansion*, No. 28-

2-09 Vtec, slip op. at 5–7 (Vt. Env'tl. Ct. July 31, 2009) (Durkin, J.); *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 4 (2/4/15); *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 5 (2/13/15).

* A particularized interest is “specified interest protected by Act 250 that is particular to [the petitioner], not a general policy concern shared by the general public. *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 9 (4/12/12); *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 5 (2/4/15).

* Petitioners’ affidavits alleging that they use nearby river for recreational purposes and wildlife viewing and that they are concerned that the project will affect the flood plain, resulting in erosion and sediment that could degrade water quality and affect petitioners’ use and enjoyment of the river are sufficient to establish a particularized interest under Criteria 1(D) and 1(F). *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 11 (4/12/12).

* Intervenors adequately assert that their particularized interests may be affected by the outcome of the jurisdictional opinion, because if Act 250 jurisdiction does not attach and a permit is not required then they would [not] have an opportunity to participate in the review and seek some mitigation of the impacts. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 19 (7/30/10).

* The procedural provisions of 10 V.S.A. § 6085(c)(2) only apply to proceedings before the district commissions and that subsection is not applicable to JO’s or their reconsideration by the district coordinators. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 21 (7/30/10).

* To obtain party status, person must first show that they have a specified interest protected by Act 250 that is particular to the person, not a general policy concern shared with the general public; second, person must demonstrate a causal connection between the proposed project’s potential adverse impacts and the person’s particularized interests. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 7 (7/2/10); *In re Big Spruce Road Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 6 (4/21/10)(Durkin, J.); *In re Champlain Marina, Inc. Dock Expansion*, No. 28-2-09 Vtec, Decisions on Multiple Motions at 5–6 (7/31/09)(Durkin, J.).

* “[T]he mere fact Neighbors’ particularized concerns may be shared by other members of the public does not cause a failure on Neighbors’ part to demonstrate particularized injuries.” *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 4 (2/4/15); *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 14 (7/2/10); *In re Champlain Marina, Inc. Dock Expansion*, No. 28-2-09 Vtec, Decision on Multiple Motions at 4 (7/31/09) (Durkin, J.); see also *Re: McLean Enters. Corp.*, #2S1147-1-EB, MOD at 8 (9/19/03) (explaining that it is irrelevant if other individuals may also be similarly impacted from a development as long as the impacts to the petitioners are particular to them, concrete, and not an impact only affecting the common rights of all persons).

- * "Neighbors' interest in avoiding undue air pollution while recreating and farming is particular to the owners of a neighboring camp-house and not a general concern shared with the public." *In re Pion Sand and Gravel*, No. 245-12-09 Vtec, Decision on Motion for Party Status at 9 (7/2/2010).
- * Neighbors whose properties are accessed solely by Big Spruce Road, a privately owned road within the Spruce Peak development project, have a particularized interest protected by criterion 9(G). *In re Big Spruce Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 6 (4/21/10).
- * Neighbor who raises food for his family has a particularized interest under Criterion 9B. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 9 (12/1/08)(citing *In re Nile & Julie Duppstadt*, Permit # 4C1013-EB (Corrected), Findings of Fact, Concl. of Law, & Order, at 19 (4/30/99) (agricultural uses are often incompatible with residential uses; noise, odors, and dust associated with agricultural uses can disturb adjacent residents)); *In re Nile & Julie Duppstadt*, # 4C1013-EB (Corrected), Mem. of Decision, at 2 (11/25/98) (children, dogs, and cars associated with residential uses can create risks for livestock and crops)).
- * The question of whether the interest raised by potential interveners is general or "particularized" depends on whether the interest is definite and related to the development proposal or whether it is "of an abstract and indefinite nature," such as the shared concerns about obedience to law discussed in *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23–24 (1998), and cases cited therein. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 10 (5/1/08), *aff'd in part / rev'd in part*, *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08).
- * To demonstrate party status, litigant on appeal must show a causal link between a decision on a proposed project and an alleged harm to the litigant's particularized interests. *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 2-3 (11/14/12).
- * Party status warranted under Criterion 1(E) where petitioner claimed that the project could lead to risk of a washout of petitioner's rail line and by supporting this claim with exhibits and proposed testimony of three employees. *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 3 (11/14/12).
- * Party status warranted under Criterion 10 where petitioner demonstrated a particularized interest in the enforcement of City Plan provisions related to railways, specifically citing such provisions, and alleging the possibility that the project might harm its interest in the enforcement of those provisions. The enforceability of the cited City Plan provisions go to the merits of the Criterion 10 claim, not party status or standing to bring the claim. *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 4 (11/14/12).
- * In order to show a reasonable possibility of harm to an individual's particularized interests under Criterion 10, individuals must "sufficiently allege a link between the proposed project and the potential violation of the town plan provisions the individuals cite." In other words, it is not enough to merely quote from a municipal plan; to have standing, a litigant must articulate a causal link

between a decision on a proposed project and reasonable possibility of harm to litigant's particularized interests. *In re North East Materials Group, LLC*, Decision on Motion to Dismiss Parties 35-3-13 Vtec at 4,5 (8/21/13).

*Cross-Appellant has sufficiently particularized interest under Criterion 1(D) because Cross-Appellant owns property adjoining the Project site and her interest in preventing additional flooding on her property is particular to her. *In re Union Bank*, 7-1-12 Vtec at 8 (4-1-13).

*Party resides within same town as the project site, approximately 4.5 miles away, and makes regular trips past the site when driving his daughter between their home and her school. This, however, is not sufficient to establish that Mr. Cunningham has a particularized interest in the aesthetic character of the project site. He does not drive by the project site in order to take advantage of the aesthetic beauty of the area; he drives by because the public highway connects his home and his daughter's school. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 26 (02/14/14).

*Party has no particularized interest in the aesthetic character of the project; his interest is the same as any person who happens to drive this section of Route 103 on a regular basis. Simply driving by a development project as part of a daily routine is not the same as the use of an area that creates a particularized interest in the aesthetic character of the area, such as hiking, fishing, boating, picnicking, or the like. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 27 (02/14/14).

* An interest is particularized if it is specific to the party seeking status, as opposed to "a general policy concern shared with the general public." *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 1 (3/14/2018), citing *In re Pion Sand & Gravel Pit*, No. 245-12-09 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Jul. 2, 2010) (Durkin, J.).

*There is a distinction between a particularized interest in protecting the agricultural potential of prime agricultural soils and an interest in the ancillary benefits of life in an agricultural area, such as pastoral views, wildlife, a dispersed settlement pattern, or an agricultural character of the neighborhood. Criterion 9(B) protects the former and other criterion, like 8, 9(H), and 9(L) protect the later. *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/22/19)

142.1.1 Requirement of causal connection to potential adverse impacts from project

*"In order to show this causal connection, the moving party must provide an offer of proof to show that the potential impact is more than mere speculation and theory. *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake's request for party Status, at 3 (3/17/2017)(internal quotations omitted).

* Demonstrating a causal relationship between development and an affected particularized interest

requires a reasonable possibility that the commission's decision may affect the particularized interest. *Gingras Act 250 Amended Permit*, No. 22-3-15 Vtec, Decision on Motion for Party Status, at 5 (8/21/2015) (citing *In re Bennington Wal-Mart Demolition/Constr. Permit, No 158-10-11 Vtec, slip op. at 9-10 (4/24/12)*); *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 8 (2/4/15); *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 5 (2/13/15).

* Organization seeking party status “need only show that there is a reasonable possibility that their members’ particularized interests may be affected by a decision on the proposed project.” *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 9-10 (4/12/12); *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 5 (2/4/15).

* “Appellant must also provide an offer of proof that shows how the particularized interests he alleges may be affected by the issuance of the state land use permit.” (i.e. a causal connection between the project and the interests he claims are protected by the criteria). *Gingras Act 250 Amended Permit*, No. 22-3-15 Vtec, Decision on Motion for Party Status, at 4 (8/21/2015) (citing *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, Decision on Motion for Party Status at 6 (7/1/11); *In re Pion Sand & Gravel Pit*, No. 245-12-09 Vtec, slip op. at 7) (Vt. Super. Ct. Envtl. Div. July 2, 2010) (Durkin, J.).

* To obtain party status, person must first show that they have a specified interest protected by Act 250 that is particular to the person, not a general policy concern shared with the general public; second, person must demonstrate a causal connection between the proposed project’s potential adverse impacts and the person’s particularized interests. *In re North East Materials Group, LLC*, Decision on Motion for Party Status 35-3-13 Vtec at 5 (8/21/13); *In re Pion Sand & Gravel Pit, #245-12-09 Vtec*, Decision on Motion for Party Status at 7) (7/2/10)(citing *In re Big Spruce Road Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 6) (4/21/10) (Durkin, J.); *In re Champlain Marina, Inc. Dock Expansion*, No. 28-2-09 Vtec, Decision on Multiple Motions at 5–6 (7/31/09) (Durkin, J.); *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 4-5 (2/4/15).

* Neighbors with a particularized interest must also demonstrate that the interest protected under Act 250 will be affected by a decision on the pending Amendment Application or they lack party status. *In re Big Spruce Road Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 10 (4/21/10).

* The party moving for status must show a “causal connection between [the] proposed project and the potential impact to their particularized interests.” *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 1 (3/14/2018), citing *In re Pion Sand & Gravel Pit*, No. 245-12-09 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Jul. 2, 2010) (Durkin, J.) (citation omitted).

142.2 Cases

* An adjoining property owner is eligible for party status under 10 V.S.A. § 6085(c)(1)(E) if activity related to permittee’s development adversely effects that neighbor’s prime agricultural soil under

10V.S.A. §6086(9)(B)(i). *Gingras Act 250 Amended Permit*, No. 22-3-15 Vtec, Decision on Motion for Party Status, at 6-7 (8/21/2015)(concerning a horse pasture limited by fields soaked with wastewater discharge that harmed horses health).

*Kayaker has particularized interest protected by Act 250 Criteria 1, 1(B), 1(E), and 4 where he established a reasonable possibility of harm to the brook from untreated stormwater and soil erosion derived from the project. *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 5-7 (2/4/15).

* Use of the river for recreation and bird watching creates a particularized interest in the river at that location under criteria 1(B), 1(E), and 4, however without a demonstration of how or if the alleged decreased water quality one and a half miles upstream from her farm will injury to her interest, the court is left with nothing more than speculation and cannot grant party status. *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 7-8 (2/4/15).

* Walkway users established a particularized interest in the walkway and desmonstrated that there is a reasonable possibility that the project may create a risk of mosquitos and pathogens, however they failed to establish a reasonable possibility of injury to an interest protected by criteria 1, 1(B), or 4. "These criteria are wholly unrelated to the interest that" the petitioners have in using the walkway. *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 8-9 (2/4/15).

*Appellant's concerns that a neighboring project could pollute her land and water with human effluent, and that such pollution could jeopardize her ability to maintain water quality on her land in compliance with the Vermont Family Forest Program, were not general policy concerns shared with the general public, but were interests particular to appellant under Criteria 1, 1(A), and 1(B). *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 7 (3/13/13).

*Appellant met the threshold for party status under Criteria 1, 1(A), and 1(B) by including photographs, maps, and affidavit by a professional engineer, and by pointing to the absence of a wastewater permit that covers the maximum per-day number of users that Applicants propose to have on the land. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 8 (3/13/13).

*Appellant's concern that an adjoining project could impact her interest in maintaining the natural condition of a stream running across her property that she regularly walks along, observes, and maintains for the use of wildlife is a particularized interested protected by 1(E). *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 8 (3/13/13).

*Where appellant alleges that stormwater and sediment from a neighboring project could degrade the stream due to its location, and that applicants' use of the site has already caused erosion on appellant's property, this meets the threshold requirement that there is a reasonable possibility that a decision on criterion 1(E) could affect her particularized interests. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 8 (3/13/13).

* Failing to grant final party status on appeal when appellant "failed to identify, or even allege, how the Project's stormwater system might impact its particularized interest." *Diverging Diamond*

Interchange Act 250 and SW Permits, Nos. 50-6-16 Vtec, 169-12-16 Vtec, slip op. at 55 (Vt. Super. Ct. Envtl. Div. June 1, 2018) (Walsh, J.). **May be appealed**

143. Petitions

* Board accepts allegations in party status petition as true, unless person opposing such petition seeks a hearing to contest their veracity. *Re: Conservation Designs, Inc. and Ritchie Crockett Lawton*, #2W1418-EB, MOD at 4 (6/4/04) [EB#847]; *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 2 (5/10/04) [EB #843], citing *Re: Bradford B. Moore*, #5L1423-EB, MOD at 2 (4/27/04) and *McLean Enterprise Corporation*, #2S1147-1-EB, MOD at 6 (9/19/03)

* Where it was unforeseen that one might be called away on official business during prehearing conference, Board will allow a later filing of a party status petition. *Nehemiah Associates, Inc.*, #1R0672-1-EB (3/9/94). [EB #592M1]

*It is within the Court's discretion to consider a late-filed motion for party status. *In re Union Bank*, 7-1-12 Vtec at 4 (4/1/13).

143.1 Offer of proof

* Organization seeking party status "need only show that there is a reasonable possibility that their members' particularized interests may be affected by a decision on the proposed project." *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 9-10 (4/12/12).

* Petitioners need not demonstrate that a decision on proposed project will affect their particularized interests, or that they will prevail at a merits hearing; rather, they need only demonstrate that the project may affect their interests. *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 9-10 (4/12/12)(citing *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 7) (7/2/10)); *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 5 (2/13/15).

* Offer of proof must be more than mere speculation and theory. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 7 (7/2/10); *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake's request for party Status, at 3 (3/17/2017).

* Party status for neighbors denied in total who fail to demonstrate an interest, evidenced by a writing, in neighboring property. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 19-20 (7/2/10).

*The Court finds that there is no heightened standard for obtaining party status when non-moving party has a valid permit. *In re North East Materials Group, LLC*, Decision on Motion to Dismiss Parties 35-3-13 Vtec at 2 (8/21/13).

* Appellants need not prove that the proposed project *will* affect their particularized interests; rather, they must make an “offer of proof” showing “a reasonable possibility that their . . . particularized interests may be affected by” the decision to grant the permit. *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 1 (3/14/2018) citing *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. Apr. 24, 2012) (Walsh, J.) (citations omitted).

144. Representatives

* Request for rehearing an appeal due to inadequate representation denied because a party is not required to have legal counsel, decision to retain lay representative with Act 250 process experience was within the control of the Permittee, and Permittee had prior experience with Act 250 process. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Rev), MOD, (7/24/98). [EB #647], *aff'd*, *In re White*, 172 Vt. 335 (2001).

144.1 Attorneys

* Fact that attorney represents person on one matter does not mean that he, or his partners, represents that person on all other matters. *Catamount Slate, Inc. et al.*, DR #389, MOD at 9 (6/29/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

* Ordinarily, service on or notice to an attorney is equivalent to service or notice on that attorney's clients, see V.R.C.P. 5(b). *Catamount Slate, Inc. et al.*, DR #389, MOD at 5 (7/27/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

* Whether an attorney is a person's representative is a question of fact. *Catamount Slate, Inc. et al.*, DR #389, MOD at 5 (7/27/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

* Movants did not appear in person, but rather had their attorney represent them at the District Commission, which is allowed under Natural Resources Board Act 250 Rule 14 (c). *In re North East Materials Group, LLC*, Decision on Motion for Party Status 35-3-13 Vtec at 4, 5 (8/21/13).

144.2 Non-attorneys

* Non-attorney must provide proof that he is authorized to represent incorporated landowning organization. *In re Chaves Londonderry Gravel Pit, LLC and David Chaves*, No. 60-4-1 Vtec, Entry Order (12/22/11).

* Non-attorneys are permitted to represent a party before the Board. EBR 14(3)(D); *Northern*

Development Enterprises, #5W0901-R-5-EB, MOD (8/21/95) [EB #627]; see, Vermont Agency of Natural Resources v. Upper Valley Regional Landfill Corporation, 159 Vt. 454 (1992).

* Non-lawyer may represent appellants before WFP, provided appellants make written designation of non-lawyer as their representative. *Town of Royalton, #19426-WFP (4/18/95).*

145. Organizations as parties

* "For an organization to have standing, it must demonstrate that '(1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action.'" *In re Bennington Wal-Mart, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 7 (4/12/12); In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 8 (5/1/08), aff'd in part / rev'd in part, In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08)(citing *Parker v. Town of Milton, 160 Vt. 74, 78 (1998); In re: Entergy Nuclear/Vt. Yankee Thermal Discharge Permit Amendment, Docket No. 89-4-06 Vtec, at 6-9 (1/9/07); In re: Unified Buddhist Church, Inc., Indirect Discharge Permit, Docket No. 253-10-06 Vtec, at 2-4 (8/15/07).**

* The germaneness requirement is flexible; members' interests are not required to exactly mirror the organizational purpose. * *In re Bennington Wal-Mart, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 8 (4/12/12).*

* The third element of the organizational standing test is satisfied in development applications because it is the nature of development applications that the relief requested – approval or denial of the application – does not require the participation of any individual members of the organizations in the action. *In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 8 (5/1/08), aff'd in part / rev'd in part, In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08).*

* In a case involving primary agricultural soils, both CLF and VNRC satisfy the second element of the organizational standing test because the organizations are concerned with the preservation of natural resources, including those that are or may be devoted to agricultural uses, and both have advocated the protection of farmland and the prevention of sprawl. *In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 9 (5/1/08), aff'd in part / rev'd in part, In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08).*

* The "particularized interest" required for standing under the first element of the organizational standing test is not satisfied by affidavits of individual members asserting policy and advocacy interests. *In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 9-10 (5/1/08), aff'd in part / rev'd in part, In re Morgan Meadows/Black Dog Realty, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08).*

- * In the interests of managing the docket and judicial efficiency, Board may require large groups of individuals with common interests to work together as an organization, regardless of opposition from other parties. *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 3 (9/19/03). [EB #829]
- * Party status denied because organization did not provide sufficient description of its interests or members. *Re: Alpine Pipeline Company*, DR #415, MOD at 3 (1/3/03).
- * Historical preservation organization granted party status because project may significantly impact its interests in preserving historical monument. *Re: Alpine Pipeline Company*, DR #415, MOD at 3 (1/3/03).
- * Letter authorizing participation by organization from its board of directors is not required. *Re: Alpine Pipeline Company*, DR #415, MOD at 3 (1/3/03).
- * EBR 14(B)(3)(b) requires that an organization seeking party status need only "describe the organization, its membership and its purposes." *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 5 (6/8/01) [EB #785], quoting *Sugarbush Resort Holdings, Inc.*, #5W1045-15-EB (Interlocutory), Order at 3 (7/15/97).
- * EBR 14(B)(3)(b) does not require that an organization provide "records or basis of its existence" or "the authority to participate in the District Commission proceedings" or an appeal. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 5 (6/8/01). [EB #785]
- * Organization is not required to produce the names and addresses of its members. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 5 (6/8/01)[EB #785]; *Re: St. Albans Group and Wal-Mart Stores, Inc.*, #6F0471-EB, MOD at 8 (5/11/94); *The Home Depot USA, Inc.*, #1R0048-12-EB, MOD at 9 (11/30/00). [EB # 766]
- * The Board will examine the stated purpose of organization when determining party status as to particular criteria. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 6-7 (6/8/01). [EB #785]
- * Organization denied party status because it did not provide any information concerning its membership as required by EBR 14(B)(3)(b). *Home Depot USA, Inc., Ann Juster, and Homer and Ruth Sweet*, #1R0048-12-EB, MOD at 9 (11/30/00). [EB # 766]
- * Citizen group granted EBR 14(B)(1) party status under Criteria 1(F) and 8 where it demonstrated specific interests, different from the general public, potentially affected by the project, but denied 14(B)(1) status for Criterion 9(B) because it failed to establish a specific interest relating to prime agricultural soils. *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 4 (10/3/00). [EB #765]
- * Organization need not be represented by counsel in appeal proceedings. *Northern Development Enterprises*, #5W0901-R-5-EB (8/21/95). [EB #627M1]

- * The Board will grant party status to a organization provided that all the members will be represented by one person who will coordinate the testimony, cross-examine, and present argument. *Okemo Mountain, Inc. (Master Plan)*, #2S0351-16-EB, MOD at 2 (3/1/93). [EB #566M]
- * Where an appeal involves complex scientific issues, organizations which will be able to materially assist the Board in its understanding of these issues may be granted party status. *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/18/91). [EB #471M3]
- * Organization which shows that its interests will be affected by requirements which might be imposed by the Board may be entitled to party status. *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB #425]
- * An organization that has adequately demonstrated that it can materially assist the Board will be granted party status, whereas party status will be denied to other organizations which cannot provide anything additional. *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB #425]
- * An association representing adjoining property owners may participate in proceedings regarding a motion to alter despite its failure to participate previously. *Re: Fairfield Associates*, #4C0570-EB (3/29/85). [EB #234]

B. Determinations and Appeals

151. Determinations by District Commission

- * While people who have been granted party status on a criterion generally have it on the entire criterion, not just a part, when Commission clearly separates grant of Criterion 8 (aesthetics) party status from denial of Criteria 8 (rare and irreplaceable natural areas) party status, party has only continuing rights under Criterion 8 (aesthetics). *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, MOD at 5 (10/8/03) [EB #831]

151.1. Preliminary Determinations

- * Whether there is a sufficient relation between Act 250 criteria and a challenger's specific "use and enjoyment" will not be determined until the evidence is presented at trial. *Re: Route 103 Quarry (Carrara)*, No. 205-10-05 Vtec., Interim Order at 2 (2/23/05).
- * Failure of Commission to rule on party status request is an abuse of discretion. *Bruce Transportation Group, Inc.*, #3W0058-1-EB (Chair's Preliminary Ruling) (4/2/97) [EB #671]
- * Before evaluating merits of party status request, Commission should decide whether request demonstrates good cause for failing to appear on time and whether the late appearance would unfairly delay proceeding or place an unfair burden on applicant or other parties. *Bruce Transportation Group, Inc.*, #3W0058-1-EB, CPR (4/2/97). [EB #671]

151.2. Re-Examination by District Commission

* Grants of preliminary party status should reviewed by Commission at the close of the merits proceedings, at which time the Commission should issue a final party status decision. 10 V.S.A. § 6085(c)(2). *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith, #5L1018-4/#5L0426-9-EB, MOD at 2 n.1 (5/29/03). [EB #824]*

*“The Act 250 Process mandates initial and final party status determinations.” *Diverging Diamond Interchange Act 250 and SW Permits, Nos. 50-6-16 Vtec, 169-12-16 Vtec, slip op. at 54 (Vt. Super. Ct. Envtl. Div. June 1, 2018) (Walsh, J.). May be appealed*

152. Effect of participation (or nonparticipation) at Commission proceedings

* Person eligible for party status in Commission is eligible for party status in Board. *In re George F. Adams & Co., Inc., 134 Vt. 172, 174 (1976).*

* A de novo proceeding contemplates those parties who had an interest in the original proceeding being allowed to appear and participate as proper parties at the second set of hearings. *In re Wildlife Wonderland, Inc., 133 Vt. 507, 518 (1975); In re Preseault, 130 Vt. 343, 348 (1972).*

* Act 250 does not mandate that a party maintain a perfect attendance record at Commission hearings, or else thereafter be barred from further appellate participation. *In re Wildlife Wonderland, Inc., 133 Vt. 507, 518 (1975).*

* Organizations denied party status have standing to appeal denial under 10 V.S.A. § 8504(d)(2)(B), even if they were granted Friends of the Commission status and did not participate on the merits below. *In re Bennington Wal-Mart, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 5-6 (4/12/12).*

* Where someone seeks to participate as a party before the Board on a jurisdictional issue, the fact that he or she did not participate on that issue before Coordinator is not relevant; only in an appeal on one or more Act 250 criteria is participation below relevant. *Re: GHL Construction, Inc. and PAK Construction, Inc., #2S1124-EB, DR #396, FCO (12/28/01).*

* Appellant’s post-hearing request to deny party status to adjoining property owners was untimely, where adjoining property owners had been granted party status before Commission and appellant did not object to such party status before Commission, in its notice of appeal to the Board, or in response to the Chair’s preliminary rulings on party status. *Lawrence White, #1R0391-8-EB (4/16/98). [EB #689]*

* Board declined to grant party status at interlocutory stage with respect to certain Act 250 criteria where the record did not reveal that Commission had been asked by the petitioner to consider impacts to his property interest with respect to those criteria. *Town of Albany and Florence Beaudry, #7R1042-EB (Interlocutory) (3/19/98). [EB #701]*

- * Where there is no timely challenge to its party status, a party is deemed to have automatically obtained party status under the Act 250 criteria for which it has been granted party status below. *Stratton Corporation*, #2W0519-9R3-EB, FCO at 4 (1/15/98). [EB # 688]; *Finard-Zamias Associates*, #1R0661-EB, MOD at 12 -13 (3/28/90). [EB # 459]
- * Although appellant did not specifically request party status under particular criterion before Commission, appellant did raise necessary issues under such criterion, such that appellant could appeal Commission's denial of party status and obtain appeal rights on criterion. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]
- * Person may be granted party status even though she was not a party during Commission proceedings. *Nehemiah Associates, Inc.*, #1R0672-1-EB (3/9/94). [EB #592M1]
- * A person does not waive his or her right to appeal by accepting a Commission ruling which denies such person party status and by being agreeable to participation in a hearing without being granted party status. *L & S Associates*, #2W0434-8-EB (11/24/92). [EB #557M2]
- * Rule 14 allows Board discretion to admit new parties when circumstances warrant, even where such parties did not participate at Commission. *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/18/91). [EB #471M3]
- * Once an appeal has been filed with the Board, there is no need for other parties who had party status at Commission level to file a cross-appeal in order to have party status before the Board; such parties are entitled to participate on those issues in which they have party status, regardless of whether they filed a cross-appeal. *Green Peak Estates*, #8B0314-2-EB (9/24/86), *aff'd In re Green Peak Estates*, 154 Vt. 363, 372-73 (1990). [EB #280M]; *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 (9/3/03) [EB #828].
- * Neither the relevant statute nor the Act 250 Rules define “participation” for the purpose of preserving appeal rights. The Court here decided that a party status request alone cannot constitute participation and neither can submitting pre-filed testimony alone cannot constitute participation in the Act 250 context. *In re North East Materials Group, LLC*, Decision on Motion for Party Status 35-3-13 Vtec at 5 (8/21/13).
- * Movants bear the burden of proving that they participated in the District Commission hearing. *In re North East Materials Group, LLC*, Decision on Motion for Party Status, 35-3-13 Vtec at 4, 5 (8/21/13).

152.1 When party does not seek party status at the Commission; level of review at the Board/ Environmental Division

- * An individual who fails to seek party status at the District Commission may file a motion to intervene pursuant to 10 V.S.A. §8504(n)(5), and must still, as a “person aggrieved,” establish an injury to a particularized interest. *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec,

Decision on Motions at 5 (2/4/15).

* When party does not seek party status before the Commission on a criterion, its petition for party status at the Board is subject to higher scrutiny. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, MOD at 3 (1/7/05) [EB #859], citing *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2nd Revision), and #2S0351-31-EB, and #2S0351-25R-EB, MOD at 10 (5/22/01); *Re: Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, MOD at 2 (2/3/99)(citing *Re: Okemo Mountain, Inc.*, #2S0351-10B-EB, MOD at 3 (1/15/93); *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, FCO at 6 - 7 (10/11/95).

153. Appeals

* “Nothing in the statute . . . unconditionally forecloses a prospective appellant from requesting party status from the Court when that party has failed to request it below.” *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, Decision on Motion for Party Status at 5 (7/1/11).

* District Environmental Commissioners are not “parties” to the appeals brought before the Court, and are not NRB “employees.” *In re: JLD Wal*Mart Act 250 LU Permit (Altered)*, No. 116-6-08 Vtec, Motion to Dismiss VNRC’s First Question on Appeal; No. 2 at 2 (10/10/08).

* Person who is denied party status on a criterion by Commission must appeal that denial to the Board if he wants party status before the Board on that criterion. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, MOD at 3 (5/29/03)

* To appeal a criterion to the Board, permitted party must obtain party status on that criterion before Commission, or have been denied party status on that criterion by Commission, appealed to the Board, and then been granted party status on that criterion by the Board. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]

*When a person wishes to appeal from an Act 250 district commission decision, 10 V.S.A. §8504 and V.R.E.C.P. §5(d)(2) govern appellant’s party status claims and challenges. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 4 (3/13/13).

153.1. to the Board or Court

* Party status is a question that remains open throughout the Act 250 permit review process. As the Environmental Court must apply the standards applicable before the District Commission, it is obligated to reevaluate party status after the presentation of evidence at trial. *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/22/19).

153.1.1

What may be appealed

** [W]e only consider the dimensions of party status pursuant to the Criteria a party has status under. We will not consider an issue that is tangential to one Criterion under that Criterion when the issue is directly addressed by another. This is based on the principle that each criterion sets

specific parameters that refine and adapt the generally applicable party status requirements, but do not expand standing. *BlackRock Construction LLC Act 250*, No. 47-4-19 Vtec., Motion to Dismiss (6/19/19).

* Organizations denied party status have standing to appeal denial under 10 V.S.A. § 8504(d)(2)(B). *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 6 (4/12/12).

* A party may only appeal the criteria on which he or she has party status before Commission, except that a party may appeal a criterion on which he or she did not have party status before Commission if: (a) the party was denied party status on the criterion and can persuade the Board that such status should be granted, or (b) the party can persuade the Board that party status on the criterion should be granted and that a substantial injustice or inequity will occur if the appeal on the criterion is disallowed. *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD at 10 (5/22/01); *Leonard R. Lemieux*, #3R0717-EB (8/12/93). [EB #581M1]; *Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, MOD at 2 (2/3/99); *Okemo Mountain, Inc. (Snowbridge Road - Pedestrian Safety)*, #2S0351-10B-EB (1/15/93). [EB #565M]; *Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB (12/23/92). [EB #564M]; *Felix J. Callan*, #5W1056-EB (9/19/90). [EB #481M]; *James Davenport, Jr. and Barbara Davenport*, #1R0667-EB (8/30/89). [EB #449M1]; *Lucy Stewart*, #4C0203 (9/8/76). [EB #73]

* Party status decisions by Commissions may be challenged by appeal or cross-appeal. *Springfield Hospital*, #2S0776-2-EB (8/14/97), *sup. ct. appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]

* Under V.R.E.C.P. §5(d)(2), the appellant's participation before the Environmental Division is limited to issues under those criteria for which the district commission granted the person party status. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 4 (3/13/13).

* Where the Commission discussed VTR's request for party status under Criterion 9(K) and explicitly did not grant that request, there is "no appreciable difference" between this and denial of party status on several other criteria. Accordingly, VTR has standing to seek party status on these criteria on appeal. *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 2 (11/14/12).

153.1.2

Who may appeal

* Regional planning commissions can appeal to the court qualify in the same manner as parties by right. *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 20 (8/6/14).

* Organizations denied party status but granted Friends of the Commission status have standing to appeal denial of party status under 10 V.S.A. § 8504(d)(2)(B). *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 6 (4/12/12).

*An appealing party who has a “particularized interest . . . that may be affected by an act or decision by a district commission” need not specifically request party status in appeals before the Environmental Court. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 2-3 (2/15/08), quoting 10 V.S.A. § 6085(c)(1)(E) and citing V.R.E.C.P. 5(d)(2).

* Person who is denied party status on a criterion by Commission must appeal that denial to the Board if he wants party status before the Board on that criterion. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, MOD at 3 (5/29/03)

* Appellant who did not request party status before Commission on certain criteria cannot obtain party status before Board on those criteria without showing that substantial injustice or inequity would result if the appeal on those criteria is disallowed. *Re: Okemo Limited Liability Company*, #2S0351-34-EB, MOD (1/7/05); *Re: Conservation Designs, Inc. and Ritchie Crockett Lawton*, #2W1418-EB, MOD at 6 (6/4/04). [EB#847]; *Re: Village of Ludlow*, #2S0839-2-EB, MOD at 2-3 (5/28/03). [EB# 826]

* Limitations on who may be parties in appeal under 10 V.S.A. § 6085(c) applies only to appellate review to Supreme Court. *In re George F. Adams & Co., Inc.*, 134 Vt. 172, 174 (1976).

* Party denied party status by Commission for a Criterion or under a particular party status rule may appeal to the Board by filing a timely appeal or cross-appeal. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, MOD at 2-3 (8/10/00) [EB #758]; *Springfield Hospital*, #2S0776-2-EB (8/14/97), *sup. ct. appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]

*A person denied party status by Commission is aggrieved by the denial and is deemed to be a party for the purpose of deciding party status only. *Springfield Hospital*, #2S0776-2-EB, MOD at 3 (8/14/97), *sup. ct. appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97) [EB #669]; *Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, MOD (7/18/95).

* To appeal a criterion to the Board, permitted party must obtain party status on that criterion before Commission, or have been denied party status on that criterion by Commission, appealed to the Board, and then been granted party status on that criterion by the Board. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]

* The term "party" includes persons who have requested and been denied party status by a Commission, so person may appeal Commission's denial of party status despite the fact that he was not a “party” before Commission. *Swain Development Corp.*, #3W0445-2-EB (7/31/89). [EB #430M].

* To appeal a Commission’s Act 250 decision, appellant must either have been granted party status, or appeal the denial of party status and assert that claim by motion filed with the notice of appeal. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 8 (11/2/10); *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 4 (3/13/13).

* Movants may be entitled to interested person status to participate in the appeal of other appellants in this case, despite their failure to prove entitlement to party status as appellants. Interested person status requires a showing of the reasonable possibility of harm to a particularized interest just as appellant party status does, but interested person status does not require participation in the proceedings below. *In re North East Materials Group, LLC*, Decision on Motion for Party Status 35-3-13 Vtec at 5 (8/21/13).

* Neither the relevant statute nor the Act 250 Rules define “participation” for the purpose of preserving appeal rights. The Court here decided that a party status request alone cannot constitute participation and neither can submitting pre-filed testimony alone cannot constitute participation in the Act 250 context. *In re North East Materials Group, LLC*, Decision on Motion for Party Status 35-3-13 Vtec at 5 (8/21/13).

153.1.2.1 Requirement of filing motion

*The requirements of § 8504(d)(1) and V.R.E.C.P. 5(d)(2), including the provision that the party must file a motion to appeal the denial of party status, do not apply to a party claiming standing as a landowner. Landowners is given party status under 10 V.S.A. § 6085(c)(1)(B), not § 6085(c)(1)(E). *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake’s request for party Status, at 2 (3/17/2017).

* Vermont Rule of Environmental Court Procedure 5(d)(2) requires an appellant to file a motion and put the parties and the Court on clear notice of the exceptional circumstances that warrant an appeal under 10 V.S.A. § 8504(d)(2). Appellants “must assert their claim of party status by motion filed with the notice of appeal.” V.R.E.C.P. 5(d)(2). This mandatory directive requires strict compliance. Failing to file a motion for party status in an appeal pursuant to § 8504(d)(2)(B) is cause for dismissal. *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 7 (2/2/10)(citing *In re Verizon Wireless Barton Permit*, No. 133-6-08 Vtec, Decision on Multiple Motions at 8 (5/20/09) (Durkin, J.)).

* When a person does not file a motion requesting party status along with their notice of appeal, the Court has discretion to accept a motion filed later and “take up [a] request for party status.” *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, Decision on Motion for Party Status at 4 (7/1/11) (citing V.R.E.C.P. 5(b)(1)).

153.1.3 Type of review on Appeal

153.1.3.1 De Novo

* The Environmental Court relies only upon evidence and testimony submitted to this Court in reviewing a petition for party status; information only presented to the District Commission is immaterial. *In re Pion Sand and Gravel*, No. 245-12-09, Decision on Motion for Party Status at 8 (7/2/2010).

* Board considers party status petitions *de novo*. *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, MOD at 3 (9/27/04); *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 6

(5/10/04) [EB #843]; *Re: Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 5 (1/31/02). [EB #799 & 801]; *Springfield Hospital*, #2S0776-2-EB (8/14/97), *sup. ct. appeal dismissed*, *In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]; *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]; *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (7/18/95). [EB #615]; *Okemo Mountain, Inc. (Snowbridge Road - Pedestrian Safety)*, #2S0351-10B-EB (1/15/93) . [EB #565M]; *Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB (12/23/92). [EB #564M]; *L & S Associates*, #2W0434-8-EB (12/4/92). [EB #557M3]; *L & S Associates*, #2W0434-8-EB (10/1/92). [EB #557M1]; *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]; *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M]; *Richard Roberts Group & Salmon Hole Associates*, #2W0771-EB (7/22/88). [EB #400]

* The Board will overturn a Commission decision regarding the party status of a planning commission only upon a showing of clear error or abuse of discretion. *Sunrise Group*, #1R0501-8(A)-EB (4/29/85). [EB #252]

* Because Board hears party status petition *de novo* and must operate under the legal fiction that no Commission proceedings have ever occurred, party status rules in effect at the time that the appeal is taken - in this case, new EBR 14(A)(6) - must govern. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 6 (5/10/04) [EB #843]

153.1.3.1.1 Whether an evidentiary hearing should be held

* Board accepts allegations in party status petition as true, unless person opposing such petition seeks a hearing to contest their veracity. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, MOD at 2 (1/7/05) [EB #859]; *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, MOD at 3 (9/24/04); *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 2 (5/10/04) [EB #843], citing *Re: Bradford B. Moore*, #5L1423-EB, MOD at 2 (4/27/04) and *Re: McLean Enterprise Corporation*, #2S1147-1-EB, MOD at 6 (9/19/03) [EB #829]; and see *Re: River Station Properties III, LLC* #5W1436-EB (Interlocutory), MOD at 2 (10/14/04) [EB #832] (where Board has no contrary evidence, it assumes party status petition to be true).

* Holding evidentiary hearing on party status petitions would enable Board to make more precise rulings, but delay such a hearing causes generally outweighs its benefit; however, applicant, aware of potential for delay, may choose to contest a factual issue in a party status petition beyond submitting opposing memoranda, by requesting an evidentiary hearing before Board makes its final determination. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, MOD at 2 n1. (1/7/05) [EB #859]; citing *Re: McLean Enterprises Corporation* #2S1147-1-EB MOD at 6 (9/19/03) [EB #829]

153.1.3.2 Record review

* Where a Commission makes a decision concerning a late request for party status, Board's standard of review is whether Commission abused its discretion in determining whether the petitioner "has demonstrated good cause for failure to appear on time, and that its late appearance will not unfairly delay the proceedings or place an unfair burden on the applicant or other parties." *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB

#532R2]; *L & S Associates*, #2W0434-8-EB (12/4/92). [EB #557M3]; *Washington Electric Cooperative, Inc.*, #5W1036-EB (10/16/90). [EB #455M]

153.1.4

When taken

153.1.4.1

After Commission merits decision

* Appeals of party status denials after Commission issues a final decision may be brought as long as the appellant alleges in good faith that he or she is aggrieved by determinations made by Commission. If the Board were to forbid such appeals of party status denials, the only avenue for appeal would be through interlocutory appeal and interlocutory appeals are not an adequate means to ensure that Commissions are properly exercising their discretion. *Swain Development Corp.*, #3W0445-2-EB (7/31/89). [EB #430M]

* A person denied party status at Commission proceeding may appeal such denial when an appeal of Commission's merits decision is brought. *L & S Associates*, #2W0434-8-EB (10/1/92). [EB #557M1]

153.1.4.2

Interlocutory appeals to the Board (see [507](#))

* Board reviews interlocutory appeals of party status determinations *de novo*. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 5 (1/31/02). [EB #799 & 801].

* Board in its sole discretion may review an appeal from any party status ruling if it determines that such review may "materially advance the application process." "Application process" means the process that has or could occur at Commission, Board, and Vermont Supreme Court levels. *H.B. Partners a/k/a Walker II Project*, #8B0500-1-EB (Interlocutory) (3/24/98). [EB #703]

* Board would consider a petition for interlocutory appeal where there were sufficient uncontested facts for the Board to reach a conclusion concerning whether a petitioner was entitled to party status, where it was clear from the record that Commission had applied the wrong legal standard in denying the petitioner party status, and where the proceeding was still at the evidentiary stage before Commission such that prompt remand with additional instructions would materially advance the application process. *Town of Albany and Florence Beaudry*, #7R1042-EB (Interlocutory) (3/19/98). [EB #701]

* Board accepted interlocutory appeal of party status denial since this would materially advance the application process by resolving petitioner's party status at the outset of Commission hearing process. Acceptance of interlocutory appeal obviated Commission's responsibility or ability to re-examine petitioner's party status. *Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal) (10/11/96), *aff'd*, *In re Maple Tree Place Associates*, No.96-559 (Vt. S. Ct. 10/10/97) (Entry Order). [EB #657]

* Questions of party status are not "controlling" questions of law. *Manchester Commons Associates*, #8B0500-EB (10/17/94). [EB #618M1]

* Board denies motion for interlocutory appeal where the issue of party status does not present a controlling question of law. *Barre City School District*, #5W1160-EB (Reconsidered-Interlocutory Appeal) (2/13/94). [EB #596]

* Where an interlocutory appeal would not materially advance the application process, and factual distinctions would affect the legal result, the issue is not appropriate for appeal. *Richard Roberts Group & Salmon Hole Associates*, #2W0771-EB (7/22/88). [EB #400]

* In interlocutory appeal, the standard of review for party status issues is whether there is a reasonable basis in Commission record for its findings and whether, as a matter of law, findings fairly and reasonably support Commission's conclusions of law. *Paul and Dale Percy*, #5L0799-EB (3/27/85). [EB #249]

153.2 to the Supreme Court

* Court reviews decisions regarding party status for abuse of discretion. *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998); *In re Chittenden Recycling Servs.*, 162 Vt. 84, 88 (1994).

* Rulings of administrative agencies on party status in Act 250 proceedings "are infused with a presumption of validity and cannot be overcome unless clear and convincing evidence is presented." *In Re Chittenden SWD*, 162 Vt. 84, 90 (1994), quoting *In re Great E. Bldg. Co.*, 132 Vt. 610, 612 (1974).

* A person denied party status by Board may appeal the decision to Supreme Court. *In re Maple Tree Place Associates*, 151 Vt. 331, 332 (1989); *Re Chittenden Recycling Services*, 162 Vt. 84, 89-90, 1994); *In re Great Waters of America, Inc.*, 140 Vt. 105 (1981); *In re Lunde Constr. Co.*, 139 Vt. 376, 378 (1981); *In re Great Eastern Building Co., Inc.*, 132 Vt. 610 (1974); *In re Preseault*, 130 Vt. 343, 347 (1972).

* Party status denials are not appealable collateral orders. *In re Maple Tree Place Associates*. 151 Vt. 331 (1989).

* Limitations on who may be parties in appeal under 10 V.S.A. § 6085(c) applies only to appellate review to Supreme Court. *In re George F. Adams & Co., Inc.*, 134 Vt. 172, 174 (1976).

154. Effect of determination

154.1 On maintenance of action

* Where Board denied appellant party status, and no other person had filed a timely appeal, Board lacked requisite jurisdiction to continue review of project. *Springfield Hospital*, #2S0776-2-EB (8/14/97), sup. ct. appeal dismissed, *In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]

154.2 On later proceedings

* Person eligible for party status in Commission is eligible for party status in Board. *In re George F. Adams & Co., Inc.*, 134 Vt. 172, 174 (1976).

* “[A]n appellant cannot prosecute an appeal of Act 250 criteria for which he or she did not obtain party status below, unless that party secures status to do so on appeal.” *Verizon Wireless Barton Act 250 Permit*, No. 6-1-09 Vtec, Decision on Multiple Motions at 6 (2/2/10).

* Notice of appeal on party status is insufficient without motion under VRECP 5(d)(2). *Verizon Wireless Barton Act 250 Permit*, No. 6-1-09 Vtec, Decision on Multiple Motions at 7 (5/20/09).

* Where grant of party status by Commission on criterion was not appealed, party was entitled to maintain that status in appeal to Board. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 4 (10/8/03) [EB #831]; *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, MOD at 3 (5/29/03) [EB #824]; *The Stratton Corporation*, #2W0519-9R3-EB, FCO at 4 (Jan. 15, 1998); *Finard-Zamias Associates*, #1R0661-EB, MOD at 12 -13 (Mar. 28, 1990).

* While people who have been granted party status on a criterion generally have it on the entire criterion, not just a part, when Commission clearly separates grant of Criterion 8 (aesthetics) party status from denial of Criteria 8 (rare and irreplaceable natural areas) party status, party has only continuing rights under Criterion 8 (aesthetics). *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, MOD at 5 (10/8/03) [EB #831]

* Denial of, or grant of, party status in a prior proceeding does not control consideration of party status in subsequent case. *McDonald’s Corporation*, #1R0477-5-EB, MOD at 11 (5/3/00). [EB #747]

* Grant of party status in a prior DR did not bar Board from considering whether appellant qualified for such status in appeal of permit obtained in compliance with DR's finding of jurisdiction. *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (7/18/95). [EB #615]

* Where potential intervenor was not a party to permit or revocation proceedings, he has no standing to file a motion with or to be heard by the Board. *Montpelier Broadcasting Inc.*, #5W0396-EB (2/17/94). [EB #571]

* The Supreme Court's determination of party status for purposes of court appeal is not dispositive of party status in proceedings before Commission or Board. *Spear Street Associates*, #4C0489-1-EB (4/4/84). [EB #213]

154.3 Of denial

* Lack of party status does not rule out the presentation of any evidence aspiring party may want to bring forth, as it may be called as a witness by other parties. *In re Lunde Constr. Co.*, 139 Vt. 376, 380 (1981).

* Person cannot be granted party status on those criteria on which they were denied below and did not appeal. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, MOD at 3

(5/29/03)

* If the Board denies an appellant's petition for party status on a criterion, the appeal or cross-appeal is dismissed as to that criterion. *Re: Village of Ludlow*, #2S0839-2-EB, MOD at 6 (5/28/03) [EB# 826]; *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD (5/ 22/01)(citing *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, FCO at 7) (10/11/95)); *Springfield Hospital*, #2S0776-2-EB (8/14/97), *sup. ct. appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97)

154.4 Of grant

* A person's participatory "rights" are defined with reference to those criteria on which he holds party status. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 5 - 6 (7/10/03) [EB #831], citing *Re: Berlin Corners Associates*, DR #62, Order at 2 (9/12/74) (persons may participate as parties only with regard to those issues upon which they are admitted as parties); *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD at 6 (5/22/01) (if the Board grants party status, it "will proceed with substantive review on any criteria concerning which it determines that the appellant qualifies for party status"), citing *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, FCO at 7 (10/11/95); *and see, In re Green Peak Estates*, 154 Vt. 363, 372-73 (1990) (once an appeal has been filed with the Board, there is no need for other parties who had party status at Commission level to file a cross-appeal in order to have party status before the Board; such parties are entitled to participate on those issues in which they have party status, regardless of whether they filed a cross-appeal); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518 (1975); *In re Preseault*, 130 Vt. 343, 348 (1972) (parties who had an interest in the original proceeding may participate as proper parties at the second set of hearings).

* Grant of Criterion 8 (aesthetics) party status is not necessarily a grant of Criteria 8 (rare and irreplaceable natural areas) party status. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 5 (10/8/03). [EB #831]

* If the Board grants party status, it "will proceed with substantive review on any criteria concerning which it determines that the appellant qualifies for party status." *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD (5/22/01)(citing *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, FCO at 7 (10/11/95)).

* Party status means the right to present evidence and cross-examine witnesses. *John and Mary Swington*, #1R0693-EB (10/15/90). [EB #491M1]

* Persons granted party status under Criterion 10 may make arguments as to any part of the Town Plan. *Finard-Zamias Associates*, #1R0661-EB, MOD at 8 (3/28/90). [EB #459M1]

* If the Board finds that a person denied party status on a particular criterion should be granted party status, the Board may consider that person's testimony directly without remanding the matter to Commission. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M] *But see, Re: Mt. Anthony Union High School District #14*, #8B0552-EB(Interlocutory Appeal), MOD at 3 (1/ 31/02) (remand would be required).

* Persons may participate as parties only with regard to those issues upon which they are admitted as parties. *Berlin Corners Associates*, DR #62 (9/12/74).

* Parties “may only appeal those issues under the criteria with respect to which the person was granted party status.” 10 V.S.A. § 8504(d)(1). *623 Roosevelt Highway*, No. 105-8-17 Vtec at 3 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018).

* NRB’s motion to dismiss Question 15 is granted because Appellants did not request and were not granted party status under Criterion 10. As Appellants do not have party status to address these issues, Question 15 is outside the scope of the present appeal. *623 Roosevelt Highway*, No. 105-8-17 Vtec at 3 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018).

155. Loss of

* EBR 14(A)(5) party who sells adjoining property, and no longer retains any rights or interests in such property, no longer retains such party status. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 2 n.1 (10/3//03). [EB #824]

* Party status is a question that remains open throughout the Act 250 permit review process. As the Environmental Court must apply the standards applicable before the District Commission, it is obligated to reevaluate party status after the presentation of evidence at trial. *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/22/19).

C. Parties by Right (formerly Statutory Parties)

166. General

* Private businesses competing with proposed businesses likely to be placed in shopping center do not qualify as statutory parties. *Derby Plaza Associates*, #7R0886-EB (2/24/94). [EB #597M1]

* Individuals were not granted party status because they were not adjoiners, and no Rules were then adopted under which they could be granted party status as a matter of right. *Great Eastern Building Co.*, #5W0202 (7/30/73), *aff'd*, *In Great Eastern Building Co.*, 132 Vt. 610 (1974). [EB #40]

166.1 Applicant

166.2 Landowner

*Entity qualifies as a landowner for purposes of 10 V.S.A. § 6085(c)(1)(B) even where the land owned is subject to condemnation proceedings as part of the project and only involves a portion of their entire property. *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake’s request for party Status, at 3 (3/17/2017).

*Entity that has a 30-year lease is not considered a landowner for purposes of 10 V.S.A. §

6085(c)(1)(B) because the plain meaning of the statute does not extend to leaseholders, leaseholders have an option to obtain status under 10 V.S.A. § 6085(c)(1)(E), and ownership/control cases deal with jurisdictional issues and do not translate to determinations of party status. *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake's request for party Status, at 2 (3/17/2017).

* Person whose interest in a permit was contingent upon its rights in land subject to the permit, loses that interest upon loss of those rights. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.).

* The landowner is entitled to party status if the applicant is not the landowner. *Hiddenwood Subdivision*, DR #324 (4/29/96).

* Petitioners lacked party status to appeal opinion where they owned a lot within a subdivision but not the actual lot which was the subject matter of the jurisdictional dispute. *Hiddenwood Subdivision*, DR #324 (4/29/96).

166.3 Municipality/Planning commissions

* Regional planning commissions for the municipality in which the proposed project is located shall have party status before the Commission pursuant to 10 V.S.A. § 6085 (c)(1)(C). *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 20 (8/6/14).

* A proposed project that is located on a municipal boundary gives party status before the Commission to the regional planning commission for the municipality adjacent to the border under 10 V.S.A. § 6085 (c)(1)(C). *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 20 (8/6/14).

* A municipality may be a statutory party if it lies adjacent to any portion of the land owned or controlled by the applicant that is part of the property on which the proposed project site will sit and is in any way affected by the proposed project. *In re Killington, Ltd.*, 159 Vt. 206, 212 (1992).

* Board could admit a municipality as a statutory party where the municipality so obviously meets the standards for permissive intervention. *In re Killington, Ltd.*, 159 Vt. 206, 214 (1992).

* A union school district is not a "municipality" for purposes of party status. *But see old EBR 2(V)(2) and new EBR 2(C)(14) and their reference to 1 VSA 126 for the definition of "municipality" Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 10 (1/20/2000); *Swanton Housing Associates*, #6F0482-EB, FCO at 17 - 18 (4/24/97). [EB #667]; *Realty Resources Chartered and Bradford Housing Associates*, #3R0678-EB, MOD at 9 (2/17/94). [EB #546M2]

* Town is party by right where many of the project spray sites are located in the town and are part of the development. *Cabot Farmers' Cooperative Creamery, Inc.*, #5W0870-13-EB (8/20/93). [EB #564]

- * A planning commission has interests that may be affected by a proposed project and has party status separate and distinct from the party status of selectboards. *L & S Associates*, #2W0434-8-EB (11/24/92). [EB #557M2]
- * Towns and town planning commissions are treated as distinct entities separately entitled to notice and party status, and as a matter of law, a town cannot be estopped by reason of a planning commission action. *Rome Family Corporation*, #1R0410-3-EB (10/11/90). [EB #416]
- * Planning commission that was an active participant and which might assist in providing testimony, cross-examining witnesses, and offering other evidence was a proper statutory party. *Sunrise Group*, #1R0501-8(A)-EB (4/29/85). [EB #252]
- * City that provides sewage treatment for neighboring town is not entitled to notice under 10 VSA § 6084(a) but is entitled to petition to qualify as a party on other grounds. *Lunde Construction*, #5W0456-EB (2/20/79). [EB #100]
- * A municipality, as an adjoining property owner, may appeal Commission's decision to the Board. *Odyssey Enterprises, Inc.*, DR #BB (1/11/73).
- * Where town in which proposed project was located had withdrawn from regional planning commission, planning commission's Motion to be Heard was denied because it was not a statutory party. *Quechee Lakes Corporation*, #900036 (12/6/71), *rev'd, In re Application of Quechee Lakes Corp.*, 130 Vt. 469 (1972). [EB #11]

166.4 State Agency

- * County Conservation District is not a "state agency" for purposes of party status. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, MOD at 5-8 (8/10/00). [EB #758]

166.4.1

ANR (and relation to Board)

- * ANR is a statutory party. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 517 (1975).
- * ANR is not at once both judge and litigant in Act 250 hearings. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 517 (1975).
- * There is a distinct difference between the Board and ANR, of which the Board is only a part. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 517 (1975); 3 V.S.A. § 2802(a)(3).
- * No apparent conflict of interest exists, since ANR has no adjudicatory powers under Act 250 and the ANR Secretary neither appoints, nor controls the Board. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 517 (1975); 10 V.S.A. § 6021(a).
- * ANR appears as a party to Board proceedings, and "there is a distinct difference between the Environmental Board and [ANR], of which the Board is only a part. ... ANR has no adjudicatory

powers under Act 250. ..." *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 6 (6/12/03), *aff'd* 2006 VT 8 (V.S.Ct), quoting *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 517 (1975).

* Because ANR is a *statutory* party to Board proceedings, 10 V.S.A. § 6084, ANR is, therefore, *as a matter of law*, an "interested" party. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 6 n.1 (6/12/03), *aff'd* 2006 VT 8 (V.S.Ct).

* ANR and Division of Historic Preservation are automatic parties to an Act 250 proceeding where such agencies received notice of the application, either directly or through the Interagency Act 250 Review Committee, and nothing in such authorities requires the State to prove that it is eligible for party status. *John and Mary Swingleton*, #1R0693-EB (10/15/90). [EB #491M1]

* The Fish and Game Department is not a party distinct from the Agency of Environmental Conservation. Although the Department may have an interest affected by the decision, its interests are represented by the Agency. *White Sands Realty*, #3W0360-EB (2/25/82). [EB #171]

D. Adjoining Property Owner

176. General

* Board's conclusion that the statutory language includes more than the land to be physically altered is reasonable, particularly in light of the statutory scheme that gives a voice to persons and entities affected by development. *In re Killington, Ltd.*, 159 Vt. 206, 213 (1992); see *In re Great Waters of America, Inc.*, 140 Vt. 105, 109, 435 A.2d 956, 959 (1981) (Legislature allowed adjoining landowners to be parties "to increase participation in permit application hearings").

* The legislature could have precluded adjoining landowners from participating in Act 250 proceedings. *In re Great Waters of America, Inc.*, 140 Vt. 105, 109 (1981).

* Notice to adjoiners is not a constitutional right. *In re Great Waters of America*, 140 Vt. 105, 108 (1981).* . *Putney Paper Co. Inc.*, #2W0436-6-EB (2/2/95) [EB #583] (right of adjoining landowners to participate in Act 250 proceeding is not of constitutional dimensions).

* Adjoiner's role is as a permitted participator, not a party; the extent of his participation is specifically limited. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518 (1975).

* Under the provisions of 10 V.S.A. § 6085(a), adjoining property owners have the right to appear at the hearing and produce evidence before Commission. *In re Preseault*, 130 Vt. 343, 347 (1972).

* 10 V.S.A. § 6085(c)(l)(E) makes no distinction between the two categories of persons - "other persons" or "adjoining property owners - who might be able to qualify for party status. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 5 (1/28/11).

* Prior to January 31, 2005, Act 250 distinguished between adjoining property owners, who were considered to be parties by right who could request a hearing on an Act 250 application, and other

parties, who were allowed to participate only by permission of the Environmental Board. See 10 V.S.A. § 6035(a), (c)(I) (2003); EBR 14(A), (B) *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 5 n.3 (1/28/11).

* It is reasonable for neighboring landowners to rely upon the terms and conditions of a permit, or at least to rely on their right to be heard on an application to amend the permit. *In re Eustance*, No. 13-1-06 Vtec, Decision at 12 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* Applicants must only provide a list of adjoining landowners to the district commission, any additional persons the District Commission deems appropriate to receive notification, is left to the determination of the District Commission. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 7 (1/28/11).

* A determination of an individual as an "adjoining property owner" is relevant only in terms of the notice which must be provided *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 7 (1/28/11).

* Elements necessary to show status as an adjoining property owner: that property is adjoining and that project may have a "direct effect" on such property under any of the ten Act 250 criteria. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 3 (10/8/03) [EB #831]; *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, DR #396, FCO (12/28/01); *Stonybrook Condominium Owners Association*, DR 385, MOD at 1- 2 (5/19/00); *McDonald's Corporation*, #1R0477-5-EB, MOD at 10 (5/3/00). [EB #747]

* Board denied petition for party status as an adjoiner where petitioner failed to demonstrate good cause for her failure to timely appeal Commission's denial of such status, where petitioner failed to object to the Board Prehearing Conference Report and Order which gave petitioner permissive party status, and where petitioner could have testified as a witness for other parties. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 5 (12/8/00). [EB# 739]

* Where an adjoining property owner demonstrates good cause for failure to appear on time before the Board and the late appearance will not place an unfair burden on the applicant or other parties, the Board will grant party status. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 92 (10/8/99). [EB# 739]

* Right of adjoining landowners to participate in Act 250 proceeding is not of constitutional dimensions. *Putney Paper Co. Inc.*, #2W0436-6-EB (2/2/95). [EB #583] (citing *In re Great Waters of America*, 140 Vt. 105, 108 (1981)).

* To obtain party status, adjoiner need not prove that "substantial injustice in equity" will result if denied such status; Board does not apply "substantial injustice" standard to people who merely seek to participate under a criterion which another party has appealed. *Re: New England Ventures*, #6F0433-EB (9/18/91). [EB #524M1]

* Failure of applicant to provide complete and accurate list of adjoining property owners, results in remand to Commission. *Winooski Housing Authority*, #4C0857-EB (4/30/91). [EB #507]

- * An association representing adjoining property owners may participate in proceedings regarding a motion to alter despite its failure to participate previously. *Re: Fairfield Associates, #4C0570-EB (3/29/85)*. [EB #234]
- * Unfamiliarity with Act 250 procedures can constitute good cause for an adjoiner to request party status. *Paul and Dale Percy, #5L0799-EB (3/27/85)*. [EB #249]
- * Where the complainant did not request a hearing as an adjoining landowner and the request for hearing was considered and denied because no petition was made before the first hearing, party status was properly denied. *Great Waters of America and Francesco Galesi and Equinox Springs Corp., #8B0209-EB (9/27/79), aff'd, In re Great Waters, 140 Vt. 105 (1981)*. [EB #116]
- * In connection with 52 unit rental housing project, adjoining landowners granted party status as to Criteria 1, 3, 4, 5, and 8. *Lunde Construction Company, #5W0456-EB (1/18/79), aff'd, In re Lunde Construction Company, 139 Vt. 376 (1981)*. [EB #94]
- * A municipality, as an adjoining property owner, may appeal Commission's decision to the Board. *Odyssey Enterprises, Inc., DR #BB (1/11/73)*.

176.1 Whether land is adjoining

- * See EBR 2(R)(2)
- * Person whose land is separated from a proposed project by another person's land is not an adjoining property owner. *In re Frank Tahmouh, 13 Vt.L.W. 237 (2002), affirming Frank Tahmouh and Wendell & Judeen Barwood, #3W0815-EB(Revocation) and #3W0815-1-EB(Revocation), FCO at 7 (10/18/01); Southwestern Vermont Health Care Corp., #8B0537-EB, MOD at 2-3 (8/10/00) [EB #758]; compare Nile and Julie Dupstadt, #4C1013 (Corrected), MOD at 4 (10/30/98)*.
- * Because the purpose of the notice provision is to provide notice to persons whose land is affected by the development, the term "adjoining properties" should be interpreted to give effect to that purpose. *In re Conway, 152 Vt. 526, 530 (1989)*.
- * "Adjoining property owners" includes people on the opposite side of a state road. *In re Conway, 152 Vt. 526, 530 (1989); Re: John J. Flynn Estate and Keystone Development Corp., #4C0790-2-EB, MOD at 3 (10/8/03) [EB #831]*
- * Nearby landowners are not statutory parties. *In re Great Eastern Building Co., Inc., 132 Vt. 610, 612 (1974)*
- * Owning an "adjacent or nearby" home without owning the underlying real estate is sufficient to meet the "particularized interest" threshold for party status. *Re: Route 103 Quarry (Carrara), No. 205-10-05 Vtec., Interim Order at 2 (2/23/05)*.
- * Where a State road project will widen the portion of road which goes through a farm, the owners

of such farm may be granted party status as adjoining landowners. *State of Vermont Agency of Transportation, #7C0558-2-EB* (Reconsideration) (5/18/90), *aff'd, In re Agency of Transportation*, 157 Vt. 203 (1991). [EB #445]

* Adjoining property owner granted party status based upon close proximity to proposed expansion of concrete contracting office and storage site and upon ability to materially assist the Board. *Walker Construction, #5W0816-1-EB* (1/14/87). [EB #313]

* Property owner immediately adjacent to one of four sites receiving major stream alteration work is proper party. *Agency of Transportation (Vermont Route 64), #5W0653-EB* (5/23/84). [EB #218].

176.2 Property interest affected

* Uncertainty regarding effect of leachate on adjoining property and condition requiring monitoring wells constitute a sufficient direct effect on that property to warrant granting party status to adjoining property owner under 10 V.S.A. § 6102(b). *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998).

* Party status considerations show the need to interpret the statute in a way that recognizes the impact on an affected party, rather than only the physical site of the development activity. *In re Killington, Ltd.*, 159 Vt. 206, 213 (1992).

* It is reasonable for neighboring landowners to rely upon the terms and conditions of a permit, or at least to rely on their right to be heard on an application to amend the permit. *In re Eustance*, No. 13-1-06 Vtec, Decision at 12 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

*Owning an “adjacent or nearby” home without owning the underlying real estate is sufficient to meet the “particularized interest” threshold for party status. *Re: Route 103 Quarry (Carrara)*, No. 205-10-05 Vtec., Interim Order at 2 (2/23/05).

* Claim that noise from the project could directly affect adjoining landowners’ use and enjoyment of the aesthetics of their property is sufficient to establish party status. *Re: Hale Mountain Fish and Game Club, Inc.*, DR#435, MOD at 4 (9/27/04).

* Direct impact on a putative party's land arises when person seeks EBR 14(A)(5) (adjoining property owner) party status; it is not a requirement for a claim of EBR 14(B)(1) party status. *Catamount Slate, Inc. et al.*, DR #389, MOD at 12 (6/29/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04).

* Not all adjoining property owners are entitled to party status, but where an adjoining property owner demonstrates that the proposed development *may* have a direct effect on his property, he is entitled to party status. *Town of Albany and Florence Beaudry, #7R1042-EB* (Interlocutory) (3/19/98). [EB #701]; *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (Chair’s Ruling on Preliminary Issues) (6/2/95). [EB #615]

- * Adjoining property owner need only demonstrate potential adverse impacts to his use and enjoyment of his property. *Town of Albany and Florence Beaudry*, #7R1042-EB (Interlocutory) (3/19/98). [EB #701]; *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (Chair's Ruling on Preliminary Issues) (6/2/95). [EB #615].
- * Where an adjoining property owner is a *pro se* litigant and appears to raise concerns such as noise and dust impacts to his property, Commission may be under a duty to at least explore with him whether Criterion 8 is implicated as well as Criterion 1. *Town of Albany and Florence Beaudry*, #7R1042-EB (Interlocutory) (3/19/98). [EB #701]; *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (Chair's Ruling on Preliminary Issues) (6/2/95). [EB #615]
- * Failure to establish that a project may have a direct effect on property leads to failure to obtain adjoining property owner party status. *Town of Royalton Carpenter Recreation Area*, DR #320 (11/20/96); *Putney Paper Company, Inc.*, DR #305 (10/30/95); *Northern Development Enterprises*, #5W0901-R-5-EB (8/21/95). [EB #627]; *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (7/18/95). [EB #615]; *William B. Kohlhepp*, #1R0332-EB (10/29/79). [EB #115]
- * Party status request granted to adjoining property owners because the project's density may have an adverse effect on the aesthetics of the surrounding area and because the project may be visible from their property. *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd, In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]
- * Adjoining landowner should be granted party status where road at issue might interfere with access to adjoining lands. *Okemo Mountain Inc.*, #2S0351-7A-EB (1/9/92). [EB #527M1]
- * Commission cannot exclude an adjoiner, who enters an appearance at the first hearing, from participating in the consideration of criteria in which the adjoiner subsequently demonstrates that a proper interest may be affected. *Paul and Dale Percy*, #5L0799-EB (3/27/85). [EB #249]
- * Presence of deer on property neighboring proposed project, even though deeryard itself is not located on neighboring property, is a valuable aspect of property ownership sufficient to grant party status to challenge loss of deeryard. *Agency of Transportation (Vermont Route 64)*, #5W0653-EB (5/23/84). [EB #218].
- * Property owner had party status because of potential direct effect of project on the right to use water and the interest in habitable use of residence, but such status was extinguished when party relinquished right to use the water source. *Green Mountain Stock Farm*, #3W0359-1-EB (10/12/83). [EB #198]
- * An adjoining landowner who has a substantial interest in a subdivision is entitled to party status. *Richard Cooper*, #5L0590-EB (7/11/80). [EB #137]
- * Ownership of a recreational easement in waters downstream from a proposed subdivision is not a sufficient basis to confer standing as an adjoining landowner. *Michael Jedware*, #6F0194-EB

(10/29/79). [EB #120]

E. Permitted Party

* 10 V.S.A. § 6085(c)(l)(E) makes no distinction between the two categories of persons - "other persons" or "adjoining property owners" - who might be able to qualify for party status. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 5 (1/28/11).

* Prior to January 31, 2005, Act 250 distinguished between adjoining property owners, who were considered to be parties by right who could request a hearing on an Act 250 application, and other parties, who were allowed to participate only by permission of the Environmental Board. See 10 V.S.A. § 6035(a), (c)(l) (2003); EBR 14(A), (B) *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 5 n.3 (1/28/11).

NOTE: The following notes are from cases applying statute and rules in effect prior to Act 115 (2004)

186. General

* Because party can protect itself in other fashion, it need not be a discretionary party to an Act 250 case. *In re Lunde Constr. Co.*, 139 Vt. 376, 380 (1981).

* Where persons are not statutory parties, allegations of harm do not constitute injury absent a legally protected right. *In re Great Eastern Building Co., Inc.*, 132 Vt. 610, 613 (1974).

* To receive party status and a hearing, the burden of initial evidentiary showing is upon requesting party. *In re RCC Atlantic, Inc., and Sousa*, #163-7-08 Vtec, Decision on Multiple Motions at 8 (5/08/09).

* Soil Conservation Act, 10 V.S.A. Ch. 31, does not prevent County Conservation District's participation as a permitted party. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 27 (2/22/01). [EB #758]

* While adjoining party status could not be granted because it was filed after first prehearing conference, Chair has discretion to grant petition for permitted party after first prehearing conference. *Stone Cutter's Way / Winooski East Waterfront Redevelopment Project*, DR #391, CPR at 3 (1/22/01). [DR #391]

* EBR 14(B)(1) party status granted to late petitioner where untimely or ineffective notice to petitioner was good cause for the late filing of its petition and grant would not unfairly delay the proceedings or burden other parties, especially where other parties do not object to grant of party status. *Stone Cutter's Way / Winooski East Waterfront Redevelopment Project*, DR #391, CPR at 4 (1/22/01). [DR #391]

* Grant of permitted party status is discretionary. *Maple Tree Place Associates*, #4C0775-EB

(Interlocutory Appeal) (10/11/96), *aff'd, In re Maple Tree Place Associates*, No.96-559 (Vt. S. Ct. 10/10/97) (Entry Order) [EB #657]; *George F. Adams & Co., Inc.*, DR #59 (1/20/75). (See *In re: Application of George F. Adams and Co., Inc.*, 134 Vt. 172 (1976)); *Great Eastern Building Co.*, DR #31 (7/25/73).

* Where potential for redundancy exists, permitted parties on the same criteria must present a joint case through one representative. *Pico Peak Ski Resort, Inc.*, #1R0265-12-EB (3/2/95). [EB #622M1]

* Person may be granted party status even though she was not a party during Commission proceedings. *Nehemiah Associates, Inc.*, #1R0672-1-EB (3/9/94). [EB #592M1]

* Board may deny party status requests on the ground that granting them would render a proceeding unmanageable. *Johnson Lumber Company*, DR #263M1 (7/16/92).

* Failure to serve request for party status on all of the parties, even after an express reminder from Board staff, will result in denial of such request. *Johnson Lumber Company*, DR #263M1 (7/16/92).

* Adjoining landowners may raise issues of general public interest and may be granted discretionary party status. *Liberty Oak Corporation*, #3W0496-EB (1/28/87). [EB #323M]

* Determination by Commission of permitted party status which is not made on first hearing day can be made subsequently upon a showing of good cause for failure to appear and a finding that late appearance will not unfairly delay proceedings or burden parties. *Paul and Dale Percy*, #5L0799-EB (3/27/85). [EB #249]

* Appellants waived any right to permitted party status where a binding prehearing conference report was issued based on appellants' representations that only adjoiner status was requested. *John A. Russell Corporation*, #1R0257-1-EB (11/30/83). [EB #212M]

* Party status should be granted only on a criterion by criterion basis. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188]

* An entity that did not exist when original permit was granted and which did not petition for party status before the first hearing of Commission, does not have party status and cannot appeal a Commission decision to the Board. *Upper Castleton River Watershed*, #1R0041-EB (1/19/79). [EB #96]

* Interested persons may file offers of proof regarding their interests relevant to Act 250, or may specify how their participation will materially assist Commission, and Commission shall rule whether petitioners may be admitted as parties. *Berlin Corners Associates*, DR #62 (9/12/74).

187. Interest Affected

* Party status considerations show the need to interpret the statute in a way that recognizes the impact on an affected party, rather than only the physical site of the development activity. *In re Killington, Ltd.*, 159 Vt. 206, 213 (1992).

* Private economic interests are not sufficient grounds on which to base a claim for party status. *In Re Chittenden SWD*, 162 Vt. 84 (1994); *Re: Hale Mountain Fish and Game Club, Inc.*, DR#435, MOD at 4 (9/27/04).

* As party status determinations are made for specific Act 250 criteria, the interest asserted must be protected by the Act 250 criterion for which the person seeks party status. *Agri-Mark, Inc*, No. 122-8-14 Vtec, Decision on Motion, at 4 (5/20/15).

* Party status granted upon offering proof of interests that may be affected under Criteria. *In re: Costco Act 250 Permit Amendment*, #143-7-09 Vtec, Entry Order at 1-2 (6/23/09).

Decisions under EBR in effect in 2004

* Despite addition of word “directly”, Board applies EBR 14(A)(6) much in the same manner as it applied former EBR 14(B)(1) in past cases. *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, MOD at 4 - 5 (9/27/04)

* Under new EBR 14(A)(6) (eff. 2004) petitioner must still establish that its interests are different from those which any member of the general public might assert. *Re: Vermont RSA Limited Partnership*, DR #441, MOD at 3 (5/11/05); *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, MOD at 4 (1/7/05) [EB #859]; *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 7 (5/10/04) [EB #843], citing cases under pre-2004 rules

* Petitioner’s claimed interests must bear a relationship or connection to the Project, a basic requirement for any claim of party status. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 7 (5/10/04) [EB #843], citing *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 3 (10/8/03); *Re: Village of Ludlow*, #2S0839-2-EB, MOD at 3 (5/28/03). [EB# 826]; *Re: Alpine Pipeline Company*, DR #415, MOD at 4 (1/3/03); *Mount Anthony Union High School District #14*, #8B0552-EB (Interlocutory), MOD at 7 (1/31/02); and see *Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal) (10/11/96), *aff'd*, *In re Maple Tree Place Associates*, No.96-559 (Vt. S. Ct. 10/10/97) (Entry Order). [EB #657]
(petitioner must demonstrate, by more than unsupported assertions that vaguely defined interests may be affected, a connection between the project and effect on certain specified interests)

* Mere speculation about the impact on an interest is not a sufficient basis to grant party status. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 7 (5/10/04) [EB #843], citing *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, MOD at 7 (4/29/03) [WFP #40]; and see *Re: Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982); *Re: CCH Stormwater Discharge Permits*, WQ-02-11, MOD (Vt. WRB, 3/21/03)

* Claim that noise from the project could directly affect petitioners’ interests under Criterion 8(aesthetics) is sufficient to establish party status. *Re: Hale Mountain Fish and Game Club, Inc.*, DR#435, MOD at 4 (9/27/04).

Decisions under EBR in effect prior to 2004

- * Petitioner must demonstrate connection between project and petitioner's specified interest, an affect on such interest, and must articulate how petitioner's interest differs from those of general public. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 3 (10/8/03) [EB #831]; *Re: Village of Ludlow*, #2S0839-2-EB, MOD at 3 (5/28/03). [EB# 826]; *Re: Alpine Pipeline Company*, DR #415, MOD at 4 (1/3/03); *Mount Anthony Union High School District #14*, #8B0552-EB (Interlocutory), MOD at 7 (1/31/02). [EB #799 & 801] *Springfield Hospital*, #2S0776-2-EB (8/14/97), *sup. ct. appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]; and see, *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, CPR at 4 (10/3/00). [EB #765]
- * Direct impact on a putative party's land arises when person seeks EBR 14(A)(5) (adjoining property owner) party status; it is not a requirement for a claim of EBR 14(B)(1) party status. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 3 (10/8/03) [EB #831]; *Catamount Slate, Inc. et al.*, DR #389, MOD at 12 (6/29/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).
- * Issue is not the *distance* between an individual and the Project, but whether the individual may be impacted by the Project. *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 5 (9/19/03). [EB #829]
- * It is irrelevant if other individuals may also be impacted from a development as long as the impacts to the petitioners are particular to them, concrete, and not an impact affecting the common rights of all persons. *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 8 (9/19/03). [EB #829]
- * In reviewing applications and petitions for party status, commissions look for impacts caused by a project, not impacts that a project will alleviate elsewhere. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 10 (1/31/02). [EB #799 & 801]
- * Direct impact on a putative party's land arises when person seeks EBR 14(A)(5) (adjoining property owner) party status; it is not a requirement for a claim of EBR 14(B)(1) party status. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 3 (10/8/03) [EB #831]; *Catamount Slate, Inc. et al.*, DR #389, MOD at 12 (6/29/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).
- * Petitioner has burden to demonstrate, by more than unsupported assertions that vaguely defined interests may be affected, a connection between the project and effect on certain specified interests. *Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal) (10/11/96), *aff'd, In re Maple Tree Place Associates*, No.96-559 (Vt. S. Ct. 10/10/97) (Entry Order). [EB #657]
- * Party status denied where petitioner failed to demonstrate that the project may affect its interest under the criteria. *Northern Development Enterprises*, #5W0901-R-5-EB (8/21/95). [EB #627]; *Spring Brook Farm Foundation, Inc.*, #2S0985-EB, CPR (6/2/95). [EB #615]
- * Persons will be denied party status where they provided insufficient information for the Board to

determine either that they have interests that would be affected or that they could materially assist the Board. *Talon Hill Gun Club, Inc. and John Swington, #9A0192-EB (Revocation) (2/8/93)*. [EB #567M1]; *Okemo Mountain, Inc., #2S0351-19-EB (6/17/92)*. [EB #548M]; *John Roach, #6G0220-EB (6/3/81)*. [EB #136]

* Board may grant party status to a person with respect to a proposed subdivision where such person is able to prove that his interests may be affected. *Okemo Mountain, Inc., #2S0351-10-EB (10/23/91)*. [EB #408]

187.1 Cases; particular criteria

General

* Private economic interests are not sufficient grounds on which to base a claim for party status. *In Re Chittenden SWD, 162 Vt. 84 (1994)*.

* Property owner who lives across the highway from proposed expansion of concrete contracting office and storage site is granted party status. *Walker Construction, #5W0816-1-EB (1/14/87)*. [EB #313]

* Only those residents who could see a proposed radio tower from their property would be admitted as parties. *Vermont Electric Power Corporation, #7C0565-EB (12/13/84)*. [EB #227]

* The Green Mountain Club qualifies for party status in a timber cutting project on public land. *Department of Forest, Parks and Recreation, #1R0488-EB (1/11/84)*. [EB #211]

* Property owners within 550 feet of residential project site are entitled to party status. *Pomfret Associates, #3R0403 (8/23/83)*. [EB #199]

Criterion 1 (air)

* Party status for Criterion 1 (dust, asbestos) denied where concern over asbestos is purely speculative because no sampling of the area has been done. *In re Pion Sand & Gravel Pit, #245-12-09 Vtec, Decision on Motion for Party Status at 9-10 (7/2/10)*; and see *In re Pion Sand & Gravel Pit, #245-12-09 Vtec, Entry Order on Motion to Alter at 2-3 (8/12/10)*.

* Court grants party status on Criterion 1 where petitioner has concerns about airborne dust affecting her on her property. *Re: Rivers Development, LLC, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 6 (7/3/07)*.

* Court grants party status on Criterion 1 where petitioners live near site and have concerns about alleged airborne carcinogens. *Re: Rivers Development, LLC, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 4 (7/3/07)*.

* Board grants party status on Criterion 1 because, although petition for party status was brief and lacked a map and detailed description as required by EBR 14(A)(5), it did state that party may be

impacted by toxic chemicals unless project site is properly cleaned up before construction begins. *Re: River Station Properties III, LLC #5W1436-EB (Interlocutory), MOD at 2 (10/14/04) [EB #832].*

* Appellants qualify for Criterion 1 (air) party status because, even though they do not reside immediately adjacent to the Project, they may be impacted by air pollution from the Project near their homes or while engaging in other activities in the area surrounding the Project; this is especially true for persons who are sensitive to air pollution due to medical conditions. *Re: McLean Enterprises Corporation, #2S1147-1-EB, MOD at 27 (9/19/03). [EB #829].*

Criterion 1 (Water)

* Assertions that stormwater will carry pollutants on to movants property as borne out by affidavit from stormwater expert sufficient to impart party status, however not as to groundwater because no casual connection to the groundwater was made. *Diverging Diamond Interchange A250, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake's request for party Status, at 4 (3/17/2017).*

Criterion 1(B)

* Movant demonstrated a reasonable possibility that the project was not designed in compliance with stormwater regulations and that wastewater in the form of stormwater runoff may enter its property and affect its interest in keeping the property free from pollution. Movant improperly uses "site balancing" and miscalculates the area of "redevelopment" under chapter 18 of the stormwater rules. *Diverging Diamond Interchange A250, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake's request for party Status, at 4 (3/17/2017).*

* Statement that group's members fish in and recreate on the waters that may be affected by the project is sufficient to support permitted party status on Criterion 1(B). *Re: Okemo Limited Liability Company, et al., #2S0351-34-EB, MOD at 4 (1/7/05) [EB #859]; Re: Village of Ludlow, #2S0839-2-EB, MOD at 4 (5/28/03). [EB# 826]*

* Request for party status denied where storm water runoff runs away from petitioner's residence, proposed project will not create any additional traffic, and petitioners will not be adversely affected by the placement of business signs. *McDonald's Corp., #1R0477-2-EB (11/24/92). [EB #538]*

Criterion 1(D)

* Court grants party status under Criterion 1(D) where petitioners allege current runoff from quarry property will flow onto their property. *Re: Rivers Development, LLC, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 6 (7/3/07).*

Criterion 1(F)

* Court grants party status under Criterion 1(F) where petitioners use the river in front of their home for recreation. *Re: Rivers Development, LLC, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 6 (7/3/07).*

* Citizen group granted EBR 14(B)(1) party status under Criteria 1(F) and 8 where it demonstrated specific affected interests, different from the general public, but denied such status for Criterion 9(B) because it failed to establish a specific interest. *Josiah E. Lupton, Quiet River Campground, Land Use Permit Application #3W0819 (Revised)-EB, CPR at 4 (10/3/00)*. [EB #765]

* Where appellants have no possessory or legal interest in the shoreline on the affected parcel, and presented no evidence of the manner in which the proposed housing development would affect the property, the issues were not properly before the Board. *William B. Kohlhepp, #1R0332-EB (10/29/79)*. [EB #115]

Criterion 1(E)

* Movant demonstrated a reasonable possibility that the project may impact its particularized interest because the movant has shown that the project may increase chloride discharges into the brook which is already impaired for chloride and if the project increases chloride under the TMDL, then movant will have to decrease their own chloride discharges. *Diverging Diamond Interchange A250, No. 169-12-16 Vtec, Entry regarding motion to dismiss Timberlake's request for party Status, at 4 (3/17/2017)*.

Criterion 2

* Court denies party status under Criterion 2 where quarry well is not certain and no offer of proof regarding groundwater flow. *Re: Rivers Development, LLC, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 3 (7/3/07)*.

Criterion 3

* Request for party status granted where persons reside on land near project, and a pipe to carry sewage will be 18 feet from existing source of drinking water. *MBL Associates, #4C0948-EB (Altered) (1/30/96), aff'd, In re MBL Associates, Inc., 166 Vt. 606 (1997)*. [EB #610]

* Party status granted when person demonstrated potential consequences to his water supply resulting from proposed subdivision. *James Davenport, Jr. and Barbara Davenport, #1R0667-EB (9/11/89)*. [EB #449M2]

* In connection with 52 unit rental housing project, nearby landowners granted party status as to Criteria 3 and 8. *Lunde Construction Company, #5W0456-EB (1/18/79), aff'd, In re Lunde Construction Company, 139 Vt. 376 (1981)*. [EB #94]

Criterion 4

* Party status under Criterion 4 granted where although the site plan drawings indicate that the exposed pit walls will be separated from the boundary by at least 100 feet (which will also include a topsoil berm), Applicant proposes to cut back the bank and remove vegetation on narrow strip parallel to Neighbors' land for 300 feet coming within 20 feet of the boundary line. *In re Pion Sand &*

Gravel Pit, #245-12-09 Vtec, Decision on Motion for Party Status at 13 (7/2/10).

Criterion 5

* In determining whether party status is appropriate under Criterion 5, “the relevant inquiry is whether the petitioner uses the roads that may be impacted by a project on a regular basis.” RE: Pike Industries, Inc., No. 5R1415-EB, Mem. of Decision, at 2 (Vt. Env’tl. Bd. Nov. 19, 2004). *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 14 (7/2/10).

* Party status under Criterion 5 & 9(K) granted where Neighbors use roads impacted by project on a regular basis and 555-sight distance planned for project’s access may be inadequate when a safe sight distance in this area for traffic traveling at an average speed of 59 MPH is between 825 and 995 feet. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 14 (7/2/10).

* Court denies party status under Criterion 5 where petitioner alleges impacts from noise of traffic, not traffic itself. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 6 (7/3/07).

* Party status pursuant granted under Criterion 5 because petitioner resides on Route 100B where trucks would pass and he bikes and walks along the road. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 3 (7/3/07).

* Party status granted under Criterion 5 because petitioner uses Route 100B at quarry entrance to walk and bike. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 4 (7/3/07).

* The question of party status under Criteria 5 and (9)(K) does not necessarily turn solely on where petitioner resides relative to a proposed project; rather, relevant inquiry is whether petitioner uses the roads that may be impacted by a project on a regular basis. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, MOD at 5 (1/7/05) [EB #859], citing *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, MOD at 2 (11/19/04) [EB #853]; *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2nd Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD at 11 (5/22/01).

* Test for party status under Criterion 9(K) (traffic) is more stringent than that under Criterion 5. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 8 (6/8/01) and MOD at 6-7 (7/26/01). [EB #785], distinguishing *Richard and Barbara Woodard*, #5W1261-EB, FCO at 13 (12/18/97); *L&S Associates*, #2W0434-8-EB, MOD (11/24/92); *The Home Depot USA, Inc.*, #1R0048-12-EB, MOD at 8 (11/30/00); *Okemo Mountain*, #2S0351-30-EB, #2S0351-31-EB, #2S0351-25R-EB, MOD (5/22/01); *Town of Milton*, #4C0046-5-EB, MOD at 2 (4/14/00); *Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, Chair's Preliminary Ruling at 8 (1/8/99); *OMYA, Inc., and Foster Brothers Farm, Inc.*, #9A0107-2-EB, Order at 2 (10/30/98); *Town of Stowe*, #100035-9-EB, Order at 2 (10/29/97).

* Request for party status denied where storm water runoff runs away from petitioner’s residence, proposed project will not create any additional traffic, and petitioners will not be adversely affected

by the placement of business signs. *McDonald's Corp.*, #1R0477-2-EB (11/24/92). [EB #538]

Criterion 6

* Party status denied on Criterion 6 where claim of injury based on decreased tax valuation leading to decreased educational services is too attenuated. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 3 (7/3/07).

* Allegations that project may impact schools attended by children of potential parties is sufficient to confer party status. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, MOD at (1/7/05) [EB #859]

Criterion 8

* Court grants party status under Criterion 8 where petition alleges injury to scenic value of Route 100B. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 4 (7/3/07).

* Petition fails to indicate how such wetlands rise to the level of sites that may be considered to be "rare and irreplaceable natural areas" under existing Board precedent. *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, MOD at 5 (10/8/03) [EB #831]

* Local citizens have no specified interests different from the general public since they can not see the monument from their homes and simply pass by and observe it like everyone else. *Re: Alpine Pipeline Company*, DR #415, MOD at 4 (1/3/03.)

* Citizen group granted EBR 14(B)(1) party status under Criteria 1(F) and 8 where it demonstrated specific affected interests, different from the general public, but denied such status for Criterion 9(B) because it failed to establish a specific interest. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, CPR at 4 (10/3/00). [EB #765]

* Request for party status denied where storm water runoff runs away from petitioner's residence, proposed project will not create any additional traffic, and petitioners will not be adversely affected by the placement of business signs. *McDonald's Corp.*, #1R0477-2-EB (11/24/92). [EB #538]

* In connection with 52 unit rental housing project, nearby landowners granted party status as to Criteria 3 and 8. *Lunde Construction Company*, #5W0456-EB (1/18/79), *aff'd, In re Lunde Construction Company*, 139 Vt. 376 (1981). [EB #94]

Criterion 8(A)

* Court grants party status under Criterion 8(A) where wildlife on petitioners' property throughout the year may be impacted by quarry. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 6 (7/3/07).

* Court grants party status under Criterion 8(A) where deer and turkey hunting is allowed on

petitioner's land and habitat may be impacted by traffic and noise. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 4 (7/3/07).

Criterion 9

* Parties opposed to project because of concern over municipality's ability to provide services rather than increase in taxes granted party status on fiscal criteria. *Home Depot USA, Inc., Ann Juster, and Homer and Ruth Sweet*, #1R0048-12-EB, MOD at 6 (11/ 30/00). [EB # 766]

* Fiscal criteria protect the municipality's ability to provide service, not the individual taxpayer; persons who oppose project because it might increase need for municipal services and ultimately raise taxes denied party status on fiscal criteria. *Brewster River Land Co., LLC*. #5L1348-EB, MOD at 9-10 (9/18/00). [EB #761]

Criterion 9(A)

* Court denies party status under Criterion 9(A) where there is no showing that quarry will affect population growth, and how the petitioners would be personally aggrieved by such a change. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 3 (7/3/07).

Criterion 9(B)

* Party status under Criterion 9(B) denied where Neighbors make no showing that primary agricultural soils exist on project site. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 15 (7/2/10).

* Neighbor who raises food for his family has standing under Criterion 9B to show whether the project will substantially interfere with his agricultural operation by disrupting the currently existing local agricultural community. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 9 (12/1/08), citing *In re Nile & Julie Dupstadt*, Permit # 4C1013-EB (Corrected), Findings of Fact, Concl. of Law, & Order, at 19 (Vt. Env'tl. Bd. Apr. 30, 1999) (agricultural uses are often incompatible with residential uses; noise, odors, and dust associated with agricultural uses can disturb adjacent residents); *In re Nile & Julie Dupstadt.*, Permit # 4C1013-EB (Corrected), Mem. of Decision, at 2 (Vt. Env'tl. Bd. 11/25/98) (children, dogs, and cars associated with residential uses can create risks for livestock and crops).

*Party status under Criterion 9(B) denied to organization which did not have (itself or through its members) interests affected by project *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 8 (5/1/08), *aff'd in part / rev'd in part*, *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08)(citing *Parker v. Town of Milton*, 160 Vt. 74, 78 (1998); *In re:Entergy Nuclear/Vt. Yankee Thermal Discharge Permit Amendment*, Docket No. 89-4-06 Vtec, at 6-9 (1/9/07); *In re: Unified Buddhist Church, Inc., Indirect Discharge Permit*,

Docket No. 253-10-06 Vtec, at. 2-4 (8/15/07)).

* Non-farmers can seek and obtain party status on Criterion 9(B). *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 6 (6/8/01) [EB #785]; In *Spear Street Associates*, #4C0489-1-EB, MOD at 3 (4/4/84).

* Citizen group granted EBR 14(B)(1) party status under Criteria 1(F) and 8 where it demonstrated specific affected interests, different from the general public, but denied such status for Criterion 9(B) because it failed to establish a specific interest. *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, CPR at 4 (10/3/00). [EB #765]

Criterion 9(C)

* Elements for party status under Criterion 9(C) differ from those under Criterion 9(B). *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 7-8 (6/8/01). [EB #785].

Criterion 9(D)

* Since Criterion 9(D) protects lands with high potential for extraction of earth or mineral resources from development that might interfere with the subsequent extraction of the minerals or earth resources, only interest at issue in earth resources Project is possibility that Project would interfere with the future extraction of earth resources. *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 14 (9/19/03). [EB #829].

Criterion 9(E)

* Party status under Criterion 9(E) granted where Neighbors demonstrate noise levels of 70 dBA may impact ability to hunt and that disturbance of 4.4 acres of land and the placing berms 25 feet from Neighbors' land may impact future use and enjoyment unless reclamation returns site to stability. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 17 (7/2/10).

Criterion 9(H)

* Court denies party status under Criterion 9(H) where petitioners failed to show that cost of quarry to town would outweigh tax revenue, and how that would directly impact them. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 3 (7/3/07).

* Court denies party status and motion to intervene under Criterion 9(H) where alleged interest is that horse farm would not be able to operate, decreasing property value and shifting tax burden to other residents, because interest is too attenuated. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 4 (7/3/07).

Criterion 9(K)

- * Given the commercial setting, the foreseeability of development, and the steps that the Applicant took to mitigate impacts, the Court concluded that the Project will not materially interfere with public's use and enjoyment of the canal path. *Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions to Reconsider at 9 (7/7/16).
- * Party status under Criterion 5 & 9(K) granted where Neighbors use roads impacted by project on a regular basis and 555-sight distance planned for project's access may be inadequate when a safe sight distance in this area for traffic traveling at an average speed of 59 MPH is between 825 and 995 feet. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 14 (7/2/10).
- * Court denies party status under Criterion 9(K) where petitioner alleges an interest only in traffic, not endangerment of public investments and no showing of impact upon investment in Route 100B. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 4 (7/3/07).
- * Court grants party status on Criterion 9(K) because of petitioners' investment in cultivating lands along Route 100B and because they use the road for biking and walking. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 3 (7/3/07).
- * The question of party status under Criteria 5 and (9)(K) does not necessarily turn solely on where petitioner resides relative to a proposed project; rather, relevant inquiry is whether petitioner uses the roads that may be impacted by a project on a regular basis. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, MOD at 2 (11/19/04) [EB #853]; *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2nd Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD at 11 (5/22/01).
- * Board has regularly granted party status on Criterion 9(K) to persons whose residences are not adjacent to the resource at issue but who use and enjoy the resource; question is not whether there are other people similarly impacted, the question is whether petitioner has demonstrated that he is specifically impacted. *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 41 (9/19/03). [EB #829].
- * Non-municipal and non-state parties may raise Criterion 9(K) claims. *Catamount Slate, Inc. et al.*, DR #389, MOD at 12 (6/29/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04); *see, Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, Findings of FCO at 2 and 24 (8/19/99) [EB #721]; *Wake Robin Associates, et al.*, #4C0814-EB, Findings of FCO at 1 and 20 (8/14/91); *Liberty Oak Corporation*, #3W0496-EB (1/28/87). [EB #323M] (adjoining landowners)
- * Test for party status under Criterion 9(K) (traffic) is more stringent than that under Criterion 5. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 8 (6/8/01) and MOD at 6-7 (7/26/01) [EB #785], distinguishing *Richard and Barbara Woodard*, #5W1261-EB, FCO at 13 (12/18/97); *L&S Associates*, #2W0434-8-EB, MOD (11/24/92); *The Home Depot USA, Inc.*, #1R0048-12-EB, MOD at 8 (11/30/00); *Okemo Mountain*, #2S0351-30-EB, #2S0351-31-EB, #2S0351-25R-EB, MOD (5/22/01); *Town of Milton*, #4C0046-5-EB, MOD at 2 (4/14/00); *Old Vermonter Wood Products and Richard*

Atwood, #5W1305-EB, Chair's Preliminary Ruling at 8 (1/ 8/99); *OMYA, Inc., and Foster Brothers Farm, Inc.*, #9A0107-2-EB, Order at 2 (10/30/98); *Town of Stowe*, #100035-9-EB, Order at 2 (10/29/97).

* As purpose of Criterion 9(K) is to protect public investments, party status under Criterion 9(K) denied where basis is claim that petitioner receives government funding to create and maintain affordable housing or that project would enhance public investment in such housing. *Town of Milton*, #4C0046-5-EB, MOD (4/14/00).

Criterion 10

* Party status under Criterion 10 denied where Town Plan language such as (1) "Maintain the Town's beautiful character as much as possible"; (2) "Have . . . unsightly land uses screened"; (3) "Protect Lowell's . . . natural resources"; (4) "Encourage open farmland"; and (5) "Allow development along . . . Route 100 that compliments and does not distract from the scenic qualities" is abstract and does not set forth a "specific policy" stated in language that is "clear and unqualified, and creates no ambiguity." *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520 (mem.) (citations omitted). *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 18 (7/2/10).

* Residents of town have party status regarding a project's compliance with their town plan. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, MOD at 4 (11/19/04) [EB #853], citing *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 7 (10/8/03) [EB #831] (every citizen of a town where a project is proposed can claim a direct interest, distinct and different from the public in general, in the efficacy and viability of his or her town plan - - an interest in seeing that such town plan is respected), citing *McLean Enterprises Corp.*, #2S1147-1-EB, MOD at 7 and 29 (9/19/03) (Town resident has an interest in ensuring that the provisions of the Town Plan concerning noise, traffic, and the preservation of the rural character of the town are upheld); and see *St. Albans Group and Wal-Mart Stores, Inc.*, #6F0471-EB, MOD at 8 (4/15/94) (as residents of the town and region, citizens have an important interest in determinations made concerning the application of town and regional plans to a project).

* Appellant denied party status where regional and local plans did not address how non-driving parents travel to local school. *Barre City School District*, #5W1160-EB (Reconsideration) (1/30/95). [EB #600]

188. Material Assistance

* In reviewing applications and petitions for party status, commissions look for impacts caused by a project, not impacts that a project will alleviate elsewhere. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 10 (1/31/02). [EB #799 & 801]

* Mere assertions of an interest do not satisfy Rule 14(B)(2); rather, party status under EBR14(B)(2) is sparingly granted, usually to a person with specific expertise who can assist Commission or Board in addressing a particularly complex, novel, or unfamiliar project." *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 8-9 (5/10/04) [EB #843]; *Re: John J. Flynn Estate and*

Keystone Development Corp., #4C0790-2-EB, MOD at 4 (10/8/03). [EB #831]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 9 (6/8/01)[EB #785]; *Stonybrook Condominium Owners Association*, DR 385, MOD at 3 (5/19/00), quoting *Springfield Hospital*, #2S0776-2-EB, MOD at 7, (8/14/97) [EB #669], *sup. ct. appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97), quoting *Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, MOD at 3 (10/3/95); and see, *Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal) (10/11/96), *aff'd, In re Maple Tree Place Associates*, No.96-559 (Vt. S. Ct. 10/10/97) (Entry Order). [EB #657]; *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/18/91). [EB #471M3]

188.1 Interest

* Despite appellant's expertise regarding effects of diesel fumes, he was not granted party status because he was unable to demonstrate that his offer was relevant to the issue under consideration. *Northeast Cooperatives and L & S Associates*, # 2W0434-11-EB (1/29/99). [EB #724]; see, *In re Taft Corners Assocs.*, 160 Vt. 583, 593 (1993).

188.2 Complexity / Novelty of issue involved

* Board grants materially assisting party status when issues are complex or novel, and when the petitioner demonstrates expertise to assist Board in understanding issues. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 9 (5/10/04) [EB #843]; *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 4 (10/8/03). [EB #831]; *Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort*, #5L1125-10B-EB and MOD #5L1125-10A(Revised)-EB, MOD at 2 (11/15/01)[EB #793]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 9 (6/8/01) [EB #785]; *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, CPR at 4 (10/3/00) [EB #765]

* Where an appeal involves complex scientific issues, organizations which will be able to materially assist the Board in its understanding of these issues may be granted party status. *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/18/91). [EB #471M3]

188.3 Expertise

* Board grants materially assisting party status when petitioner demonstrates expertise to assist Board in understanding issues. *Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort*, #5L1125-10B-EB and MOD #5L1125-10A(Revised)-EB, MOD at 2 (11/15/01). [EB #793]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 9 (6/8/01). [EB #785]; *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, CPR at 4 (10/3/00). [EB #765]

* Petitioner demonstrates its particular expertise by its track record in Act 250 proceedings, by demonstrating that project is complex, and by providing description of evidence or argument that it will present. *Mount Anthony Union High School District #14*, #8B0552-EB (Interlocutory), MOD at 9 (1/31/02). [EB #799 & 801]

* To establish material assistance, Board requires more than an assertion that petitioner can cross-

examine witnesses and present experts. *Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal) (10/11/96), *aff'd, In re Maple Tree Place Associates*, No.96-559 (Vt. S. Ct. 10/10/97) (Entry Order). [EB #657]; *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (Chair's Ruling on Preliminary Issues) (6/2/95). [EB #615]

188.4 Assistance not available from other party

* Where applicant will adequately prepare and present a matter to a commission, petition for materially assisting party status by another party is denied. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 10 & 11 (1/31/02). [EB #799 & 801].

* In evaluating EBR 14(B)(2) petition, Board considers whether another party will provide the assistance which a person who seeks Rule 14(B)(2) status may give. *Stonybrook Condominium Owners Association*, DR 385, MOD at 3 (5/19/00); *Circumferential Highway, State of Vermont, Agency of Transportation and Circumferential Highway District*, #4C0718-EB, MOD and DO at 2 (9/25/89).

188.5 Cases

* Union school district that provided the Board material assistance regarding the substantive issue on appeal was properly granted party status. *Swanton Housing Associates*, #6F0482-EB (4/24/97). [EB #667]

* Party status denied where petitioner failed to demonstrate that it could materially assist the Board. *Northern Development Enterprises*, #5W0901-R-5-EB (8/21/95). [EB #627]

* Materially assisting party status granted. *Manchester Commons Associates*, #8B0500-EB (5/25/95). [EB #631M1]; *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB #425]

* Request for party status is granted in part and denied in part. *Pico Peak Ski Resort, Inc.*, #1R0265-12-EB (3/2/95). [EB #622M1]

* Party status denied to petitioner which cannot provide anything additional. *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB #425]

F. Friends of the Commission

190. General

* Friend of the Commission status is not equivalent to party status. A Friend of the Commission is a nonparty. *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 5 (4/12/12).

* A friend of the court "may file memoranda, proposed findings of fact and conclusions of law, and

argument on legal issues, as well as provide testimony, file evidence, and cross-examine witnesses” in accordance with 10 V.S.A. § 6085(c)(5). *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 22 (8/6/14).

G. Standing

191. General

* Because standing question goes to Board's jurisdiction, it is a threshold question that must normally be reviewed prior to the consideration of substantive questions. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.).

* Organization seeking party status on behalf of members must show that members are entitled to party status individually, that the interests asserted are germane to the organization’s purpose, and that the relief requested does not require individual members’ participation. *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 7 (4/12/12).

* Neighbor who raises food for his family has standing under Criterion 9B to show whether the project will substantially interfere with his agricultural operation by disrupting the currently existing local agricultural community. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 9 (12/1/08), citing *In re Nile & Julie Dupstadt*, Permit # 4C1013-EB (Corrected), Findings of Fact, Concl. of Law, & Order, at 19 (Vt. Envtl. Bd. Apr. 30, 1999) (agricultural uses are often incompatible with residential uses; noise, odors, and dust associated with agricultural uses can disturb adjacent residents); *In re Nile & Julie Dupstadt*, Permit # 4C1013-EB (Corrected), Mem. of Decision, at 2 (Vt. Envtl. Bd. 11/25/98) (children, dogs, and cars associated with residential uses can create risks for livestock and crops).

”For an organization to have standing, it must demonstrate that ‘(1) its members have standing individually; (2) the interests it asserts are germane to the organization’s purpose; and (3) the claim and relief requested do not require the participation of individual members in the action.’” *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 8 (5/1/08), *aff'd in part / rev'd in part*, *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08)(citing *Parker v. Town of Milton*, 160 Vt. 74, 78 (1998); *In re: Entergy Nuclear/Vt. Yankee Thermal Discharge Permit Amendment*, Docket No. 89-4-06 Vtec, at 6-9 (1/9/07); *In re: Unified Buddhist Church, Inc., Indirect Discharge Permit*, Docket No. 253-10-06 Vtec, at. 2-4 (8/15/07)).

* Appellant who loses ownership interest in abutting commercial property also loses individual party status.

Re: Sports Venue Foundation, Inc., No. 168-8-07 Vtec, Judgment Order, and Decision and Order on Motion to Dismiss and Motion for Clarification at 4-5 (12/18/07).

* It has long been established in Vermont that a party who wishes to bring an action in his or her

own name must have a legal interest in the matter or controversy. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 10 (10/3/03) [EB #824], citing *Parker v. Town of Milton*, 169 Vt. 74 (1998); *Murty v. Allen*, 71 Vt. 377 (1899). See also, *Davenport v. North Eastern Mutual Life Association*, 47 Vt. 528, 532 (1875) ("[T]he suit should be brought by the party having the legal interest in the contract...."); *Heald v. Warren*, 22 Vt. 409, 413 (1850) ("It is well settled that the person having the legal interest has at law the right of action.")

* Vermont Supreme Court "has adopted the constitutional and prudential components of the standing doctrine enunciated by the United States Supreme Court." *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 10 (10/3/03) [EB #824], quoting *Schievella v. Department of Taxes*, 171 Vt. 591, 592 (2000), citing *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 341 (1997).

* Included with the first prudential elements is "the general prohibition on a litigant's raising another person's legal rights." *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 341 (1997).

* Mere speculation about the impact of some generalized grievance is not a sufficient basis to find standing. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, MOD at 7 (4/29/03) [WFP #40], citing *Re: Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982).

* The "injury" to the appellant's interest must be concrete and particularized, not an injury affecting the common rights of all persons. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, MOD at 7 (4/29/03) [WFP #40], citing *Parker v. Town of Milton*, 169 Vt. 74, 78 (1998).

* The distinction between standing and party status is slight: a person who wishes to initiate an appeal or declaratory ruling request must demonstrate *standing* to do so whereas the question of *party status* arises when a person wishes to be a party to a proceeding initiated by someone else. *Agency of Transportation (Bennington Bypass)*, DR #349 (11/12/97); *Putney Paper Company, Inc.*, DR #335 (5/29/97).

* Once a person has demonstrated standing to file an action, s/he need not make a separate demonstration of party status. *Putney Paper Company, Inc.*, DR #335 (5/29/97).

191.1 When challenge to standing/party status must be raised

* Challenge to standing is not timely when it is not made until after Commission made party status determinations and after the close of evidence and trial at the Environmental Court. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 30 (1/20/10).

192. Declaratory Ruling

192.1 To petition for

* DR petitioner lacks standing due to failure to show how the JO may affect his individual interests; all of the identified 'impacts' are general in nature and do not involve *direct* impacts on petitioner's property. *Stone Cutter's Way / Winooski East Waterfront Redevelopment Project*, DR #391, MOD at

8 (6/1/01), appeal dismissed, *In re Stone Cutter's Way/Winooski East Waterfront Redevelopment Project*, No. 2001-323 (Vt. Sup. Ct., 11/28/01). [DR #391]

* The "affected by the outcome" test requires that party status petitioner demonstrate that a proposed development or subdivision may affect his interest under any of the ten Act 250 criteria. *Re: Conservation Designs, Inc. and Ritchie Crockett Lawton*, #2W1418-EB, MOD at 4 (6/4/04) [EB#847]; *Putney Paper Company, Inc.*, DR #335 (5/29/97); *Developer's Diversified Realty Corporation (Berlin Mall Wal*Mart)*, DR #364, MOD (9/10/98).

* Petitioner with an interest in the preservation of natural resources did not establish that he had standing. *Putney Paper Company, Inc.*, DR #335 (5/29/97).

* Once a person has demonstrated standing to file an action, s/he need not make a separate demonstration of party status. *Putney Paper Company, Inc.*, DR #335 (5/29/97).

* Adjoining landowner did not establish that he had standing pursuant to the "qualifies as a Rule 14(A) party" test, where he failed to demonstrate that the use of paper sludge in the vegetative layer over a landfill may have a direct affect on his property. *Putney Paper Company, Inc.*, DR #335 (5/29/97)

* Adjoining landowner did not establish that he had standing under the "entitled to notice" test, because adjoiners are not among those entitled to notice. *Putney Paper Company, Inc.*, DR #335 (5/29/97).

* Petitioner failed to establish that the project may affect his interest under any of the Act 250 criteria. *Town of Royalton Carpenter Recreation Area*, DR #320 (11/20/96); *Hiddenwood Subdivision*, DR #324 (4/29/96).

* Persons or entities who may be affected by a JO's outcome the right to file a petition for a DR. *Wesco, Inc. and Jacob & Harmke Verburg*, DR #304M (6/30/95).

* A person who owns two properties, one of which adjoins and is at a higher elevation than a proposed activity, and other which is his primary residence and which does not adjoin, but is at a lower elevation than the activity, has an identifiable stake and entitled to request a DR. *Okemo Mountain, Inc.*, DR #268 (10/27/92).

192.2 To participate as a party in

* Party status rules in declaratory ruling proceedings turn on whether the project could impact an Act 250 interest of the adjoining landowner, not whether the outcome of the jurisdictional issue could impact that person's interest. *Re: Peter and Carla Ochs*, DR #437 MOD at 2 (11/22/04), citing *Re: Dennis Demers and NE Central R.R.*, DR #429, MOD at 3-4 (4/26/04) and *Re: Catamount Slate, Inc., d/b/a Reed Family Slate Products, and Fred and Suellen Reed*, DR #389, MOD at 11-12 (6/29/001) *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, DR #396, MOD at 3 (7/5/01)

* Party may appear as non-party participant under EBR 14(E) in DR because it may have unique access to relevant evidence and information. *Re: Peter and Carla Ochs*, DR #437 MOD at 3 (11/22/04), citing *Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, MOD at 3 (10/3/95), aff'd on other grounds, *In re Spring Brook Farm*, 164 Vt. 282 (1995)(decided under former (materially assisting party) rules and holding that the more novel or complex an issue, the greater the Board(s) need for material assistance); see also *Re: Springfield Hospital*, #2S0776-2-EB, MOD at 7 (8/14/97).

* Board applies EBR 14 party status standards in order to determine who may participate as a party in a DR proceeding. *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, MOD at 3 (9/27/04); *Re: Dennis Demers*, DR #429, MOD at 2 - 4 (4/26/04); *Re: Catamount Slate, Inc., d/b/a Reed Family Slate Products, and Fred and Suellen Reed*, DR #389, MOD at 11-12 (6/29/01)(Board looks to whether party may be affected under Act 250 criteria, rather than under jurisdictional determination, to decide party status in declaratory ruling proceeding); see also, *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, DR #396, MOD at 3 (7/5/01)(EBR 14 requires that the Board look for possible impacts under one or more Act 250 criteria in determining party status, even where the sole merits issue is jurisdictional and the Board will not be reviewing a proposed development for compliance with Act 250 criteria.)

* Party status in a DR petition does not depend on the information that such person can give relative to the jurisdictional question presented by petition. *Catamount Slate, Inc. et al.*, DR #389, MOD at 11 (6/29/01), rev'd on other grounds, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04).

* Party status in DR petition depends on whether person can show that he is either entitled to notice under 10 V.S.A. § 6084, or is a person who "may be affected by the outcome of the decision" of petition. 10 V.S.A. § 6007(c). *Catamount Slate, Inc. et al.*, DR #389, MOD at 11 (6/29/01), rev'd on other grounds, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04).

* Anyone having standing as an "interested party" is entitled to participate in DR proceedings; the term is not limited to those who qualify as parties in permit proceedings. *Interstate Uniform Services*, DR #147 (9/26/84).

193. Revocation

193.1 To petition for

* Person which has notice of application but does not participate in the permit proceedings lacks standing to petition to revoke the permit. *Michael Jedware*, #6F0194 and #6F0259 (Revocation), MOD at 11 (1/4/01). [EB #768].

* Where original permit has not expired petitioners who failed to participate in original permit proceedings lack standing. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]

- * A person may prosecute a revocation petition before the Board if he was a party to the permit or an adjoining property owner whose property interests are directly affected by an alleged violation. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]; *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96). [EB #647], *aff'd*, *In re White*, 172 Vt. 335 (2001).
- * Once standing is invoked, the Board adjudicates revocation petition without considering whether petitioner has party status. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96). [EB #647], *aff'd*, *In re White*, 172 Vt. 335 (2001).
- * Petitioner has standing to bring revocation petition where he owns property that adjoins project, can see project from his property, and, if he had received notice of the permit applications would have opposed them based on impacts. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96). [EB #647], *aff'd*, *In re White*, 172 Vt. 335 (2001).
- * In revocation proceedings, the Board Rules governing party status on applications for Act 250 permits apply. *Talon Hill Gun Club, Inc. and John Swingleton*, #9A0192-EB (Revocation) (3/4/93) [EB #567M2]; *J.P. Carrara & Sons, Inc.*, #1R0589-EB Revocation (5/13/92). [EB #498]; *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded*, *In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306]
- * The local planning commission is not barred from pursuing a revocation request because it failed to timely appeal the permit itself. *Pelham North, Inc.*, #3W0521-1-EB (4/24/89). [EB #393]

VI. PERMITS

A. General

200. General

*“‘Permit’ has a specific and accepted meaning in the Act 250 context,” and the issuance of such permit requires a full substantive review of all ten statutory criteria under the Act. *In re SP Land Co., LLC Act 250 Land Use Permit Amendment*, 2011 T 104, ¶ 24-25 ---A.3d--- (Vt 2011).

* Acquisition of an Act 250 permit is a complicated matter. *In re Agency of Administration*, 141 Vt. 68, 81 (1982).

* An Act 250 permit is required for the sale or offer for sale of any interest in a subdivision. *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 11 (11/9/07) (citing 10 V.S.A. § 6081(a)).

200.1 Purpose of permit requirement

* The obvious purpose of the permit requirement of Act 250 is to subject all "development" to scrutiny at the commission level to assure that any adverse impacts on the values described in 10

V.S.A. § 6086 will not be undue, when considered against the benefits of the development. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 153 (1979).

* The purpose of Act 250 is served by a system of land use permits established by the Legislature. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).

200.2 Need for permit *before* construction or development or subdivision commences

* Act 250 requires a state land use permit prior to the commencement of development. 10 V.S.A. § 6081(a); *In re Ochs*, 2006 VT 122, ¶19 (Vt. Sup. Ct. 11/27/06) *In re Real Audet*, 2004 VT 30 (4/1/04), *affirming, Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, FCO at 5 (12/5/02); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995).

* Once jurisdiction is established, 10 V.S.A. § 6081(a) mandates a land-use permit before commencement of any construction on a development. *In re John Rusin*, 162 Vt. 185, 190 (1994).

* If a project is one that Act 250 subjects to state level review, it cannot go forward without a permit from Commission. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 145-46 (1979).

* An Act 250 permit is required for the sale or offer for sale of any interest in a subdivision. *Zurn Sisters Development, LLC*, 233-9-06 Vtec, Order at 11 (11/9/07) (citing 10 V.S.A. § 6081(a)).

* Appellee bears the risk of moving forward with construction while an appeal of the underlying permit is pending. *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Stay) (2-7-2018).

* A person must obtain an Act 250 permit prior to commencement of development or construction on a development subject to Act 250 jurisdiction. 10 V.S.A. § 6081(a). *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 14-15 (8/15/2017).

* "As a general rule, it is probably wise to determine whether a permit is required before carrying out a development." *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 15 (8/15/2017).

200.3 Construction of

* Court must look to the entirety of a permit and attempt to harmonize its constituent parts. *In re: Maggio*, No. 166-7-06 Vtec, Decision at 7 (4/20/2007); citing *Davis v. Hunt*, 167 Vt. 263, 267 (1997), citing *Lemiux v. Tri-State Lotto Comm'n*, 164 Vt. 110, 113 (1995).

201. Issuance of

* To obtain an Act 250 permit, applicant must prove that project will not be detrimental to the public health, safety or general welfare. *In re Hawk Mountain Corp.*, 149 Vt. 179, 182 (1988).

*“Regardless of who has the burden of proof on a particular issue, the applicant always has the burden of producing evidence sufficient to enable the Court to make the requisite positive findings on all of the criteria.” *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 4 (11/28/12) (citing *Re: EPE Realty Corp. and Fergessen Mgmt., Ltd.*, No. 3W0865-EB, Findings of Fact, Concl. of Law, and Order, at 18 (Vt. Envtl. Bd. Nov. 24, 2004) (citing *Re: Peter S. Tsimortos*, No. 2W1127-EB, Findings of Fact, Concl. of Law, and Order, at 13) (Vt. Envtl. Bd. Apr. 13, 2004)); *Re: McLean Enter. Corp.*, No. 2S1147-1-EB, Mem. of Decision, at 43 (Sept. 19, 2003)).

* No application can properly be denied by the 'unless Board it finds the proposed . . . development detrimental to the public health, safety or general welfare.' *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518-19 (1975); 10 V.S.A. § 6087(a).

* On remand from Supreme Court, Board dismissed for lack of prosecution, based on permittee's express intention not to participate in any further Board proceedings and his failure to meet filing deadlines; permit that had been subject of the Court appeal is allowed to stand, and status of permitted operations are as if no appeal had been taken. *Re: Lawrence White*, #1R0391-8-EB (Remand), MOD (1/17/02). [EB #689]

* Permit issued by Commission is void, where later Board DR decision determined that permit was not required. *Atlantic Cellular Co., L.P. and Rinkers Inc.*, DR #340 (7/11/97).

* Board may extend the time for obtaining a permit for a project where Commission had scheduled a hearing on an application to operate the project and Board is informed that subsequent hearings on the application are likely. *Disposal Specialists, Inc.*, #2W0161-1-EB (10/11/89). [EB #447M2]

* Act 250 review includes not only impacts during construction but extends to impacts during use of a project *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]

201.1 Requirements for issuance; affirmative findings on each criterion

* Under Act 250, a project is entitled to a land use permit if the applicant can show that the development meets ten enumerated Act 250 criteria. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 16 (2/16/2017).

* When project only impacts certain criteria, or parties agree on facts for positive finding, factual finding is limited to those criteria and sub-criteria at issue during hearing. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 33 (1/20/10).

* Act 250 mandates that before granting a permit, the board or district commission shall find that the subdivision or development meets all ten criteria under 10 V.S.A. § 6086. 10 V.S.A. § 6086(a). *In re Woodford Packers, Inc.*, 2003 VT 60 - 22 (6/26/03); *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 293 (1998); *In re MBL Associates*, 166 Vt. 606, 606 (1997); *In re Killington, Ltd.*, 159 Vt. 206, 214 (1992); *In re Agency of Administration*, 141 Vt. 68, 82 (1982); *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 146 (1979); *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), FCO at 6 (8/19/96). [EB #629R]

- * An Act 250 application may be approved and an Act 250 permit issued only when positive findings have been rendered under all applicable criteria. *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5, ¶122 (01/17/14).
- * Act 250 requires the Board to make a finding on each factor, irrespective of the placement of the burden of proof. *In re Denio*, 158 Vt.230, 237 (1992)(citing 10 V.S.A. § 6086(a)).
- * To obtain an Act 250 permit, applicant must prove that project will not be detrimental to the public health, safety or general welfare. *In re Hawk Mountain Corp.*, 149 Vt. 179, 182 (1988).
- * When there has been an appeal from a Commission decision which grants a permit, a settlement agreement which provides that a permittee will be bound by conditions which are more restrictive than those imposed by the Commission and which will result in greater protection to the environment, need not be accompanied by additional evidence on which the Board can base Findings of Fact, which can then, in turn, form the basis for the Board to make positive Conclusions of Law on the Criteria. Rather, the Board can rely upon the Findings which appear in the Commission's decision. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 6 (6/17/04) [EB #828]
- * Where a stipulation by the parties results in a request to the Board to eliminate or relax conditions imposed by a Commission permit, the Board requires that the parties provide it with evidence or stipulated findings to support such a request. *Re: Department of Forests, Parks and Recreation (Phen Basin)*, #5W0905-7-EB, MOD at 8-10 (7/15/04) [EB#840]; *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 6- 7 (6/17/04) [EB #828]; *Re: Lawrence W. and Barbara Young*, #6F0518-EB, FCO at 3 -4 (10/1/01)
- * Board has obligation to make independent findings under all criteria; *Berlin Associates*, #5W0584-9-EB, MOD at 6 (4/24/90) [EB #379]
- * Commission's conclusion of no substantial impact under ten criteria was in error, as question is whether there are substantial impacts but whether criteria are met. *Washington Electric Cooperative, Inc.*, #5W1036-EB (8/29/89). [EB #450]
- * Board is required to make certain affirmative findings before a land use permit is issued irrespective of whether any party opposes the project under each criterion. *Marvin T. Gurman, Easley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB, FCO at 20 (6/10/85). [EB #229]
- * Permit cannot issue until Commission makes affirmative findings with respect to all Act 250 criteria. *Sunrise Group*, #1R0501-8(A)-EB (4/29/85). [EB #252]
- * Commission breached its statutory duty by authorizing pre-construction site clearing before affirmative findings were made on all criteria and deprived other parties of rights to respond and provide evidence. *Sunrise Group*, #1R0501-8(A)-EB (4/29/85). [EB #252]
- * *In re Juster Associates*, 136 Vt. 577 (1978).

201.2 Effect of issuance

* “An applicant is not obligated to complete a project after obtaining an approval; the applicant simply retains the ability to do so for the life of the applicable permit.” *In re Lathrop Limited Partnership*, No. 122-7-04 Vtec, Decision on Supplemental Pre-Trial Motion at 6 (4/12/11).

* Once a permit is issued, applicant has a vested right to construct project. *Walker Construction*, #5W0816-1-EB (1/14/87). [EB #313]

* In absence of permit language to the contrary or clear evidence that Commission has approved more intensive development, a permit which is granted for a subdivision of land or parcels restricted to residential use is limited to construction of single-family units. *Construction Management, Inc.*, DR #117 (7/11/80).

201.2.1 What a permit covers; scope of a permit

* When development is proposed for a tract of land devoted to farming, only those portions of the land “that support the development shall be subject to regulation...” and permits “shall not impose conditions on other portions” (citing 10 V.S.A. § 6001(3)(E)). *In re Eustance*, No. 13-1-06 Vtec, Decision at 10 (2/16/07), Judgment Order (3/16/07), *aff’d*, 2007-156 (Vt. S. Ct. 3/13/09).

* Appellants must apply for Act 250 approval of the as-built and any further proposed development on their property, both because the expressed terms of the existing permit required it and because the property is already subject to Act 250 jurisdiction, so that the so-called farming exemption does not divest it of jurisdiction. *In re Eustance*, No. 13-1-06 Vtec, Decision at 15 (2/16/07), Judgment Order (3/16/07), *aff’d*, 2007-156 (Vt. S. Ct. 3/13/09).

* Act 250 permit authorizes improvements “specifically authorized by the permit, but no more than that.” *In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07), Judgment Order (3/16/07), *aff’d*, 2007-156 (Vt. S. Ct. 3/13/09); *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 (1/16/07), quoting *In re: Mountainside Properties, Inc.*, No. 117-6-05 Vtec, Decision at 4 (12/13/2005), citing *In re Stowe Club Highlands*, 166 Vt. 33, 37 (1996).

* An Act 250 permit authorizes permittee to make only those improvements authorized by the permit. *In re Carson*, No. 13-1-08 Vtec, Decision at 5 (6/1/09).

* Explicit authorization to subdivide present in a permit also included an implied authorization to construct single-family homes on the subdivided lots. *Re: Holbrook Tabor Limited Partnership*, DR #431, MOD at 5 (7/15/04)

* Consistent with Commission practice, when homes have been constructed on lots which are subject to an Act 250 subdivision permit, and the subdivision application has undergone extensive review, Commissions have not required individual lot owners to file applications for permit amendments or pay fees for such construction. *Re: Holbrook Tabor Limited Partnership*, DR #431, MOD at 5 (7/15/04)

* An Act 250 permit authorizes a projects construction *and* operation. *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 30 (5/25/99), *aff’d*, *OMYA Inc. v. Town of Middlebury*, No.

99-282 (7/26/00); *Interstate Uniform Services*, DR #147 (9/26/84).

201.3 Withholding issuance

* Board may not direct Commission to withhold issuance of the applicant's permit in the midst of pending Commission proceedings on the application; this constitutes an impermissible collateral proceeding and it circumvents the statutory application and review mechanism. *Whitcomb Construction Corp.*, DR #159 (9/26/84) *But see* 10 VSA § 8011 and § 6083(g).

202. Affidavits of Compliance

* Commissions have the right to request affidavits of compliance with respect to specific conditions at any time even if no conditions in this regard are included in the permit. *R. Brownson Spencer II*, #1R0576-EB (3/10/87), *aff'd*, *In re R. Brownson Spencer II*, 152 Vt. 330 (1989). [EB #278]

203. Assignment of / Assignees

* If permittee sells permitted units of construction to a third party, original permittee has continued obligation to comply with permit conditions. *Quechee Lakes Corporation*, #3W0364-1A-EB (2/3/87), *aff'd*, *In re Quechee Lakes Corp.*, 154 Vt. 543 (1990). [#253] *But see* 10 VSA 6003 (2001 amendment).

* Purchasers are entitled to the benefits of a permit but they are also bound by its limitations. *Quechee Lakes Corporation*, #3W0364-1A-EB (2/3/87), *aff'd*, *In re Quechee Lakes Corp.*, 154 Vt. 543 (1990). [#253]

* An assignee of a permit has a duty to investigate the factual basis for the permit approval. *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded*, *In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306]

203.1 Who is a "permittee"

* Act 250 does not consider only the original developer of a subdivision to be the "permittee;" a lot owner in subdivision is also a "permittee." *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/ #5L0426-9-EB, FCO at 19 (10/3/03). [EB #824]

204. Compliance with Other Laws

* Activities that may not require other permits may still require an Act 250 permit and the only legally binding determination of Act 250 jurisdiction is that of the Board. *Champlain Construction Co.*, DR #214 (6/5/90).

* Criterion 1(B) requires Board to determine which regulations are pertinent with respect to a project and to evaluate conformance with DEC regulations, even though DEC may have previously found such conformance *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Court relies on case law and ANR rules and policies for the proposition that when there is a two-part review process of administrative and subsequent technical review (such as when ANR deems a Stormwater Permit application administratively complete) vesting is then retroactively applied to when the application was filed. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.*, No. WQ-01-01, Mem. of Decision at 13 (Vt. Wat. Res. Bd. June. 29, 2001).

* Applicant's failure to include a complete project adjoiners list in the October 3, 2014 application neither violated Stormwater Management Rule § 18-309(b)(2), nor rendered the application incomplete for vesting purposes because the rule states that the applicant shall own all impervious surfaces, but is silent regarding when the surfaces must come into the applicant's ownership, nor does it require this information to be included in the application for that application to be considered complete or that this information is necessary to begin technical analysis of project. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* By including discharges into groundwater, "regulated stormwater runoff" and "[p]reviously permitted existing stormwater discharges," the Stormwater Management Rules apply only to runoff regulated through the state permitting program, not federal and not the Clean Water Act, because the regulatory authority of the Clean Water Act (and NPDES permits) does not extend to discharges into groundwater via infiltration, see *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014). *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 19-20, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court grants summary judgement on the issue to applicant, as the Stormwater Management Rule § 18-306(a)(3) does not require the SW Permit to conform to the MS4 General Permit. *Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 20, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

204.1. Presumptions (and see [388](#) and particular criteria)

* If Act 250 requirements become a duplication of local standards, the developer may use the permits obtained from municipal agencies in the Act 250 process if they satisfy the appropriate requirements of 10 V.S.A.

§ 6086(a). *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986); see 10 V.S.A. § 6086(d).

* ANR's technical determinations associated with work on a permit must be accorded "substantial deference" by the court, even though the appeals statute does not state this specifically and ANR's Indirect Discharge Renewal Permit was before the court on a separate, *de novo* appeal. *In re: Unified Buddhist Church, Inc.*, No. 191-9-05 Vtec, at 9 (1/2/08).

* Board gives substantial deference to technical determinations in ANR discharge permit that existing use is not in the waste management zone and that proposed increase in discharge will comply with the Vermont water quality standards. *Re: Village of Ludlow*, Findings of Fact and

Conclusions of Law and Order, #2S0839-2-EB(Altered) at 13-16 (11/26/2003). [EB#826]

* CUD is entitled to a rebuttable presumption, and ANR's determinations regarding protected functions of wetland are technical determinations entitled to substantial deference under the statute. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 22 (12/31/02). [EB#800]

* Permits issued by DEC entered into record, create rebuttable presumption of compliance with the applicable criteria. *Herbert and Patricia Clark*, Application #1R0785-EB (4/3/97). [EB #652]

* Certain permits from other State agencies may create a presumption of compliance with Act 250 criteria. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92)(revising 3/25/91 FCO). [EB #486]

* Board is not bound by the approval or permits granted by other agencies. *Sherman Hollow*, #4C0422-5-EB (Revised) (2/17/89). [EB #366]

* Reviews by other agencies do not alter the Board's statutory obligation to make positive findings before issuing an Act 250 permit. *Sherman Hollow*, #4C0422-5-EB (Revised) (2/17/89). [EB #366]

* Board's review encompasses broader issues than the Health Department's concern with the effect of pesticides/fertilizers on drinking water. *Sherman Hollow*, #4C0422-5-EB (Revised) (2/17/89). [EB #366]

* ANR stormwater discharge and stormwater construction permits create a rebuttable presumption that the project meets relevant Act 250 criteria. See 10 V.S.A. §§ 6086(d), 8504(i). *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 26 (10/26/12).

* "An applicant can create a presumption of compliance with Criteria 1 and 1(B) by presenting a relevant DEC permit." 10 V.S.A. § 6086(d); Act 250 Rule 19(E). *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 8 (2/8/2018).

* The DEC permit is a shorthand way of showing that the project complies with underlying DEC regulations, thus complying with Criteria 1 and 1(B). *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 8 (2/8/2018).

* "Where a permittee offers a DEC permit as proof that a proposed project complies with an Act 250 criterion, it might make sense to condition the Act 250 permit on compliance with the terms of that DEC permit." *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 9 (2/8/2018).

204.1.1

Creation

* When ANR permit creates a rebuttable presumption that project will comply with criterion, presumption is merely "locative," placing the burden of going forward with the evidence on the party against whom it operates as a rule of law, but operating without any independent probative

value. *In re Hawk Mountain Corp.*, 149 Vt. 179, 186 (1988).

204.1.2 Rebuttal

* Presumption disappears when credible evidence is introduced fairly and reasonably indicating that the real fact is not as presumed. *In re Hawk Mountain Corp.*, 149 Vt. 179, 186 (1988).

* The standard by which the trier must measure the attempt to rebut the presumption is not one of credibility, but rather of admissibility: "Does the fact offered in proof afford a basis for a rational inference of the fact to be proved?" *In re Hawk Mountain Corp.*, 149 Vt. 179, 186 (1988).

* Permits introduced by an applicant are subject to rebuttal by a project's opponents. *In re Hawk Mountain Corp.*, 149 Vt. 179, 186 (1988); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975) (upon introduction of rebuttal evidence allowing a rational inference that system did not comply with DEC regulations, and thus was likely to result in undue water pollution, presumption disappeared, and burden of proof of compliance with regulations returned to applicant); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 18 (5/4/04) [EB #831], citing, *Herbert and Patricia Clark*, #1R0785-EB, FCO at 25 - 27 (4/3/97) (presumption of compliance created by DEC waste water/water permits may be rebutted: (1) by showing, by a preponderance of evidence, that project is likely to result in undue water pollution; or (2) by showing that project does not comply with applicable DEC regulations and that such noncompliance will result in, or substantially increase risk of, undue water pollution.)

205. Denials of Permit, see Act 250 Rule 30(C)

* "The only restriction to submitting another application arises after a permit application has been denied: in that instance, an applicant is prohibited from submitting an application that is substantially similar to the one that was denied." *In re Lathrop Limited Partnership*, No. 122-7-04 Vtec, Decision on Supplemental Pre-Trial Motion at 7 (4/12/11); see also, Act 250 Rule 30(C).

* While approval with conditions has been an accepted regulatory practice for many years, there are occasions where a proposed project's nonconformance is so significant that conditional approval is not the proper response. *In re: Rivers Dev. Act 250 Appeal*, #68-3-07 Vtec, Decision on Post-Judgment Motion to Alter at 6 (8/17/10). See *Re: McLean Enters. Corp.*, #2S1147-1-EB, FCO at 62 (11/24/04) ("[T]he Board will deny a permit if permit conditions cannot be drafted to alleviate the undue adverse impact.").

* Permit application is denied where proposed Project fails to comply with Criteria 1(D), 1(F), and 4. *Re: Woodford Packers, Inc., d/b/a WPI*, #8B0542-EB, FCO (10/5/01), *motion to alter denied*, MOD on Motion to Alter (12/20/01), *aff'd*, 2003 VT 60 (6/26/03). [EB #774]

206. Duration of

* See 10 VSA 6090(b).

* A permit duration of less than the expected life of the project was established where parties,

including the permittees, agreed by stipulation to a shorter duration in order to mitigate negative impacts of the project. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]

* Permits issued with only construction expiration date may be renewed without the addition of a permit expiration date which reflects the economic usefulness of the project. *City of Barre Sludge Management Program*, DR #284 (10/11/94).

* It is not reasonable to impose an inflexible formula for deciding permit duration; rather, a flexible case-by-case analysis is required. *Vermont Division of Buildings*, #8B0318-EB (11/14/84). [EB #222]

* The duration of a permit must reflect the time over which the permittee or a successor will remain accountable for performance of conditions. The expiration date must also reflect the economic conditions attending the project. *Vermont Division of Buildings*, #8B0318-EB (11/14/84). [EB #222]

* Act 250 contemplates issuance of permits for construction and the land use associated with construction; thus permit's "expiration date" relates only to the construction completion deadline. *Interstate Uniform Service*, DR #147 (9/26/84).

207. Use of

* Work conducted under the authority of a permit, causes the permit to be "used" within the meaning of 10 V.S.A. § 6091(b). *In re John Rusin*, 162 Vt. 185, 190 (1994).

* Substantial construction is construction significant in light of the project contemplated. *In re John Rusin*, 162 Vt. 185, 190 (1994).

208. Expiration (see Revocation and Abandonment at [IV.E.](#))

* This Decision implicates a very narrow set of circumstances where a permit would not extend indefinitely: the Act 250 permit must have a specific expiration term and it must have been issued before § 6090(b)(2) came into effect, the permitted project must have effectively been extinguished before the permit's original expiration date, with the land returning to its original state and without any adverse impacts or permit violations. *In re Leverenz Act 250 Jurisdictional Opinion* (#6-010), No. 123-10-15 VTEC, 2016 WL 6776338 (Vt.Super. Sep. 30, 2016).

* The Court concludes that the operative law created by *Huntley* is not limited to mineral extraction operations. Rather a broad reading of the rule set out in *Huntley* is appropriate: when an Act 250 permit expires and permit conditions are met without any violations, Act 250 jurisdiction ends, particularly where the permit at issue expressly stated that jurisdiction would end. *In re Leverenz, Act 250 Jurisdictional Opinion* (#6-010), No. 123-10-15 VTEC, 2016 WL 6776338 Vt.Super. Sep. 30, 2016).

* Once Act 250 jurisdiction has attached, it does not "detach" from a parcel unless the permit has expired *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07)(citing *In re Huntley*, 2004 VT 115, ¶12; 177 Vt. 596, 5999 (2004)), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* 1994 amendments to 10 V.S.A. § 6090(b)(1) came at the 20 year mark of Act 250, when permits which had been issued in the early 1970s were expiring; this caused a problem for people who lived in permitted subdivisions, and the legislature therefore amended § 6090 to state that permits for most projects would *not* expire under normal circumstances; however, legislature ensured that certain projects - those which involved activities of particular environmental concern (the extraction of mineral resources, operation of solid waste disposal facilities, and logging above 2,500 feet) - would be governed by permits which include expiration dates. 10 V.S.A. § 6090(b)(1). *Re: Richard and Elinor Huntley*, DR #419, MOD at 10 (7/3/03), rev'd, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

* For original permit to have "expired" for non-compliance, Board must make findings, before issuance of any permit amendments, that such non-compliance had occurred. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655].

* Where amended permit had been issued in 1993, legislation indefinitely extending deadline dates for Act 250 permits did not revive original permit issued in 1971. Any other conclusion would render 1993 permit, and its conditions, superfluous. *Okemo Realty*, #900033-2-EB (5/2/96). [EB #580] *See* 10 VSA § 6090(b).

* Legislation indefinitely extending deadline dates for Act 250 permits did not render appeal of pending amendment application moot. *Okemo Realty*, #900033-2-EB (5/2/96). [EB #580] *See* 10 VSA § 6090(b).

* Board is required to set an expiration date for a sand/gravel crusher plant operation. *John and Marion Gross*, #5W1198-EB (4/27/95). [EB #606]

* Landfill operation proposal moves from being marginally acceptable to a clear violation where the possibility of continued operation under a provisional certification exists, and where Board cannot control date of closure. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Where landfill's permit expired and landfill operated for an additional three years without a permit until it closed, Board must consider the effect of the landfill's operation retroactively as well as prospectively. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R].

* A permit expiration date shall reflect the economically useful life of the permitted project. *R. Brownson Spencer II*, #1R0576-EB (3/10/87), *aff'd*, *In re R. Brownson Spencer II*, 152 Vt. 330 (1989). [EB #278]

* Guidelines for permittees to follow upon the expiration of a permit may not be established through a DR but must be established through the adoption of a rule of general applicability. *Pike Industries*, DR #96 (9/29/78).

* Board may not reinstate a permit which has expired; applicant must follow the original application procedure and submit a new application to Commission within 30 days of the expiration of the

original permit. *Barker Sargent Corp.*, DR #94 (9/18/78).

209. Master Permit

- * The master permit (plan) procedure does not assure approval for the individual development components of a project; those individual development projects are subject to review in future individual permit application proceedings. *In re SP Land Co., et. al. Act 250 Permit, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 9 (12/1/09), reversed on other grounds, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).*
- * Board and Commission can conduct a partial review of a master plan voluntarily submitted by applicants despite fact that applicants are not ready to commence construction on any aspect of the project. *Killington Ltd.*, #1R0835-EB, MOD (10/22/99). [EB # 732]
- * A master plan proceeding is not a substitute for review of specific projects that are included in the master plan. *Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A-EB, MOD at 5 (8/31/99). [EB #730M]
- * Failure to appeal Commission's ruling that submitting a master plan application would subject the entire tract to review, precludes advocating for a limited review of same project tract. *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]

209.1 Purpose of

- * Master permit (plan) procedures allows for greater efficiency in the environmental review process and therefore avoids unnecessary and unreasonable costs to the applicant and parties. *In re SP Land Co., et. al. Act 250 Permit, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 9 (12/1/09), reversed on other grounds, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).*
- * EBR 21(A) contemplates a broad view of the master plan proposal at the time the proposal is initially submitted; broad review has two goals: simplification and protection of Act 250 resource criteria. *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]
- * Review of all of the land in the initial and subsequent phases of a master plan avoids piecemeal review. *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]
- * Review and protection of historic sites and necessary wildlife habitat provide examples of why broad initial review of master plan is necessary. *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]

209.2 When required / not required

- * Road not subject to master plan where land that road crosses is not part of lands subject to master plan requirement. *Edwin and Avis Smith*, DR #292 (4/21/94).
- * Act 250 requires comprehensive review of all planned development, but phased review of planned

developments is not unusual. *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (4/19/88). [EB #357]

* Where there exists (i) a growth facility, (ii) clear evidence of a plan for growth beyond what was presented in the application, and (iii) a direct relationship between the growth and the proposed construction, an application may be deemed incomplete until additional information about the overall master development plan is submitted for Commission review. *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]

209.3 Extent of

* The master permit procedure does not assure approval for the individual development components of a project; those individual development projects are subject to review in future individual permit application proceedings. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 9 (12/1/09), *reversed on other grounds, 2011 VT 104 (Vt. Supreme Ct. 9/22/11)*.

* Board has authority to review information regarding aspects of a master plan project that extend beyond a five year time period if such information is pertinent to or necessary for its conclusions. *Killington Ltd.*, #1R0835-EB, MOD (10/22/99). [EB # 732].

* Board/Commission have no authority to limit or define time frame within which affirmative findings of fact made in connection with a master plan project are final and binding if such limitation/definition contravenes appeal rights in 10 V.S.A. § 6086(b) and EBR 21. *Killington Ltd.*, #1R0835-EB, MOD (10/22/99). [EB # 732].

* For project tract located in a previously permitted industrial park for which there are defined expectations and limitations for future growth, master plan was not necessary for Board to conclude that project complied with Criterion 8. *Hector LeClair d/b/a Forestdale Heights*, #4C0329-17-EB (2/25/99). [EB #711].

* Where town plan prohibits more extensive project development review of such prohibited development is premature. *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (4/19/88). [EB #357]

* Scope of a project is limited to impacts known and reasonably suspected to result from construction and use of equipment where there is no evidence that the construction will result in significant new infrastructure upon which further development will be bound. *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]

209.4 Vested rights

* Master permit process or partial review is available to secure conceptual approval of a multi-phase project. Both forms of review apply to all forms of commercial development including condominium projects. Upon approval, an applicant could have a vested right for Criterion 10 approval in later stages of the project. *Green Peak Estates*, #8B0314-2-EB (7/22/86), *aff'd, In re*

Green Peak Estates, 154 Vt. 363 (1990). [EB #280]

* Where an applicant fails to pursue either master permit review or EBR 21 review for Criterion 10, neither Commission nor parties are estopped from raising issues regarding Criterion 10 during subsequent un-permitted stages of a multi-stage project. *Green Peak Estates*, #8B0314-2-EB (7/22/86), *aff'd*, *In re Green Peak Estates*, 154 Vt. 363 (1990). [EB #280].

209.5 Cases

* Permit condition requires applicant to submit master plan to Commission and prohibits alteration of wetland and stream areas without prior Commission approval. *Ampersand Properties*, #5L0892-EB (2/24/87). [EB #324]

* Expansion of utility system which is a "pre-existing development" should be evaluated under the "substantial change" analysis, which should be conducted through master permit process which analyzes system-wide impacts and includes uniform permit conditions to mitigate adverse effects. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267].

* "Conceptual" approval of a master plan for a condominium project does not authorize construction of sub-projects contained in a plan, nor does it bind Commission to any of the findings made at the time of the general review. *David, Mark & William Pippin*, #3W0333-EB (7/7/80). [EB #133]

210. Renewal of / Extension of construction completion deadline

* Construction completion date extended where project had been subject of revocation petition because time period was tolled by filing of petition. *George and Beverly Potwin*, #3W0587-3-EB, FCO at 8 - 10 (2/17/00).

* No criteria were at issue in consideration of construction deadline extension request since neither a material nor substantial change had occurred since the original permit's issuance. *Lilly Propane, Inc.*, #2S0859-3-EB (11/3/95). [EB #634]

* Permit issued with only construction expiration date may be renewed without addition of permit expiration date reflecting project's economic usefulness. *City of Barre Sludge Management Program*, DR #284 (10/11/94).

* Hearing may be held in conjunction with application to extend construction deadline to determine if project has been abandoned or changed since it was originally reviewed, or if some previously unknown and significant circumstances relating to a project has been discovered. *Lilly Propane, Inc.*, #2S0859-3-EB (11/3/95). [EB #634] (citing *Xenophone Wheeler*, #4C0513-1C-EB (DO) (11/8/88). [EB #395])

* Extension of construction completion deadline is warranted where permittee has demonstrated an intention to proceed with project, but has been unable to complete sale that would allow

construction. *New Haven Savings Bank*, #2W0769-1-EB (11/23/92). [EB #533]

* Permittee did not violate terms and conditions of permit where it was in full compliance with permit before seeking an extension. *New Haven Savings Bank*, #2W0769-1-EB (11/23/92). [EB #533]

* Rule 32(B) requires that the Board include construction completion and expiration dates in the permit. *Northwestern Developers, Inc. and Alferie & Mildred LaFleur*, #6F0416-EB (4/16/91). [EB #494]

* Applicant's request for extension of the construction completion date of his permit more than three years after the expiration date automatically triggered a review for compliance under all ten criteria. *Homestead Design, Inc.*, #4C0468-1-EB (9/6/90). [EB #454]

* Rule 32 gives Board discretion to hear requests to extend construction completion and permit expiration dates. *John A. Russell Corporation*, #1R0257-2-EB (6/14/90). [EB #415M]

* Commission incorrectly denied applicants' request for an extension of permit expiration date by basing its denial on a determination that the permit conditions had been violated. *Richard & Jean Wilson*, #2W0585-A-EB (3/7/88). [EB #380]

* Whether project is in conformance with its permit is for Coordinator's consideration when determining whether a renewal application should be treated as a minor or as a new application; once Coordinator determines that an application is to be treated as a minor, the application proceeds as any other application, with review of the substantive criteria. *Richard & Jean Wilson*, #2W0585-A-EB (3/7/88). [EB #380]

* Condition imposed by Commission which requires the applicant to renew the permit for two limited display areas at a recreational vehicle/small engine dealership every year is deleted as without foundation in the statute or the Rules. *Donald R. Preuss*, #1R0519-2-EB (3/24/87). [EB #321]

* The Board will extend construction completion dates in a permit where commencement was delayed for good cause. *Department of State Buildings*, #2W0609-EB (6/3/85). [EB #256]

* Public notice is not required before a permit *extension* is granted and, therefore, no hearing must be held. But permit *renewals* under § 6091(a) explicitly require a new hearing. *R. Brownson Spencer II*, #1R0576-EB (3/10/87), *aff'd*, *In re R. Brownson Spencer II*, 152 Vt. 330 (1989). [EB #278]; *Agency of Transportation (Belvidere Project)*, #5L0083-2-EB (9/13/79). [EB #114]

211. Reinstatement of

212. "Runs with the Land"

* Land Use Permits "run with the land." *In re Estate of Swinington*, 169 Vt. 583, 585 (1999)(mem.); *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 (1/16/07) (*jurisdiction* "runs with the land"); *Re:*

Dr. Anthony Lapinsky and Dr. Colleen Smith, #5L1018-4/#5L0426-9-EB, FCO at 9 (10/3//03) [EB #824]; *Construction Management, Inc.*, DR #117, FCO at 2 (7/11/80); *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19).

* Permit runs with the land," and such land, including the use thereof, is subject to Act 250 jurisdiction, such that any substantial or material change requires a permit amendment. *In re Estate of John Swinington*, 169 Vt. 583, 585 (1999); *David Enman (St. George Property)*, DR #326 (12/23/96); see EBR 32(C)(3); *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09); *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19).

* Successor owners, as successors in interest, are also bound by the conditions of the permit. *In re Quechee Lakes Corporation*, 154 Vt. 543, 550 n.5 (1990); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 9 (10/3/03). [EB #824]; *In re Eustance*, No. 13-1-06 Vtec, Decision at 10 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* Individual lot owners within subdivision, are "permittees. " *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 9 (10/3//03). [EB #824]

* If subsequent purchasers are bound by the conditions of permits that control their land, it follows that they must have standing to seek to amend such conditions. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 9 (10/3//03). [EB #824]

* Once Act 250 jurisdiction over the construction of building at a site was triggered, any construction in furtherance of the same project is also be subject to jurisdiction. *Richard Farnham*, DR #250 (7/17/92).

* Purchasers of lots created from tract subject to Act 250 jurisdiction must obtain permits before sale or offer for sale of an interest in, or commencement of construction on, their lots. *John W. Stevens and Bruce W. Gyles*, DR #240 (5/8/92).

* Because petitioner's lot is one of the original five lots subject to jurisdiction, he is bound by requirements of previous permit. Alteration without a permit amendment is a violation *Charles Christolini*, DR #208 (3/19/90).

* Permit does not expire when the permittee ceases to lease the land subject to permit because such permits and their conditions run with the land. *Daniel C. Lyons*, #5W0556-1-EB (10/12/82). [EB #182]; *Construction Management, Inc.*, DR #117 (7/11/80).

* Subsequent purchasers are bound by conditions of permits because such permits and their conditions run with the land. *NRB v. Donald Dorr, Dorr Oil Co. and MGC, Inc.*, 49-4-13 Vtec. at 9, 10 (5/27/13); *Allenbrook Associates*, #4C0466-1-EB (4/19/82). [EB #175]; *Construction Management, Inc.*, DR #117 (7/11/80).

213. Turnkey Project

* A "turnkey" project requires a fee, but fee will be returned once the project is taken over by the housing authority. *Rutland Housing Authority*, DR #H (3/10/71).

214. Umbrella Permit

* An umbrella permit is a final decision unless appealed within thirty days of issuance. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 593 (1993); citing 10 V.S.A. § 6089(a). See also *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19).

*One exception to this general proposition of finality [of umbrella permits] arises to allow for re-examination of conformance with applicable Act 250 "criteria if there is a material change to the project approved in the umbrella permit." *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19) (quoting *Haystack Highlands, LLC*, #700002-10D-EB).

* The criteria excluded from future review by the 1985 [Umbrella] Permit may be addressed when an amendment application proposes a significant impact on one or more of those criteria. (In this case the court determined a permit amendment was necessary) *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19).

*The Vermont Supreme Court stated that the Environmental Board's decision to remand a matter back to the District Commission "was not based on [the Environmental Board Rules] or a finding of a significant change but rather on the conclusions that umbrella permits can be 'reopened' and that 'many of the potential impacts from this project were never considered.'" *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19) (quoting *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 593 (1993)).

* If an umbrella permit is sought, Board and Commission may issue permit conditions for future phases designed to provide simplification of review and protection of resources. *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]

* Where an appeal involves the compliance of a proposed industrial park project with Criteria 8 and 8(A) under an umbrella permit, it is not appropriate to limit the scope of the appeal or to remand jurisdiction over some of the lots at the park to Commission. *Leo A. and Theresa A. Gauthier and Robert Miller*, #4C0842-EB (12/10/90). [EB #495M]

* Without a final decision on appeal with respect to an umbrella permit, a Commission cannot properly evaluate amendment applications under various criteria, especially where the Board could deny or revise the umbrella permit. *Leo A. and Theresa A. Gauthier and Robert Miller*, #4C0842-EB (12/10/90). [EB #495M].

* So-called "umbrella permit" policies are often applied to commercial and industrial parks whereby projects will be approved in phases, with only the initial use of each phase typically being reviewed. *John A. Russell Corporation*, #1R0257-2-EB (6/14/90). [EB #415M]

* Commission improperly applied an umbrella permit process review in this commercial park project when it did not apply all Act 250 criteria to judge the project and failed to make findings as to the compliance of the commercial project with all criteria. *Paul E. Blair Family*, #4C0388-EB (6/16/80). [EB #131]

* The umbrella policy for review of public, nonprofit development corporations is applicable to privately financed, for profit industrial parks with certain exceptions regarding inapplicable conditions. A positive finding on one of the criteria under this policy only creates a rebuttable presumption with regard to the tenant's facility, and not a final binding finding. *C & K Brattleboro Associates*, #2W0434-EB (1/2/80). [EB #125]

215. Stay of Permit (see [467](#) and [507.6](#))

* Where all parties jointly request a long-term stay, there is no hardship to parties if a stay is granted. *Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort*, #5L1125-10B-EB and MOD #5L1125-10A(Revised)-EB, MOD at 3 (11/15/01). [EB #793].

* Where parties represent opposing interests, joint request for stay minimizes any potential for impact on Act 250 values. *Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort*, #5L1125-10B-EB and MOD #5L1125-10A(Revised)-EB, MOD at 3 (11/15/01.) [EB #793].

* Act 250 permits and decisions issued by the appropriate municipal panel – such as the DRB, in this case – are not automatically stayed on appeal, but a party may move to request the Court stay authority granted by a permit. 10 V.S.A. § 8504(f); V.R.E.C.P. 5(e). *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 1 (EO on Motion to Stay) (2-7-2018).

216. Simultaneous pursuit of permit and jurisdictional determination

* Person may apply for a permit while pursuing a jurisdictional claim that he does not need one. *In re Barlow*, 160 Vt. 513, 519 (1993).

217. Automatic Issuance

* There is no “deemed approval” for applications under 10 V.S.A. § 6085(f). *In re Lussier (Rt. 114 Gravel Pit, Lyndon)*, No. 121-6-05 Vtec, Decision and Order at 8 (Apr. 13, 2006)(citing *In re Mullenstein*, 148 Vt. 170, 173-74 (1987)).

B. Application for

226. General

* It is a threshold requirement that an applicant show “a substantial change in the application or the circumstances” before the District Commission – or the Environmental Court, standing in its place in the case of a de novo appeal – can consider a revised application for a project that has already been denied an Act 250 permit. *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-

06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 14 (3/16/09), citing *In re Armitage*, 2006 VT 113, ¶ 8 (citing *In re Carrier*, 155 Vt. at 158–59).

* In determining whether to consider a revised application for a project that has already been denied an Act 250 permit, the Environmental Court has noted that a “substantial change in circumstances can occur when there have been changes to the application itself, to address concerns that caused the previous denial, a change in the physical surroundings of the property, or a change in the governing regulations.” An applicant cannot, however, “merely seek to introduce additional evidence . . . that could have been presented in the earlier proceeding.” *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 14-15 (3/16/09)(quoting *In re R.L. Vallee PUD (Spillane’s) – 811 Williston Rd.*, No. 100-5-07 Vtec, at 4 (8/17/07) (Wright, J.)).

* “We know of no authority restricting an applicant from submitting for approval, either concurrently or consecutively, two or more conflicting land use project proposals before a single permitting body or multiple permitting bodies.” *In re Lathrop Limited Partnership*, No. 122-7-04 Vtec, Decision on Supplemental Pre-Trial Motion at 7 (4/12/11).

* Act 250 Application for Communications Facility and applicable Guide to Schedule B do not require FCC licensee to disclose the frequencies, signals, broadcasts, stations or programs to be received. Rather, they seek only that information about project necessary to effectuate Legislature’s intent, and information authorized under applicable statutes/regulations. *Stokes Communication Corporation*, DR #357 (8/20/98).

* Board is directed to issue guidelines on the type of information necessary or desirable for the review of applications under the 10 Act 250 criteria. *Flanders Building Supply, Inc.*, #4C0634-EB (10/18/85). [EB #270]

* Commission cannot approve and should not propose alternative locations for projects without giving interested parties opportunity to participate in Commission proceedings as required by statute. *N.E. Tel. & Tel. and CVPS*, #1R0436-1-EB (5/14/82). [EB #176]

* The attachment to the Master Land Use Permit Application form is an example of the "guidelines" issued by Board. *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82). [EB #172]

* Final project plans need not be submitted for review if sufficient information describing the entire undertaking is included in the application. *Rutland Housing Authority*, DR #H (3/10/71).

226.1 Applicant, not Act 250, must design its own project (see [10.1.1](#))

* Board need not design an adequate project for an applicant. *In re McShinsky*, 153 Vt. 586, 591 (1990);

Bernard and Suzanne Carrier, #7R0639-EB (Reconsideration) (8/14/97) (Board does not design projects for applicants nor does it provide advisory opinions on what hypothetical elements of design would receive the Board's approval.) [EB #666]; *Herndon and Deborah Foster*, #5R0891-8B-EB, FCO at 13 (6/2/97) (Board does not design projects; it reviews and responds to submissions by applicants). [EB #665]

* It is party's responsibility to know the issues which are necessary to address in order for the Board to make the requested ruling. *In re Orzel*, 145 Vt. 355, 360 (1985).

* Applicants must design their own projects; while Board may impose conditions upon a project to ensure that it complies with the criteria, Board is not compelled to develop such conditions and may, instead, deny the project. *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652]; *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]

* Commission must review the applicant's project as proposed. *N.E. Tel. & Tel. and CVPS*, #1R0436-1-EB (5/14/82). [EB #176]

226.2 Scope of project / cumulative impacts (see [603](#))

* Several causes may contribute to a particular effect or result. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).

* Act 250 review of a coordinated development located on two parcels of land will include an assessment of the cumulative impact of units proposed in addition to those already built or authorized. *Albert & Doris Stevens*, #4C0227-3-EB (7/28/80). [EB #139]

227. Time and place of filing

227.1 When filed

* Mere fact that an applicant may not have obtained all local permits does not mean that the Act 250 process must be delayed; while most applicants have historically first addressed the local process, nothing prevents an applicant from seeking and obtaining an Act 250 permit before all local permits have been received. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 10 (10/8/03). [EB #831]

227.2 Where filed

* An application for a permit must be made to a District Commission. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).

* Board cannot, under the guise of permit enforcement, subvert the protective scheme ordained by the Legislature in Act 250 by bypassing Commission review. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).

* Board's continuing authority over its permits may include supervision of the uses and conditions

imposed by the permit, but it does not extend to considering a request to develop new land. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).

* Because initial consideration of a land use proposal is a function assigned by the Legislature to Commission. the Board lacked authority to entertain the application not heard by Commission. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).

* Board is not vested with concurrent jurisdiction with Commission to hear and decide the same matters. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).

228. Co-Applicancy / Joinder

228.1 Purpose of Co-Applicancy Rule

* The purpose of the co-applicancy rule is to ensure the enforceability of permit conditions by requiring the record owners of involved land to be co-applicants to any Act 250 application. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 11 (10/3//03) [EB #824]; *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, CPR at 3 (10/26/00). [EB #765] citing, *Hawk Mountain Corporation*, #3W0299-EB, FCO at 5 (11/29/79); and see *Re: Mark and Pauline Kisiel and Thomas and Cheryl Kaminski*, #5W1151-1-EB, MOD at 4 (2/3/05).

* Purposes of EBR 10(A) are to ensure that permit conditions imposed by Commission or Board will be enforceable, to ensure that the owners of land involved in a project have consented to such activity, and to allow persons owning involved land to participate in the permit proceedings and to define the scope of review as to the ten Act 250 criteria. *Flanders Building Supply, Inc.*, #4C0634-EB (10/18/85). [EB #270]

228.2 Discretion of Commission or Board

* Board acted within its discretion to order that the "record owner" of the tract of involved land be a co-applicant. *In re Pilgrim Partnership*, 153 Vt. 594, 597 (1990); EBR 10(A).

* Decision to require co-applicancy is within the discretion of Commission or Board. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, CPR at 3 (10/26/00). [EB #765] citing, *Hawk Mountain Corporation*, #3W0299-EB, FCO at 5 (11/29/79).

* Requiring a person to be a co-applicant is at the discretion of Commissions and Board. *David Enman (St. George Property)*, DR #326 (12/23/96).

* Commission did not abuse its discretion in waiving the requirement that petitioners be co-applicants. *H.A. Manosh Corporation*, #5L0918-EB (3/27/87). [EB #343]

* Decision to join as a co-applicant the tenant of real property, but not to require co-applicancy of the owner of the real property is a discretionary matter. *Karlen Communications, Inc.*, #5L0437 (8/28/78). [EB #89]

228.3 When co-applicancy issue must be raised

- * The issue of co-applicancy can be raised at any time. *Richard Madowitz and Douglas Kohl d/b/a The Woods Partnership Amherst Realty, LLC* # 1R0522-9-EB, MOD and DO at 7 (8/15/01). [EB #784]
- * Board will not consider argument for co-applicancy as support for claim in revocation proceeding where issue was not raised in original permit proceedings. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]
- * Board cannot consider co-applicancy issue until Commission has notified all potential parties and considered issue with all parties participating. *John Litwhiler and H.A. Manosh*, #5L1006-EB (1/15/91). [EB #451]
- * Board may address questions of applicant status during the course of a proceeding or after a hearing has been convened. *Pilgrim Partnership*, #5W0894-1-EB (10/4/88), *aff'd*, *In re Pilgrim Partnership*, 153 Vt. 594 (1990). [EB #373]; *Flanders Building Supply, Inc.*, #4C0634-EB (10/18/85). [EB #270]

228.4 Who must be co-applicants

- * Utility company applicant should not be listed as copermittee on underlying landowners' permit. *Re: CVPS/Verizon*, 2009 VT 71, ¶ 25 (Vt. Sup. Ct.), *reversing Re: CVPS/Verizon*, Nos. 18-1-07, 19-1-07 Vtec, Decision and Order on Motion for Summary Judgment at 8 (8/13/07), Judgment Order (9/10/07).
- * Record owner of land must be an applicant unless good cause is shown for waiver. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 5 (11/2/10).
- * Easements for water access and participation in use of sanitary waste disposal systems held by person who is not a "record owner" are not of such significance to require person to be a co-applicant. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09), *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).
- * EBR 10 does not require that all persons having any property or contractual interest in, or relationship to, a proposed project must be parties to the permit application. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 10 (10/3/03). [EB #824], citing *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, CPR at 3 (10/26/00). [EB #765], citing *Hawk Mountain Corporation*, #3W0299-EB, FCO at 5 (11/29/79). [EB #123].
- * The co-applicancy of the State and the local municipality is not required by the Act 250 statute, Board rules, or case precedent in connection with a proposed mixed use development. *Maple Tree Place Associates*, #4C0775-EB (3/25/98). [EB #700M]

228.4.1 Ownership of land

- * EBR 10(A) requires that "The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement. The application shall list the name or names of all persons who have a substantial property interest" *In re Quechee Lakes Corporation*, 154 Vt. 543, 548 (1990).
- * Board acted within its discretion to order that the "record owner" of the tract of involved land be a co-applicant. *In re Pilgrim Partnership*, 153 Vt. 594, 597 (1990), affirming *Pilgrim Partnership*, #5W0894-1-EB (10/4/88) (where widening of road involves land owned or controlled by adjoiner, adjoiner is a necessary co-applicant) [EB #373]; EBR 10(A).*
- * Act 250 Rule 10 requires that the record owner be an applicant unless good cause is shown for waiver. Thus, the Environmental Division requires an applicant to produce some evidence of title or interest and right in the involved land. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 5 (11/2/10).
- * Easements for water access and participation in use of sanitary waste disposal systems held by person who is not a "record owner" are not of such significance to require person to be a co-applicant. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09), *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).
- * Landowner need not sign as co-applicant where state agency is empowered to condemn landowner's land. *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 65 (1/16/07), citing 10 V.S.A. §6083(h).
- * Owner of land on which project's wastewater is to be disposed is a necessary co-applicant. *Re: Mark and Pauline Kiesel and Thomas and Cheryl Kaminski*, #5W1151-1-EB, MOD at 4 (2/3/05)
- * Determination of whether to waive the requirement that a landowner needs to be a co-applicant depends on the nature of the landowners interest. *Richard Madowitz and Douglas Kohl d/b/a The Woods Partnership Amherst Realty, LLC* # 1R0522-9-EB, MOD and DO at 7. (8/15/01). [EB #784]
- * Prospective owner will be bound by any permit issued and does not need to be a co-applicant. *Brewster River Land Co., LLC*. #5L1348-EB, MOD at 5 (9/18/00). [EB #761]
- * Where permittee is owner, but not operator, of project, and owner has oral license with operator, operator has significant property interest regardless of whether he has an interest in the land from which material is extracted, and operator is required to be a co-applicant. *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607] (*See also Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595])
- * Owner of property on which lessee proposed to construct and operate an outdoor archery facility was required to file as a co-applicant prior to use and operation of the facility. *Roger Loomis d/b/a*

Green Mountain Archery Range, #1R0426-2-EB (12/18/97). [EB #682]

* Record owners of all involved land shall be co-applicants unless good cause is shown to waive this requirement. *Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB (12/23/92). [EB #564M]

* Where an owner of an interest in land subject to Act 250 proceedings grants full control over the land to an applicant, good cause exists for a waiver of the requirement that the grantor be a co-applicant even though it owns an interest in the project land. *Berlin Associates*, #5W0584-9-EB (2/9/90). [EB #379]

* VAOT must be co-applicant (or good cause shown to waive requirement) for mitigative landscaping on land owned and controlled by AOT. *Liberty Oak Corporation*, #3W0496-EB (5/21/87). [EB #323]

* For improvements to a town road to access subdivided lots, the record owners of tracts of involved land shall be the applicants or co-applicants. *Flanders Building Supply, Inc.*, #4C0634-EB (10/18/85). [EB #270]

* Purchasers of land within subdivision need not be co-applicants, especially if they oppose the application. But if altering existing lot lines in existing subdivision is critical to project's approval, then developer may need to negotiate with purchasers as a condition of approval. *Peter Guille, Jr.*, #2W0383-EB (3/18/80). [EB #97]

228.4.2

Control of land

* Easements for water access and participation in use of sanitary waste disposal systems held by person who is not a "record owner" are not of such significance to require person to be a co-applicant. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09), *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).

* Where physical changes that would result from amendment would occur only on the applicants' land in subdivision, no need to have Homeowners' Association as co-applicant. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4//#5L0426-9-EB, FCO at 11 (10/3//03). [EB #824]

* Where an owner of an interest in land subject to Act 250 proceedings grants full control over the land to an applicant, good cause exists for a waiver of the requirement that the grantor be a co-applicant even though it owns an interest in the project land. *Berlin Associates*, #5W0584-9-EB (2/9/90). [EB #379]

* An entity with sufficient control over land as evidenced by partnership agreements will be considered a co-permittee. *Daniel C. Lyons*, #5W0556-1-EB (10/12/82). [EB #182]

228.5 "Good Cause" exception / waiver of co-applicancy requirement

* Rule 10(A) permits a waiver of the requirement that record owners of involved land be made

applicants or co-applicants for good cause shown. *In re Quechee Lakes Corporation*, 154 Vt. 543, 548 (1990); *Re: Mark and Pauline Kisiel and Thomas and Cheryl Kaminski*, #5W1151-1-EB, MOD at 5 (2/3/05); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 11 (10/3/03). [EB #824]

* Determination of whether to waive the requirement that a landowner needs to be a co-applicant depends on the nature of the landowner's interest. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 11 (10/3/03) [EB #824]; *Richard Madowitz and Douglas Kohl d/b/a The Woods Partnership Amherst Realty, LLC*, #1R0522-9-EB, MOD at 7 (8/15/01).

* Good cause exists to waive the co-applicancy requirements where a co-applicant's consent is not needed to comply with any of the permit conditions and where, as here, the Board does not want to be drawn into a dispute between the parties. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 11 (10/3/03) [EB #824]; *Larry and Diane Brown*, #5W1175-1-EB (6/19/95). [EB #591].

* Waiver of co-applicancy requirements may be justified when allowing co-applicant into case would result in a *de facto* veto of the application. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 11 (10/3/03). [EB #824]

* Under "good cause" exception, Board may (a) conclude that good cause is not shown; (b) conclude that good cause is shown; or (c) may preliminarily waive the co-applicancy requirement subject to future re-examination. *Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon*, #1R0426-1-EB (2/29/96). [EB #645]; *Town Highway #37*, DR #171 (7/12/85).

* Where an owner of an interest in land subject to Act 250 proceedings grants full control over the land to an applicant, good cause exists for a waiver of the requirement that the grantor be a co-applicant even though it owns an interest in the project land. *Berlin Associates*, #5W0584-9-EB (2/9/90). [EB #379]

* Commission did not abuse its discretion in waiving the requirement that petitioners be co-applicants. *H.A. Manosh Corporation*, #5L0918-EB (3/27/87). [EB #343]

* Good cause exists to waive the co-applicancy requirements where the applicant has a right-of-way interest in the subdivision road at issue. *Flanders Building Supply, Inc.*, #4C0634-EB (10/18/85). [EB #270].

228.6 Cases

* Utility company applicant should not be listed as copermittee under Act 250 Rule 10 on underlying landowners' permit and underlying permit does not require a permit amendment. *Re: CVPS/Verizon*, 2009 VT 71, ¶ 25 (Vt. Sup. Ct.), *reversing Re: CVPS/Verizon*, Nos. 18-1-07, 19-1-07 Vtec, Decision and Order on Motion for Summary Judgment at 8 (8/13/07), Judgment Order (9/10/07).

* A gun club which had been a co-permittee by virtue of holding a leasehold interest in property

subject to Act 250 jurisdiction no longer had an interest sufficient to support co-applicancy for a permit amendment related to development of that property once its leasehold interest had been terminated by court order. *Estate of John A. Swington*, #9A0192-4-EB (CPR) (2/9/98), *aff'd In re Estate of John Swington*, 169 Vt. 583 (1999). [#699M1]

* Commission had authority to issue a permit amendment solely to the owner of property in fee simple and was not obligated to institute a separate proceeding to effectuate the transfer of rights and obligations from a former lessee/co-permittee where prior land use permits ran with the land and rights and obligation created by them were not exclusive. *Estate of John A. Swington*, #9A0192-4-EB (CPR) (2/9/98), *aff'd In re Estate of John Swington*, 169 Vt. 583 (1999). [#699M1]

* Board lacks jurisdiction to adjudicate issue of co-applicancy as a DR where the issue may be appealed once Commission rules on pending motions. Instead petitioner's remedy is to await Commission's decision on pending motions and if not satisfied, appeal from Commission's decision. *Roger Loomis d/b/a/ Green Mountain Archery Range*, DR #344 (8/8/97).

* Cellular telephone company that would construct tower in exchange for five years' rent-free use of the tower holds a substantial property interest in the project, such that it must be joined as a co-applicant. *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (Appeal and Revocation) (12/14/93). [EB #562]

* Where a permittee is required to be responsible for removing brush and plowing snow on a town road to maintain a safe sight distance, the involvement of the town would be minimal, and co-applicancy of the town is not necessary. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/23/91). [EB #408]

* A person should not be required to sign as co-applicant to a project which consists solely of the construction of a power line to a camp. *Central Vermont Public Service*, #7C0734-EB (8/6/91). [EB #434]

* The State and town were not required to be co-applicants for a commercial store because it would pose an undue burden on them whenever improvements were made to remedy traffic impacts associated with the development. The applicant alone is responsible for complying with the conditions of the permit. *Stephen B. Tanger*, #3W0125-3-EB (8/29/89). [EB #442M]

* EBR 10(A) might require AOT to be a co-applicant as the owner of Route 4. But, since nearly every project requires some modification to highways and roads, AOT would be liable for compliance with permit conditions should it be a co-applicant. *Swain Development Corp.*, #3W0445-2-EB (7/31/89). [EB #430M]

* Adjoining landowners who own the fee underlying the right-of-way which will be used to access project need not be co-applicants if the applicant upgrades the road, as long as the applicant stays within its right-of-way. *A Safe Place Ltd.*, #8B0404-EB (6/20/89). [EB #375]

* Permit amendment extending construction completion date is void because Commission failed to either require all owners of involved land to be co-applicants or, after a hearing, to waive the

requirement. *South Burlington Realty Co.*, #4C0154-EB (5/4/89).

* Because relocation of a VELCO transmission line is wholly outside jurisdiction of Board and Commission, there is no "substantial ground for difference of opinion" whether VELCO is a necessary co-applicant and the interlocutory appeal concerning this co-applicancy issue will be denied. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M]

* Mitigative landscaping plan implemented on land owned and controlled by AOT, AOT must be included as a co-applicant unless good cause allows waiver of the requirement. *Liberty Oak Corporation*, #3W0496-EB (5/21/87). [EB #323]

* Jurisdiction extends only to lands owned or controlled by co-applicants, and thus permit conditions do not bind a lot (not owned by a co-applicant) subdivided before the issuance of permit. *TOFR Bayside Associates*, DR #158 (9/26/84).

* Only persons whose residential land is served by 3000 foot road improvements shall be considered co-applicants and co-permittees. *Elizabeth Aaronsohn*, #8B0291-EB (1/26/83). [EB #185]

* A one-third interest in a spring and waterline right-of-way located on a 30+ acre parcel is not a "substantial" interest for purposes of co-applicancy requirements. *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82) and #1R0382-EB (10/20/81). [EB #172] and [EB #146]

229. "Complete" application

* Permit amendment application for proposed expansion of a driveway must include a site plan that identifies: property lines; identification or boundary corners for adjoining parcels; topography references; and reference to other existing features, such as intermittent streams, ponds, wetlands, tree lines, power lines, stone walls, and fences; and must provide information concerning the "interplay between the shared driveway and the various adjoining developments it will serve," including anticipated vehicle traffic, and the "characteristics" of parcels that will adjoin and access the driveway. *In re: Lefgren Act 250 Appeal (JO #3-109 & 3-110) (incomplete application determination)*, No. 28-2-07, 240-11-07 Vtec, Decision and Order at 6-7 (4/15/2008), referencing 2007 "Guide for Applying for an Act 250 Land Use Permit."

* While 10 V.S.A. § 6086(b) authorizes review under only two of the Act's criteria as an initial step, it nowhere gives the applicant the right to submit an application providing information on only those two criteria and consider that "complete" for purposes of establishing vested rights. *In re Ross*, 151 Vt. 54, 57 (1989).

* Coordinator's completeness determination under EBR 10(D) is not equivalent to a complete application for vesting purposes of establishing vested rights. *In re Ross*, 151 Vt. 54, 58 n.2 (1989).

* Whether an application is complete depends upon the particular circumstances of the case; there is no bright-line test for completeness; it turns on the Coordinator's judgment of whether the application provides enough information to begin its processing. *Re: JCR Realty, Inc.*, DR #426, MOD

at 4 (5/7/04)

* A completeness determination is essential to a permit application moving forward in the process before a Commission, as Commissions have jurisdiction over complete applications; they do not have jurisdiction over applications which have been deemed incomplete. *Re: JCR Realty, Inc.*, DR #426, MOD at 4 (5/7/04);

Re: Estate of Evangeline Deslauriers and Bolton Valley Corp., #4C0436-11E-EB, MOD at 4 (1/16/03)[EB #820]

* EBR 10(D) reads: "An application that is incomplete in substantial respects shall not be accepted for filing by the district coordinator, and therefore shall not initiate the time and notice requirements of the Act and these rules." *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 5 (1/16/03). [EB #820]

* Coordinator's determination that application is not complete is a JO, subject to Board review within a DR Petition proceeding. *Re: JCR Realty, Inc.*, DR #426, MOD at 4 (5/7/04); *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 5 (1/16/03) [EB #820]; *Re: Ingleside Equity Group*, DR #397, FCO (8/15/01); and see *Re: Paul & Dale Percy*, #5L0799-EB, FCO at 3 (3/20/86) (advisory opinion); *Re: Flanders Building Supply, Inc.*, #4C0634-EB, FCO at 4 n.1 (10/18/85) (advisory opinion).

* Board will allow process to begin before the Commission, with the caveat that, if the application does not include all of the information that the Commission may ultimately require in order to make positive findings under 10 V.S.A. § 6086(a), this will only work to the applicant's disadvantage, as the process will be delayed while the Commission waits for the submission of necessary evidence. *Re: JCR Realty, Inc.*, DR #426, MOD at 4 (5/7/04)

* Determination that an application is incomplete is the equivalent of Coordinator's decision that Commission lacks jurisdiction to hear application. *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 5 (1/16/03). [EB #820].

* Sanction for applicant's failure to complete application is not dismissal; rather, application should either be returned to applicant or held, not filed, in Commission files until such time as it is either withdrawn or completed. *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 5 (1/16/03). [EB #820]

* Application for renewal of interim certification is complete when ANR receives the full application fee and the required signatures. *Rapid Rubbish Removal*, #CA-721-WFP (6/12/97). [WFP #29]

* Where plans exist to develop entire tract but original application applied only for sewer line, application is incomplete. *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]

* Coordinator shall accept an application for a development if sufficient information is provided, despite the fact that information provided is inconsistent and incomplete. *Sam and Rachel Smith*, DR #266 (1/20/93).

- * Failure of applicant to provide complete and accurate list of adjoining property owners results in remand to Commission. *Winooski Housing Authority*, #4C0857-EB (4/30/91). [EB #507]
- * Application may be dismissed as incomplete by Coordinator before a Commission hearing is convened. *Burlington Properties Limited Partnership*, #4C0473-5A-EB (8/10/89). [EB #444M]; *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]
- * Once a hearing on the merits has been convened, an application is deemed complete and dismissal cannot be made on the basis of completeness. *Burlington Properties Limited Partnership*, #4C0473-5A-EB (8/10/89). [EB #444M]; *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]
- * An application filed under 10 V.S.A. § 6086(b), which allows applicant to file first under Criteria 9 and 10, is not a complete application. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB#347]
- * Where there exists (i) a growth facility, (ii) clear evidence of a plan for growth beyond what was presented in the application, and (iii) a direct relationship between the growth and the proposed construction, an application may be deemed incomplete until additional information about the overall master development plan is submitted for Commission review. *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]
- * Commission should convene a hearing on the merits to decide the scope of a project; such an issue is not simply a matter of whether the application is complete. In such a circumstance, Commission may obtain more information in order to adequately evaluate the project. *Killington, Ltd. & International Paper Realty Corp.*, #1R0584-EB (8/8/86). [EB #297]
- * Coordinator's decision as to application completeness constitutes an "advisory opinion." *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]; *Flanders Building Supply, Inc.*, #4C0634-EB (10/18/85). [EB #270]
- * Application for proposed construction of second phase of private sewer line intended to serve subdivision which only describes sewer line and its impacts, and not subdivision is incomplete; sewer line and proposed subdivision are considered as a single project, and application must describe details of entire project, not just one phase. *Bruce Levinsky*, DR #157 (8/8/84).
- * Once application is deemed complete and hearing on merits is convened, appeal to Board is only on project's merits and not on application's completeness. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188]
- * ANR does not specifically define what constitutes administrative completeness of a stormwater permit application for the purposes of vesting. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 8, Decisions on Motion for Summary Judgement (Oct. 11, 2017).
- * Court relies on case law and ANR rules and policies for the proposition that when there is a two-part review process of administrative and subsequent technical review (such as when ANR deems a Stormwater Permit application administratively complete) vesting is then retroactively applied to

when the application was filed. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.*, No. WQ-01-01, Mem. of Decision at 13 (Vt. Wat. Res. Bd. June. 29, 2001).

* An ANR stormwater permit application is administratively complete when it includes all components normally required in an application, such that ANR is able to review the merits of the application. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 8-9, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* ANR conducts a two-step review of a stormwater permit application: the first step to determine if an application is administratively complete; if so, the second step is to weigh the technical merits of the application. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court relies on Water Resources Board precedent for the position that ANR conducts a review for application completeness separate from, and preceding, technical review of the stormwater permit application's merits. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 8, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.*, No. WQ-01-01, Mem. of Decision at 11 (Vt. Wat. Res. Bd. June. 29, 2001)(Board found that a stormwater permit application is complete for purposes of vesting when it "reasonably address[es] all the factors that the agency is legally required to address in its permit review," and "the application is such that the applicant would reasonably believe that the reviewing authority could act upon the application's merits.")

* While the Vermont Water Quality Standards do not define "deemed complete," the plain language of the phrase which defines "application" as "any request for a permit required by state or federal law when filed with, and deemed complete by, the reviewing authority" suggests a process where the agency reviews the application for completeness. 2011 VWQS § 1-01(B)(4); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 9, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* "[A]dministrative completeness necessarily precedes technical review by providing all of the elements necessary to review the application's merits [by ANR.]" *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 9, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.*, No. WQ-01-01, Mem. of Decision at 11 (Vt. Wat. Res. Bd. June. 29, 2001).

* On its face, the stormwater permit application appears to be administratively complete, as it included all required components and all required boxes were checked off on the applicants Notice of Intent (NOI) form submitted to ANR. Such information should be distinguished from additional information submitted by applicant as part of the technical review process. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 9-10 n. 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court finds stormwater application to be administratively complete before Oct. 16, 2014, because ANR official began her technical review before October 16, 2014; technical review cannot start

before the application is deemed administratively complete. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 10, Decisions on Motion for Summary Judgement (Oct. 11, 2017) citing *Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.*, No. WQ-01-01, Mem. of Decision at 11 (Vt. Wat. Res. Bd. June. 29, 2001).

* Applicant's failure to include a complete project adjoiners list in the October 3, 2014 application neither violated Stormwater Management Rule § 18-309(b)(2), nor rendered the application incomplete for vesting purposes because the rule states that the applicant shall own all impervious surfaces, but is silent regarding when the surfaces must come into the applicant's ownership, nor does it require this information to be included in the application for that application to be considered complete or that this information is necessary to begin technical analysis of project. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Changes can be made to a stormwater application permit during ANR's technical review without extinguishing the vesting date because the rules [such as 16-3 Vt. Code. R. § 505:18-309(c) and (f) "expressly contemplate an iterative technical review process in which ANR may request additional information, or changes, to a proposed project." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 13, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

229.1 Vested rights upon filing (see [801.1](#))

"In Vermont, land use rights normally vest under the version of the municipal or state land use regulations in effect at the time a proper and complete application is submitted." *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 4 (4/30/08)(citing *Smith v. Winhall*, 140 Vt. 178, 181 (1981), subsequent Decision on the Merits (3/10/09), *In re Molgano*, 163 Vt. 25, 33 (1994), and *Re: Burlington Broadcasters, Inc. d/b/a WIZN*, et al., Docket No. 4C1004R-EB, Memorandum of Decision on Group 2 Preliminary Issues at 6–7 (Vt. Env'tl. Bd. Nov. 25, 2003)).

* "Because of the multi-stage nature of Vermont land use regulatory approval a more appropriate first approach to the vesting analysis may not be to look only at the commencement of the local application process, as was the approach in *Burlington Broadcasters*, but first to see if the developer's good faith and diligence carried over to its pursuit of an Act 250 permit." *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 7 (4/30/08)(discussing *In Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 9 (11/25/03) [EB#734M4]; subsequent Decision on the Merits (3/10/09).

* Coordinator's completeness determination under EBR 10(D) is not equivalent to a complete application for vesting purposes of establishing vested rights. *In re Ross*, 151 Vt. 54, 58 n.2 (1989), affirming *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87). [EB #347]

* Even if appellants' application were deemed "complete" for Act 250, Court is unwilling to apply *Smith v. Winhall Planning Commission*, 140 Vt. 178 (1981), where the purposes behind it weigh so heavily against the creation of a vested right. *In re Ross*, 151 Vt. 54, 58 (1989), affirming *Raymond F.*

and *Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87). [EB #347].

* Rights do not vest in an application that was properly denied because it did not supply sufficient information to enable Commission to render a decision. *In re Ross*, 151 Vt. 54, 56 (1989), affirming *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87) [EB #347]; *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 6 (1/16/03). [EB #820]

* To give vested effect to an incomplete application is to elevate form over substance to a degree unnecessary to create "certainty in the law and its administration." *In re Ross*, 151 Vt. 54, 58 (1989), quoting *Smith v. Winhall Planning Commission*, 140 Vt. 178, 182 (1981), and affirming *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87). [EB #347].

* 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. *In re Ross*, 151 Vt. 54, 59 (1989), affirming *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87). [EB #347].

* An application filed under 10 V.S.A. § 6086(b), which allows applicant to file first under Criteria 9 and 10, is not a complete application. *In re Raymond F. Ross*, 151 Vt. 54 (1989), affirming *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87). [EB #347].

* By grandfathering earlier standards for stormwater system permits under 16-3 Vt. Code. R. § 505: 18-306(a)(3), ANR effectively allows a permittee to vest in the standards that exist at the time the original permit application is submitted. Vested rights are lost if the system deteriorates or is not built. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 18, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* "Generally, a permit applicant's rights vest in the laws that exist at the time the permit application is submitted." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Smith v. Winhall Planning Comm'n*, 140 Vt. 178, 180-81 (1981).

* ANR does not specifically define what constitutes administrative completeness of a stormwater permit application for the purposes of vesting. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 8, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court relies on case law and ANR rules and policies for the proposition that when there is a two-part review process of administrative and subsequent technical review (such as when ANR deems a Stormwater Permit application administratively complete) vesting is then retroactively applied to when the application was filed. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.*, No. WQ-01-01, Mem. of Decision at 13 (Vt. Wat. Res. Bd. June. 29, 2001).

* Once ANR determines that a stormwater permit application is administratively complete, that application vests retroactively back to the date that it was submitted to ANR. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct.

11, 2017).

* To vest, the application must be “full and complete.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 9, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re Keystone Dev. Corp.*, 2009 VT 13, ¶ 5, 186 Vt. 523 (mem.) (citing *Winhall*, 140 Vt. at 182).

* “Rights may not vest if an incomplete application is submitted as a vague placeholder, or in bad faith, to avoid pending unfavorable changes to regulations.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 9, Decisions on Motion for Summary Judgement (Oct. 11, 2017), See *In re Taft Corners Assocs., Inc.*, 171 Vt. 135, 142 (2000) (citing *In re Ross*, 151 Vt. 54, 56 (1989)).

* Applicant’s failure to include a complete project adjoiners list in the October 3, 2014 application neither violated Stormwater Management Rule § 18-309(b)(2), nor rendered the application incomplete for vesting purposes because the rule states that the applicant shall own all impervious surfaces, but is silent regarding when the surfaces must come into the applicant’s ownership, nor does it require this information to be included in the application for that application to be considered complete or that this information is necessary to begin technical analysis of project. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Changes can be made to a stormwater application permit during ANR’s technical review without extinguishing the vesting date because the rules [such as 16-3 Vt. Code. R. § 505:18-309(c) and (f) “expressly contemplate an iterative technical review process in which ANR may request additional information, or changes, to a proposed project.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 13, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* “If an applicant withdraws an application and submits a new application, vesting rights in the original application are extinguished, and the applicant vests in the laws and regulations in effect at the time the new application is filed.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 13, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re Times & Seasons, LLC*, 2011 VT 76, ¶ 16, 190 Vt. 163; *In re John A. Russell Corp.*, 2003 VT 93, ¶ 13, 176 Vt. 520 (mem.).

* “There is a strong policy argument to allow permit applicants to adjust and revise their applications during the application review process. Land use permit applications can be complex, and are often subject to revision as they are shepherded through the review process. It is impractical to have any small change trigger a new vesting event, which could require a review of the entire application under entirely new laws or regulations.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 14, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court grants summary judgement to applicant on questions regarding chloride management and phosphorus limitations, concluding that applicant’s stormwater permit application was administratively complete and vested in the laws and regulations in existence which predate chloride and phosphorus standards; therefore, application vested in regulations without those standards. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 14, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Technical review of an ANR stormwater permit application involves a back-and-forth, iterative process between ANR and the applicant that does not extinguish the vesting date. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Appellant barred from alleging excessive chloride and phosphorus in stormwater runoff under Criteria 1, 1(B) and 1(E) because Act 250 application vested in the same regulations as the stormwater application, which did not regulate chloride and phosphorus at the time of filing the application. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 4 (2/8/2018).

* Court grants motion to dismiss questions under Crit 1, 1(B) and 1(E) to the extent they address chloride and phosphorus in stormwater runoff because Act 250 permit vests in the same regulatory scheme that previously did not regulate chloride and phosphorus in stormwater. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 5 (2/8/2018).

* Court limits question of whether Project violates Vermont Groundwater Protection Rule by discharging chloride into groundwater to non-stormwater-based chloride impacts under Criterion 1(B), because the Project vests in the regulatory scheme that did not include specific limitations for chloride. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 5 (2/8/2018).

229.2 Elements of

* Failure to list an adjoining landowner on a permit application does not necessarily void a permit. *In re White*, 172 Vt. 335, 340 (2001), distinguishing *In re Conway*, 152 Vt. 526 (1989).

* Coordinator, after consultation with the chair of the district commission, may waive the requirement that the permit applicant provide a list of adjoining property owners as part of the application materials. *In re White*, 172 Vt. 335, 341 n.4 (2001); EBR 10(F).

* Applicants must only provide a list of adjoining landowners to the district commission, any additional persons the District Commission deems appropriate to receive notification, is left to the determination of the District Commission. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 7 (1/28/11).

230. Minor Application (see [501.2.3](#))

* Whereas Rule 34 allows for administrative amendments when there is no likelihood of impacts under the criteria of 10 V.S.A. § 6086(a), Rule 51 allows for minor amendments when there is a demonstrable likelihood that the project will not present a significant adverse impact under those criteria. *Agri-Mark, Inc.*, No. 122-8-14 Vtec, Decision on Motion, at 7 (5/20/15).

* Under Rule 51, a “minor application” may be granted a permit without a hearing or the issuance of findings of fact and conclusions of law. Act 250 Rule 51(A), (B)(3)(b). The District Commission need only convene a hearing if, after publication of a proposed permit, a person eligible for party status

raises substantive issues on an Act 250 criterion in his or her request for a hearing. Act 250 Rule 51(B)–(D). *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 2 (2/2/10).

* Permit application to install panel antennas on preexisting silo and build equipment shed adjacent to the silo, surrounded by a fence, treated as minor under Act 250 Rules 51(A) and (B). *In re RCC Atlantic, Inc., and Sousa*, #163-7-08 Vtec, Decision on Multiple Motions at 1 (5/08/09).

* Where petitioner failed to participate in original permit proceedings (although aware of such proceedings), petitioner cannot later attack the permit through a minor amendment application. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]

* Commission need not review *de novo* the entirety of previously approved project under all criteria when considering a minor amendment application for such project. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655].

* Application for relocation of existing trail will be processed as a minor application if it includes a map showing location of trail, a designation as to who will supervise, and certification that it has been reviewed by Agency of Environmental Conservation [now DEC]. *Footpaths Above 2,500 Feet*, DR #69 (10/8/75).

* EBR 51(B) requires Commission, not Coordinator, to rule that it intends to issue a permit without convening hearing unless a request for a hearing is received by a certain date. *Norman P. Kelley*, #5W0961-3-EB, FCO at 8 (3/12/02). [EB #794]

230.1 Changing a minor into a major; raising substantive issues; request for a hearing

* Under Rule 51, a “minor application” may be granted a permit without a hearing or the issuance of findings of fact and conclusions of law. Act 250 Rule 51(A), (B)(3)(b). The District Commission need only convene a hearing if, after publication of a proposed permit, a person eligible for party status raises substantive issues on an Act 250 criterion in his or her request for a hearing. Act 250 Rule 51(B)–(D). *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions FN2 at 2 (2/2/10).

* To receive a hearing, the burden of initial evidentiary showing is upon requesting party. *In re RCC Atlantic, Inc., and Sousa*, #163-7-08 Vtec, Decision on Multiple Motions at 8 (5/08/09).

* The statement “they would most likely produce a noise study,” is insufficient to meet the requirements of Act 250 Rule 51(B)(3)(d). *In re RCC Atlantic, Inc., and Sousa*, #163-7-08 Vtec, Decision on Multiple Motions at 8 (5/08/09).

* Appellant did not raise any substantive issues that require a hearing on criterion 9(K) since the additional lots will have similar impacts to the lots already approved in a prior proceeding. *Re: Okemo Mountain, Inc. n/k/a/ Okemo Ltd. Liability Co. and Timothy and Diane Mueller and Daniel and Debora Petraska*, #2S0351-25U-EB, MOD at 3 (1/16/03). [EB #816]

* Appellant may raise substantive issues on a Criterion before Board if it first requested Commission

to hold a hearing on that Criterion. *Haystack Highlands, LLC*, #700002-10D-EB, MOD at 8 (12/20/02). [EB #812].

* Commission's issuance of permit without hearing, by relying on publication of slightly different proposed permit issued several years earlier, denied opportunity for opponents to review actual permit pursuant to EBR 51(B). *Norman P. Kelley*, #5W0961-3-EB, FCO at 8 (3/12/02). [EB #794]

* In light of years of correspondence opposing removal of permit condition, Commission incorrectly concluded that no substantive issues had been raised and treated matter as an minor pursuant to EBR 51(D) *Norman P. Kelley*, #5W0961-3-EB, FCO at 8 (3/12/02). [EB #794]

* Request for hearing before Commission in an EBR 51 matter is a prerequisite to appealing a decision to deny a hearing request. *Northern Development Enterprises*, #5W0901-R-5-EB (8/21/95). [EB #627M1]

* Commission did not abuse its discretion in deciding that no substantive issues had been raised to warrant a hearing. *Raponda Landing Corp.*, #2W0604-3-EB (10/4/88). [EB #371M]

231. By innocent purchaser of subdivision created without permit

* In EBR 60 proceeding, burden of proof is on party seeking to be declared eligible for Rule 60 status. *Marcel Roberts & Noel Lussier*, #7R0858-1-EB (8/9/93). [EB #570]

* Experienced real estate brokers do not meet requirements of EBR 60 (i.e., the purchaser did not know or could not reasonably have known at the time of purchase that Act 250 applies) where a permitted subdivision lot is further subdivided. *Marcel Roberts & Noel Lussier*, #7R0858-1-EB (8/9/93). [EB #570].

* Purchasers of lots created from illegal tract may be eligible for permit approval under Rule 60 (the "innocent purchasers" rule). *John W. Stevens and Bruce W. Gyles*, DR #240 (5/8/92).

232. Withdrawal of application

* Permit vacated after Board granted permittee's request for withdraw of its application. *Re: Green Mountain Railroad*, #2W0038-3B-EB, MOD at 2 (5/16/02).

* Application could be withdrawn where no other parties participated in proceeding and thus not were prejudiced; such withdrawal did not prejudice general public's interest where enforcement could correct violations. *Re: Green Mountain Railroad*, #2W0038-3B-EB, FCO at 8 (3/22/02). [EB #797].

* Withdrawal of an application after issuance of a Commission permit and appeal therefrom would not be allowed since the public interest would be prejudiced by a lack of finality in Board and Commission decisions. *Ronald L. Saldi*, #5W1088-1-EB (10/1/96). [EB #653M1]

233. Fees

* As a legal "term of art," a "hearing on the merits," within meaning of EBR under which applicant is entitled to refund of application fee only if application is withdrawn prior to convening of hearing on merits, is necessarily limited to hearings held to determine the applicant's entitlement to an Act 250 permit under 10 V.S.A. § 6086. *In re Richard Roberts Group, Inc. et al.*, 161 Vt. 618, 619 (1994), reversing *Richard Roberts Group*, DR #225 (on Remand) (5/21/93) and (Reconsidered) (7/5/91).

* Vast disparity between the fee the Board wished to keep and the burden on the permitting process is arguably an enrichment which fails to comply with the doctrine that administrative fees must be reasonably related to the cost of the governmental function. *In re Richard Roberts Group, Inc. et al.*, 161 Vt. 618, 619 (1994), reversing *Richard Roberts Group*, DR #225 (on Remand) (5/21/93) and (Reconsidered) (7/5/91);

* An argument that a fee is excessive or is not necessary must be made, in the first instance, to the chair of the Commission: 10 V.S.A. § 6083a(f); *Re: JCR Realty, Inc.*, DR #426, MOD at 5 (5/7/04)

* Whether a fee should be required for an amendment application, and the amount of that fee, is a question that the Coordinator may initially address within a completeness determination. *Re: JCR Realty, Inc.*, DR #426, MOD at 5 (5/7/04), citing *Re: Rapid Rubbish Removal*, #CA-721-WFP, FCO at 13 (6/12/97) (application for renewal of interim certification is complete when ANR receives the full application fee and the required signatures).

* Purpose of a fee is to pay for the administrative costs of processing an application. *Re: JCR Realty, Inc.*, DR #426, MOD at 6 (5/7/04, citing *In re Richard Roberts Group, Inc. et al.*, 161 Vt. 618, 619 (1994)

* For earth resource extraction projects, statute bases fee on annual extraction rates, not *total amount of product* to be extracted. 10 V.S.A. § 6083a(a)(4); *Re: JCR Realty, Inc.*, DR #426, MOD at 6 n.3 (5/7/04) (Note: 2012 amendment to 10 V.S.A. § 6083a now bases fee on total amount, not annual rate)

* Board ordered refund of fee subject to reservation of the right to evaluate, in future cases, alternative methods of calculating a refund. Board was not equitably estopped to charge more than \$25 fee due to past Commission practice. *HS Development, Inc. and Stratfield Associates*, #700002-10B-EB (3/1/96). [EB #636]

* Project undertaken exclusively for the benefit of State of Vermont is considered a State project and exempt from application fee requirements. *R.S. Audley, Inc.*, #4C0898-EB (4/30/93). [EB #575M]

* Fee is partially waived where, due to unique set of facts, equipment replacement will not significantly alter project previously reviewed by Commission. *IBM Corp.*, #4C0354-2-EB (11/16/92). [EB #550]

* Project created by master permit approval which does not result in a hearing may qualify for a fee

waiver. *Vermont Gas Systems, Inc.*, #4C0609-EB (1/30/86), *rev'd and orders vacated*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #285]

* A "turnkey" project requires a fee, but fee will be returned once the project is taken over by the housing authority. *Rutland Housing Authority*, DR #H (3/10/71).

* Fee is not required for water or air pollution abatement facility or private enterprise if it is ordered or approved by a State agency. *Agency of Environmental Conservation*, DR #D (3/10/71).

234. Successive Application Doctrine

*"The successive-application doctrine represents an implementation of issue preclusion, as adapted to the specific context of multiple zoning applications." *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶4 (10/26/12) (citing *In re Armitage*, 2006 VT 113, ¶4, 181 Vt. 241, 917 A.2d 437).

* New Act 250 application is not automatically barred by the failure to apply for reconsideration, but rather was governed by the successive- application doctrine. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶¶15 - 16, 30 A.3d 641, 648 (Vt 2011).

* Board may not entertain a second application concerning the same property after a previous application has been denied unless a substantial change of conditions has occurred or other considerations materially affecting the merits of the request have intervened between the first and second application, (e.g. secondary growth during intervening years and a city's designation of an area as a growth center) *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶16, 30 A.3d 641, 648-650 (Vt 2011)

*"The successive-application doctrine reflects the necessarily iterative zoning and planning process in that it enforces a more relaxed standard of issue preclusion than is applicable in other contexts." *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶4 (10/26/12).

* The "successive-application doctrine," due to its ability to strike the proper balance between finality and flexibility, is more appropriate than the "changed circumstances doctrine" for analyzing whether to permit review of an Act 250 permit application for a project that has previously been denied a permit. *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 13 (3/16/09), citing *In re Dunkin Donuts*, 2008 VT 139, ¶¶ 9–10.

* It is a threshold requirement that an applicant show "a substantial change in the application or the circumstances" before the District Commission – or the Environmental Court, standing in its place in the case of a de novo appeal – can consider a revised application for a project that has already been denied an Act 250 permit. *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 14 (3/16/09), citing *In re Armitage*, 2006 VT 113, ¶ 8 (citing *In re*

Carrier, 155 Vt. at 158–59); *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 5 (10/26/12).

*“The applicant bears the burden of showing changed circumstances (to overcome successive-application doctrine).” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 10 (10/26/12) (citing *In re Carrier*, 155 Vt. at 158, 582 A.2d at 114).

* In determining whether to consider a revised application for a project that has already been denied an Act 250 permit, the Environmental Court has noted that a “substantial change in circumstances can occur when there have been changes to the application itself, to address concerns that caused the previous denial, a change in the physical surroundings of the property, or a change in the governing regulations.” An applicant cannot, however, “merely seek to introduce additional evidence . . . that could have been presented in the earlier proceeding.” *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 14-15 (3/16/09), quoting *In re R.L. Vallee PUD (Spillane’s) – 811 Williston Rd.*, No. 100-5-07 Vtec, Decision and Order on Cross Motions for Summary Judgment at 4 (8/17/07) (Wright, J.).

*A second application can be granted “when the application has been substantially changed so as to respond to objections raised in the original application or when the applicant is willing to comply with conditions the commission or court is empowered to impose.” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 5 (10/26/12) (citing *In re Carrier*, 155 Vt. 152, 158, 582 A.2d 110, 113 (1990)).

*Even without substantial change in the project there could be a successive application if it is based on new evidence unavailable at the time of the first application. *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 7 (10/26/12) (referencing *In re McGrew*, 2009 VT 44, 186 Vt. 37, 974 A.2d 619; *In re Armitage*, 2006 VT 113).

*If a second application provides sufficient detail and redesign (of a swale) to respond to the court’s previous objections, then these changes to the application are adequate to constitute a substantial change of conditions sufficient to conflict with the successive application doctrine. *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 11 and 12 (10/26/12).

*“We conclude that in keeping with the flexibility of successive-application doctrine a second complete application is not precluded by the denial of a prior incomplete application.” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 15 (10/26/12).

C. Conditions

241. General

* The necessary result of detailed environmental review, as contemplated by Act 250, is that restrictions on land use will not be simple to state or even to ascertain. *In re Denio*, 158 Vt. 230, 240 (1992).

- * A permit granted by the Board "may contain such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to [the Act 250 criteria]...." *In re Quechee Lakes Corporation*, 154 Vt. 543, 549 (1990); *In re Pilgrim Partnership*, 153 Vt. 594, 597 (1990); 10 V.S.A. § 6086(c).
- * If a properly imposed permit condition has the incidental effect of focusing more attention on future changes than would have existed prior to issuance of the permit, the result does not violate landowner's rights or impose any practical hardship on it. *In re R.E. Tucker, Inc*, 149 Vt. 551, 557 (1988).
- * Permit applicant cannot limit the Board's discretion in framing a condition by simply restricting the kind of evidence it presents on an issue whose burden of proof it bears. *In re R.E. Tucker, Inc*, 149 Vt. 551, 5585 (1988).
- * Board may exercise discretion within a range of values supported by the evidence; argument to the contrary confuses the function of finding facts with that of framing remedial or quasi-remedial orders fairly reflecting the facts. *In re R.E. Tucker, Inc*, 149 Vt. 551, 559 (1988).
- * While approval with conditions has been an accepted regulatory practice for many years, there are occasions where a proposed project's nonconformance is so significant that conditional approval is not the proper response. *In re: Rivers Dev. Act 250 Appeal*, #68-3-07 Vtec, Decision on Post-Judgment Motion to Alter at 6 (8/17/10). See *Re: McLean Enters. Corp.*, #2S1147-1-EB, FCO at 62 (11/24/04) ("[T]he Board will deny a permit if permit conditions cannot be drafted to alleviate the undue adverse impact.").
- * A permit condition creating a presumption of liability for future harm to neighboring property is invalid. *Re: Route 103 Quarry (Carrara)*, No. 205-10-05 Vtec, Decision at 29 (11/22/06), *aff'd*, *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008).
- * Permit applies to the entire parcel, but this does not necessarily not mean that every condition applies to the entire parcel. *In re O'Neil Sand and Gravel*, No. 48-2-07 Vtec Decision and Order on Cross-Motions for Summary Judgment at 9 (9/11/09), see also; Decision and Order on Motion to Reconsider or to Alter (2/23/10).
- * Permit conditions such as noise limitations on "all aspects of the operation occurring on the site" clearly apply to the entire tract. *In re O'Neil Sand and Gravel*, No. 48-2-07 Vtec, Decision and Order on Cross-Motions for Summary Judgment at 6 (9/11/09), see also; Decision and Order on Motion to Reconsider or to Alter (2/23/10).
- * A permitted project must be built in conformance with the application, conditions, findings of fact, and conclusions of law of the permit. *Construction Management, Inc.*, DR #117 (7/11/80).

241.1 Construction of

* Environmental Court will “rely upon normal rules of statutory construction” in interpreting permit conditions. Although ambiguities are construed in favor of the landowner, the Court’s “principal concern” must be to implement the intent of the drafters of the permit. *NRB Land Use Panel v. David Dodge*, No. 43-03-08 Vtec, Decision and Order on Motion for Judgment on the Pleadings at 4 (9/30/08), quoting *Agency of Natural Res. v. Weston*, 2003 VT 58, ¶ 16, 175 Vt. 573; *In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion)*, No. 116-8-12 Vtec at 2 (EO on Cross Mot for Sum J) (11/28/12).

* Condition requiring a “barely audible” noise standard both at a school building and on the portion of a school’s property used for recreation is not limited to those areas currently being used for recreation but is also applicable to areas used for recreation in the future. *In re O’Neil Sand and Gravel*, No. 48-2-07 Vtec, Decision and Order on Motion to Reconsider or to Alter at 6-7 (2/23/10).

* When a court finds the plain language ambiguous in terms of defining the scope of a permit condition it resolves the uncertainty in favor of the property owner, however, in a subsequent application to amend the permit, the applicant has the burden to establish that all aspects of the new proposed project, including the previous condition where any ambiguity was resolved in favor of the applicant, comply with Act 250 criteria contained in 10 V.S.A. § 6086(a). *In re O’Neil Sand and Gravel*, No. 48-2-07 Vtec, Decision and Order on Cross-Motions for Summary Judgment at 7-8 (9/11/09), see also; Decision and Order on Motion to Reconsider or to Alter (2/23/10).

*In construing Condition 10, the Court employs “normal statutory construction techniques” and aims to “implement the intent of the draftspersons.” *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 4 (03/19/14); *ANR v. Handy Family Ent.*, 163 Vt. 476, 481 (1995).

* The interpretation of the legal effect of a permit condition is a question of law. *NRB Land Use Panel v. David Dodge*, No. 43-03-08 Vtec, Decision and Order on Motion for Judgment on the Pleadings at 4 (9/30/08).

* A permit condition that “The applicants shall pay the Town of Danville’s costs in converting Hillside Avenue to a one-way road . . .” is an unambiguous requirement, and a provision that states “but no later than before the last lot is sold” only modifies the time at which applicants should pay and does not establish a deadline for the completion of the road conversion work or excuse applicants’ duty to pay. *NRB Land Use Panel v. David Dodge*, No. 43-03-08 Vtec, Decision and Order on Motion for Judgment on the Pleadings at 4 (9/30/08), quoting AO at ¶ 4 (citing Permit Condition #15)(emphasis added).

* Because of the emphasis in the District Commission’s Findings upon the “poor” condition of area roadways, and the lack of any reference in the Findings or Permit to a time limitation upon when the Town should complete the road conversion work, Respondent’s obligation to reimburse the Town for road work did not expire when he sold his last lot. *NRB Land Use Panel v. David Dodge*, No. 43-03-08 Vtec, Decision and Order on Motion for Judgment on the Pleadings at 4 (9/30/08).

* Court must look to the entirety of a permit and attempt to harmonize its constituent parts. *In re: Maggio*, No. 166-7-06 Vtec, Decision at 7 (4/20/2007); citing *Davis v. Hunt*, 167 Vt. 263, 267 (1997), citing *Lemioux v. Tri-State Lotto Comm’n*, 164 Vt. 110, 113 (1995).

* The Court relies upon normal rules of statutory construction in interpreting permit conditions, and endeavors to determine intent by relying on the plain language of the permit. *In re Big Rock Gravel* (JO Appeal), No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 2 (11/28/12).

* Act 250 permit conditions must be expressed with sufficient clarity to give notice of the limitations on the use of the land. *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 4 (03/19/14); *ANR v. Handy Family Ent.*, 163 Vt. 476, 482 (1995).

*The Court favors interpretations of statutes that further fair, rational consequences, and presumes that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences. *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 4 (03/19/14)(citing *Wesco, Inc. v. Sorrell*, 2004 VT 102, 177 (2004)).

*The Court concluded that Condition 10 of the Permit, which restricts operation of the facility, did not give notice that the restricted hours also apply to concrete and form truck traffic which may be required to transport product completed by closing time or to travel a considerable distance to return to the site for nightly storage. *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 4 (03/19/14).

* Sentence in permit condition capping noise levels at historic noise levels during a specific period is too vague, so replaced with stipulated numeric standards. *In re Chaves Act 250 Permit Application Appeal*, No. 267-11-08 & 60-4-11 Vtec, Entry Order at 1-2 (06/23/14).

242. Authority to impose

* A permit may contain such requirements and conditions as are allowable proper exercise of the police power and which are appropriate with respect to the statutory criteria. *In re Green Crow Corp.*, 2007 VT 137 ¶ 12 (12/14/07)(citing 10 V.S.A. § 6086(c)).

* Board and Commissions may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the statutory criteria. 10 V.S.A. § 6086(c); *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995); *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993); *In re Denio*, 158 Vt. 230, 239-40 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 550 n. 4 (1990); *In re Pilgrim Partnership*, 153 Vt. 594, 597 (1990); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 49 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Twin State Sand & Gravel, Inc.*, #3W0711-5-EB, FCO (Altered) at 20 (4/29/05) [EB #852].

* Permit conditions are "reasonable" and within the proper exercise of the police power when they are intended to alleviate an adverse impact that would otherwise be caused by a project. 10 V.S.A. § 6086(c); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 49 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re:*

Twin State Sand & Gravel, Inc., #3W0711-5-EB, FCO (Altered) at 20 (4/29/05) [EB #852]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 21- 22 (4/9/02). [EB #791]

* Act 250 conditions may only apply to property under the applicants' control absent an agreement from the party that owns or controls the other property. *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Judgment Order, at 14-15 (7/30/14), *appeal docketed*, No. 14-352.

* Commission can impose conditions over lands that are offered by applicant as a part of its project, even if it would not have been able to require that those lands be included within the project. *Stonybrook Condominium Owners Association*, DR #385, FCO at 19 n.11 (5/18/01).

* Commission can impose conditions which applicant agrees to. *Stonybrook Condominium Owners Association*, DR #385, FCO at 19 n.11 (5/18/01).

* In the absence of specifically retaining jurisdiction with Board, language in Board permit which prohibited Commission from amending specific permit condition improperly stripped Commission of its jurisdiction to hear the amendment application in the first instance. *MBL Associates*, #4C0948-1-EB (5/4/98). [EB #705]

* Board may impose conditions to assure that certain landscaping measures are undertaken, even when applicant has proposed to undertake those measures through the imposition of protective covenants. *Raymond F. and Centry M. Duff*, #5W0952-2-EB (1/29/98). [EB #684]

* Board was not empowered to make a permittee single-handedly resolve traffic flow and design problems that were not of its making. *Springfield Hospital*, #2S0776-2-EB (8/14/97), *sup. ct. appeal dismissed*, *In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]

* Board lacks authority to alter a permit condition in a DR proceeding; such relief can only be granted as part of an appeal of the condition itself. *Roger Loomis d/b/a/ Green Mountain Archery Range*, DR #344 (8/8/97).

* Where Commission had retained authority to impose conditions necessary to control erosion at a subdivision site, it could impose additional erosion control measures upon remand from Board. *Robert Blair and CS Architecture*, DR #241 (4/29/92).

* Commission has no authority to require permit condition without a finding that it is necessary for compliance with any of the ten criteria. *Trapper Brown Corp. (TBC Realty)*, #4C0582-15-EB (12/23/91). [EB #420]

* Commission may reserve right to reopen hearings, if it believes that additional conditions might need to be imposed in a permit to ensure compliance with Act 250 criteria. *Wildcat Construction Co.*, #6F0283-1-EB (10/4/91), *aff'd*, *In re Wildcat Construction Co.*, 160 Vt. 631 (1993). [EB #458]

* Board has broad authority to tailor permit conditions to reduce the environmental impacts of proposed projects, as long as a condition constitutes a proper exercise of the police power, and has an appropriate relationship to the criterion involved. *J. Philip Gerbode*, #6F0357R-EB (3/26/91). [EB

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- * Commission is not required to make a party pay for additional costs to the AOT resulting from the size of a cattle underpass. *State of Vermont Agency of Transportation*, #7C0558-2-EB (Reconsideration) (5/18/90), *aff'd, In re Agency of Transportation*, 157 Vt. 203 (1991). [EB #445]
- * Act 250 allows conditions to be imposed on permittees but gives no authority to issue permit conditions which require other parties to an Act 250 proceeding to pay for improvements. *State of Vermont Agency of Transportation*, #7C0558-2-EB (Reconsideration) (5/18/90), *aff'd, In re Agency of Transportation*, 157 Vt. 203 (1991). [EB #445]
- * Commission and Board lack authority to impose new permit conditions on project with no material or substantial changes. *Xenophon Wheeler*, #4C0513-1C-EB (11/10/88). [EB #395]
- * Commission had authority to impose a permit condition requiring the applicant to submit a plan for reducing the number of access points to property owned by the applicant which is not the subject of the permit amendment application. *Bradford Oil Company*, #3R0049-4-EB (9/29/87). [EB #352M]
- * Act 250 review includes not only impacts during construction but extends to impacts during use of a project *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]
- * Imposition of a \$40/dwelling unit contribution to a traffic study to be coordinated by a regional planning commission is a reasonable exercise of Commission powers to address traffic concerns. Such payments can be required in advance of project construction in order to identify potential solutions to imminent traffic problems before the traffic is generated. *Alpen Associates*, #5W0722-2-EB (1/16/85), *aff'd, In re Alpen Associates*, 147 Vt. 647 (1986). [EB #236]
- *As to aesthetics of proposed microwave relay tower, Board's authority is limited to imposing reasonable conditions or denying the application. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]
- * Commission can impose a condition in a permit authorizing subdivision approval which requires future Commission approval for further subdivision of the land. *Richard Saltzman and Richmond Estates*, #4C0234-1-EB (4/24/80). [EB #132]
- * Commission may impose a condition on a permit applicant to compensate a town for the resulting burden on the school system. *Dept. of Forests and Parks*, DR #77 (9/8/76).
- * "The District Commission, and this Court sitting in its place, can impose reasonable conditions in an Act 250 permit to ensure that the permitted project complies with a given criteria." *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 10 (2/8/2018). 10 V.S.A. § 6086(c); citing *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 36 (May 26, 2017), re-argument denied (Sept. 22, 2017).

243. Purpose of

* Conditions set forth in a permit allow the permittee to proceed with the subdivision or development while maintaining compliance with Act 250. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998).

* Permit conditions alleviate adverse effects that would otherwise be caused by a project, and those adverse effects would require a conclusion that a project does not comply with the criteria at issue unless the conditions are followed. *In re Alpen Associates*, 147 Vt. 647 (1986); *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 10 n.1 (11/16/04) [EB#850]; *Re: Ingleside Equity Group & Grice Brook Development Corp.; St. Albans Cooperative & Maplefields*, #6F0391-7-EB, FCO at 2 (1/23/04) (EB #827); *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 23 (4/9/02)[EB #791]; *In re McDonalds's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 15 (3/22/01) [EB #760]; *Lawrence White*, #1R0391-8-EB (4/16/98). [EB #689]; *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]; *Charles and Barbara Bickford*, #5W1186-EB (5/22/95) [EB #595]; *Clarence & Norma Hurteau*, #6F0369-EB, MOD at 3 (3/25/88) [EB #369]

* While approval with conditions has been an accepted regulatory practice for many years, there are occasions where a proposed project's nonconformance is so significant that conditional approval is not the proper response. *In re: Rivers Dev. Act 250 Appeal*, #68-3-07 Vtec, Decision on Post-Judgment Motion to Alter at 6 (8/17/10). See *Re: McLean Enters. Corp.*, #2S-1147-1-EB, FCO at 62 (11/24/04) ("[T]he Board will deny a permit if permit conditions cannot be drafted to alleviate the undue adverse impact.").

243.1 Reliance on

* At the time that such a permit is issued, a permit holder should be able to reasonable rely upon the representations in the permit. [*In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 \(1998\)](#)(explaining that "[t]he [Act 250] permitting process requires some finality because, both at the time the permit issues and subsequently, the parties and other interested persons reasonably rely on the permit conditions in making decisions."). *In re Leverenz*, Act 250 Jurisdictional Opinion (#6-010), No. 123-10-15 VTEC, 2016 WL 6776338 (Vt.Super. Sep. 30, 2016).

* Parties (and their successors) to a permit may reasonably rely upon the terms of the permit governing future activity on the property. *In re: Maggio*, No. 166-7-06 Vtec, Decision at 8 (4/20/2007)

* Act 250's notice and permitting process contemplate that parties will be able to rely on a permit's terms and conditions. *In re: Maggio*, No. 166-7-06 Vtec, Decision at 8 – 9 (4/20/2007)

244. Requirement of reasonableness, necessity and clarity

*A court imposed condition is a reasonable exercise of its police power so long as the evidence presented supports the court's factual findings and conclusions and that the condition, if complied with, will prevent potential harm. *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶¶ 23,37 (Vt. Oct. 1, 2016); see 10 V.S.A. §6087(b), (c); *In re Denio*, 158 Vt. 230, 240, 608 A.2d 1166, at 1172 (1992).

* Statute governing Act 250 conditioning authority, 10 V.S.A. § 6086(c), requires definite, qualitative or quantitative standards. Condition prohibiting noise from exceeding levels that existed from 2005 to December 2011 is vague and unenforceable since noise levels fluctuated dramatically during that time. *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5, ¶146 (01/17/14).

* Board may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the statutory criteria. 10 V.S.A. § 6086(c); *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995); *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993) (Board has the authority to impose specific conditions "as are allowable within the proper exercise of the police power" on the grant of an Act 250 permit, so long as such conditions are "reasonable"); *In re Denio*, 158 Vt. 230, 240 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 550 n.4 (1990).

* Act 250 permit conditions must be expressed with sufficient clarity to give notice of the limitations on the use of the land. *ANR v. Handy Family Ent.*, 163 Vt. 476, 482 (1995).

* Any permit condition imposed must be reasonable. 10 V.S.A. § 6086(c); *In re Denio*, 158 Vt. 230, 240 (1992); *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 22 (4/9/02) [EB #791]; *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 43 (5/25/99), *aff'd*, *OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *Lawrence White*, #1R0391-8-EB (4/16/98). [EB #689]; *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R] *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]

* All conditions relating to a permit must be clearly and specifically stated in a permit. *Robert Blair and CS Architecture*, DR #241 (4/29/92).

* Permit condition must be necessary for compliance with any of the ten criteria. *Trapper Brown Corp. (TBC Realty)*, #4C0582-15-EB (12/23/91). [EB #420]

* Board has broad authority to tailor permit conditions to reduce the environmental impacts of proposed projects, as long as a condition constitutes a proper exercise of the police power, and has an appropriate relationship to the criterion involved. *J. Philip Gerbode*, #6F0357R-EB (3/26/91). [EB #397]

* Restriction in permit against use of white and other colors for houses in subdivision is void because such use of colors will not have undue adverse effect on area. *Hickock & Boardman*, #4C0662-EB (12/3/87). [EB #303]

* Commission may find that a project will not cause unreasonable traffic congestion or unsafe conditions and still impose a condition regarding traffic safety. *Bradford Oil Company*, #3R0049-4-EB (9/29/87). [EB #352M]

* If an applicant shows that over a long period of time a less restrictive condition has been exclusively imposed to address the same problem under the same or similar circumstances, and that administrative guidelines now encourage application of that less restrictive condition, they have met the burden of showing that the existing condition may not be the most useful way to lessen the

impacts of the development. *In re Ashford Lane HOA Act 250 Application*, 69-5-13 Vtec at 7 (12-6-13).

* “The District Commission, and this Court sitting in its place, can impose reasonable conditions in an Act 250 permit to ensure that the permitted project complies with a given criteria.” *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 10 (2/8/2018). 10 V.S.A. § 6086(c); citing *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 36 (May 26, 2017), re-argument denied (Sept. 22, 2017).

245. Findings, conclusions, plans, exhibits and representations as permit conditions

* Board may rely on applicant's representations in permit application. *In re Stowe Club Highlands*. 166 Vt. 33, 40 (1996).

* Condition may require permittee to complete the project consistent with the Board's findings and conclusions and the approved plans and exhibits; findings, conclusions and approved plans and exhibits which accompany a permit have the force and effect of permit conditions.. *In re Denio*, 158 Vt. 230, 240 and 241 (1992); *Richard Bouffard*, #4C0647-6-EB, FCO at 12 (10/23/00). [EB #755]; *McDonald's Corporation*, #1R0477-5-EB, MOD at 8 (5/3/00). [EB# 747]; *Vermont Institute of Natural Science*, DR #352 (2/11/99); *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded on other grounds*, *In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306] (findings and conclusions of law that are expressly incorporated into permit considered conditions for violation and/or revocation purposes).

* Condition may require that, in event of a conflict between the findings and conclusions, on the one hand, and the plans and exhibits, on the other, the findings and conclusions will govern. *In re Denio*, 158 Vt. 230, 240 (1992).

* While site plans are not numbered conditions, they still must be adhered to. When a permittee intends to deviate materially from plans on which permit is based, it has an affirmative duty to highlight these deviations for the Commission and to file an amendment application. *Re: Hamm Mine*, No. 271-11-06 Vtec, Decision on Appellant's Motion for Summary Judgment at 11 (9/27/07); see also: *In re: Hamm Mine Act 250 Jurisdiction*, Decision and Order (5/15/08), *aff'd*, 2009 VT 88 (mem.).

* Board will accept predictions and models presented by applicants and then require them to operate within such stated predictions, by incorporating them into a permit as conditions. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 24 (4/9/02). [EB #791]; *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 22 (7/20/00). [EB #696] (tetrachlorethylene levels in discharge effluent); *Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, FCO at 15 (8/19/99). [EB #721] (traffic); *Vermont Institute of Natural Science*, DR #352 (2/11/99).

* Commissions and parties have right to rely on material information provided by applicant. *Richard Bouffard*, #4C0647-6-EB, FCO at 12 (10/23/00).

* Where affirmative finding under criterion relies on applicant's representations regarding risks

from tetrachlorethylene levels in discharge effluent, permit will require project to achieve those levels. *Re: Unifirst Corporation and Williamstown School District, #5R0072-2-EB, FCO (Altered) at 22 (7/20/00). [EB #696].*

* A permit applicant's material representations may be incorporated into a permit as conditions thereby binding the applicant to those representations unless circumstances or some intervening factor justify the issuance of a permit amendment. *Nehemiah Associates, Inc., #1R0672-1-EB (on Remand) (4/11/97), aff'd, In re Nehemiah Associates, Inc., 168 Vt. 288 (1998). [EB #592].*

* Where permit condition incorporates by reference findings and applicant's exhibits, it was appropriate to rely on the material information provided by applicant to determine whether a change has occurred in the permitted project requiring a permit amendment. *Vermont Institute of Natural Science, DR #352 (2/11/99); J.P. Carrara & Sons, Inc., #1R0589-EB Revocation, FCO at 12 (5/13/92). [EB #498]*

* Partial findings that have expired cannot supercede prior permit conditions. *Donald and Diane Weston, #4C0635-4-EB, (3/2/00). [EB # 735]*

* Plans submitted with (and which support) an application for a permit, and which are approved by Commission as part of an approved project, are part of the permit. *Trapper Brown Corp. (TBC Realty), #4C0582-15-EB (12/23/91). [EB #420]*

246. Enforceability of

* Board will not write a condition which is unenforceable. *Old Vermonter Wood Products, #5W1305-EB (8/19/99). [EB #721]*

247. Compliance with; binding effect of

* Board possesses the inherent authority, if not an obligation, to determine whether permittee is complying with its own order. *In re White, 172 Vt. 335, 344 (2001).*

* Where there are no rules that explicitly govern the procedure for determining compliance with and seeking enforcement of the Board's orders, Supreme Court must assess the process afforded to Permittee in light of the factors enumerated by the United States Supreme Court in *Mathews v. Eldridge, 424 U.S. 319 (1976). In re White, 172 Vt. 335, 344 (2001)*

* Condition suggested by applicant and incorporated into the permit, and is binding on applicant unless permit is amended. *In re Stowe Club Highlands. 166 Vt. 33, 36 (1996).*

* In a permit amendment case, there is no dispute that the applicant is bound by the provisions of the original permit. *In re Stowe Club Highlands. 166 Vt. 33, 37 (1996).*

* Permittee is required to conform to permit conditions contained therein for the entire duration of the permit or else be subject to revocation proceedings. *In re Wildcat Constr. Co., Inc., 160 Vt. 631, 633 (1993).*

- * Successor owners, as successors in interest, are also bound by the conditions of the permit. *In re Quechee Lakes Corporation*, 154 Vt. 543, 550 n.5 (1990).
- * Long ago Justice Holmes remarked: "Men must turn square corners when they deal with the Government." *In re McDonald's Corp*, 146 Vt. 380, 386 (1985), quoting *Rock Island, Arkansas & Louisiana R.R. v. United States*, 254 U.S. 141, 143 (1920).
- .
- * Board has authority to police its permits. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).
- * Whether proposed blasting can comply with noise conditions of original permit is a question of fact. *In re O'Neil Sand and Gravel*, No. 48-2-07 Vtec, Decision and Order on Cross-Motions for Summary Judgment at 13-15 (9/11/09), see also, Decision and Order on Motion to Reconsider or to Alter (2/23/10).
- * Although the costs the permit required Respondent to pay accrued at a later time than the parties originally contemplated, this delay does not excuse Respondent from the duty to pay. *NRB Land Use Panel v. David Dodge*, No. 43-03-08 Vtec, Decision and Order on Motion for Judgment on the Pleadings at 4 (9/30/08).
- * Permittee is responsible for complying with permit conditions; the method by which compliance is achieved is not of concern to Board. *Re: Maple Tree Place Associates*, #4C0775-EB (3/25/98). [EB #700M]
- * Compliance with permit conditions is presumed until facts are found to the contrary. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]
- * Responsibility for permit compliance rests with applicant. *Liberty Oak Corporation*, #3W0496-EB (7/14/88). [EB #323]

248. Conditions subsequent

- * Proposal that applicant be required to submit final plans to commission and ANR demonstrating that sewer discharge would achieve a no-risk standard is impermissible condition subsequent which cannot substitute for an affirmative finding under Criterion 1(B). *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680].
- * There is no authority in statute or Board Rules that authorizes the issuance of positive findings and a permit contingent upon future review of the color of a building. *OMYA, Inc.*, #1R0271-9-EB (2/7/91). [EB #482]
- * 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. *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). [EB # 349] [EB #357]

* Rules 20(A) and (B) do not authorize issuance of permit contingent upon future study that might prove compliance with criteria after final decision is issued. *Berlin Associates*, #5W0584-9-EB (4/24/90). [EB #379]

* Where un-submitted information might make a difference in the denial or approval of a permit, it would contradict the purpose of Act 250 to issue a conditional permit which would retain jurisdiction over a phased project with conditions requiring certain information to be provided at a later date. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

* Neither the Board nor Commission is authorized to grant a permit on the "condition" that Act 250 criteria be satisfied at some unspecified future time. *Paul E. Blair Family*, #4C0388-EB (6/16/80). [EB #131]

249. Cases

* Temporary banners hung on a building are not "signs" within meaning of permit condition. *ANR v. Handy Family Ent.*, 163 Vt. 476, 483-84 (1995).

* Commission could have provided an adequate definition of "sign" by referring to statutory language or a specific dictionary to resolve questions of interpretation. *ANR v. Handy Family Ent.*, 163 Vt. 476, 484 (1995)

* Board imposes conditions requiring reduction in truck traffic from quarry in direct proportion to quarry's use of railroad to transport product. *Re: Twin State Sand & Gravel, Inc.*, #3W0711-5-EB, FCO (Altered) (4/29/05) [EB #852].

* Where jurisdiction applies because of high-elevation logging, conditions may be imposed on the land above 2,500 feet to address impacts on land below that elevation, but conditions may not be imposed on land below 2,500 feet simply because that land is used for the high-elevation development. *In re Green Crow Corp.*, 2007 VT 137 ¶ 18 (12/14/07).

* Permit conditions requiring permittees to obtain jurisdictional opinion on any change to the permitted project and notice to potentially affected persons deleted because not necessary to comply with Criteria 8(A), 9(A), 9(C), 9(H) and 10. *Re: Central Vermont Public Service Corp. and Verizon New England (Jamaica)*, #2W1146-EB, Findings of Fact, Conclusions of Law and Order (Altered) at 10 (12/19/2003). [EB#817]

* Permittees must submit a report to Commission within one year of date of occupancy of first condominium unit to analyze whether channelization measures remedy unsafe traffic conditions. *Old Mill Pond & Paul Belaski*, #2W0753-EB (4/24/89). [EB #401]

* Board has the authority to require reclamation of pre-existing gravel extraction area. *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]

* Because of the importance of the natural resources at stake in the area surrounding a landfill

operation, the Board will exercise special caution when establishing operational conditions. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]

* Board approves a stipulation amending permit condition for industrial park project that exempts the intra-park relocation of certain tenants. *Fly-In Corporation*, #5W0147-3-EB (2/27/85). [EB #247]

* A land use permit for the development of a communication system may, as a condition of the permit, require that any future applications for additional facilities on the summit include an intent to comply with a co-location plan as approved by Commission. *University of Vermont*, DR #116 (6/25/80).

* The Board may require a petitioner to amend a co-location plan which is a condition of applications for additional developments. *University of Vermont*, DR #116 (6/25/80).

D. Amendments

261. General

* Nothing in the statutes or in the Board's rules precludes permittee from submitting an amended application at any time. *LaFrance v. Environmental Board*, 167 Vt. 597, 598 (1998)(mem.).

* The primary question in amendment cases is not whether to give effect to the original permit conditions, but under what circumstances those permit conditions may be modified. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 293 (1998).

* The initial permitting process should not be merely a prologue to continued applications for permit amendments." *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998).

* It is for the Board, in the first instance, to decide what standards will guide its evaluation of permit amendment requests and what role the ten criteria of Act 250 shall have in such evaluations. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998).

* In a permit amendment case, there is no dispute that the applicant is bound by the provisions of the original permit. *In re Stowe Club Highlands*. 166 Vt. 33, 37 (1996).

* Central question in permit amendment inquiry is not whether to give effect to the original permit conditions, but under what circumstances those permit conditions may be modified. *In re Stowe Club Highlands*. 166 Vt. 33, 37 (1996).

* Under the permit amendment process set up by the Board, permits are not final and unalterable; a party subject to a permit may seek to amend the conditions. *In re Stowe Club Highlands*. 166 Vt. 33, 37 (1996).

* Deciding what standards should guide the Board in evaluating applications for permit amendments belongs, in the first instance, to the Board. *In re Stowe Club Highlands*. 166 Vt. 33, 37 (1996).

- * The standing of the adjoining landowners to enforce the existing permit is not relevant to whether the Board should grant the permit amendment. *In re Stowe Club Highlands*. 166 Vt. 33, 40 (1996).
- * Amendment process under EBR 34 should not be used to obtain after-the-fact permits and to avoid obtaining permits before construction commences. *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at 21 n. 5; (2/15/01) [EB# 744]; *Re: The Stratton Corporation*, #2W0519-9R3-EB, FCO at 14 (11/20/97); *Quechee Lakes Corporation*, #3W0364-1A-EB (2/3/87), *aff'd*, *In re Quechee Lakes Corp.*, 154 Vt. 543 (1990). [#253]
- * Where petitioner failed to participate in original permit proceedings (although aware of such proceedings), petitioner cannot later attack the permit through a minor amendment application. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]
- * Change made to a project during the pendency of an appeal does not mandate automatic remand to Commission for filing of a new permit amendment application. *Larry and Diane Brown*, #5W1175-EB and #5W1175-1-EB (9/15/94). [EB #591M2]
- * By seeking to change a condition of a permit, a permittee needs an amendment to the permit, even if the change itself does not involve construction. *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/18/91). [EB #471M3]
- * When impacts on Act 250 criteria are likely involved, Commission should provide an opportunity for a hearing on the potential impacts in an amendment procedure. *Town of Sunderland*, DR #200 (6/24/88).
- * Commission denied motion to amend permit and ordered applicant to remove sign, when applicant erected sign different than authorized by permit. Board denied motion for stay, refusing to reward intentional violation of permit by sanctioning noncompliance. *Paul L. Handy*, #1R0572-1 (1/12/87). [EB #331M]

261.1 Who may seek

- * If subsequent purchasers are bound by the conditions of permits that control their land, it follows that they must have standing to seek to amend such conditions. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 9 (10/3//03). [EB #824]

262. When amendment must be obtained

- * No permit amendment required for farming on preserved primary agricultural soils or farming that does not conflict with any permit condition. *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 12-13 (4/11/14)(citing 10 V.S.A. § 6081(s)(1)).
- * When a permittee intends to deviate materially from plans on which permit is based, it has an affirmative duty to highlight these deviations for the Commission and to file an amendment application. *Re: Hamm Mine*, No. 271-11-06 Vtec, Decision on Appellant's Motion for Summary

Judgment at 11 (9/27/07); see also: *In re: Hamm Mine Act 250 Jurisdiction*, Decision and Order, (5/15/08), *aff'd*, 2009 VT 88 (mem.).

* No permit amendment need be obtained for utility line where required by express terms of permit, or by Act 250 Rule 34(A), because Rule 70 governs. *Re: CVPS/Verizon*, 2009 VT 71, ¶ 28 (Vt. Sup. Ct.), *reversing Re: CVPS/Verizon*, Nos. 18-1-07, 19-1-07 Vtec, Decision and Order on Motion for Summary Judgment at 5-6 (8/13/07), Judgment Order (9/10/07).

* Once Act 250 jurisdiction has attached to a project, subsequent changes to a permit's terms and conditions, or material or substantial changes in a permitted project, require a permit amendment *In Re Dover Valley Trail*, No. 84-4-6 Vtec, Decision at 5 (1/16/07), even if the newly proposed activities would not themselves have triggered the permit requirement. *In re Eustance*, No. 13-1-06 Vtec, Decision at 12 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* An amendment is required for an alpaca farm in permitted subdivision where existing permit condition requires the landowner to obtain a permit amendment prior to construction. *In re Eustance*, No. 13-1-06 Vtec, Decision at 9 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* No permit amendment is required for a substantial or material change to a permitted project where that change is subject to Public Service Board review under Title 30 Section 248. *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 15 (8/3/06); *followed, Woodchip Power Plant*, No. 91-4-06, Decision and Order (1/30/07); *distinguished in, Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 - 4 (1/16/07) (bike paths constructed by state/town).

* A permit amendment is required for any material or substantial change to a permitted project. *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 (1/16/07), citing Act 250 Rule 34(A); *Re: Vermont Association of Snow Travelers (VAST)*, DR #430, FCO at 12 (3/11/05).

* A permit granted for development on a tract of land does not authorize subsequent subdivision of the property; the developer must secure an amendment to the original permit. *Stuart Richards*, DR #17 (7/22/73).

* Under Criterion 8, Board will review any construction that occurred outside the original permit regardless of whether construction would have been a "material change" requiring a permit amendment. *Quechee Lakes Corporation*, #3W0364-1A-EB (2/3/87), *aff'd, In re Quechee Lakes Corp.*, 154 Vt. 543 (1990). [#253]

262.1 Changes to a permitted project

*"A permittee who intends to materially change a permitted project must explain the changes to the District Commission and apply for a permit amendment." *In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion)*, No. 116-8-12 Vtec at 2 (EO on Cross Mot for Sum J) (11/28/12) (citing *In re Hamm Mine Reclamation*, No. 271-11-06 Vtec, slip op. at 9 (Vt. Env'tl. Ct. Sept. 27, 2007)(Durkin, J)).

* EBR 34 provides that "[a]n amendment shall be required for any material or substantial change in a permitted project." *In re Stowe Club Highlands*. 166 Vt. 33, 36 (1996).

* Once Act 250 jurisdiction has attached to a project, subsequent changes to a permit's terms and conditions, or material or substantial changes in a permitted project, require a permit amendment *In Re Dover Valley Trail*, No. 84-4-6 Vtec, Decision at 5 (1/16/07), even if the newly proposed activities would not themselves have triggered the permit requirement. *In re Eustance*, No. 13-1-06 Vtec, Decision at 12 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

*A permit amendment is required for farming that would otherwise be exempt, because the property is already subject to an Act 250 permit. *In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* When a party wishes to make any "material or substantial" change to the permitted project, a permit amendment is required. *In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09); *In re Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 5 (1/16/07) (citing former EBR 34(A)).

*"Not all changes are material, nor do all changes require a permit amendment. In order to determine if a change is material, we must consider the scope of the project as originally permitted by the District Commission." *In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion)*, No. 116-8-12 Vtec at 2 (EO on Cross Mot for Sum J) (11/28/12).

* Court cannot grant summary judgment where undisputed facts do not establish whether the project constitutes a substantial or material change, and where the commission has not yet ruled on the issue. *In re Eustance*, No. 13-1-06 Vtec, Decision at 14 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* Appellants must apply for Act 250 approval of the as-built and any further proposed development on their property, both because the expressed terms of the existing permit required it and because the property is already subject to Act 250 jurisdiction, so that the so-called farming exemption does not divest it of jurisdiction. *In re Eustance*, No. 13-1-06 Vtec, Decision at 15 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* An amendment is required for an alpaca farm in permitted subdivision where existing permit condition requires the landowner to obtain a permit amendment prior to construction. *In re Eustance*, No. 13-1-06 Vtec, Decision at 9 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* Substantial and material change that is an energy project subject to Public Service Board review under Title 30 Section 248 does not require a permit amendment. *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 15 (8/3/06); *followed*, *Woodchip Power Plant*, No. 91-4-06, Decision and Order (1/30/07); *distinguished in*, *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 - 4 (1/16/07) (bike paths constructed by state/town).

- * Amendment is required when there are material or substantial changes to the permitted project. *Stonybrook Condominium Owners Association*, DR #385, FCO at 9 - 18 (5/18/01).
- * A change in owner/operator may well result in a change in project operations, and if such change in use is substantial or material, a permit amendment will be required. *Estate of John A. Swinington*, #9A192-4-EB (CPR) (2/9/98), *aff'd In re Estate of John Swinington*, 169 Vt. 583 (1999). [#699M1]
- * Aspects of project that were different from representations made to Commission are material and substantial changes which require permit amendment. *Montpelier Broadcasting Inc.*, #5W0396-EB (2/17/94). [EB #571]
- * Amendment by formal application is required for changes which are material; an administrative amendment is not appropriate. *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (Appeal and Revocation) (12/14/93). [EB #562]
- * Because Commission granted a permit for the subdivision, any substantial changes in project design must be submitted to Commission for review as a permit amendment application. *Pinnacle Associates*, #5L1129-EB (8/5/92). [EB #542]
- * Where the Board is asked to determine whether jurisdiction exists over a project for which a permit has been issued, the analysis for determining whether a substantial change has occurred does not change. *Greg Gallagher*, #7R0607-EB and #7R0607-1-EB (11/16/89). [EB #402]
- * A land use permit "runs with the land," and subsequent transferees must apply for a project amendment if any material or substantial changes are proposed. *Warplanes, Inc.*, #9A0136-1-EB (5/1/89). [EB #368]; and see *In re Estate of Swinington*, 169 Vt. 583, 585 (1999).
- * In determining whether a permit amendment is required, the Board need only decide whether an activity will result in a substantial or material change to the project. *Town of Sunderland*, DR #200 (6/24/88).
- * Under Criterion 8, Board will review any construction that occurred outside the original permit regardless of whether construction would have been a "material change" requiring a permit amendment. *Quechee Lakes Corporation*, #3W0364-1A-EB (2/3/87), *aff'd, In re Quechee Lakes Corp.*, 154 Vt. 543 (1990). [#253]
- * An amendment to the permit is required if a proposed project is not separate and distinct from, but is rather a significant expansion of, a previously permitted project. *Ernest A. Pomerleau*, DR #137 (6/18/82).
- * "A permittee who intends to materially change a permitted project must explain the changes to the District Commission and apply for a permit amendment." *In re Big Rock Gravel (JO Appeal)*, No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 2 (11/28/12) (citing *In re Hamm Mine Reclamation*, No. 271-11-06 Vtec, slip op. at 9) (Vt. Env'tl. Ct. Sept. 27, 2007)(Durkin, J)).

* In order to determine if a change is material, the Court must consider the scope of the project as permitted by the District Commission. *In re Big Rock Gravel (JO Appeal)*, No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 2 (11/28/12).

262.2. Scope of a “permitted project”

* An Act 250 permit allows a property owner “to conduct the improvements specifically authorized by the permit, but no more than that.” (*In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07), Judgment Order (3/16/07)(citing *In Re: Mountainside Properties, Inc. Land Use Permit Amendment*, No. 117-6-05, at 4) (12/13/05); *In Re Stowe Club Highlands*, 166 Vt. 33, 37 (1996)), *aff’d*, 2007-156 (Vt. S. Ct. 3/13/09); *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19).

* Because occasional use of contiguous parcels causes virtually no environmental impact, the size of the permitted project is limited. *West River Acres, Inc., et al.* #2W1053-EB, FCO at 10 (7/16/04) [EB #832].

* The “permitted project” is the tract of land on which the permitted construction occurs, except in those instances in which the Permittee establishes that only a smaller portion of the tract has a nexus to, or is actually impacted or affected by, such construction. *Stonybrook Condominium Owners Association*, DR #385, FCO at 9 - 18 (5/18/01).

263. Authority to Issue (see also Jurisdiction at II.E.)

* Neither the statute or Board Rules allows Board to change any conditions of a permit other than in the context of an appeal of a permit issued by a Commission. *J. P. Carrara & Sons, Inc.*, #1R0589-EB (4/23/92). [EB #498M]; *Edwin & Avis Smith*, #6F0391-EB (1/16/91). [EB #398M]

* Changes of any condition of a permit cannot be implemented without the approval of Commission and an opportunity for all statutory parties and potentially affected persons to participate in the consideration of the changes. *J. P. Carrara & Sons, Inc.*, #1R0589-EB (4/23/92). [EB #498M]

* The Board can neither delete nor interpret a finding of fact in a permit, and where no appeal was taken from a finding at the time it was issued, a permittee is bound by it. *J. P. Carrara & Sons, Inc.*, #1R0589-EB (4/23/92). [EB #498M]

* In order to delete a finding from a decision, permittee must file an amendment application with Commission. *J. P. Carrara & Sons, Inc.*, #1R0589-EB (4/23/92). [EB #498M]

* Until a finding is deleted, permittee must stay within that limitation, and if that is not possible, then work must cease until the permit, which includes the findings, is amended so that compliance with it can be achieved. *J. P. Carrara & Sons, Inc.*, #1R0589-EB (4/23/92). [EB #498M]

264. Scope of Review of Amendment

- *The primary question in amendment cases is not whether to give effect to the original permit conditions, but under what circumstances those permit conditions may be modified. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 293 (1998).
- * It is for the Board, in the first instance, to decide what standards will guide its evaluation of permit amendment requests and what role the ten criteria of Act 250 shall have in such evaluations. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998).
- * Board acted properly in considering the impact of the unauthorized changes within the context of the entire project; Board's analysis under the statute was restricted to these changes, and the mitigating conditions imposed under the order address only the changes and not the project originally approved. *In re Quechee Lakes Corp.*, 154 Vt. 543, 557 (1990).
- * Review of an amendment application must be limited to issues raised by the application, and parties may not request review of prior determinations. *Re: Route 103 Quarry* (Carrara), No. 205-10-05 Vtec, Decision at 6 (11/26/06), *aff'd*, *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008).
- * Allegations of noncompliance are beyond the scope of review by the Court. *In re Big Spruce Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 10 (4/21/10).
- * Commission need not review *de novo* the entirety of a previously approved project under all Act 250 criteria when considering minor amendment application. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]
- * Only that portion of project which was substantial/material change to existing subdivisions required permit amendment. *David Enman (St. George Property)*, DR #326 (12/23/96); *Agency of Transportation (Belvidere)*, #5L0083-EB (6/12/81). [EB #141] [EB #150]
- * Only a requested amendment for proposed expansion of existing project may be reviewed in the appeal; the entire project may not be reviewed for conformance with town plan. *Walker Construction*, #5W0816-1-EB (1/14/87). [EB #313]
- * Where an application seeks to alter a project previously approved by Commission, Board review is limited to impacts from project changes under the Act 250 criteria. *Durward Starr & George Halikas*, #7R0594-1-EB (4/30/86). [EB #288]; *Stanmar, Inc.*, #5L0558-EB (12/21/79). [EB #124] (review of amendment to a permit is limited to effects of changes brought about by amendment, not to impacts of underlying project as authorized).
- * In a permit amendment proceeding, scrutiny is limited to the change in the project's impact under specific criteria; reevaluation under all 10 criteria is appropriate only if project changes are so substantial as to create a new project. *John A. Russell Corporation*, #1R0257-1-EB (11/30/83). [EB #212M]
- * An amendment to a permit must meet all 10 criteria before it can be granted. *Allenbrook Associates*, #4C0466-1-EB (4/19/82). [EB #175]

265. Administrative Amendment

*Administrative amendments under Rule 34(D) require an underlying Act 250 land use permit. *In re SP Land Co., LLC Act 250 Land Use Permit Amendment*, 2011 VT 104, ¶ 25.

* Fifteen-lot subdivision cannot be approved without demonstrating compliance with all Act 250 criteria, regardless of whether the master plan decision and the administrative amendment required further review under the remaining Act 250 criteria before any development could take place or that other Act 250 permits cover the applicant's land for other purposes. *In re SP Land Co., LLC, Act 250 Land Use Permit Amendment*, 2011 VT 104, ¶ 28.

* Whereas Rule 34 allows for administrative amendments when there is no likelihood of impacts under the criteria of 10 V.S.A. § 6086(a), Rule 51 allows for minor amendments when there is a demonstrable likelihood that the project will not present a significant adverse impact under those criteria. *Agri-Mark, Inc.*, No. 122-8-14 Vtec, Decision on Motion, at 7 (5/20/15).

* Court expresses concern with decision to consider project as an administrative amendment when proposed project "will result in physical changes beyond purely administrative revisions," but does not reach issue of whether administrative amendment process was appropriate because appeal was dismissed for lack of standing. *Agri-Mark, Inc.*, No. 122-8-14 Vtec, Decision on Motion, at 7 (5/20/15).

* An administrative amendment is not appropriate where the changes to the project are material; an amendment must be sought by formal application. *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (Appeal and Revocation) (12/14/93). [EB #562]

266. Material Change (Substantial change: see [130](#))

266.1 General

* Vermont Supreme Court adopts Board's 2-part material change test: (a) whether the proposed project will make a cognizable change (physical change or change in use); and (b) whether that change has a significant impact on any finding, conclusion, term or condition of the project's permit, or may have an adverse effects under one or more Act 250 criteria.. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 25 (3/6/15) (mem.), affirming *Re: Burlington Airport Act 250 JO*, No. 42-4-13 Vtec (5/13/14).

* Permittee who intends to materially change permitted project has an affirmative duty to highlight changes to Commission and apply for a permit amendment. *Re: Hamm Mine*, No. 271-11-06 Vtec, Decision on Appellant's Motion for Summary Judgment at 11-12 (9/27/07); see also: *In re: Hamm Mine Act 250 Jurisdiction*, Decision and Order (5/15/08), aff'd, 2009 VT 88 (mem.).

* When a party wishes to make any "material or substantial" change to the permitted project, a permit amendment is required. *In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07),

Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09); *In re Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 5 (1/16/07)(based on former version of Environmental Board Rule 34(A))..

* When a municipal, county or state project includes elements which cross lands which are subject to Act 250 permits issued to other persons, those other permits may need to be amended if such government project's use of such lands triggers review under EBR 2(G) and (P) as a material or substantial change. *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 4 (1/16/07), (bike paths), citing *Re: Town of Barre Millstone Hill West Bike Path*, DR #440, MOD at (1/3/05), citing *Re: Green Mountain Power Corporation and Town of Wilmington*, DR #405, FCO at 8 (9/19/02).

* Board was reluctant to place administrative burdens on towns to obtain Act 250 permit amendments when curb cuts associated with projects not subject to Act 250 jurisdiction are constructed on Act 250 permitted town roads. Board did not conduct material change analysis to determine whether two curb cuts to a public road constitute a material change. *Pizzagalli Properties and Town of Colchester*, DR #374 (5/20/99).

* No permit amendment or permit is required, as timber conveyance is not a substantial or material change to the previously issued permit. *Keith Van Buskirk*, DR #302 (8/15/95).

* When called upon to address whether a permit amendment to an existing Act 250 permit is necessary, the court is not required to again review all Act 250 criteria which may have been impacted by the original project. Rather, we are directed to determine whether the changes proposed to a project constitute a "material change" pursuant to Act 250 Rule 34(A). *Costco Act 250 Permit Amend JO 157-12-16 Vtec MSJ* at 7 (Dec. 8, 2017).

* The analysis for what constitutes a material change as proposed for an already permitted project requiring a permit amendment is similar to the analysis used for a substantial change—"there must be a cognizable change that will have a significant impact on a finding or condition or may result in significant adverse impact on any of the [applicable] Act 250 criteria." *Costco Act 250 Permit Amend JO 157-12-16 Vtec MSJ* at 7 (Dec. 8, 2017), citing *In re Request for Jurisdictional Op. re: Changes in Physical Structures & Use at Burlington Int'l Airport for F-35A*, 2015 VT 41, ¶ 25, 198 Vt. 510 (quoting what is now codified as Act 250 Rule 2(C)(6)).

* Court grants NRB's motion for summary judgement because Costco's planned revisions to its stormwater treatment plan do not evidence any material change or significant adverse impact upon a finding or condition contained in Costco's existing Act 250 Permit, nor any applicable Act 250 criteria. *Costco Act 250 Permit Amend JO 157-12-16 Vtec MSJ* at 11 (Dec. 8, 2017).

266.2 Elements of

* Elements of material change: (a) whether the proposed project will make a cognizable change (physical change or change in use); and (b) whether that change has a significant impact on any finding, conclusion, term or condition of the project's permit, or may have an adverse effects under one or more Act 250 criteria. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 25 (3/6/15) (mem.) (citing Act 250 Rule 2(C)(6)).

* Act 250 Rule 2(C)(6) defines “material change” as “any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the permit and which may result in an impact with respect to any of the criteria.” *In re Carson*, No. 13-1-08 Vtec, Decision at 6 (6/1/09) (superseded by amendment to allow for potential for significant impact under any Act 250 criterion).

266.2.1 Cognizable change

* A cognizable change can be a physical change or a change in use. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 25 (3/6/15) (mem.).

* In order to determine whether an alteration has taken place, it is necessary to determine the scope of the Project initially reviewed and approved by Commission. *Hiddenwood Subdivision*, DR #378, FCO at 10-11 (1/12/00); *Developer's Diversified Realty Corp.*, DRs #364, 371, and 375 (3/25/99); *Vermont Institute of Natural Science*, DR #352 (2/11/99).

* Aspects of project that were different from representations made to Commission constitute material and substantial changes for which permit amendment is required. *Montpelier Broadcasting Inc.*, #5W0396-EB (2/17/94). [EB #571].

* In determining whether there has been an alteration to a permitted project, the issue is not whether the land has been used for similar activities, but whether such activities were contemplated as part of the approved project. *Mount Mansfield Co., Inc. (Summer Concert Series)*, DR #269 (7/22/92).

266.2.1.1 Physical change

* No physical change has occurred where Act 250 impacts were reasonably foreseeable from application. *Re: Alpine Pipeline Company*, DR 415, FCO at 9-10 (3/31/03).

* “Gross leasable *space*” and “gross leasable *area*” are not necessarily the same measurement, and even if they were, the GLA of store has not expanded beyond footage specified in the permit, and no amendment is necessary. *Developer's Diversified Realty Corp.*, DRs #364, 371, and 375 (3/25/99).

* Exterior changes to department store are physical changes to the permitted project.. *Developer's Diversified Realty Corp.*, DRs #364, 371, and 375 (3/25/99).

* Replacement of fence along 25-foot right-of-way, cleaning and re-seeding grass drainage swale, placement of nine-by-twenty-five-foot gravel strip, and placement of mesh to stabilize embankment were cognizable physical changes, but were not material changes. *Clearwater Realty*, DR #318 (9/27/96).

266.2.1.2 Change in use

* A permit amendment is required for farming that would otherwise be exempt, because the property is already subject to an Act 250 permit. *In re Eustance*, No. 13-1-06 Vtec, Decision at 13 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* Appellants must apply for Act 250 approval of the as-built and any further proposed development on their property, both because the expressed terms of the existing permit required it and because the property is already subject to Act 250 jurisdiction, so that the so-called farming exemption does not divest it of jurisdiction. *In re Eustance*, No. 13-1-06 Vtec, Decision at 15 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* Increased vehicle use on easement, while not a physical change, constitutes a change in use. *Green Mtn. Power Corp. and Town of Wilmington*, DR #405, FCO at 7 (9/19/02).

* Where one retail tenant is replacing another retail tenant, a change in use has not occurred. *Developer's Diversified Realty Corp.*, DRs #364, 371, and 375 (3/25/99).

* Evolution from a bird hospital into a bird zoo is a change in use. *Vermont Institute of Natural Science*, DR #352 (2/11/99).

* Change in use resulted from increase in number of people attracted to site. *Mount Mansfield Co., Inc. (Summer Concert Series)*, DR #269 (7/22/92).

266.2.2 Significant impact on permit / Effects on Act 250 values

* Acquisition of easement by itself does not have a significant impact on any Criteria; however, use of easement could. *Green Mtn. Power Corp. and Town of Wilmington*, DR #405, FCO at 4 (9/19/02).

* Where permit was issued for a commercial shooting range, and trees provided a noise buffer, cutting such trees is a material change because of potential impacts on Criterion 8 (aesthetics - noise). *Bull's Eye Sporting Center (Altered) and David and Nancy Brooks, Wendell and Janice Brooks*, #5W0743-2-EB (Revocation), FCO at 12 (6/23/00). [EB #742]

* Because physical changes will not have significant impacts on finding, conclusion, term, or condition of the permit, the changes are not material. *Developer's Diversified Realty Corp.*, DRs #364,371, and 375 (3/25/99).

* Court granted motion to compel discovery of impacts of Resort's rental home program, as impacts may constitute a "material change" requiring an application for an amendment to an existing Act 250 permit. *Mountain Top Inn & Resort*, JO (#1-391), No. 23-3-17 Vtec, Entry Order on Motion to Compel at 4 (11/2/2017).

266.3 Cases

266.3.1

Residential Subd., Housing Projects, etc.

- * The expansion of a shared driveway over lands subject to an Act 250 permit, to access additional parcels lacking independent basis for Act 250 jurisdiction, constitutes a “material change” requiring an amendment to existing permits; the significant increase in maximum daily vehicle travel across such shared driveway likewise constitutes a “material change” requiring a permit amendment. *In re: Lefgren Act 250 Appeal (JO #3-109 & 3-110) (incomplete application determination)*, No. 28-2-07, 240-11-07 Vtec, Decision and Order at 6 (4/15/2008).
- * Installation of a shed in a permitted residential subdivision does not constitute a material change. *In re Carson*, No. 13-1-08 Vtec, Decision at 8 (6/1/09).
- * Installation of mobile homes, similar in size and type to homes already in the neighborhood, on four lots of a previously permitted subdivision is not a cognizable change. *Ronald L. Saldi, Sr.*, DR #365 (12/24/98).
- * Driveway 1000 feet in length was material change to two existing subdivision permits. *David Enman (St. George Property)*, DR #326 (12/23/96).
- * Construction of storage shed/garage is not a material change to permits authorizing 18-lot subdivision. *George Stump and Joelle King*, DR #309 (2/29/96).
- * Tree-cutting did not require a permit amendment as a material change to a previously permitted subdivision where there was no alteration to the permitted subdivision. *Robert Blair and CS Architecture*, DR #241 (4/29/92).
- * If subsequent to the issuance of a permit, a co-applicant elects to subdivide his or her lot or make additional improvements which constitute a material change, he or she must seek an amendment to the Act 250 permit prior to commencing construction or subdividing the land. *Town Highway #37*, DR #171 (7/12/85).
- *The Court concluded that (A) Comtuck’s proposed subdivision has changed in such a material and significant manner as to constitute a new and different subdivision proposal than was authorized by the 1970 Permit, thereby necessitating a new review under all applicable Act 250 criteria; and (B) any proposed residential development of the individual East Tract lots will require a full review under all applicable criteria, unencumbered by the restrictions reflected in the 1985 Permit. [The new proposal] seeks to significantly reconfigure and increase lot size, likely reconfigure on-site road systems, and place water supply and wastewater facilities on site. *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19).

266.3.2

Skiing and Other Recreational

* Use of a woods road, intended to serve solely as an evacuation route for stranded skiers, by construction equipment is a material change. *Sugarbush Resort Holdings, Inc.*, DR #328 (2/27/97).

* If the proceeding were not moot, a permit amendment would be required prior to the construction and land use associated with the summer concert series because that construction and land use constitute a material change to a previously issued land use permit. *Mount Mansfield Co., Inc. (Summer Concert Series)*, DR #269 (7/22/92).

266.3.3 Roads, Transportation and Signs

266.3.4 Waste Treatment, Pollution, Landfills, Solid Waste Transfer Stations, etc.

* Use of a permitted landfill in a manner not in conformance with a project's land use permit requires a permit amendment. *Town of Sunderland*, DR #200 (6/24/88).

* The construction and operation of a new unlined paper sludge disposal cell in close proximity to a closed cell was not a material change. *Putney Paper Company, Inc.*, DR #310 (9/25/96).

266.3.5 Commercial and Industrial

* New generator does not constitute material change where the Act 250 impacts of the generator were reasonably foreseeable from application plans which show a concrete pad for the generator. *Re: Alpine Pipeline Company*, DR 415, FCO at 9-10 (3/31/03).

* Repainting a building's exterior can be a material change. *McDonald's Corporation*, #1R0477-5-EB, MOD at 10 (5/3/00). [EB #747]

* Culvert extension was a material change because it was a cognizable change which would have a significant impact on prior permits' sole conditions, was not discussed in the findings of fact and conclusions of law which ordered the permits' issuance, and extension was intended to prevent exposure to contaminated water and soil. *Unifirst Corporation*, DR #348 (1/30/98).

266.3.6 Quarries, Gravel Pits, Asphalt Plants, etc.

* Addition of rock splitter to permitted quarry operation deemed a substantial and material change. *J.P. Carrara & Sons*, #1R0589-3-EB (2/2/94). [EB #554]

* Where an Act 250 permit limits rock crushing and hammering to "two weeks or 10 working days per year," an interpretation of the permit that allows for crushing and hammering to take place over any 80-90 hours per year is in direct conflict with the plain language of the permit and so would alter the permit. As this interpretation could have a significant impact on noise considerations protected by Criteria 1 and 8, the interpretation is a "material change" and requires a permit amendment to implement. *In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion)*, No. 116-8-12 Vtec at 3 (EO on Cross Mot for Sum J) (11/28/12).

* Where an Act 250 permit limits rock crushing and hammering to “two weeks or 10 working days per year,” an interpretation of the permit that allows for crushing and hammering to take place over any 80-90 hours per year is a material change because it is in direct conflict with the plain language of the permit and could have a significant impact on noise considerations protected by Criteria 1 and 8. *In re Big Rock Gravel (JO Appeal)*, No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 3 (11/28/12).

* Operation and expansion of the gravel pit constitutes a material change; therefore must cease operation and get an amendment. *NRB v. Donald Dorr, Dorr Oil Co. and MGC, Inc.*, 49-4-13 Vtec. at 11 (5/27/13).

266.3.7 Communication Towers and Lines

266.3.8 Noise

* Aircraft noise not contemplated as part of the permitted project does not constitute a cognizable change where regulation of that noise is preempted by federal law. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 27 (3/6/15) (mem.).

266.3.9 Miscellaneous

* No permit amendment required for substantial and material change that is an energy project subject to Public Service Board review under Section 248 of Title 30. *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 15 (8/3/06); *followed, Woodchip Power Plant*, No. 91-4-06, Decision and Order (1/30/07); *distinguished in, Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 - 4 (1/16/07) (bike paths constructed by state/town).

* A material change occurred where the permittee’s project evolved from a bird hospital into a bird zoo, and the substantial increase in numbers of visitors resulted in a significant impact on Commission’s findings of fact and permit conditions with respect to waste disposal, water supply and traffic. *Vermont Institute of Natural Science*, DR #352 (2/11/99).

267. When permittee is allowed to seek an amendment under Act 250 Rule 34(E)(see [485.1.5](#))

(Stowe Club Highlands test: *Re: Stowe Club Highlands*, #5L0822-12-EB, Findings of Fact, Conclusions of Law and Order (June 20, 1995), *aff'd, In re Stowe Club Highlands*, 166 Vt. 33 (1996); *see also*, Act 250 Rule 34(E).)

* After a permit is granted and circumstances change, existing permit conditions may no longer be a cost-effective or efficient method to minimize the development or subdivision's impact; the permitting process should therefore be flexible enough to address changes in circumstance. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998).

* Elements of collateral estoppel are not appropriate standards to evaluate an application for a permit amendment. *In re Nehemiah Associates, Inc.*, 166 Vt. 593, 594 (1996); *In re Stowe Club Highlands*, 166 Vt. 33, 36-37 (1996).

* Language which refers to "permittee" and not "grantor" is not covenant language. *In re Nehemiah Associates, Inc.*, 166 Vt. 593, 594 (1996).

* One goal of Act 250 Rule 34(E) "is to ensure that the grant of an Act 250 permit is not 'merely a prologue to continued applications for permit amendments.'" *Waterfront Park Act 250 Amendment*, No. 138-9-14 Vtec, Decision on Motions at 5 (5/8/15) (quoting *In re: Stowe Club Highlands*, 166 Vt. 33, 39 (1996)).

* The initial permitting process should not be "merely a prologue to continued applications for permit amendments." *In re Fontaine*, No. 12-1-10 Vtec, Decision at 13 (12/20/11); *In re Stowe Club Highlands*. 166 Vt. 33, 39 (1996); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 12 (10/3/03). [EB #824].

* "Flexibility and finality" balance originated in Act 250 proceedings in *In re Stowe Club Highlands*, 166 Vt. 33, 38 (1996) and later affirmed for municipal zoning proceedings in *In re Hilderbrand*, 2007 VT 5, ¶¶ 12-13, 181 Vt. 568. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 25 (1/20/10).

* *Re: Stowe Club Highlands*, #5L0822-12-EB, FCO (6/20/95), *aff'd In re Stowe Club Highlands*, 166 Vt. 33 (1996), stands for the proposition that, once a permit has been issued and used, amendments to that permit should not be granted as a matter of course, but rather only after the person who seeks the amendment can show that there are reasons why the *status quo* should be altered and the permit amended. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4//#5L0426-9-EB, FCO at 12 (10/3//03). [EB #824]

* *Stowe Club Highlands* provides some level of assurance to the neighbors to a project (who may have opposed the original permit or who may have relied upon the terms and conditions in the original permit) that a permittee will not be allowed to accept a permit, use it, and then seek to expand it beyond its original restrictions, merely because he wishes to do so. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 12 (10/3//03). [EB #824]

*The Stowe Club Highlands test is not applicable when the proposed amendment did not require a change in a permit condition. *In re Stowe Highlands Merger/Subdivision Application*, 2013 VT 4 at ¶13 (1/11/13).

Note 2003 amendment to Stowe Club Highlands test through the adoption of EBR 34(E) and currently Act 250 Rule 34(E).

* Responding to concerns that the factors identified in *Stowe Club Highlands* might be too rigidly construed, and could be applied in a manner that inappropriately prevents amendments, the Board clarified and supplemented its *Stowe Club Highlands* case law through the adoption of EBR 34(E) on

January 15, 2003. Re: *Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4//#5L0426-9-EB, FCO at 14-15 (10/3/03). [EB #824]

267.1 When *Stowe Club Highlands* test is applicable

- * The initial permitting process should not be “merely a prologue to continued applications for permit amendments.” *In re Fontaine*, No. 12-1-10 Vtec, decision at 13 (12/20/11); *In re Stowe Club Highlands*. 166 Vt. 33, 39 (1996); Re: *Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 12 (10/3/03). [EB #824].
- * Under new EBR 34(E), *Stowe Club Highlands* test does not apply where challenged condition was not included to resolve an issue critical to the issuance of the permit. *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 7 (1/16/07); Re: *Central Vermont Public Service Corp. and Verizon New England*, #2W1146-EB and #2S0301-1-EB, MOD at 3 (2/28/03), *remanded*, MOD (4/17/03). [EB #817 and #818]
- * *Stowe Club Highlands* test applied where permittee seeks partial findings for a proposed residential development on a sand extraction area with an unexpired permit. *In re Fontaine*, No. 12-1-10 Vtec, decision at 14 (12/20/11).
- * Permit amendment required for bike path constructed by state across previously permitted lands; such project is not exempted by Rule 34(E). *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 7 (1/16/07)
- * Permit amendment required for utility line extension where permit condition states that plans for future line extensions must be filed with and approved by the district commission. Re: *Central Vermont Public Service Corp.*, DR 420, FCO at 2-3 (4/25/03).
- * *Stowe Club Highlands* test does not apply where permittee did not construct or in any way use permit and now seeks a permit for an entirely new project. *Haystack Highlands, LLC*, #700002-10D-EB, MOD at 3 (12/20/02). [EB #812].
- * Board can decide applicability of *Stowe Club Highlands* even if not considered by Commission and issue was not raised on appeal. *Ray G. & Lynda J. Colton*, #3W0405-5(Revised)-EB, MOD at 3 (7/17/02). [EB #804].
- * *Stowe Club Highlands* test applies when permittee requests modification of a permit condition which limits hours of operation. *Ray G. & Lynda J. Colton*, #3W0405-5(Revised)-EB, MOD at 5 (7/17/02). [EB #804].
- * Board will reach merits of amendment application only after applying *Stowe Club Highlands* balancing test. *In re Fontaine*, No. 12-1-10 Vtec, decision at 6-7(12/20/11); *In re McDonald’s Corp. and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 10 - 11 (3/22/01) [EB #760]; *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at 11 (2/15/01) [EB #744]; *McDonald’s Corporation*, #1R0477-5-EB, FCO at 12 (12/7/00)[EB #747]; Re: *Donald and Diane Weston*, #4C0635-4-EB, FCO at 19 (3/2/00), see also, Re: *Nehemiah Associates, Inc.*, #1R0672-1-EB (Remand),

FCO at 4 (4/11/97), *aff'd, In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998).

* The *Stowe Club Highlands* analysis does not apply when a permittee is not seeking an amendment which releases it of a permit condition in order to realize a gain. *Home Depot USA, Inc., Ann Juster, and Homer and Ruth Sweet*, #1R0048-12-EB, MOD at 12 (11/30/00). [EB # 766]

* *Stowe Club Highlands* test does not apply to amendments that a permittee may seek in order to cure an order of revocation, when cure will decrease what was previously permitted. *Bull's Eye Sporting Center (Altered) and David and Nancy Brooks, Wendell and Janice Brooks*, #5W0743-2-EB (Revocation), FCO at 19 - 22 (6/23/00). [EB #742]

* Board may apply *Stowe Club Highlands* test, even if Commission did not. *McDonald's Corporation*, #1R0477-5-EB, MOD at 12 (5/3/00). [EB #747]

* Proposed project was not consistent with land use restrictions imposed by a prior permit condition and therefore *Stowe Club Highlands* test was applied to determine whether flexibility warranted amendment of that prior permit condition. *Donald and Diane Weston*, #4C0635-4-EB, (3/2/00). [EB # 735]

* Unappealed permit condition requiring the "perpetual affordability" of multi-family units part of a planned residential development is a final condition that can be altered, if at all, solely by review under the flexibility versus finality test outlined by the Supreme Court in *Stowe Club Highlands*. It would be inappropriate to apply the doctrine of collateral estoppel in this case and, even if it were applied, this matter cannot withstand analysis under the doctrine. *MBL Associates*, #4C0948-3-EB, (10/20/99). [EB # 731]

* Board rejects applicant's argument that requested amendment does not attempt to amend any condition imposed by the permit. *Bernard Carrier*, #7R0639-1-EB (8/19/99). [EB #728].

* Board rejects applicant's argument that, because subdivision of the "remainder" parcel ("phase II") was openly contemplated at the time he applied for the original permit, the *Stowe Club Highlands* analysis was inapposite. The Board concludes that the fact that phase II was mentioned during the phase I process is significant only in determining the foreseeability of change under the three *Stowe Club Highlands* factors. *Bernard Carrier*, #7R0639-1-EB (8/19/99). [EB #728].

* Board advised the permittees that subsequent applications for permit amendments would be considered consistent with the balancing test set forth in *In re Stowe Club Highlands*. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]

* In order to address criteria challenged on which affirmative findings have previously been issued, a party has to overcome the presumption of validity by showing that reopening these criteria is justified by changed circumstances or presentation of evidence not previously presented, and if the presumption is overcome, the Board reviews the project's compliance with the criteria. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd, In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

* The *res judicata* policy of finality in proceedings is outweighed by a policy of allowing persons to be heard concerning permit amendment requests, but the Board will not look favorably at permittees who do not build in compliance with permits and then seek to amend their permits to conform with what they have actually built. *Rome Family Corporation*, #1R0410-3-EB (5/2/89). [EB #416M1]

267.2 Elements of *Stowe Club Highlands* test (Act 250 Rule 34 (E))

* Elements of *Stowe Club Highlands* test (prior to new EBR 34(E)). *In re Stowe Club Highlands*, 166 Vt. 33 (1996), affirming *Stowe Club Highlands*, #5L0822-12-EB, FCO (6/20/95); *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at 12-13 (2/15/01) [EB #744]; *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 10 - 16 (3/22/01) [EB #760]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 12-13 (12/7/00). [EB #747]; *Stratton Corporation*, #2W0519-9R3-EB (1/15/98). [EB # 688]; *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97), *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998). [EB #592]

EBR 34(E) and Act 250 Rule 34(E)

* The first step in determining whether an applicant is entitled to seek an amendment under Rule 34(E) focuses on whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit. This determination is made on a case-by-case basis. If the condition was not included to resolve a critical issue, the applicant is entitled to seek an amendment. If it was, then the factors in Rule 34(E) must be weighed. *Waterfront Park Act 250 Amendment*, No. 138-9-14 Vtec, Decision on Motions, at 6 (5/8/15).

* EBR 34(E) codified standards to evaluate applications to amend conditions of previously-approved Act 250 permits in light of decisions in *In re Stowe Club Highlands*, 166 Vt. 33 (1996), *In re Nehemiah Associates, Inc.*, 166 Vt. 593 (1996), and *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998); *In re: Mountainside Properties, Inc.*, No. 117-6-05 Vtec, Decision at 6 (12/13/2005).

* EBR 34(E) is a "substantive standard" that the Environmental Court is charged with applying in the Act 250 context. *In re: Mountainside Properties, Inc.*, No. 117-6-05 Vtec, Decision at 7 (12/13/2005), citing 10 V.S.A. § 8504(h), (m).

* EBR 34(E) applies only to critical permit terms. *In re: Mountainside Properties, Inc.*, No. 117-6-05 Vtec, Decision at 8 (12/13/2005); **Note:** superseded in part by 2007 amendments to Act 250 Rule 34(E).

* Boilerplate of standard Condition incorporating application and requiring Commission review prior to further construction is not a critical permit term. *In re: Mountainside Properties, Inc.*, No. 117-6-05 Vtec, Decision at 8 (12/13/2005); **Note:** superseded by 2007 amendments to Act 250 Rule 34(E).

* Since term which applicant seeks to amend is not a "critical" permit term, EC applies some, but not all, of the *Stowe Club Highlands* case law to the application. *In re: Mountainside Properties, Inc.*, No. 117-6-05 Vtec, Decision at 8 (12/13/2005); **Note:** superseded in part by 2007 amendments to

Act 250 Rule 34(E).

* While not altering the fundamental principles behind the *Stowe Club Highlands* decision, Rule 34(E) modifies the *Stowe Club Highlands* process, by establishing three sequential stages of analysis, which ask:

1. Was the permit condition, which is the subject of the amendment request, included to resolve issues critical to the Commission's or the Board's issuance of the prior permit pursuant to the criteria of 10 V.S.A. § 6086(a)? *Re: Central Vermont Public Service Corp. and Verizon New England, #2W1146-EB and #2S0301-1-EB, MOD at 3 (2/28/03) (under Act 250 Rule 34(E), Stowe Club Highlands test does not apply where challenged condition was not included to resolve an issue critical to the issuance of the permit).*
2. Is the permittee merely seeking to relitigate the permit condition or to undermine its purpose and intent?
3. Does the need for flexibility arising from changes or policy considerations outweigh the need for finality in the permitting process? Under this third stage, the five flexibility factors set out in Act 250 Rule 34(E)(3)(a) - (e) and the one finality factor (which appears in Act 250 Rule 34(E)(3)(f)) are considered at the same time. It is no longer necessary for an applicant for the amendment to prove that one of the flexibility factors exists before the Board will consider finality element of reliance. *Compare, Re Richard Bouffard, #4C0647-6-EB, FCO at15 (10/23/00). [EB #755]*

In re Fontaine, No. 12-1-10 Vtec, decision at 7-9 (12/20/11); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith, #5L1018-4//#5L0426-9-EB, FCO at 14-15 (10/3//03). [EB #824].*

267.2.1

Preliminary inquiries

267.2.1.1

Challenged condition was included to resolve issue critical to the issuance of the prior permit

* Where the condition invoked requires construction in accordance with the decision, plans and exhibits, it is a factual question whether an element of those plans was critical to the issuance of the permit. *In re St. Johnsbury Academy Act 250 Permit Amendment Application Appeal*, No. 13-1-14 Vtec, Decision on Motion for Summary Judgment at 6 – 7 (2/6/15).

* Under former EBR 34(E) and current Act 250 Rule 34(E), *Stowe Club Highlands* test applies only where challenged condition was included to resolve an issue critical to the issuance of the prior permit. *In re Fontaine*, No. 12-1-10 Vtec, decision at 7 (12/20/11); *In re: Judge Development Corp.*, No. 189-9-05 Vtec, Decision at 7 (Aug. 7, 2006); *Re: Central Vermont Public Service Corp. and Verizon New England, #2W1146-EB and #2S0301-1-EB, MOD at 3 (2/28/03), remanded, MOD (4/17/03). [EB #817 and #818].*

* Permit amendment required for utility line extension where permit condition states that plans for future line extensions must be filed with and approved by the district commission. *Re: Central Vermont Public Service Corp.*, DR 420, FCO at 2-3 (4/25/03).

267.2.1.2 Challenged condition does not resolve issue critical to the prior permit

* “[A] condition is not a critical condition solely by virtue of being imposed by the District Commission.” *The Scott Farm Act 250*, No. 148-11-17 Vtec., Decision on Motion at 6 (8/6/2018).

* Holding that a party’s interpretation of Act 250 Rule 34(E) “would lead to the absurd result that any condition imposed by a District Commission would be critical, despite Rule 34(E) making a clear delineation between critical and non-critical conditions. Further, it would run contrary to the clear intent to provide applicants with the opportunity to amend non-critical permit conditions without an analysis of the Rule 34(E)(3) factors.” *The Scott Farm Act 250*, No. 148-11-17 Vtec., Decision on Motion at 6 (8/6/2018).

267.2.1.3 Relitigation

* Rule 34(E)(2) asks “whether the permittee is merely seeking to relitigate the permit condition or to undermine its purpose and intent,” through an amendment application. *In re Fontaine*, No. 12-1-10 Vtec, decision at 8 (12/20/11); *In re: Judge Development Corp.*, No. 189-9-05 Vtec, Decision at 8 (Aug. 7, 2006).

* Act 250 permits are written on paper, not carved in stone, and the relitigation concepts embodied in EBR 34(E)(2) cannot be considered to be unconditionally ironclad, as, in some sense, every permit amendment application is a relitigation of an initial permit condition. And, if this provision of Rule 34(E) is read to foreclose all permit amendment applications as a matter of course, then the remainder of the Rule is rendered meaningless; a consideration of the elements listed in subsection 3 would never occur. The Board must examine each amendment application within the context of its particular facts and ask whether a desire merely to relitigate lies at the base of the application, (or the permittee is merely seeking to "undermine [the permit's] purpose and intent), or whether there are "circumstances [under which] -- permit conditions may be modified," *In re Stowe Club Highlands.*, and whether some "circumstances or some intervening factor justify an amendment." *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 18 (10/3/03) [EB #824]; quoting *Re: Department of Forests and Parks Knight Point State Park*, DR #77 at 3 (9/6/76).

* “If the applicant is only seeking to relitigate or undermine the condition, the analysis ends, and the applicant is not entitled to seek an amendment.” *The Scott Farm Act 250*, No. 148-11-17 Vtec., Decision on Motion at 4 (8/6/2018).

267.2.2 Change

* To assist in assessing the competing policies of flexibility and finality in the permitting process, the Board has identified three kinds of changes that would justify an amendment to a permit condition: (a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998).

* A change in fact or law may not always justify an amendment, especially “where the change was reasonably foreseeable at the time of the permit application,” but the primary concern under Rule 34(E) is “whether allowing the permit amendment is appropriate under the circumstances.” *Waterfront Park Act 250 Amendment*, No. 138-9-14 Vtec, Decision on Motions, at 10 (5/8/15) (quoting *In re Nehemiah Assocs., Inc.*, 168 Vt. 288, 294 (1998) and *Stowe Club Highlands*, 166 Vt. 33, 40 (1996)).

* Changes in facts, operations or technology must be the driving force behind the amendments which permittee seeks, not the other way around; amendment application must be a direct outgrowth of the above-referenced changes. *In re Fontaine*, No. 12-1-10 Vtec, decision at 9 (12/20/11); *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at 16-17 (2/15/01). [EB #744].

* In requesting amendment of a condition, permittees identified no changes in factual or regulatory circumstances beyond their control that would weigh in favor of flexibility under *Stowe Club Highlands. Donald and Diane Weston*, #4C0635-4-EB, (3/2/00). [EB # 735]

267.2.2.1 Of factual circumstances beyond applicant’s control

* Regulatory and factual changes in circumstances beyond the control of permittee weigh in favor of granting the permit amendment. *In re Nehemiah Associates, Inc.*, 166 Vt. 593, 594 (1996).

* Change in facts must be one that is relevant and controlling; not just any change should weigh in favor of flexibility; rather, it must be a change that makes a difference. *In re Fontaine*, No. 12-1-10 Vtec, decision at 9 (12/20/11); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 19 (10/3/03). [EB #824].

* Changes of ANR Deer Wintering Area maps are not factual changes beyond the permittees’ control under Act 250 Rule 34(E)(4)(a). *In re Fontaine*, No. 12-1-10 Vtec, decision at 12 (12/20/11).

* Alleged decline in the market for commercial properties and inability to sell permitted commercial lots did not address either *Stowe Club Highlands* changes in factual circumstances beyond the control of the Applicants or reasonably foreseeable changes in the "operation" of the Project. *Ronald and Marylou Saldi*, #5R0891-16-EB (1/13/00). [EB # 737]

* In considering changes in factual or regulatory circumstances beyond the control of the permittee, it is hardly unusual that land not owned by the permittee will be developed in a manner which is beyond the permittee's control. *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97), *aff’d*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998). [EB #592]

267.2.2.2 Unforeseen changes in construction or operation

* Even where the Board finds such a change, there are certain situations where an amendment may not be justified, for instance where the change was reasonably foreseeable at the time of permit application. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998), affirming *Nehemiah Associates*,

Inc., #1R0672-1-EB (on Remand) (4/11/97) (in considering changes not reasonably foreseeable at the time the permit was issued, the Board considered fact that permittee had submitted as evidence in that proceeding a plan, one page of which showed a change in the design of the project) [EB #592]; but see *In re Stowe Club Highlands*. 166 Vt. 33, 39 (1996). ("Otherwise, the initial permitting process would be merely a prologue to continued applications for permit amendments.")

* The foreseeability of the changes to a project is relevant to the evaluation of the application for a permit amendment. *In re Stowe Club Highlands*. 166 Vt. 33, 39 (1996).

* Board is justified in finding that certain changes to project were foreseeable. *In re Stowe Club Highlands*. 166 Vt. 33, 39 (1996).

* Changes in construction or operation were not reasonably foreseeable at the time prior permit was issued because effectiveness of mitigation measures and amount of noise shooting range would generate was unknown. *James L. McGovern, III*, #700002-17A-EB, MOD at 4 (12/6/02). [EB #813]

* Purely cosmetic changes (e.g. exterior colors) may qualify as unforeseen changes in construction or operation. *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at 14-16 (2/15/01) [EB #744]; *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 13 (3/22/01) [EB #760]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 14-15 (12/7/00). [EB #747]

* Forseeability element of "change in construction or operation" factor may depend on the time that has passed since the original permit was issued. *McDonald's Corp.*, #1R0477-5-EB, FCO at 15 (12/7/00). [EB#747]

* Alleged decline in the market for commercial properties and inability to sell permitted commercial lots did not address either *Stowe Club Highlands* changes in factual circumstances beyond the control of the Applicants or reasonably foreseeable changes in the "operation" of the Project. *Ronald and Marylou Saldi*, #5R0891-16-EB, (1/13/00). [EB # 737]

* Permittee demonstrated that the problems supplying water to the residents of the permitted subdivision were not reasonably foreseeable at the time the permit was issued. *Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB (9/23/98). [EB #704]

* In considering changes in the construction or operation of a permittee's subdivision not reasonably foreseeable at the time the permit was issued, additional subdivision of lots was reasonably foreseeable. *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97), *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998). [EB #592].

267.2.2.3 Changes in regulations

* Changes in the municipal regulations applicable to the potential for housing development on the property are not a regulatory change beyond the permittees' control with regard to the sand extraction permit conditions under Act 250 Rule 34(E)(4)(a). *In re Fontaine*, No. 12-1-10 Vtec, decision at 12 (12/20/11).

* The change in decisional law resulting from the Huntley decision- where Act 250 jurisdiction is understood to cease once the extraction area is closed and properly reclaimed- supports the need for flexibility under Act 250 Rule 34(E)(4)(a). *In re Fontaine*, No. 12-1-10 Vtec, decision at 12 (12/20/11).

* Regulatory and factual changes in circumstances beyond the control of permittee weigh in favor of granting the permit amendment. *In re Nehemiah Associates, Inc.*, 166 Vt. 593, 594 (1996); on remand *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97) (permittee failed to demonstrate that there were changes in regulatory circumstances beyond its control) [EB #592], *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998).

* Permittee demonstrated there were two changes in regulatory circumstances beyond its control: the availability of the off-site primary agricultural soils mitigation program and the necessity of municipal water system improvements for the permitted subdivision. *Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB (9/23/98). [EB #704]

267.2.2.4 Changes in technology

* Because the GIS mapping technology is not the “driving force” behind the proposed amendment, the improved GIS mapping technology is not a technological change requiring an amendment to the existing permit under Act 250 Rule 34(E)(4)(b). *In re Fontaine*, No. 12-1-10 Vtec, decision at 12 (12/20/11).

* It is not enough that there be a change in technology; rather, such change must create the need for the amendment, it cannot merely be a byproduct of it. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 22 (10/3//03) [EB #824]; *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at-17 (2/15/01). [EB #744]. (that technology has changed to provide more energy efficient lighting systems may indeed be a change, but illuminating a non-illuminated sign and moving and increasing the height and size of a sign are not a “direct outgrowth” of the fact that technology has given us a better light bulb).

* Permittee failed to demonstrate that there were changes in technology justifying an alteration in the project as previously approved. *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97), *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998). [EB #592].

* In considering changes in technology in permit amendment application proceeding, no changes were identified that would have been relevant to an aesthetic mitigation condition. *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97), *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998). [EB #592]

267.2.3

Flexibility v. finality

* The determination of whether an applicant may seek to amend a critical permit condition involves weighing competing goals of finality and flexibility based on the factors enumerated in Rule 34(E). Whether flexibility in the permitting process is warranted or whether finality is needed is determined on a case by case basis. *Waterfront Park Act 250 Amendment*, No. 138-9-14 Vtec, Decision on Motions, at 7 (5/8/15).

* “The determination of whether or not finality outweighs flexibility is also undertaken on a case-by-case basis and dependent on the specific facts of a given case.” *In re St. Johnsbury Academy Act 250 Permit Amendment Application Appeal*, No. 13-1-14 Vtec, Decision on Motion for Summary Judgment (2/6/15)(citing *In re Ashford Lane HOA Act 250 Application*, No. 69-5-13 Vtec, slip op. at 6 (12/6/13)).

* Court must consider the factors listed in Act 250 Rule 34(E)(4)(a)-(e) when analyzing the need for flexibility with regard to a permit condition. *In re Fontaine*, No. 12-1-10 Vtec, decision at 9 (12/20/11).

* “Balancing of finality and flexibility operates differently in the context of permits with an indefinite duration than it does with respect to permits that will actually expire so that Act 250 jurisdiction will cease after reclamation has occurred.” *In re Fontaine*, No. 12-1-10 Vtec, decision at 10 (12/20/11).

* Because Act 250 jurisdiction over the project will cease after the permit expires and once reclamation is completed, the Court concludes that flexibility outweighs finality and allows Appellants to submit their application for partial consideration of their future residential project under Act 250 Rule 21. *In re Fontaine*, No. 12-1-10 Vtec, decision at 14 (12/20/11).

* “Flexibility and finality” balance originated in Act 250 proceedings in *In re Stowe Club Highlands*, 166 Vt. 33, 38 (1996) and later affirmed for municipal zoning proceedings in *In re Hilderbrand*, 2007 VT 5, ¶¶ 12-13, 181 Vt. 568. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 25 (1/20/10).

* In performing balancing task, EBR 34(E)(3) suggests that the Court should consider, among other factors, whether there have been changes in facts, law or regulations beyond the permittee’s control; whether there have been changes in technology, construction, or operations which drive the need for the amended permit condition; whether other factors including innovative or alternative design provide a more efficient or effective means to mitigate the impact addressed by the original permit condition; whether other important policy considerations are met, including the proposed amendment’s furtherance of the goals and objectives of the duly adopted municipal plan; whether there was “manifest error” on the part of the district commission or the board in the issuance of the original permit condition; and the degree to which the issuing authority or other parties have relied on the original permit condition or on material representations of the applicant made in the prior permit proceedings. *In re: Judge Development Corp.*, No. 189-9-05 Vtec, Decision at 8 (Aug. 7, 2006).

* Board has appropriately established a balancing test of flexibility and finality in the permitting process. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998), affirming *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97) (after weighing policies of finality and flexibility,

Commission's reasonable reliance on finding of fact incorporated by permit condition required denial of project application, where permittee benefitted from the reliance, Commission would not have issued original permit but for permit condition, and stipulated facts and argument did not demonstrate that any factors in favor of flexibility were present). [EB #592]

* The initial permitting process should not be "merely a prologue to continued applications for permit amendments." *In re Fontaine*, No. 12-1-10 Vtec, decision at 13 (12/20/11); *In re Stowe Club Highlands*. 166 Vt. 33, 39 (1996); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4//#5L0426-9-EB, FCO at 12 (10/3/03). [EB #824].

* Board can protect reliance factor by conditioning subsequent permit. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 24 (10/3/03). [EB #824]

*After balancing the competing policies of finality and flexibility, the Board concluded that the circumstances justified amendment of a permit condition because flexibility was needed to address the change in circumstances, including the necessity of municipal water system improvements. *Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB (9/23/98). [EB #704].

*The Environmental Division determines on a case-by-case basis "whether flexibility in the permitting process is warranted or whether finality is needed." *The Scott Farm Act 250*, No. 148-11-17 Vtec., Decision on Motion at 5 (8/6/2018).

267.2.3.1 Flexibility

* A foreseeable change in circumstances may be sufficient to justify consideration of whether permit condition is the most efficient and cost-effective way to minimize the project's adverse impacts. Flexibility outweighs finality and amendment application may be considered on its merits. *Waterfront Park Act 250 Amendment*, No. 138-9-14 Vtec, Decision on Motions, at 10 (5/8/15).

* Amending sand pit permit to residential development would not generally weigh in favor of flexibility because the proposed amendment is not an alternative design aimed to more efficiently or effectively mitigate the impact. However, where permit conditions protecting deer wintering area are set to expire, conditions attached to proposed permit amendment which continue protection would shift factor (c) in favor of flexibility. *In re Fontaine*, No. 12-1-10 Vtec, decision at 11 (12/20/11) (citing Act 250 Rule 34(E)(4)(c)).

* After the expiration of the existing permit, policy considerations regarding housing and affordable housing in the municipal plan may come into play together with the state and local policies regarding wildlife habitat ultimately weighing in favor of flexibility. *In re Fontaine*, No. 12-1-10 Vtec, decision at 11-12 (12/20/11).

* Flexibility outweighs finality when applicant seeks to reuse portions of a site that were to be reclaimed under the original permit where proposed reuse will minimize the impact of the proposed project. *In re O'Neil Sand and Gravel*, No. 48-2-07, Decision and Order on Cross-Motions for Summary Judgment at 16-17 (9/11/09), see also; Decision on Motion to Reconsider or to Alter (2/23/10).

* Regulatory and factual changes in circumstances beyond the control of permittee weigh in favor of granting the permit amendment. *In re Nehemiah Associates, Inc.*, 166 Vt. 593, 594 (1996); on remand *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97) (permittee failed to demonstrate that there were changes in regulatory circumstances beyond its control). [EB #592], *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998).

* Flexibility outweighs finality when “the relative location of the roadway to the building has changed in the time since the issuance of the previous permit and was beyond the Appellant-Applicants’ control.” *In re Judge Development Corp. and SW Corner, LLC*, No. 189-9-05 Vtec, Decision at 3 (5/23/07).

* Free access between commonly-owned, adjoining lots is an important public policy consideration. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4//#5L0426-9-EB, FCO at 23 (10/3/03) [EB #824]; EBR 34(E)(3)(d).

* Aesthetic decline or degradation of surrounding area is not a change in fact sufficient to support a flexibility claim. *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at 14 (2/15/01) [EB #744]; *McDonald’s Corporation*, #1R0477-5-EB, FCO at 15 (12/7/00)[EB #747]; *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97), *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998). [EB #592]

* Applicant’s failure to provide any evidence in favor of flexibility equates to a failure to meet its burden of proof. *Re: Richard Bouffard*, #4C0647-6-EB, FCO at 13 – 15 (10/23/00).

* Holding that flexibility “outweighed finality” when applicant submitted an amendment application that “clearly further[ed] the explicit goals” of the county which were “not enacted at the time the Original Permit was issued.” *The Scott Farm Act 250*, No. 148-11-17 Vtec., Decision on Motion at 9 (8/6/2018).

267.2.3.2 Finality and reliance

* In determining the interest of finality the court considers, among other things, “the degree of reliance on prior permit conditions or material representations of the applicant in prior proceeding(s) by the district commission, the environmental board, the environmental court, parties, or any other person who has a particularized interest protected by [Act 250] that may be affected by the proposed amendment.” *In re Fontaine*, No. 12-1-10 Vtec, decision at 17 (12/20/11) (citing Act 250 Rule 34(E)(4)(f)).

* Even if some of the factors support flexibility, if those factors reflect a change that was “reasonably foreseeable at the time of the permit application,” or if parties or other interested persons “reasonably rel[ied] on the permit conditions in making decisions,” consideration of an application to amend the permit may not be justified. *In re Fontaine*, No. 12-1-10 Vtec, decision at 17 (12/20/11) (citing *Nehemiah II*, 168 Vt at 294).

* The permitting process requires some finality because, both at the time the permit issues and

subsequently, the parties and other interested persons reasonably rely on the permit conditions in making decisions. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998); on remand *Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97) (Commission reasonably relied on finding of fact based on material representation of applicant where that finding was necessary to reaching an affirmative finding on several Act 250 criteria and that finding was incorporated into the permit as a condition) [EB #592], *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998).

* District commissions may reasonably expect to rely on permit conditions as a factor in evaluating further development in the area of the permitted project. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 294 (1998).

* Board may consider the need for finality in the permitting process. *In re Stowe Club Highlands*. 166 Vt. 33, 39 (1996.)

* The initial permitting process should not be "merely a prologue to continued applications for permit amendments." *In re Fontaine*, No. 12-1-10 Vtec, decision at 13 (12/20/11); *In re Stowe Club Highlands*. 166 Vt. 33, 39 (1996); *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 12 (10/3/03). [EB #824].

* Board may rely on applicant's representations in permit application. *In re Stowe Club Highlands*. 166 Vt. 33, 40 (1996).

* Reasonable reliance of Commission and other parties on applicant's representations and permit conditions weighs strongly against granting the permit amendment. *In re Stowe Club Highlands*. 166 Vt. 33, 40 (1996).

* Parties (and their successors) to a permit may reasonably rely upon the terms of the permit governing future activity on the property. *In re: Maggio*, No. 166-7-06 Vtec, Decision at 8 (4/20/07).

* Act 250's notice and permitting process contemplate that parties will be able to rely on a permit's terms and conditions. *In re: Maggio*, No. 166-7-06 Vtec, Decision at 8 – 9 (4/20/07).

* It is reasonable for neighboring landowners to rely upon the terms and conditions of a permit, or at least to rely on their right to be heard on an application to amend the permit. *In re Eustance*, No. 13-1-06 Vtec, Decision at 12 (2/16/07), Judgment Order (3/16/07), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09).

* The "prior proceeding(s)" referenced in EBR 34(E)(3)(f) refer to prior Act 250 proceedings before a Commission or the Board, and not to local town Planning Commission or other proceedings. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 15 n.4 (10/3/03). [EB #824]

* Reliance by Board and Commission on terms of earlier permits should be considered in weighing finality factor. *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 14 - 15 (3/22/01). [EB #760]

- * Board and Commissions should be allowed to rely on on permittee's continued adherence to the terms and conditions in original permit. *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at 17-18 (2/15/01). [EB #744]
- * Finality principle supported by indications of Commission's sensitivity to the aesthetic impacts on area evidenced by issuance of other permits for area. *Town and Country Honda and Robert M. Aughey, Jr.*, #5W0773-2-EB, FCO at 18-19 (2/15/01).
- * Commissions and parties have the right to rely on material information provided by an applicant. *Richard Bouffard*, #4C0647-6-EB, FCO at 12 (10/23/00).
- * Even if there were changes supporting flexibility under *Stowe Club Highlands*, finality outweighed flexibility where Commission and lot buyers had relied on condition imposed to assure conformance with Criteria 9(B) and 8. *Donald and Diane Weston*, #4C0635-4-EB, (3/2/00). [EB # 735]
- * Reliance by Town and Commission on Applicants' representations concerning commercial purpose of subdivision and Applicants' benefit from such reliance in obtaining permit amendments to allow commercial development of the lots result in finality outweighing flexibility under *Stowe Club Highlands* balancing test. *Ronald and Marylou Saldi*, #5R0891-16-EB (1/13/00). [EB # 737]
- * Finality outweighs flexibility where permittee seeking to delete a permit condition fails to produce credible evidence of extreme, unforeseeable changes that would cause the Board to favor flexibility and where the unappealed permit condition had been relied upon by Commission when issuing another permit amendment requested by permittee. *MBL Associates*, #4C0948-3-EB (10/20/99). [EB # 731].
- * Appellants did not rely on open space permit condition when they purchased their properties. *Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB (9/23/98). [EB #704]

267.3 Burden of proof

- * Under 10 V.S.A § 6088, the applicant always carries the initial burden of production. *Re: Route 103 Quarry* (Carrara), No. 205-10-05 Vtec, Decision at 8(11/22/06), *aff'd*, *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008); *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 10 (11/2/10).
- * Burden of proving satisfaction of *Stowe Club Highlands* test is on applicant for permit amendment. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 14 (10/3/03) [EB #824] *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 12 (3/22/01) [EB #760]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 13-14 (12/7/00). [EB# 747]; *Richard Bouffard*, #4C0647-6-EB, FCO at 14 - 15 (10/23/00). [EB #755]; *Bernard Carrier*, #7R0639-1-EB (8/19/99). [EB #728].
- * Applicant's failure to provide any evidence in favor of flexibility equates to a failure to meet its burden of proof. *Re: Richard Bouffard*, #4C0647-6-EB, FCO at 13 – 15 (10/23/00); but see *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, FCO at 15 - 16 (10/3/03).

* Failure to meet burden of proving factual circumstances beyond the Applicants' control or unforeseeable changes in the operation of the Project causes Board not to favor flexibility in *Stowe Club Highlands* balancing test. *Ronald and Marylou Saldi*, #5R0891-16-EB, (1/13/00). [EB # 737]

* Finality outweighs flexibility where the permittee seeking to delete a permit condition failed to produce credible evidence of extreme, unforeseeable changes that would cause the Board to favor flexibility. *MBL Associates*, #4C0948-3-EB (10/20/99). [EB # 731].

* None of the pre-filed testimony or exhibits offered into the record provided evidence concerning the three factors under *Stowe Club Highlands*. *Bernard Carrier*, #7R0639-1-EB (8/19/99). [EB #728].

E. Abandonment / Revocation / Vacation

281. General

* Commission, not Coordinator, must act on petition for abandonment. *Rutland Gas & Oil Co., d/b/a Rutland Fuel Company*, DR #410, DO at 3 (7/19/02).

282. Abandonment

* An Act 250 permit is abandoned if it is not "used" for a period of three years after issuance. 10 V.S.A.

§ 6091(b). *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Entry Regarding Motion at 2 (10/13/09).

* "Substantial change" test for 250 jurisdiction is not the same as "substantial construction toward completion" of the project test for abandonment. *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Entry Regarding Motion at 3 (10/13/09).

* Abandonment results in a cessation of jurisdiction. *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Decision on Motion for Summary Judgment at 8 (10/1/09), citing *In re Audet*, 2004 VT 30, ¶13, 175 Vt. 617; see also *In re Rustin*, 162 Vt. 185, 187–88 (1994) (noting that when abandonment is determined, the jurisdiction that arose from the underlying permit ceases).

* Environmental Court lacks jurisdiction over abandonment petition where the District Commission has not yet ruled. *In re: Guite Act 250 Jurisdictional Opinion*, No. 265-11-08 Vtec, Decision and Order On Motion to Reopen and for Clarification of Scope of Remand at 3-4 (3/25/09).

* Petition for abandonment of a permit must be initiated in the Commission. *Re: Nextel WIP Lease Corporation d/b/a Nextel Partners and Charles Andrews*, #3W0876-EB, RO at 3 (1/21/03) [EB # 815]; *Re: Rutland Gas & Oil Co. d/b/a Rutland Fuel Company*, DR #410, DO at 3 (7/19/02); see, EBR 38(B)(2).

* Petitions for determination of use or abandonment are heard by Board or Commission retaining jurisdiction over the permit. EBR 38(B)(2); *Richard Madowitz and Douglas Kohl d/b/a The Woods*

Partnership Amherst Realty, LLC # 1R0522-9-EB, MOD at 3. (6/14/01). [EB #784]

* A 20-30 year lapse in use of a quarry pit leads to conclusion that permit has been abandoned. *U.S. Quarried Slate Products, Inc.*, DRs #279 and #283 (10/1/93).

* Since it has not been deemed abandoned, the subdivision permit remains in full force and effect, even if the permittee has allowed the construction completion deadlines to expire. *NRB v. Donald Dorr, Dorr Oil Co. and MGC, Inc.*, 49-4-13 Vtec. at 11 (05/ 27/13).

282.1 Who may petition

* An abandonment petition may be filed by any person who was a party to the application proceeding. *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Decision on Motion for Summary Judgment at 8 (10/1/09).

282.2. Burden of Proof

282.3. Expiration of Permit

* Gravel crusher plant was "extraction of mineral resources" and permit had expiration date. *John and Marion Gross d/b/a John Gross Sand and Gravel*, #5W1198-EB (4/27/95). [EB #606].

* Various administrative and judicial proceedings, combined with applicant's efforts over a two year period to secure Act 250 and local permits, were actions demonstrating intent to proceed -- and therefore constitute "use" of the permit preventing its expiration. Fact that there was no permit extension is not determinative. *John A. Russell Corporation*, #1R0257-1-EB (11/30/83). [EB #212M]

282.4. By non-use

* Work conducted under the authority of a permit, causes the permit to be "used" within the meaning of 10 V.S.A. § 6091(b). *In re John Rusin*, 162 Vt. 185, 190 (1994).

* Substantial construction is construction significant in light of the project contemplated. *In re John Rusin*, 162 Vt. 185, 190 (1994).

* Abandonment by non-use not found where project had been tied up in revocation petition litigation. *George and Beverly Potwin*, #3W0587-3-EB, FCO at 8 - 10 (2/17/00).

* Where original permit has not expired and where petitioners failed to participate in original permit proceedings, they lack standing to declare the permit void for non-use. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]

* Hearing held in conjunction with application to extend construction deadline to learn if project has been abandoned or changed since it was first reviewed, or if some previously unknown, significant circumstances relating to project have occurred. *Lilly Propane, Inc.*, #2S0859-3-EB, FCO at 7

(11/3/95). [EB #634]

* Where sale of lot did not create or commence construction of subdivision, or show intent to commence, permit has never been used and Board will void it. *Donald I. Gurney*, #2S0923-EB (11/2/93). [EB #579]

* By pursuing financing, marketing, and clearing of the site, regardless of whether these activities are "substantial construction," applicants "used" the permit within one year, permit is not abandoned and the findings of fact for the entire project are not voided. *New Haven Savings Bank*, #2W0769-1-EB (11/23/92). [EB #533]; *Windham Sports, Inc., Riverside Farm Corp., and Albert and Edith Wozniak*, #2W0646-2-EB (3/4/91) [EB #457]; *Vercon Associates*, #5L0806-EB (7/21/89). [EB #428]

* Where permittee fails to begin construction within two years of the permit's issuance, the permit is considered abandoned by virtue of non-use. *Vercon Associates*, #5L0806-EB (7/21/89). [EB #428]

* Because applicant commenced landfill operation within one-year from issuance date, permit was not abandoned by non-use and therefore did not expire. *H.A. Manosh*, #5L0690-1-EB (11/3/87). [EB 351]

* Protecting permit by participating in appeal demonstrates intention to proceed with project, and thus a permit will not expire for non-use. *Daniel C. Lyons*, #5W0556-1-EB (10/12/82). [EB #182]

* "Use" requirement does not require performance of activity that, standing alone, is "development;" it is intended to discourage applications that are purely speculation, rather than to require actual construction of project within one year of permit issuance. *Agency of Transportation (Belvidere Project)*, #5L0083-2-EB (9/13/79). [EB #114]

282.5. Voluntary abandonment by the permittee

* Where no substantial work towards completion of a project has begun within the three years following the issuance of an Act 250 permit, voluntary abandonment is allowed. *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Decision on Motion for Summary Judgment at 7 (10/1/09).

* Abandonment results in a cessation of jurisdiction. *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Decision on Motion for Summary Judgment at 8 (10/1/09), citing *In re Audet*, 2004 VT 30, ¶13, 175 Vt. 617; see also *In re Rustin*, 162 Vt. 185, 187–88 (1994) (noting that when abandonment is determined, the jurisdiction that arose from the underlying permit ceases).

283. Revocation

* A petition for revocation triggers the procedures outlined in Board Rule 38 which include specific requirements regarding the contents of the petition, treatment as an initial pleading in a contested case and the requirement that a permittee be given an opportunity to correct "[u]nless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment."

In re White, 172 Vt. 335, 344 (2001).

* Board may, under the statute, revoke a permit if the conditions attached to the permit are violated. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).

* Petition to amend petition to revoke filed after hearing was held was denied because it was not timely. *Re: William Kalanges #4C0593-4-EB* (Revocation), FCO at 7 (1/15/04) [EB #835].

* Board is granted discretionary authority to revoke a previously issued permit or permit amendment. *Equinox Resort Associates*, #8B0209-5-EB (Revocation) MOD at 3 (9/24/97) [EB #668M2]; see *Trybulski v. B.F. Hydro-Electric Corp.*, 112 Vt. 1 (1941).

* A revocation petition does not decide whether a project merits an Act 250 permit; this issues should be raised before Commission. *Synergy Gas Corporation*, #9A0204-EB (Revocation) (7/31/95). [EB #608 M1]

* EBR 38(A) was ratified by the General Assembly in 1985 and therefore has the force and effect of a legislative enactment. *Mt. Mansfield Co. Inc.*, #5L0646-3-EB (4/26/94). [EB #593M1]

* Where Board has determined not to dismiss a revocation petition, there is no need to have oral argument. *Talon Hill Gun Club, Inc. and John Swington*, #9A0192-EB(Revocation) (3/4/93). [EB #567M2]

* Board has authority to seek injunctive relief in court to prevent harm and maintain status quo pending permit revocation hearing; such action does not bar Board from hearing revocation petition. *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded*, *In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306]

283.1 Who may petition

See 10 V.S.A. § 6027(g).

* Board may bring revocation petition on its own motion. *Maple Tree Place Associates*, 4C0775-EB, Notice (11/20/01); *Re: Bull's Eye Sporting Center*, 5W0743-2-EB (Altered)(Revocation), Notice (11/23/99).

*Petitioner cannot use revocation petition to obtain a remand to Commission for the purpose of re-litigating issue settled in original permit process. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]

283.2 Dismissal of Petition (see [336.1](#), [511](#) and [552.6](#))

* Petition to amend petition to revoke filed after hearing was held was denied because it was not timely. *Re: William Kalanges #4C0593-4-EB* (Revocation), FCO at 7 (1/15/04) [EB #835].

* Dismissal of revocation proceeding is appropriate where permittee has cured violation. *Re: Twin State Sand and Gravel, Inc.*, #3W0711, #3W0711-EB and #3W0711-2 (Revocation), DO at 1-2

(2/28/03) [EB#795]

* Petitioner's motion to dismiss without prejudice granted, but any subsequent petition would be dismissed with prejudice in accordance with VRCP 41(a). *Re: OMYA, Inc.*, #1R0271-14-EB, Dismissal Order at 4-5 (2/21/02). [EB#776]

* When Permittees are currently seeking extension of construction completion deadline before Commission, revocation petition on prior expired permit is moot. *Richard Madowitz and Douglas Kohl d/b/a The Woods Partnership Amherst Realty, LLC* # 1R0522-9-EB, MOD and DO at 3. (8/15/01). [EB #784]

* Revocation petition to dismissed where Commission granted permittees amendment to permit correcting permit violation, because interests of the public are adequately protected. *Marty Keene, Andre and Patricia Martel*, #4C1025-EB (Revocation Request), DO at 2 (7/10/01). [EB #762]

* Petition for revocation dismissed for lack of evidence of permit violations. *Michael Jedware*, #6F0194 and #6F0259 (Revocation), DO at 4 (1/24/01). [EB#768].

* Dismissal is appropriate where petitioner fails to complete petition for revocation after having been given an opportunity to do so. *Re: Forestdale Heights, Inc.*, #4C0329-EB (Revocation), Chair's Proposed DO at 3-4 (12/20/00); made final in DO (1/3/01) and Corrected Order (1/4/01).

* Revocation petition dismissed where petitioner failed to comply with procedural requirements of Board's Rules. *Sandra-North, Inc.*, #4C0973-EB (5/21/96). [EB #650]

* When Board determines not to dismiss revocation petition, there is no need to have oral argument. *Talon Hill Gun Club, Inc. and John Swington*, #9A0192-EB (Revocation) (3/4/93). [EB #567M2]

* Failure to state a legal basis for revocation results in dismissal of petition. *Duxbury Vermont Springs, Inc.*, #5W0651-EB (7/21/89). [EB #439]

Revocation proceedings dismissed because request for revocation was satisfactorily resolved. *Snyder Company, Inc.*, #4C0593-EB (7/17/86). [EB #275]

* Execution of assurance of discontinuance is basis for dismissal of revocation proceeding. *Magic Mountain Corp.*, #2W0430-1-EB (7/2/86). [EB #274]

283.3 Burden of proof

* Person seeking revocation has burden of proof. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96). [EB #647], *aff'd, In re White*, 172 Vt. 335 (2001); *Putney Paper Co., Inc.*, #2W0436-6-EB (2/2/95). [EB #583]; *Vermont RSA Limited Partnership*, #3W0738-4-EB (Revocation) (8/21/98). [EB #698]

* Petitioner failed to meet the standards of willful or gross negligence by failing to produce

evidence. *Putney Paper Company, Inc.*, #2W0436-6-EB (2/2/95). [EB #583]

283.4 Grounds for revocation

* Board is reluctant to revoke a permit where the grounds are in doubt or uncertain. *Bull's Eye Sporting Center (Altered) and David and Nancy Brooks, Wendell and Janice Brooks*, #5W0743-2-EB (Revocation), FCO at 15 (6/23/00). [EB #742]

* Possible erroneous issuance of zoning permit is not grounds for revocation under Criterion 10 where original Act 250 permit was issued under EBR 51. *Synergy Gas Corporation*, #9A0204-EB (Revocation) (6/8/95). [EB #608]

* Grounds for revocation include willful or grossly negligent submission of inaccurate, erroneous, or materially incomplete permit application information, and the violation of a permit or the Board's Rules. *Talon Hill Gun Club, Inc. and John Swinington*, #9A0192-EB(Revocation) (3/4/93). [EB #567M2]

* Issues in revocation proceeding are limited to those alleged as grounds for revocation. *Talon Hill Gun Club, Inc. and John Swinington*, #9A0192-EB(Revocation) (3/4/93). [EB #567M2]

Effect of project upon Act 250-protected resources is not an issue except to the extent that violations have occurred. *Talon Hill Gun Club, Inc. and John Swinington*, #9A0192-EB(Revocation) (3/4/93). [EB #567M2]

* Where Board has never adopted a stipulation, violation of such stipulation is not an enumerated ground for revocation. *NJM Realty Limited Partnership*, #2W0312-EB (Revocation) (12/17/91). [EB #443]

283.4.1 Wilful or grossly negligent submission of inaccurate, erroneous or incomplete application information

* Permittees submitted inaccurate, erroneous or incomplete information in connection with their application when, *after* merits hearing but before issuance of the permit, they changed the nature of their project by logging an important tree buffer. *Bull's Eye Sporting Center (Altered) and David and Nancy Brooks, Wendell and Janice Brooks*, #5W0743-2-EB (Revocation), FCO at 13 - 15 (6/23/00). [EB #742]

* Permittee submitted inaccurate, erroneous or incomplete information in connection with its application regarding (1) the number of locations from which a communications tower would be visible, (2) how much of the tower would be visible, and (3) the analysis of the aesthetic impacts of the tower. *Vermont RSA Limited Partnership*, #3W0738-4-EB (Revocation) (8/21/98). [EB #698]

* Permittee's submission of inaccurate, erroneous, and materially incomplete information in connection with its application did not rise to the level of willfulness or gross negligence without specific evidence of permittee's intent to misrepresent the visibility of a proposed communications

tower. *Vermont RSA Limited Partnership*, #3W0738-4-EB (Revocation) (8/21/98). [EB #698].

* Information submission does not meet standards of wilful or gross negligence. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96). [EB #647]; aff'd, *In re White*, 172 Vt. 335 (2001); *Montpelier Broadcasting Inc.*, #5W0396-EB (2/17/94). [EB #571]

* Petitioner failed to meet the standards of willful or gross negligence by failing to produce evidence. *Putney Paper Company, Inc.*, #2W0436-6-EB (2/2/95). [EB #583]

* Only one ground for revocation need be proved; thus, if violation of Rules is established, petitioner need not also prove willful or gross negligence and change in outcome. *Mt. Mansfield Co. Inc.*, #5L0646-3-EB (4/26/94). [EB #593M1]

* Grounds for revocation of permit exist because permittee submitted materially incomplete information in its application. *Pelham North, Inc.*, #3W0521-1-EB (4/24/89). [EB #393]

* Failure to send plan modifications to planning commission is not gross negligence and therefore is not a basis for revoking the permit. *Pelham North, Inc.*, #3W0521-1-EB (4/24/89). [EB #393].

283.4.2 Violation of permit term or condition, finding, conclusion or representation

* Board has the power to revoke a permit if it finds, after a hearing, that the applicant has violated the terms of the permit or any permit condition. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993); EBR 38(A)(2)(b).

* Board may, under the statute, revoke a permit if the conditions attached to the permit are violated. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).

* Permittee's fence was not grounds for revocation of permit that did not prohibit fences, and the fence did not violate the CUD. *Re: William Kalanges* #4C0593-4-EB (Revocation), FCO at 9 (1/15/04) [EB #835].

* A violation of a Conclusion of Law accompanying a permit is grounds for revocation. *Bull's Eye Sporting Center (Altered) and David and Nancy Brooks, Wendell and Janice Brooks*, #5W0743-2-EB (Revocation), FCO at 10 -11 (6/23/00).

* Permittee violated representations in application (incorporated into permit as a condition) that lower half of its communications tower would be screened where more than half of tower was visible from a number of locations. *Vermont RSA Limited Partnership*, #3W0738-4-EB (Revocation) (8/21/98). [EB #698]

* Deviation from permit conditions or approved plans is grounds for revocation. *Talon Hill Gun Club, Inc. and John Swington*, #9A0192-EB(Revocation) (3/4/93). [EB #567M2]

- * Changes to telecommunications tower project violate permit and require revocation. *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (Appeal and Revocation) (12/14/93). [EB #562]
- * While no single violation of condition results in major environmental damage, collectively such violations indicate substantial disregard of permit. *Felix J. Callan*, #5W1056-EB (Revocation) (6/2/92). [EB #493]
- * Violation of plans submitted in support of application, approved by Commission as part of approved project, may be grounds for revocation. *Trapper Brown Corp. (TBC Realty)*, #4C0582-15-EB (12/23/91). [EB #420]
- * Board will revoke a permit where a permit condition was violated and successor-in-interest to the original applicant allowed operation to continue for years without fulfilling the required condition. *NJM Realty Limited Partnership*, #2W0312-EB (Revocation) (12/17/91). [EB #443]
- * Late filing intended to satisfy permit condition will not moot violation of such condition, but such filing may be relevant to cure. *NJM Realty Limited Partnership*, #2W0312-EB (Revocation) (12/17/91). [EB #443]
- * Land use permit was revoked because the permittee violated his permit by exceeding the allowed amount of gravel extraction. No opportunity to correct the violation will be given because the extraction limit was repeatedly exceeded over several years. *Felix Callan*, #5W0500 (9/20/88). [EB #384]
- * Minor permit violations, accompanied by failures to comply with basic plans approved by Commission, reveal pattern of serious non-compliance warranting revocation. *DuBois/Coltey/Tucker*, #5W0837-EB (1/19/88). [EB #302]
- * Permittee who repeatedly violates permit terms should expect revocation. *Puppy Acres Boarding*, #2W0568-EB (6/1/87). [EB #298]
- * Repeated violations of permits regarding blasting, trucking, and other facets of sand, gravel, and stone operation are grounds for revocation. *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded, In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306]
- * Board shall be notified if unavoidable events impede strict compliance with permit; revocation not appropriate if permittee substantially complies with conditions. *Stanmar, Inc.*, #6L0135-5-EB (1/8/86). [EB #276]
- * Permit for industrial facility is revoked based upon violation of conditions unless permittee complies with landscaping conditions. *Green Mountain Heat Products*, #8B0208-1-EB (3/9/82). [EB #169]

283.4.3

Violation of Board Rules

- * Case law does not *require* the Board to void or revoke permits merely based on the inadvertent

omission of an adjoining landowner from the list required on permit applications no matter when this oversight is discovered. *In re White*, 172 Vt. 335, 341 (2001), affirming (but with reservations) *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96) (Revocation results because permittee was required to list petitioner as an adjoiner, and failure to do so was a violation, as, if notified, petitioner would have opposed applications to protect interests) [EB #647], and distinguishing *In re Conway*, 152 Vt. 526 (1989).

* Because permittee failed to list petitioner as adjoiner (who was thus unaware of applications) revocation petition is not barred by equitable estoppel or laches. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96). [EB #647]; aff'd (but with reservations), *In re White*, 172 Vt. 335, 341 (2001).

* Material changes to telecommunications tower project violated permit and required revocation. *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (Appeal and Revocation) (12/14/93). [EB #562]

283.5 Cure

* Permittee given an opportunity to cure violation of permit condition that required all light sources to be shielded. Re: William Kalanges #4C0593-4-EB (Revocation), FCO at 10 (1/15/04) [EB #835].

* Amendment application to cure violation should be reviewed by district commission on all criteria. Re: *Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB, MOD on Motions to Alter at 1-2 (6/9/03). [EB#792(R)]

* Where "a permit holder is responsible for repeated violations, the board may revoke a permit without offering an opportunity to correct a violation." *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993); EBR 38(A)(2)(c).

* Appropriate cure for violating permit by logging in vegetated buffer around portion of shooting range is permanent, larger, vegetated no-shooting zone. Re: *Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB (Revocation), FCO at 10 (4/4/03), *motion to alter denied*, MOD (6/9/03). [EB #792R].

* Neither compensatory damages for neighbor's lost property value, nor reimbursement of costs is an appropriate cure in an Act 250 revocation proceeding. Re: *Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB (Revocation), FCO at 11 (4/4/03), *motion to alter denied*, MOD (6/9/03). [EB #792R].

* Appropriate time to ask that permit be denied is in permit proceeding, not in proceeding concerning appropriate cure for violation. Re: *Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB (Revocation), FCO at 15 (4/4/03)(citing Re: *Synergy Gas Corporation*, #9A0204-EB (Revocation), MOD at 4 (7/31/95); *motion to alter denied*, MOD (6/9/03). [EB #792R].

* Permittee complied with revocation order and cured prior failure to report to district commission by filing complete amendment application with Commission; Commission will review merits of that application. *Re: Twin State Sand and Gravel, Inc.*, #3W0711, #3W0711-EB and #3W0711-2 (Revocation), DO at 1-2 (2/28/03). [EB#795]

* Dismissal of revocation proceeding is appropriate where permittee has cured violation. *Re: Twin State Sand and Gravel, Inc.*, #3W0711, #3W0711-EB and #3W0711-2 (Revocation), DO at 1-2 (2/28/03) [EB#795]

* Unless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, Board must give permittee a reasonable opportunity to correct any violation prior to any order of revocation becoming final. *Bull's Eye Sporting Center (Altered) and David and Nancy Brooks, Wendell and Janice Brooks*, #5W0743-2-EB (Revocation), FCO at 16 (6/23/00). [EB #742]. *Vermont RSA Limited Partnership*, #3W0738-4-EB (Revocation) (8/21/98). [EB #698]; *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96). [EB #647], *aff'd, In re White*, 172 Vt. 335, 341 (2001); *Talon Hill Gun Club and John Swingleton*, #9A0192-EB (Revocation) (10/8/93). [EB #567]; *Sigda Lumber, Inc.*, #2W0749-EB (6/26/90) and (9/17/90) [EB #432] and [EB #432M]; *Crushed Rock, Inc.*, #1R0489 and #1R0489-1 (6/8/90). [EB #422]; *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded, In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306]; *Puppy Acres Boarding*, #2W0568-EB (6/1/87). [EB #298;] *William Blachly*, #5W0781-EB (9/13/85). [EB #265]; *Marina Internationale, Inc.*, #6G0220-5-EB (7/12/85). [EB #261].

* *Stowe Club Highlands* test does not apply to amendments that a permittee may seek in order to cure a revocation order. *Bull's Eye Sporting Center (Altered) and David and Nancy Brooks, Wendell and Janice Brooks*, #5W0743-2-EB (Revocation), FCO at 19 - 22 (6/23/00). [EB #742]

* Board had authority to supervise compliance with interim revocation order when it reopened proceeding to take additional evidence concerning permittee's compliance with terms of that order. *Lawrence White*, #1R0391-EB, #103091-3-EB, #1R03091-4-EB, #1R03091-5-EB, #1R03091-5A-EB, and #1R0391-6-EB (Rev), MOD, (7/24/98) [EB #647], *aff'd, In re White*, 172 Vt. 335, 341 (2001).

* Allowing permittee to operate under terms of a permit, pending satisfaction of conditions of a revocation decision, is consistent with EBR 38(A)(3). *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (4/16/98). [EB #647], *aff'd, In re White*, 172 Vt. 335, 341 (2001).

* Issuance of final order revoking certain permits is warranted where permittee was given opportunity to cure violation by applying for corrective permit, and such permit was granted which wholly superseded permits subject to revocation. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (4/16/98). [EB #647], *aff'd, In re White*, 172 Vt. 335, 341 (2001).

* When revocation decision provides that a certain permit subject to revocation shall be superseded by a corrective permit, supersession does not occur until final decision on corrective permit is issued. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB,

and #1R0391-6-EB (Revocation) (4/16/98). [EB #647], *aff'd, In re White*, 172 Vt. 335, 341 (2001).

* Where opportunity to cure violation was complied with 28 days after deadline, permit is not revoked, because 28 day violation did not present threat of irreparable harm to public health, safety, or general welfare or to environment. *Stokes Communications Corp.*, #3R0703-EB (Revocation) (7/1/96). [EB #644]

* Where revocation order is conditional on permittee's opportunity to correct violation, a hearing must be held before conditional revocation order can become final to give the permittee an opportunity to show compliance with the conditional revocation order. *Stokes Communications Corp.*, #3R0703-EB, (Revocation) (3/20/96). [EB #644M2]; *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (Revocation) (12/6/95). [EB #644M1]

* Steeply graded and erosion prone road poses a clear threat of irreparable harm to the environment. *Montpelier Broadcasting Inc.*, #5W0396-EB (2/17/94). [EB #571]

* Permittee given opportunity to correct violations by filing a permit amendment application. *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (Appeal and Revocation) (12/14/93). [EB #562]

* No opportunity to correct violations is required where repeated violations warrant immediate revocation of a permit. *Felix J. Callan*, #5W1056-EB (Revocation) (6/2/92) [EB #493]; *and see, Felix Callan*, #5W0500 (9/20/88). [EB #384]

* Further opportunity to correct permit violation given where permittee left the violation allegations for the operator of the permitted project to resolve rather than taking responsibility itself for achieving an assurance of discontinuance. *NJM Realty Limited Partnership*, #2W0312-EB (Revocation) (12/17/91). [EB #443]

* When project has been in violation of its permit for a long time, and in view of the time allowed for achievement of an assurance of discontinuance, opportunity to correct violation should be brief and strict. *NJM Realty Limited Partnership*, #2W0312-EB (Revocation) (12/17/91). [EB #443].

* Late filing intended to satisfy permit condition will not moot violation of such condition, but such filing may be relevant to cure. *NJM Realty Limited Partnership*, #2W0312-EB (Revocation) (12/17/91). [EB #443]

* If Board allows permittee opportunity to cure, Board shall clearly state in writing the nature of the violation and the steps necessary for its correction. *Crushed Rock, Inc.*, #1R0489 and #1R0489-1 (6/8/90). [EB #422]

* In revocation proceeding for repeated violations, where violations do not constitute a clear threat of irreparable harm to the environment or the health, safety, or general welfare of the public, the Board may require the permittee to correct violations, file for a permit amendment, and comply with the terms and conditions of the revocation order. *Roger & Erma Rowe*, #1R0387-EB (8/24/88). [EB #308]

- * Where permit violations do not pose a clear threat of irreparable harm, permittee will be given the opportunity to cure by executing an AOD. *DuBois/Coltey/Tucker*, #5W0837-EB (1/19/88). [EB #302]
- * The Board will not revoke permit where applicant has made some effort to comply. *Sunderland Hollow*, #4C0582-EB (9/23/87). [EB #339]
- * Board imposes condition requiring payment of fine for violations when permittee had opportunity to correct violations. *Puppy Acres Boarding*, #2W0568-EB (6/1/87). [EB #298]
- * When selecting remedy for permit violation, Board considers magnitude and number of violations, impact of the violations upon environment or community, knowledge or intent of permittee or its successor interest, and permittee's responsiveness to correct identified violation. *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded, In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306]

283.5.1

Mootness issues

- * Issuance of new permit moots revocation based on failure to timely file an amended permit application. *LaFrance v. Environmental Board*, 167 Vt. 597, 598 (1998)(mem.), distinguishing *In re Barlow*, 160 Vt. 513, 518 (1993)(where Act 250 permit has been granted, issue of whether a permit is required is not moot).
- * A permittee's appeal of a revocation decision is not mooted by compliance with the Board's order pending the outcome of an appeal, i.e., securing a corrective permit while appealing the revocation decision. *In re White*, 172 Vt. 335, 340 n.3 (2001), citing *In re Barlow*, 160 Vt. 513, 518-19 (1993) ("Compliance with a judgment pending appeal does not make a case moot unless the parties intended to settle, or unless it is not possible to take any effective action to undo the results of compliance.")

283.6 Reinstatement

- * On a Motion to Reinstate Land Use Permit following revocation, the permit for construction will be reinstated subject to posting of financial assurances and payment to the State of costs of compliance. *Green Mountain Heat Products, Inc.*, #8B0208-1-EB (3/28/84). [EB #226]

284. Vacation

- * Permit vacated after Board granted permittee's request to withdraw its application. *Re: Green Mountain Railroad*, #2W0038-3B-EB, MOD at 2 (5/16/02).

VII. ADMINISTRATIVE PROCESS

A. General

301. General**302. What Rules apply**

* The Vermont Rules of Civil Procedure do not apply to administrative tribunals. *John A. Russell Corp.*, #1R0257-2A-EB (10/22/92). [EB #552]

* Requirements of the Administrative Procedure Act and the Vermont Rules of Evidence were fully satisfied where all parties were sent copies of all documents, and ample opportunity existed for parties to file objections to the information submitted by the permittees or to ask for a hearing to cross-examine and object to the evidence. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/31/90). [EB #408M]

* The Board will not apply time limits set forth in rules as rigidly as it does time limits established by statute. *Larry & Joan Westall*, #4C0558-2-EB (4/10/87). [EB #342]

303. Authority to Review Other State Programs/ District Commissions/Co-Applicants / Joinder

* Decisions by the Board set precedent that binds Commissions. *Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 19 (4/19/01). [EB #763]

* Board is not bound by approval or permits granted by other agencies. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366].

304. Collateral Proceedings

* Party status denials are not appealable collateral orders. *In re Maple Tree Place Associates*. 151 Vt. 331 (1989).

* A collateral order is appealable only if three elements are satisfied: "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *In re Maple Tree Place Associates*. 151 Vt. 331, 332 (1989), citing *State v. Lafayette*, 148 Vt. 288, 290-91 (1987).

* While Court has set forth specific criteria without which a collateral order will not be reviewed by Court, overriding these threshold criteria is Court's need to balance the possible loss of important rights "against this Court's policy of avoiding piecemeal review." *In re Maple Tree Place Associates*. 151 Vt. 331, 332 (1989); *In re Pyramid Co.*, 141 Vt. 293, 305 (1982) ("[T]he lower courts must be mindful of this Court's well-established policy of avoiding piecemeal appeals.")

* Where adjudication of competing property claims (pending in a court of competent jurisdiction) is integral to Board's decision, Board defers to court to resolve claim before addressing issues within its authority. See *In re Buttolph*, 147 Vt. 641, 643 (1987); *Equinox Resort Associates*, #8B0209-5-EB

(Revocation) (9/24/97). [EB #668M2]

305. Ex Parte Communications

* Although communications were not improper, nor 3 V.S.A. § 813 violated, to avoid appearance of impartiality, Chair recuses self from matter. *Main Street Landing Company and City of Burlington*, Land Use Permit #4C1068-EB, Chair's Memorandum to Parties (8/21/01). [EB #790]

* Pursuant to 3 V.S.A § 813, Board members may not communicate with anyone, directly or indirectly, concerning a matter before Board other than during public meetings, conferences or hearings; parties must refrain from ex parte communication with Board members, including Chair. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079 (Revised)-EB, Memorandum to Parties (6/15/00). [EB# 739].

* No ex parte communication took place where copies of all documents submitted to the Board were forwarded to all other parties. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/31/90). [EB #408M]

* Discussions between Board's executive officer and parties did not violate prohibition against ex parte communications; executive officer, as Board's legal counsel and administrator, is required to communicate with parties and their attorneys. *Champlain Construction Co.*, DR #214M (10/2/90).

306. Standard of Review

306.1 De Novo

* Court must conduct a fair and impartial de novo review, so it is irrelevant that there may have been conflicts of interest in the proceedings below. Therefore, appellant may not make discovery requests that pertain solely to trying to determine whether there was a conflict of interest in the proceedings below. *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 17 (3/16/09).

* Even in de novo appeal in which no opposing party appears, the Court does not grant requested relief as if by default. *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner Lilienthals' Motions for Relief from Judgment, at 6 (3/12/08).

* On appeal from a commission, "[t]he Board ... shall hold a *de novo* hearing on all findings requested by any party." 10 V.S.A. § 6089(a); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 6 (6/26/03); *In re Killington, Ltd.* 159 Vt. 206, 214 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990); *In re Greg Gallagher*, 150 Vt. 50, 52 (1988).

* In a *de novo* hearing, Board hears the matter as if no prior proceedings had taken place. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, MOD at 6 (5/10/04) [EB #843]; *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 6 (6/26/03), affirming *Re: Woodford Packers, Inc.*, #8B0542-

EB, MOD at 3-4 (2/27/01), FCO (10/5/01), *motion to alter denied*, MOD on Motion to Alter (12/20/01) (party's conduct in Commission proceeding has no bearing on *de novo* appeal) (EB #774); *In re Killington, Ltd.* 159 Vt. 206, 214 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518 (1975); *In re Preseault*, 130 Vt. 343, 348 (1972) (a *de novo* proceeding is one in which all the evidence is heard anew, and the probative effect thereof determined); *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 9 (9/9/99) (no deference given to decision below); *Herndon and Deborah Foster*, #5R0891-8B-EB (6/2/97). [EB #665] (thus, whether Commission correctly interpreted a town plan in its decision is not relevant); *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (11/8/96). [WFP #31]; *City of Montpelier Solid Waste Management Facility*, #I9042-WFP, (4/24/92). [WFP #7]; *Upper Valley Regional Landfill Corporation*, #oG820-WFP, (4/24/91). [WFP #5]; *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]; *Green Peak Estates*, #8B0314-2-EB (9/24/86). [EB #280M]; *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188]

* In a *de novo* proceeding, the parties are expected to offer evidence anew as though there had been no hearing below. *In re White*, 172 Vt. 335, 344 (2001), noting *Re Lawrence White*, #1R0391-8-EB, PCRO at 5 (11/10/97).

* There are tensions inherent in a system of *de novo* appeal. *In re Killington, Ltd.*, 159 Vt. 206, 215 (1992); see *In re Maple Tree Place*, 156 Vt. 494, 499-500 (1991).

* A new round of evidence before the Board will inevitably shape the case somewhat differently from the way it appeared in the district commission. *In re Killington, Ltd.*, 159 Vt. 206, 215 (1992).

* Board erred in making a key finding on a hotly contested issue after refusing to give applicant opportunity to submit evidence on the issue. *In re R.E. Tucker, Inc*, 149 Vt. 551, 554 (1988).

* A *de novo* proceeding contemplates those parties who had an interest in the original proceeding being allowed to appear and participate as proper parties at the second set of hearings. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518 (1975); *In re Preseault*, 130 Vt. 343, 348 (1972).

* Failure to present certain evidence to Commission does not bar a party from presenting that evidence in a *de novo* appeal. *Re: Vermont Verde Antique International, Inc*, DR #387, DO at 3-4 (2/2/01), *rev'd on other grounds*, *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

* Because DRs are heard *de novo*, dismissal is appropriate where petitioner fails to meet burden of production in single-party DR proceeding. *Re: Vermont Verde Antique International, Inc*, DR #387, DO at 3-4 (2/2/01), *rev'd on other grounds*, *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

* Allegation that decision constituted selective enforcement erroneously confused *de novo* appeal with an enforcement proceeding. *C.V. Landfill, Inc. and John F. Chapple*, Application #5W1150-WFP (Unlined Landfill Facility) (2/3/97). [WFP #24M]

* Where no findings under Criterion 5 are challenged in notice of appeal, and no substantial injustice or inequity will result from limiting State to issues raised in appeal, Board will not hold a *de*

novo hearing on Criterion. *State of Vermont Agency of Transportation*, #7C0558-2-EB (Reconsideration) (5/18/90), *aff'd*, *In re Agency of Transportation*, 157 Vt. 203 (1991). [EB #445]

* Any position taken by a party prior to the appeal is not relevant in the appeal. *Norman R. Smith, Inc. and Killington, Ltd.*, #1R0593-1-EB (part I) (5/11/89) and *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (part II) (5/11/89). [EB #349] [EB #357]

* Because review is *de novo*, Board must take entirely new evidence and cannot consider information that is not in the record. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

* A trial *de novo* is an original proceeding and it is immaterial what errors or irregularities took place in the original proceeding. *Imported Cars of Rutland*, #1R0156-2-EB (10/12/82). [EB #192]

* A Rule 12(C) [now a Rule 14(B)] party is not limited to the record of proceedings before Commission when participating in *de novo* appeal before Board. *Bay Harbor Yachts*, #6G0220-3-EB (4/22/82). [EB #166]

* In a *de novo* proceeding, Court does not consider any previous decisions or proceedings below; “rather, we review the application anew as to the specific issues raised in the statement of questions.” *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 4-5 (5/09/13) (citing *In re Whiteyville Props. LLC*, 179-12-11 Vtec at 1 (12/13/12)).

* “A *de novo* trial is one where the case is heard as though no action whatever has been held prior thereto.” *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 4 (5/09/13) (citing *Chioffi v. Winooski Zoning Bd.*, 151 Vt. 9, 11(1989); quoting *In re Poole*, 136 Vt. 242, 245 (1978)).

* In reviewing an appeal of a jurisdictional opinion, the Environmental Court conducts a trial *de novo*, in which “all questions of law or fact as to which review is available shall be tried to the court, which shall apply the substantive standards that were applicable before the tribunal appealed from.” *In re Burlington Airport*, 42-4-13 Vtec at 1 (6/5/13) (citing V.R.E.C.P. 5(g)).

306.2 Record

See 10 VSA § 6085a

B. Preliminary Issues

331. General

* Motion for more definite statement is appropriate where a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to respond. *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 3 (5/09/13)(citing V.R.E.C.P. 12(e)).

332. Board Members

332.1. Disqualification/Recusal Due to Conflict, Bias, Prejudice, etc.

- * Municipal zoning hearings, like any quasi-judicial administrative procedure, must observe rudiments of fair play. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶ 6
- * Due process demands impartiality on the part of judicial or quasi-judicial decisionmakers. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶ 6
- * All questions regarding a decisionmakers' impartiality do not involve issues of constitutional validity. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶ 7
- * A decisionmaker enjoys a presumption of impartiality. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶ 8
- * Only in the most extreme cases is disqualification for bias constitutionally required. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶ 9
- * DRB chair's participation violated due process where he evinced a deep seated antagonism through *ad hominem* attacks of one of the parties; but due process concerns were effectively cured by the subsequent trial *de novo* in the Environmental Court. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶¶ 9 - 13, 30 A.3d 641, 645-647 (Vt 2011).
- * Code of Judicial Conduct, A.O. 10, and Chapter II, § 28 of the Vermont Constitution (justice shall be impartially administered) do not apply to proceedings conducted by the executive branch; only 12 V.S.A. § 61(a) and Due Process Clause of federal Constitution apply. *ANR v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 234 (1997), citing *In re Crushed Rock, Inc.*, 150 Vt. 613, 622-23 (1988).
- * A fair trial before an impartial decision maker is a basic requirement of due process, applicable to administrative agencies as well as to the courts. *ANR v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 234-235 (1997).
- * There is a presumption of honesty and integrity in those serving as administrative adjudicators. *ANR v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 235 (1997).
- * Party claiming bias bears burden of overcoming the presumption by establishing an interest that requires disqualification. *ANR v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 235 (1997); and see *In re Crushed Rock, Inc.*, 150 Vt. 613, 622 (1988) (presumption of honesty and integrity cannot be lightly overcome, especially if disqualification of environmental board means no administrative proceeding can go forward).
- * Court will find bias only where it is clearly established by the record. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 629 (1993).

- * The mere fact that a decision was rendered contrary to the wishes of a party does not denote bias. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 629 (1993); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 513 (1975).
- * Mistaken evidentiary ruling, standing alone, does not constitute bias. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 629 (1993).
- * Findings indicating that the Board did not believe party do not demonstrate bias. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 629 (1993).
- * 12 V.S.A. § 61(a), requiring disqualification for interest of judicial officers, jurors and others acting in a judicial capacity, applies to Board members. *In re Crushed Rock, Inc.*, 150 Vt. 613, 623 (1988); *In re State Aid Highway No. 1, Peru, Vt.*, 33 Vt. 4, 9 (1974).
- * 12 V.S.A. § 61(a), which requires disqualification where the person acting in a judicial capacity "is interested in the event of such cause or matter," must be interpreted so that the mere combination of functions does not make the adjudicator "interested" and subject to disqualification. *In re Crushed Rock, Inc.*, 150 Vt. 613, 623 (1988).
- * Court presumes that all evidence bearing upon issues considered by the trier was heard with impartial patience and adequate reflection. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 513 (1975).
- * Court strongly emphasizes the necessity for impartiality and the avoidance of even the appearance of partiality, in the judicial process. *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 10 (1974).
- * Where obvious disqualification exists, the record should clearly show a waiver; and, if not obvious, it should show clearly any reasons a judicial officer may have for not disqualifying himself. *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 10 (1974).
- * Commission member's decision whether to recuse is an integral part of the quasi-judicial process." *Rueger v. NRB*, 2012 VT 33, ¶ 8 (4/26/12).
- * Environmental Court declined to assess Commission's performance both as to manner of conducting proceeding and way in which determined findings. *In re Times & Seasons*, #45-3-09 Vtec, Entry Regarding Motion at 3 (8/11/2009); *see also*, Decision on Multiple Motions (3/29/10), *aff'd* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).
- * Although communications were not improper, nor 3 V.S.A. § 813 violated, to avoid appearance of impartiality, Chair recuses self from matter. *Main Street Landing Company and City of Burlington*, Land Use Permit #4C1068-EB, Chair's Memorandum to Parties (8/21/01). [EB #790]
- * Recusal request denied for failure to submit any information that Board members had pecuniary interest related to any aspect of project, personal relationship with any party, or bias or prejudice against any party. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (2/4/97). [EB #666M1]

* Contrary rulings alone, no matter how numerous or erroneous, do not suffice to show bias or prejudice. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (2/4/97). [EB #666M1]

* Where son of Board member has represented party to a past appeal, but has not participated in such appeal, member has no conflict of interest. *L & S Associates*, #2W0434-8-EB (11/24/92). [EB #557M2]

* When quasi-judicial decision maker is disqualified by bias or prejudice to exercise such functions as are required by law, and his jurisdiction is exclusive and there is no legal provision for calling in substitute, "rule of necessity" allows participation of another decision maker (who has no actual bias or prejudice but might be disqualified for another reason). *Okemo Mountain, Inc.*, #2S0351-12A-EB (1/18/91). [EB #471M2]

333. Prehearing Conference

* Board may choose to hold either a hearing or prehearing conference. *Michael Caldwell*, #5L1199-EB (Altered) (5/13/95). [EB #619]

334. Chair's Preliminary Rulings

* Chair has authority to issue preliminary ruling proposing dismissal of incomplete petition for revocation. *Re: Forestdale Heights, Inc.*, #4C0329-EB (Revocation), Chair's Proposed DO at 3 (12/20/00); made final in DO (1/3/01) and Corrected Order (1/4/01).

* Board will approve or reject a preliminary decision without a hearing where parties fail to request a hearing a designated deadline. *Eaglewood XI, Ltd.*, #9A0151-EB (2/18/86). [EB #279]

335. Discovery / Access to property (see 1006.5)

* Motion to compel inspection granted where Appellant has party status under Criteria 1(G) and wishes to enter land to inspect wetland for purpose of arguing wetland should be categorized as significant. *In re Costco Act 250 Permit Amendment*, #143-7-09 Vtec, Entry Order (10/14/09).

* Discovery is a broad litigation tool, authorizing parties to make various inquiries "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." V.R.C.P. 26(a). Discovery is not even limited to evidence that would be admissible at trial; it may be had even of information that isn't admissible, so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Inspection and entry upon lands for discovery purposes is specifically governed by V.R.C.P. 34. *In re Costco Act 250 Permit Amendment*, #143-7-09 Vtec, Entry Order at 2 (10/14/09).

* Structure and purpose of Act 250 imply power to compel applicant to grant site access to other parties regarding its application. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

336. Motions

336.1 To dismiss (see [511](#), [283.2](#) and [552.6](#))

* Dismissal is a severe measure which should only be imposed in circumstances where it is clearly warranted. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO at 3 (6/19/01); *Kapitan Gravel Pit*, DR #388, DO at 3 (9/8/00).

* Consideration of dismissal is discretionary. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd, In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]; *Leo A. and Theresa A. Gauthier and Robert Miller*, #4C0842-EB (12/10/90). [EB #495M]

336.1.1

Who may file

* Board may dismiss an appeal on its own or party's motion, consistent with the law or Board rules. *Re: Wright/Morrissey Realty Corp.*, #4C1070-EB and #4C1071-EB, DO (10/18/01). [EB #788]

336.1.2

Grounds

* On appeal, there is no requirement that applicant must file its Act 250 application; applicant must only produce enough evidence to allow Board to reach positive findings under criteria on appeal. *Main Street Landing Company and City of Burlington*, Land Use Permit #4C1068-EB, FCO at 4 (11/20/01). [EB #790]

* Grounds for dismissal: (1) bad faith or deliberate and willful disregard for the Board's orders; and (2) prejudice to the party seeking the dismissal. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO at 3 - 4 (6/19/01); *Kapitan Gravel Pit*, DR #388, DO at 3 (9/8/00).

* Board is hesitant to dismiss appeal or petition because of a failure to comply with the Chair's Orders. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO at 3 (6/19/01)

* A failure to comply with a Chair's or Board's Order is prejudicial to the fair and efficient administration of Act 250. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO at 5 (6/19/01).

* Failure to comply with Board's Order or Rules may lead to dismissal. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO (6/19/01); *Kapitan Gravel Pit*, DR #388, DO (9/8/00); *Bernard and Suzanne Carrier*, #7R0639-EB (6/22/87). [EB #333]

* Dismissal is appropriate where petitioner fails to meet burden of production in single-party DR proceeding. *Re: Vermont Verde Antique International, Inc.*, DR #387, DO at 3-4 (2/2/01), *rev'd on other grounds, In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

* Dismissal is appropriate where appellant acknowledges jurisdictional defect in Commission decision. *Re: Stratton Corporation*, #2W0519-17(Revised)-EB, DO at 5-7 (1/10/01).

* The remedy for noncompliance with pre-filed testimony requirements is to disallow such testimony, not to dismiss the appeal. *Elwood and Louise Duckless*, #7R0882-EB (1/4/93). [EB #555M2]

* There must be a specific authorization for dismissal in the statute or Rules. *Rome Family Corporation*, #1R0410-3-EB (5/2/89). [EB #416M1]

336.1.2.1 For procedural defect

* Failure to fully comply with any subsequent procedural step, such as defective service, may allow dismissal, but does not require dismissal of a petition or notice. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 16 (7/30/10); and see *Re: Clearwater Realty*, DR #318, FCO at 9 (9/27/96) (refusing to dismiss a request for declaratory ruling that was submitted within the filing deadline, despite the fact that it was not properly served on all parties and despite the fact that the rule was silent as to whether other procedural defects required dismissal)

* Dismissal of a case based on subsequent procedural defects is generally only warranted when it is found that a party acted in “bad faith or deliberate and willful disregard for the [tribunal’s] orders” and that there has been “prejudice to the party seeking the dismissal.” *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 16 (7/30/10), citing *Kapitan*, Decl. Ruling #388, Dismissal Order, at 3 (citing *John v. Med. Ctr. Hosp. of Vt., Inc.*, 136 Vt. 517, 519 (1978)).

336.1.3 Sufficiency of facts / need for hearing

* Motion to dismiss petition for DR is denied where giving the benefit of all reasonable doubts and inferences to the Petitioners, genuine issues of material fact exist. *City of Burlington (Waterfront Skate Park)*, DR #380, MOD at 5 (9/1/99).

* Official notice used to fulfill requirement that a motion to dismiss be supported by findings of fact to explain and support the dismissal. *State of Vermont Agency of Transportation (Williston Area Improvements)*, DR #311 (1/31/96), *aff'd*, *In re State of Vermont Agency of Transportation (Williston Area Improvements)*, No. 96-109 (Vt. S. Ct. 10/31/96).

* When Board must find facts on involuntary dismissal issue, it is not required to take evidence in the light most favorable to non-moving party. *Putney Paper Company, Inc.*, #2W0436-6-EB (2/2/95). [EB #583]

* Board is required by its own rules to find facts in a contested dismissal. *Putney Paper Company, Inc.*, #2W0436-6-EB (2/2/95). [EB #583]

* Board need not render decision on motion to dismiss prior to convening hearing. *Larry and Diane Brown*, #5W1175-EB & #5W1175-1-EB (9/15/94). [EB #591M2]

336.1.4 Consistency with goals of Act 250 / prejudice to public interest or others

- * Board has discretion to reject a withdrawal/dismissal of appeal if such would prejudice the public interest. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 7 (6/17/04) [EB #828]; *Re: Wright/Morrissey Realty Corp.*, #4C1070-EB and #4C1071-EB, DO (10/18/01). [EB #788]
- * When Petitioner seeks to withdraw DR petition (from JO that finds jurisdiction) and no party objects, dismissing petition does not prejudice public interest. *Re: Thomas Stacy, d/b/a Action Towing Service*, DR #400, DO at 2 (6/9/04)
- * Dismissal of DR will not thwart the goals of Act 250 where challenged JO would require Act 250 review of pre-existing quarry. *Re: Vermont Verde Antique International, Inc.*, DR #387, DO at 8-9 (2/2/01), *rev'd on other grounds, In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).
- * Board dismisses petition, without finding prejudice to party seeking dismissal where petitioners failure to notify other parties of filing of petition meant that there could be no party to seek dismissal. *RE: Kapitan Gravel Pit*, DR #388, DO at 4 - 5 (9/8/00).

336.1.5 Mootness of motion

- * Where DR petition has been filed and landowner voluntarily obtains a permit and then moves to dismiss petition as moot, Board conditions dismissal on implied concession, by virtue of landowners obtaining permit, that jurisdiction over parcel exists. *P&H Senesac, Inc.* DR #376, DO at 3 - 5 (6/22/00).
- * Motion to dismiss is moot where the applicant has ceased the project. *P & H Transportation Co., Inc.*, #3R0569-1-EB (12/1/95). [EB #638]

336.1.6 Oral argument (see [443](#))

- * If requested by party, Board shall convene oral argument before deciding a motion to dismiss. *Stokes Communication Corp.*, #3R0703-EB (2/11/93). [EB #562M1]; *Talon Hill Gun Club, Inc. and John Swington*, #9A0192-EB (Revocation) (2/8/93). [EB #567M1]

336.1.7 Cases

- * Motion to dismiss denied where appellants established sufficient nexus between project and tree cutting in buffer separating their properties from project. *Hector LeClair d/b/a Forestdale Heights*, #4C0329-17-EB (2/25/99). [EB #711].
- * Board denied motion to dismiss where applicants had met burden of proof with respect to noted deficiencies by redesigning proposal to include requirements of preparation and implementation of re-vegetation plan. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (8/14/97). [EB #666]

- * Waste Facility Panel may consider dismissal of any matter before it for reasons provided by the Board Rules, by statute, or by law. *Rapid Rubbish Removal, Inc.*, #CA-721-WFP (6/12/97). [WFP #29]
- * Waste Facility Panel concludes that the Secretary did not apply 10 V.S.A. § 6605f(a) retroactively and denies motion to dismiss. *Rapid Rubbish Removal, Inc.*, #CA-721-WFP (6/12/97). [WFP #29].
- * Claim that the State is estopped is not a basis for dismissing a request for a jurisdictional ruling filed by an adjoining landowner. *Triple M Marketplace*, DR #274M1 (1/15/93).
- * Petition for DR not dismissed where the petitioner failed to timely file prefiled testimony in accordance with scheduling memorandum. *Marcel Roberts and Noel Lussier*, DR #239 (7/2/91).
- * Rule 34 does not provide that Board may reject without an evidentiary hearing an appeal from a decision on an amendment application on the ground that the proposed amendment would simply correct noncompliance with an existing permit. *Rome Family Corporation*, #1R0410-3-EB (5/2/89). [EB #416M1]

336.2 Motion For More Definitive Statement

- * Motion for More Definitive Statement denied, where notice of appeal has a summary of the evidence which adequately provides other parties with notice of arguments that opponent intends to present. *Main Street Landing Company and City of Burlington*, Land Use Permit #4C1068-EB, PHCRO and CPR at 3 & 4 (8/2/01). [EB #790]

336.3 Motion For Summary Decision

- * Because EBR 23 is premised on Vermont Rule of Civil Procedure 56, it is appropriate for the Board to use the standard for summary judgment adopted by the Vermont Supreme Court, which allows a decision on summary judgment "if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *Re: Spruce Lake Association, Inc.*, DR #433, MOD at 4 (2/4/05), citing *Hedges v. Durrance*, 834 A. 2d. 1, 3 (Vt. 2003).
- * Motion for summary decision denied where undisputed facts are insufficient to determine whether physical change to permitted project has potential to cause significant Act 250 impact. *Re: George E. Benson, Sr. and Janice Benson*, DR#432, MOD at 6-7 (8/6/04).
- * Summary decision denied where undisputed facts insufficient to determine whether recreational trails project was for state or commercial purpose. *Re: Vermont Association of Snow Travelers (VAST)*, DR#430, MOD at 4 (7/30/04).

337. Mootness

- * The mootness doctrine also requires that there be an actual controversy in existence at all stages

of review. *LaFrance v. Environmental Board*, 167 Vt. 597, 598 (1998)(mem.); *In re Barlow*, 160 Vt. 513, 518 (1993).

* Even if the mootness argument is not raised at the trial court level, Supreme Court will not adjudicate any part of an appeal that is not based on a live controversy. *LaFrance v. Environmental Board*, 167 Vt. 597, 598 (1998)(mem.).

* As a general rule, a case is moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *LaFrance v. Environmental Board*, 167 Vt. 597, 598 (1998)(mem.); *In re Barlow*, 160 Vt. 513, 518 (1993), quoting *In re Moriarty*, 156 Vt. 160, 163 (1991).

* A case can become moot because the appellant obtains relief by another means, but any alternative relief must be complete so that nothing further would be ordered by the court. *In re Barlow*, 160 Vt. 513, 518 (1993).

* Issue of timeliness of filing motion for hearing moot and to reach issue would be to make an impermissible advisory opinion. *Ronald J. Placzek and John S. Placzek*, #154-8-09 Vtec, Decision and Order on Pending Motions at 12 (11/25/09).

* Petitioner can voluntarily moot its DR petition by obtaining a permit for the subject activity. *Re: Burlington Broadcasters, Inc., d/b/a WIZN*, DR #322, MOD (1/7/05); *P&H Senesac, Inc.*, DR #376, DO at 3 - 4 (6/22/00).

* Concession of jurisdiction and application for permit moots DR petition filed by party other than applicant. *CVPS Corporation / Roxbury*, DR #373, MOD at 6 (5/27/99).

* Appeal by opponents is moot where Commission had denied permit, and applicant had not timely sought reconsideration. *Manchester Commons Associates*, #8B0500-EB (Reconsideration) (12/18/96). [EB #658]

* Motion to stay is not rendered moot because applicant vacates project; motion continues to present a "live controversy" because compliance with permit conditions is required unless stayed. *P & H Transportation Co., Inc.*, #3R0569-1-EB (12/1/95). [EB #638]

* Application for permit does *not* moot applicant's request for DR. *In re Barlow*, 160 Vt. 513 (1993); compare, *Mount Mansfield Co., Inc. (Summer Concert Series)*, DR #269 (7/22/92).

* Whether case is moot depends on the continued existence, at all stages of review, of an actual controversy as to which the reviewing body can grant relief. *New England Kurn Hattin Homes*, #2W0082-4-EB (5/3/95). [EB #624M1]; *Johnson Lumber Company*, DR #263M1 (1/20/93); *Patten Corporation Northeast*, DR #261 (9/3/92).

* Demolition of a historic site did not render appeal of permit authorizing demolition moot because Board may impose conditions to mitigate adverse impact on historic site, or deny the application and order the site's restoration. *New England Kurn Hattin Homes*, #2W0082-4-EB (5/3/95). [EB #624M1].

* "Actual controversy" exists even though historic structure building was demolished prior to appeal, as a conclusion that Board cannot grant effective relief because of demolition would mean that applicants can destroy a protected resource and then claim the matter is moot, thereby controverting purposes of Act 250. *New England Kurn Hattin Homes*, #2W0082-4-EB (5/3/95). [EB #624M1].

* Fact that petitioner has filed permit application for subdivision does not render DR petition moot, where petition concerns clearing and road construction which occurred prior to filing of application. *Johnson Lumber Company*, DR #263M1 (1/20/93).

338. Notice

* Commission must provide general notice, by newspaper publication, and notice to certain persons designated by statute and by Board rule. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).

* Adjoining property owner whose interests would be directly affected was entitled to notice of the JO and the DR proceeding. *Re: George E. Benson, Sr. and Janice Benson*, DR #432, MOD (2/4/05).

* Board's obligation to provide copies to all parties is absolute and does not depend upon the criteria for which a party has received party status. *Mt. Mansfield Company*, #5L1125-10-EB (7/29/97). [EB #612M3]

* Corporation had notice of application denial where ANR provided written denial to corporation's president and sole shareholder. *Rapid Rubbish Removal, Inc.*, #CA-721-WFP (6/12/97). [WFP #29]

* Existence of 30-day appeals period provision necessarily implies that period is triggered upon notice of decision, as, without notice, person cannot know that decision exists to be appealed. *Triple M Marketplace*, DR #274M1 (1/15/93).

* Notice of an addition to a project is not the same as notice of administrative determination that such addition does not require a permit. *Triple M Marketplace*, DR #274M1 (1/15/93).

* Towns and town planning commissions are distinct entities, separately entitled to notice. *Rome Family Corporation*, #1R0410-3-EB (10/11/90) [EB #416]; *Pelham North, Inc.*, #3W0521-1-EB (4/24/89). [EB #393].

* Because planning commission was provided notice of the initial application, Commission had jurisdiction over such application. *Pelham North, Inc.*, #3W0521-1-EB (4/24/89). [EB #393]

* Applicant's failure to notify planning commission of application, voids Commission's findings and conclusions with respect to such applicatoin. *Pelham North, Inc.*, #3W0521-1-EB (4/24/89). [EB #393]

* Coordinators must make all reasonable efforts to provide notice to adjoiners. *Richard & Sandra Conway*, #1R0632-EB (9/1/88), *aff'd*, *In re Richard & Sandra Conway*, 152 Vt. 526 (1989). [EB #370]

* Where adjoining owners did not receive notice and thus did not timely request a hearing, they are entitled to a hearing. *Richard & Sandra Conway, #1R0632-EB (9/1/88), aff'd, In re Richard & Sandra Conway, 152 Vt. 526 (1989).* [EB #370]

* Public notice is not required before a permit extension is granted. *Agency of Transportation (Belvidere Project), #5L0083-2-EB (9/13/79).* [EB #114]

* Appeal dismissed where appellant failed to notify all statutory parties. *Loomis J. Grossman, Jr., #700034 (10/10/71).* [EB #13]

338.1. Sufficiency of

* Notice to adjoining landowners is not statutorily required; rather the decision to provide personal notice to adjoining landowners is vested in the discretion of the district commission. *In re White, 172 Vt. 335, 341 n.4 (2001); 10 V.S.A. § 6084(b); EBR 10(F).*

* Since there is no "liberty" or "property" interest involved that is protected by the Fourteenth Amendment, and thus requiring full due process notice and hearings protection, constructive notice by publication to adjoining landowners is constitutionally sufficient. *In re Great Waters of America, Inc., 140 Vt. 105, 109-110 (1981).*

* Considerations of due process entitle all interested parties to the best notice possible, or that notice which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Committee to Save the Bishop's House, Inc., v. MCHV, Inc., 136 Vt. 213, 216 (1978),* quoting *Mullane v. Central Hanover Bank & Trust, Co., 339 U.S. 306, 314, (1950).*

* Oral notice does not constitute the best possible notice given the required written and detailed notice contemplated by 3 V.S.A. § 809 and 10 V.S.A. § 6084(a). *Committee to Save the Bishop's House, Inc., v. MCHV, Inc., 136 Vt. 213, 216 (1978).*

* Where notice to parties was inadequate (if not nonexistent), Board was without jurisdiction to determine the rights of parties in DR proceeding. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc., 136 Vt. 213, 216 (1978).*

* No abuse of discretion by Commission's failure to provide nearby landowners with formal notice of application prior to hearing. *In re Great Eastern Building Co., Inc., 132 Vt. 610, 612 (1974).*

* Notice was adequate where permittee received copies of the neighbor's complaints, was apprised by the Board in a MOD, was sent a notice of petition and hearing. *Lawrence White, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Rev), MOD, (7/24/98).* [EB #647], *aff'd, In re White, 172 Vt. 335 (2001).*

*Where party is denied opportunity to respond due to failure to mail relevant materials, Board's order is void. *Mt. Mansfield Company, #5L1125-10-EB (7/29/97).* [EB #612M3]

- * Respondents who lease land but retain fee ownership of quarry tract are obligated to notify all adjoining; failure to do so voids issued permit. *Charles and Barbara Bickford*, #5W1093-EB (4/12/93). [EB #568M]
- * Failure of applicant to provide complete and accurate list of adjoining property owners, results in remand to Commission. *Winooski Housing Authority*, #4C0857-EB (4/30/91). [EB #507]
- * Providing copies to town manager does not provide notice to local planning commission, which is a separate party entitled to receive its own copies. *Pelham North, Inc.*, #3W0521-1-EB (4/24/89). [EB #393]
- * Although Commission failed to publish notice in a newspaper of applicant's request, appellants received actual notice and error was harmless. *John A. Russell Corporation*, #1R0257-1-EB (11/30/83). [EB #212M]
- * Commission notice was inadequate where it did not list involved lands, and party who owned property adjacent to such lands was not notified. *Eugene Ettlinger*, #2W0543-EB (12/8/82). [EB #191]

339. Authority / Discretion to provide

- * Commission must provide general notice, by newspaper publication, and notice to certain persons designated by statute and by Board rule. *In re Juster Assoc.*, 136 Vt. 577, 580 (1978).
- * Commission, not Coordinator or other individual officers, is vested with sole discretionary authority over the provision of notice to adjoining. *In re Conway*, 152 Vt. 526, 530 (1989).
- * 10 V.S.A. § 6084(a) and Act 250 Rule 10(F) allow the Commission to authorize an applicant to provide a partial or limited list of adjoining, as appropriate, and allow the Commission to notify persons who are not adjoining. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 7 (1/28/11).
- * Applicants must only provide a list of adjoining landowners to the district commission, any additional persons the District Commission deems appropriate to receive notification, is left to the determination of the District Commission. *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 7 (1/28/11).
- * A determination of an individual as an "adjoining property owner" is relevant only in terms of the notice which must be provided *In re Omya, Inc.*, No. 137-8-10 Vtec, Decision at 7 (1/28/11).

340. [Reserved]

341. Prehearing Orders

- * Prehearing Orders often reframe issues differently than those framed by an appellant's Notice of Appeal; fact that the Prehearing Order in this case may have framed the issue more broadly than the appellants framed it is of no import; it is the issue as framed by the Prehearing Order that is the

issue in this case, not the issue as framed by the appellants. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 (9/3/03) [EB #828].

* Petition for DR not dismissed where the petitioner failed to timely file prefiled testimony in accordance with scheduling memorandum. *Marcel Roberts and Noel Lussier*, DR #239 (7/2/91).

* Deadlines in prehearing order will not be extended where attorney made no attempt to comply with them. *John Kennedy and Jeffrey Kilburn*, #8B0370-2-EB (6/3/88). [EB #382M]

* Board has authority to impose reasonable requirements on parties, including the submission of pre-filed testimony, to ensure that proceedings will be conducted in a judicious, fair, and expeditious manner. *Bernard and Suzanne Carrier*, #7R0639-EB (6/22/87). [EB #333]

* In the interest of fairness to permit participation by all affected parties, a waiver of filing deadlines imposed by prehearing order may be justified. *Vermont Talc/OMYA, Inc.*, #2W0551-1-EB (6/21/85). [EB #238]

342. [Reserved]

343. Settlement (see [464](#))

* Because Board is charged to protect and conserve the lands and environment of the state, it has obligation to review any settlement reached between parties, to ensure that the public interest is not prejudiced. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 5- 6 (6/17/04) [EB #828]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 34 (3/8/02)[EB #785]; *Madeline W. Walker and Estate of Roland J. Walker (Slate Quarry)*, DR #356, FCO at 3 (1/17/02); *Brewster River Land Co., LLC.*, #5L1348-EB, FCO at 10 (2/22/01). [EB #761] *Ronald L. Saldi*, #5W1088-1-EB, MOD at 3 (10/1/96); *Cersosimo Lumber Co.*, #2W0957-EB (11/29/95). [EB #628]; *Pico Peak Ski Resort, Inc.*, #1R0265-12-EB (11/22/95). [EB #622]; and see *Rockwell Park Associates and Bruce J. Levinsky*, #5W0772-5-EB, DO (2/17/94); *H.A. Manosh Corp.*, DR #247 (12/13/91); *Inn at Jamaica, Inc.*, #2W0681-EB (1/28/87). [EB #317]; *Institute for Social Ecology*, #3W0497-EB (1/22/88). [EB #318] *Berlin Associates*, #5W0584-2-EB (1/23/85). [EB #237]

* Public policy strongly favors settlement of disputed claims without litigation. See 10 V.S.A. § 6085(e) and EBR 16(D); *Dutch Hill Inn., Inc. v. Patten*, 131 Vt. 187, 192 (1973); *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 5- 6 (6/17/04) [EB #828]; *Re: Haystack Highlands, LLC.*, #700002-10D-EB, FCO at 3 (6/19/03). [EB #812]; *Madeline W. Walker and Estate of Roland J. Walker (Slate Quarry)*, DR #356, FCO at 3 (1/17/02); *Brattleboro Chalet Motor Lodge*, #4C0481-2-EB (10/17/84). [EB #231]; *N.E. Tel. & Tel. and CVPS*, #1R0436-1-EB (5/14/82). [EB #176]

* Board has the obligation to review any settlement reached between the parties. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 5- 6 (6/17/04) [EB #828]; *Re: Haystack Highlands, LLC.*, #700002-10D-EB, FCO at 3 (6/19/03) [EB #812]; *Re: Cersosimo Lumber Co.*, #2W0957-EB, FCO at 3 (11/29/95). [EB #628]

* Settlement agreement must be reviewed to determine whether an affirmative finding can be

made under all criteria on appeal, and Board need not accept agreement if necessary affirmative findings cannot be made. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 5- 6 (6/17/04) [EB #828]; *Re: Haystack Highlands, LLC.*, #700002-10D-EB, FCO at 3 (6/19/03). [EB #812]; *Faucett Builders, Inc.*, #4C0763-2-EB (8/6/96). [EB #646]

* Board need not accept settlement if it contravenes any of the Act 250 criteria. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 5- 6 (6/17/04) [EB #828]; *Re: Haystack Highlands, LLC.*, #700002-10D-EB, FCO at 3 (6/19/03) [EB #812]; *Cersosimo Lumber Co.*, #2W0957-EB, FCO at 3(11/29/95) [EB #628]; *Pico Peak Ski Resort, Inc.*, #1R0265-12-EB, FCO at 4 (11/22/95)[EB #622]; *Andrew and Peggy Rogstad*, #2S1011-EB, FCO at 4 (12/12/96). [EB #662].

* When there has been an appeal from a Commission decision which grants a permit, a settlement agreement which provides that a permittee will be bound by conditions which are more restrictive than those imposed by the Commission and which will result in greater protection to the environment, need not be accompanied by additional evidence on which the Board can base Findings of Fact, which can then, in turn, form the basis for the Board to make positive Conclusions of Law on the Criteria. Rather, the Board can rely upon the Findings which appear in the Commission's decision. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 6 (6/17/04) [EB #828]

* Where a stipulation by the parties results in a request to the Board to eliminate or relax conditions imposed by a Commission permit, the Board requires that the parties provide it with evidence or stipulated findings to support such a request. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 6- 7 (6/17/04) [EB #828]; *Re: Lawrence W. and Barbara Young*, #6F0518-EB, FCO at 3 -4 (10/1/01)

* Settlement agreement accepted, where proposed changes constitute additional restrictions on project, Commission's permit remains sound, and there will be no adverse impact on Act 250 protected values. *Andrew and Peggy Rogstad*, #2S1011-EB (12/19/96). [EB #662]

* After finding that stipulation of parties was not contrary to purposes and requirements of Act 250, Board grants motion to dismiss appeal. *Burlington Housing*, #4C0463-EB (10/15/81). [EB #162]

344. [Reserved]

345. Subpoenas and access orders

* Witness who will only appear if subpoenaed need not submit prefiled testimony. *Brewster River Land Co., LLC*. #5L1348-EB, MOD at 6-7 (9/18/00). [EB #761]

* Board denies request to issue subpoena where (1) petitioner fails to demonstrate why information sought is material to case or that it would likely lead to discovery of material evidence and (2) compliance with subpoena would be undue burden. *Lake Champagne Campground*, DR #377, CPR at 3 (8/20/99).

* Objection that testimony of subpoenaed Coordinator should have been prefiled was without merit and untimely, when made at post-decisional phase of proceeding. *Lawrence White*, #1R0391-EB, #103091-3-EB, #1R03091-4-EB, #1R03091-5-EB, #1R03091-5A-EB, and #1R0391-6-EB (Rev), MOD,

(7/24/98). [EB #647], *aff'd, In re White*, 172 Vt. 335 (2001).

* Commission chair or Commission may compel a person's attendance by subpoena. *Sugarbush Resort Holdings, Inc.*, #5W1045-15-EB (7/15/97). [EB #679]

* Before subpoena is issued, the information sought must not be otherwise available; subpoena will issue for: (i) testimony, upon a demonstration that the sought after testimony is reasonably likely to be relevant; or (ii) production of documents, upon a demonstration that the sought after documents are (a) reasonably likely to be relevant, or (b) significantly likely to lead to the discovery of other relevant evidence. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96). [WFP #31]

* Statement that the information sought is "not to my knowledge available" was insufficient evidence of a reasonable search of the publicly available records. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96). [WFP #31]

* Before the Panel will issue an access order, the person seeking the order must demonstrate that the information sought by the testing is necessary, reasonable in scope, and relevant to the issues on appeal. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96). [WFP #31]

* Since evidence could be elicited from other witnesses, Board denies request for subpoena of Board staff in except in the most exceptional cases. *Lilly Propane, Inc.*, #2S0859-3-EB (11/3/95). [EB #634]

* Board denies request for compensation for expenses associated with subpoenas. *Putney Paper Company, Inc.*, #2W0436-7-EB (11/3/95). [EB #621]

* Subpoena will only issue to compel testimony or production of documents upon demonstration that testimony/documents are reasonably likely to be material. *Putney Paper Company, Inc.*, #2W0436-7-EB (11/3/95) [EB #621]; *Interstate Uniform Services*, DR #147 (9/26/84).

* It is unclear whether Board's authority under 10 VSA § 6027(a) extends to ruling on motions to quash subpoenas, but to extent that it does, Board may deny motion to quash and order permittee to comply with another party's subpoena. *Stokes Communication Corp.*, #3R0703-EB (4/5/93). [EB #562M4]

* An administrative subpoena will be issued for applicant's former employee who may provide testimony concerning phases of residential subdivision. *Black Willow Farm*, DR #202M (5/3/89).

C. Evidence

381. General (see [828.2](#))

* Essence of Board's inquiry is a careful sifting of the evidence offered by all sides. *In re Crushed Rock, Inc.*, 150 Vt. 613, 625 (1988).

* Administrative tribunals can base their decisions on a broader range of evidence than courts can. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In re Quechee Lakes Corporation*, 154 Vt. 543, 552 (1990).

* The Environmental Court does have the authority to compel an applicant to undertake significant destructive testing (blasting). *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 14 (2008).

* Board will not search the record for evidence to support a party's claim. *Catamount Slate, Inc. et al.*, DR #389, MOD at 3 n.4 (2/25/02), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04); and see *In re Commercial Airfield*, 170 Vt. 595, 595 n.1 (2000)(mem.) (inadequately briefed arguments will not be considered by the Court).

* Board denies a request to define the scope of relevant evidence under criteria on appeal with respect to secondary growth impacts prior to submission of any evidence; parties can provide evidence with respect to all of the project's impacts, including potential or actual cumulative impacts from secondary development, under the appealed criteria as each party deemed appropriate. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680]

* Absent a compelling reason to do so, the Board will not limit what evidence may be offered, or what issues may be decided under a criterion, relative to a project on appeal prior to the convening of an evidentiary hearing. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680]

* An entity is presumed to be in the best position to know its own legal status. *OMYA, Inc.*, #1R0271-9-EB (2/7/91). [EB #482]

* A permittee is in the best position to know the details of its processes. *OMYA, Inc.*, #1R0271-9-EB (2/7/91). [EB #482]

* Decisions must be based exclusively on evidence entered into the record. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

381.1 Failure to present to Commission

* The Environmental Court does have the authority to compel an applicant to undertake significant destructive testing (blasting). *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 14 (2008).

* Failure to present certain evidence to Commission does not bar a party from presenting that evidence in a *de novo* appeal. *Re: Vermont Verde Antique International, Inc.*, DR #387, DO at 3-4 (2/2/01), *rev'd on other grounds, In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

381.2 What is / is not evidence

* Site visit observations on which the fact-finder intends to rely must be placed on the record in order to preserve the right of rebuttal and to facilitate review. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In re Quechee Lakes Corporation*, 154 Vt. 543, 552 (1990); *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on Request to Alter at 7-8 (3/27/08), citing V.R.E.C.P. 2(d)(2)(ix); *In re: Vermont RSA Limited Partnership d/b/a Verizon Wireless*, 2007 VT 23 ¶ 3 (referencing observations made during Board site visit); and *In re Herrick*, 170 Vt. 549, 551 (1999) (mem.) (passing reference in trial court decision to site visit, with adequate facts in the record to support findings, does not constitute error).

* Filing of proposed conditions did not rise to level of introducing new evidence for purposes of analyzing compliance. *David and Nancy Brooks*, #5W0743-2-EB (Altered) (5/8/97). [EB #649]

* Proposed findings of fact, conclusions of law, or conditions, of themselves, are not evidence. *David and Nancy Brooks*, #5W0743-2-EB (Altered) (5/8/97). [EB #649]

* Conclusions of other State agencies are not evidence on which Board can make affirmative findings. *Landmark Development Corporation*, #4C0667-EB (7/9/87). [EB #320]

381.3 What evidentiary rules apply

* The Vermont Rules of Evidence are generally applicable in administrative proceedings. *In re White*, 172 Vt. 335, 348 (2001); 3 V.S.A. § 810(1); *Nelson Lyford*, DR #341 (12/24/97) (the rules of evidence as applied in civil cases shall be followed in contested cases.)

* Administrative bodies have greater latitude than courts in the nature of evidence that they may consider. *In re White*, 172 Vt. 335, 348 (2001); *In re Quechee Lakes Corp.*, 154 Vt. 543, 552 (1990); 3 V.S.A. § 810(1); *Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB (Revocation), FCO at 3-4 (4/4/03), *motion to alter denied*, MOD (6/9/03) [EB #792R] (administrative tribunals can base their decisions on a broader range of evidence than courts can, so Board denied motion to exclude scientific evidence pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

* The latitude that administrative bodies have in the nature of evidence that they may consider does not imply that agencies are also free to exclude relevant evidence. *In re White*, 172 Vt. 335, 348 (2001).

381.4 Right of parties to present

* APA provides that "[o]pportunity shall be given all parties to respond and present evidence and argument on all issues involved." *In re Crushed Rock, Inc.*, 150 Vt. 613, 625 (1988); *In re Greg Gallagher*, 150 Vt. 50, 52 (1988); 3 V.S.A. § 809(c).

* Offer of proof does not give party the opportunity to "present evidence and argument" required by 3 V.S.A. § 809(c). *In re Crushed Rock, Inc.*, 150 Vt. 613, 625 (1988).

* Board's failure to give parties opportunity to present evidence is abuse of discretion. *In re Greg Gallagher*, 150 Vt. 50, 53 (1988).

* Board erred in making a key finding on a hotly contested issue after refusing to give applicant opportunity to submit evidence on the issue. *In re R.E. Tucker, Inc*, 149 Vt. 551, 554 (1988).

381.5 Use of relevant evidence

* It is inappropriate to prohibit the use of relevant evidence in a public regulatory process charged with determining the public interest. *In re Killington, Ltd.*, 159 Vt. 206, 211 (1992).

* Administrative tribunals can base their decisions on a broader, not narrower, range of evidence than courts can. *In re Quechee Lakes Corporation*, 154 Vt. 543, 552 (1990).

381.6 Errors in evidentiary rulings (see [828.3.4](#))

* Error in the exclusion of evidence leading to prejudice is grounds for a new hearing. *In re White*, 172 Vt. 335, 347 (2001).

382. Admissibility

* Board will not apply the evidentiary test for scientific evidence established by U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 6 (11/25/03). [EB#734M4]

* The speculative nature of secondary growth projections affects the weight of the evidence not its admissibility. *In Re Wal-Mart Stores, Inc.*, 167 Vt. 75, 82 (1997).

* Administrative tribunals can base their decisions on a broader, not narrower, range of evidence than courts can. *In re Quechee Lakes Corporation*, 154 Vt. 543, 552 (1990).

* "Many evidentiary rules exist in order to prevent juries from being unfairly influenced by testimony which may be at the edges of admissibility. The Board sits more as a judge, not a jury, and has the capacity, with the help of its legal staff, to screen out and not consider evidence which is truly improper and which should be excluded. Thus, while an objection may be proper and would lead to the exclusion of evidence in order to shield a jury from its influence, the Board has experience hearing cases and is thus not as likely to be unduly swayed by a questionable evidentiary offering. The Board therefore leans toward the side of admitting evidence and then, when considering it, giving it the weight, if any, that it deserves." *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 1 (9/28/01). [EB #785]

* APA criteria (3 V.S.A. § 810) determines admissibility of evidence before Board. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 5 (9/28/00). [EB# 739].

- * When prehearing objection asserts that an exhibit lacks foundation, Board will preliminarily sustain objection but will allow offering party opportunity lay proper foundation when exhibit is offered through a witness at hearing. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 1 (9/28/01). [EB #785]
- * If rebuttal testimony is responsive and relates to direct testimony, it is admissible. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 10 (9/28/01)[EB #785]; *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, # 5W0840-6-WFP, MOD at 4 (2/2/00).
- * Once Board determines that person has standing to file DR petition, ruling on merits is premature until hearing is convened and relevant evidence is accepted. *Putney Paper Company, Inc.*, DR #335 (5/29/97).
- * A report is inadmissible hearsay if its author is not present at the hearing to authenticate the document and be available for cross-examination. *Chester P. Denio*, #1B0036-2-EB (3/27/89), *aff'd*, *In re Denio*, 158 Vt. 230 (1992). [EB #362]
- * Board will exclude prefiled testimony that is hearsay. *Northshore Development, Inc.*, #4C0626-5-EB (12/29/88). [EB #391]
- * Testimony is not hearsay where it is not hearsay as a matter of law, and the Board concludes it is admissible. *Gary Savoie*, #2W0991-EB (1/3/96). [EB #632M]
- * Introduction into evidence of studies not identified at prehearing conference, which were underway at or shortly after the conference, will be barred because it could impose a hardship on other parties who would be deprived of an opportunity to respond. *Vermont Talc/OMYA, Inc.*, #2W0551-1-EB (6/21/85). [EB #238]
- * A certificate of compliance is properly admitted into evidence and the public record exemption of the rules of evidence. *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82). [EB #172].

382.1 Privileges

- * The assertion of a privilege by a petitioner does not require the Board to decide in the petitioner's favor. *Harland Miller III*, DR #253 (5/13/92).
- * Attorney-client privilege extends only to situations where information was acquired during rendering of professional legal services and not necessarily by circumstances of employment. *Harland Miller III*, DR #253 (5/13/92).

383. Burden of Proof / Production (see particular process)also criteria at [VIII.](#))

- * Regardless of who has the burden of proof on a particular issue, the applicant always has the burden of producing evidence sufficient to enable the Commission to make the requisite positive findings on all of the criteria. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on

the Merits at 5 (2/15/08). *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 18 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 17 n.4 (5/4/04) [EB #83], citing *Re: Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1, FCO (Revised) at 21 (9/21/90); *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 13 (4/13/04) [EB #814]; *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 43 (9/19/03); *Katzenbach Act 250 Permit*, 124-9-17 Vtec., Decision on the Merits (1/2/19).

* Act 250 requires the Board to make a finding on each factor, irrespective of the placement of the burden of proof. *In re Denio*, 158 Vt. 230, 237 (1992), citing 10 V.S.A. § 6086(a).

* The allocation of the burden of proof to opponents merely relieves the applicant of the "risk of non-persuasion." *In re Denio*, 158 Vt. 230, 237 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 553 (1990) (fact that a party has the burden of proof does not mean that he must necessarily shoulder it alone; it simply means that he, and not the other party, bears the risk of nonpersuasion).

* The allocation of the burden of proof to opponents means that in the absence of evidence on the issue, or where the evidence is indecisive, the issue must be decided in the applicant's favor. *In re Denio*, 158 Vt. 230, 237 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 553 (1990).

* The burden of proof allocations of Act 250 impose "no limits, direct or indirect, on the evidence the Board is allowed to consider in deciding whether a particular issue has been proved." *In re Denio*, 158 Vt. 230, 237 (1992), quoting *In re Quechee Lakes Corp.*, 154 Vt. 543, 553 (1990).

* Burden of proof is properly satisfied by the actual proof, "regardless of which party introduces the evidence." *In re Denio*, 158 Vt. 230, 237 (1992), quoting *In re Quechee Lakes Corp.*, 154 Vt. 543, 553 (1990); *In re McShinsky*, 153 Vt. 586, 589 (1990) (party's burden of proof may be satisfied by evidence introduced by any of the parties or witnesses).

* A party may be relieved of burden imposed on it by fact that the necessary proof is introduced by adversary. *In re Denio*, 158 Vt. 230, 237 (1992).

* As long as it is not the exclusive basis for Board's decision, evidence gathered by Board during site visit may satisfy the burden of proof. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In Re Quechee Lakes Corp.* 154 Vt. 543, 551 (1990).

* 10 V.S.A. § 6088 represents a legislative determination that the applicant should prove compliance with certain of the criteria but that any alleged burdens or impacts falling under the other criteria should be proved by the opposing parties. *In re Quechee Lakes Corp.*, 154 Vt. 543, 553 (1990).

* The burden of proof, i.e., the risk of non-persuasion, never shifts from the party on whom it is placed. *In re Quechee Lakes Corp.*, 154 Vt. 543, 553 (1990).

* Board may consider all evidence (and burden of proof is satisfied by the actual proof of the facts which need to be proved), regardless of which party introduced it, in determining whether a particular issue has been proven. *In Re Quechee Lakes Corp.* 154 Vt. 543, 553-54 (1990); *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration

11/13/92). [EB #471R]; *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]; *Norman R. Smith, Inc. and Killington, Ltd.*, #1R0593-1-EB (9/21/90) and (12/13/90) and *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (9/21/90) and (12/13/90), *aff'd, In re Killington, Ltd.*, 159 Vt. 206 (1992). [EB #349] [EB #349M] [EB #357] [EB #357M]

* The Environmental Court does have the authority to compel an applicant to undertake significant destructive testing (blasting). *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 14 (2008).

* The burden of proof consists of the burden of producing the evidence, and the burden of persuading the Board. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 5 (10/20/05), *aff'd, In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007), citing *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-274 (1994) (discussing burden of production and burden of persuasion); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 18 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 17 n.4 (5/4/04) [EB #83]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 13 (4/13/04) [EB #814]; *Re: Thomas Howrigan Gravel Extraction*, DR #358, FCO at 9 (8/30/99), citing *Re: Champlain Construction Co.*, DR #214, MOD at 2-4 (10/2/90); *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91); *Re: Applewood Corporation Dummerston Management*, DR #325 (9/28/96). [EB #472R]; *Finard-Zamias Associates*, #1R0661-EB (11/19/90) [EB #459]; *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). [EB #349] [EB #357]; *Berlin Associates*, #5W0584-9-EB (4/24/90). [EB #379]; *Pratt's Propane, Inc.*, #3R0486-EB (1/27/87). [EB #311M].

* Applicant had no obligation to present evidence or carry a burden of proof on those criteria which the Commission decided in its favor and which were not appealed. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 19 (11/24/04) [EB #838], citing *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590 (1993), citing *In re Killington, Ltd.*, 159 Vt. 206 (1992) (scope of a de novo hearing is limited to those issues raised in the notice of appeal); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990).

* The burden of proof generally consists of the burdens of production and persuasion. In Act 250, the burden of production means the burden of producing sufficient evidence on which to make positive findings under the criteria; the burden of persuasion refers to the burden of persuading the Board that certain facts are true. *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 17 n.4 (5/4/04) [EB #83], citing *Re: Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1, FCO (Revised) at 21 (9/21/90).

* Regardless of who has the burden of proof on a particular issue, the applicant always has the burden of producing evidence sufficient to enable the Board to make the requisite positive findings on all of the criteria. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 18 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 17 n.4 (5/4/04) [EB #83], citing *Re: Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1, FCO (Revised) at 21 (9/21/90); *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 13

(4/13/04) [EB #814]; *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 43 (9/19/03)

* The term burden of proof as used in Act 250 refers primarily to the burden of persuasion. In judging whether a party has met its burden of proof, the issue is not whether that party has offered evidence, but whether that party has persuaded the Board. *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]; *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]; *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). [EB #349] [EB #357]; *Berlin Associates*, #5W0584-9-EB (4/24/90). [EB #379]; *Pratt's Propane, Inc.*, #3R0486-EB (1/27/87). [EB #311M].

384. Compliance with Other Statutes (see [3.2](#))

385. Testimony / Exhibits

385.1 Form of (pre-filed)

* Parties are expected to prefile testimony and exhibits, both direct and rebuttal, in accordance with the schedule and terms of the Prehearing Conference Order. *In re White*, 172 Vt. 335, 344 (2001), noting *Re Lawrence White*, #1R0391-8-EB, PCRO at 5 (11/10/97).

* Board has authority to impose reasonable requirements on parties, including the submission of pre-filed testimony, to ensure that proceedings will be conducted in a judicious, fair, and expeditious manner. *Bernard and Suzanne Carrier*, #7R0639-EB (6/22/87). [EB #333]

385.1.1

When required

* Party need not prefile exhibits that it wants to use when it is cross-examining an adverse party or a (hostile) witness for such a party. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 8 - 9 (10/8/03). [EB #831]

* The remedy for noncompliance with pre-filed testimony requirements is to disallow such testimony, not to dismiss the appeal. *Elwood and Louise Duckless*, #7R0882-EB (1/4/93). [EB #555M2]

* The Board will dismiss an appeal where the parties fail to comply with such requirements. *Bernard and Suzanne Carrier*, #7R0639-EB (6/22/87). [EB #333]

* Where party intends merely to cross-examine witnesses, no pre-filed testimony is required; pre-file requirement applies to direct testimony of party. *Marcel Roberts and Noel Lussier*, DR #239 (7/2/91).

385.1.1.1

Subpoenaed witness

* Parties are not required to prefile testimony or exhibits for those witnesses that they must subpoena. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 8

(10/8/03) [EB #831]; *Brewster River Land Co., LLC*. #5L1348-EB, MOD at 6-7 (9/18/00). [EB #761]

385.1.2 Purpose of

*Testimony is pre-filed so that opposing parties have notice of the evidence that is to be presented, so that such opposing parties will not be prejudiced. *Norman R. Smith, Inc. and Killington, Ltd.*, #1R0593-1-EB (part I) (5/11/89) and *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (part II) (5/11/89). [EB #349] [EB #357]

385.2 Why filed

* Documents are to be entered into evidence during the hearing and be subject to evidentiary objections, and, documents must be entered this way in order to create presumptions. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd, In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

385.3 When filed

* Motion for leave to offer new exhibit denied where offer was made after deadline for filing exhibits without reason for lateness and exhibit was repetitious of other exhibits already before Board. *Main Street Landing Company and City of Burlington*, Land Use Permit #4C1068-EB, FCO at 4 (11/20/01). [EB#790]

* When ample opportunity existed to pre-file zoning ordinance, Board opted not to take official notice of document; requests for official notice should not be used to avoid the pre-filing of evidence. *Larry and Diane Brown*, #5W1175-1-EB (6/19/95). [EB #591]

* Board has authority to require applicants to submit plans prior to hearing. *Elwood and Louise Duckless*, #7R0882-EB (9/30/92).

* Rules 20(A) and (B) do not allow applicant to supplement a deficient application. *Berlin Associates*, #5W0584-9-EB (4/24/90). [EB #379].

* A hearing will not be reopened to hear evidence as to "new information" which was available before the close of the Board's proceeding. *Vermont Gas Systems, Inc.*, #4C0609-EB (1/30/86), *rev'd and orders vacated, In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #285]

385.3.1 Direct

* Filing pre-filed direct testimony is encouraged but not required. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 3 (2/17/2000).

385.3.2 Rebuttal

* If rebuttal testimony is responsive and relates to direct testimony, it is admissible. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 10 (9/28/01)[EB #785]; *Re: City of Montpelier and Ellery*

E. & Jennifer D. Packard, 5W0840-6-WFP, MOD at 4 (2/2/00); *Rapid Rubbish Removal, Inc.*, #CA-721-WFP (6/12/97). [WFP #29].

385.3.3 Surrebuttal

385.3.4 Order of filing (which party files first)

* Board may determine which party should prefile its evidence first. *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, MOD at 6 (9/27/04), *citing* VRE 611(a); *State v. Bessette*, 148 Vt. 17, 19 (1987)(trial court has "wide discretion in matters of trial conduct and evidentiary rulings"; "order of proof is in the discretionary control of the trial court")(cited in *State v. Venman*, 151 Vt. 561, 571 (1989)).

385.4 Withdrawal of

* A party may withdraw its own pre-filed testimony and exhibits over the objections of an opposing party. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 2 (3/27/2000).

385.5 Attendance of witness required

* A report is inadmissible hearsay if its author is not present at the hearing to authenticate the document and be available for cross-examination. *Chester P. Denio*, #1B0036-2-EB (3/27/89), *aff'd*, *In re Denio*, 158 Vt. 230 (1992). [EB #362]

* The testimony of a person in another proceeding has no bearing on evidence in an appeal where such person did not testify in the appeal proceeding. *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (9/21/90), *aff'd*, *In re Killington, Ltd.*, 159 Vt. 206 (1992). [EB #357]

* Where an applicant provides pre-filed testimony of a witness, but both the applicant and the witness do not appear at the hearing, such pre-filed testimony is inadmissible. *Raponda Landing Corp.*, #2W0604-3-EB (1/25/91). [EB #371]

386. Objections to

* Where Board does not base finding on challenged evidence, prejudice is not demonstrated. *In re Quechee Lakes Corp.*, 154 Vt. 543, 558 (1990).

* Where Chair denies evidentiary objection, objection must be renewed before the Board at the hearing or it is waived. *Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB, MOD on Motions to Alter at 5 (6/9/2003). [EB#792(R)]

* "Many evidentiary rules exist in order to prevent juries from being unfairly influenced by testimony which may be at the edges of admissibility. The Board sits more as a judge, not a jury, and has the capacity, with the help of its legal staff, to screen out and not consider evidence which is truly improper and which should be excluded. Thus, while an objection may be proper and would

lead to the exclusion of evidence in order to shield a jury from its influence, the Board has experience hearing cases and is thus not as likely to be unduly swayed by a questionable evidentiary offering. The Board therefore leans toward the side of admitting evidence and then, when considering it, giving it the weight, if any, that it deserves.” *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 1 (9/28/01). [EB #785]; and for a comprehensive review of several different grounds for objection, see *Main Street Landing Company and City of Burlington*, Land Use Permit #4C1068-EB, MOD at 2 & 3 (10/17/01). [EB #790]

* Board has broad discretion in deciding whether or not to admit testimony and has extensive experience hearing and weighing evidence from both lay and expert witnesses. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 2 (1/12/00). [EB# 739].

* Board excludes all clearly inadmissible testimony and will weigh the probative value of the remaining admitted testimony. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 2 (1/12/00). [EB# 739].

* Joint motion requesting oral argument on evidentiary objections is denied. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 2 (1/4/00). [EB# 739].

* Motions *in limine* do not serve a useful purpose in Board cases; since Board itself determines admissibility of evidence, such motion will not insulate Board from prejudicial evidence in the same manner that a judge may insulate a jury. *David Camara and Camara Slate*, DR #366, CPR (11/9/98).

* Remedy for noncompliance with pre-filed testimony requirements is to disallow such testimony, not to dismiss the appeal. *Elwood and Louise Duckless*, #7R0882-EB (1/4/93). [EB #555M2]

387. Official Notice

* Where the Board takes official notice of exhibits in Commission proceedings, it cannot exclude them in response to evidentiary objections. *In re White*, 172 Vt. 335, 347 (2001).

* Post-trial formal motion for judicial notice (official notice) of traffic evidence from previous Act 250 permits and applicable “umbrella” permits from nearby developments granted where no party disputed accuracy of permit copies offered, even though moving party merely requested judicial notice at trial. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 31-33 (1/20/10).

* Board can take official notice of earlier permits granted to permittee and application materials filed by permittee. *Re: Twin State Sand & Gravel, Inc.*, #3W0711-5-EB, FCO (Altered) at 15 - 16 (4/29/05) [EB #852], citing 3 V.S.A. 810(4) and *In re White*, 172 Vt. 335 (2001); *In re Denio*, 158 Vt. 230, 240 and 241 (1992); *Re: Central Vermont Public Service Corp. and Verizon New England (Jamaica)*, #2W1146-EB, FCO (Altered) at 4 (12/19/03). [EB#817]; *Re: Nehemiah Associates, Inc.*, #1R0672-1-EB (on Remand) (4/11/97), *aff'd*, *In re Nehemiah Associates, Inc.*, 168 Vt. 288 (1998);

* Request to take official notice of Commission permit and decision, town plan, and regional plan

made and granted at hearing. *Re: Central Vermont Public Service Corp. and Verizon New England (Jamaica)*, #2W1146-EB, FCO (Altered) at 4 (12/19/03). [EB#817]

* Request to take official notice of Commission permit and decision and regional plan made and granted at hearing. *Re: Central Vermont Public Service Corp. and Verizon New England (Guilford)*, #2W1154-1-EB, FCO at 3 (Altered) (12/19/03). [EB# 821]

* Notice may be taken of judicially cognizable facts in contested cases. *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 1 n.1 (1/16/03) (such as undisputed facts in the record) [EB #820]; *Nelson Lyford*, DR #341, FCO at 3 (12/24/97).

* Board declines to take official notice of document that is not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 2 (1/12/00)[EB# 739].

* In DR proceeding, the Board takes official notice of a final JO and an AOD between ANR and project operator, where facts are not subject to reasonable dispute, are capable of accurate and ready determination and have sources whose accuracy cannot reasonably be questioned. *Lake Champagne Campground*, DR #377, FCO at 13 (3/22/01). [D.R. 377]

* Exhibits were not within the ambit of official notice provision of the prehearing order and were not the type of documents which could be officially noted. *Lawrence White*, #1R0391-8-EB, MOD, (7/24/98). [EB # 689]

* Board could decide legal question based on facts found by Commission in proceeding below (because of parties' stipulation) and by taking official notice of Commission's decision, project application, and other related documents in Commission's file. *Stratton Corporation*, #2W0519-9R3-EB (1/15/98). [EB #688]

* Under VRE, a judicially noticed fact must be one not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *Nelson Lyford*, DR #341 (12/24/97).

* Board may take official notice of a judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. *Nelson Lyford*, DR #341 (12/24/97).

* Board may make findings of fact based on matters officially noticed. *Nelson Lyford*, DR #341 (12/24/97).

* When ample opportunity existed to pre-file zoning ordinance, Board opted not to take official notice of document; requests for official notice should not be used to avoid the pre-filing of evidence. *Larry and Diane Brown*, #5W1175-1-EB (6/19/95). [EB #591]

388. Presumptions

* Court gives ANR's technical determinations associated with work on a permit "substantial

deference,” even though this is not expressly stated in the appeals statute and ANR’s Indirect Discharge Renewal Permit was before the court on a separate, *de novo* appeal. *In re: Unified Buddhist Church, Inc.*, No. 191-9-05 Vtec, at 9 (1/2/08).

* Board gives substantial deference to technical determinations in ANR discharge permit that existing use is not in the waste management zone and that proposed increase in discharge will comply with the Vermont water quality standards. *Re: Village of Ludlow*, Findings of Fact and Conclusions of Law and Order, #2S0839-2-EB(Altered) at 13-16 (11/26/2003). [EB#826]

* Technical determinations made by ANR in issuing a permit entitled to a presumption under Board rules are entitled to substantial deference. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 23 (12/31/02). [EB #800]

* The standard for rebutting a straight presumption is a preponderance of the evidence, but to rebut a technical determination entitled to substantial deference, the opposing party must provide clear evidence. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 24 (12/31/02). [EB#800]

* ANR's issuance of storm water permit creates rebuttable presumption under Criterion 1(B). *Brewster River Land Co., LLC.*, #5L1348-EB, Findings of Facts, Conclusions of Law, and Order at 11 (2/22/01). [EB #761]

* When a presumption is rebutted, burden of proof with respect to the applicable criteria shifts back to applicant and the permit which created the presumption serves only as evidence that the project complies with the applicable criteria. *Herbert and Patricia Clark*, Application #1R0785-EB (4/3/97). [EB #652]; *Hawk Mountain Corporation*, #3W0347-EB (8/21/85), *aff'd in part / rev'd in part*, *In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251]

* Submission of a permit for a project is a rebuttable presumption for only that project; Board cannot accept permit for *existing* facility as presumption of compliance for *proposed* facility. *L & S Associates*, #2W0434-8-EB (6/2/93). [EB #557]; *Mount Mansfield Co., Inc. (Summer Concert Series)*, DR #269 (7/22/92).

* Fair process and reliable decision-making demand that applicants abide by chosen alternatives and that other agency permits be introduced in accordance with the procedure specified. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

* Board is permitted by statute to adopt rules which give presumptive effect to other State agency permits, and EBR 19 grants presumptions to various State and local permits but provides that they may be challenged and rebutted by parties or by the Board itself. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

* A letter from a State official does not create a rebuttable presumption. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

- * Documents are to be entered into evidence during the hearing and be subject to evidentiary objections, and documents must be entered this way in order to create presumptions. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd, In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2].
- * To receive a presumption, a final discharge permit must be entered into the record in accordance with the Rule. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd, In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2].
- * While ANR permits may be offered as presumptions that specific Act 250 criteria are satisfied. Board has independent authority to make findings under all criteria. *Barre Granite Association*, #5W0483-3-EB (3/27/89). [EB #376]
- * Board will apply standards regarding rebuttable presumptions in EBR 19 notwithstanding presumption standard in Vermont Rule of Evidence. *Juster Development Corp.*, #1R0048-8-EB (12/19/88). [EB #367]
- * Permits of other State agencies will not be accepted unless Board is satisfied that they result in compliance with Act 250 criteria; Board has independent authority to decide which regulations are applicable to review. *Hawk Mountain Corporation*, #3W0347-EB (8/21/85), *aff'd in part / rev'd in part, In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251]
- * Permit based on a WRB regulation which is the subject of a remand decision from Supreme Court cannot create rebuttable presumption in lieu of producing evidence. *Berlin Associates, Ltd.*, #5W0584-EB (4/13/83). [EB #195]
- * Obtaining a certificate of compliance from [ANR] creates rebuttable presumption that there will be no undue air pollution. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188]
- * Rebuttable presumption procedure merely operates to shift the burden of persuasion to the opposing party. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188].
- * A certificate as to drilled wells, when obtained, creates rebuttable presumption that a sufficient supply of potable water is available. *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82). [EB #172]
- * Opponent failed to rebut presumption created by certificate of compliance that septic disposal system satisfies State health regulations. *Topnotch Associates*, #5L0365-3-EB (4/13/81). [EB #151]

389. Witnesses

- * A "hostile witness" is one whose interests are contrary to the party who is conducting the examination. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 7 (10/8/03). [EB #831]
- * Objection to subpoena overruled where grounds for objection were that the subpoenaing party never prefiled testimony and timely notice of the intent to call the adverse witness was provided.

Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB, MOD at 3 (1/12/00). [EB# 739].

* Where Board denied appellant party status, and no other person had filed a timely appeal, appellant could not be called as Board's own witness, since Board lacked requisite jurisdiction to continue review of project. *Springfield Hospital, #2S0776-2-EB (8/14/97), sup. ct. appeal dismissed, In re Springfield Hospital, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]*

* Act 250 does not contain a provision which addresses the authority of the Board to disqualify a witness. In contested case proceedings, however, the Vermont Rules of Evidence apply (VRE 601). *Manchester Commons Associates, #8B0500-EB (5/25/95). [EB #631M1]*

* The testimony of a person in another proceeding has no bearing on evidence in an appeal where such person did not testify in the appeal proceeding. *Killington, Ltd. and International Paper Realty Corp., #1R0584-EB-1 (9/21/90), aff'd, In re Killington, Ltd., 159 Vt. 206 (1992). [EB #357]*

* The opinion of a witness is only one piece of evidence. *Berlin Associates, #5W0584-9-EB (4/24/90). [EB #379]*

* Where record contains abundant testimony from experts on the underlying facts and data to support their conclusions, Board will not exclude testimony of such experts, even though phrased in language of the statute. *Norman R. Smith, Inc. and Killington, Ltd., #1R0593-1-EB (part I) (5/11/89) and Killington, Ltd. and International Paper Realty Corp., #1R0584-EB-1 (part II) (5/11/89). [EB #349] [EB #357]*

390. Board / Commission witnesses / investigation

* EBRs contemplate circumstances in which no party appears in opposition to a permit issuance or no opponent presents evidence on the issues for which opponents bear the burden of proof, and permit the Board "to make reasonable inquiry as it finds necessary to make findings and conclusions as required." *In re Denio, 158 Vt. 230, 237 (1992), quoting EBR 20(C).*

* Board may require applicant/permittee to submit relevant supplementary evidence for Board's use in resolving issues and determining whether or not issue a permit. *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB, MOD at 3 (8/2/00). [EB# 739].*

* Where Board denied appellant party status, and no other person had filed a timely appeal, appellant could not be called as Board's own witness, since Board lacked requisite jurisdiction to continue review of project. *Springfield Hospital, #2S0776-2-EB (8/14/97), Sup. Ct. appeal dismissed, In re Springfield Hospital, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]*

* Board's rules contemplate that Board itself may make reasonable inquiry as it finds necessary to make findings and conclusions. *Herndon and Deborah Foster, #5R0891-8B-EB (6/2/97). [EB #665]; Pratt's Propane, Inc., #3R0486-EB (1/27/87). [EB #311M]; Pratt's Propane, Inc., #3R0486-EB (1/27/87). [EB #311]*

* Should evidence prove insufficient, Board may require more investigation or deny the application. *Jerrold D. MacKenzie and Katherine G. Stone*, #5W1047-EB (11/16/90). [EB #484M]

* Rules 20(A) and (B) allow Board to seek additional information when necessary. *Berlin Associates*, #5W0584-9-EB (4/24/90). [EB #379]

* The Board may deny party status to someone but still call him as a Board witness to enable him to express his interests and concerns to the Board. *Zachary's Pizza*, #2S0699-EB (2/24/87). [EB #338M]

The Board may secure its own expert witnesses. *Quechee Lakes Corporation*, #3W0411-A-EB (11/4/85), *aff'd, In re Quechee Lakes Corp.*, 154 Vt. 543 (1990). [EB #254 and #255]

* Board may require applicant to submit needed information. *Raymond Duff*, #5W0921-2R-EB (12/29/89). [EB #436M1]

* Board has no statutory authority to investigate alternative sites for a proposed microwave relay tower project, but has such authority in matters of shorelines, necessary wildlife habitat, endangered species, and primary agricultural soils. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]

* Board may request additional information under its general responsibility to find that a proposed development is not detrimental to public health, safety, or welfare. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188]

* Commission may require soil boring and percolation tests in conformance with subdivision regulations, if Commission is convinced that such testing is appropriate. *Richard Saltzman*, DR #79 (6/2/77).

* Where additional information is required by Commission, an applicant may not substitute a 20 foot contour map for a five foot contour map. *Magic Mountain*, DR #J (4/28/71).

391. Unauthorized / untimely filings

* Board discourages unauthorized filings and will not respond. *Lake Champagne Campground*, DR #377, CPR at 3 (5/24/99). [D.R. 377].

* Board has authority to refuse to accept into evidence pre-filed testimony and exhibits submitted far after imposed deadline. *Swanton Housing Associates*, #6F0482-EB (4/24/97). [EB #667]

* Objection that testimony of subpoenaed Coordinator should have been prefiled was untimely made at post-decisional phase of the proceeding and without merit. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Rev), MOD, (7/24/98). [EB #647], *aff'd, In re White*, 172 Vt. 335 (2001).

* Without showing good cause, parties may not file pleadings that are not authorized by Act 250, Board Rules, or Board orders. *Northern Development Enterprises*, #5W0901-R-5-EB (8/21/95). [EB #627M1].

* A post-argument memorandum which inappropriately contains new evidence will not be considered or relied upon by the Board. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/31/90). [EB #408M]

* A hearing will not be reopened to hear evidence as to "new information" which was available before the close of the Board's proceeding. *Vermont Gas Systems, Inc.*, #4C0609-EB (1/30/86), *rev'd and orders vacated, In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #285]

392. Source of

* The Board can use both evidence presented by neighbors and the observations made on the site visit to conclude if there would be a "significant visual impacts on the aesthetics of the area" or "any impacts on the ambient noise levels in the area." *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶111 (2007), citing *In re Quechee Lakes Corp.*, 154 Vt. 543, 552 (1990).

D. Hearings

421. General

* Board is required to follow procedures set out in 3 V.S.A. § 809 before ruling on a matter. *In re Greg Gallagher*, 150 Vt. 50, 52 (1988); 10 V.S.A. § 6089; 3 V.S.A. § 814(a).

* Where appeal of a Commission ruling is taken, Board must "hold a de novo hearing on all findings requested by any party." *In re Killington, Ltd.* 159 Vt. 206, 214 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990), citing 10 V.S.A. § 6089(a).

* Where citation of errors reveals need for only a limited factual inquiry, or brief oral argument on a potentially dispositive legal issue, Board may choose to hold a hearing or a legal argument before the Board. *Michael Caldwell*, #5L1199-EB (Altered) (5/13/95). [EB #619]

* Board cannot make a determination with respect to a request for a farmland conservation program without a hearing on the issues. *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB #425]

421.1 "Hearing on the merits"

* As a legal "term of art," a "hearing on the merits," within meaning of EBR under which applicant is entitled to refund of application fee only if application is withdrawn prior to convening of hearing on merits, is necessarily limited to hearings held to determine the applicant's entitlement to an Act 250 permit under 10 V.S.A. § 6086. *In re Richard Roberts Group, Inc. et al.*, 161 Vt. 618, 619 (1994).

* "Hearing on the merits" does not include hearing on party status or site visit. *In re Richard Roberts Group, Inc. et al.*, 161 Vt. 618, 619 (1994).

422. Administrative Hearing Officer

* Board will allow a matter to be heard by a hearing panel or a hearing officer where the issues raised are not complex or highly significant. *Okemo Mountain, Inc. (Snowbridge Road - Pedestrian Safety)*, #2S0351-10B-EB (1/15/93). [EB #565M]

* Cases are heard by full Board if any party objects to use of a hearing officer; if no timely objection is made, it is waived. *Vermont Division of Buildings*, #8B0318-EB (11/14/84). [EB #222]

423. Conduct of

* Municipal zoning hearings, like any quasi-judicial administrative procedure, must observe rudiments of fair play. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶16

* Due process demands impartiality on the part of judicial or quasi-judicial decisionmakers. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶16

* All questions regarding a decisionmakers' impartiality do not involve issues of constitutional validity. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶17

* A decision maker enjoys a presumption of impartiality. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶18

* Only in the most extreme cases is disqualification for bias constitutionally required. . *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶19

* DRB chair's participation violated due process where he evinced a deep seated antagonism through *ad hominem* attacks of one of the parties; but due process concerns were effectively cured by the subsequent trial *de novo* in the Environmental Court. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶¶19 - 13, 30 A.3d 641, 645-647 (Vt 2011).

* Party who tape records proceedings is not required to make tape available to opposing counsel. *Northern Development Enterprises*, #5W0901-R-5-EB (8/21/95). [EB #627M1]

423.1 Sanctioning abuse of process

* Court has the inherent power to sanction lawyers for abuse of the judicial process; however, this Court has stated that sound discretion and restraint must be used when relying on these inherent powers. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 630 (1993).

* Motion for sanctions granted where Applicant challenged standing at close of evidence and trial contrary to Environmental Court Rule 2(d)(2)(ii) on the limited basis of that Applicant waived right to raise such challenge. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at

31 (1/20/10).

424. Continuances

* Continuance not warranted simply because applicant made changes to original permit application. *In re Chaves Londonderry Gravel Pit*, No. 60-4-11 & 267-11-08 Vtec, Entry Order on Remand Request at ¶8 (3/9/12).

* Request for continuance denied where previous continuance was not used for stated purpose and no explanation was provided. *Re: Larkin Tarrant Hoehl Partnership*, #4C1057-1-EB, CPR (11/ 6/01). [EB #782]

* Request for continuance of appeal granted when other circumstances could moot appeal. *Re: Larkin Tarrant Hoehl Partnership*, #4C1057-1-EB, CPR (4/13/01), MOD (8/30/01); CPCO (10/ 2/01). [EB #782] (franchise agreement); *City of Montpelier Water Treatment Facility*, DR #260M (3/23/92) (zoning decision).

* Hearings will not be recessed with respect to issues concerning a wetland where an Army Corps of Engineers decision is pending and where conditions at the wetland will be amenable to investigation after a short time. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

* Where applicant revised application during Commission's hearing before entertaining question of whether town should be a co-applicant, Commission should recess hearing, require list of adjoiners, and then publish notice of revised application and send notice to adjoiners. *John Litwhiler and H.A. Manosh*, #5L1006-EB (1/15/91). [EB #451]

425. Convening of

* Proper remedy for Commission's failure to convene merits hearing is a remand to order new hearing, not automatic approval of project. *Killington, Ltd. & Int'l Paper Realty Corp.*, #1R0584-EB (8/8/86) [EB #297]

426. Request for / Failure to Request a Hearing

* Request to reconvene hearing granted to allow parties opportunity to be heard on new evidence submitted after hearing at Board's request, but purpose of reconvened hearing is limited. *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD (10/2/01).

* Once a party requests a hearing and raises substantive issues, Commission's discretion is limited, and convening of hearing is required; fact that issues might be heard within the context of Master Plan proceedings does not provide grounds for declining to convene a hearing. *Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A-EB (8/31/99). [EB #730M]

* Where party requests a hearing and facts are in dispute, an evidentiary hearing to allow parties to

present facts and cross-examine witnesses must be held. *Atlantic Cellular Co.*, #3W0726-EB (2/24/94). [EB #588M2]

* Where final Commission decision was different from proposed decision, permittee was denied notice of objectionable conditions in final decision and as a result was denied opportunity to request a hearing. *Allie Ring*, #6L0169-1-EB (6/23/89 and 7/19/89). [EB #440]

* Party waives right to appeal a permit approval to Board by failing to request Commission hearing. *Farrell Distributing Corp.*, #1R0311-3-EB (5/2/86). [EB #293]

427. Panel

* Once an objection has been made to using a panel to hear appeal, Board must decide if appeal should be heard by full Board. *Nehemiah Associates, Inc.*, #1R0672-1-EB (3/9/94). [EB #592M1]

* When issue is neither complex nor novel, hearing panel and not full Board hearing will usually suffice. *Nehemiah Associates, Inc.*, #1R0672-1-EB (3/9/94). [EB #592M1]; *Okemo Mountain, Inc. (Snowbridge Road - Pedestrian Safety)*, #2S0351-10B-EB (1/15/93). [EB #565M]

428. Quorum

* A majority of Board's nine members is required to constitute a quorum, unless waived, and four are required in any event. *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 9 (1974).

* Findings and conclusions should not be signed by the chairman alone, as this does not indicate which members actually participated in the decision. *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4 (1974).

* It is sufficient that a quorum of Board members is present during hearing, and individual members who miss any part of live testimony may review audio tape of hearing prior to taking part a decision. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Department of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, MOD of Motion to Alter at 6-7 (4/29/02). [EB#778]

* Argument and written filings are to be made to officials who render decision, and where argument on a matter has been made to certain Board members, no less than a quorum of those members should continue to serve on and decide such matter. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/23/91). [EB #408M]

* Board decisions must be made by a majority of all of its members (5 of 9), not just those who are present and voting. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (12/10/96). [EB #629(R)M1]; *MBL Associates, Inc.*, Land Use Permit #4C0948-EB, MOD and Order (12/2/95); *Re: St. Albans Group and Wal*Mart Stores, Inc.*,

#6F0471-EB, MOD (5/11/94): *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

- * Parties may waive a quorum of Board without invalidating Board's decision provided that each member participating in decision reviews entire record. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]
- * A quorum for purposes of formal Board proceeding can be met when one member of quorum, although not present for three hearings, familiarized himself with proceedings by reading available material. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]
- * When Commission member disqualifies self, project need not be heard by a different Commission so that three members will hear case; two-member Commission is a valid quorum. *Green Mountain Meadows, Inc.*, DR #Y (7/5/72).

429. Reopening

- * Hearing reopened and reconvened because adjoining landowner entitled to party status had not received notice of JO or DR proceeding. *Re: George E. Benson, Sr. and Janice Benson*, DR #432, MOD (2/4/05).
- * Request to reconvene hearing granted to allow parties opportunity to be heard on new evidence submitted after hearing at Board's request, but purpose of reconvened hearing is limited. *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD (10/2/01).
- * No reason to reopen record to admit Environmental Court decision denying zoning permit where there is no ambiguous provision of town or regional plan is at issue, because zoning decision is irrelevant under Criterion 10. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 5 (12/31/02). [EB#800]
- * Motion to reopen hearing denied where movant offered subjective testimony of witnesses who already testified and where Board already had substantial evidence. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 3 & 4 (7/20/00). [EB # 739].
- * Motion to reopen hearing granted where ANR discovered additional facts relating to a rare swamp following hearing adjournment. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 4 (5/18/00). [EB # 739].
- * Full Board reopened a panel hearing where newly discovered evidence was found and where Board needed to judge credibility of witnesses who testified before panel. *Lake Champagne Campground*, DR #377, MOD at 3 (7/6/00).
- * Board may determine whether record is complete and that hearing should be adjourned, or whether, upon review of record, recommended decision, and parties' objections, record should remain open. *Bull's-Eye Sporting Center / David and Nancy Brooks*, #5W0743-2-EB (9/30/96). [EB #649M1]

- * Applicant's motion to supplement record after hearing's close denied where no party requested opportunity to file additional evidence, receipt of such evidence would require Board to re-open hearing, and applicant could present new evidence given Board's denial of the application. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680].
- * Hearing would not be reopened for additional evidence since no further evidence was required to establish conclusion that unlined landfill required an Act 250 permit for a substantial change. *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (Unlined Landfill Facility) (2/3/97). [WFP #24M]
- * Motion to reopen hearing denied where petitioner had opportunity to cross-examine during hearing. *Mt. Mansfield Co., Inc.*, #5L1125-4-EB (8/14/95). [EB #573]
- * If Commission believes that it might need to impose additional permit conditions to ensure compliance with Act 250 criteria, Commission properly exercises authority by reserving right to reopen hearing. *Wildcat Construction Co.*, #6F0283-1-EB (10/4/91), *aff'd, In re Wildcat Construction Co.*, 160 Vt. 631 (1993). [EB#458]
- * Request to reopen taking of evidence granted to allow evidence regarding whether permit was necessary at time that Phase I of project was created. *Black Willow Farm*, DR #202M (5/3/89).
- * Because decisions must be based exclusively on evidence entered into record, Board would have to reopen record to review town or regional plans, or to clarify and explain testimony. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]
- * Motion for reconsideration is granted and Board hearings will be reopened to consider whether additional test drilling will be required for proposed landfill. *Howard & Louse Leach*, #6F0316-EB (8/28/86). [EB #299M]
- * It is highly unusual for Board to open record months after final decision and permit have been issued. Were risk of environmental impact less significant, Board would be justified in refusing to reopen record after issuance of final decision. *Howard & Louse Leach*, #6F0316-EB (8/28/86). [EB #299M].
- * Hearing will not be reopened to hear evidence as to "new information" which was available before close of Board's proceeding. *Vermont Gas Systems, Inc.*, #4C0609-EB (1/30/86), *rev'd and orders vacated, In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #285]

430. Scheduling

- * Board denies request for accelerated proceedings where the schedule was established within a prehearing order and no party objected. *Lake Champagne Campground*, DR #377, CPR at 2 (5/24/99). [D.R. 377].
- * With regard to scheduling, Commission and parties should try to accommodate each other. Making witnesses available, holding a second hearing on a particular issue or criterion, or making

transcripts or tape-recordings available are all measures which can facilitate adherence to an extended hearing schedule. *Sugarbush Resort Holdings, Inc.*, #5W1045-EB (Interlocutory) (8/12/97). [EB #679]

* Because Board required submission of pre-filed testimony to expedite hearing and determined that one day of testimony would be sufficient, request for a second day is denied. *Liberty Oak Corporation*, #3W0496-EB (1/28/87). [EB #323M]

* At conclusion of hearing, if party that feels it has not had sufficient time for case may submit an offer of proof and request that Board schedule an additional hearing day. *Liberty Oak Corporation*, #3W0496-EB (1/28/87). [EB #323M]

* Six-month delay from last hearing date to date of commission decision does not constitute undue delay under 10 V.S.A. § 6085(f) where commission requested additional information from applicant, applicant failed to respond, and hearing was adjourned on date decision was issued. *In re Lussier (Rt. 114 Gravel Pit, Lyndon)*, No. 121-6-05 Vtec, Decision and Order at 8 (Apr. 13, 2006).

* Time limit for commission decision under 10 V.S.A. § 6085(f) does not begin to run until the hearing has been adjourned. *In re Lussier (Rt. 114 Gravel Pit, Lyndon)*, No. 121-6-05 Vtec, Decision and Order at 8 (Apr. 13, 2006).

431. Site Visit

* Board can use both evidence presented by neighbors and the observations made on the site visit to conclude if there would be a “significant visual impacts on the aesthetics of the area” or “any impacts on the ambient noise levels in the area.” *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶111 (2007), citing *In re Quechee Lakes Corp.*, 154 Vt. 543, 552 (1990).

* As long as it does not constitute the exclusive basis for the Board's decision, evidence gathered during a site visit may satisfy the burden of proof on the factors to be considered in granting an Act 250 permit. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In re Denio*, 158 Vt.230, 238 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 551-52 (1990); *In re McShinsky*, 153 Vt. 586, 589 (1990).

* Ordinarily, the Board is required to enter its observations from the site visit on the record to allow rebuttal and facilitate review. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In re Denio*, 158 Vt.230, 238 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 552 (1990).

* Party waives requirement that Board is required to enter its observations from the site visit on the record by failing to raise it in response to the Board's proposed decision. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In re Denio*, 158 Vt.230, 238 (1992); *In re Quechee Lakes Corp.*,154 Vt. 543, 552 (1990).

* Site visit observations on which the fact-finder intends to rely must be placed on the record in order to preserve the right of rebuttal and to facilitate review. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In re Quechee Lakes Corporation*, 154 Vt. 543, 552 (1990).

* Board denied request for site visit to another, already operating quarry where Board is generally familiar with quarrying and risk of prejudice from visit outweighs any potential benefit. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 5 (12/8/00)[EB# 739].

* Parties' stipulation was not supported by Board's own site visit observations. *Aaron & Sons, Inc.*, DR #359 (10/29/98).

* Structure and purpose of Act 250 imply power to compel applicant to grant site access to other parties regarding its application. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

E. Legal Argument

441. Briefs

* The 25 page limit established under EBR 12 is both reasonable and necessary. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 4 (1/31/02). [EB #799 & 801].

442. Motions

* Motion for summary decision denied where undisputed facts are insufficient to determine whether physical change to permitted project has potential to cause significant Act 250 impact. *Re: George E. Benson, Sr. and Janice Benson*, DR #432, MOD at 6-7 (8/6/04).

* Motion for summary decision denied in part where undisputed facts are insufficient to determine question of jurisdiction. *Re: Vermont Association of Snow Travelers (VAST)*, DR#430, MOD at 4 (7/30/04).

* On a motion for a directed verdict, Court must view the evidence in the light most favorable to the nonmoving party and exclude all modifying evidence. *Environmental Board v. Levi Chickering*, 155 Vt. 308, 311 (1990).

* A motion for a directed verdict or to dismiss must not be granted "where there is any evidence fairly and reasonably tending to justify a verdict in the nonmoving party's favor." *Environmental Board v. Levi Chickering*, 155 Vt. 308, 311-12 (1990).

443. Oral Argument (see [336.1.6](#))

* Board found it unnecessary to hold hearing or oral argument to dispose of interlocutory appeal. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 4 (1/31/02). [EB #799 & 801]

F. Decisions

461. General

- * Court will not honor a party's claim that it should have prevailed before an inadequately informed Board. *In re Killington, Ltd.*, 159 Vt. 206, 211 (1992).
- * Examination of case law concerning the “retroactive” application of Board decisions, which change past precedent or apply new standards, to other pending Board cases. *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 48 - 51 (3/8/02). [EB #785]
- * A decision of Board in a case applies to that case, not just prospectively to future cases. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 8-9 (7/26/01). [EB #785]
- * Although Board held one deliberative session prior to receipt of parties’ proposed findings of fact and conclusions of law, Board considered parties’ filings before issuing a final decision, and therefore there were not deficiencies in Board’s deliberative process. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Rev), MOD, (7/24/98). [EB #647], *aff’d*, *In re White*, 172 Vt. 335 (2001).
- * ANR must make a final decision regarding denial of a certification under the waste management personnel background review law within 90 days of receiving a completed application. *Rapid Rubbish Removal*, #CA-721-WFP (6/12/97). [WFP #29]
- * Uncontested findings and conditions in Commission's decision remain in force. *Killington, Ltd. and Int’l Paper Realty Corp.*, #1R0584-EB-1 (9/21/90), *aff’d*, *In re Killington, Ltd.*, 159 Vt. 206 (1992). [EB #357]
- * Board must conduct a reasonable inquiry to make affirmative findings, and must reduce decisions to written findings and conclusions. *The Switchyard*, #6F0192-3-EB (10/17/83). [EB #204]

461.1 Basis of

- * Trial court's concerns, based on either conjecture or some unarticulated concept of unacceptability not set out in the requirements of the law, are, in the face of the facts evidentially and legally insufficient as a basis to reverse the granting of the Act 250 permit. *In re Patch*, 140 Vt. 158, 166 (1981).
- * Where record is barren of any evidence or findings of fact on which this appeal can be decided by Supreme Court, case must be remanded to afford an opportunity for the parties to be heard on the issue apparently sought to be resolved. *In re Quechee Lakes Corp.*, 130 Vt. 469, 471 (1972).
- * Findings are made based on factual statements alleged in petitioner's memorandum which, for the purposes of dismissal decision, Board accepts as true. *Re: Dexter and Susan Merritt*, DR #407, MOD at 2 (6/20/02), *aff’d*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03).
- * Board may make findings of fact based on matters officially noticed. *Nelson Lyford*, DR #341 (12/24/97).
- * Decisions must be based exclusively on evidence entered into the record. *Sherman Hollow*,

#4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

* Conclusions of other State agencies are not evidence on which Board can make affirmative findings. *Landmark Development Corporation*, #4C0667-EB (7/9/87). [EB #320]

461.2 Affirmative findings on each criterion required (see [201.1](#))

* Under Act 250, a project is entitled to a land use permit if the applicant can show that the development meets ten enumerated Act 250 criteria. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 16 (2/16/2017).

* When project only impacts certain criteria, or parties agree on facts for positive finding, factual finding is limited to those criteria and sub-criteria at issue during hearing. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 33 (1/20/10).

* When there has been an appeal from a Commission decision which grants a permit, a settlement agreement which provides that a permittee will be bound by conditions which are more restrictive than those imposed by the Commission and which will result in greater protection to the environment, need not be accompanied by additional evidence on which the Board can base Findings of Fact, which can then, in turn, form the basis for the Board to make positive Conclusions of Law on the Criteria. Rather, the Board can rely upon the Findings which appear in the Commission's decision. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 6 (6/17/04) [EB #828]

* Where a stipulation by the parties results in a request to the Board to eliminate or relax conditions imposed by a Commission permit, the Board requires that the parties provide it with evidence or stipulated findings to support such a request. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 6-7 (6/17/04) [EB #828]; *Re: Lawrence W. and Barbara Young*, #6F0518-EB, FCO at 3 -4 (10/1/01)

462. Findings of Fact

* There was no abuse of discretion by the Board on remand when it refined its preremand findings and conclusions and added new findings and conclusions. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 297 (1998).

* Purpose of findings of fact is to make a clear statement to the parties and to Court of what was decided and how the decision was reached. *Argast v. Environmental Board*, 143 Vt. 84, 86 (1983)

* Findings of fact must state the facts essential to the disposition of the cause. *Argast v. Environmental Board*, 143 Vt. 84, 86 (1983).

* Failure to make proper findings of fact mandates reversal. *Argast v. Environmental Board*, 143 Vt. 84, 86 (1983).

* Commission's failure to make findings of fact or conclusions of law requires Board to determine that Commission has not addressed issues raised by a party. *Winhall/Stratton Fire District #1 and*

The Stratton Corporation, #2W0519-6A-EB (8/31/99). [EB #730M]

* Board may make findings of fact based on matters officially noticed. *Nelson Lyford*, DR #341, FCO at 3 (12/24/97), citing 3 VSA 809(g).

* When the Board is required to find facts on an issue of involuntary dismissal it is not required to take the evidence in the light most favorable to the non-moving party; Board is required by its own rules to find facts in contested dismissal. *Putney Paper Company, Inc.*, #2W0436-6-EB (2/2/95). [EB #583]

* Findings of fact that support permits are based on information presented to Commission during its review of a proposed project and are incorporated by reference into a permit; as such, they are binding. *Tudhope Sailing Center*, DR #270 (4/29/93).

* Commission must issue findings and conclusions on criteria issue even if failure to meet other criteria precludes the issuance of a permit. *Realty Resources Chartered & Bradford Housing Assoc.*, #3R0678-EB, MOD at 3 (8/5/92). [EB #546M1]

* Board has an independent duty to make its own findings of compliance with Act 250. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd, In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

* Reviews by other agencies do not alter the Board's statutory obligation to make positive findings before issuing a permit. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366].

* Where Commission's findings with respect to a criterion are not relevant, such may not form basis for denial or conditioning of amended permit. *Agency of Transportation*, #5L0083-EB (6/12/81). [EB #141]

462.1 Evidence used as basis for

* Where Board does not base finding on challenged evidence, prejudice is not demonstrated. *In re Quechee Lakes Corp.*, 154 Vt. 543, 558 (1990).

463. Conclusions of Law

* There was no abuse of discretion by the Board on remand when it refined its preremand findings and conclusions and added new findings and conclusions. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 297 (1998).

* Commission's failure to make findings of fact or conclusions of law requires Board to determine that Commission has not addressed issues raised by a party. *Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A-EB (8/31/99). [EB #730M]

* Board's conclusions of law are binding and supersede potentially conflicting Commission conclusions. *Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB (6/12/97). [EB #651RM1]

* Commission must issue findings and conclusions on criteria issue even if failure to meet other criteria precludes issuance of permit. *Realty Resources Chartered & Bradford Housing Assoc.*, #3R0678-EB MOD at 3 (8/5/92). [EB #546M1]

464. Stipulated findings, conclusion, permit terms (see [343](#))

* Once parties agree to a stipulation, they are bound by it, and the course of the trial is determined by it. *In re Great Eastern Building Co., Inc.*, 132 Vt. 610, 612 (1974).

* When there has been an appeal from a Commission decision which grants a permit, a settlement agreement which provides that a permittee will be bound by conditions which are more restrictive than those imposed by the Commission and which will result in greater protection to the environment, need not be accompanied by additional evidence on which the Board can base Findings of Fact, which can then, in turn, form the basis for the Board to make positive Conclusions of Law on the Criteria. Rather, the Board can rely upon the Findings which appear in the Commission's decision. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 6 (6/17/04) [EB #828]

* Where a stipulation by the parties results in a request to the Board to eliminate or relax conditions imposed by a Commission permit, the Board requires that the parties provide it with evidence or stipulated findings to support such a request. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 6-7 (6/17/04) [EB #828]; *Re: Lawrence W. and Barbara Young*, #6F0518-EB, FCO at 3-4 (10/1/01).

* Board's conclusion after hearing might differ from stipulated facts and conclusion in parties' settlement. *Re: Haystack Highlands, LLC*, #700002-10D-EB, FCO at 3 (6/19/03) [EB #812]; *Otter Creek Development, LLC*. #1R0535-3-EB, FCO at 3 (4/19/02). [EB #803]

* Board finds in accordance to certain stipulations by parties but not those which are not supported by the Board's own site visit observations. *Aaron & Sons, Inc.*, DR #359 (10/29/98).

* Board may review and make findings of fact and conclusions of law based on parties' stipulation and revise or add stipulated permit conditions accordingly, provided that Board determines that this is not contrary to requirements or purpose of Act 250. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]

* Given that Board relied on parties' stipulation, including proposed permit conditions, in order to reach positive findings, Board advised permittees that subsequent amendment applications would be considered under *Stowe Club Highlands* balancing test. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]

* Permit duration less than project's expected life was established where all parties stipulated to a shorter duration in order to mitigate project's negative impacts. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693].

* Board will remand stipulation for Commission's consideration where stipulation goes toward fulfillment of Commission's permit condition rather than toward appeal thereof. *Angelo DeCicco*,

#2W0612-1-EB (5/24/91). [EB #479M1]

* Board will remand a stipulation for Commission's consideration where stipulation does not contain sufficient factual support for Board to issue findings and conclusions, and where Commission has already heard the matter, is familiar with the facts, and has issued findings which it can easily amend. *Angelo DeCicco*, #2W0612-1-EB (5/24/91). [EB #479M1]

*Commission's concern that utilities be installed underground as part of road reconstruction and that ratepayers not bear installation costs is satisfactorily addressed in stipulation; Board amends permit as stipulated. *City of South Burlington & Vermont Agency of Transportation*, #4C0607-R-EB (4/12/91). [EB #386]

465. Partial findings / Expedited Review

* While 10 V.S.A. § 6086(b) authorizes review under only two of the Act's criteria as an initial step, it nowhere gives the applicant the right to submit an application providing information on only those two criteria and consider that "complete" for purposes of establishing vested rights. *In re Ross*, 151 Vt. 54, 57 (1989).

* Partial findings that have expired cannot supercede prior permit conditions. *Donald and Diane Weston*, #4C0635-4-EB, (3/2/00). [EB # 735]

* Commission's partial decision was not ripe as it had not made affirmative findings or a denial on the individual criteria on appeal. *Vermont Agency of Transportation*, #4C1010-EB (5/5/98). [EB #702]

* Because Commission improperly proceeded with partial review, remand was necessary in light of appeal of procedural defect. *F.P. Elnicki Rutland Storage Trailers, Inc.*, #1R0203-2-WFP (5/28/96). [WFP #32]

* Applicant may elect to have Board issue partial findings of fact and conclusions of law to facilitate review of projects, and such findings and conclusions are to be valid for a period to be determined by Board. *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (6/26/91). [EB #466]

* Extension of Commission's findings is reasonable where a number of findings have been on appeal and appeal was filed by party which applicant does control. *P.F. Partnership and Harlan and Jean Bodette*, #9A0169-EB (5/1/90) and (6/7/91). [EB #424] (*See P.F. Partnership*, No. 90-276 (V.S.Ct.3/21/91)).

* Applicant which requested partial review of project under only Criterion 9(B) cannot appeal Commission's findings on selected subcriteria to Board; only findings and conclusions on all of Criteria 9 and 10 are considered final for purposes of appeal. *Philip Gerbode and Jessie Laurie*, #6F0357-EB (1/5/88). [EB #365]

* An application which allows the applicant to file first under Criteria 9 and 10 is not complete until

an application covering all 10 criteria is filed. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB #347]

* Commission may defer a decision under some criteria where the issues raised by such criteria are so inextricably intertwined with other criteria that a decision cannot be made without consideration of those other criteria. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB #347]

* Once Commission accepts an application which addresses some criteria, Commission must either issue its findings and decision or proceed to consider the remaining criteria. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB #347]

* Under partial review of complex projects, findings of fact issued under Criteria 9 and 10 are final for purposes of appeal; findings of fact as to Criteria 1-8, however, are not final until the permit for the entire project is issued. *Shelburne Farms Resources, Inc.*, #4C0660-EB (8/4/86). [EB #310M]

* Master permit process or partial review are available to secure conceptual approval of a multi-phase project. *Green Peak Estates*, #8B0314-2-EB (7/22/86), *aff'd, In re Green Peak Estates*, 154 Vt. 363 (1990). [EB #280]

* Upon master permit process or partial review approval, applicant could have vested right for Criterion 10 approval in later stages of project. *Green Peak Estates*, #8B0314-2-EB (7/22/86), *aff'd, In re Green Peak Estates*, 154 Vt. 363 (1990). [EB #280]

* Where applicant fails to pursue either master permit review or EBR 21 review under Criterion 10, neither Commission nor parties are estopped from raising issues regarding Criterion 10 during subsequent un-permitted stages of a multi-stage project. *Green Peak Estates*, #8B0314-2-EB (7/22/86), *aff'd, In re Green Peak Estates*, 154 Vt. 363 (1990). [EB #280]

* Though all of the land of an entire project is to be considered for the purpose of determining jurisdiction, it is not necessary for Commission to review and approve the entire project in order to grant a permit for any constituent phase of it. *Rutland State Airport*, DR #127 (8/31/81).

* In an appeal to Board of a permit denial, an application will be remanded to Commission where a substantial change in the project plans necessitate a review of the project under all criteria; Board's partial review on appeal of a project substantially different from that reviewed by Commission would undercut the purposes of Act 250. *Windsor Improvement*, #2S0455-EB (3/27/80). [EB #130]

* A partial decision per Rule 21 that offsite mitigation was appropriate for impacts to prime agricultural soils was not a final decision under Criterion 9(B) where the District Commission reserved issuing a final decision until the applicant provide a copy of a proposed offsite mitigation agreement with the Agency of Agriculture for the Commission's review and approval. If the Commission had tried to issue a final decision under Criterion 9(B) without first reviewing the proposed agreement, it would have imposed an invalid condition subsequent. *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/28/19).

* The fact that the District Commission did not include an expiration date in its Rule 21 partial findings indicates it did not intend to finally resolve any questions related to Criterion 9(B). *Snyder Group, Inc. Act 250, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/28/19)*.

466. Issuance of

* Proper remedy for Commission's failure to mail decision within 20 day time limit from adjournment of hearing is a new hearing on the merits, not issuance of permit. *R. Brownson Spencer II, #1R0576-EB (3/10/87), aff'd, In re R. Brownson Spencer II, 152 Vt. 330 (1989)*. [EB #278]

* Purpose of 20 day rule is to ensure that Commission does not unduly delay a decision on an application, thus denying the applicant an opportunity to begin construction, if decision is favorable or to appeal unfavorable decision. *R. Brownson Spencer II, #1R0576-EB (3/10/87), aff'd, In re R. Brownson Spencer II, 152 Vt. 330 (1989)*. [EB #278]

* Board decisions must be made by a majority of all of its members (5 of 9), not just those who are present and voting. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised) (12/10/96)*. [EB #629(R)M1]; *MBL Associates, Inc., Land Use Permit #4C0948-EB, MOD and Order (12/2/95); Re: St. Albans Group and Wal-Mart Stores, Inc., #6F0471-EB, MOD (5/11/94): Finard-Zamias Associates, #1R0661-EB (3/28/90)*. [EB #459M1]

466.1 Signing of

* Findings and conclusions should not be signed by the chairman alone, as this does not indicate which members actually participated in the decision. *In re State Aid Highway No. 1, Peru, Vt., 133 Vt. 4 (1974)*

* Board decisions must be made by a majority of all of its members (5 of 9), not just those who are present and voting. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised) (12/10/96)*. [EB #629(R)M1]; *MBL Associates, Inc., Land Use Permit #4C0948-EB, MOD and Order (12/2/95); Re: St. Albans Group and Wal-Mart Stores, Inc., #6F0471-EB, MOD (5/11/94): Finard-Zamias Associates, #1R0661-EB (3/28/90)*. [EB #459M1]

466.2 Timeliness of

* Board's issuance of decision within twenty days of the close of the hearings complies statutory limit in 10 V.S.A. § 6086(b). *In re Sherman Hollow, Inc., 160 Vt. 627, 629 (1993)*.

* Requirement that Board act "promptly" upon motions to alter, EBR 31(A), does not impose any set time limit. *In re Sherman Hollow, Inc., 160 Vt. 627, 629 (1993)*.

466.2.1

Failure to issue timely decision

* The automatic issuance of a permit without conditions is not the remedy for Commission's failure to issue decision within the statutorily prescribed twenty-day period. *In re Spencer*, 152 Vt. 330, 340 (1989); 10 V.S.A. § 6086(b).

* Existence of remedy in one part of statute demonstrates a legislative intent not to provide for such a remedy where similar express provision is absent in another part. *In re Spencer*, 152 Vt. 330, 340(1989).

* Board did not err by concluding that automatic approval of the permit without conditions, simply because *de minimis* delay in issuance of the decision occurred, was not justified when the possible harm to the applicant for such a delay is balanced against the overall protection of the public's health, safety and welfare. *In re Spencer*, 152 Vt. 330, 341 (1989).

* Applicant must show prejudice in Board's failure to meet the twenty-day decision period requirement of 10 V.S.A. § 6086(b). *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 516 (1975).

467. Stay of

* The issuance of a stay is a discretionary act. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 4 (7/10/03) [EB #831]; *Wildcat Construction Co., Inc.*, #6F0283-1-EB, MOD at 2 (8/3/92). [EB #458M]

467.1 Standing to seek (see [V\(F\)](#))

* "Injury" to the interest of a party who seeks standing to bring action or appeal must be concrete and particularized, not an injury affecting the common rights of all persons. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, MOD at 7 (4/29/03) [WFP #40], citing *Parker v. Town of Milton*, 169 Vt. 74, 78 (1998).

* Standing to petition for a stay is a question that must be first determined, as without such standing, the stay cannot issue. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 4 (7/10/03). [EB #831]

* Pursuant to EBR 42(A), an "aggrieved party" may file a stay request; the words "aggrieved party" in EBR 42(A) must be given some meaning. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 5 (7/10/03) [EB #831], noting *State v. Central Vermont Ry. Co.*, 81 Vt. 463 (1908) ("The party aggrieved must be the party, and all the parties, whose right, debt or duty is attempted to be avoided."); *Beach v. Boynton*, 26 Vt. 275 (1853) ("the definition of 'aggrieved person' [is] one whose rights have been injuriously affected.")

* Request for preliminary stay was denied where petitioner failed to demonstrate that it was a party to the permit proceedings or otherwise had standing to request a stay. *Michael Jedware*, #6F0194 and #6F0259 (Revocation), CPR at 3 (10/19/00). [EB#768].

* Stay request denied when Board determined that requestor lacked standing to support appeal.

Springfield Hospital, #2S0776-2-EB (8/14/97), *app.dism*, *In re Springfield Hospital*, No. 97-369 (10/30/97). [EB #669]

* Request by adjoining landowner for a stay of a permit amendment authorizing continued blasting at a rock quarry is denied where adjoining landowner did not file an appeal of the amendment itself. *J.P. Carrara & Sons, Inc.*, #2S0351-3-EB (interlocutory) (8/3/92). [EB #551]

467.2 What can / cannot be stayed

* Board denies request for stay where advisory opinion is neither a decision nor order which can be stayed under EBR 42. *Kelly Green Recycling Facility*, DR #293M1 (4/15/94).

* Limited authority exists for granting permission to operate while obtaining a permit. *U.S. Quarried Slate Products, Inc.*, DR #279 and 283 (10/1/93).

* Board may stay orders that it or Commissions issue. *U.S. Quarried Slate Products, Inc.*, DR #279 and 283 (10/1/93).

* Appeals from decision of Commission granting a permit stayed pending remand for issuance of a permit amendment. *Shelburne Partnership*, #4C0815-EB (8/26/92). [EB #539M]

467.3 Burden to demonstrate required elements

* Party requesting a stay bears the burden of proving that its request is justified. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 8 (7/10/03). [EB #831]

* The opponent to a project bears the burden in a request for a stay of a permit. *Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A, MOD at 2 (7/28/99) [EB #730]; *Stokes Communication Corp.*, #3R0703-EB (2/26/93). [EB #562M2]

* The opponent of a development or subdivision bears the burden before the Board when requesting a stay of decision. *Richard Cooper*, #5L0590-EB (7/11/80). [EB #137]

467.4 Elements considered

* Pursuant to EBR 42, Board must consider three factors in determining whether to grant a request for a stay: i) the hardship to the parties, ii) the impact on the values sought to be protected by Act 250, and iii) the effect on the public health, safety or general welfare. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 7 (7/10/03) [EB #831]; *Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A, MOD at 2 (7/28/99)[EB #730]; *C.V. Landfill Inc.*, #FR221-WFP, (3/23/92). [WFP #11]

* In deciding whether to issue a stay of a Commission decision, Board considers hardship to the parties, impact on Act 250 values, and the effect on public health, safety, or general welfare. A stay will be denied when all parties simply contest the permit conditions for a project rather than when denial of a permit is at issue. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd*, *In re*

Vermont Gas Systems, Inc., 150 Vt. 34 (1988). [EB #267]

467.4.1 Hardship

* Where all parties jointly request a long-term stay, there is no hardship to parties if a stay is granted. *Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort*, #5L1125-10B-EB and MOD #5L1125-10A(Revised)-EB, MOD at 3 (11/15/01). [EB #793].

* Request for preliminary stay was denied where hardship from delay to permittee would outweigh hardship to petitioner, where there is no evidence of adverse impacts on Act 250-protected values, and little evidence of irreparable harm. *Michael Jedware*, #6F0194 and #6F0259 (Revocation), CPR at 5 (10/19/00). [EB#768].

*Where a contention of hardship is not supported, and where the stay request was filed well after the appeal was taken and because of the imminence of an enforcement action, the time lapse between the date of the permit and the date of the stay request undercuts the credibility of the permittee's allegation of hardship, the stay request will be denied. *Wildcat Construction Co., Inc.*, #6F0283-1-EB (8/3/92). [EB #458M]

* Permit stay should issue where permittee alleges no hardship. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

* Commission denied amended permit for, and ordered removal of, sign different from permitted; Board denied motion for stay based on economic hardship, refusing to reward intentional violation of permit by sanctioning noncompliance. *Paul L. Handy*, #1R0572-1 (1/12/87). [EB #331M]

467.4.2 Impact on Act 250 values

* Since it is not clear that Commission considered impacts from blasting for road construction, Chair will stay those activities until Board can hear the matter; further, even though Commission considered aesthetic impacts of the road construction, impacts are significant enough that prior stay order should remain in effect until Board can consider them. *Re: McLean Enterprises Corp.*, #2S1147-1-EB, CSP at 2 (5/13/03). [EB #829].

* Where parties represent opposing interests, joint request for stay minimizes any potential for impact on Act 250 values. *Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort*, #5L1125-10B-EB and MOD #5L1125-10A(Revised)-EB, MOD at 3 (11/15/01). [EB #793].

* Board denies request for stay, refusing to reward intentional violation of permit by sanctioning noncompliance. *Paul L. Handy*, #1R0572-1 (1/12/87). [EB #331M]

* Stay of Board decision pending appeal under EBR 42 will be denied where a party repeatedly refused to correct permit violations that led to a permit revocation. *Crushed Rock*, #1R0489-EB (10/17/86), *vacated and remanded, In re Crushed Rock, Inc.*, 150 Vt. 613 (1988). [EB #306]

467.4.3 Harm

- * For a stay to issue, harm must be imminent or certain, not merely speculative. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 8 (7/10/03) [EB #831]; *Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A, MOD at 2 (7/28/99). [EB #730].
- * When no specific harm has been shown, Board is unwilling “base a stay (of a permit) on a general allegation of detrimental impact to the public health, safety and welfare.” *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 8 (7/10/03) [EB #831], citing *Re: Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A, MOD at 3 (7/28/99)[EB #730], and quoting *Re: Brian Nichols d/b/a Speedwell, Inc.*, #7C0568-2-EB, MOD at 3 (12/22/95).
- * Request for preliminary stay was denied where permittee made assurances not to undertake activities which could result in irreparable harm. *Central Vermont Public Service Corporation and New England Telephone and Telegraph d/b/a Bell Atlantic Telephone Company*, #2W1074-EB, CPR at 3 (4/26/00)[EB#756], cited in *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 8 (7/10/03). [EB #831]
- * Board is unwilling “base a stay (of a permit) on a general allegation of detrimental impact to the public health, safety and welfare.” *Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A, MOD at 3 (7/28/99)[EB #730], quoting, *Brian Nichols d/b/a Speedwell, Inc.*, #7C0568-2-EB MOD at 3 (12/22/95).
- * Permit stay should issue where the permit authorizes construction which may imperil wetlands which are at issue in an appeal and the criteria which are on appeal with respect to wetlands embody values which may be affected by the construction. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]
- * Motion denied where the construction does not pose a threat to the public health, safety, and welfare or to the environment. *Trapper Brown Corp. (TBC Realty)*, #4C0582-15-EB (1/15/89). [EB #420M]

467.5 Mootness

- * A motion to stay is not rendered moot by applicant vacating the project; motion continues to present a "live controversy" because compliance with the conditions is required unless stayed. *P & H Transportation Co.*, #3R0569-1-EB (12/1/95). [EB #638]

467.6 Cases

- * Motion for long-term stay denied in part where project opponent failed to demonstrate that a stay was necessary. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 9 (5/11/00). [EB# 739]
- * Motion for Preliminary and Long-term Stay granted in part to stay truck traffic until road improvements are complete and to stay tree cutting for 30 days. *Barre Granite Quarries, LLC and*

William and Margaret Dyott, #7C1079(Revised)-EB, Chair's Ruling on Preliminary Stay and CPR (4/13/00). [EB# 739]

* Stay denied where permit opponent failed to demonstrate that it will incur hardship justifying the imposition of a stay; failed to show adverse impacts to the values protected by Act 250; and failed to show adverse effects on public health, safety or general welfare. *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB, MOD at 8 (9/8/99). [EB# 739]*

* Where a permit is pending before Commission on a Motion to Alter, Board is without jurisdiction to hear a Motion to Stay the permit. *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB, MOD at 3 (8/5/99). [EB# 739]*

* Motion to stay denied where Board finds that motel customers will not be disturbed by truck refueling station. *Speedwell, Inc., #7C0568-2-EB (12/22/95). [EB #642M]*

* Stay denied where Board finds no harm to natural resources or water supply during proposed snow-making activity. *Pico Peak Ski Resort, Inc., #1R0265-12-EB (FCO on Preliminary Issues) (3/2/95). [EB #622]*

* Motion to stay portion of permit that disallowed use of larger capacity trucks in gravel pit operation, granted. *John Gross Sand and Gravel, DR #280M1 (9/22/93).*

* If a permit applicant commences construction at a site during an appeal, and Board subsequently denies or modifies the permit, the applicant will have to restore the site to its pre-construction condition. *Winhall/Stratton Fire District #1 and The Stratton Corporation, #2W0519-6A, MOD at 4 (7/28/99); Stokes Communication Corp., #3R0703-EB (2/26/93). [EB #562M2].*

* Appeal of permit recessed pending final decision of Vermont Supreme Court on an earlier appeal by the applicants of a Board ruling that an Act 250 permit was needed for the pit. *Robert and Barbara Barlow, #8B0473-EB (10/23/92). [EB #547M1]*

468. Injunctions

* Board, as an agency of the State, is exempted from the requirement of furnishing security when seeking an injunction. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc., 137 Vt. 142, 148 (1979).*

* An injunction is generally regarded as an extraordinary remedy and will not be granted routinely unless the right to relief is clear. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc., 136 Vt. 213, 218 (1978).*

* An order for injunctive relief must set forth the reasons for its issuance. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc., 136 Vt. 213, 218 (1978).*

469. Precedential effect of (see [573](#))

- * Courts are bound to previous decision as a matter of stare decisis. *In re Killington, Ltd.*, 159 Vt. 206, 216 (1992).
- * Prejudgment of the law does not normally rise to a due process violation. *In re Crushed Rock, Inc.*, 150 Vt. 613, 621 (1988).
- * Board need not establish precedent applicable to all cases only by rule pursuant to 3 V.S.A. Ch. 25. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 3 (2/25/03), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04); *ard see Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, DR #406, FCO at 12 n. 5. (12/31/02).
- * Supreme Court is “not bound by, and, indeed, do[es] not defer to, Environmental Board and Environmental Court precedent that conflicts with [their] established vested rights doctrine and the principles that underlie it.” *Times and Seasons, LLC*, 2011 VT 76, ¶ 15 (7/8/11) (citing *In re Village Assocs. Act 250 Land Use Permit*, 2010 VT 42A, ¶ 7).
- * Precedential value of decision is qualified by fact that it incorporates parties’s settlement. *Otter Creek Development, LLC*. #1R0535-3-EB, FCO at 3 (4/19/02). [EB #803]
- * Examination and analysis of case law concerning the “retroactive” application of Board decisions, which change past precedent or apply new standards, to other pending Board cases. *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 48 - 51 (3/8/02). [EB #785]
- * Fact that Board may have erred in its analysis in a past decision does not mean that it should intentionally repeat that error in present decision. *Catamount Slate, Inc. et al.*, DR #389, MOD at 2 (2/25/02), *rev’d on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04).
- * A decision of the Board in a case applies to that case, not just prospectively to future cases. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 8-9 (7/26/01). [EB #785]
- * Decisions by the Board set precedent that binds Commissions. *Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 19 (4/19/01). [EB #763]
- * Commission decisions in other cases are not precedent or even guidelines for the Board to follow. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366].

469.1 Effect of legislative action/non-action since decision

- * Adherence to precedent is reinforced by the fact that the Legislature has met since such precedent and has not amended the statute in response to that decision. *In re Killington, Ltd.*, 159 Vt. 206, 216 (1992)

469.2 Retroactive application of

- * Examination of case law concerning the “retroactive” application of Board decisions, which change

past precedent or apply new standards, to other pending Board cases. *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 48 - 51 (3/8/02) [EB #785]; and see, *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 9 (1/27/04) [EB #833]

* Regarding the application of new case precedent to pending cases, there is no specific case law which establishes when an Act 250 case "commences." *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 10 (1/27/04) [EB #833]

* The date of an Act 250 application is the beginning of the Act 250 process. *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 9 (1/27/04) [EB #833]

* A decision of Board in a case applies to that case, not just prospectively to future cases. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 8-9 (7/26/01). [EB #785]

G. Post Decision Issues

471. General

* Board will not search for errors not supported by argument. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 16 (6/8/01)[EB #785], citing *Perrott v. Johnson*, 151 Vt. 464, 467 (1989), citing *In re Wright*, 131 Vt. 473, 490 (1973).

* Board did not grant rehearing of entire appeal where there was no statutory authority or rule authorizing such post-decisional relief; even if a reviewing court were to determine that Board has implied authority to grant such relief, movant failed to raise arguments warranting a rehearing of the appeal. *Lawrence White*, #1R0391-EB, #103091-3-EB, #1R03091-4-EB, #1R03091-5-EB, #1R03091-5A-EB, and #1R0391-6-EB (Rev), MOD, (7/24/98). [EB #647], *aff'd*, *In re White*, 172 Vt. 335 (2001).

* Board is allowed to correct typographical errors and omissions, as well as manifest error and mistakes. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (11/8/90). [EB #430M2]; *Berlin Associates*, #5W0584-9-EB (4/24/90). [EB #379]

472. Motion to Reconsider

* It is established that seeking reconsideration "does not constitute the submission of a new application;" it instead "constitute[s] the review of the original, albeit modified, application." *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 10 (3/29/10), *aff'd* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* Merits of reconsideration of application were reached notwithstanding applicant's providing neither reconsideration request nor affidavit certifying that the deficiencies have been corrected, as required by 10 V.S.A. § 6087(c). *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 4 (3/29/10), *aff'd* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* Allowing appeal to state's highest authority allows Applicant to confirm the specific deficiencies

that must be corrected on reconsideration. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 8 (3/29/10) (thus applicant need not choose between appeal and immediate filing of reconsideration motion), aff'd on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* EBR 31(B) is inapplicable where petitioner is attempting to rely on prior findings, not request reconsideration of denial of original application. *Re: Greater Upper Valley Solid Waste Management District*, DR #418, MOD at 3 (5/13/03).

472.1 Subject of

* Because Commission granted a permit, any substantial changes in project must be submitted to Commission for review as a permit amendment, not as a request for reconsideration. *Pinnacle Associates*, #5L1129-EB (8/5/92). [EB #542]

* Unless Board specifically retains jurisdiction to review minor changes in a project, it consistently requires applicants who wish to present additional evidence in response to a permit denial to file a reconsideration request. *Bernard & Suzanne Carrier*, #7R0639-EB (12/17/90). [EB #435M]

472.2 Process

472.2.1

Proper forum for

* While the Board conducts hearings on a *de novo* basis, it is an appellate body, and to allow a request for reconsideration to be heard initially by the Board would subvert its function as an appellate body. *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/23/92). [EB #471M5]

* All reconsideration requests are to be initially determined by relevant Commission. *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/23/92). [EB #471M5]

472.2.2

Timeliness of

* Allowing Applicant to file Application for Reconsideration 5 and 1/2 months after denial at VT Supreme Court (4 years after denial at Environmental Board) does not offend principles of finality and judicial economy. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 7 (3/29/10)(Note that Act 250 Rule 31(B)(1) rule requires filing of motion within 6 months of a "final denial."), aff'd on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* Allowing appeal to state's highest authority allows Applicant to confirm the specific deficiencies that must be corrected on reconsideration. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 8 (3/29/10), aff'd on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

"The running of the time in which to file for reconsideration is stayed by the filing of an appeal." *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 9 (3/29/10)(quoting *J. Philip Gerbode and Highland Development Corp.*, No. 6F0396-EB, Prehearing Conference Report and Order, at 1 n.1 (10/17/89) (calculating the six-month deadline from the date of the last Environmental Board decision)), aff'd on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

- * Denied application may be submitted within six months of denial to Commission for reconsideration provided applicant corrects deficiencies in prior denial. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB(Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]
- * Commission lacks jurisdiction to hear untimely motion for reconsideration; motion for reconsideration must be timely filed unless there are circumstances warranting late reconsideration in the interest of fairness. *Robert Cone, Pine Cone Construction, Inc.*, #1B0042-EB (3/31/88). [EB #378]
- * Time period for filing reconsideration request is computed from date decision is mailed, not date it was signed. *Larry & Joan Westall*, #4C0558-2-EB (4/10/87). [EB #342]; *Marylou Saldi*, #5W0902-EB (1/8/87). [EB #340M]; *White Sands Realty*, #3W0360-EB (2/25/82). [EB #171]

472.2.3

When hearing must be held

- * Commission's reconvening hearing 2 days beyond 40 day requirement caused no prejudice. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (2/4/97). [EB #666M1]
- * Requirement that reconsideration hearing occur within 40 days of receipt of a complete application is not jurisdictional, nor is it mandatory because it fails to specify consequences for noncompliance. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (2/4/97). [EB #666M1]
- * Commission's five year recess of reconsideration hearing, due to litigation over project, was reasonable. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (2/4/97). [EB #666M1]

472.3 Scope of review on reconsideration

- * Reconsideration pursuant to § 6087(c) is a continuation of the original application, in which the applicant maintains the benefit of initial affirmative findings made on the original application and to review only those aspects of the application that led to denial. *In re Times and Seasons, LLC*, 2011 VT 76, ¶ 10–11 (7/8/11).
- * Applicant need not pay a new application fee, and all the affirmative findings made in the original decision are entitled to a rebuttable presumption of validity. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 7 (3/29/10)(citing *Re: Berlin Associates*, #5W0584-14-EB, MOD at 5-6 (1/10/92)), *aff'd* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).
- * Allowing appeal to state's highest authority allows Applicant to confirm the specific deficiencies that must be corrected on reconsideration. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 8 (3/29/10), *aff'd* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).
- * It is established that seeking reconsideration "does not constitute the submission of a new application;" it instead "constitute[s] the review of the original, albeit modified, application." *In re*

Times & Seasons, LLC, #45-3-09 Vtec, Decision on Multiple Motions at 10 (3/29/10)(citing *Re: Barre City Sch. Dist.*, #5W1160-Reconsideration-EB, FCO at 14 (1/30/95)), *aff'd* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* On reconsideration of Board denial, Commission properly limits its review to only those aspects of project which have been modified to correct noted deficiencies; however, where circumstances warrant a more exhaustive review, due to project changes, different impacts, or new evidence, Commission (or Board on appeal) has discretion to broaden its review. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (Reconsideration) (8/27/97). [EB #659]; *Berlin Associates*, #5W0584-9-EB (2/9/90). [EB #379]

* Reconsideration procedure allows applicants to modify their projects to correct deficiencies without wholesale review of modified project under all criteria. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2].

* At any reconsideration before Commission, applicants may ask to reopen specific issues concerning permit conditions or issues left unresolved by Board. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366].

* Board reviews information provided to determine if project now complies with criteria at issue; *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2].

* On a motion for reconsideration of a permit condition, Board first determines whether permittee articulates an adequate basis for reconsideration; if so, Board proceeds to take evidence on issues warranting reconsideration. *Fairfield Associates, Ltd.*, #4C0570-EB (8/29/84). [EB #220]

472.3.1

What laws apply

* When a permit application is filed, the law existing at that time is the one that must be applied to that application, regardless of any changes to it while the application is pending. *Times and Seasons, LLC*, 2011 VT 76, ¶ 12 (7/8/11).

* Where Applicant failed to correct deficiencies concerning Criterion 9(B), Applicant cannot avail itself of definition of prime agricultural soils amended during its litigation in order to secure compliance with 9(B). *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 13 (3/29/10), *aff'd*, *Times and Seasons, LLC*, 2011 VT 76, ¶ 12 (7/8/11).

* The law governing at time of permit application should control the outcome of Applicant's reconsideration request absent a demonstration that the March 2004 application has been sufficiently modified. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 10 (3/29/10)(citing *Coty v. Ramsey Assocs., Inc.*, 154 Vt. 168, 171 (1990)), *aff'd* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* It is well settled in Vermont that an Act 250 permit application is governed by the law in effect at the time a completed permit application is filed. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision

on Multiple Motions at 10 (3/29/10)(citing *In re Jolley Assocs.*, 2006 VT 132, ¶ 11, 181 Vt. 190), *aff'd*, *Times and Seasons, LLC*, 2011 VT 76, ¶ 12 (7/8/11).

* Environmental Court distinguishes between retroactive application of changes to *Act 250 Rules, zoning regulations, or town plans*, which the Court may apply, as opposed to a *statutory amendment* where retroactive application is governed by 1 V.S.A. § 214; a statutory amendment can “only” be applied to pending litigation if it “will not affect any right, privilege, obligation, or liability acquired prior to the statute’s effective date.” *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 11 (3/29/10)(citing *In re Eustance Jurisdictional Opinion*, 2009 VT 16, ¶ 27 and quoting *Sanz v. Douglas Collins Construction*, 2006 VT 102, ¶ 7, 180 Vt. 619 (mem.)), *aff'd*, *Times and Seasons, LLC*, 2011 VT 76, ¶ 12 (7/8/11).

* Where Applicant sought Supreme Court review and Supreme Court affirmed non-compliance with Criterion 9(B), such affirmation became Applicant’s obligation not to disturb the site’s primary agricultural soils such that statutory amendment to 9(B) definition could not be applied to Application for Reconsideration. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 11 (3/29/10), *aff'd*, *Times and Seasons, LLC*, 2011 VT 76, ¶ 12 (7/8/11).

* Applicable town and regional plans in reconsideration proceeding are the same plans that were in effect when application was originally filed. *Barre City School District*, #5W1160-EB (1/30/95). [EB #596]

472.4 Correction of deficiencies

* On appeal of permit granted by Commission on reconsideration, Board would determine whether the deficiencies had been corrected after conducting an evidentiary hearing on the appeal. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (2/4/97). [EB #666M1].

* Denied application may be submitted within six months of denial to Commission for reconsideration provided applicant corrects deficiencies in prior denial. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB(Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* Reconsideration procedure allows applicants to modify their projects to correct deficiencies without wholesale review of modified project under all criteria, applicants must correct the deficiencies stated in the denial of the original permit. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2].

* On reconsideration, applicants must show correction of deficiencies by providing information listed as necessary in original denial; Board may decline to review compliance if insufficient information is provided. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

* Appeal dismissed where applicant filed motion for reconsideration with Commission and was issued a permit, and Board found that dismissal was not contrary to the intent or purposes of Act 250. *Porter's Orchard Partnership & Paul and Carolyn Porter*, #4C0758-EB (8/21/89). [EB #404]

472.4.1**Affidavit required**

* Merits of reconsideration of application were reached notwithstanding Applicant's failure to present affidavit certifying that deficiencies were corrected, as required by 10 V.S.A. § 6087(c). *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 4 (3/29/10), aff'd on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* Applicant complied with requirement that an affidavit be filed with regard to the deficiencies which were the basis of the original permit denial. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (2/4/97). [EB #666M1]

* Affidavit must accompany motion for reconsideration indicating that applicant has altered its project sufficiently to meet deficiencies under Criterion 5. *George Tardy*, #5W0534 (3/21/80). [EB #122]

473. Motion to Alter**473.1 General**

* Under EBR 13(b), party is required to move to reopen the hearing in order to submit new evidence. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 629 (1993).

* "We recognize four basic functions of a motion to alter or amend: (1) to 'correct manifest errors of law or fact upon which the judgment is based'; (2) to allow a moving party to 'present newly discovered or previously unavailable evidence'; (3) to 'prevent manifest injustice'; and (4) to respond to an intervening change in the controlling law.' *In re Lathrop Limited Partnership*, No. 122-7-04 Vtec, Decision on Supplemental Pre-Trial Motion at 10–11 (4/12/11) (citing 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1) and *McCullough Crushing, Inc. Act 250 Expansion*, 3-1-10 Vtec, Decision on Motions to Alter/ Amend at 1-2 (2/16/2017).

* The moving party has a high burden in demonstrating the need to alter or amend a previous judgment. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Entry Order on Motion to Alter at 2-3 (8/12/10).

* Person denied party status may request reconsideration of a denial, even though EBR 31(A) appears to limit the filing of motions to alter to "parties." *Okemo Mountain, Inc. n/k/a Okemo Limited Liability Company and Vermont Department of Forests, Parks, and Recreation*, #2S0351-23E-EB and #2S0351-25S-EB, MOD at 4 (7/3/02).

* Motion to alter is typically granted when it "is neither frivolous nor made as a dilatory maneuver or in bad faith." *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 11 (2/2/10), citing *In re Guardianship of L.B.*, 147 Vt. 82, 84 (1984).

* Merely because a party does not cite to EBR 31(A) does not mean that its motion to alter is improper; Board can address an unnamed motion which is properly made under a Board Rule. *The*

Van Sicklen Limited Partnership, #4C1013R-EB, MOD at 3 (7/26/01). [EB #785]

* Motion to alter cannot be used to convert the Board's final decision into a "proposed" decision. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Rev), MOD, (7/24/98). [EB #647], *aff'd, In re White*, 172 Vt. 335 (2001).

* Board declines to alter Board permit condition where alternation would eliminate reference to Commission permit, thereby eliminating conditions in Commission permit that had not been appealed. *Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB(6/12/97). [EB #651RM1]

* Holding a hearing on motion to alter is discretionary. *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (Unlined Landfill Facility) (2/3/97) [WFP #24M]; *Robert and Barbara Barlow*, #8B0473-EB (10/23/92). [EB #547M1]; *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (11/8/90). [EB #430M2]

* EBR 31(A) is not limited solely to motions to alter permit decisions but applies to interlocutory appeals as well. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M].

473.2 New evidence / argument

* Board declines to reopen record to hear new evidence in support of motion to alter decision concerning applicability of EBR 34(A) and amendment jurisdiction to utility line projects. *Re: Central Vermont Public Service Corp. and Verizon New England (Jamaica)*, #2W1146-EB, MOD on Motions to Alter at 5, Docket #817 (12/19/2003). [EB#817]; *Re: Central Vermont Public Service Corp. and Verizon New England (Guilford)*, #2W1154-1-EB, MOD on Motions to Alter (12/19/2003). [EB#821]

* Motions to alter decisions of the Board pursuant to EBR 31(A) must be based on the existing record; no new hearings are held, nor is new evidence or argument taken. *Re: Woodford Packers, Inc., d/b/a WPI*, #8B0542-EB, MOD on Motion to Alter (12/20/01), *aff'd, In re Woodford Packers, Inc.*, 2003 VT 60 (6/26/03). [EB #774] [EB #774]; *Catamount Slate, Inc. et al.*, DR #389, MOD at 2 (7/27/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04); *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 3 (7/26/01). [EB #785]; *North Country Animal League*, #5L0487-4-EB, MOD (4/20/00). [EB #750]; *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 4 & 5 (11/8/99). [EB# 739]; *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (Unlined Landfill Facility) (2/3/97). [WFP #24M]; *Re: Charles and Barbara Bickford*, #5W1186-EB, MOD at 3 (9/12/95). [EB #595]; *Robert and Barbara Barlow*, #8B0473-EB (10/23/92). [EB #547M1]; *Upper Valley Regional Landfill*, #3R0609-EB, FCO at 7 (11/12/91), *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (11/8/90). [EB #430M2]; *Marylou Saldi*, #5W0902-EB (1/8/87). [EB #340M] *And see Finard-Zamias Associates, et al.*, #1R0661-EB, MOD at 2 (1/16/91) ("This interpretation is based on the need to maintain the integrity of the Board's appeal process by ensuring that arguments and evidence are introduced prior to final decision."), cited in *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 4 (7/26/01). [EB #785]

* Unless the Board decides to reopen the hearing, all requested alterations must be based on a proposed reconsideration of the existing record. EBR 31(A). *Re: Hale Mountain Fish and Game Club*,

Inc., DR #435, MOD (10/17/05), reversed and remanded on other grounds, *In re Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102 (9/13/07)(mem.).

* On motion to alter, new arguments are not acceptable, with exception of argument about matters parties could not reasonably have known about before. *Catamount Slate, Inc. et al.*, DR #389, MOD at 6 (7/27/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04); *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 4 (7/26/01). [EB #785]; *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (12/10/96); *Nehemiah Associates, Inc.*, #1R0672-1-EB, MOD at 2 - 3 (10/3/95.) [EB #592M3]

473.3 What issues can be reviewed

Motions that ask to curtail or expand the condition are not appropriate for alteration, but clarifications can be made by the Court. *McCullough Crushing, Inc. Act 250 Expansion*, 3-1-10 Vtec, Decision on Motions to Alter/ Amend at 2 (2/16/2017).

* Motions to alter decisions of the Board cannot be used to reconsider matters not initially considered. *Re: Green Mountain Railroad*, #2W0038-3B-EB, MOD at 4 (4/18/02); *Catamount Slate, Inc. et al.*, DR #389, MOD at 2 (7/27/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04); *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 3-4 (7/26/01). [EB #785], citing *Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, MOD at 2 (6/12/97).

* Motions to alter are appropriate for argument about improper procedure or permit conditions, but not for raising new arguments. *Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB (6/12/97). [EB #651RM1]; *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]; *Finard-Zamias Associates*, #1R0661-EB (1/16/91). [EB #459M2]; *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (11/8/90). [EB #430M2]; *Berlin Associates*, #5W0584-9-EB (4/24/90). [EB #379];

473.3.1

Second requests

* Motion to alter, which is a second request to reconsider issue which has been decided, is barred. EBR 31(A). *Catamount Slate, Inc. et al.*, DR #389, MOD at 3 (9/20/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

473.4 Timeliness of

* Requirement that Board act "promptly" upon motions to alter, EBR 31(A), does not impose any set time limit. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 629 (1993).

* Rule 3(D)(2) allows request to reconsider a Declaratory Ruling to be filed within 30 days from the date of the decision. *Re: McLean Enterprises Corporation*, DR #428, MOD at 2 (10/13/05).

* Motion to Alter filed beyond the 30-day time limit imposed by EBR 31(A) is untimely. *Catamount Slate, Inc. et al.*, DR #389, MOD at 10-12 (9/20/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04); *Bernard Carrier*, #7R0639-1-EB, MOD (10/20/99). [EB #728M]

* Motion to Alter denied where movant filed response to proposed noise demonstration within time, but subsequently filed its Motion to Alter out of time. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 3 - 5 (5/18/00). [EB# 739].

* Board declined to hear untimely motion to alter. *Lawrence White*, #1R0391-EB, #103091-3-EB, #1R03091-4-EB, #1R03091-5-EB, #1R03091-5A-EB, and #1R0391-6-EB (Rev), MOD, (7/24/98). [EB #647], *aff'd*, *In re White*, 172 Vt. 335 (2001).

* Where a decision was reconsidered, a motion to alter must be made within 30 days of the original decision, not the reconsidered decision. *Okemo Mountain, Inc.*, #2S0351-10-EB (1/3/92). [EB #408M]

473.5 Effect of filing

473.5.1

Appeal placed on hold pending resolution

* Appeal becomes ineffective upon the timely filing of a motion to alter with Commission, but it is revived when the motion is decided. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, DR #409, MOD at 2 (2/25/03), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04); *Re: Wright/Morrissey Realty Corp.*, #4C1070-EB and #4C1071-EB, DO at 2 (10/18/01). [EB #788]; see V.R.A.P. 4.

* A plain reading of both Rule 31(A) and V.R.A.P 4 leads us to the conclusion that, with the motion to alter pending, the present notice of appeal is not effective in this Court. Further, “[t]he running of the time for filing a notice of appeal is terminated as to all parties by a timely motion to alter.” *BlackRock Construction, LLC Act 250*, #32-2-19 Vtec., Decision on Motion to Dismiss Appeal as Untimely/ Allow Untimely Appeal (4/2/19) (referencing Act 250 Rules, Rule 31(A)(3)).

473.5.2

Appeal period tolled

* Motion to alter a decision under EBR 31(A) will toll the period for appeal. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M]

* Motion to alter a decision tolls period for appeal; a second revised Commission order starts a new period for appeal; motions for permission to take interlocutory appeal are allowable when timely filed after revised Commission order. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M]

* A plain reading of both Rule 31(A) and V.R.A.P 4 leads us to the conclusion that, with the motion to alter pending, the present notice of appeal is not effective in this Court. Further, “[t]he running of the time for filing a notice of appeal is terminated as to all parties by a timely motion to alter.” *BlackRock Construction, LLC Act 250*, #32-2-19 Vtec., Decision on Motion to Dismiss Appeal as Untimely/ Allow Untimely Appeal (4/2/19) (referencing Act 250 Rules, Rule 31(A)(3)).

473.6

Effect of failure to file

* Party waives requirement that Board is required to enter its observations from the site visit on the record by failing to raise it in response to the Board's proposed decision. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In re Denio*, 158 Vt.230, 238 (1992); *In re Quechee Lakes Corp.*,154 Vt. 543, 552 (1990).

* Appellant waives an argument not raised in a post-decision motion made under EBR 31, which provides a party with an opportunity to object or move to alter to a Board decision. *In re Quechee Lakes Corp*, 154 Vt. 543, 552 n.7 (1990), citing 10 V.S.A. § 6089(c).

473.7 Refined or new findings and conclusions

* There was no abuse of discretion by the Board on remand when it refined its preremand findings and conclusions and added new findings and conclusions. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 297 (1998)

473.8 Specific cases

* Motion to alter denied, but Board alters decision and permit to incorporate technical determination from discharge permit concerning distance from project to existing use. *Re: Village of Ludlow*, MOD on Motion to Alter at 4-5, #2S0839-2-EB (11/26/2003). [EB#826]

* Motion to alter is dismissed where allegation is that assistant Coordinator cannot expand permit authorized by Coordinator. *Putney Paper Company, Inc.*, #2W0436-7-EB (11/3/95). [EB #621]

* Motion to alter is dismissed when a reopening of permits of other previously permitted projects is sought. *Putney Paper Company, Inc.*, #2W0436-7-EB (11/3/95). [EB #621].

* Motion granted to alter conclusions to be consistent with findings concerning characterization of the February median flow. *Okemo Mountain, Inc.*, #2S0351-12A-EB (11/13/92). [EB #471M6]

* Rule 31(A) is appropriate vehicle for parties to seek clarification of unclear permit conditions clear, to correct or modify conditions as may be necessary, and to argue that Board's findings are not based upon the evidence or that conclusions are incorrect. *Okemo Mountain, Inc.*, #2S0351-10-EB (1/3/92). [EB #408M]

* Because parties participating pursuant to Rule 14(B) cannot appeal to Supreme Court, it is particularly important that they have an opportunity to request Board to reconsider its decision to ensure that it is not erroneous. *Okemo Mountain, Inc.*, #2S0351-10-EB (1/3/92). [EB #408M]

* Current Rule 31(A) allows motions to alter as are appropriate with respect to the decision, similar to old Rule 31(A). *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (11/8/90). [EB #430M2]

* EBR 31(A) is not limited solely to motions to alter permit decisions but applies to interlocutory appeals as well. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M]

* 10 V.S.A. § 6087 does not provide for reconsideration of permit conditions; *Larry & Joan Westall*, #4C0558-2-EB (4/10/87). [EB #342]

* 10 V.S.A. § 6087 provides for reconsideration of permit denials, within a period of 6 months. *Larry & Joan Westall*, #4C0558-2-EB (4/10/87). [EB #342]

* On motion to alter, Board concludes that implementation of revised storm water disposal regime will comply with applicable state regulations and will not result in undue water pollution under Criterion 1(B). *Fairfield Associates*, #4C0570-EB (3/29/85). [EB #234]

H. Finality of Decisions

483. General

483.1 JOs / Declaratory Rulings

* Statutory changes effective in 2005 provide for final jurisdictional opinions to be published and on all persons with a particularized interest. *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 11 (4/11/14)(citing 10 V.S.A. § 6007(c)); *see also*, 10 V.S.A. § 6007(d)(1)(providing that any person served with a jurisdictional opinion when issued must file any request for reconsideration within 30 days)(eff. 7/1/13).

* Unappealed PRS is a jurisdictional opinion, is a final determination, and is binding on those on whom it is properly-served. *Re: Dexter and Susan Merritt*, DR #407, MOD at 5 (6/20/02), *aff'd on other grounds*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03); *Central Vermont Public Service Corporation*, DR #401, FCO at 11 (4/2/02); *Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, MOD at 5 (2/9/01); *noted but not decided*, *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 2 n.2 (1/16/07).

* After PRS was held to be final and binding upon applicant, its arguments that it had a right to withdraw its application covering the activity at issue in PRS for lack of jurisdiction was without merit. *Re: Green Mountain Railroad*, #2W0038-3B-EB, FCO at 6 (3/22/02). [EB #797].

* As a general rule, principles of finality dictate that valid judgments remain undisturbed. *Central Vermont Public Service Corporation*, DR #401, FCO at 4 (4/2/02), citing *Town of Putney v. Town of Brookline*, 126 Vt. 194, 200 (1967).

* Subject matter jurisdiction – a tribunal's authority to decide the question presented - can be reviewed at any time that a matter is alive and pending. *Central Vermont Public Service Corporation*, DR #401, FCO at 5 (4/2/02).

* Board lacks authority to consider extent of involved land in permit appeal because JOs ruling on the issue were never appealed. *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, MOD (2/9/01). [EB #767]

* Board gives presumptive weight to a prior jurisdictional determination to which no timely objection has been raised,. *Putney Paper Company, Inc.*, #2W0436-7-EB (FCO at 10-11) (11/3/95). [EB #621]; *Rock of Ages*, DR #291, (MOD at 7) (3/28/94).

* A Declaratory Ruling is not subject to collateral attack in a subsequent enforcement action. *Joseph Gagnon*, DR #173M (7/3/86).

483.2 Permits

* To allow Neighbors to re-litigate the issues related to previously approved road in an amendment proceeding that is not proposing any changes related to the road “would violate concepts of finality, ‘would severely undermine the orderly governance of development[,] and would upset reasonable reliance on the process.’” *In re Big Spruce Road Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 7 (4/21/10)(citing *Taft Corners*, 160 Vt. 583 at 593 (1993) (quoting *Levy v. Town of St. Albans Zoning Bd. Of Adjustment*, 152 Vt. 139, 143 (1989)).

* “The fact that the previous Permit authorizes the development of Big Spruce Road does not vest a person in a subsequent amendment proceeding with the authority to challenge all prior impacts.” *In re Big Spruce Road Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 7 (4/21/10) (citing *In re Taft Corners Assocs., Inc.*, 160 VT 583 (1993)).

* An applicant precluded from pursuing a motion for reconsideration by the six-month deadline of Rule 31(B) is not necessarily prevented from submitting a new application for a similar development project; however, applicants electing not to pursue a motion for reconsideration necessarily waive the benefits that they would have otherwise received under Rule 31(B). *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 10-11 (3/16/09).

*The “successive-application doctrine,” due to its ability to strike the proper balance between finality and flexibility, is more appropriate than the “changed circumstances doctrine” for analyzing whether to permit review of an Act 250 permit application for a project that has previously been denied a permit. *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 13 (3/16/09), citing *In re Dunkin Donuts*, 2008 VT 139, ¶¶ 9–10.

* Appropriate time to ask that permit be denied is in permit proceeding, not in proceeding concerning appropriate cure for violation. *Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB (Revocation), FCO at 15 (4/4/03)(citing *Re: Synergy Gas Corporation*, #9A0204-EB (Revocation), MOD at 4 (7/ 31/95); *motion to alter denied*, MOD (6/9/03). [EB #792R].

* Board declined to acknowledge that Commission’s decision was final as to landscaping, as issue was not properly before Board and appeared contrary to Board precedent with regard to finality. *Vermont Agency of Transportation*, #4C1010-EB (5/5/98). [EB #702]

* Once permit is issued and appeal period has expired, the findings, conclusions, and permit are final and not subject to attack. *Roger and Beverly Potwin*, #3W5087-1-EB (Revocation) (7/15/97). [EB #655]

* Un-appealed Commission decision not making adjoining landowner co-applicant was final even if Commission erred by not making adjoiner a co-applicant. *David Enman (St. George Property)*, DR #326 (12/23/96).

* Where the Board issues a decision denying an application, and that decision was not appealed to the Supreme Court, such decision is final and binding. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd, In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

483.3 Partial findings

* A partial decision per Rule 21 that offsite mitigation was appropriate for impacts to prime agricultural soils was not a final decision under Criterion 9(B) where the District Commission reserved issuing a final decision until the applicant provide a copy of a proposed offsite mitigation agreement with the Agency of Agriculture for the Commission's review and approval. If the Commission had tried to issue a final decision under Criterion 9(B) without first reviewing the proposed agreement, it would have imposed an invalid condition subsequent. *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/28/19).

484. Res Judicata / Claim Preclusion

* "The concept of *res judicata* embraces two doctrines, claim preclusion and issue preclusion (or collateral estoppel), that bar, respectively, a subsequent action or the subsequent litigation of a particular issue because of the adjudication of a prior action." *In re Quechee Lakes Corp.*, 154 Vt. 543, 559 (1990).

* *Res judicata* applies only where a party seeks to relitigate the identical issues already decided. *In re Quechee Lakes Corp.*, 154 Vt. 543, 559 (1990).

* When prior application for similar development denied, whether local or state land use regulation, proponent of successive, similar project must show "a substantial change in the application or the circumstances" surrounding the current project. *In re JLD Properties – Wal-mart St. Albans*, Nos. 116-8-08, 95-5-07, and 242-10-06 Vtec at 14 (3/16/09) (Durkin, J.) (quoting *In re Armitage*, 2006 VT 113, ¶ 8, 181 Vt. 241); *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 24 (1/20/10).

* *Res judicata* doctrine is outweighed by a policy of allowing persons to be heard concerning permit amendment requests, but Board will not look favorably at permittees who do not build in compliance with permits and then seek to amend permits to conform with has been actually built. *John Litwhiler and H.A. Manosh*, #5L1006-EB (2/28/90). [EB #451M]

484.1 Principle of

* *Res judicata* applies only where a party seeks to relitigate the identical issues already decided. *In re Quechee Lakes Corp.*, 154 Vt. 543, 559 (1990).

* “The principle of *res judicata*, or claim preclusion, bars litigation of claims or causes of action which were or might properly have been litigated in a previous action.” *Re: Dexter and Susan Merritt*, DR #407, MOD at 10 (6/20/02), *aff’d*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03), citing *Agway, Inc. v. Gray*, 167 Vt. 313, 316 (1997) (internal quotation marks omitted) (quoting *State v. Dunn*, 167 Vt. 119, 125 (1997); *Central Vermont Public Service Corporation*, DR #401, FCO at 11 -12 (4/2/02).

* Where issues permittee seeks to litigate have already been litigated and finally determined by Board, need for finality in the process and burdens to other parties far outweigh any arguments advanced for proceeding with further appeal. *Berlin Associates*, #5W0584-14-EB (2/4/93). [EB #563]; *Rome Family Corporation*, #1R0410-3-EB (5/2/89). [EB #416M1].

* Where the petitioners appeal of Board decision to deny a permit for the operation of a gravel pit was denied by Supreme Court, their subsequent request for a DR was barred by *res judicata*. *Dorothy and George Carpenter*, DR #237 (4/25/91).

484.2 Elements of

* *Res judicata* will bar a subsequent action only if there was a final judgment in the previous action, by an administrative agency acting in judicial capacity, and parties, subject matter, and causes of action are identical or substantially identical; two causes of action are the same if they can be supported by the same evidence. *Unifirst Corporation*, DR #348 (1/30/98).

* Elements of *res judicata* are satisfied where each application concerns approval of a substantially identical project, parties are the same, and earlier application was pursued to final judgement. *John A. Russell Corp.*, #1R0257-2A-EB (10/22/92). [EB #552]

484.2.1

Prior litigation / judgment

* Where issues raised in revocation petition have not been litigated, doctrine of *res judicata* does not bar Board from considering petition. *Talon Hill Gun Club, Inc. and John Swingleton*, #9A0192-EB(Revocation) (3/4/93). [EB #567M2]

* *Res judicata* is not applicable where issue has not been previously adjudicated, and issues considered in an earlier ruling are not identical to present case. *John Litwhiler and H.A. Manosh*, #5L1006-EB (2/28/90). [EB #451M]

484.2.2

Identity of Facts / subject matter

* *Res judicata* bars relitigation of claims that were or could have been litigated in a prior action

before an administrative agency acting in a judicial capacity. *Land Use Panel v. Donald Dorr, et al.*, 2015 VT 1 ¶ 10 (1/9/15).

* Claim preclusion rests on fundamental precept of finality, and on the interests of consistency and repose. *Land Use Panel v. Donald Dorr, et al.*, 2015 VT 1 ¶ 11 (1/9/15).

* Res judicata bars respondents from raising claim that could have been raised in a prior enforcement proceeding. *Land Use Panel v. Donald Dorr, et al.*, 2015 VT 1 ¶¶ 12-13 (1/9/15).

* Applicant may revise development proposal, particularly to address shortcomings of prior project, and may present evidence in support of revised project including material change in circumstances surrounding prior project or applicable regulatory provisions. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 25 (1/20/10).

* *Res judicata* does not apply when the facts have changed. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 19 n. 12 (4/19/01). [EB #763]; *Talon Hill Gun Club, Inc.*, #9A0192-2-EB(Revised) (11/7/94). [EB #611M]

* Appeal of permit amendment obtained pursuant to conditional revocation order not barred by collateral estoppel or *res judicata* because permit amendment authorized new activity. *Talon Hill Gun Club, Inc. and John Swingleton*, #9A0192-2-EB (6/7/95) (*see also* MOD (11/7/94)). [EB #611 and #611M1]

* *Res judicata* is not applicable where the subject matter and causes of action of a Superior Court necessity hearing are not identical or even substantially similar to the issues in a later Act 250 proceeding. *State of Vermont Agency of Transportation*, #7C0558-2-EB (Reconsideration) (5/18/90), *aff'd*, *In re Agency of Transportation*, 157 Vt. 203 (1991). [EB #445]

* *Res judicata* is not applicable where issue has not been previously adjudicated, and issues considered in an earlier ruling are not identical to present case. *John Litwhiler and H.A. Manosh*, #5L1006-EB (2/28/90). [EB #451M]

484.2.3

Identity of parties

484.3 In administrative proceedings

*The “successive-application doctrine,” due to its ability to strike the proper balance between finality and flexibility, is more appropriate than the “changed circumstances doctrine” for analyzing whether to permit review of an Act 250 permit application for a project that has previously been denied a permit. *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 13 (3/16/09), citing *In re Dunkin Donuts*, 2008 VT 139, ¶¶ 9–10.

* In administrative proceedings, the doctrine of *res judicata* should not be applied as an inflexible rule of law, but must be tempered with flexibility, fairness, and equity. *Berlin Associates*, #5W0584-

14-EB (2/4/93). [EB #563]; *Rome Family Corporation*, #1R0410-3-EB (5/2/89). [EB #416M1]

484.4 Relation to collateral estoppel

* Analysis of *res judicata* and its relationship to collateral estoppel. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 18 - 19 (4/19/01). [EB #763]

484.5 Successive applications

* When prior application for similar development denied, whether local or state land use regulation, proponent of successive, similar project must show “a substantial change in the application or the circumstances” surrounding the current project. *In re JLD Properties – Wal-mart St. Albans*, Nos. 116-8-08, 95-5-07, and 242-10-06 Vtec at 14 (Mar. 16, 2009) (Durkin, J.) (quoting *In re Armitage*, 2006 VT 113, ¶ 8, 181 Vt. 241). *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 24 (1/20/10).

* Applicant may revise development proposal, particularly to address shortcomings of prior project, and may present evidence in support of revised project including material change in circumstances surrounding prior project or applicable regulatory provisions. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 25 (1/20/10).

484.6 Cases

* Commission’s determination that already completed road work was insufficient to sustain the proposed subdivision is final and cannot be challenged in any subsequent appeal to this Court. *In re Edward E. Buttolph Revocable Trust*, No. 19-2-09 Vtec, Decision on Motion for Summary Judgment at 6-7 (10/1/09).

* Where *res judicata* elements are met such that there is no jurisdiction over proposed ground water collection system, Board is bound by a WRB decision to affirm, with modifications, a DEC permit with respect to a project’s compliance with applicable health and environmental conservation department regulations under Criteria 1 and 1(B). *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 15-18 (7/20/00). [EB #696].

* Law of *res judicata* inapplicable to consideration of project under Criterion 10, regional plan. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]

* *Res judicata* principles apply to Act 250 proceedings and Board and Commissions are precluded from review of settled issues in an approved permit unless the permit contains a fixed expiration date for its findings of fact or unless the limited exceptions in EBR 21, 30, and 35 provide otherwise. *J.D. Apartment Corporation*, #1R0408-3-EB (12/19/84). [EB #224]

485. Estoppel

485.1. Collateral Estoppel / Issue Preclusion (see [267](#))

* Doctrine of collateral estoppel, or issue preclusion, which applies when a party seeks to relitigate a factual or legal issue previously decided in a judicial or administrative proceeding, does not provide the correct framework in which to evaluate applications for permit amendments. *In re Stowe Club Highlands*. 166 Vt. 33, 36- 37 (1996).

* The effect of collateral estoppel is that resolution of a specific issue, such as a factual dispute or question of law, is given the same preclusive effect as the final judgment of the court or agency. *In re Stowe Club Highlands*. 166 Vt. 33, 37 (1996).

* EBR 31 and 10 V.S.A. § 6087(c) do not supersede the doctrine of collateral estoppel; rather, they implement its terms. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 13 (6/8/01). [EB #785]

* Collateral estoppel doctrine - often referred to as "issue preclusion" - applies to issues litigated in previous proceedings; if its elements are met, re-litigation of an issue may be barred. *Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB (12/23/92). [EB #564M]

* If collateral estoppel doctrine is to have any meaning, it must operate to bar some substantial / material changes to permitted projects. *Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB (1/20/93). [EB #564M1]

* Issue preclusion did not apply to town's design review board because the municipal hearing was much less formal than an Act 250 hearing and no evidence was presented to show the town's DRB was authorized to undertake local Act 250 review of municipal impacts under 24 V.S.A. §4420. *In re Barefoot Act 250 Application*, 46-4-12 Vtec at 3,4 (11/13/13).

* Court will not apply judicial estoppel in this case, as Vermont Supreme Court has not adopted the doctrine. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 18 (8/15/2017).

485.1.1

Purpose of

* The effect of collateral estoppel is that resolution of a specific issue, such as a factual dispute or question of law, is given the same preclusive effect as the final judgment of the court or agency. *In re Stowe Club Highlands*. 166 Vt. 33, 37 (1996).

* As a general rule, a zoning board or planning commission 'may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions has occurred. *In re Stowe Club Highlands*. 166 Vt. 33, 38 (1996).

* As a general rule, principles of finality dictate that valid judgments remain undisturbed. *Central Vermont Public Service Corporation*, DR #401, FCO at 4 (4/2/02), citing *Town of Putney, Town of Putney v. Town of Brookline*, 126 Vt. 194, 200 (1967).

* Collateral estoppel is a doctrine which is intended to eliminate repetitive litigation, and give repose to litigants. *Re: Greater Upper Valley Solid Waste Management District*, DR #418, MOD at 3 (5/13/03); *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 31 (5/25/99) 25, 1999), *aff'd, OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990); *Unifirst Corporation*, DR #348 (1/30/98).

485.1.2 Elements of

* As a general rule, a zoning board or planning commission 'may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions has occurred. *In re Stowe Club Highlands*. 166 Vt. 33, 38 (1996).

* Elements of collateral estoppel. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 9-11 (6/8/01)[EB #785]; *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 16 - 20 (4/19/01). [EB #763]

* In depth analysis of whether positive findings on criteria in an application case involving the same parcel will bar relitigation of those criteria by a party to the earlier case. *The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 9-11 (6/8/01). [EB #785]

* Before precluding re-litigation of an issue, there must be an examination of the first action and the treatment the issue received in it based on five factors. *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 31 (5/25/99), *aff'd, OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990); *Unifirst Corporation*, DR #348 (1/30/98).

* *Res judicata* and collateral estoppel do not apply where new issues are addressed by the appeal. *Talon Hill Gun Club, Inc.*, #9A0192-2-EB(Revised) (11/7/94). [EB #611M]

* Under collateral estoppel doctrine, a party may be barred from re-litigating those issues "necessary and essentially determined" in a prior action. *Rockwell Park Associates*, #5W0772-5-EB (8/9/93). [EB #509]

485.1.3 In administrative proceedings

* Elements of collateral estoppel are not appropriate standards to evaluate an application for a permit amendment. *In re Nehemiah Associates, Inc.*, 166 Vt. 593, 594 (1996); *In re Stowe Club Highlands*, 166 Vt. 33, 36-37 (1996)

* Doctrine of collateral estoppel is not applicable in permit amendment proceedings because permits are not final unalterable judgments. *James L. McGovern, III*, #700002-17A-EB, MOD at 6 (12/6/02). [EB #813].

* Although collateral estoppel principles of generally apply to Act 250 proceedings, they do not apply to administrative proceedings as an inflexible rule of law; policy considerations must also be

taken into account. *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (7/18/95). [EB #615M1]

* Collateral estoppel doctrine applies to zoning and Act 250 proceedings. *Rockwell Park Associates*, #5W0772-5-EB (8/9/93). [EB #509]

* Collateral estoppel may be applied to Act 250 applications where its five criteria have been met. *John A. Russell Corp.*, #1R0257-2A-EB (10/22/92). [EB #552]

485.1.4

Against the Board

* Failure by permittee to satisfy permit conditions, to take corrective measures, and to disclose such failures to his successor in title preclude him from claiming that the District Commission and the Land Use Panel of the Natural Resources Board are estopped from asserting Act 250 jurisdiction over the property. *In re: Hamm Mine Act 250 Jurisdiction* (Jurisdictional Opinion #2-241), No. 271-11-06 Vtec, Decision and Order at 11 (5/1/08) *aff'd*, 2009 VT 88 (mem.).

* Analysis of claim of collateral estoppel against the Board. *Re: Greater Upper Valley Solid Waste Management District*, DR #418, MOD at 4 (5/13/03); *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 16 - 20 (4/19/01). [EB #763]

485.1.5

Cases

* District commission's conclusion that project is "in conformance with" municipal plan bars relitigation of issue in zoning case where zoning ordinance requires "substantial conformance" with municipal plan. *In re Hartland Group North Avenue Permit*, 2008 VT 97 (2008)(mem.).

* District commission's conclusion that project is "in conformance with" municipal plan bars relitigation of issue in zoning case where zoning ordinance requires "substantial conformance" with municipal plan. *In re Hartland Group North Avenue Permit*, 2008 VT 97 (2008)(mem.).

* Where aesthetics standard and analysis under Act 250 Criterion 8 is distinct from the scenic landscape analysis under municipal bylaws, these are not the same issue such that issue preclusion applies. *In re Rinker's, Inc. d/b/a Rinker's Communications, and Beverly and Wendell Shephard*, No. 302-12-08 Vtec, Decision and Order on Appellee-Applicants' Motion for Partial Summary Judgment at 8 (8/19/09) see also, Decision and Order (5/17/10).

* Since the five *Trepanier* factors were satisfied, there was no jurisdiction over proposed ground water collection system. Based on the doctrine of collateral estoppel, the Board is bound by a WRB decision to affirm, with modifications, a DEC permit with respect to a project's compliance with applicable health and environmental conservation department regulations under Criteria 1 and 1(B). *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 13 (7/20/00). [EB #696].

* Application for development on lot set aside by original permit condition was denied since Commission's original affirmative finding relied upon lot being left in undeveloped state. *Stowe Club*

Highlands, #5L0822-12-EB (6/29/95), *aff'd on grounds other than collateral estoppel*, *In re Stowe Club Highlands*, No. 95-341 (Vt. S. Ct. 11/8/96). [EB #616]

* Application for subdivision permit amendment of tract denied where developer sought permit amendment which would negate original permit condition that tract be kept undeveloped by means of deed covenant; however, collateral estoppel is not an absolute bar; rather, until such time as applicant complies with original permit condition, policy of finality outweighs policy of flexibility. *Nehemiah Associates, Inc.*, #1R0672-1-EB (6/8/95) [EB #592], *rev'd*, *In re Nehemiah Associates, Inc.*, 166 Vt. 593, 594 (1996).

* Limitations in allowable changes to an Act 250 permit may be necessary to uphold the finality of Act 250 decisions while at the same time allowing flexibility in the Act 250 process. Such limitations seek to ensure that collateral estoppel is waived only where changes occur that are beyond an applicant's control or based on good faith actions, and not based on an applicant's desire to do away with a condition which it simply does not wish to fulfill. *Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB (1/20/93). [EB #564M1]

* Where applicant argues against application of collateral estoppel by arguing that an economic downturn has forced a change of circumstances, Board found such an assertion, by itself, inadequate to bar a collateral estoppel finding. *Rockwell Park Associates*, #5W0772-5-EB (8/9/93). [EB #509]

* Even if the elements of collateral estoppel have been satisfied, other policy considerations may require the Board to forbear to apply collateral estoppel if an applicant makes certain proofs which show changed conditions and that the current application is a direct outgrowth of such changes. *Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB (12/23/92). [EB #564M].

* Issue preclusion is an affirmative defense under V.R.C.P. 8(c) and is distinct from the preliminary matter of party status. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 4 (3/13/13).

* Issue preclusion did not apply to town's design review board because the municipal hearing was much less formal than an Act 250 hearing and no evidence was presented to show the town's DRB was authorized to undertake local Act 250 review of municipal impacts under 24 V.S.A. §4420. *In re Barefoot Act 250 Application*, 46-4-12 Vtec at 3,4 (11/13/13).

485.2. Equitable Estoppel

* Even if applicant relied on the representations of an ANR employee that the proposed project was not located in the floodway or floodway fringe using the Federal Emergency Agency (FEMA) National Flood Insurance Program (NFIP) maps, ANR was not foreclosed from presenting evidence on appeal regarding the inadequacy of the NFIP maps to support a finding that the site would be free from flood hazards. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 7 (6/26/03).

* The doctrine of equitable estoppel "is based upon the grounds of public policy, fair dealing, good faith, and justice." *ANR v. Godnick*, 162 Vt. 588, 592 (1994); quoting *Dutch Hill Inn, Inc. v. Patten*,

131 Vt. 187, 193 (1973).

* Because the Board compelled person to seek a permit, he is not estopped from challenging the Board's jurisdiction. *In re Barlow*, 160 Vt. 513, 520 (1993).

* It would defeat the legislative intent to allow a statutory requirement to be avoided by equitable estoppel. *In re Barlow*, 160 Vt. 513, 524 (1993), citing *In re Orzel*, 145 Vt. 355, 361 (1985) and *In re Agency of Administration*, 141 Vt. 68, 80 (1982) (remarks of state employee will not color court's construction of legal language).

* To find that the representation by the Agency's inspector prevents the Board from ever finding that petitioners need a permit fails to give meaning to the "substantial change" language of the statute. *In re Orzel*, 145 Vt. 355, 361 (1985).

* "Judicial estoppel is a principle that prevents a party who has successfully taken a particular legal position from subsequently changing that position during the pendency of litigation." *In re Lathrop Limited Partnership*, No. 122-7-04 Vtec, Decision on Supplemental Pre-Trial Motion at 7 (4/12/11) (citing *Boivin v. Town of Addison*, 2010 VT 67 ¶ 18 n3 (mem.)).

* Equitable estoppel is "based upon the grounds of public policy, fair dealing, good faith, and justice." *Re: Dexter and Susan Merritt*, DR #407, MOD at 9 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03). citing *Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 193 (1973); *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, DR #396, FCO (12/28/01); *Nelson Lyford*, DR #341 (12/24/97).

* Estoppel against the government is "rare and [is] to be invoked only in extraordinary circumstances," *Re: Dexter and Susan Merritt*, DR #407, MOD at 5 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03), citing *In re Green Peaks Estates*, 154 Vt. 363, 370-71 (1990) (quoting *In re McDonald's Corp.*, 146 Vt. 380, 383 (1985)).

* Doctrine of equitable estoppel will not be invoked in favor of a party "whose own omissions or inadvertence contributed to the problem." *Re: Dexter and Susan Merritt*, DR #407, MOD at 6 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03), citing *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.*, 139 Vt. 288, 294 (1981); *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, DR #396, FCO (12/28/01); *Nelson Lyford*, DR #341 (12/24/97).

* Failure to disclose material facts constitutes failure to act in good faith and precludes equitable estoppel. *Re: Dexter and Susan Merritt*, DR #407, MOD at 6 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03).

* Equitable estoppel has not been held to bar Board from making any *de novo* determination. *Re: Dexter and Susan Merritt*, DR #407, MOD at 8 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03).

* It is axiomatic that one who seeks equitable relief must have "clean hands." *Re: Dexter and Susan*

Merritt, DR #407, MOD at 6 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03), citing *Vermont Acc. Ins. Co. v. Fletcher*, 87 Vt. 394 (1914).

* To apply the doctrine of equitable estoppel against a district coordinator, the Board must "find 'extraordinary circumstances' or resulting 'injustice.'" *Re: Dexter and Susan Merritt*, DR #407, MOD at 8 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03); *Liberty Transportation, Inc.* DR #394 FCO at 6 (9/20/01).

* Because permittee failed to list petitioner as adjoiner (who was thus unaware of applications) revocation petition is not barred by equitable estoppel or laches. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) (9/17/96). [EB #647]; *aff'd*, *In re White*, 172 Vt. 335 (2001).

* Evaluating the applicability of equitable estoppel involves a fact-based determination that can only be made through an evidentiary hearing. *Triple M Marketplace*, DR #274M1 (1/15/93).

485.2.1 Elements of

* To prevail on an equitable estoppel claim, claimant must prove each of the elements of equitable estoppel: (1) the party to be estopped must know the facts, (2) that party's conduct must be intended to be acted on by the other, or reasonably perceived as such, (3) the party asserting the estoppel must be ignorant of the true facts, and (4) the party asserting the estoppel must rely on the other party's conduct, causing injury. *ANR v. Godnick*, 162 Vt. 588, 592 (1994); *In re Barlow*, 160 Vt. 513, 523 (1993); *In re Spencer*, 152 Vt. 330, 342 (1989); *In re McDonald's Corp.*, 146 Vt. 380, 383-84 (1985); *Re: Dexter and Susan Merritt*, DR #407, MOD at 5 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03); *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, DR #396, FCO (12/28/01); *Nelson Lyford*, DR #341 (12/24/97).

* Because Board had an incomplete knowledge of the relevant facts when a PRS was issued, its therefore could not have given person's predecessors in title any assurances upon which they or later owners were entitled to rely. *In re Barlow*, 160 Vt. 513, 524 (1993).

* A person cannot benefit from the doctrine of equitable estoppel unless he relied to their detriment on the other person's conduct. *In re Conway*, 152 Vt. 526, 531 (1989); *In re McDonald's Corp.*, 146 Vt. 380, 383-84 (1985).

* Consistent with the requirement of good faith, estoppel will not be invoked in favor of a party " 'whose own omissions or inadvertence contributed to the problem.' " *ANR v. Godnick*, 162 Vt. 588, 593 (1994); *In re Green Peak Estates*, 154 Vt. 363, 371-72 (1990); *In re Conway*, 152 Vt. 526, 531 (1989); *In re McDonald's Corp.*, 146 Vt. 380, 384 (1985); *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.*, 139 Vt. 288, 294 (1981).

* " '[S]ilence without knowledge works no estoppel.' " *In re Green Peak Estates*, 154 Vt. 363, 370-71 (1990), quoting *Laird Properties New England Land Syndicate v. Mad River Corp.*, 131 Vt. 268, 282 (1973).

* No equitable estoppel where applicants knew that they had to give notice to all adjoining property owners, but failed to do so, allegedly relying upon Coordinator's advice that such notice was not required. *In re Conway*, 152 Vt. 526, 531 (1989).

* Board cannot be estopped from finding a substantial change because of prior representations made by an environmental agency employee. *In re Orzel*, 145 Vt. 355, 361 (1985).

* Party asserting equitable estoppel did not allege that Coordinator knew a crucial fact. *Re: Dexter and Susan Merritt*, DR #407, MOD at 6 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03), citing *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.*, 139 Vt. 288, 294 (1981).

* "'True facts' in estoppel are facts known to the party being estopped but unknown to the party asserting estoppel." *Re: Dexter and Susan Merritt*, DR #407, MOD at 7 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03), citing *Gravel and Shea v. White Current Corp.*, 170 Vt. 628, 630 (2000) (mem.).

* Equitable estoppel applies only where there are facts known to the party to be estopped that are not known to the party claiming estoppel. *Re: Dexter and Susan Merritt*, DR #407, MOD at 7 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03).

* Equitable estoppel does not apply to Coordinator's decision that a permit was not required for a subdivision, where petitioner failed to establish Coordinator's knowledge that project was intended to be a commercial subdivision at time decision was issued. *Investors Corporation of Vermont*, DR #249 (12/31/91)

* Equitable estoppel does not apply where petitioner fails to establish the nature and extent of the injury it incurred as a result of its reliance on a determination. *Investors Corporation of Vermont*, DR #249 (12/31/91).

* Petitioners fail to prevail in a claim of equitable estoppel. While they may have purchased a gravel pit in reliance on a project review sheet stating that the development was not subject to Act 250 jurisdiction, their use of the pit involved substantial changes to that pre-existing development and therefore was not identical to the use described in the project review sheet. *Robert and Barbara Barlow*, DR #234 (9/20/91), *aff'd*, *In re Barlow*, 160 Vt. 513 (1993).

* Board is not estopped from asserting jurisdiction where there is no reliance upon advisory opinions issued by State agents. *McDonald's Corporation*, DR #136 (FCO at 12) (10/26/82), *aff'd*, *In re McDonald's Corp.*, 146 Vt. 380 (1985).

485.2.1.1 Burden of proving elements

* One who invokes the doctrine of equitable estoppel has the burden of establishing each of its constituent elements. *In re McDonald's Corp*, 146 Vt. 380, 384 (1985); *Re: Dexter and Susan Merritt*, DR #407, MOD at 6 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03).

* ANR is not estopped from denying application for renewal of interim certification where applicant fails to prove elements of equitable estoppel. *Rapid Rubbish Removal, Inc.*, #CA-721-WFP (6/12/97). [WFP #29]

485.2.2 Against the State

* Estoppel is rarely invoked against the government. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 7 (6/26/03); *In re Green Peak Estates*, 154 Vt. 363, 370-71 (1990) (rare and invoked only in extraordinary circumstances); *In re McDonald's Corp.*, 146 Vt. 380, 383 (1985).

* Estoppel against the State is "only appropriate when the injustice that would ensue from a failure to find an estoppel sufficiently outweighs any effect upon the public interest that would result from estopping the government in a particular case." *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 6 (6/26/03); *In re Barlow*, 160 Vt. 513, 524-25 (1993) (court is reluctant to apply estoppel against the state unless there are 'extraordinary circumstances'), citing *In re Spencer*, 152 Vt. 330, 342 (1989), quoting *In re McDonald's Corp.*, 146 Vt. 380, 383 (1985); and see. *ANR v. Godnick*, 162 Vt. 588, 593 (1994); *In re Conway*, 152 Vt. 526, 530-31 (1989).

* "Estoppel is not a defense that should be readily available against the state, but neither is it a defense that should never be available." *In re McDonald's Corp.*, 146 Vt. 380, 383 (1985).

485.3 Cases

* Landowner's failure to challenge the continued enforceability of the permit at the time the bylaws were adopted, or question permit's validity until five years after it was issued, estops landowner from retroactively challenging the continued Act 250 jurisdiction. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993), citing *In re Denio*, 158 Vt. 230, 234 (1992).

486. Collateral Attack of Decisions

* Appellant did not timely appeal, and Court will not entertain collateral attacks with regard to "mere errors or irregularities in the exercise of jurisdiction." *In re Alpen Associates*, 147 Vt. 647 (1986).

* Subject matter jurisdiction - a tribunal's authority to decide the question presented - can be reviewed at any time that a matter *is alive and pending*. *Central Vermont Public Service Corp.*, DR #401, FCO at 5 (4/2/02).

* Analysis of when a judgment may be attacked collaterally because the authority which renders it does not have jurisdiction over the subject matter or the parties. *Central Vermont Public Service Corporation*, DR #401, FCO at 5 - 7 (4/2/02); cited in, *Re: Dexter and Susan Merritt*, DR #407, MOD at 10 (6/20/02), *aff'd*, 2003 VT 84.

* Unappealed permit condition cannot be collaterally attacked by a DR proceeding since the appropriate avenue for challenging a permit condition is a timely appeal. *State of Vermont Agency*

of Transportation (Williston Area Improvements), DR #311 (1/31/96), *aff'd*, *In re State of Vermont Agency of Transportation (Williston Area Improvements)*, No. 96-109 (Vt. S. Ct. 10/31/96).

VIII. APPEALS OF THE MERITS

A. General

501. General

* Statutes giving and regulating the right of appeal are remedial in nature and should receive a liberal construction in furtherance of the right of appeal. *In re Preseault*, 130 Vt. 343, 346 (1972).

*The appellate rules can be suspended as a matter of discretion in the interest of judicial economy. *In re Stowe Highlands Merger/Subdivision Application*, 2013 VT 4 at ¶18 (1/11/13) (citing *In re Paynter 2-Lot Subdivision*, 2010 VT 28, ¶ 3 n.2, 187 Vt. 637, 996 A.2d 219 (mem.)).

* Motion for more definite statement is appropriate where a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to respond. *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 3 (5/09/13)(citing V.R.C.P. 12(e)).

501.1 Who may appeal

* Person who lost its interest in a permit had no standing to appeal the Commission's grant of the permit amendment to another person. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.).

* The word "appeal" as used in 10 V.S.A. § 6085(c) refers to appeals to the Vermont Supreme Court. *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 28 (1995), citing *In re George F. Adams & Co.*, 134 Vt. 172, 174-75 (1976).

* Statutes giving and regulating the right of appeal are remedial in nature and should receive a liberal construction in furtherance of the right of appeal. *In re Preseault*, 130 Vt. 343, 346 (1972).

* Pursuant to 3 V.S.A. § 815(a) a method of obtaining judicial review of an administrative action is made available to a person who has exhausted all administrative remedies available, and is aggrieved by a final decision in a contested case. *In re Preseault*, 130 Vt. 343, 347 (1972).

* Adjoining property owners can appeal to Board. *In re Preseault*, 130 Vt. 343, 347 (1972); 3 V.S.A. § 815(a)

* A de novo proceeding contemplates those parties who had an interest in the original proceeding being allowed to appear and participate as proper parties at the second set of hearings. *In re Preseault*, 130 Vt. 343, 348 (1972).

* A literal enforcement of the language of 10 V.S.A. § 6085(c) would result in an unjust and unreasonable departure from the intent of the legislature when it recognized the interest adjoining property owners have in an application for an environmental permit on lands adjacent to theirs. *In*

re Preseault, 130 Vt. 343, 348 (1972).

* The intent of the legislature as expressed in the broad purposes of the Act, and in the Act itself, is to accord to adjoining property owners the right to appear as parties at hearings before the Board. *In re Preseault*, 130 Vt. 343, 348-49 (1972).

* Act 115 allows non-statutory parties to bring appeals to the Vermont Supreme Court. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 5 (3/20/06)

* Claim that any adjoining landowner are exempt from requirements of 10 V.S.A. § 8504(d)(1) and may appeal any criteria lacks merit because § 8504(d)(1) states “no aggrieved person may appeal” unless the person secures party status in the proceedings below and expressly limits that “the person may only appeal those issues under the criteria with respect to which the person was granted party status.” *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 8 (2/2/10).

* A party may only appeal the criteria on which he or she has party status before Commission, except that a party may appeal a criterion on which he or she did not have party status before Commission if: (a) the party was denied party status on the criterion and can persuade Board that such status should be granted, or (b) the party can persuade the Board that party status on the criterion should be granted and that a substantial injustice or inequity will occur if appeal on the criterion is disallowed. *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD (5/22/01); *Leonard R. Lemieux*, #3R0717-EB (8/12/93). [EB #581M1]; *Okemo Mountain, Inc. (Snowbridge Road - Pedestrian Safety)*, #2S0351-10B-EB (1/15/93). [EB #565M]; *Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB (12/23/92). [EB #564M]; *Felix J. Callan*, #5W1056-EB (9/19/90). [EB #481M]; *James Davenport, Jr. and Barbara Davenport*, #1R0667-EB (8/30/89) and (9/11/89) [EB #449M1 and #449M2]; *Lucy Stewart*, #4C0203 (9/8/76). [EB #73]

* If a person lacks standing to bring an appeal, the Board lacks jurisdiction to consider the merits of that appeal and the appeal must be dismissed. *Estate of John A. Swington*, #9A192-4-EB (CPR) (2/9/98), *aff'd In re Estate of John Swington*, 169 Vt. 583 (1999). [#699M1]

* To appeal a criterion to Board, party must obtain party status on that criterion before Commission, or have been denied party status on that criterion by Commission, but then granted party status by Board. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]

* EBR 40(D) does not intend to be construed to allow appeal by a non-party; rather Rule is directed at limiting the scope of issues brought before Board in an otherwise proper appeal. *Derby Plaza Associates*, #7R0886-EB (2/24/94). [EB #597M1]

* An appeal may be taken on a criterion by an individual who requested and was denied party status on criterion. *Leonard R. Lemieux*, #3R0717-EB (8/12/93). [EB #581M1]

* Owner of company who sold his operation and no longer had any legal interest in the permit lost legal standing to pursue appeal. *Warplanes, Inc.*, #9A0136-1-EB (5/1/89). [EB #368]; *and see Estate of John A. Swington*, #9A192-4-EB (CPR) (2/9/98). [#699M1]

* An appellant may seek Board review only of those matters on which it has raised and requested party status before Commission. *Topnotch Associates*, #5L0365-3-EB (4/13/81). [EB #151]

* Where appellant did not appeal Commission's limitation on the scope of his participation, his request for a *de novo* review of the entire development will be denied. *Topnotch Associates*, #5L0365-3-EB (4/13/81). [EB #151]

501.2 What may /may not be appealed

* Interlocutory review of the 2008 Partial Review Order [concerning Criterion 9(B)] would have been inappropriate [because] the 2008 Partial Review Order did not result in a final decision or an appealable preliminary order. The Court concluded the District Commission refrained from reaching a final decision on Criterion 9(B), or any aspect of the Criterion, until it could assess whether the off-site mitigation agreement for impacts to prime agricultural soils was suitable. *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/28/19).

* Whether or not issue was expressed for the first time in Rule 59(e) motion, the applicability of Rule 34(D) was a question of law intrinsic to the Environmental Court's summary judgment ruling and therefore well within the court's discretion to reconsider on the appellant's 59(e) motion. *In re SP Land Co., LLC Act 250 Land Use Permit Amendment*, 2011 T 104, ¶ 15-20 ---A.3d--- (Vt 2011).

* De novo review by the Environmental Court is limited to the issues that have been preserved by the appellants in their respective statements of questions. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 2-3 (2/15/08), citing V.R.E.C.P. 5(f) and *In re Garen*, 174 Vt. 151, 156 (2002) (citing *Village of Woodstock v. Bahramian*, 160 Vt. 417 (1993)).

* Claim that any adjoining landowner are exempt from requirements of 10 V.S.A. § 8504(d)(1) and may appeal any criteria lacks merit because § 8504(d)(1) states "no aggrieved person may appeal" unless the person secures party status in the proceedings below and expressly limits that "the person may only appeal those issues under the criteria with respect to which the person was granted party status." *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 8 (2/2/10).

* Board cannot decide jurisdictional question not presented in appeal from permit denial. *Re: Central Vermont Public Service Corp. and Verizon New England (Guilford)*, #2W1154-1-EB, MOD on Motions to Alter (12/19/2003). [EB#821]

* Initial consideration of a land use proposal is assigned by legislature to Commission; Board has no authority to decide issues that were not ruled upon by Commission. *Re: MBL Associates*, #4C0948-1-EB (5/4/98).

* Where decision is not final, but rather a preliminary decision, it is not appealable pursuant to EBR 40; however, it is appealable on an interlocutory basis pursuant to EBR 43. *Burlington Broadcasters, Inc.*, #4C1004-EB (CPR) (4/23/97). [EB #670]; *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB

#425]

* Aggrieved parties have the right to appeal any decision of Commission or Coordinator that may be contrary to law; this right is not forfeited if a party does not first raise issue with Commission. *Atlantic Cellular Co.*, #3W0726-EB (2/24/94). [EB #588M2]

* An appeal may be taken on a criterion by an individual who requested and was denied party status on criterion. *Leonard R. Lemieux*, #3R0717-EB (8/12/93). [EB #581M1]

* No appeal may be taken to the Board when Commission does not hold hearing on criterion. *Re: Stokes Communication Corp. and Idora Tucker*, #3R0703-EB, MOD at 7 (3/31/93); and see 10 V.S.A. § 6089(d); EBR 51 (minor permits).

* Appeal of a permit amendment based on fact that zoning litigation is pending in court raises no appealable issues under Act 250 and will be dismissed. *McDonald's Corp. & McCue*, #1R0477-1-EB (11/15/88). [EB #405]

* Coordinator's decision on whether permit renewal should be treated as a minor or a new application is not appealable to Board since there is no statutory or Rule provision for such an appeal; only those decisions of a Coordinator identified as advisory opinions are appealable to Board. *Richard & Jean Wilson*, #2W0585-A-EB (6/2/88). [EB #390M]

* Commission's refusal to consider the merits of an application without the submission of additional information has the same effect as the dismissal of an application and is therefore a final order appealable to the Board within 30 days of its issuance. *Killington, Ltd. & International Paper Realty Corp.*, #1R0584-EB (8/8/86). [EB #297]

* Coordinator's decision that an application is complete cannot be appealed as an advisory opinion. *Killington, Ltd. & International Paper Realty Corp.*, #1R0584-EB (8/8/86). [EB #297]

* An appeal may be barred where no hearing is set on Commission's own motion, no hearing is requested by a party, a permit is issued, and a party then seeks appeal to the Board; an appeal is not barred where a hearing has been set by Commission, but where a hearing was not requested by any party. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd, In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]

501.2.1

Partial findings/splitting criteria into components

Note: 1993 Vt. Laws No. 232 secs. 32, 50 (Adj. Sess.) (eff. March 15, 1995), amended 10 V.S.A. § 6086(b) to allow appeals of partial decisions as to all criteria.

* Board lacks jurisdiction to accept appeal (at this time) because of a 1990 statutory amendment that limits appeals of partial findings to Criterion 10. *Mt. Mansfield Co. Inc.*, #5L1125-10-EB, #5L1125-10R-EB (MOD and DO) (9/29/94). [EB #639M]

* The Board declines to split criteria into components for appellate review noting the absence of

statutory authority for fragmentation and that to do so could result in numerous appeals on the same criterion. *Vermont Agency of Transportation*, #4C1010-EB (5/5/98). [EB #702].

501.2.2 Collateral orders

* A collateral order is appealable only if three elements are satisfied: "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *In re Maple Tree Place Associates*. 151 Vt. 331, 332 (1989), citing *State v. Lafayette*, 148 Vt. 288, 290-91 (1987).

* While Supreme Court has set forth specific criteria without which a collateral order will not be reviewed by Court, overriding these threshold criteria is Court's need to balance the possible loss of important rights "against this Court's policy of avoiding review." *In re Maple Tree Place Associates*. 151 Vt. 331, 332 (1989); *In re Pyramid Co.*, 141 Vt. 293, 305 (1982) ("[T]he lower courts must be mindful of this Court's well-established policy of avoiding piecemeal appeals.")

501.2.3 Minor applications (see [230](#))

* Since Commission heard case as a minor pursuant to EBR 51, appellant can request Board to determine if there are substantive issues that require a hearing *only if* it first requested Commission to hold a hearing on that criterion. *Re: Okemo Mountain, Inc. n/k/a/ Okemo Ltd. Liability Co. and Timothy and Diane Mueller and Daniel and Debora Petraska*, #2S0351-25U-EB, MOD at 3 (1/16/03). [EB #816]

* No appeal may be taken to the Board when Commission does not hold hearing on criterion. *Re: Stokes Communication Corp. and Idora Tucker*, #3R0703-EB, MOD at 7 (3/31/93); and see 10 VSA 6089(d); EBR 51 (minor permits).

501.3 Perfecting an appeal / what the notice must contain

* Failure of an applicant to take any steps, other than the timely filing of notice of appeal, does not affect validity of appeal, but is grounds only for such action as Board deems is appropriate. *Bruce Transportation Group, Inc.*, #3W0058-1-EB (CPR) (4/2/97). [EB #671]; *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]; *Felix J. Callan*, #5W1056-EB (9/19/90). [EB #481M]; *Durward Starr & George Halikas*, #7R0594-1-EB (4/30/86). [EB #288]

* Failure to specifically reference a given statutory or regulatory provision does not bar provision from being an issue on appeal provided notice of appeal discusses the subject matter covered by the particular provision with reasonable specificity. *Putney Paper Company, Inc.*, #WH-600-WFP (1/10/96).

* Board is not deprived of jurisdiction to hear an appeal if one of the three separate documents that accompanies an appeal notice is not filed within 30 days. *Gary Savoie*, #2W0991-EB (10/11/95). [EB #632]

- * Appeal is timely even though attached documents were filed late. *Gary Savoie*, #2W0991-EB (10/11/95). [EB #632].
- * Notice of appeal must state the issues with specificity; but failure to specifically reference a criterion does not bar that provision from being an issue, provided the notice discusses the subject matter covered with reasonable specificity. *Bruce Transportation Group, Inc.*, #3W0058-1-EB (CPR) (4/2/97). [EB #671]; *Michael Caldwell*, #5L1199-EB (12/13/94). [EB #619M1]
- * Board has always construed requirements of Rule 40 liberally in favor of appellants. *Upper Valley Regional Landfill Corporation*, #OG820-WFP, (4/24/91). [WFP #5]
- * 10 V.S.A. § 6089(a) does not require that appeal specify those challenged Commission findings; that provision governs nature of hearing that Board will give appellants who challenge Commission decisions by specifying that such a hearing will be *de novo*; it does not govern the content of notices of appeal. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]
- * Notice of appeal satisfies Rule 40 where it identifies which criteria are being appealed, states specific issues appellants seek the Board to address, and states that Commission ignored evidentiary and factual issues which appellants raised in Commission proceedings. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1].
- * The starting point for determining which issues are cognizable in an appeal is the notice of appeal. *Vermont Division of Buildings*, #8B0318-EB (11/14/84). [EB #222]
- *“The compelling fact of neighbor’s lack of notice [of appeal] is not in itself enough to allow a final permit to be reopened.” *In re Mathez Act 250 LU Permit*, 2018 Vt. 55, at ¶ 16 (2018).

501.4 To whom appealed

- * Appeal from Commission is to Board unless an exception to Board jurisdiction exists or parties otherwise object. *Putney Paper Company, Inc.*, #2W0436-7-EB (11/3/95). [EB #621]

501.5 Activities taken while appeal is pending

- * If permittee commences construction at a site during appeal, and Board subsequently denies or modifies permit, permittee must restore site to its pre-construction condition; therefore, permittee commences construction during pendency of an appeal at his own risk. *Re: Winhall/Stratton Fire District #1 and The Stratton Corporation*, #2W0519-6A-EB, MOD at 4 (7/28/99). [EB #730]; *Stokes Communication Corp.*, #3R0703-EB (2/26/93). [EB #562M2]; *Sunrise Group*, #1R0501-8(A)-EB (4/29/85). [EB #252]; *and see, In re McDonald's Corp*, 146 Vt. 380, 386 (1985) (developer acted at its own risk when it went forward with construction with full knowledge that Act 250 jurisdiction had been placed at issue in a declaratory ruling proceeding before Board).

501.6 Transfer of Jurisdiction to appellate body

See [10.3](#)

501.7 Authorized Procedures and Limitations

* “Having failed to appeal through an authorized procedure, neighbor cannot now appeal the permit through [an] alternative second-notice process. Nor can the Commission create a new procedure in order to address her concerns.” *In re Mathez Act 250 LU Permit*, 2018 Vt. 55, at ¶ 15 (2018).

502. Filing of

* Date that Notice of Appeal was mailed is not relevant to the question of whether an appeal is timely filed; only question is whether the Notice of Appeal was *filed* with the Board within the 30-day prescribed time period. 10 V.S.A. § 6089(a)(4); *Re: John Larkin, Inc.*, #4C0526-11R-EB, DO at 2 n.4 (5/27/04) [EB #848], *citing City Bank & Trust v. Lyndonville Savings Bank and Trust Co.*, 157 Vt. 666 (1991); *Re: Ruby Iantosca*, #2S1085-EB, MOD and DO at 2 n.2 (10/23/00) [EB #764]; *Okemo Mountain Inc.* #2S0351-32-EB MOD and DO at 4-5. (5/18/01) [EB #769] (filing is accomplished when appeal is received in Board’s office, regardless of when notice of appeal was mailed or whether other prudent steps were taken).

* Providing copies of notice of appeal to applicants one day after filing does not constitute failure to fulfill a jurisdictional requirement. *Bruce Transportation Group, Inc.*, #3W0058-1-EB (CPR) (4/2/97). [EB #671]

* A document is considered filed with Board on the date it is received. *Haystack Group, Inc.*, #700002-10-EB (3/29/89).

503. Ripeness of

* Court lacks subject matter jurisdiction to consider impacts of proposed developments when permit amendment authorized subdivision but no development at this time. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09), *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).

* Only when future applications are filed can a determination be made as to what impact, if any, the proposed future development may have on another person’s easement interests. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 7 (12/1/09), *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).

* Because applicant must proceed with a review, the entire matter of compliance is not resolved until that review takes place and a final decision is rendered. *Flanders Lumber Company*, #4C0695-EB (11/23/87). [EB #350M]

503.1 Need for final Commission decision/order

* Board has no authority to accept the appeal of a criterion *or* appeal of individual findings for a criterion where Commission was unable to render an affirmative finding under that criterion; the

term "affirmative findings" means findings sufficient to support a conclusion of law. *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2d Revision), #2S0351-31-EB, and #2S0351-25R-EB, MOD (5/22/01); *Killington Ltd*, #1R0835-EB, MOD, (10/22/99). [EB # 732]

* Appeal was not ripe as Commission had not reached affirmative findings or a denial on either of the criteria appealed. *Vermont Agency of Transportation*, #4C1010-EB (5/5/98). [EB #702]

* Where decision is not final, but rather a preliminary decision, it is not appealable pursuant to EBR 40; however, it is appealable on an interlocutory basis pursuant to EBR 43. *Burlington Broadcasters, Inc.*, #4C1004-EB (CPR) (4/23/97). [EB #670]; *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB #425]

* Commission's decision not final or ripe for appeal because final findings regarding certain criteria would not be issued until after plans submitted. *Circumferential Highway*, #4C0178-1-EB (4/26/90). [EB #461]

* When determining whether Commission decision denying a motion for reconsideration is a final order from which appeals can be taken, Board will analyze the effects of that decision. *Killington, Ltd. & International Paper Realty Corp.*, #1R0584-EB (8/8/86). [EB #297]

* Because appeal relates to assumptions by which Commission is evaluating evidence, appeal to Board is untimely and is dismissed. *Developers Diversified*, #5W0584-EB (3/18/80). [EB #129]

* An interlocutory appeal from Commission that is substantive in nature will be denied where no final appealable order has been issued. *Paul E. Blair Family Trust*, #4C0388-EB (11/2/79). [EB #121]

503.2 Appeal of partial review by Commission

* Where applicant requested partial review of project under a criterion, applicant cannot appeal Commission's findings to Board; Commission's findings on selected subcriteria are not appealable. *Philip Gerbode and Jessie Laurie*, #6F0357-EB (1/5/88). [EB #365]

* Where Commission made findings under all 10 criteria but issued an Act 250 permit for only a part of the project, only findings made for that part together with findings made for Criteria 9 and 10 for the entire project are appealable; findings made for Criteria 1-8 for the rest of the project are not final and appealable until approval for those portions is issued. *Shelburne Farms Resources, Inc.*, #4C0660-EB (8/4/86). [EB #310M]

504. Timeliness of (see [10.1.2](#) and [552.4.2](#))

* The Petitioner was warned by phone and email that he could not electronically file his notice to appeal, thus this matter does not warrant an extension beyond the 30 day deadline. *Jericho Market Act 250*, No. 1-1-16 Vtec, Entry Regarding Motion to Dismiss at 2 (2/26/16).

* Permits are final decisions unless appealed within thirty days of issuance. *In re Taft Corners*

Associates, Inc., 160 Vt. 583, 593 (1993); citing 10 V.S.A. § 6089(a).

*To be granted leave to file a late notice of appeal, appellant must show good cause or excusable neglect. *In re: Jim Sheldon Excavating, Inc. and Taran Bros., Inc. Act 250 Land Use Permit (Appeal of Pelton)*, No. 54-4-09 Vtec, Decision and Order on V.R.A.P. 4 Motion for Extension of Time to File Appeal at 3 (6/8/09)(citing *In re Rinker's, Inc.*, No. 302-12-08 Vtec, at 2–3 (Mar. 25, 2009)).

*While appellant may have been delayed fifteen days in filing an appeal because the Commission's decision was sent to an incorrect ZIP Code, because she had seventeen days to file a timely notice of appeal after receiving the decision, her failure to file the notice of appeal on time was within her control and the grounds for filing the late appeal do not fall within the category of "good cause." *In re: Jim Sheldon Excavating, Inc. and Taran Bros., Inc. Act 250 Land Use Permit (Appeal of Pelton)*, No. 54-4-09 Vtec, Decision and Order on V.R.A.P. 4 Motion for Extension of Time to File Appeal at 4 (6/8/09).

*In evaluating a party's claim of excusable neglect, the Court must consider "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *In re: Jim Sheldon Excavating, Inc. and Taran Bros., Inc. Act 250 Land Use Permit (Appeal of Pelton)*, No. 54-4-09 Vtec, Decision and Order on V.R.A.P. 4 Motion for Extension of Time to File Appeal at 4 (6/8/09), quoting *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993).

* Motion to extend deadline is denied for lack of "excusable neglect" where party fails to cite any reason for having missed the appeal deadline. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, MOD (4/27/05) [EB#859].

* Petition to amend petition to revoke filed after hearing was held was denied because it was not timely. *Re: William Kalanges #4C0593-4-EB (Revocation)*, FCO at 7 (1/15/04) [EB #835].

* Date that Notice of Appeal was mailed is not relevant to the question of whether an appeal is timely filed; only question is whether the Notice of Appeal was *filed* with the Board within the 30-day prescribed time period. 10 V.S.A. § 6089(a)(4); *Re: John Larkin, Inc.*, #4C0526-11R-EB, DO at 2 n.4 (5/27/04) [EB #848], citing *City Bank & Trust v. Lyndonville Savings Bank and Trust Co.*, 157 Vt. 666 (1991); *Re: Ruby Iantosca*, #2S1085-EB, MOD and DO at 2 n.2 (10/23/00) [EB #764]; *Okemo Mountain Inc.* #2S0351-32-EB MOD and DO at 4-5. (5/18/01) [EB #769] (filing is accomplished when appeal is received in Board's office, regardless of when notice of appeal was mailed and whether other prudent steps were taken).

* An appeal that is untimely filed will be dismissed because Board has no jurisdiction to hear appeal which is not filed within the 30 day appeal period; deadlines established by statute for the filing of appeals or DR petitions are jurisdictional, and Board has no discretion to waive such deadlines. *Re: John Larkin, Inc.*, #4C0526-11R-EB, DO at 3 (5/27/04) [EB #848]; *Dexter and Susan Merritt*, DR #407, MOD at 9 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03); *Central Vermont Public Service Corporation*, DR #401, FCO at 11 (4/2/02); *Okemo Mountain Inc.* #2S0351-32-EB MOD and DO at 4-5. (5/18/01) [EB #769]; *Ruby Iantosca*, #2S1085-EB, MOD and DO (10/23/00)

[EB #764]; *Central Vermont Public Service Corporation and New England Telephone and Telegraph d/b/a Bell Atlantic Telephone Company*, #2W1074-EB, MOD at 8 (4/29/00) [EB#756]; *North Country Animal League*, #5L0487-4-EB, DO at 2, (3/29/00) [EB #750] *Marietta Palmer*, #4C0561-5-EB, MOD, (11/24/98); *Haystack Group, Inc.*, #700002-10-EB (3/29/89). [EB #419]; *Club 107*, #3W0196-3-EB (2/2/87) [EB #328]; *Puppy Acres Boarding Kennel*, #2W0568-2-EB (10/11/85). [EB #271]; *Alpen Associates*, #5W0722-2-EB (1/16/85), *aff'd, In re Alpen Associates*, 147 Vt. 647 (1986). [EB #236]; *Killington 43 Corporation*, #1R0522-EB (10/3/84). [EB #230]; *Stanmar, Inc.*, #5L0558-EB (12/21/79). [EB #124]

* Three days are not added for mailing where Commission or Board issues the document which is the subject of the appeal. *Re: John Larkin, Inc.*, #4C0526-11R-EB, DO at 2 n.4 (5/27/04) [EB #848], *Ruby Iantosca*, #2S1085-EB, MOD and DO at 2 (10/23/00). [EB #764]

* Notion that matters of jurisdiction are not waived by a party's failure to timely appeal pertains only to subject matter jurisdiction. *Central Vermont Public Service Corporation*, DR #401, FCO (4/2/02); *Club 107*, #3W0196-3-EB (2/2/87). [EB #328].

* Subject matter jurisdiction - a tribunal's authority to decide the question presented - can be reviewed at any time that a matter is alive and pending. *Central Vermont Public Service Corporation*, DR #401, FCO at 5 (4/2/02).

* Board is not estopped from imposing 30 day appeal deadline, where Coordinator was unaware of facts relating to neighbor's knowledge of Commission's decision and where neighbor had knowledge of the issuance of permit. *Central Vermont Public Service Corporation and New England Telephone and Telegraph d/b/a Bell Atlantic Telephone Company*, #2W1074-EB, MOD at 7 (4/29/00). [EB#756].

* In computing any period of time prescribed or allowed by statute or Rules, the day of the act or event from which the designated period of time begins to run is not included. *Bruce Transportation Group, Inc.*, #3W0058-1-EB (CPR) (4/2/97). [EB #671]

* Providing copies of notice of appeal to applicants one day after filing, does not constitute failure to fulfill a jurisdictional requirement. *Bruce Transportation Group, Inc.*, #3W0058-1-EB (CPR) (4/2/97). [EB #671]

* Failure of an applicant to take any steps, other than the timely filing of notice of appeal, does not affect the validity of the appeal, but grounds only for such action as the Board deems appropriate. *Bruce Transportation Group, Inc.*, #3W0058-1-EB (CPR) (4/2/97). [EB #671]; *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]; *Felix J. Callan*, #5W1056-EB (9/19/90). [EB #481M]; *Durward Starr & George Halikas*, #7R0594-1-EB (4/30/86). [EB #288]

* Appeal filed on 30th day after Commission decision is timely. *Northern Development Enterprises*, #5W0901-R-5-EB (8/21/95). [EB #627]

* Decision of Commission was not issued until findings of fact/conclusions of law were issued at which time 30 day period to file appeal starts. *Mt. Mansfield Co., Inc.*, #5L1125-4-EB (8/14/95). [EB #573]

- * Appeal is timely when it is filed within 30 days from date notice received. *Jericho Corners Elementary School*, DR #285 (12/9/94); *Felix J. Callan*, #5W1056-EB (9/19/90). [EB #481M]
- * 30 day appeal deadline applies only to final decisions of Commission or Board, which include determinations of party status. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188]
- * An advisory opinion is not a final Commission order subject to the 30 day appeal period. *William Dibbern*, #5R0194-1-EB (7/16/81). [EB #158]
- * Filing appeal with upreme Court will toll time for filing an appeal to Board, which is the correct forum. *Richard Cooper*, #5L0590-EB (7/11/80). [EB #137]
- * Party seeking authority to extend appeal deadline bears burden of demonstrating mistake, failure of notice, excusable neglect, or similar ground for extension. *Stanmar, Inc.*, #5L0558-EB (12/21/79). [EB #124]

505. Issues on Appeal / Scope of Review / Scope of Appeal (see [10.2](#))

- * [W]e only consider the dimensions of party status pursuant to the Criteria a party has status under. We will not consider an issue that is tangential to one Criterion under that Criterion when the issue is directly addressed by another. This is based on the principle that each criterion sets specific parameters that refine and adapt the generally applicable party status requirements, but do not expand standing. *BlackRock Construction LLC Act 250*, No. 47-4-19 Vtec., Motion to Dismiss (6/19/19).
- *Former EBR 40(E): "The scope of the appeal hearing shall be limited to the errors and issues assigned by the appellant and any cross-appellant unless substantial inequity or injustice would result from such limitation."
- * The scope of a de novo hearing is limited to those issues raised in the notice of appeal. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590 (1993), citing *In re Killington, Ltd.*, 159 Vt. 206 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 19 (11/24/04) [EB #838] (applicant had no obligation to present evidence or carry a burden of proof on those criteria which the Commission decided in its favor and which were not appealed).
- * Once an Act 250 criterion is noticed for appeal, issues generally within the scope of the criterion are properly before the Board. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590-91 (1993); *In re Killington, Ltd.*, 159 Vt. 206 (1992); and see *In re Green Peak Estates*, 154 Vt. 363, 372 (1990); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB, MOD at 2 (1/3/05) [EB#857]; *Re: Bethel Mills, Inc.*, #3W0898(Altered)-EB, MOD at 2 - 4 (11/4/04); *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 (9/3/03) [EB #828]; and see *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, MOD at 2 - 4 (12/27/00). [EB #765]; *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 9 (9/9/99) ("[I]ssues within a criterion on appeal are fair game for any party to the appeal."); *Re: Raymond Rowley*, #4C0534-1-EB, FCO at 9 (12/1/93).

* In appeal, Board's jurisdiction is limited by the scope of the proceedings below. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 591 (1993).

* Board has no jurisdiction to decide issues regarding criteria that were not before Commission and not ruled upon by it. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 591 (1993); *In re Vermont Gas Systems*, 150 Vt. 34, 40 (1988); *In re Juster Assoc.*, 136 Vt. 577, 581 (1978) (because initial consideration of a land use proposal is a function assigned by the Legislature to Commission. the Board lacked authority to entertain the application not heard by Commission).

* Although Board has attempted to avoid unnecessary relitigation by attempting to narrow the issues before it, there must be a limit to the restriction imposed by Rule 40(E). *In re Killington, Ltd.*, 159 Vt. 206, 215 (1992).

* Nothing in Act 250 puts any burden on Board to either inquire about, or make findings on, the financial viability of the project. *In re Preseault*, 132 Vt. 471, 475 (1974).

* When project only impacts certain criteria, or parties agree on facts for positive finding, factual finding is limited to those criteria and sub-criteria at issue during hearing. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 33 (1/20/10).

* The Environmental Court can address only "those issues which have been appealed." *In re: Free Heel, Inc.*, No. 217-9-06 Vtec, Decision at 4 (3/21/07)(citing V.R.E.C.P. 5(f)).

* Applicant had no obligation to present evidence or carry a burden of proof on those criteria which the Commission decided in its favor and which were not appealed. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 19 (11/24/04) [EB #838], citing *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590 (1993), citing *In re Killington, Ltd.*, 159 Vt. 206 (1992) (scope of a de novo hearing is limited to those issues raised in the notice of appeal); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990).

* While Chairs routinely narrow scope of the public investments and lands which will be considered under Criterion 9(K) to only those specifically raised in the Notice of Appeal, where other party objects and has been given party status under Criterion 9(K) as to other lands, Board will not restrict Criterion 9(K) to only those raised in Notice of Appeal. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB, MOD at 2- 3 (1/3/05) [EB#857], citing *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, PCRO 4 (7/10/03); *Re: Peter S. Tsimortos*, #2W1127-EB, PCRO at 4 (11/8/02) and other cases.

* Prehearing Orders often reframe issues differently than those framed by an appellant's Notice of Appeal; fact that the Prehearing Order in this case may have framed the issue more broadly than the appellants framed it is of no import; it is the issue as framed by the Prehearing Order that is the issue in this case, not the issue as framed by the appellants. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 (9/3/03) [EB #828].

- * Board is an appellate body, and it is limited to deciding only those issues raised by the parties on appeal. *Re: Dr. Anthony Lapinsky and Dr. Colleen Smith*, #5L1018-4/#5L0426-9-EB, MOD at 2 (5/29/03). [EB #824]; *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration), FCO at 10 (8/14/97). [EB #666] (Board limits its *de novo* review to consideration of only those issues raised on appeal from Commission's reconsideration permit and decision.); *Vermont Talc/OMYA, Inc.*, #2W0551-1-EB (6/21/85). [EB #238] (matters raised in notices of appeal and cross-appeal are appropriate for consideration on appeal); *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229] (appeal is confined to those Commission findings identified by parties under 10 V.S.A. § 6089(a)); *Vermont Division of Buildings*, #8B0318-EB, FCO at 2 (11/14/84). [EB #222] (starting point for determining which issues are cognizable in an appeal is the notice of appeal); EBR 40(E).
- * Where Commission consolidated for review several permit amendment applications, and notice of appeal challenged Commission's findings, conclusions, and order with respect to only one of the applications, scope of the appeal was limited to such application. *Herndon and Deborah Foster*, #5R0891-8B-EB (6/2/97). [EB #665]
- * Failure to specifically reference a given statutory or regulatory provision does not bar provision from being an issue on appeal provided notice of appeal discusses the subject matter covered by the particular provision with reasonable specificity. *Putney Paper Company, Inc.*, #WH-600-WFP (1/10/96).
- * Issue raised for the first time at oral argument before the full Board are not within scope of criteria before Board. *Raymond Rowley*, #4C0534-1-EB (12/1/93). [EB #577]; *Norman R. Smith, Inc. and Killington, Ltd.*, #1R0593-1-EB (9/21/90). [EB #349]
- * The Board cannot generally review Commission decisions. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]
- * Board has only authority to review the particular case on appeal. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]
- * Once application is deemed complete and hearing on merits is convened, appeal to Board is only on project's merits and not on application's completeness. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188]
- * Stipulation among some, but not all, parties does not dispose of the legal issues remaining to be addressed in this appeal; it merely means that the evidentiary hearing goes forward with some parties presenting a unified set of facts and proposed conditions. *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257 and Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 20 (1/17/13), *aff'd on other grounds, In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).

505.1 Appeal of criterion

* Criterion 1 was an issue on appeal due to permittee's appeal from a condition which was made part of Commission permit pursuant to Criterion 1 affirmative finding made by Commission. *Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB (7/12/96). [EB #651M1]

* Where applicant who did not appeal a condition is precluded from raising the issue before Board. *Raymond Duff*, #5W0921-2R-EB (6/14/91). [EB #436M2]; *John A. Russell Corporation*, #1R0257-2-EB (3/27/90). [EB #415]

505.1.1 Need/no need for cross-appeal

* Once an Act 250 criterion is noticed for appeal, issues generally within the scope of the criterion are properly before the Board. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590-91 (1993), *In re Killington, Ltd.*, 159 Vt. 206 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372-73 (1990) (where one party appeals a criterion, other parties may seek review of such criterion without need for cross-appeal; to hold otherwise would encourage the filing of duplicitous appeals); *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 (9/3/03) [EB #828].

* Mere fact that Commission incorporates findings of fact by reference under more than one criteria does not place a criterion which was not specifically appealed or cross-appealed before Board. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, MOD at 3 (10/25/00). [EB #765]

* In order to preserve its rights, a party (with party status on a criterion) need not file a cross-appeal of such criterion appealed by another party. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 (9/3/03) [EB #828]; *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 4-9 (1/20/00); *Green Peak Estates*, #8B0314-2-EB (9/24/86). [EB #280M]

* Once an Act 250 Criterion is appealed, issues within the scope of that criterion are properly before the Board. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 9 (9/9/99); *Raymond Rowley*, #4C0534-1-EB (12/1/93). [EB #577]

* EBR 40(D) does not intend to be construed to allow appeal by a non-party; rather Rule is directed at limiting the scope of issues brought before Board in an otherwise proper appeal. *Derby Plaza Associates*, #7R0886-EB (2/24/94). [EB #597M1]

* Once a criterion has been made an issue in an appeal, any other party may participate without the need to cross-appeal. *Landmark Development Corporation*, #4C0667-EB (7/9/87). [EB #320]

505.1.2 By person denied party status on the criterion

* Two exceptions to rule that one must have party status on a criterion before Commission in order to appeal that criterion: 1) appeal may be made by individual who was denied party status on that criterion if individual persuades the Board that she should have party status, or 2) where disallowing appeal would work a substantial injustice or inequity. *Re: Okemo Mountain, Inc. n/k/a/ Okemo Ltd. Liability Co. and Timothy and Diane Mueller and Daniel and Debora Petraska*, #2S0351-25U-EB, MOD at 2 - 3 (1/16/03) [EB #816]; *Re: Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, MOD at 2 (2/ 3/99) (citing *Re: Okemo Mountain, Inc.*, #2S0351-10B-EB, MOD

at 3 (1/15/93) *Grand Union Co.*, #1R0733-EB (8/26/92). [EB #553M]; *Swain Development Corp.*, #3W0445-2-EB (7/31/89). [EB #526M]

* Where appellant did not appeal Commission's limitation on the scope of his participation, his request for a *de novo* review of the entire development will be denied. *Topnotch Associates*, #5L0365-3-EB (4/13/81). [EB #151]

505.1.3 By person who did not request party status on the criterion

* Appellant who did not request party status before Commission on certain criteria cannot obtain party status before Board on those criteria without showing that substantial injustice or inequity would result if the appeal on those criteria is disallowed. *Re: Village of Ludlow*, #2S0839-2-EB, MOD at 2-3 (5/28/03). [EB# 826]

505.2 Issues heard by Commission

* Board has no jurisdiction to decide issues regarding criteria that were not before commission and not ruled upon by it; initial review of all projects is a task specifically assigned to Commissions. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680]; *Re: MBL Associates*, #4C0948-1-EB, (5/4/98); *Stratton Corporation*, #2W0519-9R3-EB (1/15/98); and see *Okemo Mountain, Inc.*, #2S0351-12A-EB (7/23/92). [EB #471M5]; *J. P. Carrara & Sons, Inc.*, #1R0589-EB (4/23/92). [EB #498M]; *Edwin & Avis Smith*, #6F0391-EB (1/16/91). [EB #398M] (*See In re Application of George F. Adams and Co.*, 134 Vt. 172 (1976)).

505.2.1 Revisions to plans after Commission decision

* Board has jurisdiction to review a site plan which was revised after Commission decision because revisions did not raise criteria other than those under appeal and no new parties were affected. *Burlington Housing*, #4C0463-EB (10/15/81). [EB #162]

See [510.1](#) and [510.2](#)

505.3 Expanding / limiting issues on appeal

* Although Board has attempted to avoid unnecessary relitigation by attempting to narrow the issues before it, there must be a limit to the restriction imposed by Rule 40(E). *In re Killington, Ltd.*, 159 Vt. 206, 215 (1992).

* Board must be free to make common-sense rulings within the general scope of the notice of appeal. *In re Killington, Ltd.*, 159 Vt. 206, 215 (1992).

* Appellant's post-hearing request to narrow scope of appeal was untimely, where appellant had not previously requested such narrowing in notice of appeal or at appeal's prehearing phase. *Lawrence White*, #1R0391-8-EB (4/16/98). [EB #689]

- * Where question arose as to under what rule appellant was entitled to party status, and the issue was not included in notices of appeal and cross-appeal, Board could expand issues on appeal to resolve the issue. *Swanton Housing Associates*, #6F0482-EB (4/24/97). [EB #667]
- * In assessing the impact of a portion of an extraction operation over which jurisdiction exists, Board may consider the aggregate impact caused by the extraction operation even though it does not have jurisdiction over the remainder. *John and Marion Gross d/b/a John Gross Sand and Gravel*, #5W1198-EB (4/27/95). [EB #606]
- * Economy of public resources favors denying a motion to limit scope of appeal or to remand jurisdiction for various criteria which would result in two Act 250 tribunals reviewing the same project at the same time. *Leo A. and Theresa A. Gauthier and Robert Miller*, #4C0842-EB (12/10/90). [EB #495M]
- * Limiting scope of an appeal might diminish Board's ability to conduct an independent evaluation of project's compliance with criteria. *Leo A. and Theresa A. Gauthier and Robert Miller*, #4C0842-EB (12/10/90). [EB #495M]
- * Where subject of appeal is existence of necessary bear habitat, and where proposed pond site constitutes a wetland that allegedly is necessary bear habitat, the issue of wetlands as bear habitat is a proper consideration on appeal even though it was not raised before Commission, and it was not raised on appeal or cross-appeal. *Norman R. Smith, Inc. and Killington, Ltd.*, #1R0593-1-EB (part I) (5/11/89) and *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (part II) (5/11/89). [EB #349] [EB #357]
- * Only a requested amendment for proposed expansion of existing project may be reviewed in the appeal; the entire project may not be reviewed for conformance with town plan. *Walker Construction*, #5W0816-1-EB (1/14/87). [EB #313]
- * Act 250 review of a coordinated development located on two parcels of land will include an assessment of the cumulative impact of units proposed in addition to those already built or authorized. *Albert & Doris Stevens*, #4C0227-3-EB (7/28/80). [EB #139]

505.3.1

Review of issues not advocated

- * Whether or not issue was expressed for the first time in Rule 59(e) motion, the applicability of Rule 34(D) was a question of law intrinsic to the Environmental Court's summary judgment ruling and therefore well within the court's discretion to reconsider on the appellant's 59(e) motion. *In re SP Land Co., LLC Act 250 Land Use Permit Amendment*, 2011 T 104, ¶ 15-20 ---A.3d--- (Vt 2011).
- * Board may review issue not raised before Commission if it is related to the criterion on appeal. *In re Killington, Ltd.*, 159 Vt. 206, 215 (1992).

* Board may review projects under criteria even when those most interested in those criteria do not participate in appeal. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, MOD at 2 (7/2/02). [EB #791]

506. Cross-Appeals

* In order to preserve its rights, a party (with party status on a criterion) need not file a cross-appeal of such criterion appealed by another party. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 (9/3/03) [EB #828]; *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 4-9 (1/20/2000); *Green Peak Estates*, #8B0314-2-EB (9/24/86). [EB #280M]

* A party (with party status on a criterion) may continue an appeal brought by another party on such criterion, even if the appellant subsequently withdraws its appeal. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 4-9 (1/20/2000).

* EBR 40(D) does not intend to be construed to allow appeal by a non-party; rather Rule is directed at limiting the scope of issues brought before Board in an otherwise proper appeal. *Derby Plaza Associates*, #7R0886-EB (2/24/94). [EB #597M1]

* It is reasonable to allow a recipient of a permit additional time to file a cross-appeal where such permit recipient believed that all appeals had been withdrawn. *L & S Associates*, #2W0434-8-EB (11/24/92). [EB #557M2]

* Withdrawal of an appeal does not affect rights of other parties to file cross-appeals and notices of appearance after parties have received copies of the appeals. *L & S Associates*, #2W0434-8-EB (10/1/92). [EB #557M1]

507. Interlocutory (see also [153.1.4.2](#))

507.1 General

*Interlocutory appeal of a preliminary order by an administrative body such as a district commission are to be reviewed pursuant to 3 V.S.A. § 815(a). A party may appeal a decision that is not a final decision only “if review of the final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision.” Additionally, under *In re taft Corners Assoc., Inc.*, an interlocutory appeal of an administrative order may be appropriate where the order exceeds the decisionmaking body’s jurisdiction or where the order is defective in a way that delaying review would lead to a greater degree of harm. *Scott Farm Act 250*, No. 48-4-17 Vtec, Entry Regarding Motion to Dismiss at 2 (8/22/2017) (citing *Mathez Act 250 LU permit*, No. 101-9-16 Vtec, (5/24/2017).

*Untimely-filed motion for permission to file an interlocutory appeal denied where the question of controlling law was addressed by a decision issued three months previous. *NRB v. Stratton Corporation*, No. 106-7-14 Vtec, Entry Regarding Motion for Interlocutory Appeal at 2-3 (07/27/2015).

- * Board's order remanding to district commission for further proceedings is not a final order. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 588 (1993).
- * Ordinarily, Court declines to review a decision that is not a final disposition of the matter. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 588 (1993).
- * Where an agency has clearly exceeded its jurisdiction in an intermediate ruling, interlocutory review is appropriate. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 588 (1993).
- * The Court will consider interlocutory appeals that challenge the extent of the authority of an administrative board. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 589 (1993).
- * An intermediate ruling, is appealable only if review of the final decision would not provide an adequate remedy. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 589 (1993), citing 3 V.S.A. § 815(a).
- * Interlocutory appeals are an exception to the normal restriction of appellate jurisdiction to the review of final judgments. *In re Pyramid Co.*, 141 Vt. 293, 300 (1982).
- * Weighty considerations support the normal restriction of appellate jurisdiction to the review of final judgments. *In re Pyramid Co.*, 141 Vt. 293, 300 (1982).
- * Piecemeal appellate review causes unnecessary delay and expense, and wastes scarce judicial resources. *In re Pyramid Co.*, 141 Vt. 293, 300 (1982).
- * An appellate court labors under great disadvantages in disposing of interlocutory appeals (1) the litigants may not yet have narrowed the case's issues sufficiently for appellate review; (2) court is deprived of the benefits of a final trial court opinion; (3) interlocutory review requires court to decide legal questions in a vacuum, without benefit of factual findings; (4) appellate decisionmaking suffers from such abstractness; (5) by its very nature, interlocutory appeals impair court's basic functions of correctly interpreting the law and providing justice for all litigants. *In re Pyramid Co.*, 141 Vt. 293, 300-01 (1982).
- .
- * While disagreeing over some details, the federal courts have limited interlocutory appeals to "exceptional" cases. *In re Pyramid Co.*, 141 Vt. 293, 301 (1982).
- * Interlocutory appeal was not intended merely to provide review of difficult rulings in hard cases. *In re Pyramid Co.*, 141 Vt. 293, 306 (1982).
- * Interlocutory appeal was not designed to substitute wholesale appellate certainty for trial court uncertainty. *In re Pyramid Co.*, 141 Vt. 293, 306-07 (1982).
- * When Board receives a motion for an interlocutory appeal it must answer, as a threshold question, whether such motion is suitable pursuant to EBR 43. *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 2 (7/17/02). [EB #809]

- * Board treats interlocutory appeal which raises jurisdictional question as a DR Petition. *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 4 (7/17/02)[EB #809]; *Central Vermont Public Service Corporation*, DR#401, FCO at 1 (4/2/02).
- * Commission's interlocutory rulings may be appealed interlocutory to the Panel; however, party is not obligated to do so, and failure to bring interlocutory appeal does not constitute waiver of rights. *C.V. Landfill, Inc.*, #AP-92-025-WFP and #5W1150-WFP (6/14/95).
- * Whether a nearby gravel pit owned by the applicant is "involved land" and should be included in the permit application is an admissible question for interlocutory appeal. *John Litwhiler & H.A. Manosh*, #5L1006-EB (1/10/89). [EB #427]
- * Although cross-appeals that were filed before the Board decided to allow such appeals in this case were procedurally inappropriate, they will be treated as motions for leave to take interlocutory appeal. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M].
- * Interlocutory appeals should be entertained only in unusual circumstances. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M]; *Howard and Louise Leach*, #6F0316-EB (6/3/85). [EB #258]
- * An interlocutory appeal is an extraordinary method of review. *Unifirst Corp.*, DR #166 (2/20/85).

507.1.1

Review is proper for questions of law, not fact

- * An interlocutory appeal will not "materially advance litigation towards ultimate completion" if the moving parties were not denied party status all together and if an appeal of party status under a particular Criterion will not bring a final resolution. *In re Killington Resort Project*, Decision on Motion for Interlocutory Appeal at 2 (10/21/14).
- * Interlocutory appeal is proper for questions of law, not fact. *In re Pyramid Co.*, 141 Vt. 293, 304 (1982); *Re: Stratton Corporation and Intrawest Development Corp.*, #2W1149-EB (Interlocutory) MOD at 4 (1/3/03).
- * If factual distinctions could control the legal result, the issue is not an appropriate subject for interlocutory appeal. *In re Pyramid Co.*, 141 Vt. 293, 304 (1982).
- * The need for a factual record is heightened by the procedural status of case where Act 250 authorizes a de novo proceeding in an appeal; because additional facts may be presented in a de novo trial, and such changes in the factual record may have a substantial impact on the questions raised on appeal. *In re Pyramid Co.*, 141 Vt. 293, 304-05 (1982).

507.2 What decisions may be reviewed

- * Environmental Court dismissed interlocutory appeal of District Commission's 34 (E) ruling because 34(E) ruling was not a final administrative decision, the Commission did not exceed its jurisdiction,

and no indication that review of a final decision would not provide an adequate remedy. *Scott Farm Act 250*, No. 48-4-17 Vtec, Entry Regarding Motion to Dismiss at 2 (8/22/2017).

* The Court is able to revisit a decision regarding interlocutory orders “if the evidence admitted at trial supports doing so” and “the facts presented support both reconsideration and reversal of our prior determination.” *In re Killington Resort Project*, Decision on Motion for Interlocutory Appeal at 2 (10/21/14).

* While disagreeing over some details, the federal courts have limited interlocutory appeals to “exceptional” cases. *In re Pyramid Co.*, 141 Vt. 293, 301 (1982).

* “Interlocutory appeal is appropriate for questions of law, not fact,” because “a question of law is one capable of accurate resolution by an appellate court without the benefit of a factual record. If factual distinctions could control the legal result, the issue is not an appropriate subject for interlocutory appeal.” *In re Pyramid Co. of Burlington*, 141 Vt. 294, 304 (1982); *Re: William and Maryjean Kalanges* (Interlocutory Appeal) #4C0593-6-EB MOD at 5 (8/28/03) [EB #834] (appeal which raises factual issues concerning *Stowe Club Highlands* analysis is inappropriate for interlocutory review); *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 3 (7/17/02)[EB #809]; and see *Agency of Transportation / Circumferential Highway*, #4C0718-EB (7/22/88) [EB #392]; *Howard and Louise Leach*, #6F0316-EB (6/3/85). [EB #258]

* A preliminary decision is not a final decision; it is not appealable pursuant to EBR 40, but is an interlocutory appeal governed by EBR 43. *Re: William and Maryjean Kalanges* (Interlocutory Appeal) #4C0593-6-EB MOD at 2 (8/28/03) [EB #834] (applicability of *Stowe Club Highlands* test is non-dispositive and not Commission’s final ruling on permit application); *Burlington Broadcasters, Inc.*, #4C1004-EB (Chairs Preliminary Ruling) (4/23/97). [EB #670]; *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB #425]

* Applicant's motion for interlocutory appeal is dismissed without prejudice because the applicant filed a motion to reconsider. An interlocutory appeal may be refiled after Commission issues a decision on the motion to alter. *Litwhiler & H.A. Manosh*, #5L1006-EB (6/20/89). [EB #446]

* An interlocutory appeal from Commission that is substantive in nature will be denied where no final appealable order has been issued. *Paul E. Blair Family Trust*, #4C0388-EB (11/2/79). [EB #121]

*“Because the matter challenged is whether the Commission ‘clearly exceeded its jurisdiction,’ and delaying review until the final decision would harm the parties, we conclude that interlocutory review was appropriate.” *In re Mathez Act 250 LU Permit*, 2018 Vt. 55, at ¶ 9 (2018).

507.3 Timeliness of filing

*Untimely-filed motion for permission to file an interlocutory appeal denied where the question of controlling law was addressed by a decision issued three months previous. *NRB v. Stratton Corporation*, No. 106-7-14 Vtec, Entry Regarding Motion for Interlocutory Appeal, at 2-3 (07/27/2015).

* Since filing deadline established by statute is jurisdictional, Board has no discretion to waive such deadlines; but since deadline for filing interlocutory appeal is only found in Board's rules, untimely filed appeal is not a jurisdictional defect that requires automatic dismissal. *Re: William and Maryjean Kalanges* (Interlocutory Appeal), #4C0593-6-EB, MOD at 3 (8/28/03). [EB #834], citing *Fyles v. Schmidt* 141 Vt. 419, 422 (1982).

* Under EBR 43, a motion for interlocutory appeal must be filed with Board, not with Commission, no later than 10 days following the entry of an order or ruling of Commission that is the subject of the appeal. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M]

* EBR 31(A) motion to alter a decision tolls period for appeal; a second, revised Commission order starts a new 10 day period for appeal under EBR 43. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M].

* EBR 31(A) is not limited solely to motions to alter permit decisions but applies to interlocutory appeals as well. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M].

507.4 Factors

* The Court found that even if the intervenors' motion had been timely, there is not substantial grounds for a difference of opinion as the preclusive effect of a permit decision is settled, and an interlocutory appeal would not materially advance the termination of the litigation because the Court has already set a hearing date. *NRB v. Stratton Corporation*, No. 106-7-14 Vtec, Entry Regarding Motion for Interlocutory Appeal, at 3-4 (07/27/2015).

*The Court must grant a party permission to appeal upon reaching three conclusions: (1) the order "involves a controlling question of law;" (2) the question of law is one about which "there exists substantial ground for different of opinion;" (3) "an immediate appeal may materially advance the termination of the litigation." *NRB v. Stratton Corporation*, No. 106-7-14 Vtec, Entry Regarding Motion for Interlocutory Appeal, at 2 (07/27/2015)(citing V.R.A.P.5 (b)(1)).

* V.R.A.P. 5 requires that, to grant a motion for interlocutory appeal, the Court must find that the order or ruling "involves a controlling question of law" about which "there is substantial ground for difference of opinion," and that "an immediate appeal may materially advance the termination of the litigation." *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 3 (12/1/08), quoting V.R.A.P. 5(b)(1); see also *In re Pyramid Co. of Burlington*, 141 Vt. 294, 301 (1982); *Sunset Cliff Homeowners Assoc., Inc. v. City of Burlington, et al.*, No. 198-8-06 Vtec, at 7 (12/4/06) (Durkin, J.).

* Three criteria for interlocutory appeals must be satisfied: (1) the appeal order must involve a "controlling question of law;" (2) there must be "substantial ground for difference of opinion" as to the correctness of that order; (3) an interlocutory appeal should "materially advance the termination of the litigation." *In re Pyramid Co.*, 141 Vt. 293, 301 (1982); *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 3 (7/17/02)[EB #809]; *Catamount Slate, Inc. et al.*, DR #389, MOD at 10-12 (7/27/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04); *Town of Albany and Florence Beaudry*, #7R1042-EB (Interlocutory) (3/19/98). [EB #701]; *Sugarbush Resort*

Holdings, Inc., #5W1045-EB (8/12/97)[EB #679]; *Sherman Hollow*, #4C0422-5-EB (7/9/87). [EB #259]; *In re Bennington Wal-Mart Demolition/Constr. Permit (Appeal from District #7 Environmental Commission Determination)*, 158-10-11 Vtec at 1 (EO on Mot. For Interlocutory Appeal) (09-24-12).

* The interlocutory appeal rule's criteria do not draw bright lines: the definitions of "controlling questions of law," "substantial grounds for difference of opinion," and "material advancement of litigation's termination" are not self-evident. *In re Pyramid Co.*, 141 Vt. 293, 301-02 (1982).

* The three interlocutory appeal factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal. *In re Pyramid Co.*, 141 Vt. 293, 302 (1982); *In re Bennington Wal-Mart Demolition/Constr. Permit (Appeal from District #7 Environmental Commission Determination)*, 158-10-11 Vtec at 1 (EO on Mot. For Interlocutory Appeal) (09-24-12).

* A failure to satisfy any one of the interlocutory appeal criteria precludes appellate decision. *In re Pyramid Co.*, 141 Vt. 293, 302 (1982).

507.4.1

Controlling Question of Law

* The interlocutory appeal rule's criteria do not draw bright lines: the definitions of "controlling questions of law," "substantial grounds for difference of opinion," and "material advancement of litigation's termination" are not self-evident. *In re Pyramid Co.*, 141 Vt. 293, 301-02 (1982).

* Whether a question of law is "controlling" is not defined by whether the question governs the outcome of the litigation. *In re Pyramid Co.*, 141 Vt. 293, 302 (1982).

* A controlling question of law is one that deals solely with substantive issues of law. *In re Pyramid Co.*, 141 Vt. 293, 303 (1982); *In re Bennington Wal-Mart Demolition/Constr. Permit (Appeal from District #7 Environmental Commission Determination)*, 158-10-11 Vtec at 2 (EO on Mot. For Interlocutory Appeal) (09-24-12).

* "Controlling question of law" factor requires a practical application that focuses upon the potential consequences of the order at issue. *In re Pyramid Co.*, 141 Vt. 293, 303 (1982).

* Since the core purpose of interlocutory appeal is to avoid unnecessary proceedings in the trial courts, the criterion that an order raise a 'controlling question of law' requires that reversal result in an immediate effect on the course of litigation and in some savings of resources either to the court system or to the litigants. *In re Pyramid Co.*, 141 Vt. 293, 303 (1982); *In re Bennington Wal-Mart Demolition/Constr. Permit (Appeal from District #7 Environmental Commission Determination)*, 158-10-11 Vtec at 2 (EO on Mot. For Interlocutory Appeal) (09-24-12).

* At one extreme, an order that preordains the outcome of litigation is certainly controlling. *In re Pyramid Co.*, 141 Vt. 293, 303 (1982).

- * Further down the continuum, an order may be "controlling" if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial. *In re Pyramid Co.*, 141 Vt. 293, 303 (1982).
- * The controlling character of a question can only be evaluated in the context of the underlying action. *In re Pyramid Co.*, 141 Vt. 293, 303 (1982).
- * To be controlling, resolution of the question must have an immediate effect on the course of litigation and save resources for either the court or the litigants. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 3 (12/1/08), citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 301 (1982).
- * The question of VNRC's and CLF's party status is controlling because although as amici the two organizations could participate in the trial to the same extent as if they were interveners, they would not have the standing to bring an appeal of the Court's final decision, and would have to move for interlocutory appeal at that time to resolve their party status to determine if they could then bring an appeal of any decision on the merits. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 3 (12/1/08).
- * Request for interlocutory appeal raises a controlling question of law where ruling would have immediate effect on the course of the application. *Sugarbush Resort Holdings, Inc.*, #5W1045-EB (8/12/97). [EB #679]
- * Questions of party status are not "controlling" questions of law. *Manchester Commons Associates*, #8B0500-EB (10/17/94). [EB #618M1]
- * Issues concerning the fairness of Commission proceeding do not constitute questions of law. *J.P. Carrara & Sons, Inc.*, #2S0351-3-EB (7/20/92). [EB #551M]
- * A motion for interlocutory appeal with respect to whether Commission's requests are improper and beyond the scope of its authority does not present a question of law. *Disposal Specialists, Inc.*, #2W0161-1-EB, MOD at 2 (8/21/89). [EB #447M1]
- * The Board is able to decide as a matter of law whether the nearby gravel pit is "involved land" because Commission's decision contains sufficient findings of fact to allow the Board to assume those facts are true for purposes of the appeal without itself engaging in fact finding. *John Litwhiler & H.A. Manosh*, #5L1006-EB (1/10/89). [EB #427].
- * If interlocutory appeal were the sole avenue of appeal, the Board would find that a controlling question of law was raised. However, if appellants are not left without an opportunity to appeal, the consequences are not so grave as to be "controlling." Moreover, where it is likely that an appeal will result to the Board regarding Commission's final decision regardless of the resolution of interlocutory matters, the question is not "controlling". *Howard and Louise Leach*, #6F0316-EB (6/3/85). [EB #258].

* A question as to proper forum does not raise a controlling question of law for purposes of interlocutory review by the Board. *Agency of Transportation / Circumferential Highway, #4C0718-EB (7/22/88)*. [EB #392].

507.4.1.1 What is a "Question of Law"

* The certified questions in this case are not questions of "law," as the resolution of each of them may be dictated by the facts that are developed at trial. *In re Pyramid Co.*, 141 Vt. 293, 304 (1982).

* Simply phrasing a question as turning on a matter of law does not create a question of law for interlocutory appeal purposes. *In re Pyramid Co.*, 141 Vt. 293, 304 (1982).

* A question of law is one capable of accurate resolution by an appellate court without the benefit of a factual record. *In re Pyramid Co.*, 141 Vt. 293, 304 (1982).

* As a threshold matter, before Board examines whether an interlocutory appeal concerns a "controlling question of law," it must first determine whether appeal raises a *question of law*. *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 3 (7/17/02). [EB #809]

* An appeal involves a "question of law" if no facts are required to resolve the issue or if a factual record has been previously developed by the district commission in a manner that allows the Board to assume the relevant facts without engaging in factual determinations. *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 3 (7/17/02). [EB #809]

507.4.2 Difference of Opinion

* The interlocutory appeal rule's criteria do not draw bright lines: the definitions of "controlling questions of law," "substantial grounds for difference of opinion," and "material advancement of litigation's termination" are not self-evident. *In re Pyramid Co.*, 141 Vt. 293, 301-02 (1982).

* In interpreting interlocutory appeal criterion - that there is "substantial ground for a difference of opinion" - courts should place little stock in the vehemence of disagreeing counsel. *In re Pyramid Co.*, 141 Vt. 293, 306 (1982).

* Trial courts should not be swayed by the unique character of a particular issue when deciding whether it meets the third interlocutory appeal criteria. *In re Pyramid Co.*, 141 Vt. 293, 306 (1982).

* Whether the organizations' members meet the "particularized interest" requirement of 10 V.S.A. § 8502(7) is a question on which there is a substantial ground for difference of opinion. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 4 (12/1/08).

* "Substantial ground for disagreement" standard: trial court must believe that a reasonable appellate judge could vote for reversal of the challenged order. *In re Pyramid Co.*, 141 Vt. 293, 307 (1982).

* There was sufficient grounds for difference of opinion where issue related to interpretation of Act of the United States Congress. *Sugarbush Resort Holdings, Inc.*, #5W1045-EB (8/12/97). [EB #679]

* The “substantial ground for difference of opinion” standard requires the belief that a reasonable appellate judge could vote for reversal of the challenged order. *Waterbury Shopping Village*, #5W1068-EB (6/15/90). [EB #477M2]; *Disposal Specialists, Inc.*, #2W0161-1-EB (8/21/89). [EB #447M1]

* Because relocation of a VELCO transmission line is outside Board’s and Commission’s jurisdiction, there is no "substantial ground for difference of opinion" whether VELCO is a necessary co-applicant and interlocutory appeal on co-applicancy issue is denied. *Maple Tree Place Associates*, #4C0775-EB (12/22/88). [EB #413M]

*There was a substantial ground for difference of opinion where, though the Court was confident in the soundness and reasoning of its prior decision, the parties (VNRC, CFGB, and NRB) raised a number of arguments in their motions, and analysis of said arguments led Court to conclude that the issue was one about which reasonable appellate judges could have differing opinions. *In re Bennington Wal-Mart Demolition/Constr. Permit (Appeal from District #7 Environmental Commission Determination)*, 158-10-11 Vtec at 2 (EO on Mot. For Interlocutory Appeal) (09-24-12).

507.4.3

Material Advancement of Process

* The interlocutory appeal rule's criteria do not draw bright lines: the definitions of "controlling questions of law," "substantial grounds for difference of opinion," and "material advancement of litigation's termination" are not self-evident. *In re Pyramid Co.*, 141 Vt. 293, 301-02 (1982).

* Where, inherent in an interlocutory appeal, is the prospect of even greater delay, it does not have at least the potential to materially advance the termination of the litigation. *In re Pyramid Co.*, 141 Vt. 293, 305 (1982)

* An interlocutory appeal is proper only if it may advance the ultimate termination of a case. *In re Pyramid Co.*, 141 Vt. 293, 305 (1982).

* A trial court must consider not only the time saved at trial, but also the time expended on appeal. *In re Pyramid Co.*, 141 Vt. 293, 305 (1982).

* "[T]he lower courts must be mindful of this Court's well-established policy of avoiding piecemeal appeals." *In re Pyramid Co.*, 141 Vt. 293, 305 (1982).

* The extra days required to try the issues in this case pale in comparison to the months, stretching into years, required for this appeal. *In re Pyramid Co.*, 141 Vt. 293, 306 (1982).

* An interlocutory appeal has the potential to materially advance the termination of the litigation when it may advance the ultimate termination of the case, including time spent on appeal. Here, interlocutory review of CLF’s and VNRC’s party status will advance the ultimate termination of the case by avoiding relitigation if the organizations are granted party status. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration

and Motion for Interlocutory Appeal at 4 (12/1/08), citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 305 (1982).

* An interlocutory appeal is proper only if it may advance the ultimate termination of a case. *Re: River Station Properties III, LLC* #5W1436-EB (Interlocutory), MOD at 2 (9/17/04) [EB #854]; *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 5 (7/17/02)[EB #809]; *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 3 (1/31/02). [EB #799 & 801]

* In deciding whether to grant an interlocutory appeal, the trial court "must consider not only the time saved at trial, but also the time expended on appeal." *Re: Rutland Public Schools* , # 1R0038-8-EB, MOD at 5 (7/17/02)[EB #809], citing *State v. Lafayette*, 148 Vt. 288, 290 (1987).

* Time saved includes "both the appeal time expended in the interlocutory appeal and the appeal of the final order." *Re: Rutland Public Schools* , # 1R0038-8-EB, MOD at 5 (7/17/02). [EB #809]

* While there may be instances in which denial of party status might bring about a matter's swift conclusion, because party status can be appealed to Supreme Court, Board decision to deny party status could *delay* termination of process, not advance it. *Re: Rutland Public Schools* , # 1R0038-8-EB, MOD at 6 (7/17/02). [EB #809]

* Board may in its sole discretion review an appeal from any Commission party status ruling if it determines that such review may "materially advance the application process." *Town of Albany and Florence Beaudry*, #7R1042-EB (Interlocutory) (3/19/98). [EB #701]; *John and Mary Swington*, #1R0693-EB (10/15/90). [EB #491M]

* Fundamental to whether an interlocutory appeal will materially advance an application is the potential for a substantial delay in the issuance of a Commission's final decision, and the potential for a substantial increase in the amount of time it may take to reach a final decision with respect to a land use permit application in the event of a series of appeals to the Board. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 3 (1/31/02) [EB #799 & 801]; *Sugarbush Resort Holdings, Inc.*, #5W1045-EB (8/12/97). [EB #679]

* The Board denied a motion for party status interlocutory appeal because the application process would not be materially advanced if the Board were to conduct such an inquiry. *H.B. Partners a/k/a Walker II Project*, #8B0500-1-EB (Interlocutory) (3/24/98). [EB #703]; *Manchester Commons Associates*, #8B0500-EB (5/14/96). [EB #654]; *Manchester Commons Associates*, #8B0500-EB (10/17/94). [EB #618M1]; *IBM Corp.*, #4C0354-2-EB (5/4/92). [EB #541]; *Richard Roberts Group & Salmon Hole Associates*, #2W0771-EB (7/22/88). [EB #400]

* An interlocutory appeal is an extraordinary method of review and the Board will entertain such an appeal only if an immediate appeal will materially advance the application process. When Commission proceedings would dispose of the matter sooner than the Board's schedule allows, a request for an interlocutory appeal will be denied. *Unifirst Corp.*, DR #166 (2/20/85).

*Where a party makes a motion for interlocutory appeal of the Court's prior decision not to remand,

granting the motion has the potential to expedite the ultimate termination of the case because, if the Court denies the motion and hears the case on its merits and the Supreme Court, on appeal, decides that the Court should have remanded the case, then all of the litigation will have to be repeated; whereas if the Court hears the appeal and the Supreme Court affirms the decision on appeal, the Court can proceed to the case on the merits, without remand, resolving the matter in a "summary and expedited proceeding." V.R.E.C.P. 1; *In re Bennington Wal-Mart Demolition/Constr. Permit (Appeal from District #7 Environmental Commission Determination)*, 158-10-11 Vtec at 2 (EO on Mot. For Interlocutory Appeal) (09-24-12).

507.5 Discretion to accept interlocutory appeal

* It is within the Board's discretion whether to accept an appeal from Commission interlocutory orders or rulings. *Town of Albany and Florence Beaudry*, #7R1042-EB (Interlocutory) (3/19/98). [EB #701]; *Sugarbush Resort Holdings, Inc.*, #5W1045-EB (8/12/97). [EB #679]; *John and Mary Swington*, #1R0693-EB (10/15/90) [EB #491M]; *Sherman Hollow*, #4C0422-5-EB (7/9/87). [EB #259]

* The Board may in its sole discretion review an appeal from any party status ruling of Commission if it determines that such review may "materially advance the application process." *Town of Albany and Florence Beaudry*, #7R1042-EB (Interlocutory) (3/19/98). [EB #701]; *John and Mary Swington*, #1R0693-EB (10/15/90). [EB #491M]

507.6 Stay of Commission proceedings (see [215](#) and [467](#))

* Factors considered: i) the hardship to the parties, ii) the impact on the values sought to be protected by Act 250, and iii) the effect on the public health, safety or general welfare. *Re: Dexter and Susan Merritt*, DR #407, MOD at 11 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03).

* Burden is on the proponent to prove that a stay is necessary. *Re: Dexter and Susan Merritt*, DR #407, MOD at 11 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03).

* Board Chair stayed Commission proceedings to preserve judicial economy (by avoiding need for reconvening additional hearings)and to allow Board to consider whether to take interlocutory appeal and hear merits of appeal in a timely manor so as not to create undue delay. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), CSP at 2 (1/3/02). [EB #799 & 801].

508. Waiver of Right to Appeal

* Party waives right to appeal a permit approval to the Board by failing to request a Commission hearing. *Farrell Distributing Corp.*, #1R0311-3-EB (5/2/86). [EB #293]

509. Withdrawal of appeal

509.1 When Allowed

- * Given that appellants seek to withdraw their own appeal and no party objects, it is hard to conceive of how dismissing appeal could prejudice the public interest. *Re: Champlain College Business Center and Student Life Complex*, #4C0515-6(Remand)-EB, EB #822 and #4C0515-7-EB, DO at 2 (4/17/03) [EB #823]; *Re: H. A. Manosh, Inc., Vermont RSA Ltd. Part., Lamoille Co. Sheriff's Dept. & Vt. Electric Coop., Inc.*, #5L1331, DO at 1 (3/7/03) [EB #753] (when no permit has been issued and applicant seeks to withdraw appeal, dismissing appeal causes no prejudice to the public interest).
- * An administrative agency has discretion to reject a withdrawal or dismissal of an appeal if it would prejudice the public interest that the agency is charged to protect. *Re: Spruce Lake Association, Inc.*, DR #433, DO at 1 (10/5/05); *Re: Town of Barre Millstone Hill West Bike Path*, DR #440, DO at 2 (5/19/05); *Re: Rutland Public Schools*, DR # 414, DO at 2 (2/2/05); *Re: River Station Properties, Trevor Cole, Kelley Taft, and RLO, LLC*, #5W1436-EB, DO at 1 (1/13/05) [EB #863]; *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 7 (6/17/04) [EB #828]; *Re: Dexter and Susan Merritt, et al.*, #5W1395-EB, DO at 2 (10/30/02), *aff'd*, 2003 VT 84; *Filskov Brothers, Inc.*, DR #395, DO at 2 (6/20/01); *P&H Senesac, Inc.*, DR #376, DO (6/22/00); *Vermont Agency of Transportation* #4C1010-EB, DO (5/17/00) [EB #745]; *Ronald L.Saldi*, #5W1088-1-EB, MOD at 3 (10/1/96) [EB #653M1]; and see *Rockwell Park Associates and Bruce J. Levinsky*, #5W0772-5-EB, DO (2/17/94) [EB #509]; *Re: H.A. Manosh Corp.*, DR #247 (12/13/91).
- * Allowing dismissal of appeal will not prejudice the public interest that Board is charged to protect, because dismissal causes Commission's permit to become final. *Re: River Station Properties, Trevor Cole, Kelley Taft, and RLO, LLC*, #5W1436-EB, DO at 2 (1/13/05) [EB #863]; *Re: Dexter and Susan Merritt, et al.*, #5W1395-EB, DO at 2 (10/30/02), *aff'd*, 2003 VT 84; *Re: Vermont Agency of Transportation, City of South Burlington and Town of Shelburne*, #4C1010-EB, DO (5/17/00).
- * EBR 40 and Board and Supreme Court precedent all dictate that a unilateral request to voluntarily withdraw an appeal is improper where other parties that have appeared in the proceedings before Board oppose the withdrawal. *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, MOD at 4 (10/26/00). [EB #765]
- * Dismissal is appropriate where appellant acknowledges jurisdictional defect in commission decision. *Re: Stratton Corporation*, #2W0519-17(Revised)-EB, DO at 5-7 (1/10/01).
- * Request to withdraw appeal allowed where dismissal was not contrary to values embodied in Act 250. *John A. Russell Corp.*, #1R0257-2A-EB (10/22/92). [EB #552]
- * Board cannot equate withdrawal with recess, for a recess means an application is still pending and vested rights may still accrue; whereas withdrawal means application is no longer pending. *Richard Roberts Group, Inc.*, DR #225 (7/5/91).
- * A written letter of withdrawal is required prior to a hearing on the merits and a cessation of application processing. *Richard Roberts Group, Inc.*, DR #225 (7/5/91).
- * Where applicant is a successor corporation to record owner of land, withdrawal of an appeal requiring such record owner to be a co-applicant will be allowed where such withdrawal does not contravene the values protected by Act 250. *Lake Realty, Inc.*, #9A0175-EB (10/20/89). [EB #437]

509.2 Effect of withdrawal of initial appeal

* A party (with party status on a criterion) may continue an appeal brought by another party on such criterion, even if other party later withdraws its appeal. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 4-9 (1/20/00).

* Withdrawal of appeal does not affect the rights of other parties to file cross-appeals and notices of appearance after parties have received copies of appeals. *L & S Associates*, #2W0434-8-EB (10/1/92). [EB #557M1]

509.3 When not allowed

* Motion to dismiss appeal on the merits issues is denied where Permittee has not clearly withdrawn all remaining merits issues. *Re: Green Crow Corporation*, #3R0903-EB, MOD (3/29/05) [EB#845], *appeal remanded on other grounds, In re Green Crow Corp.*, 2006 VT 14 (1/30/06)(mem.).

510. Remand

* Interpreting a remand order from the Board to Commission as divesting the Board of all jurisdiction is "elevating form over substance to an absurd extent." *Realty Resources Chartered & Bradford Housing Assoc.*, #3R0678-EB (MOD at 5) (2/17/94). [EB #546M1]

* Appeal dismissed without prejudice where a request was made to remand matter to Commission to revise permit condition. *Circumferential Highway, State of Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-EB (9/25/89). [EB #425]

* Remand for the filing of an amendment application is not contrary to intent or purposes of Act 250. *Paul & Jane Choquette*, #7R0234-3-EB (5/9/89). [EB #388]

510.1 When necessary for initial Commission review

* Remand required for changes to project that may implicate criteria not on appeal before the Environmental Division, or that may affect new parties not participating in the proceedings. *In re Lathrop L.P.*, 2015 VT 49, ¶ 109.

* Remand granted to allow Applicants opportunity to file with Commission, pursuant to EBR 31(B), a request for reconsideration of Commission's denial of their permit application. *Champlain Oil Co., Inc. and McDonald's Corporation*, #1R0862-1, MOD at 2 (4/19/01). [EB #777]

* Appeal seeking a permit amendment was remanded to Commission as it had not ruled on the merits of the application in the first instance. *MBL Associates*, #4C0948-1-EB (5/4/98). [EB #705]

* Commission improperly proceeded with partial review under 10 V.S.A. § 6086(b); remand was necessary in light of applicant's appeal of procedural defect. *F.P. Elnicki Rutland Storage Trailers, Inc.*, #1R0203-2-WFP (5/28/96). [WFP #32]

- * Where Board finds that original permit may have been deficient, the Board remands to Commission. *Robert Blair and CS Architecture*, DR #241 (FCO at 7) (4/29/92).
- * Board remands proposed stipulation for consideration by Commission where stipulation goes toward fulfillment of permit condition issued by Commission rather than toward appeal thereof. *Angelo DeCicco*, #2W0612-1-EB (5/24/91). [EB #479M1]
- * Board will remand a proposed stipulation for consideration by Commission where stipulation does not contain sufficient factual support for Board to issue findings and conclusions, and where Commission has already heard the matter, is familiar with the facts, and has issued findings which it can easily amend. *Angelo DeCicco*, #2W0612-1-EB (5/24/91). [EB #479M1].
- * Failure of applicant to provide complete and accurate list of adjoining property owners resulted in remand to Commission. *Winooski Housing Authority*, #4C0857-EB (4/30/91). [EB #507]
- * Proper remedy for Commission's failure to convene a hearing on the merits within 40 days after receipt of the application is a remand to order a new hearing rather than the automatic approval of the project. *Killington, Ltd. & International Paper Realty Corp.*, #1R0584-EB (8/8/86). [EB #297]

510.2 When unnecessary or inadvisable

- * Remand not required for project changes that do not change the nature of the permit requested, alter the location of the project, or increase the scope of the project. Policy supports revising project to respond to issues. Remand for such changes would be extremely inefficient; a procedural ping-pong match. *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5, ¶¶ 14-16. (01/17/14). *Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec. (Dec. 6, 2018). **May be appealed**
- * Remand not required where appellant alleges Commission applied an erroneous legal standard. *Brewster River Land Co., LLC*. #5L1348-EB, MOD at 12 (9/18/00). [EB #761]
- * Board will not remand a part of case back to Commission because Board and Commission would then simultaneously have jurisdiction over the same matter. *Town of Milton*, #4C0046-5 (MOD) (4/14/00) [EB #746]; *Leo A. and Theresa A. Gauthier and Robert Miller*, #4C0842-EB (12/10/90). [EB #495M] (economy of public resources favors denying a motion to limit the scope of appeal or to remand jurisdiction for various criteria which would result in two Act 250 tribunals reviewing the same project at the same time).
- * Waste Facility Panel will remand an appeal to ANR if ANR has failed to conduct a review, but not where a party merely disagrees with the quality or results of that review. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 6 (9/9/99).

510.3 Changes to project after Commission review

510.3.1. Remand warranted

*To avoid this result [procedural ping=pong match (*Sisters & Bros.*, 2009 VT 58, ¶ 21.)], the Vermont Supreme Court has necessitated remand only where “truly substantial changes to the form or type of an application” have taken place. *Sisters & Bros.*, 2009 VT 58, ¶ 21. The Court later characterized “truly substantial” changes as those that revise “the nature of the permit requested, alter the location of the project, or increase the scope of the project.” *In re Chaves A250 Permit Reconsider*, 2014 VT 5, ¶ 14, 195 Vt. 467.

* Remand required for changes to project that may implicate criteria not on appeal before the Environmental Division, or that may affect new parties not participating in the proceedings. *In re Lathrop L.P.*, 2015 VT 49, ¶ 109.

* Board's continuing authority over its permits may include supervision of the uses and conditions imposed by the permit, but it does not extend to considering a request to develop new land. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978).

* New impacts or impacts to new parties due to changes in the project as a result of settlement agreement require new review even if the commission had previously made findings of facts that support affirmative conclusions of law. *Re: Greater Upper Valley Solid Waste Management District*, DR #418, MOD at 5 (5/13/03).

* Applicant’s amendment of project requires remand because new project involves new land and could impact new parties. *George and Mary Osgood*, #7E0709-3-EB, DO at 2 (11/26/02). [EB #811].

* Even if changes to project result from settlement agreement between parties, changes may create impacts to new parties or impacts on Criteria not at issue before Board and therefore requires that the matter be remanded. *Ray G. & Lynda J. Colton*, #3W0405-5(Revised)-EB, MOD and Remand Order at 3 (10/2/02). [EB #804]

* Remand to Commission is warranted where alterations in a project design were not reviewed by Commission and where changes introduced new impacts on criteria not at issue before Board. *Edward E. Buttolph Revocable Trust*, #5L1339-EB, CPR at 2 (7/20/00) [EB#752]; *Spear Street Associates*, #4C0489-1-EB (4/4/84). [EB #213]

* A change in wastewater treatment system pending review of an appeal to Board is a substantial change requiring a remand to Commission. *Windsor Improvement*, #2S0455-EB (3/27/80). [EB #130]

510.3.2 Remand not warranted

*The Environmental Division may approve revisions to project without remand as long as the revisions do not amount to “truly substantial changes to the form or type of an application.” *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5, at 4 (01/17/14)(citing *In re Sisters & Bros. Inv. Grp.*, LLP, 2009 VT 58 (2009)).

* Remand not warranted because proposed changes to original application “do not appear so substantial as to change the very nature of the permit application.” *In re Chaves Londonderry Gravel Pit*, No. 60-4-11 & 267-11-08 Vtec, Entry Order on Remand Request at ¶6 (3/9/12) (citing *In re Torres*, 154 Vt. 233 (1990)), *aff'd*, *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).

* Remand not necessary when changes to a project increase the degree of potential impact of a project on adjoining or their properties when: (1) those adjoining received notice; (2) there has been no change to the nature of the permit requested; (3) the location of the project and its components has not been altered; (4) the scope of the project has not been increased; and (5) no new parties need to receive notice of the project as a result of the change. *Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec. (Dec. 6, 2018). **May be appealed**

* Remand not warranted because changes were proposed “in response to concerns of project opponents” and therefore “do not change the material aspects of the proposed project.” *In re Chaves Londonderry Gravel Pit*, No. 60-4-11 & 267-11-08 Vtec, Entry Order on Remand Request at ¶6 (3/9/12) (citing *In re Brothers & Sisters Inv. Group, LLP*, 2009 VT 58), *aff'd*, *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).

* Remand denied where slight modifications to project did not involve development of new, noncontiguous lands, with possible impacts on new parties, nor impacts on criteria not at issue before the Board. *Main Street Landing Company and City of Burlington*, #4C1068-EB, MOD at 4 (9/27/01). [EB #790]

* Change made to a project during the pendency of an appeal does not mandate automatic remand to Commission for filing of a new permit amendment application. *Larry and Diane Brown*, #5W1175-EB and #5W1175-1-EB (9/15/94). [EB #591M2]

* Application which is amended before Board need not be returned to Commission if the modifications neither involve new construction on different lands potentially involving new parties, nor implicate any issue cognizable under the 10 Act 250 criteria. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]

* Board will not remand a case when a threshold issue is appealed and Commission decision is reversed, unless new land is involved, new adjoining landowners are affected, or project has been remanded since Commission's hearings. *Didace & Susan LaCroix*, #3W0485-EB (4/27/87). [EB #292]; *Ammex Warehouse Co., Inc.*, #6F0248-EB (8/3/81). [EB #160]

* Remand to Commission not warranted where project does incorporate new lands implicating new parties and substantive issues impacted by changes fall within confines of criteria previously appealed by parties. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

* Remand is inappropriate where revised plan considered on appeal calls for substantially less construction than the plan before Commission and issues raised are those already cognizable on appeal. *Fairfield Associates*, #4C0570-EB (3/29/85). [EB #234]

* Board has jurisdiction to review a site plan which was revised after Commission decision because revisions did not raise criteria other than those under appeal and no new parties were affected. *Burlington Housing*, #4C0463-EB (10/15/81). [EB #162]

511. Dismissal of (see [336.1](#) and [283.2](#) and [552.6](#))

* Failure to comply with Board's or Commission order may lead to dismissal. *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 4 and 5 n.6 (1/16/03). [EB #820]

* On remand from Supreme Court, Board dismissed for lack of prosecution, based on permittee's express intention not to participate in any further Board proceedings and his failure to meet filing deadlines; permit that had been subject of the Court appeal is allowed to stand. *Re: Lawrence White*, #1R0391-8-EB (Remand), MOD (1/17/02). [EB #689]

* Motion to dismiss appeal on the grounds that Permittees had not filed Permit Application with Board denied; there is no requirement that a copy of application (or any other specific document) be filed with Board; instead, Permittee must produce enough evidence to allow Board to reach positive findings under Criteria on appeal. *Main Street Landing Company and City of Burlington*, Land Use Permit #4C1068-EB, FCO at 4 (11/20/01). [EB #790]

* Dismissal is appropriate where appellant fails to complete appeal after having been given an opportunity to do so. *Re: Ralph G. Winchester, d/b/a R.G. Winchester Auto*, #2W1058-EB, CPD (3/28/01), DO (4/16/01).

* Failure to comply with Board's or Commission order may lead to dismissal. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO (6/19/01); *Kapitan Gravel Pit*, DR #388, DO (9/8/00).

* Involuntary dismissal is a severe measure which should only be imposed where clearly warranted. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO at 3 (6/19/01); *Kapitan Gravel Pit*, DR #388, DO at 3 (9/8/00).

* Before Board will dismiss, it ordinarily must find that there has been (a) bad faith or deliberate or wilful disregard for its orders, and (b) prejudice to the party seeking dismissal. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO at 4 - 5 (6/19/01); *Kapitan Gravel Pit*, DR #388, DO (9/8/00).

* Where Board denied appellant party status, and no other person had filed a timely appeal, appellant could not be called as Board's own witness, since Board lacked requisite jurisdiction to continue review of project. *Springfield Hospital*, #2S0776-2-EB (8/14/97), *sup. ct. appeal dismissed*, *In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. 10/30/97). [EB #669]

512. Effect of filing of Motion to Alter on (see [473.5](#))

IX. JURISDICTIONAL OPINIONS AND DECLARATORY RULINGS

551. Jurisdictional Opinions (JO) (see also Revocations at [VI.E.](#))

- * Party may waive procedural defects in the issuance of a jurisdictional opinion. *Re: Holbrook Tabor Limited Partnership*, DR #431, MOD at 2 n.1 (7/15/04), noting *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).
- * Failure to file an Act 250 Disclosure Statement along with a request for a jurisdictional opinion is not a fatal flaw to the issuance of a jurisdictional opinion, as such Statements are only required when a parcel is subdivided. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 7- 8 (6/12/03), *aff'd* 2006 VT 8 (V.S.Ct).
- * Coordinator's determination that application is not complete is a JO, subject to Board review within a DR Petition proceeding. *Re: Estate of Evangeline Deslauriers and Bolton Valley Corp.*, #4C0436-11E-EB, MOD at 5 (1/16/03) [EB #820]; *Re: Ingleside Equity Group*, DR #397, FCO (8/15/01); and see *Re: Paul & Dale Percy*, #5L0799-EB, FCO at 3 (3/20/86) (advisory opinion); *Re: Flanders Building Supply, Inc.*, #4C0634-EB, FCO at 4 n.1 (10/18/85) (advisory opinion).
- * An Act 250 jurisdictional determination is only as good as the facts upon which it is based. *Re: Richard and Elinor Huntley*, DR #419, MOD at 2 n.1 (7/3/03), *rev'd* on other grounds, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004); *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 11 (4/11/14)(citing *In re Lake Champlain Bluegrass Festival*, No. 204-11-10 Vtec, slip op. at 11 (1/3/12)); *In re: Hamm Mine Act 250 Jurisdiction*, Decision on Appellant's Motion for Summary Judgment at 10 (9/27/07), *aff'd on other grounds*, *In re Hamm Mine Act 250 Jurisdiction*, 2009 VT 88 (mem.); *Re: Swedish Ski Club of Vermont Land Trust*, DR #411, FCO at 2 n.1 (1/16/03); *Re: Dexter and Susan Merritt*, DR #407, MOD at 6 (6/20/02), *aff'd on other grounds*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03); *Re: GHL Construction, Inc. PAK Construction, Inc.*, #2S1124-EB and DR #396, FCO at 14 (12/27/01); *Catamount Slate, Inc. et al.*, DR #389, MOD at 11 (6/29/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).
- * Coordinators intend that parties rely on JOs. *Re: Dexter and Susan Merritt*, DR #407, MOD at 7 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03).
- * Salt storage shed is still subject to Act 250 jurisdiction (after application for shed was withdrawn) because PRS was issued regarding shed, was unchallenged and became final and binding. *Re: Green Mountain Railroad*, #2W0038-3B-EB, FCO at 8 (3/22/02). [EB #797]
- * The routine issuance of JOs by Coordinators does not vitiate their legitimacy. *Central Vermont Public Service Corporation*, DR #401, FCO at 10 (4/2/02)
- * Commission lacks authority to issue JO. *Re: Stratton Corp.* #2W0519-17(Revised)-EB, DO at 5 (1/10/01).
- * Act 250 JOs are final and binding only as to the facts they are based upon. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 18 (8/15/2017), *citing In re Catamount Slate, Inc.*, 2004 VT 14, ¶ 20, 176 Vt. 284.

“A JO is only as good as the facts presented to the District Coordinator.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 18 (8/15/2017), citing *WhistlePig, LLC Act 250 JO*(#9-070), No. 21-2-13 Vtec, slip op. at 11 (Vt. Super. Ct. Env'tl. Div. Apr. 11, 2014) (Durkin, J.) (citing *Lake Champlain Bluegrass*, No. 204-11-10 Vtec at 11 (Jan. 3, 2012)).

* One can infer when reading both 10 V.S.A. §§ 6081(a) and 6007(c) together that if a permit is required prior to construction, then a jurisdictional opinion should probably be obtained prior to construction; however, “this does not mean that if a permit is not required, a jurisdictional opinion should be obtained prior to construction.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 15 (8/15/2017).

* Failing to request or obtain a jurisdictional opinion or Act 250 permit prior to a development triggering jurisdiction does not prevent either an after-the-fact request for a JO, or after-the-fact application for an Act 250 permit. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 15 (8/15/2017).

* “Strictly requiring jurisdictional opinions to be obtained before development commences could lead to absurd results.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 15 (8/15/2017).

* As after-the-fact JO requests and permit applications are common, to avoid absurd results “failure to obtain a jurisdictional opinion regarding the applicability of § 6081(w)(1) to changes at a shooting range prior to making those changes does not bar the statute from being applied after the fact to those changes.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 15 (8/15/2017).

*The developer “may not have any current plans for construction [at the subject property, but] we know of no statutory restriction on its ability to seek a jurisdictional opinion regarding the scope of Act 250 jurisdiction over its future activities.” *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19) (quoting *In re WhistlePig, LLC Act 250 JO*, No. 21-2-13 Vtec (9/2/15)).

551.1 Who may request

* Act 250 Rule 3 allows any person to request a JO from a District Coordinator and does not require the requesting person to serve the request on any other party. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 10 (7/30/10).

* The procedural provisions of 10 V.S.A. § 6085(c)(2) only apply to proceedings before the district commissions and that subsection is not applicable to JO’s or their reconsideration by the district coordinators. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 21 (7/30/10).

* Party may waive procedural defects in the issuance of a jurisdictional opinion. *Re: Holbrook Tabor Limited Partnership*, DR #431, MOD at 2 n.1 (7/15/04), noting *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

* While “any person” may initially request a JO from Coordinator concerning applicability of Act 250, 10 V.S.A. § 6007(c), once that JO has been issued and has not been timely appealed, it may be final as to the world, and a new “any person” cannot request such a JO. *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04), reversing *Catamount Slate, Inc. et al.*, DR #389, MOD at 10-11 (6/29/01).

* Coordinators may not issue JOs *sua sponte*; EBR 3(c), to the extent that it authorizes the issuance of a jurisdictional opinion at the request of a district coordinator, exceeds the scope of § 6007(c) and is invalid. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 212-13 (2002), reversing *Re Vermont Verde Antique International Inc.*, DR #387, DO (2/2/01); *overruling Central Vermont Public Service Corporation*, DR #401, FCO at 7 and n.5 (4/2/02); see *Norwich Associates, Inc.*, DR #275 (4/3/96).

* “Any person” can ask for a jurisdictional opinion. *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Decision at 1 (May 30, 2007); *In re Burlington Airport*, 42-4-13 Vtec at 1 (6/5/13) (citing 10 V.S.A. § 6007(c)).

* The words “any person” in 10 V.S.A. § 6007(c) refer to anyone other than the Coordinator. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 5 (6/12/03), *aff’d* 2006 VT 8 (V.S.Ct), interpreting *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002), and citing *Re: Alpine Pipeline Co.*, DR #415, MOD at 7 (1/3/03); *but see In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04), reversing *Catamount Slate, Inc. et al.*, DR #389, MOD at 10-11 (6/29/01) (while “any person” may initially request a JO from Coordinator concerning applicability of Act 250, 10 V.S.A. § 6007(c), once that JO has been issued and has not been timely appealed, it may be final as to the world, and a new “any person” cannot request such a JO.)

* Coordinator may reconsider, *sua sponte*, a jurisdictional opinion. *Re: Alexander D. McEwing and McEwing Services, LLC*, DR #417, MOD at 5 (4/18/03) (when a Reconsidered JO is a continuation of an initial, valid request for a jurisdictional opinion, the blurring of prosecutorial and adjudicatory roles that the Supreme Court found to be troubling in *Vermont Verde* is not apparent, and the Coordinator's reconsideration of her earlier decision should not be barred on policy grounds), appeal *dism.* No. 2003-218 (Vt. S. Ct. 8/25/03); EBR 3(C)(3), distinguishing *In re: Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

* District coordinator cannot request a jurisdictional opinion from himself, but any other person can make such a request; in *In re: Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002), the Supreme Court's use of the term “interested third party” was distinguishing the “third party” from an official of the board itself. *Re: Alpine Pipeline Company*, DR #415, MOD at 7 (1/3/03).

551.2 Reconsideration of

* See 10 V.S.A. § 6007(d)(requiring Natural Resources Board reconsideration of jurisdictional opinions prior to any appeal, effective 7/1/13).

* Because a reconsideration request made under Act 250 Rule 3 is one made to the district coordinator, and is not a proceeding before the district commission, such a request is not subject to

Act 250 Rules 10 through 21, which only govern “Procedures Before the District Commissions.” Act 250 Rules art. II. *In re: Lamoille Valley Rail Trail, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 9 (7/30/10).*

551.2.1 Who may request

* Party status to request reconsideration of a jurisdictional opinion before the District Coordinators is governed by Act 250 Rule 3(B) and 10 V.S.A. § 6085(c)(1). See Act 250 Rule 3(B) (stating that “[p]ersons who qualify as parties pursuant to 10 V.S.A. § 6085(c)(1)(A) through (E) may request reconsideration from the district coordinator”); 10 V.S.A. § 6085(c)(1) (enumerating five categories of those who qualify for “party status” in Act 250 proceedings generally). *In re: Lamoille Valley Rail Trail, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 17-18 (7/30/10).*

* Any person may request a JO but only requestors qualified under 10 V.S.A. § 6085(c)(1)(A) through (E) (e.g. adjoining property owners or other persons who have a particularized interest protected by Act 250 and who interest may be affected by an act or decision by a District Commission) may Request a Reconsideration of a JO. *In re: Lamoille Valley Rail Trail, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 18 (7/30/10).*

* Party status to request reconsideration of JO granted where Intervenor were all adjoining property owners who either reside or operate commercial businesses in the direct vicinity of the proposed project and they showed a very close proximity—as close as 20 or 30 feet, and in any event less than 100 feet—to the rail corridor and therefore showed their potential to be specifically affected by the activities proposed for the project. *In re: Lamoille Valley Rail Trail, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 19 (7/30/10).*

* The procedural provisions of 10 V.S.A. § 6085(c)(2) only apply to proceedings before the district commissions and that subsection is not applicable to JO’s or their reconsideration by the district coordinators. *In re: Lamoille Valley Rail Trail, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 21 (7/30/10).*

551.2.2 When filed

* Thirty day period to request reconsideration of JO begins on date of mailing JO. *In re: Lamoille Valley Rail Trail, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 11-12 (7/30/10).*

551.2.3 How filed (electronic filing of)

* There is nothing in the 2007 Act 250 Rules prohibiting electronic filings related to JO’s. *In re: Lamoille Valley Rail Trail, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 12 (7/30/10).*

* Under the 2009 Act 250 Rules, electronic filing is now required in permit application proceedings before a district commission. Act 250 Rule 10(E) (2009). (“[F]ilings by the applicant and any other

party to a permit application shall also be submitted in electronic format unless the district coordinator waives this requirement because it creates an undue burden for the applicant or a party,” and “[t]he district coordinator may provide for alternate electronic filing methods.”). Although by its terms 2009 Act 250 Rule 10(E) does not apply to the filing of requests for jurisdictional opinions and requests for reconsideration of such opinions from district coordinators, it does suggest that the policy of the NRB generally is to encourage the filing of documents in electronic format. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment FN at 12-13 (7/30/10).

* Act 250 Rule 12(A), inapplicable to requests submitted to a District Coordinator, which are governed by Rule 3, states that documents are “deemed to have been filed when [they are] received by the district commission,” but the [2007] Act 250 Rules are silent as to the permissible methods for accomplishing such “receipt,” even in cases before the district commissions. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 13 (7/30/10).

551.2.4

Sua Sponte by Coordinator

* Coordinator may reconsider, *sua sponte*, a jurisdictional opinion. *Re: Alexander D. McEwing and McEwing Services, LLC*, DR #417, MOD at 5 (4/18/03) (when a Reconsidered JO is a continuation of an initial, valid request for a jurisdictional opinion, the blurring of prosecutorial and adjudicatory roles that the Supreme Court found to be troubling in *Vermont Verde* is not apparent, and the Coordinator's reconsideration of her earlier decision should not be barred on policy grounds), appeal dism. No. 2003-218 (Vt. S. Ct. 8/25/03); EBR 3(C)(3), distinguishing *In re: Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

* Coordinator may reconsider JO, on own motion and at any time, if there is "an adequate showing of a failure to disclose material facts or fraud." EBR 3(C)(3). *Catamount Slate, Inc. et al.*, DR #389, MOD at 10 (6/29/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04); *EGZ Associates*, DR #354 (8/20/98).

551.3 Finality of

* A JO that has been properly served may be final as regards the world. *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04), reversing *Catamount Slate, Inc. et al.*, DR #389, MOD at 10-11 (6/29/01).

* The finality of quarry registrations may be different from that afforded to other JOs. *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04), reversing *Catamount Slate, Inc. et al.*, DR #389, MOD at 7-9 (7/27/01).

* Salt storage shed is still subject to Act 250 jurisdiction (after application for shed was withdrawn) because PRS was issued regarding shed, was unchallenged and became final and binding. *Re: Green Mountain Railroad*, #2W0038-3B-EB, FCO at 8 (3/22/02). [EB #797]

* Act 250 JOs are final and binding only as to the facts they are based upon. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 18 (8/15/2017), citing *In re Catamount Slate, Inc.*, 2004 VT 14, ¶ 20, 176 Vt. 284.

* When a JO is still on appeal, applicant does not have a pre-existing obligation or liability in the form of a final opinion requiring an Act 250 permit and should be able to avail itself of the favorable change in law that § 6081(w)(1) may represent before a final decision is rendered. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 17 (8/15/2017).

551.3.1 Through service/publication

* The statutory scheme of requiring the District Coordinator, not requester, to publish notice of a JO in order to make the JO a “final determination” allows potentially interested parties to request reconsideration of the JO. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 10 (7/30/10).

* In the absence of a specific rule, the practice of the District Coordinators appears to be to notify 10 V.S.A.

§ 6007(c) parties to initial JO when a request for reconsideration is filed and to provide for service of any memoranda filed in connection with a reconsideration request on the parties who had been notified of the issuance of JO, and to allow a full fifteen days for any responsive memoranda to be filed, much as is provided for district commission proceedings under Act 250 Rule 12(H) and 12(F). *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 11-12 (7/30/10).

* Party who wants a JO to be final and binding on other persons must identify them and pay expenses of service. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 8 (6/12/03), *aff'd* 2006 VT 8 (V.S.Ct); *Catamount Slate, Inc. et al.*, DR #389, MOD at 5-6 (6/29/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04).

* Service of a Jurisdictional Opinion is effectuated by mail. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 8 (6/12/03), *aff'd* 2006 VT 8 (V.S.Ct), citing 10 V.S.A. § 6007(c) (appeal to the Board from a Jurisdictional Opinion must be taken within 30 days of "the mailing of the opinion"); EBR 3(C)(3) and 12(J); *Catamount Slate, Inc. et al.*, DR #389, MOD at 6 - 7 (6/29/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04).

* Nothing in the statute or the Board Rules says that a jurisdictional opinion is not valid if it is not served on everyone who might be interested in it. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 9 (6/12/03), *aff'd* 2006 VT 8 (V.S.Ct).

* Coordinator has no affirmative legal duty to publish notice that he has issued a JO. *Catamount Slate, Inc. et al.*, DR #389, MOD at 6 (6/29/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

* Service is effectuated by mailing of a JO to a person. 10 V.S.A. § 6007(c); EBR 3(C)(3) and 12(J). *Catamount Slate, Inc. et al.*, DR #389, MOD at 6 (6/29/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

* For JO to be binding on a person, law requires that it be served on him; language of § 6007(c) requires more than just constructive or actual notice. *Catamount Slate, Inc. et al.*, DR #389, MOD at 7 (6/29/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04) (*but note that the Supreme Court appears to say that others, who were not served, may also be bound by the decision*).

* Notice of JO is different from service of JO. *Catamount Slate, Inc. et al.*, DR #389, MOD at 7 (6/29/01), *rev'd on other grounds, In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

551.3.2 Necessity of service by requester

* Act 250 Rule 3 does not *require* the requesting person to serve the request on any other party. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 10 (7/30/10).

* When requesting a reconsideration of JO from District Coordinator, Intervenors were not required by the Act 250 Rules to comply with the service requirements enumerated in Rule 12. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 14 (7/30/10).

* The only service requirements provided in 10 V.S.A. § 6007(c) relate to service of a final jurisdictional opinion once it is issued, rather than a request for the opinion, and even those requirements fall largely on the district coordinators, and are not at issue in this case. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 15 (7/30/10).

551.4 Advisory Opinions

(Note amendments to 10 V.S.A. § 6007(c), which make Advisory Opinions obsolete)

* An unappealed advisory opinion is presumed correct unless: (a) circumstances have changed materially since the opinion was issued, or (b) the opinion was incorrect or that information relied upon was materially incorrect. *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (FCO at 30) (10/15/96). [WFP #24]

* Based on 1991 amendments to 10 V.S.A. § 6007(c), advisory opinions must be appealed within 30 days, or they become binding, final judgments. *Rock of Ages Quarry*, DR #291M1 (3/28/94).

* Advisory opinion review sheet cannot bind a person who does not appear to have been notified of it. *Triple M Marketplace*, DR #274M1 (1/15/93).

* Advisory opinion that a substantial change has occurred with respect to pre-existing operations gives notice that development is not exempt from Act 250. *H.A. Manosh Corp.*, DR #247M (7/2/91).

Cases prior to 1987 amendment to 10 V.S.A. § 6007(c)

* While advisory opinions, as a matter of law, are not binding, final judgments, they should be given presumptive weight. *Joseph Gagnon*, DR #173M (7/3/86).

* Where both advisory opinions and executive officer opinions are issued, EO opinions should supersede advisory opinions. *Joseph Gagnon*, DR #173M (7/3/86).

* An advisory opinion is a formal interpretation of the law and is a convenient method to answer jurisdictional questions. It serves notice that Act 250 jurisdiction may apply, and may be used in enforcement actions to show knowledge or intent. *Joseph Gagnon*, DR #173M (7/3/86).

* Coordinator's decision as to application completeness constitutes an "advisory opinion." *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]; *Flanders Building Supply, Inc.*, #4C0634-EB (10/18/85). [EB #270]

552. Declaratory Rulings (appeals of Jurisdictional Opinions)

552.1 General

* The Legislature has taken care to separate the prosecutorial and adjudicatory functions of the Board, which serves in turn to maintain its integrity when functioning as an adjudicatory forum for resolving jurisdictional questions. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208 (2002).

* Petition for DR is heard de novo. *Re: Alpine Pipeline Company*, DR 415, FCO at 8 (3/31/03); *Applewood Corporation Dummerston Management*, DR #325 (9/28/96) (when determining applicability of any statutory provision or of any Board Rule or order).

* An Act 250 jurisdictional determination is only as good as the facts upon which it is based. *Re: Richard and Elinor Huntley*, DR #419, MOD at 2 n.1 (7/3/03), rev'd on other grounds, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004); *Re: Swedish Ski Club of Vermont Land Trust*, DR #411, FCO at 2 n.1 (1/16/03); *Re: Dexter and Susan Merritt*, DR #407, MOD at 6 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03); *Re: GHL Construction, Inc. PAK Construction, Inc.*, #2S1124-EB and DR #396, FCO at 14 (12/27/01); *Catamount Slate, Inc. et al.*, DR #389, MOD at 11 (6/29/01), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct.2/13/04).

* Although party presents case as an interlocutory appeal, because case jurisdictional question, Board considers matter to be Petition for DR and treats it accordingly. *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 4 (7/17/02)[EB #809]; *Central Vermont Public Service Corporation*, DR #401, FCO at 1 (4/2/02).

* General Assembly intended to consolidate in one statute all fees required of applicants, appellants and petitioners within the Act 250 program; statutory provision for a hundred dollar filing fee for jurisdictional determinations supersedes the conflicting fee requirement of twenty-five dollars found in the older statute. *Morningside Drive Extension*, DR #367, MOD (9/9/98).

* A DR is an APA contested case. *Nelson Lyford*, DR #341 (12/24/97); *Joseph Gagnon*, DR #173M (7/3/86).

* Board lacks jurisdiction to adjudicate issue of co-applicancy as a DR where issue may be appealed once Commission rules on motions. *Roger Loomis d/b/a/ Green Mountain Archery Range*, DR #344 (8/8/97).

* Board lacks authority to alter a permit condition in a DR proceeding; such relief can only be granted on appeal of permit condition itself. *Roger Loomis d/b/a/ Green Mountain Archery Range*, DR #344 (8/8/97).

* Board cannot opine on whether or not changes to a pre-existing development are substantial without sufficient information to determine whether or not the changes at issue may result in a significant impact; Board may compel the submission of additional information and hold its decision in abeyance pending such submission. *Vermont Agency of Transportation (Rock Ledges)*, DR #296 (Third Revision) (3/28/97).

* Board may compel evidence pertaining to development that is not, in and of itself, the subject of a DR to determine whether or not the changes at issue are substantial. *Vermont Agency of Transportation (Rock Ledges)*, DR #296 (Third Revision) (3/28/97).

* Board decisions must be made by a majority of all of its members (5 of 9), not just those who are present. *MBL Associates, Inc.*, #4C0948-EB, MOD and Order (12/2/95); *Re: St. Albans Group and Wal-Mart Stores, Inc.*, #6F0471-EB, MOD (5/11/94); *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

* Issue before Board in DR is applicability of any statutory provision or any Board Rule or order over project described in JO being appealed, and Chair's clarification of issue in a prehearing conference order is final where no party objects. *Keith Van Buskirk d/b/a American Wilderness Resources, Inc.*, DR #302 (8/15/95).

* Party-status determinations in DR proceeding do not bar a re-evaluation of party status in a later permit or DR proceeding. *Spring Brook Farm Foundation, Inc.*, #2S0985-EB (Chair's Ruling on Preliminary Issues) (6/2/95). [EB #615]

* Because there must be an actual controversy to warrant issuance of a DR, Board will not evaluate discontinued operations. *Interstate Uniform Services*, DR #147 (9/26/84).

552.2 Purpose of (see [52](#))

- * The purpose of a declaratory ruling is to determine the applicability of a statutory provision, rule or order. *In re Orzel*, 145 Vt. 355, 360 (1985); EBR 3(D).
- * The purpose of a declaratory ruling is is distinct from the Board's rulemaking function. *In re Orzel*, 145 Vt. 355, 360 (1985).
- * A challenge to the jurisdiction of Act 250 over an activity must be pursued through the proper administrative route, which the legislature has established in 10 V.S.A. § 6007(c). *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 4 (7/17/02). [EB #809]
- * Purpose of a DR is to test applicability of any statutory provision or of any rule or order of an agency to a given set of circumstances or facts. *Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB (7/12/96). [EB #651M1]
- * DR petition was dismissed where petitioner asked Board to establish a "pre-existing rate" of extraction under which petitioner could operate without triggering Act 250 jurisdiction. *Pompy Farms Crushed Stone, Inc.*, DR #235M (8/14/91).
- * Board would not limit issues to be considered, because the purpose of a DR is to determine whether a permit is required for a development. *H.A. Manosh Corp.*, DR #247M (7/2/91).

552.3. Authority to Issue

- * 10 V.S.A. § 6007(c) provides that jurisdictional questions must first be presented to District Coordinator; only after Coordinator has ruled, may the matter be brought to Board through a Petition for DR. *Re: Rutland Public Schools*, # 1R0038-8-EB, MOD at 4 (7/17/02). [EB #809]
- * Whether public utility provided notice required by EBRA-3(d) is not an issue for the Board to consider in the context of a DR proceeding because it does not involve the applicability of the Rule to the Project. Rather, it concerns whether utility complied with a requirement of EBR A-3(d), and thus may be an appropriate consideration in context of enforcement action. *VPS Corporation/Roxbury*, DR #373 (5/27/99).
- * DR considered only whether jurisdiction attached to project that was the subject of a JO and not to other development and commercial improvements allegedly undertaken by petitioner on adjacent land. *EGZ Associates*, DR #354 (8/20/98); *Nelson Lyford*, DR #341 (12/24/97).
- * Board lacks jurisdiction to adjudicate issue of co-applicancy as a DR where the issue may be appealed once Commission rules on pending motions; instead petitioner's remedy is to await Commission's decision on pending motions and if not satisfied, appeal from Commission's decision. *Roger Loomis d/b/a/ Green Mountain Archery Range*, DR #344 (8/8/97).
- * Coordinator's JO regarding a waste management facility, like all JOs, is appealable only to Board and not to Waste Facility Panel. *Putney Paper Company, Inc.*, DR #335 (FCO at 5) (5/29/97).

- * Permit condition not appealed cannot be collaterally attacked by a DR proceeding since the appropriate avenue for challenging a permit condition is a timely appeal. *State of Vermont Agency of Transportation (Williston Area Improvements)*, DR #311 (1/31/96), *aff'd, In re State of Vermont Agency of Transportation (Williston Area Improvements)*, No. 96-109 (Vt. S. Ct. 10/31/96).
- * Board may not issue DR which determines the applicability of Act 250 to each of eight hypothetical development proposals. *Lawrence and Darlene McDonough*, DR #306 (12/22/95).
- * DR before administrative board is like declaratory judgment action in court and therefore there must be an actual controversy to confer jurisdiction; hypothetical controversy will not confer jurisdiction. *Lawrence and Darlene McDonough*, DR #306 (12/22/95).
- * Act 250 jurisdiction should be determined based upon proposed activities which are "settled in intention and purpose." *Lawrence and Darlene McDonough*, DR #306 (12/22/95).
- * In DR, it is not Board's function to issue guidelines or to outline for petitioners activities which will or will not require permits; rather, Board determines applicability of statute to a particular set of facts. *Lawrence and Darlene McDonough*, DR #306 (12/22/95).
- * Waste Facility Panel has jurisdiction over appeals from Commission decisions that involve solid or hazardous waste management facility, but Panel has no authority to adjudicate a petition for DR relative to Act 250 jurisdiction. *Putney Paper Company, Inc.*, DR #305 (10/30/95).
- * Board no longer has independent jurisdiction to hear a declaratory ruling request that is not filed within 30 days of the issuance of an advisory opinion. *Rock of Ages Quarry*, DR #291M1 (3/28/94).
- * Board was not barred by a judgment order of the superior court from adjudicating the issues raised in the advisory opinion since, by the terms of the order, petitioner was obligated to comply with the Act. *H.A. Manosh Corp.*, DR #247M (7/2/91).
- * DR petition is not the appropriate mechanism to contest a permit issued by Commission. The Board has no jurisdiction over collateral challenges to land use permits which are subject to motions to alter or reconsider. *Robert and Margaret North*, DR #199 (3/8/88).
- * Even though a proposed project has not received final approval from a town or full funding, Board has authority to rule on a petition for a DR. *Town of Springfield Hydroelectric Project*, DR #111 (1/19/81); and see *Town of Springfield v. Vermont Environmental Board*, 521 F. Supp. 213 (D.Vt. 1981) (federal provisions pre-empt Act 250 jurisdiction)

552.4. Petitions for

- * Coordinator's JO regarding a waste management facility, like all JOs, is appealable only to the Board and not to the WFP. *Putney Paper Company, Inc.*, DR #335 (5/29/97).

* WFP has jurisdiction over appeals from Commission decisions that are in respect of a solid or hazardous waste management facility, but Panel has no authority to adjudicate DR petitions. *Putney Paper Company, Inc.*, DR #305 (10/30/95).

552.4.1 Notice / Service of

* Provided that a notice of appeal is timely filed, a petitioner will be allowed an opportunity to cure the failure to serve a copy of the petition for DR on all other parties. *Clearwater Realty*, DR #318 (9/27/96).

552.4.2. Timeliness of (see 10.1.2, 504 and 1007.1.3)

* Subject matter jurisdiction - a tribunal's authority to decide the question presented - can be reviewed at any time that a matter is alive and pending. *Central Vermont Public Service Corporation*, DR #401, FCO at 5 (4/2/02).

* Notion that matters of jurisdiction are not waived by a party's failure to timely appeal pertains only to subject matter jurisdiction. *Central Vermont Public Service Corporation*, DR #401, FCO (4/2/02); *Club 107*, #3W0196-3-EB (2/2/87). [EB #328].

* DR petition that is untimely filed will be dismissed because Board has no jurisdiction to hear petition which is not filed within the 30 day appeal period; deadlines established by statute for the filing of petitions are jurisdictional, and Board has no discretion to waive such deadlines. *Re: Dexter and Susan Merritt*, DR #407, MOD at 9 (6/20/02), *aff'd*, *In re Dexter and Susan Merritt*, 2003 VT 84 (Vt. S. Ct. 9/12/03); *Central Vermont Public Service Corporation*, DR #401, FCO at 11 (4/2/02).

* Petition is timely when it is filed within 30 days from date notice received. *Jericho Corners Elementary School*, DR #285 (12/9/94)

* Petition for DR is timely filed where letter did not contain 'JO' language and Coordinator issued subsequent formal JO. *Stone Cutter's Way / Winooski East Waterfront Redevelopment Project*, DR #391, MOD at 5 (6/1/01), appeal dismissed, *In re Stone Cutter's Way / Winooski East Waterfront Redevelopment Project*, No. 2001-323 (Vt. Sup. Ct., 11/ 28/01).

* Filing deadlines are jurisdictional and the Board therefore has no discretion to waive a deadline established by statute. *Ruby Iantosca*, #2S1085-EB, MOD and DO at 3 (10/23/00) [EB #764]; *Algiers Fire District #1*, DR #297 (10/18/94); *Earth Construction Company*, DR #278 (3/16/93).

* Three days are not added for mailing where Commission or Board issues the document which is the subject of the appeal. *Ruby Iantosca*, #2S1085-EB, MOD and DO at 2 (10/23/00). [EB #764]

* Because the filing deadline for the appeal of an advisory opinion is established by statute with no provisions for extensions, the Board has no discretion to extend the deadline and will dismiss a petition which is not timely filed. *Earth Construction Company*, DR #278 (3/16/93).

* DR may be sought even if more than 30 days have passed since the issuance of an advisory opinion; a party must be provided an opportunity for a hearing before a legally binding decision can be rendered. *Pompy Farms Crushed Stone, Inc.*, DR #235M (8/14/91). *Note: case was pre-amendment to 10 V.S.A. § 6007(c).*

* Appeal for a DR from advisory opinion filed outside the thirty (30) day period will not be dismissed because an advisory opinion does not, like a DR, constitute a binding determination of jurisdiction. *Esprit, Inc.*, DR #181 (6/3/87) (*superseded by 10 V.S.A. § 6007(c)*).

552.4.3. Who may petition for and participate in (see [192.1](#) and [192.2](#) and [1007.1.1](#))

* Under 10 V.S.A. § 6007(c) “any person” may request a JO from a District Coordinator but right to appeal a JO is limited by 10 V.S.A. § 8504(a) to “persons aggrieved” as defined by 10 V.S.A. § 8502(7). *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 28-29 (1/20/10).

* “The Court reads 10 V.S.A. §§ 8502(7) and 8503 as allowing an entity that lawfully requests a jurisdictional opinion from an Act 250 District Coordinator to have standing to take an appeal from an adverse j.o. determination.” *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Entry Order (Oct. 4, 2007).

* “Any person aggrieved by an act or decision of ... a district coordinator” may appeal a jurisdictional opinion.
In re: Marcelino Waste Facility, No. 44-2-07 Vtec, Decision at 1 (May 30, 2007), citing 10 V.S.A. §8504(a).

* Definition of a “person aggrieved.” *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Decision at 2 (May 30, 2007), citing 10 V.S.A. §8502(7).

552.5 Burden of Proof

552.5.1 General

* The burden of proof consists of the burden of producing the evidence, and the burden of persuading the Board. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 5 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007), citing *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-274 (1994) (discussing burden of production and burden of persuasion); *Re: Thomas Howrigan Gravel Extraction*, DR #358, FCO at 9 (8/30/99), citing *Re: Champlain Construction Co.*, DR #214, MOD at 2-4 (10/2/90); *Re: Applewood Corporation Dummerston Management*, DR #325 (9/28/96).

* Burden of proof is on party that claims that jurisdiction should attach. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 5 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); *Re: McLean Enterprises Corp.*, DR #428, FCO at 5 (7/22/05); *Re: Real J.*

Audet and Joe Audet Auto and Truck Sales, Inc., DR #409, FCO at 9-10 (12/5/02), *aff'd*, *In re Real Audet*, 2004 VT 30 (4/1/04); *Town of Williston Road Improvements*, DR #381, FCO at 4-5 (1/13/01); *W. Joseph Gagnon*, DR #173, MOD at 4 -6 (7/3/86); *Lincoln Haynes Gravel Pit*, DR #192, FCO at 8 (9/25/87), *aff'd*, *In re L.W. Haynes, Inc.*, 150 Vt. 572 (1988).

* The party which asserts that a project is subject to Act 250 must prove that the project, if constructed today, would be either a “development” or “subdivision” and thus within the reach of the law. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 5 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007), citing *Re: Robert and Barbara Barlow*, DR #222, FCO at 3 (12/26/90); *see also Re: Village of Ludlow*, DR #212 (12/29/89); *Re: Vermont Marble Co.*, DR #101, FCO at 3 (12/13/78).

* Party seeking to change the status quo generally has the burdens of production and proof. *W. Joseph Gagnon*, DR #173 (11/22/87); *Lincoln Haynes Gravel Pit*, DR #192 (9/25/87), *aff'd*, *Lincoln W. Haynes*, 150 Vt. 572 (1988).

552.5.1.1 Shifting burdens

* In DR proceeding, the party which asserts that a project is subject to Act 250 must prove that the project, if constructed today, would be either a “development” or “subdivision” and thus within the reach of the law. If the proponent of jurisdiction satisfies the initial burden of proof threshold (and demonstrates that the project, if built today, would fall within Act 250’s ambit), then the party seeking the benefit of Act 250's exemption for preexisting developments bears the burden of proving that the exemption applies. Once it has been established that a pre-existing development or subdivision is exempt from Act 250 jurisdiction, a permit will be required if a "substantial change" has occurred. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 5 - 7 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); and *see Lake Champagne Campground*, DR #377, FCO at 12 (3/22/01).

* Once petitioner establishes that project is preexisting development, the burden of persuasion shifts to the party who claims that a substantial change has occurred, but petitioner retains burden of production. *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, FCO at 14 (8/04/05), reversed and remanded on other grounds, *In re Hale Mountain Fish and Game Club, Inc.*, 2007 VT 102 (9/13/07)(mem.); *Re: Howrigan*, FCO at 9 (8/30/99)(citing *Champlain Construction Co.*, MOD at 2-4).

552.5.2 Grandfathered (pre-existing) status

* The burden of proving that a development is exempt from Act 250 is on the person claiming the exemption. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 6 (10/20/05), *aff'd*, *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, MOD at 5 (9/27/04); *Re: Thomas Howrigan*, DR #358, FCO at 9 (8/30/99); *Re: Applewood Corporation Dummerston Management*, DR #325 (9/28/96).

* Owner/operator of pre-existing quarry bears burden of producing evidence of pre-1970 and post-1970 extraction rates on issue of substantial change, and failure to meet that burden may justify dismissal. *Re: Vermont Verde Antique International, Inc*, DR #387, DO at 8-9 (2/2/01), *rev'd on other*

grounds, In re Vermont Verde Antique International, Inc., 174 Vt. 208 (2002); *W. Joseph Gagnon*, DR #173 (11/22/87); *Lincoln Haynes Gravel Pit*, DR #192 (FCO at 8) (9/25/87), *aff'd, In re L.W. Haynes, Inc.*, 150 Vt. 572 (1988).

* Petitioner claiming to be a pre-existing development failed to meet its burden of proof with respect to the level of pre-June 1, 1970 business activity such that development was not exempt from Act 250 under 10 V.S.A.

§ 6081(b) and EBR 2(O). *Commercial Airfield, Cornwall, Vermont*, DR #368 (1/28/99).

* Permittees who might contest jurisdiction prior to the issuance of present permit would have the burden of production and persuasion with respect to both pre-existing development and post-1970 development at the project tract. *Pike Industries*, #1R0807-EB, FCO at 2 n. 1(6/25/98) [EB #693]; *Cassella Waste Management, Inc.*, DR #244 (2/7/92); *Champlain Construction Co.*, DR #214M (10/2/90).

* To maintain exemption, a gravel pit owner must not only demonstrate that the gravel pit was in existence as of June 1, 1970 but also prove what the pre-existing annual rate of extraction was. *John Gross Sand and Gravel*, DR #280 (7/28/93).

* The Petitioner has not established that the concert area is a pre-existing development where there is no evidence that the area was operated for a commercial purpose prior to June 1, 1970. *Mount Mansfield Co., Inc. (Summer Concert Series)*, DR #269 (7/22/92).

* Operator of a recycling facility has the burden of proving that its development is pre-existing in order for its activities to be exempt from Act 250. *Cassella Waste Management, Inc.*, DR #244 (2/7/92).

* Petitioners for a DR are not necessarily entitled to a directed verdict, even though the opposing party failed to offer evidence in support of its exempt status. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd, In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2].

* The burden of proof to establish an exemption to a permit is on the party claiming the exemption. *Champlain Construction Co.*, DR #214 (6/5/90); *L. W. Haynes, Inc.*, DR #192 (9/25/87); *United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967).

* Applicants have the burden of proof that the activity commenced before June 1, 1970, and is therefore a pre-existing development. *Hugh Sparks Gravel Pit*, DR #195 (3/2/88).

552.5.3

Substantial change to pre-existing project (see [130.2](#))

* Proponents of jurisdiction bear burden of proof (burden of persuasion) that changes to a preexisting development are substantial changes. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 6 - 7 (10/20/05), *aff'd, In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); *Re: Hale Mountain Fish and Game Club, Inc.*, DR #435, MOD at 5 - 6 (9/27/04); *Re: Joseph Gagnon*, DR #173, MOD (7/3/86).

* Owner/operator of pre-existing quarry bears burden of proof (burden of production); owner must produce evidence of pre-1970 and post-1970 extraction rates on issue of substantial change, and failure to meet that burden may justify dismissal. *Re: Vermont Verde Antique International, Inc*, DR #387, DO at 8-9 (2/2/01), *rev'd on other grounds, In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

* Where owners failed to produce evidence on rate of gravel extraction for the years 1975-1991, Board could not conclude that there had not been a substantial change to the pre-existing operations. *Thomas Howrigan Gravel Extraction*, DR #358 (8/30/99).

* The burden of production and persuasion regarding whether there has been a substantial change rests on the applicant. *Champlain Construction Co.*, DR #214M (10/2/90).

552.5.4 Substantial or material change to permitted project

* In DR Petition concerning a *permitted* project, burden of proof is on the permittee to establish that a substantial or material change has *not* occurred. *New England Container Company and Roland Devost*, DR #393, PHO at 8 (3/25/01); *Pizzagalli Properties (Burger King)*, DR #361, CPR (6/8/98); *Re: Pizzagalli Properties and Town of Colchester*, DR #374, FCO (5/20/99); *Developer's Diversified Realty Corp.*, DRs #364, #371, and #375 (consolidated), FCO (3/25/99); *Vermont Institute of Natural Science*, DR #352 (2/11/99); *Ronald L. Saldi, Sr.*, DR #365 (12/24/98).

552.6. Dismissal of Petition (see [336.1](#) and [511](#) and [283.2](#))

* Board dismisses petition for DR on its own motion where Commission granted petitioners permit amendment relative to issue in petition, and petition therefore became moot and public interest was adequately protected. *New England Container Company and Roland Devost*, DR #393, DO at 2 & 3 (5/10/02).

* Dismissal of DR Petition when Coordinator has found that no Act 250 jurisdiction exists will not thwart goals of Act 250 because Board has no reason to believe that Coordinator's decision was in error. *Re: Spruce Lake Association, Inc.*, DR #433, DO at 1 (10/5/05)

* Dismissal of DR Petition will not thwart goals of Act 250 because challenged JO which requires Act 250 review of project becomes final upon dismissal. *Re: Town of Barre Millstone Hill West Bike Path*, DR #440, DO at 2 (5/19/05); *Re: Rutland Public Schools*, DR #414, DO at 2 (2/2/05); *Re: Central Vermont Public Service Corporation*, DR #412, RO at 2 (9/19/02); *Re: CVPS Corporation/Roxbury*, DR #373, MOD (5/27/99); *Re: Vermont Verde Antique International, Inc*, DR #387, DO at 8-9 (2/2/01), *rev'd on other grounds, In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

* Failure to meet burden of producing evidence may justify dismissal. *Re: Vermont Verde Antique International, Inc*, DR #387, DO at 8-9 (2/2/01), *rev'd on other grounds, In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

- * Dismissal is appropriate where petitioner fails to meet burden of production in single-party DR proceeding. *Re: Vermont Verde Antique International, Inc*, DR #387, DO at 3-4 (2/2/01), *rev'd on other grounds, In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).
- * Failure to comply with Board's Order or Rule may lead to dismissal. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO (6/19/01); *Kapitan Gravel Pit*, DR #388, DO (9/8/00).
- * Involuntary dismissal is a severe measure which should only be imposed where clearly warranted. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO at 3 (6/19/01); *Kapitan Gravel Pit*, DR #388, DO at 3 (9/8/00).
- * Before Board will dismiss a petition, it ordinarily must find that there has been (a) bad faith or deliberate or willful disregard for its orders, and (b) prejudice to the party seeking dismissal. *Security Self Storage, Inc.*, DR Petition #386, MOD and DO at 3 (6/19/01); *Kapitan Gravel Pit*, DR #388, DO at 4 - 5 (9/8/00).
- * Board dismisses petition, without finding prejudice to party seeking dismissal where petitioners failure to notify other parties of filing of petition meant that there could be no party to seek dismissal. *Kapitan Gravel Pit*, DR #388, DO (9/8/00).
- * Where DR petition has been filed and landowner voluntarily obtains a permit and then moves to dismiss petition as moot, Board will dismiss; but Board will condition dismissal on implied concession, by virtue of landowner's obtaining permit, that jurisdiction over parcel exists. *P&H Senesac, Inc.* DR #376, DO at 3 - 5 (6/22/00).
- * Where JO finds no jurisdiction but landowner then obtains a permit and moves to dismiss, Board will find that landowner has conceded jurisdiction. DR Petition *P&H Senesac, Inc.*, DR #376, DO (6/22/00).
- * Dismissal of petition for DR is appropriate where parties enter into court-approved Consent Order which directs dismissal of petition. *City of Burlington (Waterfront Skate Park)*, DR #380, CPR at 2 (11/29/99).
- * Concession of jurisdiction and application for permit moots DR petition filed by party other than applicant. *CVPS Corporation / Roxbury*, DR #373, MOD at 6 (5/27/99).
- * Where public utility conceded jurisdiction and Board's findings support a conclusion that jurisdiction exists and existed at the time construction commenced, utility was and is required to obtain an Act 250 permit, and no live issue remains. *CVPS Corporation / Roxbury*, DR #373 (5/27/99).
- * Matter is dismissed where petitioners failed to comply with Chair's preliminary order and issues raised were rendered moot. *Ernest and Gudrun Paquette*, DR #316 (9/25/96).

- * Dismissal of petition for DR is not contrary to values embodied in Act 250, subject to the condition that should the petitioners go forward with the project, they will seek an Act 250 permit of final ruling. *McDonald's Corporation*, DR #307 (12/1/95); *Okemo Mountain, Inc.*, DR #268 (6/21/93).
- * Board may, at its discretion, dismiss a matter at the request of a party for reasons provided by its Rules, by statute, or by law. *Okemo Mountain, Inc.*, DR #268M (10/27/92).
- * Board will decline to dismiss a DR proceeding where a petitioner has raised genuine issues concerning whether a permit is required for an event. *Okemo Mountain, Inc.*, DR #268M (10/27/92).
- * DR petition was dismissed where petitioner obtained a permit under "innocent purchasers" rule. *Moss Farm Subdivision*, DR #238 (6/15/92).
- * Board declines to dismiss DR where Board has often waived time period requirements and where Board has accepted petitions for DRs without requiring prior advisory opinions from Commissions or executive officer. *Costantino Antique Business*, DR #262M1 (5/12/92).
- * Withdrawal is denied where Board has determined that gravel pit has caused significant adverse impact and a determination needs to be made whether jurisdiction exists over the pit's continued operation. *H.A. Manosh Corp.*, DR #247 (12/13/91).
- * Public interests protected by Act 250 will be prejudiced by allowing withdrawal regarding subdivision. *Geoffrey Wilcock and Judith Burns*, DR #224 (2/8/91).
- * DR petition for a Vermont Agency of Transportation project was dismissed as premature when proposed road construction would not commence for several years. *Agency of Transportation Highway Projects*, DR #184 (11/22/87).
- * DR petition may be dismissed upon petitioner's request to withdraw petition, where interested parties no longer wish to continue their participation, and withdrawal is not contrary to Act 250 or the Board Rules. *W. Joseph Gagnon*, DR #173 (11/22/87).
- * DR petitioner has no absolute right to withdraw the petition once the proceeding has commenced and a hearing is warned and held; the petition may be dismissed only according to Vermont Rules of Civil Procedure. *Joseph Gagnon*, DR #173M (7/3/86).
- * Board dismissed petitioner's request for a DR because a DR is not the appropriate method for contesting a Commission's decision. *Unifirst Corp.*, DR #166 (2/20/85).
- * There must be an actual controversy between parties to confer jurisdiction to the Board, and therefore Board will not issue a ruling on issues which are moot. *Unadilla Theatre*, DR #161 (10/10/84).
- * DR request was dismissed when petitioner failed to proceed with request in a timely fashion. *Earle Simpson, Jr.*, DR #112 (5/5/80).

552.7 Withdrawal of Petition (see [509](#))

* Board may reject a withdrawal or dismissal of petition if it would prejudice the public interest that Board agency is charged to protect. *Re: Central Vermont Public Service Corporation*, DR #412, RO at 1 (9/19/02).

* Allowing withdrawal of Petition will not prejudice public interest that Board must protect, as project will be subject to Act 250 jurisdiction. *Re: Central Vermont Public Service Corporation*, DR #412, RO at 2 (9/19/02).

552.8 Scope of

* The issuing of guidelines is beyond the scope of a declaratory ruling. *In re Orzel*, 145 Vt. 355, 360 (1985).

* Validity of an agency order is not an appropriate subject for a declaratory ruling. *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 7 (1974); 3 V.S.A. § 807.

* Act 250 Rule 3 allows requests for jurisdictional opinions only as to “whether an activity constitutes a development or a subdivision” subject to Act 250 jurisdiction, not as to whether an activity subject to Act 250 jurisdiction should encompass additional elements or corresponding impacts. That is a question properly raised within the review of the application itself and in related appeals of any resulting determinations. *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 6 (5/09/13).

552.9 Effect of

* The determination that property is not exempt from Act 250 jurisdiction changes the essence of property. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002).

552.10 Reconsideration of

* Rule 3(D)(2) allows request to reconsider a Declaratory Ruling to be filed within 30 days from the date of the decision ruling. *Re: McLean Enterprises Corporation*, DR #428, MOD at 2 (10/13/05).

555. Act 250 Disclosure Statements

* Act 250 specifically imposes the responsibility for compliance with respect to subdivided land on the seller. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002)(citing 10 V.S.A. § 6081(a)).

* Important policy is directly undermined when sellers are able to evade Act 250 review of lands intended to be covered by the statute. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002).

* Legislative intent behind requiring Act 250 disclosure statement was to prevent a sale of

subdivided land without a required Act 250 permit. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002).

* Failure to provide Act 250 Disclosure Statement makes contract for sale of land unenforceable and contract may be rescinded by buyer. *Jipac, N.V. v. Silas*, No. 2000-424 (May 31, 2002), overruling *Robitaille v. Rubin*, 159 Vt. 152 (1992).

* Failure to file an Act 250 Disclosure Statement along with a request for a jurisdictional opinion is not a fatal flaw to the issuance of a jurisdictional opinion, as such Statements are only required when a parcel is subdivided. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 7- 8 (6/12/03), *aff'd* 2006 VT 8 (V.S.Ct.).

X. APPLICABLE LAW

571. Vested Rights (see [801.1.1](#))

* Allowing an applicant to take advantage of a change to a Town Plan may also require reexamination of the application in terms of Act 250's other nine criteria under other applicable laws as they exist at the time of the change. *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (Remand)-EB, Findings of Fact, Conclusions of Law and Order at 14 (1/17/02). *See, Swain Development Corp., and Philip Mans*, #3W0445-2-EB, Memorandum of Decision at 7 (12/6/91) ("If the Applicants wish to have the benefit of the expiration of the Plan, they should file a new application for the reconfigured project to be reviewed under all ten criteria."); *and see, In re Great Waters of America*, 140 Vt. 105, 109 (1981) (a party "must take the bitter with the sweet.").

* "We have adopted the minority rule that a permit applicant gains a vested right in the governing laws and regulations in existence when a complete permit application is filed." *Times and Seasons, LLC*, 2011 VT 76, ¶ 12 (7/8/11) (citing *Paynter 2-Lot Subdivision*, 2010 VT 28, ¶ 9 (citing *Smith*, 140 Vt. at 181-82, 436 A.2d at 761)); *South Village Communities, LLC*, 74-4-05 Vtec, Decision on Appellee-Applicant's Motion to Reconsider and Amend at 4 (09/14/2006) (Vermont follows the minority rule regarding vested rights: that no litigant has a vested right in a statute or rule that is remedial or procedural in nature).

* When a permit application is filed, the law existing at that time is the one that must be applied to that application, regardless of any changes to it while the application is pending. *Times and Seasons, LLC*, 2011 VT 76, ¶ 12 (7/8/11).

* "[O]ur vested rights doctrine prevents applicant on reconsideration from availing itself of the definition amended during the course of litigation and relying solely on the change in law to correct the deficiencies causing its Act 250 permit denial." *In re Times and Seasons, LLC*, 2011 VT 76, ¶ 9 (7/8/11).

* "In Vermont, land use rights normally vest under the version of the municipal or state land use regulations in effect at the time a proper and complete application is submitted." The "appropriate first approach to the vesting analysis may not be to look only at the commencement of the local application process, as was the approach in *Burlington Broadcasters*, but first to see if the

developer's good faith and diligence carried over to its pursuit of an Act 250 permit." *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 7 (4/30/08)(discussing *In Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 9 (11/25/03) [EB#734M4]); subsequent Decision on the Merits (3/10/09).

* Applying for reconsideration is not a separate vesting event. The applicant "may not simultaneously take advantage of the laws in effect at the time of the initial application and those in effect at the time of the reconsideration application—it is not a two-way street. To decide otherwise would be contrary to our vested rights doctrine, which allows the applicant on reconsideration to maintain the advantage of favorable findings when laws or regulations have changed unfavorably." *In re Times and Seasons, LLC*, 2011 VT 76, ¶¶ 10–11 and 14 (7/8/11)(citing *In re Preseault*, 132 Vt. 471, 474, 321 A.2d 65, 66 (1974) and 1 V.S.A. § 213).

* Right to have phased project's compliance with ag mitigation standards in effect prior to Board's decision in *Southwestern Vermont Health Care Corporation*, #8B0537-EB, FCO at 44 (2/22/01), did not vest where application for phase was not filed until March 2001. *Re: Ingleside Equity Group*, DR #397, FCO at 14 (8/15/01).

* Applicant may secure vested rights for phased project if it has obtained partial findings and conclusions from Commission or Board pursuant to a master plan application for such project. *Re: Ingleside Equity Group*, DR #397, FCO at 14 (8/15/01). Citing, *In re Taft Corners Associates, Inc.*, 160 Vt. 583 (1993).

* Vested rights analysis: the issuance of a permit does not shield a permittee against a change in facts or law which occurs after a permit is issued; Board may examine case in light of present circumstances and law. *Stonybrook Condominium Owners Association*, DR #385, FCO at 21 - 26 (5/18/01).

* It is only reasonable to apply *In re Molgano*, 163 Vt. 25 (1994) to situations in which a determination in an Act 250 proceeding is made by reference to *local law*. In contrast, whether a project is subject to Act 250 jurisdiction is a matter determined *solely by Act 250 law* - the Act 250 statute, Board rules, and case precedent. *NYNEX Mobile Limited Partnership 1 and Mount Mansfield Television*, DR #350 (2/26/98).

* Request for a JO is not a "proper application" for purposes of establishing vested rights. *Smith v. Winhall Planning Commission*, 140 Vt. 178 (1981); *NYNEX Mobile Limited Partnership 1 and Mount Mansfield Television*, DR #350 (2/26/98).

* Equity does not require that a request for a JO be considered a "proper application;" petitioners could have preserved jurisdictional challenge while simultaneously applying for Act 250 permit; in addition, when petitioners filed their request for a JO, change to Act 250 statute was a *fait accompli*. *NYNEX Mobile Limited Partnership 1 and Mount Mansfield Television*, DR #350 (2/26/98).

* Permittee had no vested right to fee amount being permanently fixed at time of original permit application because (a) fee rule is not a substantive regulation; (b) there had been a substantial

change to project, and applications required thereunder would be subject to EBR 11; and (c) current project was not the same project as originally permitted. *HS Development, Inc. and Stratfield Associates*, #700002-10B-EB (3/1/96). [EB #636]

* Where applicant filed local zoning permit application while town plan was in effect, and where applicant filed Act 250 application after such plan had expired, applicant had no vested right to have Act 250 application reviewed for conformance with expired plan; applicant who has applied for local zoning approval but has not yet received Act 250 permit has no reasonable expectation of automatic approval of his project through Act 250. *Renbel Richmond Trust, Carl & Esther Parker, and Waylen & Dorothy Bowen*, #4C0818-EB (1/15/91). [EB #465]

* Applicant has vested right not to be subject to compliance with WRB wetland rules effective on 2/23/90, where applicant filed Act 250 application on 1/25/90, and proceeded in good faith to obtain all necessary local approvals before finalizing plans. *Waterbury Shopping Village*, #5W1068-EB (6/26/90). [EB #477M3]

* Because original permit requires that future changes to system must meet regulations in effect when changes are submitted for approval, changes must comply with current regulations. *Charles Christolini*, DR #208 (3/19/90).

* Vesting rule is not intended to apply where landowner has been operating illegally for a some years and then files application for permit to authorize its operation several months before a new town plan is adopted. *George & Dorothy Carpenter*, #5W0976-EB (1/19/90), *aff'd, In re Carpenter*, No. 90-96 (Vt. S. Ct. 11/9/90). [EB #433]

* Applicant acquired no vested rights in absence of a town plan because the new town plan had been proposed and a public hearing held prior to the date that applicant filed application for an Act 250 permit and plan was adopted prior to adjournment of Act 250 hearing and issuance of permit. *George & Dorothy Carpenter*, #5W0976-EB (1/19/90), *aff'd, In re Carpenter*, No. 90-96 (Vt. S. Ct. 11/9/90). [EB #433]; *and see Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB #347]

* Person who receives an Act 250 permit has a vested right to use permit within one year of issuance date. *Xenophon Wheeler*, #4C0513-1C-EB (11/10/88). [EB #395]

* An application, which allows applicant to file first under Criteria 9 and 10, is governed by town plan in effect at the time a complete application - covering all 10 criteria - is filed, at which time, certain rights vest. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB #347]

* Incomplete application does not vest rights. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB #347]

* Application for a zoning variance or building permit does not freeze the terms of State, regional, or municipal laws and regulations applied to development proposals under Act 250; such procedures are not considered a "suit" for purposes of vested rights protection. *Albert & Doris Stevens*,

#4C0227-3-EB (7/28/80). [EB #139]

* There are no vested rights for conceptual review of a plan under Act 250; nothing authorizes a formal process for conceptual approval of projects not fully tested against the criteria of Act. *David, Mark & William Pippin*, #3W0333-EB (7/7/80). [EB #133]

* By grandfathering earlier standards for stormwater system permits under 16-3 Vt. Code. R. § 505: 18-306(a)(3), ANR effectively allows a permittee to vest in the standards that exist at the time the original permit application is submitted. Vested rights are lost if the system deteriorates or is not built. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 18, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* “Generally, a permit applicant’s rights vest in the laws that exist at the time the permit application is submitted.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Smith v. Winhall Planning Comm’n*, 140 Vt. 178, 180–81 (1981).

* ANR does not specifically define what constitutes administrative completeness of a stormwater permit application for the purposes of vesting. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 8, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court relies on case law and ANR rules and policies for the proposition that when there is a two-part review process of administrative and subsequent technical review (such as when ANR deems a Stormwater Permit application administratively complete) vesting is then retroactively applied to when the application was filed. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.*, No. WQ-01-01, Mem. of Decision at 13 (Vt. Wat. Res. Bd. June. 29, 2001).

* Once ANR determines that a stormwater permit application is administratively complete, that application vests retroactively back to the date that it was submitted to ANR. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* To vest, the application must be “full and complete.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 9, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re Keystone Dev. Corp.*, 2009 VT 13, ¶ 5, 186 Vt. 523 (mem.) (citing *Winhall*, 140 Vt. at 182).

* “Rights may not vest if an incomplete application is submitted as a vague placeholder, or in bad faith, to avoid pending unfavorable changes to regulations.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 9, Decisions on Motion for Summary Judgement (Oct. 11, 2017), See *In re Taft Corners Assocs., Inc.*, 171 Vt. 135, 142 (2000) (citing *In re Ross*, 151 Vt. 54, 56 (1989)).

* Court finds stormwater application to be administratively complete before Oct. 16, 2014, because ANR official began her technical review before October 16, 2014; technical review cannot start before the application is deemed administratively complete. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 10, Decisions on Motion for Summary Judgement (Oct. 11, 2017) citing

Re: Hannaford Bros. Co. and Lowes Home Centers, Inc., No. WQ-01-01, Mem. of Decision at 11 (Vt. Wat. Res. Bd. June. 29, 2001).

* Applicant's failure to include a complete project adjoiners list in the October 3, 2014 application neither violated Stormwater Management Rule § 18-309(b)(2), nor rendered the application incomplete for vesting purposes because the rule states that the applicant shall own all impervious surfaces, but is silent regarding when the surfaces must come into the applicant's ownership, nor does it require this information to be included in the application for that application to be considered complete or that this information is necessary to begin technical analysis of project. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Changes can be made to a stormwater application permit during ANR's technical review without extinguishing the vesting date because the rules [such as 16-3 Vt. Code. R. § 505:18-309(c) and (f) "expressly contemplate an iterative technical review process in which ANR may request additional information, or changes, to a proposed project." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 13, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* "If an applicant withdraws an application and submits a new application, vesting rights in the original application are extinguished, and the applicant vests in the laws and regulations in effect at the time the new application is filed." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 13, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re Times & Seasons, LLC*, 2011 VT 76, ¶ 16, 190 Vt. 163; *In re John A. Russell Corp.*, 2003 VT 93, ¶ 13, 176 Vt. 520 (mem.).

* "There is a strong policy argument to allow permit applicants to adjust and revise their applications during the application review process. Land use permit applications can be complex, and are often subject to revision as they are shepherded through the review process. It is impractical to have any small change trigger a new vesting event, which could require a review of the entire application under entirely new laws or regulations." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 14, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court grants summary judgement to applicant on questions regarding chloride management and phosphorus limitations, concluding that applicant's stormwater permit application was administratively complete and vested in the laws and regulations in existence which predate chloride and phosphorus standards; therefore, application vested in regulations without those standards. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 14, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Technical review of an ANR stormwater permit application involves a back-and-forth, iterative process between ANR and the applicant that does not extinguish the vesting date. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 7, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* If statutes or rules change in favor of an applicant before there is a final decision on their application, the applicant can take advantage of the new more favorable statute or rule. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion for Summary Judgment at 16 (8/15/2017),

citing *In re Times & Seasons, LLC*, 2011 VT 76, ¶ 16, 190 Vt. 163; *In re John A. Russell Corp.*, 2003 VT 93, ¶ 13, 176 Vt. 520 (mem.).

572. Law of the Case (see [28.1](#) and [28.1.1](#))

* Prior rulings establish the "law of the case" for subsequent proceedings in the same matter. *Re: Greater Upper Valley Solid Waste Management District*, DR #418, MOD at 4-5 (5/13/03); *McDonald's Corporation*, #1R0477-5-EB, FCO at 11-12 (12/7/00). [EB# 747]

* Board's revocation decision is law of the case in appeal from application to cure violation. *Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB (Revocation), FCO at 12-13, n.5 (4/4/03), *motion to alter denied*, MOD (6/9/03). [EB #792R].

* Law of the case doctrine does not apply when the facts of the case have changed. *Re: Greater Upper Valley Solid Waste Management District*, DR #418, MOD at 4-5 (5/13/03).

* Board's ruling on burden of proof in prior MOD constitutes law of the case. *Re: Vermont Verde Antique International, Inc.*, DR #387, DO at 3-4 (2/2/01), *rev'd on other grounds*, *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

573. Board Precedent (see [469](#))

* Prejudgment of the law does not normally rise to a due process violation. *In re Crushed Rock, Inc.*, 150 Vt. 613, 621 (1988).

* Fact that Board may have mistakenly erred in its analysis in a past decision does not mean that it should intentionally repeat that error in present decision. *Catamount Slate, Inc. et al.*, DR #389, MOD at 8 (2/25/02), *rev'd on other grounds*, *In re Catamount Slate, Inc.*, 2004 VT 14 (V.S.Ct. 2/13/04).

* Board's conclusions as to the nature of a project cannot be read as "mere dicta" where the Board expressly relied upon those conclusions in the disposition of the case. *Re: Bethel Mills Inc.*, No. 243-11-05 Vtec, Decision on Appellant's Motion to Alter or Reconsider (7/18/06).

574. Reference to other laws

* Board may refer to other laws to understand and interpret Act 250 Criteria. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 58 n. 4 (2/22/01) [EB #758]; *In re Wal*Mart Stores, Inc.*, 167 Vt. 75, 85 (1997).

575. After-the-fact applications

* Because permit must be obtained before commencement of construction and operation, if permit is applied for after-the-fact, project is reviewed under criteria as of the date that a permit was required and not as of application date. *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (Unlined Landfill Facility) (2/3/97). [WFP #24M]

576. Law in effect at time of review (see [28.1](#) and [28.1.1](#))

* Projects are judged based on the circumstances as they exist at the time the review occurs; if circumstances change, commission may review criteria affected by such changed circumstances. *Re: Greater Upper Valley Solid Waste Management District*, DR #418, MOD at 5 (5/13/03).

XI. ACT 250 CRITERIA

A. General

600. General

* Act 250 mandates that "before granting a permit, the board or district commission shall find that the subdivision or development" meets all ten criteria under 10 V.S.A. § 6086. 10 V.S.A. § 6086(a). *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 22 (6/26/03); *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 16 (2/16/2017) .

* The concern for sound and viable planned development which best serves the public interest is expressed in the ten precepts contained in 10 V.S.A. § 6086. *In re Great Eastern Building Co., Inc.*, 132 Vt. 610, 614 (1974).

* Act 250 precedent or statutory authority does not require positive findings on Act 250 criteria where factual findings may overlap and each of ten Act 250 criteria (thirty in number when counting sub-criteria) have separate legal standards, requiring separate analysis of the criteria applicable to a project. See 10 V.S.A.

§ 6086(a). *In re: Rivers Dev. Act 250 Appeal*, #68-3-07 Vtec, Decision on Post-Judgment Motion to Alter at 2 (8/17/10).

* When Board concludes, based on projections, that a project will not be able to meet established criterion standards; the Board will deny the application. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 30 (6/07/05) [EB #853], citing *Re: McLean Enterprises, Inc.*, #2S1147-1-EB, FCO at 62 and 68 (11/24/04).

600.1 Review of criteria under circumstances in effect at time of review

* Projects are judged based on the circumstances as they exist at the time the review occurs; if circumstances change, commission may review criteria affected by such changed circumstances. *Re: Greater Upper Valley Solid Waste Management District*, DR #418, MOD at 5 (5/13/03).

* Applicant's request for extension of the construction completion date of his permit more than three years after the expiration date automatically triggered a review for compliance under all ten criteria. *Homestead Design, Inc.*, #4C0468-1-EB (9/6/90). [EB #454]

600.2 Setting standards (based on projections) which a project must meet

* For many criteria, based on modeling, projections, or other credible evidence, Board may be able to reasonably conclude that a project will be able to meet measurable compliance standards (e.g. decibel limits; well interference); in those circumstances, Board may impose restrictions under those standards as permit conditions; applicant therefore takes the risk that, if its projections are ultimately incorrect, its operations may subsequently be shut down or substantially curtailed as being in violation of the standards-based permit conditions. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 30 - 31 (6/07/05) [EB #853]

* When Board concludes, based on projections, that a project will not be able to meet established criterion standards; the Board will deny the application. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 30 (6/07/05) [EB #853], citing *Re: McLean Enterprises, Inc.*, #2S1147-1-EB, FCO at 62 and 68 (11/24/04).

601. Commission's obligations

* The absence of opposition does not mean that appellants automatically prevail. *In re Denio*, 158 Vt. 230, 237 (1992).

* Commission improperly applied an umbrella permit process review when it did not apply all Act 250 criteria to judge the project and failed to make findings as to the compliance of the project with all criteria, particularly air pollution and wastewater management. *Paul E. Blair Family*, #4C0388-EB (6/16/80). [EB #131]

602. Review of project on its own merits, not in comparison with other projects

* Board reviews impacts caused by project, not impacts that project will alleviate elsewhere. *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), MOD at 10 (1/31/02). [EB #799 & 801].

* 10 V.S.A. § 6086(a) requires Board to look at a project on its own merits, not in comparison to previous proposals, or to what could be built, or to other factors unrelated to project. *Re: Chittenden Solid Waste District* #EJ99-0197-WFP, FCO at 21 n.4 (10/24/03) [WFP #40]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 43-44 (3/8/02)[EB #785]; see, *In re Southview Associates*, 153 Vt. 171, 179 (1989).

* Board cannot approve project because it looks good by comparison to something worse, as this reduces Board's role to finding lowest common denominator and then deciding whether project rises above that level. *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 43-44 (3/8/02). [EB #785]; see, *In re Southview Associates*, 153 Vt. 171, 179 (1989).

603. Cumulative / incremental Impact (see [226.2](#))

* Several causes may contribute to a particular effect or result. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).

* It would be absurd to permit a hazardous condition to become more hazardous. *In re Pilgrim*

Partnership, 153 Vt. 594, 596 (1990) (review of additional traffic under Criterion 5).

* Under Criterion 8, Board will review any construction that occurred outside the original permit regardless of whether the construction would have been a "material change" requiring a permit amendment. *Quechee Lakes Corporation*, #3W0364-1A-EB (2/3/87), *aff'd*, *In re Quechee Lakes Corp.*, 154 Vt. 543 (1990). [EB #253]

* Act 250 review of a coordinated development located on two parcels of land includes assessment of the cumulative impact of units proposed in addition to those already built or authorized. *Albert & Doris Stevens*, #4C0227-3-EB (7/28/80). [EB #139]

604. What is "undue"?

* "Undue" has been defined . . . to mean "that which is more than necessary—exceeding what is appropriate or normal." *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 14-15 (3/25/10), citing *Re: McLean Enters. Corp.* #2S-1147-1-EB, FCO at 41 (11/24/04); *Brattleboro Chalet Motor Lodge, Inc.*, #4C0581-EB, FCO at 6 (10/17/84).

* There is no clear definition of what constitutes "undue" pollution; decisions are fact-specific and more instructive about what is *not* "undue," than what is. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 31 (6/07/05) [EB #853]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 17 B 18 (5/4/04) [EB #831]; *Mark and Pauline Kisiel*, #5W1270-EB (8/7/98), *rev'd* on other grounds, *In re Kisiel*, 172 Vt. 124 (2000). [EB # 695]; *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) (7/20/00). [EB #696]; *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, FCO at 21 (5/22/00) [WFP #35]; *Re: Upper Valley Regional Landfill*, #3R0609-EB, FCO at 32 (11/12/91)[EB #453R]; *Brattleboro Chalet Motor Lodge, Inc.*, #4C0581-EB, FCO at 6 (10/17/84) (defining "undue" as "that which is more than necessary - exceeding what is appropriate or normal.")

* Whether a pollutant is "undue" can depend on a series of factors, which may include an analysis of the nature and amount of the pollution, a proposed project's location and topography, prevailing winds, whether the pollutant complies with certain standards or recommended levels, and whether effective measures will be taken to mitigate the pollution. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 31 (6/07/05) [EB #853]

* With respect to pollution, "undue" is not a relative term, and should not be defined only in relation to other projects or by weighing the public benefits against the risks. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Pollution of groundwater is not always undue, but where water supplies are polluted, then that pollution is undue. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* "Undue air pollution" standard should not incorporate any consideration of costs of installation of air pollution control system. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188].

605. Burden of proof / production on criteria (see [383](#) and specific Criteria within Part XI)

*"The applicant bears the burden of production on all criteria, though the burden of persuasion shifts to opponents on Criteria 5 through 8." *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 15-16 (2/16/2017)(citing 10 V.S.A. 6088 and *In re Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Slip op. at 5 (Vt. Env'tl. Ct. Feb. 15, 2008)).

* "As with all Act 250 criteria, the applicant bears the burden of proof." *In re Woodford Packers, Inc.*, 2003 VT 60 &17 (6/26/03).

* Nothing in language of Act 250 prevents Board from finding against applicant on issue even though applicant does not have burden of proof on that issue. *In re Denio*, 158 Vt. 230, 237 (1992).

* 10 V.S.A. § 6088 represents a legislative determination that the applicant should prove compliance with certain of the criteria but that any alleged burdens or impacts falling under the other criteria should be proved by the opposing parties. *In re Quechee Lakes Corp.* 154 Vt. 543, 553 (1990).

* Applicant bears the initial burden of production under all applicable Act 250 criteria, the ultimate burden of proving that a project does not conform to criteria 5 through 8 rests upon the project's opponents. 10 V.S.A.

§ 6088(b). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10)(citing *In re Route 103 Quarry*, No. 205-10-05 Vtec, at 8 (11/22/06) (Durkin, J.), *aff'd*, 2008 VT 88).

* Where applicant does not provide sufficient information to allow permit application process to move forward Environmental Court will affirm dismissal by Commission. *Watchtower Wireless Cell Tower*, No. 21-2-06 Vtec, Decision (Aug. 23, 2006)

* The burden of proof generally consists of the burdens of production and persuasion. *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 13 (4/13/04) [EB #814]; *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]; *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]; *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). [EB #349] [EB #357]; *Berlin Associates*, #5W0584-9-EB (4/24/90). [EB #379]; *Pratt's Propane, Inc.*, #3R0486-EB (1/27/87). [EB #311M].

* Given that applicant has the burden of production on all Criteria and the burden of persuasion on many Criteria, it is up to applicant to choose how to meet its respective burdens under the Criteria at issue. *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 43 (9/19/03). [EB #829].

* Burdens of production and persuasion are both squarely on applicant under criteria 1 through 4, 9 and 10; however, burden of persuasion with respect to criteria 5 through 8 is on the party opposing the applicant. *Imported Cars of Rutland*, #1R0156-2-EB (10/12/82). [EB #192].

* Burden of production is always on applicant, and once applicant shows compliance with criteria, opponent has burden of persuasion that project has adverse effect through preponderance of the

evidence. *Berlin Associates*, #5W0584-9-EB (4/24/90)[EB #379]; *Pratt's Propane, Inc.*, #3R0486-EB (1/27/87). [EB #311M].

*“Regardless of who has the burden of proof on a particular issue, the applicant always has the burden of producing evidence sufficient to enable the Court to make the requisite positive findings on all of the criteria.” *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 4 (11/28/12) (citing *Re: EPE Realty Corp. and Fergessen Mgmt., Ltd.*, No. 3W0865-EB, Findings of Fact, Concl. of Law, and Order, at 18 (Vt. Env'tl. Bd. Nov. 24, 2004) (citing *Re: Peter S. Tsimortos*, No. 2W1127-EB, Findings of Fact, Concl. of Law, and Order, at 13 (Vt. Env'tl. Bd. Apr. 13, 2004)); *Re: McLean Enter. Corp.*, No. 2S1147-1-EB, Mem. of Decision, at 43 (Sept. 19, 2003)).

*State permits can and do create a presumption of compliance with Act 250 criteria; for instance, a stormwater permit creates a presumption that the permitted project will cause no undue water pollution and will comply with Criterion 1(B). *Pizzagalli Properties, LLC Mountain View Park SD Act 250*, No. 114-8-12 Vtec at 4 (4/17/13) (citing *Re: Brewster River Land Co., LLC.*, No. 5L1348-EB, Findings of Fact, Conclusions of Law, and Order, at 11 (Vt. Env'tl. Bd. Feb. 22, 2011)).

*...Based upon the Court’s review of Applicant’s other state permits, it does not appear that these permits specifically review the potential impact of the proposed berm on Appellant’s property. Therefore, Appellants have effectively rebutted Applicant’s presumption of compliance with Criterion 1(B). Thus, the burden of proof with respect to the applicable criteria shifts back to Applicant, and the permits which created the presumption serve only as evidence that the project complies with Criterion 1(B). *In re Pizzagalli Properties, LLC*, 114-8-12 Vtec at 5 (04/17/13).

* Motion to dismiss question granted insofar as it raises non-stormwater-based chloride impacts on groundwater, as appellant did not establish sufficient grounds for party status under Criterion 1(B) for potential chloride impacts to groundwater. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 7 (2/8/2018)

605.1 Requirement that applicant present prima facie case on criteria

* “As with all Act 250 criteria, the applicant bears the burden of proof.” *In re Woodford Packers, Inc.*, 2003 VT 60 ¶17 (6/26/03);

* Nothing in language of Act 250 prevents Board from finding against applicant on issue even though applicant does not have burden of proof on that issue. *In re Denio*, 158 Vt. 230, 237 (1992).

* Regardless of who has the burden of proof on a particular issue, the applicant always has the burden of producing evidence sufficient to enable the board to make the requisite positive findings on all of the criteria. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 18 (11/24/04) [EB #838]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 13 (4/13/04)[EB #814]; *Re: McLean Enterprises Corporation*, #2S1147-1-EB, MOD at 43 (9/19/03); *Herndon and Deborah Foster*, #5R0891-8B-EB, FCO at 11 (6/2/97) EB #665]; *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92) [EB #471R]; *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91) [EB #472R]; *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]; *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). [EB #349] [EB #357]; *W. Joseph Gagnon*, DR #173 (11/22/87); *Green Peak Estates*, #8B0314-2-EB (9/24/86). [EB #280M]; *Lawrence E. Thomas*, #2W0644-EB (2/18/86). [EB #266]; *The Switchyard*, #6F0192-3-EB (10/17/83). [EB #204]; *Imported Cars of Rutland*, #1R0156-2-EB (10/12/82). [EB #192]. *Katzenbach Act 250 Permit*, 124-9-17 Vtec., Decision on the Merits (1/2/19).

* Even with no opposing party or evidence on criterion for which opponent carries burden of proof, applicant does not automatically prevail. *Herndon and Deborah Foster*, #5R0891-8B-EB (6/2/97). [EB #665]

606. Impacts reviewed: construction and operation

* Board is tasked with looking at the *environmental* impacts of construction. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 3 n.3 (2/5/04), *aff'd* 2006 VT 8 (V.S.Ct).

* Environmental Board is empowered to regulate property based upon its use, not the identity or the specific characteristics or attributes of its users. *Re: S-S Corporation / Rooney Housing Developments*, DR #421, MOD at 4 - 5 (2/5/04), *aff'd* 2006 VT 8 (V.S.Ct), citing *Vermont Baptist Convention v. Burlington Zoning Board*, 159 Vt. 28, 30 (1992).

* Act 250 review includes not only impacts during construction but extends to impacts during use of a project *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]

607 Subjects not within coverage of criteria

607.1 Economic considerations

* Any economic issues implicated by Act 250 and 10 V.S.A. § 6605b(b)(1) and (2) are for the protection of the general public, not competitors. *In Re Chittenden SWD*, 162 Vt. 84, 91 (1994).

* Private economic interests are not sufficient grounds on which to base a claim for party status. *In Re Chittenden SWD*, 162 Vt. 84 (1994).

* Nothing in Act 250 puts any burden on Board to either inquire about, or make findings on, the financial viability of the project. *In re Preseault*, 132 Vt. 471, 475 (1974).

B. Criterion 1 - Air or Water Pollution

* The historical interpretations of Criterion 1 concerning air pollution do not establish a sole reliance upon governmental air quality standards, but rather vest the adjudicating tribunal with the responsibility of determining whether all applicable factors support a finding of undue air pollution. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 14 (3/25/10).

621. General

* Legislature did not intend Dep't of Agriculture pesticide regulations to preempt Act 250 review of herbicide use on utility rights-of-way under Criteria 1(B) and 1(E). *N.E. Tel. & CVPS*, #2W0037-1-EB and #2W0579-EB (11/30/83). [EB #210]

* Because statute requires notifying property owners prior to spraying electrical distribution line, a similar Commission condition is deleted. *Central Vermont Public Service*, #3W0286-EB (12/28/78). [EB #99]

* Clear cutting and herbicide use in connection with electric transmission line conforms with Act 250 subject to permit conditions. *Central Vermont Public Service*, #2W0001 (12/7/92) and #800010 (7/30/71). [EB #12] [EB #9]

622. Air Pollution

622.1. General

* The historical interpretations of Criterion 1 concerning air pollution do not establish a sole reliance upon governmental air quality standards, but rather vest the adjudicating tribunal with the responsibility of determining whether all applicable factors support a finding of undue air pollution. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 14 (3/25/10).

* A project will generate "undue" air pollution establishes a threshold beyond mere annoyance. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 14-15 (3/25/10), citing *Re: McLean Enters. Corp.* #2S1147-1-EB, FCO at 41 (11/24/04); *Brattleboro Chalet Motor Lodge, Inc.*, #4C0581-EB, FCO at 6 (10/17/84).

* Before granting a permit, the Board or Commission must find that the development will not result in undue air pollution. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 513 (1975); 10 V.S.A. § 6086(a) (1); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 31 (6/07/05) [EB #853]

* Whether a pollutant is "undue" can depend on a series of factors, which may include an analysis of the nature and amount of the pollution, a proposed project's location and topography, prevailing winds, whether the pollutant complies with certain standards or recommended levels, and whether effective measures will be taken to mitigate the pollution. *Goddard College Act 250 Reconsideration*, 175-12-11 Vtec at 8 (01/06/14); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 31 (6/07/05) [EB #853]

* "Undue air pollution" standard should not incorporate any consideration of costs of installation of air pollution control system. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188].

* In Criterion 1 context, adverse health effects can be psychological as well as physical. *J.P. Carrara & Sons*, #1R0589-3-EB (2/2/94). [EB #554]

622.2. What "air pollution" covers

* Noise, fumes, airborne contaminants, bioaerosols, and dust may be considered under Criterion 1.

Re: Pike Industries, Inc. and Inez M. Lemieux, #5R1415-EB, FCO at 31 (6/07/05) [EB #853]; *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, FCO at 20-21 (5/22/00) WFP #35]; *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), FCO at 22 (8/19/96) [EB #629R] (noise, fumes and dust constitute air pollution); *George and Marjorie Drown*, #7C0950-EB, FCO at 14 (6/19/95) [EB #607] (dust), *L&S Associates*, 2W0434-8-EB, FCO at 38-41 (6/2/93) (fumes from diesel trucks); *Jerrold D. MacKenzie and Katherine G. Stone*, #5W1047-EB (4/23/91). [EB #484]; *David and Joyce Gonyon*, 5W0125-EB, FCO at 7 (7/17/91) (toxic paints and thinners).

622.2.1**Dust**

* On-site and off-site dust controls which minimize air pollution are effective mitigative measures leading to a conclusion of no undue air pollution. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 31 (6/07/05) [EB #853]; *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 68 (12/8/00)[EB# 739].

* Dust can be considered as air pollution under Criterion 1 *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, FCO at 20 (5/22/00) [WFP #35]; *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607]

622.2.2**Noise (see [762.1.8](#))**

* Noise a proposed project may generate can be of such an adverse level as to constitute air pollution. *Goddard College Act 250 Reconsideration*, 175-12-11 Vtec at 9 (01/06/14); *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 5 (11/28/12); *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 15 (3/25/10), citing *Re: Bull's-Eye Sporting Center*, #5W0743-EB, FCO at 14 (2/27/97) ("The test for undue air pollution caused by noise is whether the noise has 'impacts rising above annoyance and aggravation to cause adverse health effects such as hearing damage'.") *Re: Talon Hill Gun Club' Inc. and John Swinington*, #9A0192-2-EB, FCO at 8 (6/7/95).

* Board may exercise discretion within a range of values supported by the evidence, even though there were no noise level readings based on a sound source located at the precise point chosen by the Board as reasonable; argument to the contrary confuses the function of finding facts with that of framing remedial or quasi-remedial orders fairly reflecting the facts. *In re R.E. Tucker, Inc*, 149 Vt. 551, 559 (1988).

* Noise is considered air pollution where its occurrence may cause adverse health effects; test for undue air pollution (noise) is whether the noise has impacts rising above annoyance and aggravation to cause adverse health effects such as hearing damage. *Re: Vermont RSA Limited Partnership*, DR #441, MOD at 2 (5/11/05); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 32 (6/07/05) [EB #853]; *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 68 (12/8/00)[EB# 739]. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, FCO at 21 (5/22/00) [WFP #35]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 27 (5/16/00); *Pike Industries, Inc.*, #400008-2-EB (10/23/97). [EB #674]; *Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB (Altered) (6/12/97). [EB #651R]; *Bull's-Eye*

Sporting Center / David and Nancy Brooks, #5W0743-2-EB (2/27/97). [EB #649]; *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607]; *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB #474]; *Roadside Chapel*, #1R0319-4-EB (12/18/90). [EB #483]; *John A. Russell Corporation*, #1R0257-2-EB (3/27/90). [EB #415]; *Jan Leland*, #2W0403-EB (9/10/79). [EB #98]; *Donald A. Rivers*, #4C0136 (9/11/74). [EB #47]

* Noise analysis under Criterion 1 focuses primarily on the health and safety impacts of noise, rather than its welfare impacts, which are considered under Criterion 8. *Goddard College Act 250 Reconsideration*, 175-12-11 Vtec at 10 (01/06/14); *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 5 (11/28/12); *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, FCO at 21 (5/22/00) [WFP #35]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28 (5/16/00); *UVM, State Agriculture College, and Novarr-Mackesey Development Co.*, #4C0895-EB (8/28/92). [EB #540]; *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]; *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB #474]

* In the context of Criterion 1, adverse health effects can be psychological as well as physical. *J.P. Carrara & Sons*, #1R0589-3-EB (2/2/94). [EB #554]

* Board has jurisdiction to regulate noise-generating activities. *Warplanes, Inc.*, #9A0136-1-EB (5/1/89). [EB #368]; *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]

622.2.2.1 Measurement standards

* A project will generate “undue” air pollution establishes a threshold beyond mere annoyance. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 14-15 (3/25/10), citing *Re: McLean Enters. Corp.* #2S-1147-1-EB, FCO at 41 (11/24/04); *Brattleboro Chalet Motor Lodge, Inc.*, #4C0581-EB, FCO at 6 (10/17/84).

* Board relies on EPA standard of 70 dbA for 24 hours/day, 365 days/year in a lifetime for health and safety considerations of noise. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 32 (6/07/05) [EB #853]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28 (5/16/00).

* Levels of noise under 90 decibels is not of the degree that constitutes air pollution under Criterion 1. *Goddard College Act 250 Reconsideration*, 175-12-11 Vtec at 10 (01/06/14); *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28 (5/16/00); *Wildcat Construction Co.*, #6F0283-1-EB (10/4/91), *aff'd*, *In re Wildcat Construction Co.*, 160 Vt. 631 (1993). [EB #458]

* For commercial operations such as quarrying operations, Board measures maximum sound levels (Lmax) at either project's property line or at relevant receptors on neighboring properties, or both. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 22 (4/9/02) [EB #791]; *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, FCO at 33 (2/4/02), *Dominic A. Cersosimo and Dominic A. Cersosimo Trustee Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries Inc.*, #2W0813-

3 (Revised) - EB, FCO at 13 (4/19/01); see *Bull's-Eye Sporting Center / David and Nancy Brooks*, #5W0743-2-EB (2/27/97). [EB #649]

622.2.3 Telecommunications

* In determining whether radio frequency radiation from radio broadcast facility violates Criterion 1, Board looks to whether any undue adverse health effects will result. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD on Motion to Alter (9/26/2003). [EB#734M3]

* Board may consider whether radio frequency radiation from radio broadcast facility violates Act 250, and may consider whether the facility complies with Federal Communications Commission Guidelines. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 5-6 (8/8/2003). [EB#734M3]

* Federal law preempts the Board from considering whether radio frequency interference violates Act 250. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 4 (8/8/2003). [EB#734M3]

* Federal law preempts the Board from considering whether radio frequency radiation from a personal wireless services facility violates Act 250, where that facility complies with Federal Communications Commission Guidelines. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 5-6 (8/8/2003). [EB#734M3]

* Because tower project will not interfere with television and radio reception in the area, Board concludes that project will not violate Criterion 1. *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (Appeal and Revocation) (12/14/93). [EB #562]

622.3. Presumptions (compliance with other permits) (see [204.1](#))

* Board need not find compliance with Air Pollution Control Division recommendations and regulations have been in order to find no undue air pollution. *David and Joyce Gonyon.*, #5W1025-EB (7/17/91). [EB #510]

* DEC air pollution permits creates presumption that project will not result in undue air pollution under Criterion 1. *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]

* ANR certification is evidence of compliance with Criterion 1. *Juster Development Corp.*, #1R0048-8-EB, FCO at 24 (12/19/88). [EB #367]

* Presumption was rebutted as to air pollution, but the proponent of the presumption submitted sufficient evidence to sustain burden of proof; even though burden was met, Board imposes conditions to reduce allowable emissions. *Burlington Street Dep't*, #4C0156-EB (4/13/83). [EB #188]

622.4 Burden of Proof

* Applicant has burden to demonstrate that the criteria of § 6086(a)(1), including the noise pollution, had been met. *In re R.E. Tucker, Inc*, 149 Vt. 551, 558 (1988); and see, *In re Barker Sargent Corp.*, 132 Vt. 42, 46 (1973); 10 V.S.A. § 6088(a). *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 31 (6/07/05) [EB #853]

622.5 Cases

622.5.1

General

* A project will generate “undue” air pollution establishes a threshold beyond mere annoyance. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 14-15 (3/25/10), citing *Re: McLean Enters. Corp.* #2S-1147-1-EB, FCO at 41 (11/24/04); *Brattleboro Chalet Motor Lodge, Inc.*, #4C0581-EB, FCO at 6 (10/17/84).

* Undue air pollution is not caused where emissions will comply with federal pollution standards for stationary sources, where cancer risk is less than 1 in one million, and where most trucks are new and equipped with latest air pollution controls. *L & S Associates*, #2W0434-8-EB (6/2/93). [EB #557]

* Operation of autobody paint/repair shop will not create undue air pollution. *David and Joyce Gonyon*, #5W1025-EB (7/17/91). [EB #510].

* Restrictions on use of heavy machinery to control noise and pollution were modified to avoid potential vehicle accidents and to permit complete coverage of weekly arrivals of waste. *Town of Charlotte*, #4C0424-1-EB (12/26/90). [EB #462]

* Operation of sand and gravel pit will not result in undue air pollution because there are mitigating measures. *Charles Drown*, #7R0644-EB (3/24/87). [EB #316]; *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]; *Donald A. Rivers*, #4C0136 (9/11/74). [EB #47]

* Insufficient information to determine if game farm / zoo will result in undue air pollution. *Wildlife Wonderland*, #1R0117 (10/17/74), *aff'd, In re Wildlife Wonderland*, 133 Vt. 507 (1975). [EB #45]

* Sanitary landfill satisfies criterion subject to permit conditions. *Palisades, Inc.*, #5W0164 (4/24/73). [EB #30]

* Permit for single family home subdivision denied in part for failure to show compliance with air and water pollution regulations. *Cape Lookoff Mountain*, #400002 (9/16/70). [EB #3]

622.5.2.

Dust

* On-site and off-site dust controls which minimize air pollution are effective mitigative measures leading to a conclusion of no undue air pollution. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 68 (12/8/00). [EB# 739].

* Dust can be considered as air pollution under Criterion 1 *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, FCO at 20 (5/22/00). [WFP #35]; *George and Marjorie Drown*,

#7C0950-EB (6/19/95). [EB #607]

* Because of permit conditions pertaining to dust and noise, earth extraction project does not result in undue air pollution. *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607]; *Raymond Rowley*, #4C0534-1-EB (12/1/93). [EB #577]

* Applicants fail to demonstrate that project will not create undue air pollution where they have not provided sufficiently specific plans for dust suppression. *Elwood and Louise Duckless*, #7R0882-EB (6/11/93). [EB #555]

* Undue air pollution will result from operation of a landfill unless access road is paved. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]

* Operation of oil trucks on unpaved route would cause undue air pollution. *Vermont Talc/OMYA, Inc.*, #2W0551-1-EB (6/21/85). [EB #238]

* A marina, if not properly mitigated as to vehicular traffic, will cause undue air pollution from fugitive dust. *John Roach*, #6G0220-EB (6/3/81). [EB #136]

622.5.3. Noise

* Board may exercise discretion within a range of values supported by the evidence, even though there were no noise level readings based on a sound source located at the precise point chosen by the Board as reasonable; argument to the contrary confuses the function of finding facts with that of framing remedial or quasi-remedial orders fairly reflecting the facts. *In re R.E. Tucker, Inc*, 149 Vt. 551, 559 (1988).

* Noise a proposed project may generate can be of such an adverse level as to constitute air pollution. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 15 (3/25/10), citing *Re: Bull's-Eye Sporting Center*, #5W0743-EB, FCO at 14 (2/27/97) ("The test for undue air pollution caused by noise is whether the noise has 'impacts rising above annoyance and aggravation to cause adverse health effects such as hearing damage.'" *Re: Talon Hill Gun Club' Inc. and John Swington*, #9AO192-2-EB, FCO at 8 (6/7/95).

* No noise data or expert evidence needed to support conclusion that a smaller number of tandem-axle truck deliveries would have less impact than four or five times the number of one-ton dump truck deliveries. *In re: Cota Act 250 Land Use Permit (altered)*, No. 114-6-07 Vtec, Decision at 5-6 (1/14/09).

* Where noise levels do not have impacts rising above annoyance and aggravation to cause adverse health effects such as hearing damage, Board finds that the noise will not result in undue air pollution. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 68 (12/8/00). [EB# 739].

* Noise from the proposed project operations might be aggravating to adjoining property owners and neighbors, but the noise will not cause adverse health effects in violation of Criterion 1. *Pike*

Industries, #1R0807-EB (6/25/98). [EB #693]

* Noise as conditioned by the permit, will not have impacts rising above aggravation to cause adverse health effects. *Pike Industries, Inc.*, #400008-2-EB (10/23/97). [EB #674]; *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607]; *Roadside Chapel*, #1R0319-4-EB (12/18/90). [EB #483]; *John A. Russell Corporation*, #1R0257-2-EB (3/27/90). [EB #415]; *Jan Leland*, #2W0403-EB (9/10/79). [EB #98]; *Donald A. Rivers*, #4C0136 (9/11/74). [EB #47]

* The potential disturbance to motel guests from diesel refueling station will not result in detriment to public health, safety, or welfare where hours of operation are limited. *Speedwell, Inc.*, #7C0568-2-EB (2/29/96). [EB #642]

* Noise from gun club would not have an undue adverse effect on human health. *Talon Hill Gun Club, Inc. and John Swinington*, #9A0192-2-EB (6/7/95). [EB #611]

* Earth extraction project would not result in undue air pollution. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]

* Noise from traffic associated with road improvements did not result in undue air pollution. *Howe Center Limited*, #1R0770-EB (5/4/95). [EB #614]

* Proposed blasting of subdivision project will not result in undue air pollution. *Landmark Development Corporation*, #4C0667-EB (7/9/87). [EB #320]

* Applicants for gravel operation took all available mitigating steps to reduce noise impacts. *R.E. Tucker, Inc.*, #5W0829-EB (6/2/86), *aff'd in part / rev'd in part, In re R.E. Tucker, Inc.*, 149 Vt. 551 (1988). [EB #281]

* Annual substantiation of gravel extraction required to assure continued viability of findings and conditions under Criteria 1 and 8, along with prior notice to Commission of any addition of major equipment. *R.E. Tucker, Inc.*, #5W0829-EB (6/2/86), *aff'd in part / rev'd in part, In re R.E. Tucker, Inc.*, 149 Vt. 551 (1988). [EB #281].

* Undue air pollution will result from noise generated by hauling vehicles used in gravel extraction operation. *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]

*Where noise from a project may be apparent to neighbors, but is less than the EPA-established adverse health impact standard (70 dBA or higher for 24 hours a day, 365 days a year, over a lifetime) it will not cause adverse health effects and is not air pollution in violation of Criterion 1. *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 6-7 (11/28/12).

*While the noise from the Project operations might be apparent to Appellants, the noise will be less than the EPA-established adverse health impact standard of 70 dB(A) for 24 hours each day, 365 days a year, over a lifetime. Several aspects of the Project will further reduce or eliminate any potential adverse health effects from noise. First, the woodchip deliveries, the loudest element of the Project, will occur approximately 36 times per year, will take an estimated 30 minutes or less to

complete, and will be limited to weekdays before 5:00 p.m. The noise levels in close proximity to the boiler equipment itself are estimated to be less than present background noise levels. As the distance from the equipment increases, sound levels decrease. Appellants' houses are approximately 200 feet or more from the Project. Thus, the proposed Project noise will not cause adverse health effects and will therefore not constitute undue air pollution in violation of Criterion 1. *Goddard College Act 250 Reconsideration*, No. 175-12-11 Vtec at 11 (01/06/14).

623. Water Pollution

623.1. General

* Criterion 1(B) asks whether project "will meet [all] applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells." 10 V.S.A. § 6086(a)(1)(B). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 19 (3/25/10).

* "Wastewater" does not include stormwater; such a broad definition would include all rain water that falls upon any developed property. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 20 (3/25/10).

* Before issuing a permit and concluding that a project will not be harmful, Board must find that it will not result in undue water pollution. 10 V.S.A. § 6086(a)(1); *In re Hawk Mountain Corp.*, 149 Vt. 179, 182 (1988); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 17 (5/4/04) [EB #831]
Re: Barre Granite Quarries, LLC, and William and Margaret Dyott, #7C1079 (Revised)-EB, FCO at 67 (12/8/00).

* In making determination that project will not result in undue water pollution. Board must consider applicable health and environmental conservation regulations. *In re Hawk Mountain Corp.*, 149 Vt. 179, 182 (1988).

* Board can consider water quality standards them when determining whether a land use permit should be granted. *In re Hawk Mountain Corp.*, 149 Vt. 179, 184 (1988).

* Board did not exceed its authority by requiring applicant to obtain a water discharge permit pursuant to 10 V.S.A. § 1263, although ANR waived this requirement. *In re Hawk Mountain Corp.*, 149 Vt. 179, 185 (1988).

* Board's jurisdiction under Criteria 1 and 1(B) is concurrent with WRB's jurisdiction over discharge to waters of state. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 13 (7/20/00); *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, MOD at 3 (9/16/98). [EB #696].

* Board is not limited to analysis of Criterion 1 subcriteria when determining whether project

complies with Criterion 1. *Mark and Pauline Kiesel*, #5W1270-EB (8/7/98), *rev'd on other grounds*, *In re Kiesel*, 172 Vt. 124 (2000). [EB # 695]

* Fact that substance will be diluted when applied to ground does not ensure that no water pollution will result where it is not known what the substance is or what its characteristics are. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

* Because original permit requires that future changes to system relating to Criterion 1 must meet regulations in effect when changes are submitted for approval, changes must comply with current regulations. *Charles Christolini*, DR #208 (3/19/90).

* Allowing Appellant to raise concerns about chloride and phosphorus under Criteria 1, 1(B) and 1(E) in the current Act 250 process for the area not covered by the permit would lead to absurd results in the Act 250/stormwater regulatory schemes because it would mean applying more stringent stormwater controls for the unpermitted area, versus less stringent stormwater controls within the permitted area. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 5* (2/8/2018).

623.2 Presumptions (compliance with other permits) (see [204.1](#))

* [ANR] Certificate of Compliance creates a rebuttable presumption that the proposed leach field complies with regulations governing waste disposal. *In re Hawk Mountain Corp.*, 149 Vt. 179, 182 (1988).

* Upon introduction of rebuttal evidence allowing a rational inference that system did not comply with DEC regulations, and thus was likely to result in undue water pollution, presumption disappeared, and burden of proof of compliance with regulations returned to applicant. *In re Hawk Mountain Corp.*, 149 Vt. 179, 186 (1988); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975); 10 V.S.A. § 6088(a).

* DEC permits create presumptions that the project complies with Criterion 1 and Criterion 1(B), applicable regulations governing waste disposal, and stormwater. 10 V.S.A. § 6086(d); EBR 19(E); *In re Hawk Mountain Corp.*, 149 Vt. 179, 182 (1988); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 18 (5/4/04) [EB #831] *see Nile and Julie Duppsstadt*, #4C1013-EB, FCO at 28 (4/30/99) (DEC Stormwater Discharge Permit creates a rebuttable presumption that stormwater can be disposed of without resulting in undue water pollution); *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), FCO at 22 - 23 (8/19/96) (DEC wastewater permit creates presumption of compliance with Criterion 1(B)).

* Unless stormwater system results in or substantially increases the risk of undue water pollution, presumption is not rebutted. *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 19 (5/4/04) [EB #831], citing *Swain Dev. Corp. and Philip Mans*, #3W0445-2-EB, FCO (8/10/90); and see *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB, FCO (12/18/97).

* CUD is entitled to a rebuttable presumption, and ANR's determinations regarding protected functions of wetland are technical determinations entitled to substantial deference under the statute. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 23 (12/31/02). [EB#800]

* Project which follows DEC Stormwater Management Procedures does not (unless proven otherwise) cause undue water pollution. *Nile and Julie Dupstadt*, #4C1013-EB, FCO at 28 (4/30/99). [EB #716]

* Presumption of compliance created by DEC waste water/water permits may be rebutted: (1) by showing, by a preponderance of evidence, that project is likely to result in undue water pollution; or (2) by showing that project does not comply with applicable DEC regulations and that such noncompliance will result in, or substantially increase risk of, undue water pollution. *Herbert and Patricia Clark*, #1R0785-EB, FCO at 25 - 27 (4/3/97). [EB #652]

623.3 Burden of Proof (see [605](#))

* The burden of proof on Criterion 1(water pollution) is on the applicant. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975), citing 10 V.S.A. § 6088(a); *In re Barker Sargent Corp.*, 132 Vt. 42, 46 (1973); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 17 (5/4/04) [EB #831]

* Burden of proof with respect to water pollution is on applicants who must present evidence on issue for Board's evaluation; should this evidence prove insufficient, Board may require more investigation or deny application. *Jerrold D. MacKenzie and Katherine G. Stone*, #5W1047-EB (11/16/90). [EB #484M]

* Without site-specific data, applicant failed to meet the burden of proof regarding undue water pollution. *Hawk Mountain Corporation*, #3W0347-EB (8/21/85), *aff'd in part / rev'd in part*, *In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251]

623.4 Cases

* Board's conclusion that, without knowing the ingredients of fertilizer, it could not make a reliable determination of the compound's characteristics or determine whether undue water pollution would be created by its use, was supported by the findings, and challenged findings were amply supported by the evidence. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 628 (1993); see *In re Southview Associates*, 153 Vt. 171, 178 (1989).

* "Wastewater" does not include stormwater; such a broad definition would include all rain water that falls upon any developed property. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 20 (3/25/10).

* Criteria 1 (water) and 1(B) are met upon conclusion that the project as proposed will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells and upon expectations that (1) project will be approved and operated in accordance with the SWPPP

and BMPs established under the approved MSGP coverage; (2) will not contribute undue water pollution; and (3) will conform with all applicable health and Department of Environmental Conservation regulations. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 20-21 (3/25/10).

* Sediment dredged to restore artificial pond to natural wetland must be stored beyond riparian buffer to comply with Criteria 1(B), 1(E) and 4. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 25 (12/31/02). [EB#800]

* Quarry project will not result in undue water pollution where potential hydrogeologic impacts will be periodically assessed to ensure that project does not have an adverse impact on wetlands and streams. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 69 (12/8/00). [EB# 739].

* Project will not affect well's water quality where nearby road is so compacted that additional traffic is not likely to adversely affect recharge of well, where well appears to be supplied by water running downhill from same side of the road, and where fluid spills from trucks are not likely to affect well because of its location *Jerrold D. MacKenzie and Katherine G. Stone*, #5W1047-EB (4/23/91). [EB #484]

* Municipal landfill's permit conditions were modified to allow low concentration salt/sand use to leave surface water monitoring station in place to best record water conditions before flowing by landfill. *Town of Charlotte*, #4C0424-1-EB (12/26/90). [EB #462]

* Sand and gravel pit will not result in undue water pollution. *Charles Drown*, #7R0644-EB (3/24/87). [EB #316]

* Realignment and relocation of river and brook to accommodate road reconstruction will not cause undue water pollution. *Agency of Transportation (Belvidere)*, #5L0083-EB (6/12/81). [EB #150]

* 64-unit apartment complex can hook up to local sewage treatment plant because increase in effluent discharge is within plant's design capacity, and it will result in minimal decrease in water quality despite change in State and federal law governing treatment standards. *Henry and Suzanna LaGue, Jr.*, #5W0496-EB (6/30/80). [EB #138]

* Construction of an impoundment to hold storm water runoff will not cause undue water pollution. *Edward C. & Barbara C. Buttolph*, #9A0071-EB (6/7/79). [EB #105]

* Sawdust and slabwood present at proposed sawmill will not result in undue water pollution. *Stuart Hunt, Sr. & Russell Howe*, #2W0325 (9/8/76). [EB #72]

* Insufficient information to determine whether game farm / zoo will result in undue water pollution. *Wildlife Wonderland*, #1R0117 (10/17/74), *aff'd, In re Wildlife Wonderland*, 133 Vt. 507 (1975). [EB #45]

- * Commercial shopping center conforms with Criterion 1 regarding sewage disposal and surface drainage. *Justgold Holding Corporation*, #1R0048 (7/19/73). [EB #31]
- * Sanitary landfill satisfies Act 250 criteria subject to permit conditions. *Palisades, Inc.*, #5W0164 (4/24/73). [EB #30]; *Barker Sargent Corporation*, #3R0020 (2/16/73), *aff'd, In re Environmental Application of Barker Sargent Corp.*, 132 Vt. 42 (1972). [EB #18]
- * Townhouses will not cause undue water pollution because town agrees to allow discharge of sewage into sewer system. *Skokemo, Inc.*, #2S0097 (3/19/73). [EB #29]
- * Insufficient information whether mixed use condominium and commercial development would result in undue water pollution. *Land/Tech Corporation*, #100036 (2/20/73). [EB #20]
- * Construction of 2400 feet of road and water / sewer main to service industrial site will not result in undue water pollution. *Brattleboro Development Credit Corporation*, #2W0101 (2/8/73). [EB # 27]
- * Permit for subdivision denied in part for failure to show compliance with air and water pollution regulations. *Cape Lookoff Mountain*, #400002 (9/16/70). [EB #3]
- * Appellant barred from alleging excessive chloride and phosphorus in stormwater runoff under Criteria 1, 1(B) and 1(E) because Act 250 application vested in the same regulations as the stormwater application, which did not regulate chloride and phosphorus at the time of filing the application. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 4* (2/8/2018).

624. Criterion 1(A) - Headwaters

624.1 General

- * Project complies with Criterion 1(A) where it will not result in erosion of existing stream channels, where sediments and suspended solids will be removed by sumps and settling ponds, and where an ANR Waste Management Division discharge permit is obtained. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 70 (12/8/00). [EB# 739].
- * Where water that falls on-site does not penetrate to or recharge groundwater, elimination of wetlands on project site will not affect the quality of ground or surface waters on project site or other lands within a drainage area under Criterion 1(A). *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]
- * Motion for party status under Criterion 1(A) granted due to a sufficient showing that developing the access road and significantly increasing large truck traffic associated with the proposed project may exacerbate erosion in the area, thereby supporting a conclusion that there is a reasonable possibility the proposed project will impact the quality of the ground or surface waters on land with headwaters of watersheds characterized by steep slopes and shallow soils, under Criterion 1(A)(i). *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 2 (3/14/2018).
- * Court declined to adopt NRB's strict reading of Criterion 1(A)--that movant failed to show party

status under Criterion 1(A) when motion did not cite to any specific Health and Environmental Conservation Department regulation that might apply to the proposed project. *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 2 (3/14/2018).

* It is sufficient for party status for Appellants to present a particularized interest that is protected by Criterion 1(A) and show a reasonable possibility that the proposed project will impact that interest; Appellants need not cite to specific Health and Environmental Conservation Department regulations that may apply. *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 2 (3/14/2018).

624.2 Presumptions (compliance with other permits) (see [204.1](#))

* A certificate of compliance with Vermont State Board of Health Regulations, Chapter 5, Sanitary Engineering, satisfies Criterion 1(A). *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82). [EB #172]

625. Criterion 1(B) - Waste Disposal

625.1. General

* Board's jurisdiction under Criteria 1 and 1(B) is concurrent with WRB's jurisdiction over discharge to waters of state. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 13 (7/20/00); *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, MOD at 3 (9/16/98). [EB #696].

* Board may deny project which does not technically comply with Criterion 1(B); but Board may, at its discretion, approve such project if applicant adequately demonstrates that it will not cause undue water pollution. *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652]

*Criterion 1(B) does not directly relate to surface runoff issues, but does relate where runoff could impact neighboring property, including septic system. *Pizzagalli Properties, LLC Mountain View Park SD Act 250*, No. 114-8-12 Vtec at 4 (4/17/13).

*Criterion 1(B) does not directly relate to surface runoff issues. *In re Pizzagalli Properties, LLC*, 114-8-12 Vtec at 4 (04/17/13).

* Presumption rebutted where ANR permits do not address potential off-site impacts of proposed berm, so burden of proof shifts back to the applicant. *In re Pizzagalli Properties, LLC*, 114-8-12 Vtec at 5 (04/17/13).

625.2 Presumptions (compliance with other permits) (see [204.1](#))

* Certain ANR permits create a rebuttable presumption that the application meets the relevant Act 250 criteria. But applicants cannot get the benefit of this presumption if those collateral permits are not introduced into evidence before this Court. *Katzenbach Act 250 Permit*, 124-9-17 Vtec., Decision on the Merits (1/2/19) (Citing *In re Harvey & West 65-unit Campground*, 110-7-10 Vtec,

Decision and Order at 9-10 (11-09-2011) (citing 10 V.S.A. § 6086(a)(1)(B), (a)(4); Act 250 Rule 19(E)(1)(a), (E)(6)).

* Applicant obtained an ANR Wastewater System and Potable Water Supply Permit, which created a rebuttable presumption that the discharge covered by the permit meets criterion 1(B). *In re Harvey & West 65-unit Campground*, 110-7-10 Vtec, Decision and Order at 9-10 (11-09-2011).

* ANR's technical determinations associated with work on a permit must be accorded "substantial deference" by the court, even though the appeals statute does not state this specifically and ANR's Indirect Discharge Renewal Permit was before the court on a separate, *de novo* appeal. *In re: Unified Buddhist Church, Inc.*, No. 191-9-05 Vtec, at 9 (1/2/08).

* Wastewater System and Potable Water Supply Permit and Authorization to Discharge Under General Permit create a rebuttable presumption that project will comply with Criterion 1(B). *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 5 (5/27/04) [EB #837]

* Unless stormwater system results in or substantially increases the risk of undue water pollution, presumption is not rebutted. *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 19 (5/4/04) [EB #831], citing, *Swain Dev. Corp. and Philip Mans*, #3W0445-2-EB, FCO (8/10/90); and see *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB, FCO (12/18/97).

* Board gives substantial deference to technical determinations in ANR discharge permit that existing use is not in the waste management zone and that proposed increase in discharge will comply with the Vermont water quality standards. *Re: Village of Ludlow*, Findings of Fact and Conclusions of Law and Order, #2S0839-2-EB(Altered) at 13-16 (11/26/2003). [EB#826]

* Opponent did not rebut presumption created by Water Supply/Wastewater Permit because he failed to prove that alleged non-compliance with Environmental Protection Rules would result in or substantially increase risk of undue water pollution. *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB (12/18/97). [EB #682]

* Presumption created by subdivision and wastewater permits was not rebutted, and applicants demonstrated that project's wastes will be appropriately handled and disposed of off-site. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), FCO at 22 - 23 (8/19/96). [EB #629R]

* Presumption created by subdivision and wastewater permits was rebutted, but upon shift of burden of proof to applicant, applicant met burden through further evidence. *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd*, *In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]

* Opponents failed to rebut presumption created by discharge and wastewater permits despite Board's disapproval of ANR's use of draft procedure in issuing permits. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

- * Indirect discharge permit creates presumption that land application program complies with Criterion 1(B). *Cabot Farmers' Cooperative Creamery, Inc.*, #5W0870-13-EB (8/20/93). [EB #564]
- * DEC discharge permit, wastewater disposal permit, and subdivision permit create a presumption that project complies with Criteria 1(B) and 2. *J. Philip, FCO*, #6F0396R-EB-1 (revised 1/29/92; previous version 3/25/91). [EB #486]
- * DEC discharge permit approving a storm water discharge system creates presumption that waste materials and wastewater can be disposed of through discharge system without resulting in undue water pollution under Criterion 1(B). *City of Burlington and Burlington International Airport*, #4C0331-4-EB (4/26/91). [EB #488]
- * Under EBR 19(F), permits creating presumption of compliance with Criterion 1(B) may be rebutted if party persuades Board that discharge is likely to result in undue water pollution. *City of Burlington and Burlington International Airport*, #4C0331-4-EB (4/26/91). [EB #488].
- * Wastewater and discharge permits create presumptions of compliance with respect to waste disposal under Criterion 1(B), but such presumptions may be rebutted. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]
- * Technical non-compliance with EPRs with respect to sewage disposal which will not result in, or substantially increase the risk of, undue water pollution, does not rebut presumption created by permits. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]
- * Discharge and subdivision permits were submitted as presumptions of compliance with Criterion 1(B) and were not rebutted. *Clearwater Realty & Agency of Transportation*, #4C0712-EB (5/10/89). [EB #385]
- * Presumption of compliance with Health regulations for on-site sewage disposal system not rebutted. *Hawk Mountain Corporation*, #3W0347-EB (8/21/85), *aff'd in part / rev'd in part*, *In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251]
- * Presumption created by certificate of compliance for hotel units that septic disposal system satisfies State health regulations under Criterion 1(B) was not rebutted. *Topnotch Associates*, #5L0365-3-EB (4/13/81). [EB #151]
- * By including discharges into groundwater, "regulated stormwater runoff" and "[p]reviously permitted existing stormwater discharges," the Stormwater Management Rules apply only to runoff regulated through the *state* permitting program, not federal and not the Clean Water Act, because the regulatory authority of the Clean Water Act (and NPDES permits) does not extend to discharges into groundwater via infiltration, see *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014). *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 19-20, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court grants summary judgement on the issue to applicant, as the Stormwater Management Rule § 18-306(a)(3) does not require the SW Permit to conform to the MS4 General Permit. *Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 20, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Applicant's failure to include a complete project adjoiners list in the October 3, 2014 application neither violated Stormwater Management Rule § 18-309(b)(2), nor rendered the application incomplete for vesting purposes because the rule states that the applicant shall own all impervious surfaces, but is silent regarding when the surfaces must come into the applicant's ownership, nor does it require this information to be included in the application for that application to be considered complete or that this information is necessary to begin technical analysis of project. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 11, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* "[C]oncerning any application, the Water Quality Standards in effect at the time of filing apply." VWQS 12-004-052 Vt. Code R. § 1-01(A)(2) (2011); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 9, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court limits question of whether Project violates Vermont Groundwater Protection Rule by discharging chloride into groundwater to non-stormwater-based chloride impacts under Criterion 1(B), because the Project vests in the regulatory scheme that did not include specific limitations for chloride. *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 5 (2/8/2018).

* Appellant intended to show noncompliance with Criterion 1(B) by showing that a stormwater discharge permit should not be issued, but the court rejected that argument after concluding that the stormwater permit should be issued. *Diverging Diamond Interchange Act 250 and SW Permits*, Nos. 50-6-16 Vtec, 169-12-16 Vtec, slip op. at 56 (Vt. Super. Ct. Env'tl. Div. June 1, 2018) (Walsh, J.). **May be appealed**

625.3 Burden of Proof (see [605](#))

* Applicant has the burden of proof of meeting Criterion 1(B). *In re Patch*, 140 Vt. 158, 168 (1981); 10 V.S.A. § 6088(a); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 4 (5/27/04) [EB #837]

* Since standards for Class B waters require analysis of discharges' effect on particular water's environment, applicant must provide information regarding existing stream conditions in order to give Board background data against which to measure project's discharge impacts; failure to meet this. *Mark and Pauline Kisiel*, #5W1270-EB (8/7/98), *rev'd on other grounds*, *In re Kisiel*, 172 Vt. 124 (2000). [EB # 695]

* Project complies with Criterion 1(B) where appellants failed to show by a preponderance of the evidence that waste management zone in river would feed into, rather than be fed by, groundwater, or any other proof that groundwater would be contaminated by the proposed expansion of a

wastewater treatment facility. *Re: Village of Ludlow, Findings of Fact and Conclusions of Law and Order, #2S0839-2-EB(Altered)* at 16 (11/26/2003). [EB#826]

* Presumption created by state permits may be rebutted, which shifts of burden of proof to applicant to establish that undue water pollution will not result. *Houston Farms Associates, #5L0775-EB (4/27/87)*. [EB #260]; *MBL Associates, #4C0948-EB (Altered) (1/30/96), aff'd, In re MBL Associates, Inc., 166 Vt. 606 (1997)*. [EB #610]

* Without site-specific data, applicant failed to meet the burden of proof regarding undue water pollution. *Hawk Mountain Corporation, #3W0347-EB (8/21/85), aff'd in part / rev'd in part, In re Hawk Mountain Corp., 149 Vt. 179 (1988)*. [EB #251]

* Without actual plans and figures (necessary to assess project's impact on streams), applicants' conclusion that no undue water pollution will occur from pesticide use is based almost entirely on untested assumptions, and applicants have not met their burden. *Sherman Hollow, #4C0422-5-EB (Revised Decision) (2/17/89)*. [EB #366]

*Where ANR permits do not review potential impacts on neighboring property, the permits that created the presumption are only evidence that the project covered by those permits will cause no undue water pollution complies. *Pizzagalli Properties, LLC Mountain View Park SD Act 250, No. 114-8-12 Vtec at 4 (4/17/13)* (citing *Herbert and Patricia Clark, No. 1R0785-EB, Findings of Fact, Conclusions of Law, and Order, at 25-27 (Vt. Env'tl. Bd. Apr. 3, 1997)*; *In re Hawk Mountain Corp., 149 Vt. 179, 185-186 (1988)*).

*Where Applicant's engineers established a baseline study and survey of how the proposed project's berm would impact surface water runoff to neighboring property, and this information demonstrates that the berm would reduce surface water runoff to the neighboring property, the land use permit mandating the installation of the berm sufficiently and appropriately addresses the neighbor's concern that the berm would cause additional runoff. *Pizzagalli Properties, LLC Mountain View Park SD Act 250, No. 114-8-12 Vtec at 5-6 (4/17/13)*.

*Based upon the Court's review of Applicant's other state permits, it does not appear that these permits specifically review the potential impact of the proposed berm on Appellant's property. Therefore, Appellants have effectively rebutted Applicant's presumption of compliance with Criterion 1(B). Thus, the burden of proof with respect to the applicable criteria shifts back to Applicant, and the permits which created the presumption serve only as evidence that the project complies with Criterion 1(B). *In re Pizzagalli Properties, LLC, 114-8-12 Vtec at 5 (04/17/13)*.

* Motion to dismiss question granted insofar as it raises non-stormwater-based chloride impacts on groundwater, as appellant did not establish sufficient grounds for party status under Criterion 1(B) for potential chloride impacts to groundwater. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 7 (2/8/2018)*

625.4 Elements of criterion

* Criterion 1(B) requires demonstration that project complies with applicable Health Department

and DEC regulations regarding disposal of wastes and that project will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 4 (5/27/04) [EB #837]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 17 (5/4/04) [EB #831]; *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 71 (12/8/00) [EB# 739]; *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 19 (7/20/00). [EB #696]; *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (6/19/92), aff'd, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). [EB #499M2]

* Board is not limited to an analysis of the Criterion 1 subcriteria when determining whether or not a project complies with Criterion 1. *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 18 (5/4/04) [EB #831], citing *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 68 (12/8/00) [EB# 739]; citing *In re Hawk Mountain Corp.*, 149 Vt. 179, 184 (1988).

625.4.1

Compliance with applicable Health Department and DEC Regulations

* Board's jurisdiction under Criteria 1(B) is concurrent with WRB's jurisdiction over discharge to waters of state with respect to compliance with applicable Health Department and DEC regulations. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 13 (7/20/00). [EB #696]. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB (9/16/98). [EB #696M].

* Groundwater collection system complies with applicable health and DEC regulations under Criteria 1 and 1(B), as Board is bound by WRB decision affirming/modifying DEC permit with respect to those criteria. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 13 (7/20/00). [EB #696].

* Criterion 1(B) requires Board to determine which regulations are pertinent with respect to a project and to evaluate conformance with DEC regulations, even though DEC may have previously found such conformance *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Court limits question of whether Project violates Vermont Groundwater Protection Rule by discharging chloride into groundwater to non-stormwater-based chloride impacts under Criterion 1(B), because the Project vests in the regulatory scheme that did not include specific limitations for chloride. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 5 (2/8/2018).

625.4.1.1

What qualify as regulations

* ANR's Hazardous Materials Management Division regulations. *Lawrence White*, #1R0391-8-EB (4/16/98). [EB #689]

- * Vermont Water Quality Standards (VWQS) and Ground Water Protection Rule and Strategy (GWPR). *C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (10/15/96). [WFP #24]; *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91) [EB #453R]; *Hawk Mountain Corporation*, #3W0347-EB (8/21/85), *aff'd in part / rev'd in part, In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251] (VWQS)
- * Any classifications and protective standards and regulations adopted by [DEC] must be considered "applicable water resources department regulations" evaluated under Criterion 1(B). *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]
- * Where no regulations have been promulgated, Act provides no standards for Board to apply. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269] (landfills)
- * Storm water regulations. *Fairfield Associates*, #4C0570-EB (3/29/85). [EB #234]
- * A certificate of compliance with Vermont State Board of Health Regulations, Chapter 5, Sanitary Engineering. *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82). [EB #172]
- * It is the purview of the District Commission, and this Court on appeal, to determine what regulations are "applicable" under Criterion 1(B). *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 7* (2/8/2018), citing *Hawk Mountain Corp.*, #3W0347-EB, slip op. at 16 (Vt. Env'tl. Bd. Aug. 21, 1985), *aff'd* 149 Vt. 179 (1988).
- * The Court engaging in retrospective analysis of Applicant's compliance with the MS4 and TS4 authorizations would be irrelevant in determining whether the Project, which does not yet exist, will comply with the MS4 or TS4 authorizations. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 9* (2/8/2018).
- * "Where a permittee offers a DEC permit as proof that a proposed project complies with an Act 250 criterion, it might make sense to condition the Act 250 permit on compliance with the terms of that DEC permit." *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 9* (2/8/2018).
- * Court dismisses the question and strikes the permit condition of requiring compliance with the MS4 and TS4 permits, as this requirement would far exceed the scope of the Project and is not a reasonable condition because those permits regulate activities well outside of and beyond the scope of the Project. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 10* (2/8/2018).
- * The broad language of Criterion 1 and 1(B) requires compliance with the Vermont Groundwater Protection Rule, even if the Rule is not specifically identified in Appellant's statement of questions; thus, this specific issue is not new on appeal. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 6* (2/8/2018), See Groundwater Protection Rule 16-3 Vt. Code. R. § 502:12-102 (explaining policy of the rule); *In re Atwood Planned Unit Dev.*, 2017 VT 16, ¶ 15 (Mar. 17, 2017).
- * Court concludes that Vermont Water Pollution Control Permit Regulations, 16-3 Vt. Code. R. § 301:13.12(F)(6) "Duty to Operate and Maintain" requiring compliance with DEC permits, is not an "applicable [DEC] regulation" under Criterion 1 or 1(B) requiring Applicant to demonstrate

compliance with the Applicant's MS4 or TS4 permit, because viewing compliance in this way would reverse the normal method of determining whether a project would cause undue water pollution under Criteria 1 and 1(B), and the MS4 or TS4 permits have a much broader scope and implicate areas/activities not at issue here, nor will examining compliance with MS4/TS4 permits illuminate whether the Project complies with Criteria 1 and 1(B). *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 8-9 (2/8/2018)*.

* Criteria 1 and 1(B) aim to ensure projects will not cause undue water pollution; one method of compliance is requiring projects to comply with applicable DEC regulations where, assuming the project complies with regulations designed to prevent pollution, the project will likely not cause pollution. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 8 (2/8/2018)*.

* "An applicant can create a presumption of compliance with Criteria 1 and 1(B) by presenting a relevant DEC permit." 10 V.S.A. § 6086(d); Act 250 Rule 19(E). *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 8 (2/8/2018)*.

* The DEC permit is a shorthand way of showing that the project complies with underlying DEC regulations, thus complying with Criteria 1 and 1(B). *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 8 (2/8/2018)*.

* Court grants motion to clarify question when pursuant to the 2011 Vermont Stormwater Management Manual, site balancing for Project may be used based on practicability, not feasibility. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 14 (2/8/2018)*.

625.4.1.2 Cases (involving regulations)

* Prior to expansion of an existing waste management zone, Board must determine that such expansion will not: (i) interfere with those uses which have actually occurred on or after November 28, 1975, in or on a water body, whether or not the uses are included in the standard for classification of the particular body; or (ii) be inconsistent with the anti-degradation policy in the VWQS. *Town of Stowe, #100035-9-EB (5/22/98)*. [EB #680]

* To make affirmative finding on Criterion 1(B), Board imposed condition requiring permittee to dispose of waste diesel fuel by a licensed hazardous wastes handler, in absence of evidence that the burning of such fuel was authorized by applicable DEC regulations. *Lawrence White, #1R0391-8-EB (4/16/98)*. [EB #689]

* Because leachate discharges into waters of the state were occurring without a discharge permit and in violation of GWPR and Strategy and VWQS, landfill failed to meet applicable Health Department and DEC regulations regarding the disposal of wastes. *C.V. Landfill, Inc. and John F. Chapple, #5W1150-WFP (10/15/96)*. [WFP #24]

* Excavation of soil for fill and placement onto project site involved no disposal of waste materials and no applicable Health and DEC regulations. *Putney Paper Company, Inc., #2W0436-7-EB*

(11/3/95). [EB #621]

* Storm water runoff flowed into catch basins or dissipated by soil infiltration and, therefore, met applicable Health and DEC regulations regarding the disposal of wastes. *Howe Center Limited*, #1R0770-EB (5/4/95). [EB #614]

* Failure provide evidence of compliance with WQS and GWPR, means that application fails to satisfy Criterion 1(B). *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Certificate of compliance and health department letter provide assurance that project meets applicable regulations regarding disposal of wastes and would not involve injection of wastes or any harmful or toxic substances into groundwater or wells. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff'd, In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348]

* Discharge permitted by [DEC] that does not comply with WQS does not meet applicable regulations under Criterion 1. *Hawk Mountain Corporation*, #3W0347-EB (8/21/85), *aff'd in part / rev'd in part, In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251]

* Waste disposal system does not comply with various EPR requirements with regard to Criterion 1(B) and the presumption favoring the original plan does not carry forward to the amended certification issued by the Agency of Natural Resources. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

* Implementation of revised storm water disposal regime under applicable [DEC] regulations and will not result in undue water pollution under Criterion 1(B). *Fairfield Associates*, #4C0570-EB (3/29/85). [EB #234]

* Residential project meets health and water regulations. *Pomfret Associates*, #3R0403 (8/23/83). [EB #199]

* By including discharges into groundwater, “regulated stormwater runoff” and “[p]reviously permitted existing stormwater discharges,” the Stormwater Management Rules apply only to runoff regulated through the *state* permitting program, not federal and not the Clean Water Act, because the regulatory authority of the Clean Water Act (and NPDES permits) does not extend to discharges into groundwater via infiltration, see *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014). *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 19-20, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court grants summary judgement on the issue to applicant, as the Stormwater Management Rule § 18-306(a)(3) does not require the SW Permit to conform to the MS4 General Permit. *Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 20, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court grants motion to dismiss questions under Crit 1, 1(B) and 1(E) to the extent they address chloride and phosphorus in stormwater runoff because Act 250 permit vests in the same regulatory

scheme that previously did not regulate chloride and phosphorus in stormwater. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 5 (2/8/2018)*.

*Court limits question of whether Project violates Vermont Groundwater Protection Rule by discharging chloride into groundwater to non-stormwater-based chloride impacts under Criterion 1(B), because the Project vests in the regulatory scheme that did not include specific limitations for chloride. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 5 (2/8/2018)*.

625.4.2 Injection of Waste/Toxic Substances into Ground Water/Wells

* Criterion 1(B) does not mean that an applicant must show absolutely that the project will not discharge toxic substances into the ground water. *In re Patch*, 140 Vt. 158, 168 (1981).

* Project complies with Criterion 1(B) where appellants failed to show by a preponderance of the evidence that waste management zone in river would feed into, rather than be fed by, groundwater, or any other proof that groundwater would be contaminated by the proposed expansion of a wastewater treatment facility. *Re: Village of Ludlow*, Findings of Fact and Conclusions of Law and Order, #2S0839-2-EB(Altered) at 16 (11/26/2003). [EB#826]

* Proposed ground water collection system (activated carbon filtration) that results in no undue water pollution complies with applicable health and DEC regulations and does not result in injection of waste materials or any harmful or toxic substances into ground water or wells. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 19 (7/20/00). [EB #696].

*Court limits question of whether Project violates Vermont Groundwater Protection Rule by discharging chloride into groundwater to non-stormwater-based chloride impacts under Criterion 1(B), because the Project vests in the regulatory scheme that did not include specific limitations for chloride. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 5 (2/8/2018)*.

625.5 Cases

* Finding by the Environmental Court that blasting at a permitted quarry in same area as an earlier gasoline spill would comply with Criterion 1(B) was supported by substantial evidence, where 1) there was no direct evidence that quarry activities were contributing to the contamination of neighboring wells from the gasoline spill; and 2) routine past monitoring of neighboring wells showed that contaminants from the gasoline spill continued to dissipate, even as the quarry operator dug deeper into the quarry. *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 22 (2008).

* Criteria 1 (water) and 1(B) are met upon conclusion that the project as proposed will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells and upon expectations that (1) project will be approved and operated in accordance with the SWPPP and BMPs established under the approved MSGP coverage; (2) will not contribute undue water

pollution; and (3) will conform with all applicable health and Department of Environmental Conservation regulations. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 20-21 (3/25/10).

* Criterion met where proposed quarry will not measurably increase the flow of stormwater off of the parcel, and quarry construction and operation will not introduce contaminants or hazardous materials into the stormwater that travels from parcel. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 21 (3/25/10).

* Proposal that applicant be required to submit final plans to commission and ANR demonstrating that sewer discharge would achieve a no-risk standard was an impermissible condition subsequent which could not substitute for an affirmative finding under Criterion 1(B). *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680].

* DEC may authorize composting toilet only when it would be unreasonable to require a water closet and lavatory because of the infrequency or briefness of occupancy, or the availability of nearby toilet. *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652]

* Permit condition prohibited installation of culvert that would exacerbate an existing environmental condition in violation of Criteria 1(B) and 4. *Okemo Realty*, #900033-2-EB (5/2/96). [EB #580]

* Since project solely involved excavation of soil for fill and its placement onto project site, there was no disposal of waste materials, and therefore involves no applicable health and DEC regulations or the injection of waste materials or toxic substances into ground water or wells. *Putney Paper Company, Inc.*, #2W0436-7-EB (11/3/95). [EB #621]

* Road improvement project will meet the standards of Criterion 1(B). *Howe Center, Ltd.*, #1R0770-EB (5/4/95). [EB #614]

* Board imposed conditions relating to sewage capacity in order to ensure compliance with Criterion 1(B). *UVM, State Agriculture College, and Novarr-Mackesey Development Co.*, #4C0895-EB (8/28/92). [EB #540]

* Where less than three feet separate bottom of leach field from ground water supply (which flows towards adjoiner's well, Criterion 1(B) has not been met. *Warren and Mary Noyes*, #5W0663-10-EB (8/21/92). [EB #531]

* Where landfill leachate discharges into river via groundwater, and discharge rate has increased over time, such discharge requires Chapter 47 permit unless specifically exempted. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* "Significant concerns" exist with regard to waste disposal where (1) permit approves less gallons per day than system designed for, and (2) short underground travel time could be significant regarding treatment of contaminants. *Waterbury Village Shopping Center Inc.*, #5W1068-EB (7/19/91). [EB #503]

- * Criteria 1(B), 4, and 8 apply to wetlands because particular values of wetlands that are addressed under criteria may be affected. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]
- * Septic systems for five-lot residential subdivision if properly constructed will not pollute adjoining's springs. *Richard Provencher*, #8B0389-EB (10/19/88). [EB #354]
- * Floor drain for spray paint shop need not be cement sealed to prevent groundwater/soil contamination as long as no paints, solvents, or other pollutants are stored there. *L.H. & A. Realty, Inc.*, #5L0856-EB (12/12/86). [EB #315]
- * Act 250 review includes impacts from waste disposal and water availability resulting from use of proposed facilities. *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]
- * Because of a bedrock ridge and the direction of groundwater flow, leachate from landfill will not contaminate drinking wells or private springs. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]
- * In gravel extraction operation, no threat of contamination of ground water exists because of an impervious layer of silt and a natural hydro-geologic barrier. *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]
- * Residential subdivision can dispose of sewage without resulting in undue water pollution. *White Sands Realty Co.*, #3W0360 (10/19/81). [EB #156]
- * Because of proposed offset through future installation of treatment system, hook-up sewer disposal from a mall will not cause undue increase in water pollution. *Juster Associates*, #1R0048-5-EB (2/24/81). [EB #154]
- * 64-unit apartment complex can hook up to local sewage treatment plant because increase in effluent discharge is within plant's design capacity, and it will result in minimal decrease in water quality despite change in State and federal law governing treatment standards. *Henry and Suzanna LaGue, Jr.*, #5W0496-EB (6/30/80). [EB #138]
- * Proposed apartment building is approved subject to conditions regarding sewer flow, landscaping, and energy conservation. *Abraham Brown*, #6F0209-EB (7/17/79). [EB #108]
- * Subdivision with access road will not cause undue water pollution if conditions regarding wastewater disposal system are met. *Summit Associates*, #4C0307 (10/18/78). [EB #90]
- * Condominium project will not violate Criterion 1(B). *Domestic Capital Corporation*, #8B0042 (10/21/73). [EB #41]
- * Commercial shopping center conforms with Criterion 1 regarding sewage disposal and surface drainage. *Justgold Holding Corporation*, #1R0048 (7/19/73). [EB #31]

- * Townhouses will not cause undue water pollution because town agrees to allow discharge of sewage into sewer system. *Skokemo, Inc.*, #2S0097 (3/19/73). [EB #29]
- * Mixed commercial / residential development did not carry burden of proof under Criterion 1(B). *Land/Tech Corporation*, #100036 (2/20/73). [EB #58]
- * Proposed improvements to land are consistent with Act 250 subject to permit conditions regarding reasonable precautions against ground and surface water contamination. *Vermont Railway, Inc.*, #300004 (11/5/70). [EB #2]
- * Where proposed project's berm would actually reduce surface water runoff to neighboring property, project does not violate Criterion 1(B). *Pizzagalli Properties, LLC Mountain View Park SD Act 250*, No. 114-8-12 Vtec at 5-6 (4/17/13).

626. Criterion 1(C) - Water Conservation

- * Snowmaking water withdrawal project from reservoir involves direct relationship between water conservation under Criterion 1(C) and the water and shoreline values protected under Criterion 1(F). *Killington Ltd., Farm and Wilderness Foundation, and Dep't of Forests, Parks, and Recreation*, #1R0813-5-EB (8/25/98). [EB #697]
- * Snowmaking operation uses water conservation measures which maximize snowmaking coverage thereby ensuring water conservation and maximizes system efficiency through water-recapture and multiple use/recycling system; snowmaking equipment will be upgraded upon availability of better technology. *Killington Ltd., Farm and Wilderness Foundation, and Dep't of Forests, Parks, and Recreation*, #1R0813-5-EB (8/25/98). [EB #697]
- * Project will comply with Criterion 1(C) where it utilizes 1.5 gallon per flush toilets which are technically feasible. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]
- * Agreement to require by covenant the use of water conserving plumbing fixtures satisfies Criterion 1(C). *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82). [EB #172]

627. Criterion 1(D) - Floodways

- * "The plain language of the statute states that the Secretary of ANR is authorized to make determinations as to what constitutes a floodway or a floodway fringe." *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 12 (6/26/03), affirming *Re: Woodford Packers, Inc., d/b/a WPI*, #8B0542-EB, FCO (10/5/01), *motion to alter denied*, MOD (12/20/01)[EB #774] (ANR Secretary determines what are Criterion 1(D) floodways and floodway fringes, either by traditional means of relying on FEMA's National Flood Insurance Rate Map or by analysis of fluvial geomorphology).
- * ANR's decision to utilize fluvial geomorphology to determine the presence of a floodway did not constitute the creation of a rule consisting of an "agency statement of general applicability which implements, interprets, or prescribes law or policy." 3 V.S.A. § 801(b)(9); *In re Woodford Packers*,

Inc., 2003 VT 60 ¶ 15 (6/26/03).

* Assuming arguendo, that WPI relied on the representations of an ANR employee that the proposed project was not located in the floodway or floodway fringe when using the Federal Emergency Agency (FEMA) National Flood Insurance Program (NFIP) maps, ANR was not foreclosed from presenting evidence on appeal regarding the inadequacy of the NFIP maps to support a finding that the site would be free from flood hazards. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 7 (6/26/03).

* Road improvements do not restrict or divert the flow of flood waters, where improvements result in increased runoff during storm event but no difference to peak discharge to receiving stream. *Howe Center Limited*, #1R0770-EB (5/4/95). [EB #614]

* Although located in a floodway, project will not restrict or divert floodwater flow in violation of Criterion 1(D). *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

* Marina will not create a public hazard as to seasonal flooding where all permanent structures will be located at least one foot above historic high-water line. *John Roach*, #6G0220-EB (6/3/81). [EB #136]

* Motel construction within floodway fringe will not significantly increase peak discharge of the river during flooding. *Ralph Devereaux & Paul M. Aiken*, #7R0364 (11/16/77). [EB #85]

*Under the specific facts of this case, we find that denying Cross-Appellant the opportunity to seek party status under Criterion 1(D) would be a manifest injustice. We place particular weight on the facts that (1) Cross-Appellant appeared before the Commission pro se; (2) the Commission considered the Project under Criterion 1(D) on its own motion and permitted Cross-Appellant to participate and offer evidence under Criterion 1(D) in the proceeding below; and (3) Cross-Appellant's concerns with the Project revolve almost exclusively around its effect on flooding on her property, a protected concern under Criterion 1(D). *In re Union Bank*, 7-1-12 Vtec at 6 (4-1-13).

*Cross-Appellant has sufficiently particularized interest under Criterion 1(D) because Cross-Appellant owns property adjoining the Project site and her interest in preventing additional flooding on her property is particular to her. *In re Union Bank*, 7-1-12 Vtec at 8 (4-1-13).

*The Project satisfies Criterion 1(D) as the Project will not restrict or divert the flow of flood waters, will not significantly increase the peak discharge of the river, and will not endanger the health, safety and welfare of the public or riparian owners during flooding. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 13 (2/14/14).

* Supreme Court applied ANR's definition and find that Korrow's project was within the "floodway" under 10 V.S.A. § 6001(6), thereby triggering analysis of project compliance with Act 250 Criterion 1 (D). *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 26 (April 13, 2018).

- * Supreme Court upheld lower court's finding that project complied with Criterion 1(D) (even though the court erroneously found that the project was located outside the "floodway") due to sufficient evidence presented at trial that the project would not restrict or divert floodwater movement in a manner that would endanger others. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 28 (April 13, 2018).
- * "For the Korrow project to remain as developed, compliance with Criterion 1(D) is not enough; if this project is within a shoreline, the project must also comply with Criterion 1(F), which regulates development within shorelines." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 30 (April 13, 2018).
- * ANR has specific statutory authority to determine the area comprising a "floodway" or "floodway fringe" pursuant to 10 V.S.A. § 6001(6) and (7), and thus whether a project falls within those areas. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 19 (April 13, 2018).
- * ANR guidelines permit ANR to expand the scope of the Act 250 definition of "floodway" to align with the fluvial erosion hazard (FEH) area for compliance with Criterion 1(D)--even if the FEH area is broader than the NFIP or FEMA measurements. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 11 (April 13, 2018).
- * An applicant for an Act 250 permit bears the burden of proving compliance with both Criteria 1 (D) and 1(F). *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 4 (April 13, 2018).
- * Criteria 1(D) and 1(F) attempt to protect Vermonters from the hazards of flooding and erosion and preserve the scenic and recreational features of Vermont rivers and shorelines. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 4 (April 13, 2018).

628. Criterion 1(E) - Streams

- * Act 250 criterion 1(E) directs that a proposed project must be shown to "whenever feasible, maintain the natural condition of the stream[s on or adjacent to the project], and . . . not endanger the health, safety, or welfare of the public or of adjoining land owners." 10 V.S.A. § 6086(a)(1)(E). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 23 (3/25/10).
- * "Stream" is defined as "a current of water which is above an elevation of 1,500 feet above sea level or which flows at any time at a rate of less than 1.5 cubic feet per second." 10 V.S.A. § 6001(18); *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 7 (11/16/04) [EB#850]
- * Sediment dredged to restore artificial pond to natural wetland must be stored beyond riparian buffer to comply with Criteria 1(B), 1(E) and 4. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 25 (12/31/02). [EB#800]
- * Values protected by Act 250, specifically Criterion 1(E) Streams, are not compromised by postponing filing of a final snowmaking needs and alternative analysis closer in time to new or alternate snowmaking activities. *Pico Peak Ski Resort, Inc.*, # 1R0265-12-EB, MOD (4/18/02). [EB #622]

* Appellant barred from alleging excessive chloride and phosphorus in stormwater runoff under Criteria 1, 1(B) and 1(E) because Act 250 application vested in the same regulations as the stormwater application, which did not regulate chloride and phosphorus at the time of filing the application. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 4 (2/8/2018)*.

* Court grants motion to dismiss questions under Crit 1, 1(B) and 1(E) to the extent they address chloride and phosphorus in stormwater runoff because Act 250 permit vests in the same regulatory scheme that previously did not regulate chloride and phosphorus in stormwater. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 5 (2/8/2018)*.

* Court limits question of whether Project violates Vermont Groundwater Protection Rule by discharging chloride into groundwater to non-stormwater-based chloride impacts under Criterion 1(B), because the Project vests in the regulatory scheme that did not include specific limitations for chloride. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 5 (2/8/2018)*.

628.1 Presumptions (compliance with other permits) (see [204.1](#))

* Opponents failed to rebut presumption created by discharge and wastewater permits despite Board's disapproval of ANR's use of draft procedure in issuing permits. *St. Albans Group and Wal*Mart Stores, Inc., #6F0471-EB (Altered) (6/27/95), aff'd, In re St. Albans Group and Wal*Mart Stores, Inc., 167 Vt. 75 (1997)*. [EB #598R2]

* When applicant submits [DEC] certification of compliance which creates presumption that waste disposal system would not cause undue water pollution, but opponents introduce expert evidence casting doubt on presumption, burden shifts to applicant to establish that undue water pollution will not result. *Houston Farms Associates, #5L0775-EB (4/27/87)*. [EB #260]

* "Where a permittee offers a DEC permit as proof that a proposed project complies with an Act 250 criterion, it might make sense to condition the Act 250 permit on compliance with the terms of that DEC permit." *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 9 (2/8/2018)*.

* "An applicant can create a presumption of compliance with Criteria 1 and 1(B) by presenting a relevant DEC permit." 10 V.S.A. § 6086(d); Act 250 Rule 19(E). *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 8 (2/8/2018)*.

* The DEC permit is a shorthand way of showing that the project complies with underlying DEC regulations, thus complying with Criteria 1 and 1(B). *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 8 (2/8/2018)*.

628.2 Burden of Proof

* The burden of proof is on the applicant under Criterion 1(E). 10 V.S.A. § 6088(a). *Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB (Altered), FCO at 35 (11/4/05), aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC, 2008 VT 7 (Vt. S. Ct.); Re: George Huntington,*

#3R0279-1 (Altered)-EB, FCO at 7 (11/16/04) [EB#850]

* Applicants have burden of proof to demonstrate consideration of "all reasonable alternatives" which would allow streams to remain in their natural condition. *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 7 (11/16/04) [EB#850]; *Mark and Pauline Kisiel*, #5W1270-EB (8/7/98, *rev'd on other grounds*, *In re Kisiel*, 172 Vt. 124 (2000) [EB # 695], citing *Re: Okemo Mountain, Inc.*, #2S0351-12A-EB, Findings of Fact, Conclusions of Law, and Order (Revised) at 14 (Jul. 23, 1992); *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680].

* When applicant submits [DEC] certification of compliance which creates presumption that waste disposal system would not cause undue water pollution, but opponents introduce expert evidence casting doubt on presumption, burden shifts to applicant to establish that undue water pollution will not result. *Houston Farms Associates*, #5L0775-EB (4/27/87). [EB #260]

628.3 Elements of criterion

* Applicant must demonstrate "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." 10 V.S.A. § 6086(a)(1)(E); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 35 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 7 (11/16/04) [EB#850]; *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 71 (12/8/00).

628.3.1 Maintaining stream's natural condition

* While placement of trash racks and rip-rap to ensure culverts will not be blocked and cause downstream flooding does not maintain stream's natural condition, condition had already been altered by earlier permit allowing placement of culverts. *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 10 n.2 (11/16/04) [EB#850]

* Given prior alterations, it is impossible to determine stream's natural condition. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 38. (8/20/01). [EB #766]

* Plans to relocate stream and install gravel base, riffles, gentle curves, and shade plants could improve aquatic habitat. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB, FCO at 38 (8/20/01) [EB #766]

* Quarry maintains stream's natural condition and will not endanger the health, safety, or welfare of public or adjoining where activities do not take place on or adjacent to tributary banks and receiving waters have capacity to assimilate flow from quarry. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 71 (12/8/00). [EB# 739].

- * Ground water collection system will maintain stream's natural condition where project's design includes vegetative cover between treatment facility and stream, where an outflow structure that discharges the water flows over a stone apron before entering stream and where erosion control measures are utilized. *Re: Unifirst Corporation and Williamstown School District, #5R0072-2-EB, FCO (Altered) at 20 (7/20/00).* [EB #696].
- * Reservoir drawdown could be detrimental to downstream river's natural condition, so natural flow regime below reservoir's dam must be protected by permit conditions. *Killington Ltd., Farm and Wilderness Foundation, and Dep't of Forests, Parks, and Recreation, #1R0813-5-EB (8/25/98).* [EB #697]
- * Project would not maintain streams' natural conditions; applicants could have implemented more specific erosion controls during construction and after project's completion, and designed project to have less impact on streams by minimizing construction of roads, driveways, and houses in close proximity to streams. *Mark and Pauline Kisiel, #5W1270-EB (8/7/98), rev'd on other grounds, In re Kisiel, 172 Vt. 124 (2000).* [EB # 695]
- * Project was denied where it would result in additional non-point source pollution to already impaired river. *Town of Stowe, #100035-9-EB (5/22/98).* [EB #680].
- * Road improvements did not alter the natural condition of adjacent stream despite stabilization of the streambank slopes, and seeding and mulching of adjacent areas. *Howe Center Limited, #1R0770-EB (5/4/95).* [EB #614].
- * Water withdrawal will not maintain river's natural condition where habitat will be lost. *Okemo Mountain, Inc., #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92).* [EB #471R]
- * Fact that river has already been degraded does not justify further degradation; if anything, it justifies greater degree of protection. *Okemo Mountain, Inc., #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92).* [EB #471R]
- * Allowing reduction in minimum downstream flow to a level which is a natural flow condition to which river's aquatic biota has adapted provides reasonable level of protection for habitat in river. *Okemo Mountain, Inc., #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92).* [EB #471R]
- * To comply with Criteria 1(E) and 4, several erosion control measures are required, which shall, wherever feasible, maintain the natural condition of the stream. *LTH Associates, #4C0526-5-EB (1/27/88).* [EB #358]
- * Concentration of nitrate and phosphorous discharging from leachfield into river will not cause any degradation of river by outbreak of algae bloom. *Houston Farms Associates, #5L0775-EB (4/27/87).* [EB #260]

* Road construction will minimize disturbance to stream and therefore will not result in undue water pollution. *Agency of Transportation (Vermont Route 64)*, #5W0653-EB (5/23/84). [EB #218].

* Subdivision project does not satisfy Act 250 because plans for roads do not maintain natural condition of streams. *Peter Guille, Jr.*, #2W0383-EB (3/18/80). [EB #97]

628.3.2 Endangering public/adjoining landowner health, safety, or welfare

* Where discharge will improve stream's natural condition (since discharge complies with VWQS and is less contaminated than existing substandard groundwater), and where erosion control measures are included, proposed groundwater collection system will not endanger public's or adjoining's health, safety, or welfare. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 20 (7/20/00). [EB #696]

* Project complies with Criterion 1(E) where such project includes an outfall built on a brook and which will discharge storm water runoff into that brook if the location of the outfall on the bank was lowered to make it less visible. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]

* Applicants have not met burden to demonstrate that project will not endanger public health, safety, or welfare. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

* Project design protects wetland area from runoff and erosion, stream's natural condition is maintained and public's health, safety, and welfare is not endangered. *Colchester Hotel Group*, #4C0288-14-EB (4/21/88). [EB#372]

*VTR met its burden of party status for criterion 1(E) by claiming that the project may lead to risk of a washout of the rail line and by supporting this claim with a threshold showing, including exhibits and proposed testimony of three employees. *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec at 3 (E.O on Mot. to Alter) (11/14/12).

629. Criterion 1(F) - Shorelines

* In order to develop on a shoreline, Act 250 requires the applicant to prove that the proposed project "must of necessity be located on a shoreline in order to fulfill the purpose of the development." 10 V.S.A. § 6086 (a)(1)(F); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 18 (6/26/03).

* Criterion 1(F) protects shorelands "in their natural condition" when encroached upon by development. 10 V.S.A. § 6086(a)(1)(F). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 23 (3/25/10).

* Under Criterion 1(F), Board conducts two-step inquiry: first, whether project must "of necessity"

be located on a shoreline to fulfill its purpose; second, if so, whether project will, insofar as possible and reasonable in light of its purpose, satisfy Criterion 1(F)(i) - (iv). *Killington Ltd., Farm and Wilderness Foundation, and Dep't of Forests, Parks, and Recreation*, #1R0813-5-EB (8/25/98). [EB #697]

* Possible and reasonable measures may be required to protect shoreline. *Killington Ltd., Farm and Wilderness Foundation, and Dep't of Forests, Parks, and Recreation*, #1R0813-5-EB (8/25/98). [EB #697].

* An applicant for an Act 250 permit bears the burden of proving compliance with both Criteria 1 (D) and 1(F). *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 4 (April 13, 2018).

* Criteria 1(D) and 1(F) attempt to protect Vermonters from the hazards of flooding and erosion and preserve the scenic and recreational features of Vermont rivers and shorelines. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 4 (April 13, 2018).

629.1 "Shoreline" defined

* An analysis of Criterion 9(F) begins with a determination as to whether the Project is on a "shoreline." *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 20 (11/24/04) [EB #838]

* Act 250 defines "shoreline" as "the land adjacent to the waters of lakes, ponds, reservoirs and rivers. Shorelines shall include the land between the mean high water mark and the mean low water mark of such surface waters." 10 V.S.A. § 6001(17); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 18 (6/26/03); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 20 (11/24/04) [EB #838]

* A project involves the "development or subdivision of shorelines," if one, or both, of the following two questions is answered affirmatively: a. does the project involve construction on or the use of "the land between the mean high water mark and the mean low water mark of such surface waters?" 10 V.S.A. § 6001(17); or b. does the project, or an element of it, have the potential to adversely affect the values which Criterion 1(F) seeks to protect, as stated in the criterion's four subcriteria: maintenance of the shoreline and the waters in their natural condition, continuing access to the waters and their recreational opportunities; the retention of vegetation for aesthetic purposes, and bank stabilization to prevent erosion? *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 23, and see cases cited at 20 - 22 (11/24/04) [EB #838]

* Because the purpose of Criterion 1(F) - to protect shorelines - is not served by imposing restrictions on portions of a project tract not adjacent to the river, Board will only apply the Criterion 1(F) test to those components of a project that it determines are on the shoreline. *West River Acres, Inc., et al.* #2W1053-EB, FCO at 12 (7/16/04)[EB #832].

* Given the moderately sloping meadow towards the top of the river bank, the shoreline extends beyond the high water mark and includes the land immediately adjacent to the top of the river

bank; swimming access area, canoe access area, and carriage-driving training area are within the shoreline for purposes of Criterion 1(F). *West River Acres, Inc., et al.* #2W1053-EB, FCO at 12 (7/16/04) [EB #832].

* Shorelines are not limited to the area located between the mean high water mark and the mean low water mark of such surface waters, but rather, may include lands that are adjacent to and a considerable distance from the water body itself. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, FCO at 15 (5/18/01). [EB #765], citing *S.G. Phillips Corporation*, DR #152, FCO (6/13/84); *Re: Mill Lane Development Co., Inc.*, #2W0942-2-EB, FCO (12/17/99); *Re: Bernard and Suzanne Carrier*, #7R0639-EB, FCO (10/5/90).

* Project is located on "shoreline" of a river where project is located at top of river bank immediately adjacent to water of the river and also located within floodplain of river. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, FCO at 15 (5/18/01). [EB #765]

* Project is located on "shoreline" where intervening 100-200' wide strip of land owned by third party lies between project boundary and reservoir shoreline. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99) [EB #726]

* Where lot lines will end between 75 and 100 feet from river, but nothing prevents lot owners from using buffer strip retained by applicants, such buffer strip must be considered involved land for Criterion 1(F) purposes and project will be located on a shoreline. *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB #474]

* "Whether the Korrow project is on a 'shoreline' [for the purposes of Criterion 1(F)] is a finding of fact that this Court reviews for clear error. The lower court's determination will stand unless there is "no credible evidence that a reasonable person would rely upon to support the conclusion." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 33 (April 13, 2018), citing *Zaremba Group Act 250 Permit*, 2015 VT 88, ¶ 6.

* Criterion 1(F) requires the Environmental Division to "make its own determination that a development need be located on the shoreline." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 41 (April 13, 2018), Quoting *In re McShinsky*, 153 Vt. 586, 591, 572 A.2d 916, 919 (1990).

* Supreme Court reversed lower court's finding that project complied with Criterion 1(F), due to insufficiency of lower court's analysis of the terms "adjacent," "shoreline," and whether the project necessarily needed to be located on the shoreline. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 42 (April 13, 2018).

629.2 Elements of criterion

629.2.1

"Of necessity"

* No error where Board's emphasis on the "threshold question" of whether the project must "of necessity" be located on a shoreline to fulfill its purpose application represented a change in the Board's interpretation of the statute. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 20 (6/26/03).

* We find no error in the Board's consideration of whether a project's shoreline location "serves an integral part of the developmental scheme." *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 20 (6/26/03).

* "We have previously held that criterion 1(F) requires that the Board make its own determination that a development need be located on a shoreline . . ." *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 20 (6/26/03), citing *In re McShinsky*, 153 Vt. 586, 591 (1990).

* Board reasonably concluded, on the facts before it, that the applicant's laudable objective of providing walking paths and other facilities to meet the needs of the project's residents was not so integral to the developmental scheme to "of necessity" require location on a shoreline. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 20 (6/26/03).

* Under 10 V.S.A. § 6086(a)(1)(F), Board did not address whether plaintiffs had shown that the development needed to be located on a shoreline. *In re McShinsky*, 153 Vt. 586, 589-90 (1990).

* The phrase, in 10 V.S.A. § 6086(a)(1)(F), "insofar as possible and reasonable in light of its purpose" does not mean that the Board must accept every proposed shoreline development project, regardless of its purpose and impact on the shoreline, merely because the applicant is doing what he or she feels is possible or reasonable. *In re McShinsky*, 153 Vt. 586, 591 (1990).

* Paths, seasonal deck, and contemplation room are on the shoreline and satisfy the "of necessity test" because they must be in close proximity to "living water" for permittee to practice its religion. *Re: Alodium Church*, #3W0637-5-EB, FCO at 7 (6/23/05).

* Swimming and canoeing access areas are "of necessity" located on a shoreline because they are water dependent activities; but carriage training area is not water-dependent and does not require proximity to the shoreline. *West River Acres, Inc., et al.* #2W1053-EB, FCO at 13 (7/16/04) [EB #832].

* Threshold question is whether project must "of necessity" be located on the shoreline to fulfill its purpose. *Re: Woodford Packers, Inc., d/b/a WPI*, #8B0542-EB, FCO at 24 (10/5/01), *motion to alter denied*, MOD on Motion to Alter (12/20/01), *aff'd In re Woodford Packers, Inc.*, 2003 VT 60 (6/26/03) [EB #774]; *Re: Pathway Ministries, Ltd. and Charles L. Rubner*, #5W1336-EB, FCO at 8 (6/2/00); *Re: Mill Lane Development Co., Inc.*, #2W0942-EB (12/19/99) and *Re: Town of Barre*, #5W1167-EB, FCO at 16-18 (6/2/94).

* Phrase "of necessity" is not a soft requirement lending to compromise; plain meaning of these words requires a finding beyond the fact that project's purpose in locating on the shore is simply desirable; Board must consider whether project's location on shoreline serves as an integral part of developmental scheme. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, FCO at 16 (5/18/01). [EB #765], overruling, by implication, *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (8/14/97). [EB #666]

* Question of necessity is a factual question: first, project's purpose is determined; second, Board

considers whether a project will satisfy its purpose. If a project does not satisfy its purpose, then reasonable alternatives to a project will be identified. *Re: Pathway Ministries, Ltd. and Charles L. Rubner, #5W1336-EB, FCO at 8 (6/2/00) Killington Ltd., Farm and Wilderness Foundation, and Dep't of Forests, Parks, and Recreation, #1R0813-5-EB (8/25/98).* [EB #697]

* Where Board had previously concluded that purpose of subdivision was for landowners to enjoy pleasures of living on a shoreline and, therefore, subdivision of necessity must be located on shoreline to fulfill its purpose, this "necessity" determination was not altered when applicants later submitted proposal that limited development to three of the original nine lots. *Bernard and Suzanne Carrier, #7R0639-EB (Reconsideration) (8/14/97).* [EB #666]

* When reasonable alternatives exist, construction of new bridge and subsequent extensive alteration to a shoreline area is not necessary. *Town of Barre, #5W1167-EB (6/2/94).* [EB #589]

629.2.2 Subcriteria

* Board need not design an adequate project for an applicant or issue a permit and retain oversight to assure that the applicant is doing all that is "reasonable and possible" to meet the relevant subcriteria of 10 V.S.A.

§ 6086(a)(1)(F). *In re McShinsky, 153 Vt. 586, 591 (1990).*

* Determination of "reasonableness" under Criterion 1(F) involves a balancing of effect on resource resulting from project with applicant's need to affect resource in order to fulfill purpose of project. *Okemo Mountain, Inc., #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92).* [EB #471R]

629.2.2.1 1(F)(i): retain shoreline's natural condition

* Project does not retain shoreline and waters in their natural condition where fill and construction is proposed in floodplain and rip-rap will be added to river banks. *Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, FCO at 17 (5/18/01).* [EB #765]

* Where insufficient information was provided that lake's shoreline and water will be retained in natural condition, or that bank will be stabilized from erosion, compliance with Criterion 1(F) has not been demonstrated. *Upper Valley Regional Landfill, #3R0609-EB (revised 11/12/91; previous version 7/26/91).* [EB #453R]

* Applicants failed to demonstrate that, insofar as possible and reasonable in light of its purpose, proposed residential subdivision would retain water's natural condition and would retain or provide screening vegetation. *Bernard & Suzanne Carrier, #7R0639-EB (10/5/90).* [EB #435]

* Sand and gravel extraction project will not retain shoreline in its natural condition and will interfere with continued public access to and enjoyment of river. *H.A. Manosh, #5L0918-EB (8/8/88).* [EB #359]

* To satisfy Criteria 1(F)(i) and 8 regarding visual impacts, the permit for a shorefront subdivision will

contain conditions limiting construction and tree removal. *J. Graham Goldsmith*, #4C0685-EB(10/8/87). [EB #341]

* A marina built to preserve as much of the natural shoreline as possible satisfies Criterion 1(F). *John Roach*, #6G0220-EB (6/3/81). [EB #136]

629.2.2.2 1(F)(ii): access to water and recreational opportunities

*Where no public access currently exists on project parcel, then none should be created or required by Act 250 process. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, FCO at 18 (5/18/01). [EB #765]

* Under Criterion 1(F)(ii), applicant need not "create" public access to lake where the particular area affected was never used by the public, but under Act 250 he cannot restrict an already existing access. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99) [EB #726].

* Snowmaking water withdrawal would not impede continued access to reservoir's waters and recreational opportunities. *Killington Ltd., Farm and Wilderness Foundation, and Dep't of Forests, Parks, and Recreation*, #1R0813-5-EB (8/25/98). [EB #697]

* Project satisfies Criterion 1(F) where no construction will occur within buffer area, trees will be planted to better screen project from river, bank will be stabilized from erosion, as necessary, with vegetative cover, and continued access to the waters will be provided. *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB #474].

* Proposed residential subdivision complied with Criterion 1(F) where access to shoreline would be ensured. *Clearwater Realty & Agency of Transportation*, #4C0712-EB (5/10/89). [EB #385]

* Sand and gravel extraction project will not retain shoreline in its natural condition and will interfere with continued public access to and enjoyment of river. *H.A. Manosh*, #5L0918-EB (8/8/88). [EB #359]

629.2.2.3 1(F)(iii): retain vegetation to screen from waters

* Project does not retain or provide vegetation which will screen project from waters where foliage will be missing during winter months and project will be visible during periods of high water. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, FCO at 19 (5/18/01). [EB #765]

* Snowmaking water withdrawal would result in only selective or limited removal of vegetation, and shoreline's shape and slope would not be altered. *Killington Ltd., Farm and Wilderness Foundation, and Dep't of Forests, Parks, and Recreation*, #1R0813-5-EB (8/25/98). [EB #697]

* Permit conditions requiring planting of additional trees in accordance with revegetation plan before sale of lots addressed Criteria 1(F) and 8 deficiencies. *Bernard and Suzanne Carrier*,

#7R0639-EB (Reconsideration) (8/14/97). [EB #666]

* Project satisfies Criterion 1(F) where no construction will occur within buffer area, trees will be planted to better screen project from river, bank will be stabilized from erosion, as necessary, with vegetative cover, and continued access to the waters will be provided. *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB #474]

* Applicants failed to demonstrate that, insofar as possible and reasonable in light of its purpose, proposed residential subdivision would retain water's natural condition and would retain or provide screening vegetation. *Bernard & Suzanne Carrier*, #7R0639-EB (10/5/90). [EB #435]

* Existing vegetation by shoreline White River would not adequately screen the project from the river; foot traffic may damage vegetation along the banks and cause erosion. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff'd, In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348]

* To satisfy Criteria 1(F) and 8 regarding visual impacts, shorefront subdivision permit requires certain cutting to be pre-approved by Commission and that no trees over 4" caliper be removed; construction within 200 feet of shoreline is also prohibited. *J. Graham Goldsmith*, #4C0685-EB(10/8/87). [EB #341]

629.2.2.4 1(F)(iv): stabilize bank from erosion

* Project with a vegetated buffer which is too narrow to protect against erosion does not stabilize bank from erosion. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, FCO at 19 (5/18/01). [EB #765]

* Where insufficient information was provided that lake's shoreline and water will be retained in natural condition, or that bank will be stabilized from erosion, compliance with Criterion 1(F) has not been demonstrated. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Project satisfies Criterion 1(F) where no construction will occur within buffer area, trees will be planted to better screen project from river, bank will be stabilized from erosion, as necessary, with vegetative cover, and continued access to the waters will be provided. *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB #474].

* Existing vegetation by shoreline White River would not adequately screen the project from the river; foot traffic may damage vegetation along the banks and cause erosion. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff'd, In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348]

630. Criterion 1(G) - Wetlands

630.1 "Significant" wetlands

* Criterion 1(G) protects only those wetlands that have been designated Class I and II wetlands under Vermont Wetland Rules. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 36 n.2 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 4 n.1 (7/10/03) [EB #831]; *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 72 (12/8/00)[EB# 739]; *Mark and Pauline Kisiel*, #5W1270-EB (8/7/98), *rev'd on other grounds, In re Kisiel*, 172 Vt. 124 (2000). [EB # 695]

630.2 Presumptions (compliance with other permits) (see [204.1](#))

* Only conditional use determinations with respect to uses in Class One or Two wetlands are afforded a presumption under criterion 1(G). *In re Costco Act 250 Permit Amendment*, #143-7-09 Vtec, Entry Order at 2 (10/14/09).

* CUD is entitled to a rebuttable presumption, and ANR's determinations regarding protected functions of wetland are technical determinations entitled to substantial deference under the statute. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 23 (12/31/2002). [EB#800]

* Presumption created by DEC conditional use determination (CUD) for wetland not rebutted. *Nile and Julie Dupstadt*, #4C1013-EB (4/30/99). [EB #716]

* DEC's conditional use determination issued under Vermont Wetlands Rules did not create presumption of compliance with Criterion 1(G), but is considered evidence of compliance. *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd, In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]

630.3 Cases

* With respect to Criterion 1(G), after the applicant meets the burden of production by showing compliance with regulations and presenting receipt of agency determinations, the burden shifts to the opposing party to present credible evidence that the agency determination is incorrect. *Re: Route 103 Quarry (Carrara)*, No. 205-10-05 Vtec, Decision at 18 (11/22/06), *aff'd, In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008).

* Stipulated facts insufficient for Board to determine whether project would comply with Criterion 1(G) without a condition requiring relocation of recreational trail away from wetland complex. *Re: Department of Forests, Parks and Recreation (Phen Basin)*, #5W0905-7-EB, MOD at 8-10 (7/15/04). [EB#840]

* Class II wetland located on south side of road connected to wetland on north side of road via a culvert means north side wetland is also a Class II wetland. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]

* Criteria 1(B), 4, and 8 apply to wetlands because particular values of the wetlands that are addressed under the criteria may be affected. *FinardZamias Associates*, #1R0661-EB (3/28/90). [EB

#459M1]

* Criterion 1(G) need not be applied to project where wetland will be reviewed under other criteria with respect to wetlands and where other equitable factors, such as permittee's reliance on statutory scheme, favor not applying wetland rules to project. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

C. Criterion 2 - Sufficient Water Available

641. General

* Criterion 2, "Water Supply," is considered in conjunction with Criterion 3, "Impact on Existing Water Supplies," which "specifically addresses whether a development will cause an unreasonable burden on neighboring water supplies." *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 18 (2008).

* Criterion 2 asks whether there is sufficient water supply available "for the reasonably foreseeable needs of the" project; the latter prohibits the project from having "an unreasonable burden on an existing water supply." 10 V.S.A. §§ 6086(a)(2)–(3). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 26 (3/25/10).

* Act 250 review includes both impacts during construction and impacts from project's use, including the availability of water during use. *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]

* Before issuing a permit, the Board must find that the Project has sufficient water available for the reasonably foreseeable needs of the subdivision or development. 10 V.S.A. § 6086(a)(2). *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 33 (6/07/05) [EB #853]

* Criterion 2 does not directly protect the interest of a development's neighbor to have sufficient water, but specifies that the development should have sufficient water for the development's needs. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 9 (3/13/13).

641.1 "Sufficient"

* Criterion 2's reference to "sufficient" refers to quality and quantity of water appropriate to serve project's purpose. *Vermont Division of Buildings*, #8B0318-EB (11/14/84). [EB #222]

641.2 Presumptions (compliance with other permits) (see [204.1](#))

* Automobile dealership complied with Criterion 2 where presumption created by subdivision and waste water permits was not rebutted. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]

* Discharge, wastewater disposal, and subdivision permits create presumption that project complies with Criteria 1(B) and 2. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO).

[EB #486]

* Approval of project's water system demonstrates adequate potable and emergency water supplies; projected water usage will not burden existing city supply. *Raymond Duff*, #5W0921-2R-EB (Revised) (6/14/91). [EB #436]

* Health Department permit triggers presumption that sufficient supply of potable water is available, and where such presumption was not rebutted, the Board must presume that Criterion 2 is met with regard to availability of drinking water. *Raymond Duff*, #5W0921-2R-EB (12/29/89). [EB #436M1]

* Since Health Department permit does not include provision of water for fire control Board cannot rule that Criterion 2 is completely met. *Raymond Duff*, #5W0921-2R-EB (12/29/89). [EB #436M1]

641.3 Cases

* Criteria 2 and 3 met where Applicant proposed two stage detention pond with final annual recharge of over 1,000,000 gallons and EC found persuasive testimony of Applicant's expert that, during his many years of experience concerning quarries and conformance with Act 250 criterion 3, he has not identified a quarry with isolation distances and operational designs similar to the Rivers quarry that has impacted a neighboring well. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 27 (3/25/10).

* Quarry project will have sufficient water available based on proposed recycling practice and hydrologist's calculations. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 73 (12/8/00). [EB# 739]. Accord, *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 33 (6/07/05) [EB #853]

* Applicants addressed Criterion 2 deficiencies by substituting a lakewater fire protection system (which presented maintenance and freezing issues) with NFPA-standard sprinkler systems served by municipal water. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (8/14/97). [EB #666]

* Applicants fail to ensure that water supply system will be properly maintained and operated to provide sufficient water for project's reasonably foreseeable needs. *Bernard & Suzanne Carrier*, #7R0639-EB (10/5/90). [EB #435]

* Applicant's plan for changing water line connections in subdivision can occur with a minimum of disruption to appellant's water service if water line is hand-excavated in the area of appellant's water line and financial guarantees are posted. *Clearwater Realty & Agency of Transportation*, #4C0712-EB (5/10/89). [EB #385]

* Permittee's payments to city will ensure that sufficient water is available to the project. *Ran-Mar, Inc.*, #5W0933-3-EB (1/16/89). [EB #417]

* Project has sufficient water available for its foreseeable needs. *Domestic Capital Corporation*, #8B0042 (10/21/73). [EB #41]; *Justgold Holding Corporation*, #1R0048 (7/19/73). [EB #31]; *Palisades, Inc.*, #5W0164 (4/24/73). [EB #30]; *Brattleboro Development Credit Corporation*, #2W0101 (2/8/73). [EB #27]

642. Burden of Proof

* The burden of proof under Criterion 2 is on the applicant. 10 V.S.A. § 6088(a); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 33 (6/07/05) [EB #853]

D. Criterion 3 - Effect on Existing Water Supply

661. General

* Criterion 3 addresses impacts on water quantity, not quality. *Re: Waitsfield Public Water System*, No. 33-2-10 Vtec, Decision on the Merits at 9 (7/11/12); *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 9 (3/13/13) (citing *In re Pion Sand & Gravel Pit*, No.245-12-09 Vtec, slip op. at 7).

* The scope and concern of Criterion 3 is whether a proposed project “impacts on the ability to meet demand of neighboring wells or water sources.” *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 12 (7/2/10), citing *Re: Nile and Julie Dupstadt*, #4C1013 (Corrected)-EB, FCO at 2 (10/30/98) (quoting *Re: MBL Assocs.*, # 4C0948-EB (Altered), FCO at 28 (5/2/95); *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 9 (3/13/13).

* Before issuing a permit, the Board must find that the Project “[w]ill not cause an unreasonable burden on an existing water supply, if one is to be utilized.” 10 V.S.A. § 6086(a)(3). *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 33 (6/07/05) [EB #853]

* Criterion 3 addresses the “impacts on the ability to meet the demand of neighboring wells or water sources if those other wells or water sources share the same basic source of water such as an aquifer or common spring.” *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 33 - 34 (6/07/05) [EB #853], quoting *Re: McLean Enterprises, Inc.*, #2S1147-1-EB, FCO at 62 (11/24/04); *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 30-31 (12/21/00); *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 74 (12/8/00)[EB# 739]; *Re: MBL Associates*, #4C0948-EB, FCO at 28 (5/2/95). [EB #610]

* While one hundred years ago, the movement of groundwater was “so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to [it] would be involved in hopeless uncertainty, and would, therefore, be practically impossible,” fifty years later courts recognized a growing knowledge of groundwater science. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 34 (6/07/05) [EB #853], quoting *Houston & Texas Central Railway Co. v. East*, 81 S.W. 279, 281 (Tex. 1904), quoting *Frazier v. Brown*, 12 Ohio St. 294, 311 (Ohio 1861), and citing *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 805-06 (Tex. 1955) (Wilson, J., dissenting)

661.1 Presumptions (compliance with other permits) (see [204.1](#))

* Department of Health permit with respect to availability of potable water does not establish a presumption with respect to criterion 3. *Raymond Duff*, #5W0921-2R-EB (12/29/89). [EB #436M1]

*Certificate as to drilled wells, when obtained, will create a rebuttable presumption that a sufficient supply of potable water is available. *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82). [EB #172]

661.2 Cases

* Project complies with Criterion 3 where the applicant shows that there are no wells in an existing development that would be impacted by the proposed project. *Re: Waitsfield Public Water System*, No. 33-2-10 Vtec, Decision on the Merits at 9 (7/11/12).

* Criterion 3 satisfied where applicant received a Transient Non-Community Water System Source and Construction permit from ANR, the appellant failed to provide any evidence to overcome the substantial deference given to ANR technical determinations, and the imposed conditions satisfied the court that the project will not cause unreasonable burden on the appellant's or any other existing water supply. *In re Harvey & West 65-unit Campground*, 110-7-10 Vtec, Decision and Order at 10-12 (11-09-2011).

* Motion for summary judgment denied where neighbor's affidavit states that Project would prevent her from accessing her wells and contaminate her water supply, and refers to a study on the Project's impacts on her wells. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 11 (11/2/10).

* Evidence supports Environmental Court's conclusion that deepening a quarry would not have a significant impact on neighboring wells, where applicant's expert testified about pump tests indicating a negligible impact, and a hydrologist for the Agency of Natural Resources testified favorably on the method employed for the pump tests. *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 20 (2008).

* Criteria 2 and 3 met where Applicant proposed two stage detention pond with final annual recharge of over 1,000,000 gallons and EC found persuasive testimony of Applicant's expert that, during his many years of experience concerning quarries and conformance with Act 250 criterion 3, he has not identified a quarry with isolation distances and operational designs similar to the Rivers quarry that has impacted a neighboring well. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 27 (3/25/10).

* Based upon hydrologic evaluation and modeling, it appears that quarry will not adversely impact groundwater yield or quality in potential zone of interference; but, because there are some unknowns and there is the potential for minor source interference, permittee must monitor yield and water quality data, and Board imposed permit conditions to respond to possible future source interference. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 34 - 36 (6/07/05) [EB #853], following *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 73 & 74 (12/8/00). [EB# 739]

*"Unacceptable level of source interference" on existing water supplies is defined same as "unacceptable interference" in of Vermont Environmental Protection Rules § 11.6.3.1, Ch. 21, Water Supply Rule. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 74 (12/8/00). [EB# 739].

* Criterion 3 satisfied where capacity of opponents' up-gradient well far exceeded personal needs and where estimated demand in area was far below estimated regional water supply. *George, Mary, and Rene Boissoneault*, #6F0499-EB (1/29/98). [EB #678]

* Permit amendment granted under Criterion 3 where level of water use was substantially less than that previously permitted. *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB (12/18/97). [EB #682]

* Project complied with Criterion 3 because aquifer was sufficient to supply water to both project and surrounding residences. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]

* Criterion 3 will be satisfied because project will not affect any other users of the system. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]

* Where landfill creates an unreasonable burden on existing water supplies, in order to satisfy Criteria 3, landfill must construct water system with capacity to serve all properties with water that has or could become contaminated by landfill and must establish trust fund for continued operation and maintenance of water system. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Existing water supply will not be unreasonably burdened by residential subdivision project. *Raymond Duff*, #5W0921-2R-EB (Revised) (6/14/91); [EB #436]; *James Davenport, Jr. and Barbara Davenport*, #1R0667-EB (7/9/90). [EB #449]; *Okemo Mountain, Inc.*, #2S0351-8-EB (12/18/86). [EB #305]

* Applicants have not met burden to demonstrate that the proposed project will not endanger public health, safety, or welfare. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

* Mobile home park will not cause unreasonable burden on spring water supply to adjoining property. *Jerome and Juanita Reis*, #7C0157 (9/11/74). [EB #52]

* Construction of road and water / sewer main will not negatively impact existing water supply. *Brattleboro Development Credit Corporation*, #2W0101 (2/8/73). [EB # 27]

662. Burden of Proof

* The burden of proof under Criterion 3 is on the applicant. 10 V.S.A. § 6088(a). *Re: Pike Industries*,

Inc. and Inez M. Lemieux, #5R1415-EB, FCO at 34 (6/07/05) [EB #853]; *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 74 (12/8/00)[EB # 739].

E. Criterion 4 - Soil Erosion

681. General

* Where existing erosion would be exacerbated by the proposed development, the project failed to comply with criterion 4. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 21 (6/26/03).

* Under Criterion 4, applicant must demonstrate that the Project "[w]ill not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result." 10 V.S.A. § 6086(a)(4). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 28 (3/25/10); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 35 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 24 (11/24/04) [EB #838]; *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 7 (11/16/04) [EB#850]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 19-20 (5/4/04) [EB #831]

* Erosion control plans used to satisfy Criterion 4 must be site specific. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, FCO at 19 -20 (5/4/04) [EB #831]; *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 23 (12/31/02); *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 82 (2/22/02). [EB#778]; *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 28 (12/21/00); *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

681.1 Presumptions (compliance with other permits) (see [204.1](#))

* Applicant obtained an ANR Construction General Permit, which created a rebuttable presumption that the activities covered by the permit meet criterion 4. *In re Harvey & West 65-unit Campground*, 110-7-10 Vtec, Decision and Order at 9-10 (11-09-2011).

* DEC stormwater discharge permit establishes presumption that project has adequate permanent and temporary erosion control measures. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, FCO at 20 (5/4/04) [EB #831]; *Nile and Julie Dupstadt*, #4C1013-EB, FCO at 31 (4/30/99). [EB #716]

681.2 Cases

* Where existing erosion would be exacerbated by the proposed development, the project failed to comply with criterion 4. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 21 (6/26/03), affirming *Re: Woodford Packers, Inc., d/b/a WPI*, #8B0542-EB, FCO (10/5/01), *motion to alter denied*, MOD (12/20/01). [EB #774]

- * Criterion 4 met where Applicant's experts and consultants worked cooperatively with ANR to plan for erosion challenges. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 28 (3/25/10).
- * Permittees' comprehensive erosion control plan and stormwater treatment system will collect runoff and convey it into a micropool retention basin and discharge the runoff via a level spreader satisfies Criterion 4. *Re: CHA Butson Rutland, LLC and E. Paul Hood Inter Vivos Trust*, #1R0703-2-EB, FCO at 14 (6/1/05).
- * Quarry's site specific soil erosion control plan mandates that erosion control procedures conform to practices set out in the *Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites*; this, with further conditions, monitoring and reporting, will prevent unreasonable soil erosion or reduction in land's capacity to hold water. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 75 (12/8/00). [EB# 739].
- * Neither unreasonable soil erosion nor a reduction of land to hold water will occur where ground water collection system's construction and operation will use erosion control practices, maintain stream-side vegetation, impact less than 0.2 acres of Class III wetlands, comply with VWQS for wetland filling, and not require a conditional use determination under Vermont Wetland Rules. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 21 (7/20/00). [EB #696].
- * Project would cause unreasonable soil erosion so that an unhealthy condition may result. *Mark and Pauline Kisiel*, #5W1270-EB, (8/7/98), rev'd on other grounds, *In re Kisiel*, 172 Vt. 124 (2000). [EB # 695] (residential subdivision); *Bernard & Suzanne Carrier*, #7R0639-EB (10/5/90). [EB #435] residential subdivision on steep banks); *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366] (golf course and resort); *Peter Guille, Jr.*, #2W0383-EB (3/18/80). [EB #97] (subdivision and its roads); *Land/Tech Corporation*, #100036 (2/20/73). [EB #58] (mixed commercial / residential development).
- * Criterion 4 deficiencies addressed by implementation of standard erosion control measures during construction of improvements. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (8/14/97). [EB #666]
- * Permit condition prohibited installation of culvert that would exacerbate an existing environmental condition. *Okemo Realty*, #900033-2-EB (5/2/96). [EB #580]
- * Because of erosion control permit conditions, project will not cause unreasonable soil erosion. *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607]; *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]; *Twin State Sand & Gravel, Inc.*, #3W0711-EB (3/17/94). [EB #576]; *A. Judson Babcock*, #5W0401 (6/5/78). [EB #88]; *Palisades, Inc.*, #5W0164 (4/24/73). [EB #30]; *Central Vermont Public Service*, #800010 (7/30/71). [EB #9]
- * Applicant complies with Criterion 4 where it submitted drainage and erosion control plan. *John*

and Joyce Belter, #4C0643-6R-EB (5/28/91) [EB #474]; *Clearwater Realty & Agency of Transportation*, #4C0712-EB (5/10/89). [EB #385]; *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

* Where post-construction water flows leaving the site of a project will be at a lower rate than pre-construction, where all discharges at site will be adequately treated, and where permittee will undertake comprehensive measures to ensure that unreasonable soil erosion does not result, proposed project complies with Criterion 4. *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]

* Criteria 1(B), 4, and 8 apply to wetlands because particular values of the wetlands that are addressed under the criteria may be affected. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

* Project will not result in unreasonable soil erosion or a reduction in capacity of the land to hold water so that a dangerous or unhealthy condition may result. *Howe Center Limited*, #1R0770-EB (5/4/95). [EB #614] (road improvements which resulted in expanded road width and flatter side slopes down streambank); *Richard Provencher*, #8B0389-EB (10/19/88). [EB #354] (subdivision's road if properly constructed and maintained as proposed) *Landmark Development Corporation*, #4C0667-EB (7/9/87). [EB #320] (subdivision); *Nancy Lang, Claude Gagne, and the Brickyard Association*, #4C0255-2-EB (12/31/81). [EB #142] (relocation of condominium clusters with no further construction); *White Sands Realty Co.*, #3W0360 (10/19/81). [EB #156] (subdivision); *Donald A. Rivers*, #4C0136 (9/11/74). [EB #47] (gravel pit expansion); *Domestic Capital Corporation*, #8B0042 (10/21/73). [EB #41]; *Justgold Holding Corporation*, #1R0048 (7/19/73). [EB #31] (commercial shopping center); *Skokemo, Inc.*, #2S0097 (3/19/73). [EB #29] (townhouses)

* Soil erosion is not a significant problem caused by a landfill because of site's isolation from surrounding surface waters. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]

* Insufficient information to determine if project will result in unreasonable soil erosion and a reduction in the capacity of the land to hold water. *Wildlife Wonderland*, #1R0117 (10/17/74), *aff'd*, *In re Wildlife Wonderland*, 133 Vt. 507 (1975). [EB #45]; *Land/Tech Corporation*, #100036 (2/20/73). [EB #20]

682. Burden of Proof

* Applicant has the burden of proving that the proposed development will cause no unreasonable soil erosion and will cause no reduction in the capacity of the land to hold water. 10 V.S.A. § 6086(a)(4). *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975), citing 10 V.S.A. § 6088(a); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 35 (11/4/05), *aff'd* in part, *rev'd* in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 24 (11/24/04) [EB #838]; *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 7 (11/16/04) [EB#850]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 20 (5/4/04) [EB #831]

F. Criterion 5 - Traffic Congestion and Safety

701. General

* The Board's traffic requirements are limited to the context of Act 250. *In Re Wal-Mart Stores, Inc.*, 167 Vt. 75, 86 (1997).

* Under Criterion 5, Board or Commission must find that the subdivision or development "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and air ways, and other means of transportation existing or proposed." *In re Agency of Transportation*, 157 Vt. 203, 207 (1991), quoting 10 V.S.A. § 6086(a)(5); *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, Decision on Motion for Party Status at 7 (7/1/11); *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 36 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Susan Dollenmaier and Martha Dollenmaier Spoor*, #3W0125-5-EB, FCO at 8 (2/7/05); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 20 (5/4/04) [EB #831] *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28 (5/16/00) [WFP #38]

* Criterion 5 does not require that a proposed development be the principal cause or original source of traffic problems. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).

* Several causes may contribute to a particular effect or result. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).

* Criterion 5 concerns the impact a project may have on area highways and the traffic that flows over those highways, including whether a proposed project may exacerbate an already hazardous traffic situation. *In re Pilgrim Partnership*, 153 Vt. 594, 596–97 (1990), cited by *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10).

* Benefits which fluctuate with the changing currents of travel are not matters in which any individual has any vested right. *In re Great Eastern Building Co., Inc.*, 132 Vt. 610, 613 (1974).

* Environmental Court declines to consider possible future developments' impact on traffic in area where future developments not yet permitted, may occur at undetermined time in future, and Commission may impose additional traffic conditions upon future developments. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 40 (1/20/10).

* Where most of the evidence presented by Appellant on Criterion 5 was anecdotal in nature, and more often referred to possible disturbances to the tranquility that walkers, joggers and bicyclists enjoy than to particular traffic impacts, such concerns are more appropriately considered under Criterion 8. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 11 (2/15/08).

* Persons have no vested rights to have the traffic status quo always remain the same. *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 29 (5/16/00). [WFP #38]

- * State regulation of roads does not violate Commerce Clause, Equal Protection Clause or Supremacy Clause of US or Vermont Constitutions. *Re: OMYA. Inc. and Foster Brothers Farm. Inc., #9A0107-2-EB, FCO at 25-30 (5/25/99), aff'd, OMYA Inc. v. Town of Middlebury, No. 99-282 (7/26/00).*
- * Individual economic interests are not cognizable under either Criterion 5 or 9(K). *L & S Associates, #2W0434-8-EB (11/24/92). [EB #557M2]*
- * "Other means of transportation" includes traffic conditions on project driveways and internal roads. *Juster Development Co., #1R0048-8(b)-EB (3/13/92). [EB #508]*
- * Unopposed motion for summary judgment on Criterion 9(K) granted where engineer's affidavit and related exhibits stated that town roads have capacity to accommodate the project's 25-50 vehicle trips, and that the project does not unnecessarily or unreasonably endanger the public investment in town roads in the vicinity, will not require stop lights, stop signs, or materially increase wear-and-tear or maintenance of town roads. *In re: Bergmann, No. 158-8-05 Vtec, Decision and Order at 3 (4/11/06).*
- * NRB's motion to strike Question 9 is denied because Questions 8 and 9 appear to be addressing a different vantage point of traffic impacts. *623 Roosevelt Highway, No. 105-8-17 Vtec at 3 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018).*

701.1 Retention of jurisdiction by Commission to ensure continued compliance with Criterion

- * Although significant traffic will be added by project, Criterion 5 is met when Commission retains jurisdiction in order to confirm actual traffic generated; applicant must report traffic counts to the Commission and parties. *In re JLD Properties of St. Albans, LLC, #116-6-08 Vtec, Decision on the Merits at 39 (1/20/10).*
- * Environmental Court directs that Commission may analyze impact on pedestrians and bicyclists, if and when it decides, in its discretion, to reopen its analysis of the project under Criterion 5. *In re JLD Properties of St. Albans, LLC, #116-6-08 Vtec, Decision on the Merits at 40 (1/20/10).*

702. Project can be conditioned but not denied

- * A permit cannot be denied for a project that creates unsafe conditions within the meaning of criterion 5, but permit conditions can be imposed to remedy those conditions. *In re Agency of Transportation, 157 Vt. 203, 207 (1991)(cited in In re Champlain Parkway Act 250 Permit, No. 68-5-12 Vtec, Decision at 11 (7/30/14), appeal docketed, No. 14-352);10 V.S.A. § 6087(b).*
- * Board may not deny an Act 250 permit solely on criterion 5. *In re Pilgrim Partnership, 153 Vt. 594, 597 (1990); .*

* No project may be denied an Act 250 permit solely due to adverse impacts under criteria 5, 6, or 7. 10 V.S.A. § 6087(b). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10).

* Board cannot deny project for failure to satisfy Criterion 5 but may impose reasonable conditions and requirements to alleviate burdens created. *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 21 (Vt. Oct. 1, 2016);

Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB (Altered), FCO at 37 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, FCO at 9 (9/8/05) [EB#859]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 20 (5/4/04) [EB #83]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28 (5/16/00); *L & S Associates*, #2W0434-8-EB (6/2/93) [EB #557]; *Arthur Marcus, Peter Holl, and William Gustafson*, #2S0809-EB (4/29/92)[EB #497]; *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]

703. Unsafe conditions

* "Safe travel ... is in the public interest." *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 37 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.)

703.1 Standards

703.1.1

Safety

* B71 standards do not control traffic safety analysis. *Re: Old Vermonter Wood Products*, #5W1305-EB FCO at 16 - 17 (8/19/99). [EB #721].

* Where road will not create unsafe traffic conditions or undue congestion, construction of that road to all of the A-76 standards is not necessary. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/23/91). [EB #408]

* Although AASHTO standards are intended primarily for new or reconstructed roads, these standards are informative with regard to conditions on existing roads as long as other factors (such as historical function and safety record) are taken into account. *Rome Family Corporation*, #1R0410-3-EB (10/11/90). [EB #416]

* If project conforms with AOT Standard B-71, Detail C and the Profile of Drive and Side Road Intersection, it will not cause unreasonable safety or congestion. *Didace & Susan LaCroix*, #3W0485-EB (4/27/87). [EB #292]

* Standards regarding road grades established under State Highway standard sheet A.76 are proper with respect to permit conditions imposed. *William N. and Elizabeth Pitney*, #5W0086 (10/10/74). [EB #46]

703.1.2**Town / local**

* Criterion 5 does not require conformance with town road standards regarding right of ways and minimum requirements for width and slope. *Horizon Development Corp.* #4C0841-EB (8/21/92). [EB #518].

703.1.3**Sight distances**

* Adequate sight distances are an element of the Board's safety consideration. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 37 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Susan Dollenmaier and Martha Dollenmaier Spoor*, #3W0125-5-EB, FCO at 8 (2/7/05); *Re: Old Vermonter Wood Products*, #5W1305-EB, FCO at 16 - 18 (8/19/99), citing *Re: Richard and Barbara Woodard*, #5W1262-EB, FCO at 14 (12/12/97); *Re: Town of Barre*, #5W1167-EB, FCO at 19 (6/2/94).

* Whether sight distances are adequate is a function of the length of unobstructed views and speed limits. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 37 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Old Vermonter Wood Products*, #5W1305-EB, FCO at 17(8/19/99)

* Although no vehicular accidents were reported between 1991 and 1995 at project driveway's entrance, evidence concerning sight distances is not dispositive. *Re: Richard and Barbara Woodard*, #5W1262-EB, FCO at 14 (12/18/97), cited in *Old Vermonter Wood Products*, #5W1305-EB, FCO at 16 - 18 (8/19/99). [EB #721].

* Project fails Criterion 5 where sight distance issues exist at dangerous intersection and such issues would not be solved and perhaps exacerbated by project. *Town of Barre*, #5W1167-EB, FCO at 19 (6/2/94). [EB #589]; *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (6/26/91). [EB #466]; *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]

* Although available sight distance is less than recommended standards, distance is adequate and satisfies Criterion 5 where only emergency vehicles will be using road. *Hector LeClair*, #4C0926-EB (8/2/93). [EB #578]

* Road design fails Criterion 5 because it is unsafe where grade is too steep, where inadequate sight distances exist, and where turn-around is too small. *Arthur Marcus, Peter Holl, and William Gustafson*, #2S0809-EB (4/29/92). [EB #497]

* Where AASHTO sight distance standard is met and warning signs are posted, on road with relatively light vehicle use and speed limitations, project will not cause undue congestion or unsafe conditions with respect to traffic. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/23/91). [EB #408].

* In determining whether a proposed project limits sight distance on a road, such distance should be measured from a point 3.75 feet above the pavement. *Rome Family Corporation*, #1R0410-3-EB (1/8/91). [EB #416M2]

703.1.4 Speed limits

* Board has no authority to impose a speed limit on a town road. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/23/91). [EB #408]

703.2 Exacerbated by project

* Several causes may contribute to a particular effect or result. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).

* It would be absurd to permit a hazardous condition to become more hazardous. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).

* Traffic increase as a result of project can only exacerbate existing dangerous situation; if Board were to issue permit, conditions would be listed in order to ensure traffic safety and take into consideration increased road traffic as a result of project. *Nile and Julie Dupstadt*, #4C1013-EB (4/30/99). [EB #716]

* Project's expansion of existing retail complex would generate enough traffic to exacerbate pre-existing serious congestion and unsafe conditions; it fails Criteria 5 and 9(K). *Shimon & Malka Shalit*, #8B0334-3-EB (2/8/91). [EB #438]

704. Unreasonable congestion

* Commission and Board are authorized to impose permit conditions to address congestion issues. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 37 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.)

704.1 Percentage increase in traffic

* Project will result in minimal increase in truck traffic because it will be replacing truck traffic that already exists. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 37 (6/07/05) [EB #853].

* A "trip end" is defined as one vehicle either entering or exiting a given location; one car entering a project and then exiting the project constitutes two "trip ends." *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 9 n.3 (5/4/04) [EB #831], *citing, Re: Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, FCO at 8 (8/19/99) [EB #721].

* Quarry project complies with Criterion 5 where it creates maximum of 12 additional vehicle trips/day (a 2% increase on fairly safe section of state highway), and there is no evidence of safety hazard. *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, FCO at 27-28 (2/4/02). [EB#767]

* Project's estimated trip ends will not cause unreasonable congestion or unsafe conditions; increase in total volume resulting from project is insignificant. *Old Vermonter Wood Products, #5W1305-EB (8/19/99)*. [EB #721]

* 3-4 additional cars / day, which will use existing commercial driveway to access storage units, will not cause unreasonable congestion or unsafe conditions. *Richard and Barbara Woodard, #5W1262-EB (12/18/97)*. [EB#676]

* Two percent increase in traffic is not insignificant, especially given increase in number of tractor trailer trips. *L&S Associates, #2W0434-8-EB (6/2/93)*. [EB #557].

704.2 Level of service

* Under Criterion 5, the Board must make its own determination as to the nature of the area and the level of service appropriate for that area. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 86 (1997); *In re Agency of Transportation.*, 157 Vt. 203, 206, (1991).

* Level of service below C is generally inconsistent with Criterion 5 at intersections that are not in compact, urban areas. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, FCO at 10 (9/8/05) [EB#859]; *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 86 (1997)(cited in *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Decision at 13 (7/30/14), *appeal docketed*, No. 14-352).

*While VTrans standards, such as Level of Service, are instructive when analyzing a project's impact on transportation, we need not defer to these standards. The Court makes an independent determination, typically with the assistance of VTrans standards, of a project's conformance with Criterion 5. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec at 15 (2/14/14) (citing *In re Walmart Stores, Inc.* 167 Vt. 75, 85-86 (1997)).

705. Mitigation measures to address safety and congestion concerns

705.1 General

* Project complied with Criterion 5 after mitigation measures (installation of street light, paying for police traffic control during peak periods, setting up traffic cones, operating shuttle bus, offering mid-week ski vacations and ski packages with Amtrak) were taken. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 83 (2/22/02)*. [EB#778]

* Quarry project will not cause unreasonable congestion or unsafe conditions where low volume traffic will continue; road improvements are mandated; granite transfer truck traffic is specifically conditioned including maximum truck length, restrictions are unposed during school busing hours and winter seasons, condition imposes limitation on trucking routes, and maximum truck speeds are established. *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB, FCO at 76 (12/8/00)*. [EB# 739].

705.2 Road improvements

- * Additional mitigation is required because of increased truck movements making left turns at a high accident location; intersection should be upgraded to include exclusive left turn lanes. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 37 (6/07/05) [EB #853].
- * Safe conditions will result if improvements to road are made. *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 30 (12/21/00); *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 76 (12/8/00). [EB# 739]
- * If highway improvements (including pedestrian improvements) are in place at the time it opens, mixed use development project will not cause unreasonable congestion or unsafe conditions with respect to use of highways. *Maple Tree Place Associates*, #4C0775-EB (6/25/98). [EB #700]
- * Project would have required permit condition for road construction for emergency vehicle use only, and plan to ensure that affected intersections function at level of service "C". *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]
- * Where umbrella permit, permit amendment, and stipulation were ambiguous concerning road improvements, but parties' intent, findings supporting umbrella permit, and amendment itself mandated that certain improvements be constructed before project's construction commenced. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]
- * Scope of road improvements required before project's construction commenced was reduced since distinction between area intersections and representations to make improvements between those intersections did not support original permit condition. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]
- * Road improvements which caused increased traffic on adjoining residential street did not create unsafe conditions, but Board noted that future development could create unreasonable congestion or an unsafe condition along same street. *Howe Center Limited*, #1R0770-EB (5/4/95). [EB #614]
- * Project will cause unsafe conditions on road unless substantial reconstruction of the road's "S" curve takes place, because curve has inadequate turning radii, insufficient sight distances, and is too narrow. *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB #474]
- * Project for construction of two storage buildings will not violate Criterion 5 if the road leading to the site is improved. *A Safe Place Ltd.*, #8B0404-EB (6/20/89). [EB #375]
- * Installation of traffic light and creation of middle lane will prevent any unreasonable congestion and satisfy Criterion 5. *Liberty Oak Corporation*, #3W0496-EB (5/21/87). [EB #323]

705.3 Signs / signals

- * Project would not cause unreasonable congestion or unsafe conditions to residential street adjoining project driveways where permit was conditioned on existence of specific traffic signs and verbal and written warnings to tenants of industrial park. *Pilgrim Partnership, Stephen Van Esen, and Green Mountain Coffee Roasters, Inc.*, #5W0894-6/5W1156-6B-EB (1/28/99). [EB #709]
- * Board condition requiring black-on-orange portable signs only when project was active supersedes Commission condition requiring flashing beacons at intersection. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB#595]
- * Placing signs at head of subdivision road as part of pedestrian safety plan is appropriate mitigation to offset the level of unsafe pedestrian use of access road. *Okemo Mountain, Inc.*, #2S0351-10B-EB (10/14/93). [EB #565]
- * Where proposed project will cause traffic congestion, permit condition requires applicant to contribute toward paying for signalization. *Eastern Landshares, Inc.*, #4C0790-EB (11/19/91). [EB #512]
- * Where AASHTO sight distance standard is met and warning signs are posted, on road with relatively light vehicle use and speed limitations, project will not cause undue congestion or unsafe conditions with respect to traffic. *Okemo Mountain, Inc.*, #2S0351-10-EB (10/23/91). [EB #408].
- * Installation of signs is required at gravel extraction operation to mitigate any unsafe traffic conditions. *R.E. Tucker, Inc.*, #5W0829-EB (6/2/86), *aff'd in part, rev'd in part, In re R.E. Tucker, Inc.*, 149 Vt. 551 (1988). [EB #281]

705.4 Limitations on traffic / use

- * Board's findings concerning truck traffic impact establish a real and substantial relationship between condition limiting such traffic and public welfare, so condition is not violative of substantive due process as arbitrary or capricious. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).
- * Criterion 5 satisfied by permit condition limiting number of persons allowed to use facility and vehicles allowed in the parking areas. *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB (12/18/97). [EB #682]

705.5 Traffic Studies

- * Traffic and other environmental studies are well within the scope of activity contemplated by Act 250, and the commission clearly has jurisdiction over this sort of consideration. *In re Alpen Associates*, 147 Vt. 647 (1986).
- * Whether or not the commission erred in requiring appellant, as a condition of an Act 250 permit, to contribute, together with other permittees, to the funding of a regional traffic study is a question to be addressed pursuant to the appellate review procedure set forth in 10 V.S.A. § 6089. *In re Alpen Associates*, 147 Vt. 647 (1986).

- * Project would not cause unreasonable congestion or unsafe conditions with respect to truck traffic on a highway passing an elementary school, where project would adopt company policy discouraging use of that route during hours when children would likely walk along or cross highway. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]
- * With permit conditions, increased truck traffic will not cause unreasonable congestion or unsafe conditions. *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607]; *Twin State Sand & Gravel, Inc.*, #3W0711-EB (3/17/94). [EB #576]; *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]; *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]; *Jerrold D. MacKenzie and Katherine G. Stone*, #5W1047-EB (4/23/91). [EB #484]
- * Numbering and posting of company trucks is appropriate condition in light of identified traffic safety concerns. *Cabot Farmers' Cooperative Creamery, Inc.*, #5W0870-13-EB (8/20/93). [EB #564]
- * Although available sight distance is less than recommended standards, distance is adequate and satisfies Criterion 5 where only emergency vehicles will be using road. *Hector LeClair*, #4C0926-EB (8/2/93). [EB #578]
- * If condominium project implements traffic channelization measures, it will not create unsafe traffic conditions. *Old Mill Pond & Paul Belaski*, #2W0753-EB (4/24/89). [EB #401]

705.6 Miscellaneous mitigative conditions

706. Cases

706.1 Examples of unsafe

- * Trucking operation creates unsafe traffic conditions under Criterion 5 where tractor-trailers driving on a narrow side street have driven over the yards of houses on the corner, hit the houses, and have disconnected. *Wildcat Construction Co.*, #6F0283-1-EB (10/4/91), *aff'd, In re Wildcat Construction Co.*, 160 Vt. 631 (1993). [EB #458]
- * Parking lot will create unsafe traffic conditions and materially jeopardizes the safety of surrounding roads where it creates an obstruction which limits sight distances on those roads, and parking lot is adjacent to a high accident intersection. *Rome Family Corporation*, #1R0410-3-EB (10/11/90). [EB #416]
- * Given that lengthy delays in being able to turn left into project are likely to encourage turning movements which are unsafe, congestion caused by project will create unsafe traffic conditions. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430].

706.2 Examples of congested

- * Commission and Board are authorized to impose permit conditions limiting number of truck trips based on Criteria 5 and 8(A). *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).
- * 30 additional vehicular trips per day creates traffic congestion. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).
- * Exacerbating the existing traffic hazard by allowing additional travel on a road would be detrimental to the public interest. *In re Pilgrim Partnership*, 153 Vt. 594, 596-97 (1990).
- * An intersection is unsafe and congested where its asymmetrical design is confusing to motorists and does not allow trucks to go through without blocking other traffic, and where such intersection is operating over design capacity. *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB #474]
- * Project will create unreasonable congestion along highway where drivers will wait in traveling lane to make left turns into project and are likely to create traffic queues behind them, causing unreasonable delays. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430].

706.3 Other

- * Criterion 5 met notwithstanding existing dangerous traffic conditions and concerns that haul trucks will scatter stones on the roads where Applicant proposes mitigation measures (cobblestone strip to dislodge stones from truck tires, regular inspection of Rt. 100B, and require loaded trucks to cover loads) at the access road intersection. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 34 (3/25/10).
- * Environmental Court directs that Commission may analyze impact on pedestrians and bicyclists, if and when it decides, in its discretion, to reopen its analysis of the project under Criterion 5. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 40 (1/20/10).
- * Summary judgment granted that Project complies with Criteria 5, 7 and 9(K) where applicant submitted engineer's affidavit and exhibits showing that subdivision will not require stop lights, stop signs, or materially increase maintenance needs on town roads, and that proposed access road is safe and will not place an unreasonable burden on town's ability to provide municipal services. *Re: Bergmann*, 158-8-05 Vtec, Decision and Order at 3-4 (4/11/06).
- * Project complied with Criterion 5, notwithstanding contention that secondary growth resulting from expanded sewer service areas would cause traffic problems. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680]
- * Tramway will not cause unreasonable congestion or unsafe traffic conditions with respect to use of highways in immediate vicinity of Route 108 or the Stowe area generally. *Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort*, #5L1125-10 and 10R-EB (Base Lodge) (Altered) (3/27/96). [EB #639(R)]

- * Warehouse facility will cause unreasonable congestion and unsafe conditions given existing level of congestion and growth in traffic that is expected to occur, and mitigation efforts will not alleviate projected traffic congestion. *L & S Associates, #2W0434-8-EB (6/2/93)*. [EB #557]
- * Closure of road will not create unsafe traffic conditions or unreasonable traffic congestion, but is rather a reasonable response to safety and congestion problems caused by fair. *Okemo Mountain, Inc., #2S0351-7A-EB (8/31/92)*. [EB #527]
- * To ensure with Criterion 5 compliance for student housing project, Board imposed conditions relating to traffic safety and congestion. *UVM, State Agriculture College, and Novarr-Mackesey Development Co., #4C0895-EB (8/28/92)*. [EB #540]
- *Subdivision will not cause undue traffic safety and congestion concerns. *Horizon Development Corp. #4C0841-EB (8/21/92)*. [EB #518]
- * Board accepted stipulation agreement that rectified potential traffic congestion and safety issues for proposed subdivision. *Loomis Highlands, Inc., #5W1095-EB (7/14/92)*. [EB #537]
- * Road design fails Criterion 5 because it is unsafe where grade is too steep, where inadequate sight distances exist, and where turn-around is too small. *Arthur Marcus, Peter Holl, and William Gustafson, #2S0809-EB (4/29/92)*. [EB #497]
- * When evaluating traffic safety and congestion, Board considers existing conditions on road constructed to serve subdivision's Phase I, when such road is being extended to also serve Phase II. *Okemo Mountain, Inc., #2S0351-10-EB (10/23/91)*. [EB #408].
- * Proposed plan for 75,000 square foot shopping center does not adequately address Criterion 5 concerns. *Waterbury Village Shopping Center Inc., #5W1068-EB (7/19/91)*. [EB #503]
- * In reviewing traffic impacts of a proposed shopping center under Criterion 5, Board uses most conservative traffic projections presented: "most conservative" means those reasonably reliable projections which show the highest traffic generation rates. *Swain Development Corp. and Philip Mans, #3W0445-2-EB (8/10/90)*. [EB #430]
- * Because subdivision would have substantial effect on traffic conditions, Board required applicants to work with town to implement a joint proposal to alleviate certain conditions. *James Davenport, Jr. and Barbara Davenport, #1R0667-EB (7/9/90)*. [EB #449]
- * Board cannot make positive Criterion 5 finding where no clear evidence exists that traffic increase from project will not create unsafe conditions or unreasonable congestion and with some evidence that unsafe conditions and unreasonable congestion will occur in project area. *Berlin Associates, #5W0584-9-EB (2/9/90)*. [EB #379]
- *To ensure that Commission can impose proper traffic remedies if necessary, permit requires that permittees retain control over a 12 foot strip on their property which may be necessary if turning

lane is required. *W. Thompson Cullen & Barry Reardon*, #2W0720-1-EB and #2W0720-2-EB (8/10/89). [EB #431]

- * Traffic associated with residential project to be completed in three phases will not cause unreasonable congestion or unsafe traffic conditions. *John Kennedy and Jeffrey Kilburn*, #8B0370-2-EB (9/26/88). [EB #382]
- * Applicants for hotel and restaurant complex satisfied Criteria 5, 7, and 9(K) by their agreement with the town to contribute to road maintenance, reducing the burden on municipal services. *Colchester Hotel Group*, #4C0288-14-EB (4/21/88). [EB #372]
- * Proposed RV campground along banks of White River would not cause unreasonable congestion or unsafe traffic conditions. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff'd*, *In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348]
- * Board has no jurisdiction under Criterion 5 to consider downhill skiing safety unless it conflicts with other modes of transportation (e.g. on-grade trail crossings of roads). *Okemo Mountain*, #2W0351-8-EB (4/24/87). [EB #336]
- * Access road will accommodate additional truck traffic and therefore no unsafe conditions or unreasonable congestion will result. *Charles Drown*, #7R0644-EB (3/24/87). [EB #316]
- * Residential subdivision project will result in unsafe traffic conditions. *Okemo Mountain, Inc.*, #2S0351-8-EB (12/18/86). [EB #305]; *Peter Guille, Jr.*, #2W0383-EB (3/18/80). [EB #97]
- * Excavating and patching paved streets may reduce roadways' structural integrity; Board imposes conditions to mitigate potential negative impacts of utility roadway excavation on traffic safety and on municipal sewers and roads as public investments. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd*, *In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]
- * Applicant failed to establish need for new access road in view of potential highway changes that would result from large, multi-faceted community project. *Quechee Lakes Corporation*, #3W0411-A-EB (11/4/85).
- * Rock quarry will not cause unreasonable congestion or unsafe conditions. *Palazzi Corp.*, #6F0322-EB (9/13/85). [EB #264]
- * Installation of an additional at-grade intersection at a proposed mall will not cause an unsafe condition under Criterion 5. *Berlin Associates*, #5W0584-2-EB (1/23/85). [EB #237] (Board amended permit conditions in response to Motion to Alter re Criterion 5 (3/6/85). [EB #250])
- * Imposition of \$40/dwelling unit contribution to regional planning commission's traffic design study is reasonable exercise of Commission powers to address Criterion 5 concerns; payments can be required before project construction in order to identify potential solutions to imminent traffic problems before traffic is generated. *Alpen Associates*, #5W0722-2-EB (1/16/85), *aff'd*, *In re Alpen Associates*, 147 Vt. 647 (1986). [EB #236]

- * Residential project will not cause unreasonable traffic congestion. *Pomfret Associates*, #3R0403 (8/23/83). [EB #199]; *Richard & Napoleon LaBrecque*, #6G0217-EB (11/17/80). [EB #140]; *George F. Adams & Co., Inc.*, #5L0289 (4/23/75). [EB #61] (See *In re Application of George F. Adams and Co., Inc.*, 134 Vt. 172 (1976)).
- * Proposed subdivision road need not be paved, and project will not cause unreasonable congestion. *White Sands Realty Co.*, #3W0360 (10/19/81). [EB #156]
- * Project will not cause unreasonable congestion or unsafe conditions with respect to highways and local roads. *Ammex Warehouse Co., Inc.*, #6F0248-EB (8/3/81). [EB #160]
- * Exploration for talc ore bodies will not cause or result in unreasonable highway congestion. *Vermont Talc & OMYA, Inc.*, #2W0406-EB (8/23/79). [EB #113]
- * Access to mobile home park will not cause unreasonable highway congestion or unsafe conditions. *Jerome and Juanita Reis*, #7C0157 (9/11/74). [EB #52]
- * Gravel pit expansion will not cause highway congestion or unsafe conditions. *Donald A. Rivers*, #4C0136 (9/11/74). [EB #47]
- * Campground will cause unreasonable highway congestion and unsafe conditions without restrictions. *Walter K. and Virginia K. Smith*, #7R0113 (1/23/74). [EB #35]
- * Commercial shopping center will not result in unreasonable highway congestion or unsafe conditions. *Justgold Holding Corporation*, #1R0048 (7/19/73). [EB #31]
- * Gasoline service station will not cause unreasonable highway congestion or unsafe conditions if one access point is constructed and sufficient setback is created. *Southgate Development Corporation*, #3W0014 (4/13/73) [EB#14]
- * Mixed commercial / residential development will cause unreasonable highway congestion. *Land/Tech Corporation*, #100036 (2/20/73). [EB # 20 and #58]
- * Construction of power line and telephone cable. *New England Telephone Company*, #7C0085 (1/11/73). [EB #25]
- * Construction of industrial building. *Baumritter Corporation*, #3R0033 (4/28/72). [EB #19]
- * No substantive evidence offered that proposed electric power line would cause unusual highway congestion or unsafe conditions. *Green Mountain Power*, #7C0017 (2/14/72). [EB #16]
- * Unopposed motion for summary judgment on Criterion 9(K) granted where engineer's affidavit and related exhibits stated that town roads have capacity to accommodate the project's 25-50 vehicle trips, and that the project does not unnecessarily or unreasonably endanger the public investment in town roads in the vicinity, will not require stop lights, stop signs, or materially increase wear-and-

tear or maintenance of town roads. *In re: Bergmann*, No. 158-8-05 Vtec, Decision and Order at 3 (4/11/06).

* A one percent increase in the average number of vehicles passing a property on Route 100 and an increase of no more than a ten percent in the average number of heavy trucks travelling in the area, is not sufficient to suggest that truck traffic from the project will cause unreasonable congestion or unsafe conditions under Criterion 5. *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion (#2-257)* and *Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 21 (1/17/13), *aff'd on other grounds, In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).

* Based on the Level of Service analysis and the minimal change in used highway capacity; the court found the Project complies with Criterion 5 because the Project will not cause unreasonable congestion or unsafe conditions with respect to use of the highways or other means of transportation existing or proposed. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 15 (02/14/14).

707. Burden of Proof

* With respect to . . . Criteri[on] 5 . . . a party opposing the applicant has the burden of showing an undue adverse effect. 10 V.S.A. § 6088(b). Therefore, [the opposing party] has the burden of showing such an effect. [The opposing party] however, is entitled to question whether [the applicant] has provided sufficient evidence to meet its initial burden of production, or whether additional studies are required. *BlackRock Construction LLC Act 250*, No. 47-4-19 Vtec., Motion to Dismiss (6/19/19).

* “The party opposing the applicant bears the burden of proof under [10 V.S.A.] § 6088(a), but the applicant bears the burden of production to establish at least a ‘prima facie case’ of compliance.” *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 21 (Vt. Oct. 1, 2016).

* Appellant failed to meet burden of production and persuasion when the only evidence was submitted by the Applicant and that evidence showed no unreasonable congestion or unsafe conditions on any means of transportation, existing or proposed.. *Re: Waitsfield Public Water System*, No. 33-2-10 Vtec, Decision on the Merits at 10 (7/11/12).

* Applicant bears the initial burden of production under all applicable Act 250 criteria, the ultimate burden of proving that a project does not conform to criteria 5 through 8 rests upon the project’s opponents. 10 V.S.A.

§ 6088(b). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10)(citing *In re Route 103 Quarry*, No. 205-10-05 Vtec at 8 (Nov. 22, 2006) (Durkin, J.), *aff'd*, 2008 VT 88).

* With respect to Criterion 5, after the applicant meets the initial burden of production, the opposing party must meet the “fairly high” burden of persuasion that the proposed development will “cause unreasonable congestion or unsafe conditions” on area highways. *Re: Route 103 Quarry (Carrara)*, at 22, No. 205-10-05 Vtec, Decision (11/22/06), *aff'd, In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008).

* With respect to Criterion 5, burden of proof is on a party opposing application, but applicant has burden of producing sufficient evidence for Commission/Board to make positive findings. 10 V.S.A. § 6088(b); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 37 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 20 (5/4/04) [EB #831]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28-29 (5/16/00) [WFP #38]; *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 32 (5/25/99), *aff'd, OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *Re: St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB, FCO (altered) at 56 (1/27/95). *Re: Richard and Barbara Woodard*, #5L01267-EB, FCO at 14 (12/18/97).

* Opponent failed to meet burden of proof where Board conditioned permit by limiting number of persons allowed to use facility and vehicles allowed in the parking areas. *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB (12/18/97). [EB #682]

* Opponents to residential subdivision failed to meet burden under Criterion 5. *Clearwater Realty & Agency of Transportation*, #4C0712-EB (5/10/89). [EB #385]

G. Criterion 6 - Educational Services

721. General

* The inquiry under Criterion 6 focuses on the reasonableness of the burdens imposed on the local government. *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75, 83 (1997); *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, FCO at 13 (9/8/05) [EB#859].

* Criterion 6 cautions that a project cannot be allowed if it will cause an “unreasonable burden on the ability of a municipality to provide educational services.” 10 V.S.A. § 6086(a)(6). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 38 (3/25/10).

* No project may be denied an Act 250 permit solely due to adverse impacts under criteria 5, 6, or 7. 10 V.S.A. § 6087(b). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10).

* Condition may be imposed on project to compensate town for its resulting burden on school system. *Dept. of Forests and Parks*, DR #77 (9/8/76).

722. Purpose of Criterion

* The inquiry under Criterion 6 focuses on the reasonableness of the burdens imposed on the local government. *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75, 83 (1997).

* In the interest of general welfare, the police power may be exercised to protect citizens and their businesses in financial and economic matters, and it may be exercised to protect the government itself against potential financial loss. *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997)

* Common element in so-called "fiscal criteria" (Criterion 6, 7, 9(A), 9(H), and 9(K)) is the protection of government finances from burdens imposed by new development. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered), FCO at 50-51 (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997) . [EB #598R2]

* Project's competitive effect on existing businesses is relevant only to extent that Act 250 protects tax base of relevant localities from "undue adverse" impacts. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997) . [EB #598R2]

723. Ascertaining the burden on town

* Criterion 6 met where Applicant demonstrated changes in capacity of area schools, revisions in educational funding schemes and the fact that development may actually contribute to a reduction in per-pupil costs. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 34 (1/20/10).

* Proposed retail store's impact on existing retail stores may be considered under Criterion 6 to the extent that such impact may have a negative impact on appraised property values (tax base), and would thereby impact the municipality's ability to provide educational services. *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

* Just as the public health, safety, and welfare depend on the tax base, so do educational and other public services. *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

* Burden on town can be ascertained by calculating what would be an appropriate impact fee, considering the following factors: (i) whether new facilities are necessary because of proposed project; (ii) if yes, the costs of such new facilities; and (iii) whether project should be given credits because of other revenues it will generate. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 87 (2/22/02). [EB#778]; *Swanton Housing Associates*, #6F0482-EB, FCO at 20 (4/24/97) [EB #667]; *Clarence & Norma Hurteau*, #6F0369-EB (4/24/89). [EB #369]

723.1 Reasonableness of burden

* Proper for Board to conclude that application failed Criterion 6 where burden on educational services established by evidence showing that project would add six students to area schools and

applicant failed to produce evidence of plan to reduce or eliminate burden, even though applicant does not bear burden of proof on Criterion 6. *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75, 87 (1997).

* Reasonableness of burden depends on (i) ability of community as a whole to absorb burden, (ii) other burdens from developments which have been accepted or not accepted as reasonable by town or other communities, and (iii) other measures which may be taken, or factors which may exist, to mitigate the burden. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 88 (2/22/02) [EB#778]; *Swanton Housing Associates*, #6F0482-EB (4/24/97). [EB #667].

723.1.1

Impact fees

* An impact fee must be fair, spent within a reasonable time, and spent only to remedy the impacts for which it is levied. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 88 (2/22/02). [EB#778]; *Swanton Housing Associates*, #6F0482-EB (4/24/97); *Clarence & Norma Hurteau*, #6F0369-EB (4/24/89). [EB #369]

* No impact fee warranted under Criterion 6 where school enrollments are declining and school closings are possible even with proposed project. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, FCO at 13 (9/8/05) [EB#859].

* An impact fee permit condition must be reasonable; \$442/pupil impact fee was credible and reasonable amount because it resulted in no unreasonable burden being created by residential apartment housing project. *Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB (4/16/96), *aff'd, In re Fair Haven Housing Limited Partnership*, Docket #96-228 (V.S.Ct.4/3/97) (Unpublished). [EB #643]

723.1.2

Phasing of project

* Subdivision will not create unreasonable burden on town educational services, if construction of resources is phased in over four years. *Horizon Development Corp.*, #4C0841-EB (8/21/92). [EB #518]; *Poquette & Bruley, Inc.*, #6F0372-1-EB (4/24/89) [EB #412]; *Richard & Napoleon LaBrecque*, #6G0217-EB (11/17/80). [EB #140]

* To avoid negative impact on local school system, restrictions are placed on the number of subdivision lots that may be occupied per year. *Poquette and Bruley, Inc.*, DR #233 (1/9/91).

* Board will allow cumulative phasing: if permittee does not occupy two of the seven units in one year, it can carry those two units over to next school year. *Poquette & Bruley, Inc.*, #6F0372-1-EB (4/24/89). [EB #412]

724. Cases

- * Once Wal*Mart offered evidence showing that the project would cause a burden on regional education services, the Board could properly require Wal*Mart to produce additional evidence demonstrating its plan to reduce or eliminate that burden. *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75, 87 (1997).
- * Criteria 6 met where haul trucks will increase frequency of noise disruptions at nearby school but existing traffic already contributes noise disruptions at school, town claims current road noise distractions are not unreasonable burden and there have been no complaints from the school or discussion at school board meetings concerning existing road noise distractions. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 39 (3/25/10).
- * Project which adds 13.6 students to school district, which is at near capacity due to population trends that will soon reverse, imposes no Criterion 6 burden. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 88 - 90 (2/22/02). [EB#778]
- * Project which adds up to 20 new students did not cause an unreasonable burden on ability of municipality to provide educational services, where school incurred no capital costs, and non-capital costs would be financed by state education fund and funds that municipality might elect to spend above and beyond the state's block grant. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99). [EB #726]
- * Because additional capital expenditures may be required to accommodate new students resulting from project, and because project's public costs may exceed the public benefits, applicants failed to meet burden of production. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2].
- * Relevancy of fiscal impacts on public entities does not mean that Act 250 protects existing businesses from new competition. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]
- * Applicants provided sufficient evidence that proposed subdivision will not create an unreasonable burden on town's ability to provide educational services. *Clarence & Norma Hurteau*, #6F0369-EB (4/24/89). [EB #369]
- * Residential project will not cause unreasonable burden on the town's ability to provide educational services. *Pomfret Associates*, #3R0403 (8/23/83). [EB #199]
- * Fiscal impacts of a mall project in comparison to available budget figures is insignificant. *Berlin Associates, Ltd.*, #5W0584-EB (4/13/83). [EB #195]

- * Construction of park is authorized, under with permit condition that permittee compensate town for secondary school tuition and transportation costs incurred for students residing at park. *Department of Forests and Parks, #6G0062 (9/8/76)*. [EB #69]
- * Mobile home park will not cause unreasonable burden on town to provide educational services. *Jerome and Juanita Reis, #7C0157 (9/11/74)*. [EB #52]
- * Condominium project will not cause an unreasonable burden on the town's ability to provide educational services. *Domestic Capital Corporation, #8B0042 (10/21/73)*. [EB #41]
- * Expansion of mobile home park. *Ward A. Fuller, #300013 (5/17/71 & 2/28/72)*. [EB #8]
- * Permit for single family home subdivision denied in part for failure to address impact upon educational services. *Cape Lookoff Mountain, #400002 (9/16/70)*. [EB #3]

725. Burden of Proof

- * When a project will result in commercial development and, consequently, in added strain on the financial abilities of affected local governments, the Board must have sufficient evidence to determine whether an unreasonable burden would be placed on those governments. *In Re Wal*Mart Stores, Inc., 167 Vt. 75, 83 (1997)*.
- * Proper for Board to conclude that application failed Criterion 6 where burden on educational services established by evidence showing that project would add six students to area schools and applicant failed to produce evidence of plan to reduce or eliminate burden, even though applicant does not bear burden of proof on Criterion 6. *In Re Wal*Mart Stores, Inc., 167 Vt. 75, 87 (1997)*.
- * While the applicant must present some facts to satisfy its initial burden of production (conformance with criteria 6 and 7 is often proved by "ability to serve" letters from the affected municipal entities), the burden of persuasion and ultimate burden of proof under criteria 6 and 7 rests with the parties opposing the project application. 10 V.S.A. § 6087(b). *In re: Rivers Dev. Act 250 Appeal, 68-3-07 Vtec, Decision on the Merits at 39 (3/25/10)*.
- * Applicant bears the initial burden of production under all applicable Act 250 criteria, the ultimate burden of proving that a project does not conform to criteria 5 through 8 rests upon the project's opponents. 10 V.S.A. § 6088(b). *In re: Rivers Dev. Act 250 Appeal, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10)(citing In re Route 103 Quarry, No. 205-10-05 Vtec at 8 (Nov. 22, 2006) (Durkin, J.), aff'd, 2008 VT 88)*.
- * Although burden of proof is on opponents to project, applicant must first provide sufficient information for Board to make affirmative findings; if such evidence is provided, opponents must prove (i) that project will impose a burden on town; (ii) that this burden is unreasonable; and (iii) that an impact fee is an appropriate remedy for burden. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad,*

#2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 87 (2/22/02) [EB#778]; *Swanton Housing Associates*, #6F0482-EB (4/24/97). [EB #667]; *Clarence & Norma Hurteau*, #6F0369-EB (4/24/89). [EB #369]

* Party seeking imposition of impact fees has burden of coming forward with adequate information for a fair fee assessment. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 88 (2/22/02). [EB#778]; *Swanton Housing Associates*, #6F0482-EB (4/24/97); *Clarence & Norma Hurteau*, #6F0369-EB (4/24/89). [EB #369]

H. Criterion 7 - Municipal and Government Services

741. General

* Proposed retail store's impact on existing retail stores may be considered under Criterion 7 to the extent that such impact may have a negative impact on appraised property values (tax base), and would thereby impact the local government's ability to provide municipal or governmental services. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

* The inquiry under Criterion 7 focuses on the reasonableness of the burdens imposed on the local government. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 83 (1997).

* Just as the public health, safety, and welfare depend on the tax base, so do educational and other public services. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

* Criterion 7 concerns "the ability of local governments to provide municipal or governmental services." 10 V.S.A. § 6086(a)(7). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 38 (3/25/10).

* No project may be denied an Act 250 permit solely due to adverse impacts under criteria 5, 6, or 7. 10 V.S.A. § 6087(b). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10).

* In determining Criterion 7, issue is whether proposed project will place an unreasonable burden on the ability of local and regional governments to provide municipal or governmental services. *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 30 (12/21/00) [EB #751]; see *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]

* Unopposed motion for summary judgment on Criterion 9(K) granted where engineer's affidavit and related exhibits stated that town roads have capacity to accommodate the project's 25-50 vehicle trips, and that the project does not unnecessarily or unreasonably endanger the public investment in town roads in the vicinity, will not require stop lights, stop signs, or materially increase wear-and-tear or maintenance of town roads. *In re: Bergmann*, No. 158-8-05 Vtec, Decision and Order at 3 (4/11/06).

742. Purpose of Criterion

* The inquiry under Criterion 7 focuses on the reasonableness of the burdens imposed on the local government. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 83 (1997).

* In the interest of general welfare, the police power may be exercised to protect citizens and their businesses in financial and economic matters, and it may be exercised to protect the government itself against potential financial loss. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

* Common element in so-called "fiscal criteria" (Criterion 6, 7, 9(A), 9(H), and 9(K)) is the protection of government finances from burdens imposed by new development. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* Relevancy of fiscal impacts on public entities does not mean that Act 250 protects existing businesses from new competition. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2].

743. Presumptions (compliance with other permits) (see [204.1](#))

* Health Department permit with respect to availability of potable water does not establish a presumption with respect to Criteria 3 and 7. *Raymond Duff*, #5W0921-2R-EB (12/29/89). [EB #436M1]

744. Cases

* Criteria 7 met where haul trucks will increase frequency of noise disruptions at nearby school but existing traffic already contributes noise disruptions at school, town claims current road noise distractions are not unreasonable burden and there have been no complaints from the school or discussion at school board meetings concerning existing road noise distractions. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 39 (3/25/10).

* Criterion 7 met where Applicant made pledge to cover costs of municipal services (e.g. fire, police, and ambulance) that exceed amount of taxes being paid by or on behalf of the development. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 34-35 (1/20/10).

* Summary judgment granted on Criteria 5, 7 and 9(K) where applicant submitted engineer's affidavit and exhibits showing that subdivision will not require stop lights, stop signs, or materially increase maintenance needs on town roads, and that proposed access road is safe and will not place an unreasonable burden on town's ability to provide municipal services. *Re: Bergmann*, 158-8-05 Vtec, Decision and Order at 3-4 (4/11/06).

* Board rejects argument that municipal service providers would be unable to provide services if a few business competitors went out of business as result of project; it would require many commercial establishments in region to go out of business and spaces which they occupy to remain

vacant for extended time to lower rents charged, value of buildings, fair market value of comparable sales, and ultimately the grand list. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet #1R0048-12-EB* FCO at 43. ((8/20/01). [EB #766]

* Where project performed substantial roadways improvements and agreed with impacted towns to pay for ongoing road maintenance resulting from project, project will not place unreasonable burdens on ability of local governments to provide municipal or governmental services. *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB*, FCO at 78 (12/8/00). [EB# 739]

* Sewer expansion project complied with Criterion 7 where opponents did not provide evidence regarding present cost of specific municipal services (fire, police, and schools), or those what costs would be after project's completion; there was no evidence that project, or resulting secondary growth, would require tax increases that would force residents and businesses to leave town, or cause town to significantly reduce municipal services it is obligated to provide. *Town of Stowe, #100035-9-EB* (5/22/98). [EB #680].

* As conditioned by permit, operation of stone quarry will not place unreasonable burden on town to meet costs of maintaining its roads. *Crushed Rock, #1R0489-4-EB* (2/18/94). [EB #572]

* Road closure will not create unreasonable burden on ability of local governments to provide emergency services if, when closed, road is kept clear of vehicles and physical obstruction, and if applicant clears all pedestrians from road when emergency access is needed. *Okemo Mountain, Inc., #2S0351-7A-EB* (8/31/92). [EB #527]

* Apartment building complies with Criterion 7 provided there is a supervisor on site during evening and night time hours. *Richard Berman and Bradford B. Moore, #5L1086-EB* (5/8/92). [EB #522]

* Unsafe road will satisfy Criterion 7 if provision is made to make road comply with town standards if town takes over road in the future. *Arthur Marcus, Peter Holl, and William Gustafson, #2S0809-EB* (4/29/92). [EB #497]

* Landfill does not comply with Criteria 7, 9(G), and 9(J) where town might have to provide water to those water supplies contaminated by landfill, where sufficient funds may not be available to ensure proper landfill closure, and where inadequate or improper closure of the landfill could result in financial burden on town. *Upper Valley Regional Landfill, #3R0609-EB* (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Because project could burden town's understaffed police department, conditions requiring private security firm or contract police are required. *Waterbury Village Shopping Center Inc., #5W1068-EB* (7/19/91). [EB #503]

* Where no evidence is offered to show that project conforms with town capital program or plan, project must post surety to protect town if town must assume responsibility. *Raymond Duff, #5W0921-2R-EB* (Revised) (6/14/91). [EB #436]

- * Evidence is relevant that competition with other fiscal centers may affect the ability of a government to provide services. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]
- * Project satisfied Criteria 5, 7, and 9(K) by its agreement with town to contribute to road maintenance, reducing burden on municipal services and protecting public's investment in roads. *Colchester Hotel Group*, #4C0288-14-EB (4/21/88). [EB #372]
- * Permit requires escrow to cover closure and clean-up costs where landfill raises possibility of contamination of private water resources. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]
- * Vacation home subdivision will not place an unreasonable burden on municipal fire services or road maintenance services. *Hawk Mountain Corporation*, #3W0347-EB (8/21/85), *aff'd in part / rev'd in part, In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251]
- * Fiscal impacts of mall project in comparison to available budget figures is insignificant. *Berlin Associates, Ltd.*, #5W0584-EB (4/13/83). [EB #195]
- * Construction of fire ponds/reservoirs in residential subdivision are unnecessary and their absence will not place an unreasonable burden on government services. *White Sands Realty Co.*, #3W0360 (10/19/81). [EB #156]
- * Proposed subdivision will satisfy criterion if future sales and construction are done in phases. *Richard & Napoleon LaBrecque*, #6G0217-EB (11/17/80). [EB #140]
- * Subdivision fails criterion because it will place unreasonable burden on ability of local government to provide municipal services. *Peter Guille, Jr.*, #2W0383-EB (3/18/80). [EB #97]
- * Sawmill will not unreasonably burden the town's ability to provide fire protection. *Stuart Hunt, Sr. & Russell Howe*, #2W0325 (9/8/76). [EB #72]
- * Standards regarding road grades established under State Highway standard sheet A76 are proper with respect to permit conditions imposed. *William N. and Elizabeth Pitney*, #5W0086 (10/10/74). [EB #46]
- * Campground will cause unreasonable burden on governmental services. *Walter K. and Virginia K. Smith*, #7R0113 (1/23/74). [EB #35]
- * Condominium units will not place unreasonable burden on governmental services because developer will finance sewer line improvements. *Skokemo, Inc.*, #2S0097 (3/19/73). [EB #29]
- * Construction of road and water / sewer main to service industrial site will not place unreasonable burden on local government to provide services. *Brattleboro Development Credit Corporation*, #2W0101 (2/8/73). [EB # 27]
- Expansion of mobile home park. *Ward A. Fuller*, #300013 (5/17/71 and 2/28/72). [EB #8]

*Unopposed motion for summary judgment on Criterion 9(K) granted where engineer's affidavit and related exhibits stated that town roads have capacity to accommodate the project's 25-50 vehicle trips, and that the project does not unnecessarily or unreasonably endanger the public investment in town roads in the vicinity, will not require stop lights, stop signs, or materially increase wear-and-tear or maintenance of town roads. *In re: Bergmann*, No. 158-8-05 Vtec, Decision and Order at 3 (4/11/06).

745. Burden of Proof

* When a project will result in commercial development and, consequently, in added strain on the financial abilities of affected local governments, the Board must have sufficient evidence to determine whether an unreasonable burden would be placed on those governments. *In Re Wal-Mart Stores, Inc.*, 167 Vt. 75, 83 (1997).

* Applicant bears the initial burden of production under all applicable Act 250 criteria, the ultimate burden of proving that a project does not conform to criteria 5 through 8 rests upon the project's opponents. 10 V.S.A. § 6088(b). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 (3/25/10) (citing *In re Route 103 Quarry*, No. 205-10-05 Vtec, at 8 (Nov. 22, 2006) (Durkin, J.), *aff'd*, 2008 VT 88).

* Under Criterion 7, the burden of proof is on the opponent to project. *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 30 (12/21/00). [EB #751].

* Sewer expansion project complied with Criterion 7 where opponents did not provide evidence regarding present cost of specific municipal services (fire, police, and schools), or those what costs would be after project's completion; there was no evidence that project, or resulting secondary growth, would require tax increases that would force residents and businesses to leave town, or cause town to significantly reduce municipal services it is obligated to provide. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680].

* Where applicant failed to satisfy burden of production under Criteria 7, 8, and 9(A) and burden of production and persuasion under Criteria 9(B) - (L) and 10, the Board could not assess the potential impacts of the extension of a distribution utility line into a remote area under these criteria. *Washington Electric Cooperative, Inc.*, #5W1036-EB (12/19/90). [EB #455]

I. Criterion 8 - Aesthetics, Historic Site, Natural Area, Scenic / Natural Beauty

760. Constitutional considerations

* Permit condition limiting illumination of a religious cross does not violate state or federal constitution. *In re Downing*, No. 225-11-09 Vtec, Decision and Order at 22 (5/10/12).

* Act 250 is a neutral statute of general applicability; it is not unconstitutional on its face. *In re Downing*, No. 225-11-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment

at 8 (11/29/10).

* The relative subjectivity of Criterion 8 has even been the basis of constitutional attacks, including that this criterion is “so vague that it violates the Due Process Clause” of the United States Constitution and that it amounts to an improper delegation of power by our Legislature, based upon an assertion that “Act 250 provides no intelligible standards for interpreting the subjective concepts of ‘undue adverse effect,’ ‘scenic beauty’ and ‘aesthetics.’” *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 49 (3/25/10),

*The term “undue” generally means that which is more than necessary – exceeding what is appropriate or normal. The word “adverse” means unfavorable, opposed, hostile. “Scenic and natural beauty” pertain to the pleasing qualities that emanate from nature and the Vermont landscape. In short, through Criterion 8 the Legislature has directed that no project within our jurisdiction be approved if it has an unnecessary or inappropriate negative impact on the enjoyment of surrounding natural and scenic qualities. Criterion 8 is, therefore, sufficiently specific to constitute a proper delegation [of power, as prescribed by the U.S. Constitution]. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 49-50 (3/25/10). citing *Re: Brattleboro Chalet Motor Lodge, Inc.*, #4C0581-EB, FCO at 6 (10/17/84).

761. Criterion 8 - Aesthetics, Scenic or Natural Beauty – General

* “Under Act 250, a proposed proposed project may ‘not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irraplacable natural-areas.’” *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 26 (Vt. Oct. 1, 2016); see 10 VSA § 6086(a)(8).

* An applicant must provide evidence sufficient to enable the Court to find that the proposed project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare irreplaceable natural areas. If an applicant satisfies the initial burden of production, then the ultimate burden of proving that a project does not conform to Criterion 8 rests upon the project’s opponents. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 17 (2/16/2017)(citing 10 V.S.A. § 6086(a)(8) and § 6088(b)).

* *Quechee Lakes* test described and followed by the Vermont Supreme Court in *In re Rinkers, Inc.*, 2011 VT 78, ¶9, (mem.); *In re Eastview at Middlebury, Inc.*, 2009 VT 98, ¶20; *In re Times and Seasons, LLC*, 2008 VT 7, ¶8, 183 Vt. 336; *In Re Petition of Halnon*, 174 Vt. 514, 515 (2002); *In re McShinsky*, 153 Vt. 586 (1990); see also *In re Verizon Wireless Barton*, No. 2011-204 (May 2, 2012) (unpublished entry order)

* *Quechee* test applied. *In re Downing Act 250 Application*, 225-11-09 Vtec, Decision and Order at 8 (5/10/12); *In re Harvey & West 65-unit Campground*, 110-7-10 Vtec, Decision and Order at 13-14 (11-09-2011); *In re Eastview at Middlebury, Inc.*, 2009 VT 98, ¶20; *In re Times and Seasons, LLC*, 2008 VT 7, ¶8, 183 Vt. 336.

* Criterion 8 requires the applicant to present convincing evidence that the proposed project “will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.” 10 V.S.A. § 6086(a)(8). *In re: Rivers Dev. Act 250*

Appeal, 68-3-07 Vtec, Decision on the Merits at 49 (3/25/10).

* The cornerstone of the Criterion 8 analysis is whether the proposed project will be in harmony with its surroundings—will it ‘fit’ the context within which it will be located? *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 16 (02/14/14); *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 7 (11/28/12); *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 50-51 (3/25/10), quoting *Re: Quechee Lakes Corp.*, ##3W0411-EB and 3W0439-EB, FCO at 18 (11/4/85).

* In assessing the “fit” of a project in its context, “this may relate to the built environment or to another aspect of the surrounding area, without relating at all to ‘scenic’ or ‘natural’ beauty” and in fact may relate “to a characteristic of the surroundings beyond the scope of the other subcriteria of Criterion 8.” *In re Rinker’s, Inc. d/b/a Rinker’s Communications, and Beverly and Wendell Shephard*, No. 302-12-08 Vtec, Decision and Order on Appellee-Applicants’ Motion to Dismiss at 5 (9/17/09); see also, Decision and Order (5/17/10).

* “Aesthetics” is more broad than “scenic or natural beauty of the area.” Depending on its surroundings, a project could have an adverse effect on aesthetics without having an adverse effect on scenic or natural beauty. *In re Rinker’s, Inc. d/b/a Rinker’s Communications, and Beverly and Wendell Shephard*, No. 302-12-08 Vtec, Decision and Order on Appellee-Applicants’ Motion for Partial Summary Judgment at 4 (8/19/09); see also, Decision and Order at 10 (5/17/10).

* Evidence of possible disturbances to the tranquility that walkers, joggers and bicyclists enjoy is more appropriately considered under Criterion 8 than Criterion 5. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 11 (2/15/08).

* In light of its lengthy precedent, it is “indisputable” that the Quechee test must be applied in analyzing aesthetic impacts of development under Criterion 8. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 15 (2/15/08), *aff’d In re Eastview at Middlebury, Inc.*, 2009 VT 98, ¶20.

* Analysis of a project’s compliance with the aesthetics component of Criterion 8 is guided by the methodology established in the Quechee Lakes decisions of the Vermont Supreme Court and the former Environmental Board. *In re: Free Heel, Inc.*, No. 217-9-06 Vtec, Decision at 5 (3/21/07)(citing *In re Quechee Lakes Corporation*, 154 Vt. 543 (1990); *In re Quechee Lakes Corporation*, No. 3W0411-A-EB (Vt. Env’tl. Bd., 11/4/1985).

* Adjacent residential parcel, acquired after Act 250 jurisdiction was triggered, is involved land because it bears a relationship to commercial lumber yard that is likely to have substantial impact on aesthetic values. *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 6 (4/9/06).

* Under Criterion 8, before issuing a permit, the Board must find the proposed Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare or irreplaceable natural areas. 10 V.S.A. ' 6086(a)(8). *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 38 (11/4/05), *aff’d in part, rev’d in part, In re Appeal of*

Times & Seasons, LLC, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 24 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 23 (5/4/04) [EB #831]

* Application of Criterion 8 does not guarantee that views of a landscape will not change, or that view one sees from one's property will remain the same forever; but it does give reasonable consideration to a project's visual impacts on neighbors, the community, and on Vermont's special scenic resources. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 39 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 25 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 25 (5/4/04) [EB #831] *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 36 (3/8/02). [EB #785]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 29 (2/22/01). [EB #758]; *Main Street Landing Company and City of Burlington*, #4C1068-EB, FCO at 17- 18 (11/20/01) [EB #790]; *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 31 (12/21/00). [EB #751]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 16 (12/7/00). [EB# 747]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 33 (5/16/00); *Re: Horizon Development Corporation*, #4C0841-EB FCO at 20 (8/21/92). [EB #518]; *Re: Okemo Mountain Inc.*, #2W5051-8-EB, FCO at 9 (12/18/86).

* Assessing the aesthetic impacts of a project is a fact-specific inquiry. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 40 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 25 (5/4/04) [EB #831]

* Loss of open space and alteration of vistas adversely affects aesthetics. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 40 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 26 (11/24/04) [EB #838]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 15 (4/13/04) [EB #814]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 36 (3/8/02). [EB #785]; *Main Street Landing Company and City of Burlington*, #4C1068-EB, FCO at 18 (11/20/01). [EB #790]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 29 (2/22/01). [EB #758]; *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (6/26/91). [EB #466]; *see also Re: Maple Tree Place Associates*, #4C0775-EB, FCO at 48-49 (6/25/98); *Re: George, Mary, and Rene Boissoneault*, #6F0499-EB, FCO at 19 (1/29/98).

* Board has continually noted importance of protecting the visual continuity of Vermont's prominent mountaintop ridge lines. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (Reconsideration) (8/27/97). [EB #659]

* Analysis of economic benefit is not relevant under Criterion 8. *Mt. Mansfield Co., Inc.*, #5L1125-4-EB (8/14/95). [EB #573]

* Functional effects of a project are not aesthetic effects protected by Criterion 8. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 29-30 (12/31/02). [EB#800]

- * The Board may use "subjective" rather than "objective" standards when evaluating projects pursuant to Criterion 8. *Chester P. Denio*, # 1B0036-2-EB (3/27/89), *aff'd In re Denio*, 158 Vt. 230 (1992). [EB # 362]
- * Criteria 1(B), 4, and 8 apply to wetlands because particular values of the wetlands that are addressed under the criteria may be affected. *FinardZamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]
- * Criterion 8 requires evidence of impact not only from public viewing areas but also collective impacts from private property of area residents under "general welfare" police powers. *Lawrence E. Thomas*, #2W0644-EB(2/18/86). [EB #266].
- * Sensitive character of Vermont's mountains is an important consideration in planning for development. *Northshore Communications, Inc. and Carthusian Foundation of America, Inc.*, #8B0324-EB (6/6/85). [EB #239]
- * Board has no statutory authority to investigate alternative sites for a proposed project to address matters of aesthetics under Criterion 8, however, Legislature has granted such authority in matters of shorelines, necessary wildlife habitat, endangered species, and primary agricultural soils. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]
- * Vermont SCORP is used as guidance concerning scenic enjoyment of Interstate 89, which has been designated a scenic corridor since 1967. *Brattleboro Chalet Motor Lodge, Inc.*, #4C0481-2-EB (10/17/84). [EB #231] Permit amended (1/14/85). [EB #246]
- * Parties may make an informal disposition by stipulation regarding location of a buried cable satisfying requirements of Criterion 8. *N.E. Tel. & Tel. and CVPS*, #1R0436-1-EB (5/14/82). [EB #176]
- * Criterion 8 was not intended to protect the natural beauty of only pristine areas of the state. *George Tardy*, #5W0534 (3/21/80). [EB #122]
- *Where there is no evidence of historic sites or rare and irreplaceable natural areas located on the Property or surrounding areas, Criterion 8 review is limited to the project's impact upon scenic or natural beauty of the area and its aesthetics. *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257 and Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 22 (1/17/13), *aff'd, In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 ¶37 (01/17/14).
- * NRB's motion to strike (i.e., dismiss for redundancy under V.R.C.P. 12(f)) Question 4 is denied, because Questions 4 and 6 seek to address aesthetic impacts from different vantage points and thus, are not redundant of one another. *623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018).

762. Elements of Quechee Lakes test

*The Quechee test is used to evaluate a projects conformance with Criterion 8. First, we examine whether a proposed project may cause an adverse impact on the character of the area and second we must determine whether that impact will be “undue”. If adverse, then it is also undue if any of the following are answered in the affirmative: (1) does the project violate a clear, written, community standard intended to preserve the aesthetics of scenic, natural beauty of the area; (2) does the project offend the sensibilities of the average person; (3) has the applicant failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 19 (2/16/2017)(citing *Quechee Lakes Corp.*, Nos. 3W0411-EB and 3W0439-EB, at 17).

*Cornerstone of analysis under Criterion 8 is the question: “will the proposed project be in harmony with its surroundings- will it fit the context within which it will be located?” *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 17 (2/16/2017).

* *Quechee Lakes* test described and followed by the Vermont Supreme Court in *In re Lathrop L.P.*, 2015 VT 49, ¶ 74; *In re Petition of Cross Pollination*, 2012 VT 29 (mem.); *In re Rinkers, Inc.*, 2011 VT 78 (mem.); *In re Eastview at Middlebury, Inc.*, 2009 VT 98, ¶20; *In re Times and Seasons, LLC*, 2008 VT 7, ¶8, 183 Vt. 336; *In Re Petition of Halnon*, 174 Vt. 514, 515 (2002); *In re McShinsky*, 153 Vt. 586 (1990); see also *In re Verizon Wireless Barton*, No. 2011-204 (May 2, 2012) (unpublished entry order)

* The District Commission, and Environmental Court in a de novo appeal, must first determine whether the aesthetic effect of the proposed project is “adverse,” that is, whether it is or is not in harmony with its surroundings. If it is determined to be adverse, the second step in the analysis is to determine whether the anticipated adverse aesthetic effect of the project is “undue.” *In re: Free Heel, Inc.*, No. 217-9-06 Vtec, Decision at 5 (3/21/07)(citing *In re Quechee Lakes Corporation*, 154 Vt. 543 (1990); *In re Quechee Lakes Corporation*, No. 3W0411-A-EB (Vt. Env'tl. Bd., 11/4/1985)); *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 26 (10/26/12) (Citing 2008 VT 7, ¶ 8, 183 Vt. 336, 950 A.2d 1189) *In re Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257* and *In re Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 22 (1/17/13), *aff'd*, *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 ¶ 23 (01/17/14).

* For aesthetics determination, the Board uses a two-step analysis in which it first determines whether the proposed project would have an adverse aesthetic impact and then looks at whether that impact would be undue. *In re Denio*, 158 Vt.230, 239 (1992); *In re McShinsky*, 153 Vt. 586, 591 (1990); *Re: John Larkin, Inc.*,#4C0526-11R(2)-EB, FCO (10/11/05) [EB#861].

* Elements and analysis of the *Quechee Lakes* test: *Quechee Lakes Corporation*, #3W0411-A-EB (11/4/85). [EB #254 and #255]; *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 17 (2/16/2017)

* First question is whether project will have adverse impact by considering whether it is in harmony with its surroundings; this depends upon the following factors: the nature of the surroundings, the compatibility of the design, the context of the colors and materials chosen, where the project can be seen from, and the impact on the open space in the area. If project will have an adverse effect on

aesthetics or scenic and natural beauty of the area, the second question is whether the adverse effect is "undue," which will be found if a positive conclusion is reached regarding any of the following: (i) whether the project violates a clear, written community standard intended to preserve the aesthetics or scenic / natural beauty of the area; (ii) whether the project offends the sensibilities of the average person; or (iii) whether the applicant has failed to take generally available mitigative steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings. *Goddard College Act 250 Reconsideration*, 175-12-11 Vtec at 11, 12 (01/06/14); *Re: John Larkin, Inc.*, #4C0526-11R(2)-EB, FCO (10/11/05) [EB#861]; *Re: George and Diana Davis*, #2S1129-EB, FCO at 7 - 9 (12/15/04) [EB#844]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 25 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 23 (5/4/04) [EB #831]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 13 (4/9/02) [EB #791]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 35 and 38 (3/8/02). [EB #785]; *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 16 - 22 (3/22/01). [EB #760] *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 28 (2/22/01). [EB# 758]; *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 32 (12/21/00) [EB #751]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 17-23 (12/7/00). [EB# 747]; *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 25-30 (5/25/99), *aff'd*, *OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), FCO at 24-25 (8/19/96); *Quechee Lakes Corporation*, #3W0411-A-EB (11/4/85). [EB #254 and #255]

* ANR's Scenic Resource Evaluation is not tantamount to the *Quechee Lakes* standard, but it may be used as evidence within the *Quechee Lakes* analysis. *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, Finding of Fact, Conclusion of Law, and Order at 29 (2/4/02). [EB#767]

* Under the *Quechee Lakes* test, District Commission in the first instance, and the Court on appeal, must first determine whether the proposed project is "adverse," that is, whether it is in harmony with its surroundings from an aesthetic perspective. If the project would be aesthetically adverse, a determination must then be made as to whether the anticipated adverse aesthetic impacts are "undue." *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 2 (10/23/06)(citing *In re Quechee Lakes Corporation*, 154 Vt. 543 (1990) and No. 3W0411-A-EB, Findings of Fact, Conclusion of Law and Order (Vt. Env'tl. Bd., Nov. 4, 1985)).

762.1 Adverse Effect and Character of the Area

* Adverse means unfavorable, opposed, hostile to the character of the area. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 16 (2/16/2017).

* "When considering a project's aesthetic and noise impacts under Criterion 8, the baseline "character of the area" includes existing development in the area, and the sounds and noises historically emitted from existing development and other nearby uses and background noise." *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 18 (2/16/2017).

* The Court or Commission must first examine the baseline character of the area, including its

aesthetics, in order to determine whether the proposed use will have an adverse aesthetic impact. *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257* and *Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 23 (1/17/13), *aff'd*, *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).

* A multi-level residential retirement community that, considering its mass and multiple components, is not readily in “harmony” with the surrounding undeveloped lands and scenic beauty around the project site, which has an undisputable “particular scenic value,” will have an adverse impact. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 15 (2/15/08), citing *In re: Quechee Lakes Corp.*, Nos 3W0411-EB and 3W0439-EB, FCO at 18 (Vt. Env'tl. Bd., Nov. 4, 1985).

* To determine if a project will have an adverse aesthetic impact, the Environmental Court seeks to determine “if the proposed project is ‘unfavorable,’ ‘opposed,’ or ‘hostile’ to its surroundings.” *In re Verizon Wireless/Barton Act 250 Permit Telecommunications Facility*, No. 6-1-09 Vtec, Decision on the Merits at 9 (4/21/11) (quoting *Re: Brattleboro Chalet Motor Lodge, Inc.* No. 4C0581-EB, Findings of Fact, Conclusions of Law and Order (Vt. Entl. Bd. Oct. 17, 1984), *aff'd*, No. 2011-204 (mem.) (unpublished) (Vt. Supreme Ct. 5/1/12).

* Board must determine whether the project will have an adverse effect under Criterion 8. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 39 (11/4/05), *aff'd* in part, *rev'd* in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Susan Dollenmaier and Martha Dollenmaier Spoor*, #3W0125-5-EB, FCO at 10 (2/7/05); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), FCO at 24-25 (8/19/96), citing *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, FCO at 17 -19 (11/4/85)

* To determine whether project “fits” the context of its area, Board first has to determine what that context is. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 40 (11/4/05), *aff'd* in part, *rev'd* in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: George and Diana Davis*, #2S1129-EB, FCO at 8 (12/15/04) [EB#844]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 26 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 24 (5/4/04) [EB #831]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 15 (4/13/04) [EB #814]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 14 (4/9/02); *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 36 (3/8/02) [EB #785]; *Herndon and Deborah Foster*, #5R0891-8B-EB (6/27/97)[EB # 665] (to determine whether project will be in harmony with its surroundings, Board must determine nature of those surroundings; this factual inquiry considers, *inter alia*, the types of present lands uses, the type of topography, whether area has particular scenic value, scale of project in relation to surrounding land uses, density of land uses in vicinity, and the project’s visibility); *Paul & Dale Percy*, #5L0799-EB (3/20/86)[EB #277] (when determining a project's "fit," special attention must be paid to whether the scenic qualities of certain "special features" will be maintained; these include ridge lines, steep slopes, shorelines, floodplains, and other aesthetically unique features such as historical structures, wetlands, and natural areas.)

* If a project "fits" its context, it will not have an adverse effect, and inquiry under Criterion 8 ends.

Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB (Altered), FCO at 40 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Bethel Mills, Inc.*, #3W0898 (Altered)-EB, FCO at 9 (8/4/05) [EB#851]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 26 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 24 (5/4/04) [EB #831]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 14 (4/9/02). [EB #791]; *Re: Talon Hill Gun Club and John Swington*, #9A0192-2-EB, FCO at 9 (6/7/95).

* If a project does not fit its context, then Board will conclude that its impacts are adverse, and Board proceeds to next stage of analysis. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 39 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 26 (11/24/04) [EB #838]

* While a built environment is not always adverse, projects that result in loss of open space and alteration of vistas can have an adverse effect on aesthetics and scenic beauty. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 14 (4/9/02). [EB #791]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 36 (3/8/02). [EB #785]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 29 (2/22/01). [EB #758]; *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB, FCO at 21 (6/26/91). [EB #466]; see also *Re: Maple Tree Place Associates*, #4C0775-EB, FCO at 48-49 (6/25/98); *Re: George, Mary, and Rene Boissoneault*, #6F0499-EB, FCO at 19 (1/29/98).

* Criterion 8 requires applicants to demonstrate that proposed additions and alterations would not cause an undue adverse impact upon the aesthetics of the neighboring areas. 10 V.S.A. § 6086(a)(8). *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 1 (10/23/06).

* Under the Quechee Lakes test, District Commission in the first instance, and the Court on appeal, must first determine whether the proposed project is "adverse," that is, whether it is in harmony with its surroundings from an aesthetic perspective. If the project would be aesthetically adverse, a determination must then be made as to whether the anticipated adverse aesthetic impacts are "undue." *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 2 (10/23/06)(citing *In re Quechee Lakes Corporation*, 154 Vt. 543 (1990) and No. 3W0411-A-EB, Findings of Fact, Conclusion of Law and Order (Vt. Env'tl. Bd., Nov. 4, 1985)).

762.1.1

Residential Subdivisions, Housing Projects, etc.

* Vegetative buffer will significantly screen view of buildings, therefore, Project will not have an adverse affect on aesthetics. *Otter Creek Development, LLC*. #1R0535-3-EB, FCO at 6-7 (4/19/02). [EB #803]

* Project will have adverse impact on aesthetics because size and density of units differs from surrounding structures. *Brewster River Land Co., LLC.*, #5L1348-EB, Findings of Facts, Conclusions of Law, and Order at 15 (2/22/01). [EB #761]

- * Large, senior housing project (inn and cottages) in rural area does not fit its surroundings. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 30 (2/22/01). [EB #758].
- * Project that places 8 single family homes on previously undeveloped mixed forested woodland is not in harmony with its surroundings. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99). [EB #726]
- * Placement of 55 homes on separate lots with associated roadways does not fit within surrounding rural context and thus causes adverse effect on area's aesthetics. *Nile and Julie Dupstadt*, #4C1013-EB (4/30/99). [EB #716]
- * Project does not have adverse effect where house sites are located to maximize the screening benefit gained from existing trees, covenants restrict clearing of trees for house sites, covenants prohibit clearing of trees to create an uninterrupted view of an entire building facade, covenants limit tree cutting in all forested areas to uneven aged forestry management practices in order to maintain a continuous wooded canopy over project tract, outdoor lighting is shielded, and all service lines for utilities are installed underground. *Mark and Pauline Kiesel*, #5W1270-EB, (8/7/98), *rev'd on other grounds, In re Kiesel*, 172 Vt. 124 (2000). [EB # 695]
- * Recreation trail located along perimeter of rural subdivision and close to adjoiner's property line did not create adverse impact on aesthetics, because trail is not obtrusively visible and only minimal physical changes would occur. *Sidehill Enterprises*, #5L1237-EB (Altered) (6/9/98). [EB # 687]
- * Residential subdivision, which would result in loss of open space and alteration of visual experience of scenic vistas for passing motorists, would have an adverse effect on aesthetics and scenic beauty of area. *Raymond F. and Centry M. Duff*, #5W0952-2-EB (1/29/98) [EB #684]; *Edwin & Avis Smith*, #6F0391-EB (5/11/89). [EB #398]
- * Project which would entirely cover existing corn field and significantly diminish scenic value of area causes adverse effect under Criterion 8 . *George, Mary, and Rene Boissoneault*, #6F0499-EB (1/29/98). [EB #678]
- * Large scale residential development would not have undue adverse effect. *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd, In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]
- * Project has adverse effect in terms of noise and nuisance, but not in terms of modest loss of views and open space. *UVM, State Agriculture College, and Novarr-Mackesey Development Co.*, #4C0895-EB(8/28/92). [EB #540]
- * Apartment building, located in a mixed-student / non-student residential area and in close proximity to college, will not create adverse noise impact. *Richard Berman and Bradford B. Moore*, #5L1086-EB (5/8/92). [EB #522]
- * Noise from project will not create an adverse effect, but the creation of a 42 car parking lot will have an adverse visual effect. *Richard Berman and Bradford B. Moore*, #5L1086-EB (5/8/92). [EB #522]

- * Cutting lines on previously approved subdivision lot and relocating house site on the lot does not create any potential audio impacts to adjoining property; thus project meets Criterion 8. *Worcester Corp.*, #5L0979-2-EB (5/15/91). [EB #464]
- * Extensive clearing in anticipation of proposed residential subdivision, together with regrading of natural landforms and opening of views to lake, resulted in project that was clearly not in harmony with its surroundings and which had an adverse visual effect. *Bernard & Suzanne Carrier*, #7R0639-EB (10/5/90). [EB #435]
- * Residential subdivision causes loss of open space and is visible from road, causing an adverse aesthetic impact, but impact is not undue. *James Davenport, Jr. and Barbara Davenport*, #1R0667-EB (7/9/90). [EB #449]
- * Condominium has no undue adverse aesthetic effects, because houses are architecturally similar to existing houses in area, and there is no significant loss of open space. *Twin State Development Associates*, #5W1021-EB (6/11/90). [EB #448]; *Woodstock Heritage, Inc.*, #3W0373-EB (11/10/81). [EB #167]
- * Subdivision of 3 lots immediately adjacent to previously approved 71-lot subdivision has no undue adverse aesthetic impact on the scenic beauty of area. *Chester P. Denio*, #1B0036-2-EB (3/27/89), *aff'd, In re Denio*, 158 Vt. 230 (1992). [EB #362]
- * Condominium site, which is located in an aesthetically sensitive area, would have a profound visual impact and would be out of context with its surroundings. *Northshore Development, Inc.*, #4C0626-5-EB (12/29/88). [EB #391]; *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]
- * Although mass and scale of buildings associated with residential project will have an adverse impact on area, impact will be mitigated by landscaping and will not be truly adverse. *John Kennedy and Jeffrey Kilburn*, #8B0370-2-EB (9/26/88). [EB #382]
- * Multi-phase residential development will have adverse effect because it does not fit within forested location off the interstate highway. *Landmark Development Corporation*, #4C0667-EB (1/22/88). [EB #353]
- * Project's impact will be adverse because a densely spaced, single family residential subdivision on small lots is out of context with its rural residential location. *Hickock & Boardman*, #4C0662-EB (12/3/87). [EB #303]
- * Condominium project in a pastoral setting is out of context and will cause an adverse aesthetic impact. *Houston Farms Associates*, #5L0775-EB (4/27/87). [EB #260]
- * Commission may disapprove a building type or dimension within a single family subdivision to ensure it will not have an adverse affect on the surrounding area. *Allenbrook Associates*, #4C0466-1-EB (4/19/82). [EB #175]

* Absence of 300 plantings in original landscaping plan will not have an undue adverse affect under Criterion 8. *Nancy Lang, Claude Gagne, and the Brickyard Association*, #4C0255-2-EB (12/31/81). [EB #142]

* Mixed commercial/residential development will have undue adverse effect. *Land/Tech Corporation*, #100036 (2/20/73). [EB #58]; *Land/Tech Corporation*, #100036 (2/20/73). [EB #20]

* Expansion of mobile home park is not adequately screened from the Interstate and will result in an undue adverse effect . *Ward A. Fuller*, #300013 (5/17/91 & 2/28/72). [EB #8]

* Permit for single family home subdivision denied in part because the location is a natural and scenic area. *Cape Lookoff Mountain*, #400002 (9/16/70). [EB #3]

*The conclusion that a project would not result in an adverse impact because the project was designed with buildings that matched the local architecture and preserved upland fields and forested hillsides visible to passing travelers is sufficient to uphold the project against the Criterion 8 challenge. *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 31 (10/26/12).

762.1.2

Skiing and other Recreation

* Recreation trail located along perimeter of rural subdivision and close to adjoiner's property line did not create adverse impact on aesthetics, because trail is not obtrusively visible and only minimal physical changes would occur. *Sidehill Enterprises*, #5L1237-EB (Altered) (6/9/98). [EB # 687]

* Archery facility, as conditioned by Board, would not cause an adverse effect on the aesthetics of the area. *Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB (12/18/97). [EB #682]

* Non-winter use of base lodge and associated tramway service would not have an undue adverse effect on scenic or natural beauty or aesthetics of Mt. Mansfield area. *Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort*, #5L1125-10 and 10R-EB (Base Lodge) (Altered) (3/27/96). [EB #639(R)]; *Mt. Mansfield Company*, #5L1125-10-EB (12/28/95). [EB #612]

* Ski project intrudes on the nighttime sky and will have an adverse effect upon aesthetics and the scenic and natural beauty, including the night sky. *Mt. Mansfield Co., Inc.*, #5L1125-4-EB (8/14/95). [EB #573]

* No persuasive evidence was presented to show adverse aesthetic impact from additional lighting on cross-country ski trails. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

* Chairlifts and ski trails do not unduly affect the aesthetics or natural beauty of the area under Criteria 8 and 9(A). *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]

762.1.3**Roads, Transportation and Signs**

* Commercial banners primarily seen against the background of the retail building and warming hut, or against the background of the neighboring buildings and foreground trees on the properties or against Route 4 itself will not adversely affect scenic views. *In re: Free Heel, Inc.*, No. 217-9-06 Vtec, Decision at 6 (3/21/07).

* In determining whether sign fits within context of its surroundings, Board will consider size of sign, the size of signs at similar commercial establishments nearby, and whether such signs are internally or externally illuminated. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 26 (4/9/02) [EB #791]; *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 47. (8/20/01). [EB #766]

* Board cannot determine whether internally lit 25' by 14' free standing sign fits within context of its surroundings without evidence of it and free standing signs at similar commercial establishments in area. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 45. (8/20/01). [EB #766]

* A building can, in some cases, take on the attributes of a sign. *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 17 - 18 (3/22/01). [EB #760]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 19 (12/7/00). [EB# 747]

* Competition in strip development leads to escalating sign visibility. *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 17 (3/22/01) [EB #760]; *McDonald's Corp. & Murphy Realty Co.*, #100012-2-EB (2/10/89). [EB #410]

* Proposed large, illuminated sign at car dealership would significantly diminish scenic quality of semi-rural area. *Town & Country Honda*, #5W0773-1-EB (6/14/89). [EB #383]

* Noncompliance with Vermont's sign law leads to conclusion that proposed new signs will have an undue adverse aesthetic effect. *Philip E. Alderman d/b/a Alderman's Chevrolet*, #1R0263-5-EB (3/27/89). [EB #399]

* Installation of a business identification sign to an existing restaurant does not result in an adverse impact on area aesthetics. *Durward Starr & George Halikas*, #7R0594-1-EB (4/30/86). [EB #288]

* Sign will violate Criterion 8, because if its size, construction material, colors used, and its non conformity with area's rural character. *Imported Cars of Rutland, Inc.*, #1R0156-2-EB (12/12/82). [EB #184] [EB #192]

* Addition of free-standing sign for a restaurant in a shopping center does not have an undue adverse effect. *Juster Associates*, #1R0048-1-EB (7/9/80). [EB #101]

* Under the Quechee Lakes test, District Commission in the first instance, and the Court on appeal, must first determine whether the proposed project is "adverse," that is, whether it is in harmony

with its surroundings from an aesthetic perspective. If the project would be aesthetically adverse, a determination must then be made as to whether the anticipated adverse aesthetic impacts are “undue.” *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 2 (10/23/06)(citing *In re Quechee Lakes Corporation*, 154 Vt. 543 (1990) and No. 3W0411-A-EB, Findings of Fact, Conclusion of Law and Order (Vt. Env'tl. Bd., Nov. 4, 1985)).

* Adding and enlarging signs and periodic use of display tent is not aesthetically adverse because proposed signage is not inharmonious to the aesthetic character of this section of Route 4 in Rutland. Proposed sign additions are not a significant departure from existing permitted signs and those existing at neighboring properties *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 2 (10/23/06).

* Summary judgment granted in applicant’s favor when undisputed facts show that proposed signage is not inharmonious to the aesthetic character of section of Route 4 in Rutland. *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 2 (10/23/06).

762.1.4

Waste Treatment, Pollution, Landfills, Solid Waste Transfer Stations, etc.

* Solid waste transfer station and recycling center did not have adverse effect on aesthetics where permit conditions regulated outside storage of equipment, parking of vehicles, and disposal of waste, and area surrounding project was commercial/industrial area. *Timothy and Mary Baker*, #8B0506-WFP (1/10/96).

762.1.5

Commercial and Industrial

* Project fits its context because it is a commercial in-fill development surrounded by similar intensive commercial developments. Project does not encroach upon true open space removed from surrounding intensive development. Therefore, Project does not have an adverse impact. *Re: CHA Butson Rutland, LLC and E. Paul Hood Inter Vivos Trust*, #1R0703-2-EB, FCO at 18-19 (6/1/05).

* Large store fits surrounding context. because of intensive commercial uses in immediate vicinity, vegetative screening, use of earth tone colors, and fact that project has virtually no impact on open space. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 45. (8/20/01). [EB #766]

* Bright red roof is out of context and adverse to scenic views of mountains. *In re McDonalds’s Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 15 (3/22/01). [EB #760]

* 2,300 foot road and associated utilities has no adverse aesthetic effect because project is in harmony with industrial park, and a buffer effectively screens project from view. *Hector LeClair d/b/a Forestdale Heights*, #4C0329-17-EB (2/25/99). [EB #711]

* Master plan for 4 million SF industrial project to be constructed over 20 year period on 700 acres will have adverse aesthetic effect on scenic and natural beauty of predominantly rural, agricultural

area. *Greater Burlington Industrial Corp. and Husky Injection Molding Systems*, #4C1007-1-EB (6/25/98). [EB #677]

* Board concludes that a retail store and merchandise storage shed would not "fit" its surroundings and therefore would have an adverse effect on aesthetics and scenic beauty. *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652]

* Potential disturbance to motel guests from diesel refueling station will not result in detriment to public health, safety, or welfare where hours of operation are limited. *Speedwell, Inc.*, #7C0568-2-EB (2/29/96). [EB #642]

* Auto dealer's vehicle parking, night time lighting, and general visibility of cars in context of surrounding residential area would have an adverse effect on scenic beauty and aesthetics of area. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]

* Use of northern half of right-of-way by commercial traffic had undue adverse effect on surrounding residential land uses and would be prohibited, but use of southern half did not and would be allowed. *Larry and Diane Brown*, #5W1175-1-EB (6/19/95). [EB #591]

* While large scale commercial project would have adverse effect, such effect was not undue. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]

* Shopping center is out of scale with surroundings where proposed development is 25 times the size of typical commercial building in area. *Waterbury Village Shopping Center Inc.*, #5W1068-EB (7/19/91). [EB #503]; *Stephen B. Tanger*, #3W0125-3-EB (5/22/90). [EB #442]

* Project is like strip development because it is along a major rural highway; is outside existing village centers; is orientated primarily towards the automobile; has broad road frontage; is not connected to existing settlements by anything except highway; is not accessible to pedestrians; and is uncoordinated with surrounding projects in terms of design, signs, lighting, and parking. *Waterbury Village Shopping Center Inc.*, #5W1068-EB (7/19/91). [EB #503]

* Strip development project will adversely affect aesthetics and scenic values by interfering with the traditional Vermont settlement pattern. *Waterbury Village Shopping Center Inc.*, #5W1068-EB (7/19/91). [EB #503]

* Project will have an adverse effect on aesthetics and scenic and natural beauty of an area where it will result in the loss of much open space and alteration of visual experience for passing motorists. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]

* Expansion of existing retail complex, located on steep slope and dominated by buildings, parking areas, and massive retaining wall, has adverse effect on area. *Shimon & Malka Shalit*, #8B0334-3-EB (2/8/91). [EB #438]

- * Projects, with peaked roofs, clapboard siding, and neutral colors, are in harmony with surrounding buildings and lands. *W. Thompson Cullen & Barry Reardon*, #2W0720-1-EB and #2W0720-2EB (8/10/89). [EB#432]
- * Where proposed project will be much larger than surrounding commercial uses, where open space will be lost, and where some wetlands will be filled, project has adverse effect. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]
- * Proposed commercial truck sales and service building is not "adverse" because it "fits" its location in industrial park. *Ray Pecor, Jr. and Stuart Ireland*, #4C0288-11-EB (11/12/87). [EB #356]
- * Addition of two limited display areas at recreational vehicle/small engine dealership will not have undue adverse impact if certain mitigative measures are taken. *Donald R. Preuss*, #1R0519-2-EB (3/24/87). [EB #321]
- * Placing boats in visible locations is adverse because existing green spaces on both sides of building would be obscured by boats changing property's overall appearance. *Donald R. Preuss*, #1R0519-2-EB (3/24/87). [EB #321]
- * Large commercial buildings with parking lots for used cars is not compatible with rural-residential area and will have an undue adverse affect unless mitigating measures are undertaken. *Didace & Susan LaCroix*, #3W0485-EB (4/27/87). [EB #292]
- * Mixed commercial/residential development will have undue adverse effect. *Land/Tech Corporation*, #100036 (2/20/73). [EB #58]; *Land/Tech Corporation*, #100036 (2/20/73). [EB #20]
- * Commercial shopping center will not have undue adverse effect. *Justgold Holding Corporation*, #1R0048 (7/19/73). [EB #31]

762.1.6

Quarries, Gravel Pits, Asphalt Plants, etc.

- * Character of area on Route 14 side of gravel pit operation and character of the area on Balentine Road area to the west and south are distinct areas in determining the baseline "character of the area". Because visual impacts will increase to Balentine Road area, the effects of the project are adverse as to that specific location. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 16 (2/16/2017).
- * Instantaneous noise levels (Lmax) are the appropriate standard by which to judge noise impacts from trucks, since that is what people experience. *In re Lathrop L.P.*, 2015 VT 49, ¶ 86 (citations omitted).
- * The Court does not "require" Rivers to guarantee against fly rock. *In re: Rivers Dev. Act 250 Appeal*, #68-3-07 Vtec, Decision on Post-Judgment Motion to Alter at 6 (8/17/10).
- * Noise from quarry has no undue adverse impact on aesthetics where limited to 55 dB(A) Lmax at areas of frequent human use. *Re: Alpine Stone Corporation, ADA Chester Corporation and Ugo*

Quazzo, #2S1103-EB, FCO (2/4/02). [EB#767]

* Quarry which represents a significant departure from existing area land uses, may be visible to some residents and traveling public, and will increase noise, traffic and dust in its vicinity, will not be in harmony with its surroundings and will create adverse aesthetic impact. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 80 (12/8/00). [EB# 739]

* Additions to permitted dolomite rock quarry would have an adverse effect on scenic and natural beauty and aesthetics of area. *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (8/19/99) and see subsequent FCO (1/17/02), *rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 (V.S.Ct.10/15/03). [EB #723]

* Noise from asphalt plant operations would be adverse. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]; *Pike Industries, Inc.*, #400008-2-EB (10/23/97). [EB #674]; *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]

* Earth extraction project would not have adverse effect on aesthetics because of ongoing interim and final reclamation measures, and surrounding context. *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607]

* Earth extraction project would not have undue adverse effect on aesthetics. *John and Marion Gross d/b/a John Gross Sand and Gravel*, #5W1198-EB (4/27/95). [EB #606]

* Earth extraction project will have an adverse effect on the rural character of the area, due to the high increase in noise from added traffic. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]

* Earth extraction project which violated town plan's standard regarding scenic entrances and would be out of context with surrounding rural residential and conservation area, would have undue adverse effect. *Leonard and Rose Lemieux*, #3R0717-EB (3/1/95). [EB #581]

* Neither 42,800 nor 28,888 quarry truck passbys would fit within context of a primarily residential neighborhood, and either would have adverse aesthetic impact on area. *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]

* Ledge quarry project in steep, narrow valley of rural and residential character would be out of context and would have adverse effect on aesthetics and scenic beauty. *Leonard R. Lemieux*, #3R0717-EB (8/12/93). [EB #581]

* Commercial gravel extraction operation will have adverse aesthetic effect on surrounding rural and residential area. *Elwood and Louise Duckless*, #7R0882-EB (6/11/93). [EB #555]

* Sand removal project will not have an undue adverse effect where the terrain is flat, has no ridge lines, open space, shoreline, or steep slopes. *Forestdale Heights, Inc.*, #4C0329-16-EB (1/8/93). [EB #543]

- * Sand/gravel operation will have adverse aesthetic effect in strong rural and residential context, when existing traffic falls below peak levels (peak levels mask project noise). *R.J. Colton*, #9A0082-1R-2-EB (4/17/92). [EB#529]
- * Project involving extraction of sand and gravel does not fit into context of bucolic area and will cause undue adverse impacts on the aesthetics and scenic beauty. *H.A. Manosh*, #5L0918-EB (8/8/88). [EB #359]
- * Quarry project satisfies Criterion 8 because of an adequate buffer zone. *J.P. Carrara & Sons, Inc.*, #1R0589-EB (2/17/88). [EB #337]
- * Noise generated by hauling vehicles and the crushing/washing impact has a clearly adverse impact on aesthetics and surrounding land uses. *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]
- * Gravel extraction operation in an aesthetically unique area of high woodland falls, which is preserved by the State, is out of context and will cause undue adverse impact. *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB#277]
- * Where a proposed earth extraction project will bring more intensive operations to an area, then any noises that the more intensive operations generate that have a unique, discernible, or disturbing character, as compared to the baseline levels of noise, may be adverse to the neighborhood, its residents, and visitors, regardless of whether the noises rise above the discernible level of other area noises. *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257 and Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 24 (1/17/13), *aff'd*, *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).
- *Where a proposed rock extraction/crushing operation will generate noises that are harsh, impulsive, and intermittent in an area surrounded by residences, wooded areas, and hiking trails, the addition of these additional noises would produce an adverse effect, even though the area already includes intermittent noise from other nearby gravel operations. *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 8 (11/28/12) (citing *Barre Granite Quarries*, No. 7C1079(Revised)-EB, at 79-80).

762.1.7

Communications Towers and Lines

- * Where proposed tower is in an area transitioning between compact residential and mixed uses in a river valley and traditional agricultural, forest, and conservation uses at the higher elevation such that the tower will be approximately 80 feet above the height of the trees, it will not 'fit' into the context and therefore has an adverse effect on aesthetics. *In re Rinkers, Inc., d/b/a Rinkers Communications, and Beverly and Wendell Shepard*, No. 302-12-08 Vtec, Decision and Order at 14 (5/17/10).

- * Tower “designed to replicate a tall pine tree, a not uncommon site in the region . . . located nearly 4,800 feet away from I-91 and 3,300 feet away from Appellant’s farm house” which “will cause little earth disturbance and little or no tree cutting” will not cause an adverse impact. *In re Verizon Wireless/Barton Act 250 Permit Telecommunications Facility*, No. 6-1-09 Vtec, Decision on the Merits at 10 (4/21/11), aff’d, No. 2011-204 (mem.) (unpublished) (Vt. Supreme Ct. 5/1/12).
- * Project which results in a net reduction in utility poles and wires has no adverse aesthetic effect, notwithstanding argument that burying the wires would improve aesthetics of area. *Central Vermont Public Service and VTel*, # 1R0869-EB Findings of Facts, Conclusions of Law, and Order at 6 (2/22/01). [EB # 771]
- * Proposal to construct equipment building, fencing, and panel antennae on an existing permitted tower will have an adverse aesthetic effect. *Nextel Communications*, #3R0703-EB-2A-EB (3/10/99). [EB #718]
- * Purpose of collocation provisions of a regional plan is to mitigate, or if possible eliminate, the negative visual impacts caused by certain telecommunications facilities; such facilities, when they protrude above ridge line, are not only visible but incongruous with the scenic qualities associated with Vermont’s mountain ridges. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (Reconsideration) (8/27/97). [EB #659]
- * Radio tower, located on undeveloped and unmarred forested mountaintop, would stand out and be highest skyline interruption visible from surrounding area and detract from surrounding picturesque context, and would have adverse effect on aesthetics and natural beauty. *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]
- * Because telecommunications project would introduce a large commercial structure into an undeveloped area, clear an area for power lines and recreational use, and because in order to create the site a bulldozer would be used, the project would have an adverse effect on aesthetics and scenic beauty. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]
- * Criterion 8 requires evidence of impact not only from public viewing areas but also collective impacts from private property of area residents under "general welfare" police powers. *Lawrence E. Thomas*, #2W0644-EB(2/18/86). [EB #266].
- * Construction of tower on Mt. Equinox will have an adverse aesthetic impact especially in light of proliferation of towers on summit. *Northshore Communications, Inc. and Carthusian Foundation of America, Inc.*, #8B0324-EB (6/6/85). [EB #239]
- * Microwave relay tower will not have an "undue adverse effect" on area’s natural beauty. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]
- * Microwave relay tower 76' high, exposed above surrounding treetops, would have an adverse aesthetic impact. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]
- * Opponents failed to sustain burden of proof that installation of two microwave dishes on an

existing mast would have an undue adverse affect under Criterion 8. *Karlen Communications, Inc.*, #5L0437 (8/28/78). [EB #89]

* Construction of power line and telephone cable will not have an undue adverse effect on the scenic or natural beauty of the area.. *New England Telephone Company*, #7C0085 (1/11/73). [EB #25]

762.1.8

Noise (see [622.2.2](#))

*"We use a benchmark known as the Barre Granite standard for measuring whether noise is adverse under the Quechee test: 70 decibels (dBA)(Lmax) at the property line of a project and 55 dBA (Lmax) outside an area of frequent human use. Even with the benchmark, the question of whether noise is "adverse" ultimately depends on whether the noise suits the existing soundscape, considering the nature and volume of existing noise and the qualitative character of the noise that will be added. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 20-21 (2/16/2017)(citing *Re: Barre Granite Quarries, LLC*, No. 7C1079 (Revised)-EB, Findings Fact, Conclusions of Law, and Order, at 80 (Vt. Entl. Bd. Dec. 9, 2000; *In re Application of Lathrop Ltd. P'ship*, 2015 VT 49, ¶180; and *In re Mclean Enters. Corp.*).

* "When considering a project's aesthetic and noise impacts under criterion 8, the baseline "character of the area" includes existing development in the area, and the sounds and noises historically emitted from existing development and other nearby uses and background noise." *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 18 and 21 (2/16/2017).

* Criterion 8 requires consideration of Lmax instantaneous noise levels, including frequency and intensity of high-decibel noise events caused by the project. Instantaneous noise levels (Lmax) are the appropriate standard by which to judge noise impacts from trucks, since that is what people experience. *In re Lathrop L.P.*, 2015 VT 49, ¶ 86 (citations omitted).

* The *Barre Granite* noise standard, 70 dBA (Lmax) at the property line and 55 dBA (Lmax) at surrounding residences and outside areas of frequent human use, has guided Act 250 determinations for over the past decade. *In re Lathrop L.P.*, 2015 VT 49, ¶ 80 (citations omitted).

* Board may exercise discretion within a range of values supported by the evidence, even though there were no noise level readings based on a sound source located at the precise point chosen by the Board as reasonable; argument to the contrary confuses the function of finding facts with that of framing remedial or quasi-remedial orders fairly reflecting the facts. *In re R.E. Tucker, Inc.*, 149 Vt. 551, 559 (1988).

* Noise from dogs at kennel is intermittent, so the potential adverse impacts do not relate to the specific volume of the noise but rather the frequency and duration of the noise. *Re: Hovey Act 250 Permit*, No. 130-9-13 Vtec, Merits Decision at 12 (3/31/15), Entry Order at 3 (4/14/15), *appeal docketed*, No. 2015-205.

* Noise is an aesthetic consideration. *Re: George and Diana Davis*, #2S1129-EB, FCO at 7 (12/15/04) [EB#844]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, MOD at 2 (7/2//02) [EB #791]; *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 80 (12/8/00); *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 31-40 (5/16/00); *Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB (Altered) (6/12/97). [EB #651R]; *Bull's-Eye Sporting Center / David and Nancy Brooks*, #5W0743-2-EB (2/27/97). [EB #649]; *Grand Union Co.*, #1R0733-EB (8/26/92). [EB #553M]; *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]; *John and Joyce Belter*, #4C0643-6R-EB (5/28/91) [EB #474] *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]

* Whether the noise created by a project is out of character with its setting is both a quantitative and qualitative determination. *Re: George and Diana Davis*, #2S1129-EB, FCO at 8 (12/15/04) [EB#844]

* Different types of noises must be treated differently; sharp, intermittent or high frequency noises must be judged differently from low frequency continuous noises. *Re: George and Diana Davis*, #2S1129-EB, FCO at 8 (12/15/04) [EB#844]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at (4/9/02). [EB #791]; *Re: Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 31 - 32 (5/16/00); *In Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 32 (5/25/99); *Re: Bull's Eye Sporting Center et al.*, #5W0743-2-EB, FCO at 17 (2/27/97); *Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB (Altered), FCO at 19 (6/12/97). [EB #651R]; *Re: Talon Hill Gun Club and John Swingleton*, #9A0192-2-EB, FCO at 9 (6/7/95).

* It makes no sense to impose a maximum nighttime noise limitation on a project when that limit is exceeded by the background noise levels. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, MOD at 3 (7/2//02). [EB #791]

* Question of whether noise produced by project is out of character with its setting is a qualitative determination, involving both an examination of the type of noise that project will generate and neighboring land uses. *Goddard College Act 250 Reconsideration*, 175-12-11 Vtec at 15 (01/06/14); *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 7 (11/28/12); *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 15 (4/9/02). [EB #791]; *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079 (Revised)-EB, FCO at 79-80 (12/8/00); *Charles and Barbara Bickford*, #5W1186-EB, FCO at 33 (5/22/95); *John and Marion Gross*, #5W1198-EB, FCO at 10 (4/27/95); *R.J. Colton Company, Inc.*, #9A0082-1R-2-EB, FCO at 11 (1/14/82).

* For commercial operations such as quarrying operations, Board measures maximum sound levels (Lmax) at either project's property line or at relevant receptors on neighboring properties, or both. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 22 (4/9/02). [EB #791]; *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, FCO at 33 (2/4/02), *Dominic A. Cersosimo and Dominic A. Cersosimo Trustee Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries Inc., and Cersosimo Industries Inc* #2W0813-3 (Revised) - EB, FCO at 13 (4/19/01); *see Bull's-Eye Sporting Center / David and Nancy Brooks*, #5W0743-2-EB (2/27/97). [EB #649]

- * What neighbors hear depends on a range of factors including their distance from project, topography of land, and density of vegetation. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 12 - 15 (4/19/01). [EB #763]
- * Noise from proposed quarry does not have unduly adverse impact on aesthetics where limited to 55 dB(A) Lmax at areas of frequent human use. *Re: Alpine Stone Corporation, ADA Chester Corporation and Ugo Quazzo*, #2S1103-EB, FCO (2/4/02). [EB#767]
- * As conditioned, gravel pit will not conflict with Town Plan provisions prohibiting pits from resulting in an inconvenience or burden on their neighbors; Board applies a higher standard in this case under Criterion 10 than aesthetics standard (noise) in Criterion 8; Board applies decibel maximums at residences, not property lines. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 12 - 14 (4/19/01). [EB #763]
- * Noise from project operations, including use of back up alarms on vehicles and equipment, would be adverse. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]
- * The types of noises consistent with and in harmony with subdivision's recreation trail can be inferred from the kinds of activities permitted and might include thuds of horses' hooves, the swishing of skis, and the sound of human voices. *Sidehill Enterprises*, #5L1237-EB (Altered) (6/9/98). [EB # 687]
- * Noise emanating from 24 hour operation of asphalt plant, no more than eight occasions per year, will have an adverse effect on area's rural character. *Pike Industries, Inc.*, #400008-2-EB (10/23/97). [EB #674]
- * In conducting noise analysis, Board first determines whether project will have an adverse effect and, if so, whether that adverse effect is undue. *Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB (Altered) (6/12/97). [EB #651R]
- *To determine whether a project will have an adverse aesthetic impact, the Court reviews the nature of the project's surroundings, the compatibility of the project's design with those surroundings, and the locations from which the project can be viewed or heard. These factors must be weighed collectively to determine whether the project is in harmony with its surroundings. *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 7-8 (11/28/12) (citing *Hannaford Bros.*, No. 4C0238-5-EB, at 15-18; *Barre Granite Quarries*, No. #7C1079(Revised)-EB, at 79-80).
- *Commercial shooting range does not fit the surroundings and is thus adverse under Criterion 8. *Bull's-Eye Sporting Center / David and Nancy Brooks*, #5W0743-2-EB (2/27/97). [EB #649]
- * Permit amendment authorizing rearranged shooting alignment at gun club would not have undue adverse effect. *Talon Hill Gun Club, Inc. and John Swinington*, #9A0192-2-EB (6/7/95). [EB #611]
- * Due to the high increase in noise from added traffic, earth extraction project will have an adverse effect on the rural character of area. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]

- * Noise from sand/gravel quarry will have an adverse aesthetic impact on surrounding residential and rural area. *Rockwell Park Associates, #5W0772-5 (8/9/93)*. [EB #509]
- * Sand/gravel operation will have adverse aesthetic effect in strong rural and residential context, when existing traffic falls below peak levels (peak levels mask project noise). *R.J. Colton, #9A0082-1R-2-EB (4/17/92)*. [EB#529]
- * Project will not have an adverse aesthetic effect with respect to noise where atmospheric conditions will cause project noise to diminish over distance, intervening topography and vegetation will reduce levels of project noise, and cumulative noise levels from project construction will not exceed background noise. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick, #4C0814-EB (8/14/91)*. [EB #492]
- * Where construction noise of drilling and blasting will be more than the neighborhood is used to on a regular basis, it will have an adverse effect on aesthetics. *John and Joyce Belter, #4C0643-6R-EB (5/28/91)*. [EB # 474]
- * Noise is considered air pollution in the context of potential adverse health effects caused by noise. *John and Joyce Belter, #4C0643-6R-EB (5/28/91)*. [EB # 474]
- * "Quechee analysis" provides a useful framework for evaluating whether noise from construction of a project will have an undue adverse effect upon aesthetics. *John and Joyce Belter, #4C0643-6R-EB (5/28/91)*. [EB # 474]
- * Noise impacts are also evaluated using the two-step Quechee test for "undue" adverse impact on the character of the area. *Goddard College Act 250 Reconsideration, 175-12-11 Vtec at 15 (01/06/14)*.
- * Noise generated by hauling vehicles and the crushing/washing impact has a clearly adverse impact on aesthetics and surrounding land uses. *H.A. Manosh Corp., #5L0690-EB (Revised) (8/8/86)*. [EB #289]
- * Noise and dust from operation of oil trucks on unpaved route would cause an undue adverse effect. *Vermont Talc/OMYA, Inc., #2W0551-1-EB (6/21/85)*. [EB #238]
- * Where a proposed earth extraction project will bring more intensive operations to an area where the baseline has been less intensive earth extraction operations, then any noises that the more intensive operations generate that have a unique, discernible, or disturbing character, as compared to the baseline levels of noise, may be adverse to the neighborhood, its residents, and visitors, regardless of whether the noises rise above the discernible level of other area noises. *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257 and Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App., Nos. 267-11-08 and 60-4-11 Vtec at 24 (1/17/13), aff'd, In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit, 2014 VT 5 (01/17/14)*.

*Where a proposed earth extraction operation will generate additional traffic noises to the neighborhood, but evidence convincingly shows that the noises will not exceed the existing traffic noises in the neighborhood, the additional truck traffic does not have an adverse discernible impact on the neighborhood. *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257 and Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 24 (1/17/13), *aff'd, In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).

762.1.9

Roads, Transportation

762.1.9.1

Construction of

* 2,300 foot road and associated utilities did not have an adverse effect under Criterion 8 because project was in harmony with industrial park, and buffer effectively screened project. *Hector LeClair d/b/a Forestdale Heights*, #4C0329-17-EB (2/25/99). [EB #711]

* Road improvements would not have adverse effect on aesthetics because character of area was a mixture of businesses and residences. *Howe Center Limited*, #1R0770-EB (5/4/95). [EB #614]

* Road and bridge reconstruction project will have adverse aesthetic effect due to large scale of project relative to its surroundings. *Town of Barre*, #5W1167-EB (6/2/94). [EB #589]

* Road reconstruction must be modified to retain four barns that are essential to preserving agricultural soils and economic viability of agricultural units under Criteria 8, 9(B), and 10; project will have undue adverse effect on scenic or natural beauty of area and aesthetics, but not on historic sites or rare and irreplaceable areas. *Agency of Transportation (New Haven Project)*, #9A0071-EB (9/14/79). [EB #106]

762.1.9.2

Impact of project on

* Commission and Board were authorized to impose permit conditions limiting number of truck trips based on Criteria 5 and 8(A). *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).

* Vermont SCORP is used as guidance concerning scenic enjoyment of Interstate 89, which has been designated a scenic corridor since 1967, and construction of motel constitutes an adverse impact, especially to travelling public along I-89. *Brattleboro Chalet Motor Lodge, Inc.*, #4C0481-2-EB (10/17/84). [EB #231] Permit amended (1/14/85). [EB #246]

* Board has authority to consider project's potential impact on aesthetic and natural beauty of road. *George F. Adams & Co., Inc.*, DR #59 (1/20/75); see *In re Application of George F. Adams and Co., Inc.*, 134 Vt. 172 (1976).

Criterion 8 requires applicants to demonstrate that proposed additions and alterations would not cause an undue adverse impact upon the aesthetics of the neighboring areas. 10 V.S.A. § 6086(a)(8). *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 1 (10/23/06).

762.1.10 Miscellaneous

- * Internally illuminated cross near private chapel had adverse effect only at night. *In re Downing*, No.225-11-09 Vtec, Decision and Order at 12-14 (5/10/12) at 8-9.
- * Water reservoir project would have an adverse effect on aesthetics. *Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB (9/23/98). [EB #704]
- * Mixed use development is not out of character with its surroundings because it "fits" the context within which it will be located, project will not have an adverse effect on the scenic and natural beauty of the area. *Maple Tree Place Associates*, #4C0775-EB (6/25/98). [EB #700]
- * Even though proposed illuminated parking is at a higher elevation than the abutters, its placement between two existing lighted lots does not create an adverse impact. *State of Vermont - Buildings & General Services and Vermont State Colleges*, #3R0581-5-EB (6/24/98). [EB #694]
- * Storage units will have an adverse effect under Criterion 8 because it will be out of character with village of mixed residential and commercial uses. *Richard and Barbara Woodard*, #5W1262-EB (12/18/97). [EB #676]
- * Project has adverse effect on aesthetics and natural beauty, where it causes disruption to natural appearance of a lake and shoreline, visible to homes on lake. *Raponda Landing Corp.*, #2W0604-3-EB (1/25/91). [EB #371]
- * RV campground along river's banks does not fit area's scenic rural residential character, and thus has adverse aesthetic impact.. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff'd*, *In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). EB #348]
- * Installation of petroleum storage tanks and construction of a warehouse/storage building will have undue adverse impact. *Pratt's Propane, Inc.*, #3R0486-EB (1/27/87). [EB #311]
- * Expansion of concrete contracting office and storage site is not in character with surrounding area and its mass has adverse effect on view from homes on hill. *Walker Construction*, #5W0816-1-EB (1/14/87). [EB #313]
- * Applicant has made little effort to adapt its building design to the selected site, choosing instead to place an "off the shelf" design within a scenic corridor. *Brattleboro Chalet Motor Lodge, Inc.*, #4C0481-2-EB (10/17/84). [EB #231] Permit amended (1/14/85). [EB #246].
- * Tent and trailer park off Route 100 along the Mad River will have an undue adverse effect on scenic and natural beauty of area. *George Tardy*, #5W0534 (3/21/80). [EB #122]
- * Sawmill will not have an undue adverse effect on aesthetics. *Stuart Hunt, Sr. & Russell Howe*, #2W0325 (9/8/76). [EB #72]
- * Game farm/zoo will have undue adverse effect upon beauty of area. *Wildlife Wonderland*,

#1R0117 (10/17/74), *aff'd, In re Wildlife Wonderland*, 133 Vt. 507(1975). [EB #45]

762.2 Undue Adverse Effect (and see [604](#))

* Internally illuminated cross near private chapel in rural area had undue adverse effect only at night. No undue adverse effect if only lit for an hour at dusk. *In re Downing*, No.225-11-09 Vtec, Decision and Order at 12-14 (5/10/12) at 8-9.

* “Undue” has been defined . . . to mean “that which is more than necessary—exceeding what is appropriate or normal.” *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 14-15 (3/25/10), citing *Re: McLean Enters. Corp.* #2S-1147-1-EB, FCO at 41 (11/24/04); *Brattleboro Chalet Motor Lodge, Inc.*, #4C0581-EB, FCO at 6 (10/17/84).

*Where the developer of a multi-level residential retirement community has incorporated many suggestions from town officials on mitigating project impacts into design revisions, has conformed the project with established community standards, and the project does not offend an average person’s sensibilities, the project’s adverse impacts will not be “undue.” *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 17 (2/15/08).

* “We need not render a determination of whether the adverse impact is ‘undue’ when we have concluded that there is no adverse impact.” *In re Verizon Wireless/Barton Act 250 Permit Telecommunications Facility*, No. 6-1-09 Vtec, Decision on the Merits at 11 (4/21/11), *aff’d*, No. 2011-204 (mem.) (unpublished) (Vt. Supreme Ct. 5/1/12).

* Determining the degree of adverse aesthetic effect is a matter of weighing of the evidence, a role for the Board rather than for Supreme Court. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 297 (1998).

* By statute, Board, not the average person in the community, is required to determine whether a development will have an undue impact on the aesthetics of an area. *In re McShinsky*, 153 Vt. 586, 592 (1990); *Re: Bethel Mills, Inc.*, #3W0898 (Altered)-EB, FCO at 9 (8/4/05) [EB#851].

* If project will have an adverse effect on aesthetics or scenic and natural beauty of the area, the question is whether the adverse effect is "undue," which will be found if a positive conclusion is reached regarding any of the following: (i) whether the project violates a clear, written community standard intended to preserve the aesthetics or scenic / natural beauty of the area; (ii) whether the project offends the sensibilities of the average person; or (iii) whether the applicant has failed to take generally available mitigative steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 19 (2/16/2017); *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 16, 20 (02/14/14); *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257* and *Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 24 (1/17/13), *aff’d, In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14); *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 9 (11/28/12); *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 32 (10/26/12); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB

(Altered), FCO at 41 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: George and Diana Davis*, #2S1129-EB, FCO at 9 (12/15/04) [EB#844]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 27 (11/24/04) [EB #838]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 13 (4/9/02). [EB #791]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 35 and 38 (3/8/02). [EB #785]; *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 16 - 22 (3/22/01). [EB #760] *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 28 (2/22/01). [EB# 758]; *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 32 (12/21/00). [EB #751]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 17-23 (12/7/00). [EB# 747]; *Re: OMYA Inc. and Foster Brothers Farm. Inc.*, #9A0107-2-EB, FCO at 25-30 (5/25/99), *aff'd*, *OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), FCO at 24-25 (8/19/96); *Quechee Lakes Corporation*, #3W0411-A-EB (11/4/85). [EB #254 and #255].

* What is "undue." See [604](#)

* Criterion 8 requires applicants to demonstrate that proposed additions and alterations would not cause an undue adverse impact upon the aesthetics of the neighboring areas. 10 V.S.A. § 6086(a)(8). *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 1 (10/23/06).

*Although some of the Project's aesthetic impacts may be adverse to the character of the area, we also conclude that none of the aesthetics will be "undue." *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 22 (02/14/14).

*"Even if the Court finds that a project does not fit within its context, and therefore has an 'adverse' aesthetic impact on the area, a project will still be found to comply with Criterion 8 unless the adverse aesthetic impact is found to be 'undue.'" *NE Materials Group, LLC et al Act 250*, No. 75-6-17 Vtec., at 35 (2018). **May be Appealed**

762.2.1

Community Standard

* Under this factor, Board must determine whether project violates a clear, written community standard "intended to preserve the aesthetics or scenic beauty of the area" where project would be located. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 42 - 44 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 33 - 34 (2/22/01); *Re: Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, FCO at 24 (5/18/01); *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2W0694-I-EB, FCO at 36 (12/21/00).

* Elements and analysis of the *Quechee Lakes* "community standard" test. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 42 - 44 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: George and Diana Davis*, #2S1129-EB, FCO at 9 (12/15/04) [EB#844]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 38 (3/8/02). [EB #785]; *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 19 - 20 (3/22/01). [EB #760] *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 31-34

(2/22/01) [EB #758]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 20-23 (12/7/00). [EB# 747]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28 (5/16/00). [WFP #38]

* A “community standard” is set by the appropriate “community,” not the Board; Board will respect community’s assessment concerning assets that community considers worthy of protection; therefore, while Board might not consider views protected by Town Plan to be particularly scenic, this is not Board’s judgment to make. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 n.2 (11/4/05), *aff’d in part, rev’d in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.)

* A specific reference in a Town Plan to Act 250’s “community standard” test when describing some places or particular constructions does not mean that other places or constructions are not also subject to or protected by the standard. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 - 47 (11/4/05), *aff’d in part, rev’d in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.)

* Board has often urged towns to take a more active role in regulating land uses within their borders. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 - 47 (11/4/05), *aff’d in part, rev’d in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.), *citing Re: EPE Realty Corporation and Fergessen Management, Ltd*, #3W0865-EB, FCO at 43 n. 10 (11/24/04)

* Intent of *Quechee’s* clear, written community standard element. *Re: Town of Barre*, #5W1167-EB, FCO (6/2/94).

* Adding and enlarging signs and periodic use of display tent is not aesthetically adverse because proposed signage is not inharmonious to the aesthetic character of this section of Route 4 in Rutland. Proposed sign additions are not a significant departure from existing permitted signs and those existing at neighboring properties *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 2 (10/23/06).

762.2.1.1 What qualifies as a Community Standard

* Town plan, regional plan, and zoning regulations in effect at time Act 250 application is filed apply as sources of clear, written community standard under Criterion 8. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 10-11 (11/25/03). [EB#734M4]

* In evaluating whether a project violates clear written community standard, Board looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists to be applied in review of aesthetic impacts of project. *Re: George and Diana Davis*, #2S1129-EB, FCO at 9 (12/15/04) [EB#844]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 18 (4/9/02). [EB #791]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 38 (3/8/02). [EB #785]; *Raymond and Centry Duff*, #5W0952-2-EB, FCO at 9 (1/29/98); *Re: Herbert and Patricia Clark*, #1R0785-EB, FCO at 35 - 37 (4/3/97); *E.g., Re: Thomas W.*

Bryant and John P. Skinner, #4C0795-EB, FCO at 22 (6/26/91); *Re: Thomas W. Bryant and John P. Skinner* at 22; and see *Nile and Julie Dupstadt & Deborah and John Alden*, #4C1013 (Corrected)- EB, FCO at 34 (4/30/99). (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.”) See, *Re: The Mirkwood Group and Barry Randall*, #1R0780-EB, FCO at 22-23 (8/19/96); *Re: Taft Corners Associates*, #4C0696-11-EB (Remand), FCO at 18-19 (Revised) (5/5/95).

* A clear, written community standard must be “intended to preserve the aesthetics or scenic beauty of the area” where the project is located. *Re: George and Diana Davis*, #2S1129-EB, FCO at 9 (12/15/04) [EB#844]; *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2WO694-I-EB, FCO at 36 (12/21/00). [EB #751]; *Mt. Mansfield Co., Inc., d/b/a Stowe Mountain Resort, and the State of Vermont*, #5L1125-4-EB, FCO (6/15/95); *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, FCO at 24 (5/18/01). [EB #765]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 33 - 34 (2/22/01). [EB #758]

* Open lands study which allows other means of preserving background and mid-ground views is a community standard which will not be violated by the proposed project. *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (6/26/91). [EB #466]

762.2.1.1.1 Not a Community Standard

*Community standards must be more than regulations stating the broad goal of avoiding undue aesthetic impacts, and town plan asserting non-specific aspirational language is an equally insufficient community standard. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 20 (2/16/2017).

* Town plan goal to protect “a rural and natural skyline” is not a clear, written community standard that prohibits towers that disrupt the skyline where town plan policy balances need for modern telecommunications facilities and the inherent intrusiveness of towers by promoting co-location and allowing taller towers to achieve co-location. *In re Rinkers, Inc.*, 2011 VT 78 ¶10 (mem.).

* Designation of scenic byway is not “intended to be used in an Act 250 hearing, nor [to] . . . preclude any land development otherwise permitted by existing zoning” regulations. The Vermont Scenic Byways Program Manual, Vt. Agency of Transp. and Vt. Scenery Preservation Council, at 6, 9 (March 2, 2006). *In re: Rivers Dev. Act 250 Appeal*, #68-3-07 Vtec, Decision on Post-Judgment Motion to Alter at 2 (8/17/10).

* Regional plan which states “consideration should be made...” is not a clear, written community standard. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 81 (12/8/00). [EB# 739]

* Where parties provide Board with no evidence that town where project is located has adopted a standard, Board cannot conclude that project violates such standard. *Raymond F. and Centhy M. Duff*, #5W0952-2-EB (1/29/98). [EB #684]; *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB

#652]; *Leonard R. Lemieux*, #3R0717-EB (8/12/93). [EB #581]

* Language in Town Plan which applies generally to community at large rather than to specific resources in project area is not a clear, written community standard. *Re: Town of Barre*, #5W1167-EB, FCO at 21 (6/2/94); and see *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, FCO at 24 (5/18/01). [EB #765]

* ANR guidebook is not a community aesthetic standard. *Richard and Barbara Woodard*, #5W1262-EB (12/18/97). [EB #676]

* Zoning bylaws' recitation of Criterion 8 does not establish a community standard. *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd*, *In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]

Federal noise standards are not a community standard. *Talon Hill Gun Club, Inc. and John Swington*, #9A0192-2-EB (6/7/95). [EB #611]

* A municipal vote on proposed road reconstruction does not indicate a clear community standard. *Town of Barre*, #5W1167-EB (12/23/93). [EB #589M1]

762.2.1.2 What Community Standard applies

* Community standard in effect on date application is filed controls. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 10-11 (11/25/03). [EB#734M3]; *Northshore Development, Inc.*, #4C0626-5-EB (12/29/88). [EB # 391]

762.2.1.3 Cases

* Town plan goal to protect “a rural and natural skyline” is not a clear, written community standard that prohibits towers that disrupt the skyline where town plan policy balances need for modern telecommunications facilities and the inherent intrusiveness of towers by promoting co-location and allowing taller towers to achieve co-location. *In re Rinkers, Inc.*, 2011 VT 78 ¶10 (mem.).

* Town plan provision that describes “views from Dairy Hill looking west” as a “scenic area” which is considered to be a “visual asset” and which “help[s] to define the present character of Royalton” is an applicable Community standard for Criterion 8 purposes. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 42 - 44 (11/4/05), *aff'd* in part, *rev'd* in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.)

* Two Rivers-Ottawaquechee Regional Plan provides a standard for evaluating the aesthetic impact of the proposed project with regard to protection of scenic public corridors *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 47 - 48 (11/4/05), *aff'd* in part, *rev'd* in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 30 (11/24/04) [EB #838]

* Language in the town plan that requires earth extraction projects to mitigate impacts including noise only imposes the same standard already found in Criterion 8. *Re: Pike Industries, Inc. and Inez*

M. Lemieux, #5R1415-EB, FCO at 42 (6/07/05) [EB #853].

* Board may apply noise limitations that differ from or are stricter than EPA's or municipality's standards. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, MOD at 4 (7/2//02). [EB #791]

* Zoning restriction on building height constitutes clear, written community standard, but does not apply when modified for PUD in accordance with statute. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Department of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 75-76 (2/22/02). [EB#778]

* City ordinance's use of one-hour average Leq measurement does not protect residents from sudden noises, as a noise source can be quiet for 59 minutes and loud for one minute and yet still comply with hourly average standard. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 20 (4/9/02). [EB #791]

* Project violates Town Plan which targets precise location of project site as a scenic resource which "shall be protected." *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 33 - 34 (2/22/01). [EB #758]

* Intensity of new housing development would violate written community aesthetic standard set forth in City Plan and Town Zoning Regulations and Map which designate much of the project tract as area to be preserved because of its special character. *Nile and Julie Dupstadt*, #4C1013-EB (4/30/99). [EB #716]

* Noise from proposed project operations, including use of back up alarms on vehicles and equipment, would be adverse, but it violates no clear written community standard. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]

* There is no written community aesthetic standard, and ANR guidebook is not such standard; thus, project will not violate a community aesthetic standard. *Richard and Barbara Woodard*, #5W1262-EB (12/18/97). [EB #676]

* Based upon specific policies in town plan that planning commission should encourage development that compliments or enhances village's scenic quality and should prohibit development that threatens to adversely affect visual amenities, project would violate a clear written community standard. *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652]

* Radio tower violated clear, written community standard contained in zoning ordinance against development of conservation district lands with any use other than single family detached dwellings, forestry, or agriculture. *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]

* Auto dealership does not violate clear, written community standard intended to preserve aesthetics or scenic beauty of area since project would be consistent with character of area, given

other commercial uses; and project is based on architectural / landscape design plan that complements surrounding environment. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised) (8/19/96)*. [EB #629R]

*Rearranged shooting alignment at gun club has no undue adverse effect because federal noise standards are not a community standard; even they are, project complies with them. *Talon Hill Gun Club, Inc. and John Swinington, #9A0192-2-EB (6/7/95)*. [EB #611]

* Zoning bylaws' recitation of Criterion 8 does not establish a community standard. *MBL Associates, #4C0948-EB (Altered) (1/30/96), aff'd, In re MBL Associates, Inc., 166 Vt. 606 (1997)*. [EB #610]

* Earth extraction project would not have undue adverse effect on aesthetics because there was no community standard. *John and Marion Gross d/b/a John Gross Sand and Gravel, #5W1198-EB (4/27/95)*. [EB #606]

* Zoning bylaws' general statements regarding purposes, and requirement of rehabilitation plan for earth extraction project, are not sufficiently detailed to establish an aesthetic standard. *Charles and Barbara Bickford, #5W1186-EB (5/22/95)*. [EB #595]; *Town of Barre, #5W1167-EB (6/2/94)*. [EB #589]

* Earth extraction project violated town plan's clearly written community standard regarding scenic entrances because project would be out of context with the surrounding rural residential and conservation area due to noise and visibility. *Leonard and Rose Lemieux, #3R0717-EB (3/1/95)*. [EB #581]

* Town zoning ordinance that states "all . . . lighting shall be installed or shielded in such a manner as to conceal light sources . . . from view substantially beyond the perimeter of the area illuminated" means that fixtures and not the lighted area must be hidden from view. *Mt. Mansfield Co., Inc., #5L1125-4-EB (8/14/95)*. [EB #573]

* Road use for 42,800 trips by 10-wheel, 14-yard dump trucks does violate town's clear written community standard; 28,888 passbys along road does not interfere with town plan, and will not be so noisy and intrusive so as to violate town plan's aesthetic standard. *Crushed Rock, #1R0489-4-EB (2/18/94)*. [EB #572]

* Ledge quarry project will violate clear, written community standard where protection of aesthetic heritage and scenic vistas is dominant policy of town plan. *Leonard R. Lemieux, #3R0717-EB, FCO at 9 - 10 (3/1/95)*. [EB #581]

* Large commercial project conformed to written community standard in town plan. *Taft Corners Associates, Inc., #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993))*. [EB #532R2]

* Because town does not have "unreasonable" noise impacts in its town plan, there is no violation of a clear, written community standard. *R.J. Colton, #9A0082-1R-2-EB (4/17/92)*. [EB #529]

* Based on mitigation imposed through permit conditions, residential project will not be shocking or offensive or violate any applicable community standards. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick*, #4C0814-EB (8/14/91). [EB #492]

* Project violated clear written community standards of town master plan. *Stephen B. Tanger*, #3W0125-3-EB (5/22/90). [EB #442]

* Sign would not violate a written community standard. *McDonald's Corp. & Murphy Realty Co.*, #100012-2-EB (2/10/89). [EB #410]

* 3 - lot residential subdivision immediately adjacent to approved 71-lot subdivision violates no clear, written community standards. *Chester P. Denio*, #1B0036-2-EB (3/27/89), *aff'd, In re Denio*, 158 Vt. 230 (1992). [EB #362]

* Zoning ordinance is a written community standard intended to preserve the scenic beauty of the view from the lake. *Northshore Development, Inc.*, #4C0626-5-EB (12/29/88). [EB # 391]

* Without town plan in evidence, Board cannot determine if there is a clear, written community standard intended to preserve area's scenic and natural beauty. *Sherman Hollow*, #4C0422-5-EB (Rev. Decision) (2/17/89). [EB #366]

* Board cannot find that proposed destination resort violates any community standard. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366].

* Expansion of concrete contracting office and storage site is not in character with surrounding area and its mass has adverse effect on view from homes on hill, but it is consistent with town plan and will not have undue adverse effect if mitigative measures are implemented. *Walker Construction*, #5W0816-1-EB (1/14/87). [EB #313]

* If Vermont Talc adheres to a list of conditions imposed by Board, project (with imposed conditions) conforms to town and regional plans. *Vermont Talc/OMYA, Inc.*, #2W0551-1-EB (6/21/85). [EB #238]

*When considering the Project's aesthetics impacts, the baseline "character of the area" includes existing buildings, roadways, and other nearby developments; but not the village center which exhibits a distinct land use pattern and development pattern, and is located 0.6 miles from the project site. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 17 (02/14/14).

immediately surrounded by more contemporary development and the Project does not detract from the historic village green and its immediate surroundings. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 21 (02/14/14).

762.2.2

Shocking and Offensive/Sensibilities of Average Person

* Impacts must be considered from the perspective of the average person, not necessarily from the

perspective of neighboring appellants. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 20 (2/16/2017)(citing *In re Goddard College Conditional Use*, Nos. 175-12-11 Vtec and 173-12-12 Vtec, slip op. at 14 (Vt. Super. Ct. Env'tl. Div. Jan. 6, 2014).

* Gravel pit expansion would be a foreign and deleterious use subjecting nearby residents to all the sights that come with such an operation, and as a result the Court concludes such an expansion would shock and offend the sensibilities of the average person. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 20 (2/16/2017).

* In making aesthetics determination, Board need not poll the populace or require vociferous local opposition in order to conclude that an average person would consider the project to be offensive. *In re McShinsky*, 153 Vt. 586, 592 (1990).

* Project is shocking and offensive if it offends or shocks the sensibilities of the average person -- if it is so out of character with its surroundings that it significantly diminishes the aesthetic qualities of the area and therefore causes an adverse effect which is undue. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 49 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: George and Diana Davis*, #2S1129-EB, FCO at 9 (12/15/04) [EB#844]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 31 (11/24/04) [EB #838]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 20 (4/9/02) [EB #791]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 38 (3/8/02). [EB #785]; *In re McDonald's Corp. and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 22 (3/22/01). [EB #760]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 35 (2/22/01). [EB #758]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 23 (12/7/00). [EB# 747]; *Nile and Julie Dupstadt*, #4C1013-EB, FCO at 35 (4/30/99). [EB #716]; *Re: Pike Industries, Inc. and William E. Dailey, Inc.*, #1R0807-EB, FCO at 18 - 19 (6/25/98) *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]; *Larry and Diane Brown*, #5W1175-1-EB (6/19/95). [EB #591]; *Town of Barre*, #5W1167-EB (6/2/94). [EB #589]; *H.A. Manosh*, #5L0918-EB (8/8/88). [EB #359]; *Robert B. & Deborah J. McShinsky*, #3W0530-EB, FCO at 9 (4/21/88), *aff'd*, *In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348]

* For noise, determination of shocking and offensive turns on whether project noise is merely annoying or whether it will dramatically interrupt the setting. *Re: George and Diana Davis*, #2S1129-EB, FCO at 10 (12/15/04) [EB#844], citing *Re: Talon Hill Gun Club and John Swingleton*, #9A0192-2-EB, FCO (6/7/95).

* Project is not shocking and offensive because of adequate buffer between operational areas of the quarry and the neighbors as well the ample screening which allows for only distant views of the project. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 44 (6/07/05) [EB #853].

* Of all the aesthetic considerations under the *Quechee* Test, the shocking and offensive test is, by far, the most subjective. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 31 (11/24/04) [EB #838]

* Size and scope of the Project are so out of character with the surrounding area, and that, if constructed, it would be shocking and offensive to the average person's sensibilities. *Southwestern*

Vermont Health Care Corp., #8B0537-EB, FCO at 35-36 (2/22/01). [EB #758]

* Project will have undue adverse effect on area's scenic or natural beauty or aesthetics where mitigation does not effectively mitigate aesthetic impacts from scale and height of RV camping park, increased traffic, and blocked views. *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, FCO at 27 (5/18/01.). [EB #765]

* Noise from truck traffic exiting transfer station road will not be shocking or offensive, but times of operation will d be limited to mitigate possible effects of noise from trucks on the road itself. *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 31-40 (5/16/00). [WFP #38]

* Excessive truck traffic through historic village is shocking or offensive. *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 38 (5/25/99), *aff'd, OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00).

* Noise from asphalt plant operations, including use of vehicle and equipment back up alarms, is adverse, but not undue, because project is not so out of context with its surroundings as to be offensive or shocking to the ordinary person. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]

* Dust and noise impacts from project were offensive and shocking because they were out of character with surrounding pre-existing land uses. *Lawrence White*, #1R0391-8-EB (4/16/98). [EB #689]

* Residential subdivision was not offensive and shocking because the lots were not comparable in size to those in an adjoining subdivision. *Raymond F. and Centry M. Duff*, #5W0952-2-EB (1/29/98). [EB #684]

* Location of two subdivision access roads was not offensive and shocking where they were an integral part of subdivision and their location was established to enable creation of large lots and physical separation from surrounding uses. *Raymond F. and Centry M. Duff*, #5W0952-2-EB (1/29/98). [EB #684]

* Poorly designed intensive use of meadow is offensive because it will significantly diminish area's scenic value. *George, Mary, and Rene Boissoneault*, #6F0499-EB (1/29/98). [EB #678]

* Large industrial-type buildings, and glare of project lighting and car headlights on project's driveways are offensive because are out of character with residential neighborhood, but permit conditions alleviate undue adverse effects. *Richard and Barbara Woodard*, #5W1262-EB (12/18/97). [EB #676]

* Board does not need to determine whether project is offensive or shocking when it already fails the other two "undue" factors. *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652]

* Although radio tower would be an aesthetic intrusion, it was not shocking or offensive. *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]

- * Based on cluster of commercial uses, auto dealership is not so inherently inappropriate to its surroundings that offends the sensibilities of the average person or diminishes scenic qualities of area. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]
- * Rearranged shooting alignment at gun club was not shocking or offensive, and mitigation included days and hours of operation. *Talon Hill Gun Club, Inc. and John Swington*, #9A0192-2-EB (6/7/95). [EB #611]
- * Noise from earth extraction project was not offensive or shocking. *John and Marion Gross d/b/a John Gross Sand and Gravel*, #5W1198-EB (4/27/95). [EB #606]
- * Ledge quarry project would offend sensibilities of average person and would be out of context with surrounding rural residential and conservation area. *Leonard R. Lemieux*, #3R0717-EB (8/12/93). [EB #581]
- * 42,800 trips would offend be offensive or shocking because such volume of quarry truck traffic would be out of character with residential neighborhood; but 28,888 trips, would not shock or offend or diminish aesthetic qualities of Clarendon. *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]
- * Degree to which large scale commercial project was out of context of area was not shocking or offensive. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]
- * Residential project (with additional conditions) will not be shocking or offensive. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick*, #4C0814-EB (8/14/91). [EB #492]
- * Adverse visual effect of industrial/commercial project located in open fields will not be shocking or significantly diminish area's scenic qualities where similar development already exists and is visible from the Interstate, and because site is located at Interstate exit, where such development would be expected. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]
- * Where construction is conducted during a time of year when people are likely to be indoors, it would not generate noise that is shocking or offensive. *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB # 474]
- * Disfiguring hillside for parking space was visually shocking and did not take all mitigative steps to improve project's harmony with its surroundings. *Shimon & Malka Shalit*, #8B0334-3-EB (2/8/91). [EB #438]
- * Extensive clearing, regrading of natural landforms, and opening of views to lake makes project out of harmony with its surroundings and which has shocking and offensive visual effect because of complete diminution of previously existing scenic qualities on site. *Bernard & Suzanne Carrier*,

#7R0639-EB (10/5/90). [EB #435]

* Road sign is not shocking or offensive because of proposed mitigation. *McDonald's Corp. & Murphy Realty Co.*, #100012-2-EB (2/10/89). [EB #410]

* Project would offend sensibilities of average person, because visual impact would be out of context when viewed from lake. *Northshore Development, Inc.*, #4C0626-5-EB (12/29/88). [EB #391]

* Large, illuminated sign at car dealership is out of context with semi-rural area and is offensive because it significantly diminishes scenic quality of area. *Town & Country Honda*, #5W0773-1-EB (6/14/89). [EB #383]

* Project is not shocking or offensive where it is not highly visible from most areas road or neighbor's homes and because substantial areas of vegetation will be left. *Sherman Hollow*, #4C0422-5-EB (Revised) (2/17/89). [EB#366]

* Subdivision is not shocking to average person. *Chester P. Denio*, #1B0036-2-EB (3/27/89), *aff'd, In re Denio*, 158 Vt. 230 (1992). [EB #362]

* Display of boats is not shocking or offensive to sensibilities of average person, even though they have an adverse impact on property. *Donald R. Preuss*, #1R0519-2-EB (3/24/87). [EB #321]

* Ski bridge (a wall of earth, steel, cement, and wood rising 26 feet above the natural terrain) would be shocking and offensive in surrounding area. *Okemo Mountain, Inc.*, #2S0351-8-EB (12/18/86). [EB #305]

* An eight-fold increase in extraction volume (with commensurate increase in truck and equipment noise) and the introduction of a land-filling operation would be shocking and offensive. *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]

*Where residents in an area are used to hearing sporadic quarry operation noise from other properties in the area, additional quarry noise, though adverse, is not undue, as it would not be shocking or offensive to the average person. *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 9 (11/28/12).

*The Court concluded that the Project will not offend the sensibilities of the average person and that it will not be shocking or offensive. While neighboring Appellants testified as to how they found the Project to be offensive and how potential views from specific locations may shock them, the Court must consider the Project's impacts from the perspective of an average person. *Goddard College Act 250 Reconsideration*, 175-12-11 Vtec at 14 (01/06/14).

762.2.3

Mitigation Steps and Approvals Subject to Conditions

- * Proposed mitigation insufficient, but court imposed condition limiting the extent of the gravel pit expansion does provide sufficient mitigation and results in no undue adverse effect. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 21 (2/16/2017).
- * Applicants who proposed to light internally illuminated cross near private chapel in rural area from dusk to dawn during specified periods failed to take reasonably available mitigating steps. Reasonable mitigation includes limiting lighting to one hour at dusk. *In re Downing*, No.225-11-09 Vtec, Decision and Order at 13-14 (5/10/12) at 8-9.
- * For a mitigating step to be reasonably available, it must be reasonably feasible and not defeat the purposes of the project or of Act 250. *In re Rinkers, Inc., d/b/a Rinkers Communications, and Beverly and Wendell Shepard*, No. 302-12-08 Vtec, Decision and Order on Motion to Reconsider at 4 (10/20/10), *aff'd*, 2011 VT 78 (mem.).
- * In evaluating mitigation steps under Criterion 8, the potential for alternatives to the proposed project relates only to determining whether “the applicant has taken reasonable mitigating steps to improve the project’s harmony with its surroundings.” *In re Rinkers, Inc., d/b/a Rinkers Communications, and Beverly and Wendell Shepard*, No. 302-12-08 Vtec, Decision and Order at 23 (5/17/10); *see also*, Decision and Order on Motion to Reconsider at 4 (10/20/10), *aff'd*, 2011 VT 78 ¶ 12-13 (mem.).
- * It is the Board's practice to require applicants to take generally available mitigating steps to reduce the negative aesthetic impact of a particular project. *In re Stokes Communications Corp.*, 164 Vt. 30, 39 (1995), citing *In re McShinsky*, 153 Vt. 586, 591-92 (1990); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 49 (11/4/05), *aff'd* in part, *rev'd* in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: George and Diana Davis*, #2S1129-EB, FCO at 10 (12/15/04) [EB#844] (in judging whether there has been mitigation, the Board asks whether applicant has taken generally available mitigating steps to reduce aesthetic impacts on, and improve harmony of project with, the character of the area where it is proposed); *accord*, *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 32 (11/24/04) [EB #838]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 22 (4/9/02). [EB #791]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 43 (3/8/02). [EB #785]; *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 17 - 18 (3/22/01). [EB #760]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 35 (2/22/01). [EB #758]
- * A mitigating step is not reasonably available if it defeats the purpose of the project. *In re Rinkers, Inc.*, 2011 VT 78 ¶ 12-13 (mem.).
- * Failure to take advantage of available alternatives may render an aesthetic impact unduly adverse. *In re Stokes Communications Corp.*, 164 Vt. 30, 39 (1995).
- * Although the Board has not defined the term "generally available mitigating step," it has applied the term broadly. *In re Stokes Communications Corp.*, 164 Vt. 30, 39 (1995), citing *In re Denio*, 158 Vt. 230, 240-41 (1992) (imposition of mitigating conditions, including requirement to retain open spaces and limit agricultural and forestry use, was reasonable under circumstances); *In re Quechee Lakes*, 154 Vt. 543, 546 (1990) (removal of installed skylights, construction of visual barriers and

installation of nonglare glass were reasonable mitigating steps).

* An alternative need not be formally recognized or widely available to be generally available. *In re Stokes Communications Corp.*, 164 Vt. 30, 38 (1995).

* "[A] generally available mitigating step is one that is reasonably feasible and does not frustrate the project's purpose or Act 250's goals." *In re Stokes Communications Corp.*, 164 Vt. 30, 39 (1995).

* Where mitigating steps may be unaffordable or ineffective, it is within the Board's discretion to grant or deny a permit. *In re Stokes Communications Corp.*, 164 Vt. 30, 39 (1995), citing 10 V.S.A. § 6086(c).

* In evaluating mitigation, Board looks at a project on its own merits, not in comparison to previous proposals, or to what could be built, or to other factors unrelated to project; Board cannot approve project because it looks good by comparison to something worse, as this reduces Board's role to one of finding the lowest common denominator and then deciding whether a project rises above that level. *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 43-44 (3/8/02). [EB #785]; see, *In re Southview Associates*, 153 Vt. 171, 179 (1989).

* What may be required to mitigate a project is highly case and context-specific. *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 21 (3/22/01). [EB #760]

* There are circumstances where a project has such a significant impact that no degree of mitigation will neutralize the impact. *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]

762.2.3.1 Residential Subdivisions, Housing Projects, etc.

* Mitigation element is satisfied by clustering single family residences, roads and infrastructure to maximize open space and protect natural resources, minimizing perception of project's mass by landscaping, muted house and roof colors, and constructing homes consistent with surrounding architectural styles. *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 43-44 (3/8/02). [EB #785]

* A building incompatible with its surroundings cannot be made compatible by attempting to screen it from view with landscaping. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 35 (2/22/01). [EB #758]; *Northshore Development, Inc.*, #4C0626-5-EB (12/29/88). [EB # 391]; compare *John and Marion Gross d/b/a John Gross Sand and Gravel*, #5W1198-EB, FCO at 13 (4/27/95). [EB #606]

* Applicants have failed to take mitigating steps to improve project's harmony with its surroundings. *In re McDonald's Corp and Murphy Realty Co., Inc.*, #100012-2B-EB, FCO at 21 (3/22/01). [EB #760] *Nile and Julie Dupstadt*, #4C1013-EB (4/30/99). [EB #716]

* Landscape plan that includes common land areas and regulates cutting and planting around project's perimeter, and imposition of various protective covenants, constitutes adequate mitigation. *Raymond F. and Centry M. Duff*, #5W0952-2-EB (1/29/98). [EB #684]

- * Project fails when applicants attempt to hide poor design behind trees rather than take available mitigating steps, such as cluster planning. *George, Mary, and Rene Boissoneault*, #6F0499-EB (1/29/98). [EB #678]
- * Development of only the three upland subdivision lots and establishment of minimum 500-foot setback from lake dramatically reduces project's visual impact from the lake and reduced visual incompatibility with neighboring properties. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (8/14/97). [EB #666]
- * Large scale residential development would not have undue adverse effect where mitigation included clustering, landscaping, muted colors, rooflines below tree levels, and set-aside of 127 acres as open space. *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd, In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]
- * Conditions imposed on proposed student housing project mitigate adverse noise, student conduct, lack of occupancy controls, loss of open space, and loss of view corridor to the Green Mountains. *UVM, State Agriculture College, and Novarr-Mackesey Development Co.*, #4C0895-EB (8/28/92). [EB #540]
- * Adequate mitigation includes a 35 acre reserve, special siting of new buildings, use back up alarms on all front-end loaders, lowering access road, and limits on hours of operation and number of truck trips. *R.J. Colton*, #9A0082-1R-2-EB (4/17/92). [EB #529]
- * Installing fences and planting trees along parking lot boundary is adequate mitigation. *Richard Berman and Bradford B. Moore*, #5L1086-EB (5/8/92). [EB #522]
- * Mitigation element is satisfied by height restrictions on subdivision homes, planting to screen the development, covenants to govern future construction and activities on site, limits on exterior house colors, and preserving open space *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (6/26/91). [EB #466]
- * If forest management plan is successful and not undermined by subsequent action, applicants have taken reasonable steps to mitigate visibility of project. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick*, #4C0814-EB (8/14/91). [EB #492]
- * As a result of extensive clearing, regrading of natural landforms, and opening of views to lake, applicants failed to take any mitigative steps to improve project's harmony with its surroundings *Bernard & Suzanne Carrier*, #7R0639-EB (10/5/90). [EB #435]
- * Tree planting to reduce homes' visibility and not developing western portion of parcel to preserve deer wintering area satisfies mitigation element. *James Davenport, Jr. and Barbara Davenport*, #1R0667-EB (7/9/90). [EB#449]
- * If landscaping plan is implemented, proposed residential subdivision will not have an undue adverse effect. *Edwin & Avis Smith*, #6F0391-EB (5/11/89). [EB #398]; *Richard & Napoleon*

LaBrecque, #6G0217-EB (11/17/80). [EB #140]

* Applicant must submit a screening and landscaping plan for proposed residential subdivision in order to avoid undue adverse affect. *Clearwater Realty & Agency of Transportation*, #4C0712-EB (5/10/89). [EB #385]

* Residential subdivision will not have undue adverse impact on aesthetics when mitigating measures are taken. *Chester P. Denio*, #1B0036-2-EB (3/27/89), *aff'd, In re Denio*, 158 Vt. 230 (1992). [EB #362]

* A building incompatible with its surroundings cannot be made compatible by attempting to screen it from view with landscaping; landscaping should be used to soften effect of building or to enhance aesthetic enjoyment. *Northshore Development, Inc.*, #4C0626-5-EB (12/29/88). [EB # 391]

* Adverse impact from mass and scale of buildings in residential project will be mitigated by landscaping. *John Kennedy and Jeffrey Kilburn*, #8B0370-2-EB (9/26/88). [EB #382]

* Minimal visual view from interstate of residential development be mitigated by plantings. *Landmark Development Corporation*, #4C0667-EB (1/22/88). [EB #353]

* To satisfy Criteria 1(F) and 8 regarding visual impacts, shorefront subdivision permit requires certain cutting to be pre-approved by Commission and that no trees over 4" caliper be removed; construction within 200 feet of shoreline is also prohibited. *J. Graham Goldsmith*, #4C0685-EB (10/8/87). [EB #341]

* High visibility of house and clear-cut strip along ridge lines has undue adverse aesthetic impact and must be mitigated by landscaping. *J. Graham Goldsmith*, #4C0685-EB (10/8/87). [EB #341]

* Subdivision along highway scenic corridor will have adverse aesthetic effect, but it will not be "undue" if there are clearing and tree-cutting restrictions. *Landmark Development Corporation*, #4C0667-EB (7/9/87). [EB #320]

* Condominiums are out of context with pastoral setting but adverse impact will not be "undue" if landscaping mitigation measures are taken. *Houston Farms Associates*, #5L0775-EB (4/27/87). [EB #260]

* In condominium project, fence will protect overall aesthetics as effective screen from adjoining properties. *Adrian Lesage & Pinetree Commons Homeowners*, #4C0433-5-EB (6/10/86). [EB #291]

* Permit for subdivision would condition approval on moving building envelopes and limiting height and location of planting. *Spear Street Associates*, #4C0489-EB (10/26/82), *aff'd, In re Spear Street Associates*, 145 Vt. 496 (1985). [EB #179]

* Proposed apartment building is approved subject to conditions regarding sewer flow, landscaping, and energy conservation. *Abraham Brown*, #6F0209-EB (7/17/79). [EB #108]

* Subdivision will not cause undue adverse affect on aesthetics of road, subject to conditions. *George F. Adams & Co., Inc.*, #5L0289 (4/23/75). [EB #61]; see *In re Application of George F. Adams and Co., Inc.*, 134 Vt. 172 (1976).

* Condominium project is consistent with surrounding land use and will not have undue adverse effect, subject to conditions. *Skokemo, Inc.*, #2S0097 (3/19/73). [EB #29]

762.2.3.2 Skiing and other Recreation

* Mitigation taken by shooting range includes limitations on seasonal operation, reduction of firing stations, and creation of buffer zone. *Bull's-Eye Sporting Center / David and Nancy Brooks*, #5W0743-2-EB (2/27/97). [EB#649]

* Rearranged shooting alignment at gun club would not have undue adverse effect because mitigation limits days and hours of operation. *Talon Hill Gun Club, Inc. and John Swinington*, #9A0192-2-EB (6/7/95). [EB #611]

* Mitigation taken includes visors and shields on lights to reduce their impacts beyond the trails. *Mt. Mansfield Co., Inc.*, #5L1125-4-EB (8/14/95). [EB #573]

* If conditions are followed, construction and operation of golf course will not cause undue adverse effect on area. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366]

* Mitigation conditions cause undue adverse aesthetic effect from excessive noise to not be undue. *Sherman Hollow*, #4C0422-5-EB (Revised Decision) (2/17/89). [EB #366].

762.2.3.3 Roads, Traffic, Transportation and Signs

* Commission and Board were authorized to impose permit conditions limiting number of truck trips based on Criteria 5 and 8(A). *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000).

* No amount of screening can successfully mitigate visual effect on natural area and village from size of bridge and road reconstruction which is so greatly out of scale with its surroundings, *Town of Barre*, #5W1167-EB (6/2/94). [EB #589]

* Proposed 25' road sign has adverse effect on area's scenic beauty because it represents an escalation in competition for visibility of commercial signs leading to more obtrusive signs; mitigation keeps effect from being "undue." *McDonald's Corp. & Murphy Realty Co.*, #100012-2-EB (2/10/89). [EB #410]

* Installation changeable-letters sign at mall entrance is inconsistent with original permit condition imposed for mitigation purposes. *Berlin Associates*, #5W0584-2-EB (5/13/87). [EB #304]

* Board modifies traffic volume limitations in gravel pit permit. *H.A. Manosh*, #5L0690-EB (11/9/86). [EB #307]

762.2.3.4 Waste Treatment, Pollution, Landfills, Solid Waste Transfer Stations, etc.

- * Limits on hours of operation mitigates effect from nighttime truck traffic. *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28 (5/16/00). [WFP #38]
- * 8 foot high wire mesh fence along landfill's boundary, screened with planted white pines, is required as a mitigation step. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]
- * Landfill satisfies Act 250 criteria subject to permit conditions. *Palisades, Inc.*, #5W0164 (4/24/73). [EB #30]

762.2.3.5 Commercial and Industrial

- * Project will not have an undue adverse effect on the scenic or natural beauty or aesthetics of the area where, *inter alia*, mitigating steps have been taken. *Main Street Landing Company and City of Burlington*, #4C1068-EB, FCO at 16 -19 (11/20/01). [EB #790]
- * Conditions prohibit use of a rock crusher at project tract, require dust suppression, and restrict hours of outdoor operations, including use of heavy trucks. *Lawrence White*, #1R0391-8-EB (4/16/98). [EB #689]
- * Condition requires project to identify specific outdoor locations on its property where it intends to store specified materials and to obtain Commission review prior to storage. *Lawrence White*, #1R0391-8-EB (4/16/98). [EB #689]
- * Generally available mitigating steps to improve project's harmony with its surroundings taken. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB#629R]
- * Potential disturbance to motel guests from diesel refueling station will not result in detriment to public health, safety, or welfare where hours of operation are limited. *Speedwell, Inc.*, #7C0568-2-EB (2/29/96). [EB #642]
- * Mitigation conditions for large scale commercial project include subdivision design, landscaping, building design, lighting, and signs. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]
- * Mitigation has not occurred when size of commercial project has not been substantially reduced to improve its harmony with its surroundings. *Waterbury Village Shopping Center Inc.*, #5W1068-EB (7/19/91). [EB #503]
- * Mitigation has occurred when applicant has gone to great lengths to design project to minimize its visibility. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92)(revising 3/25/91 FCO). [EB #486]

- * Disfiguring hillside for parking space for expanding retail complex did not consider all mitigative steps to improve project's harmony with its surroundings. *Shimon & Malka Shalit*, #8B0334-3-EB (2/8/91). [EB #438]
- * That landscaping mitigation will be required on VAOT right-of-way is no obstacle to granting permit because responsibility for permit compliance in that regard rests with applicant. *Liberty Oak Corporation*, #3W0496-EB (7/14/88). [EB #323]
- * Addition of two limited display areas at recreational vehicle/small engine dealership will not have an undue adverse impact if mitigative measures are taken. *Donald R. Preuss*, #1R0519-2-EB (3/24/87). [EB #321]
- * Installation of petroleum storage tanks and construction of warehouse/storage building will have undue adverse impact unless mitigative measures are implemented. *Pratt's Propane, Inc.*, #3R0486-EB (1/27/87). [EB #311]
- * Proposed expansion of concrete contracting office and storage site will not have an undue adverse effect if mitigative measures are implemented. *Walker Construction*, #5W0816-1-EB (1/14/87). [EB #313]
- * Large commercial buildings with parking lots for used cars is not compatible with rural-residential area and will be unduly adverse unless mitigation is undertaken. *Didace & Susan LaCroix*, #3W0485-EB (4/27/87). [EB #292]
- * By placing an "off the shelf" motel design within scenic corridor, applicant made little effort to adapt design to selected site; if motel is redesigned to be less obtrusive aesthetically, permit might issue. *Brattleboro Chalet Motor Lodge, Inc.*, #4C0481-2-EB (10/17/84). [EB #231] Permit amended (1/14/85). [EB #246].
- * If built in accordance with permit conditions, project will not have undue adverse affect on scenic or natural beauty of area. *Ammex Warehouse Co., Inc.*, #6F0248-EB (8/3/81). [EB #160]
- * Construction of home improvement store and lumberyard is approved based upon stipulation of parties including landscaping plan. *Evans Products*, #1R0329-EB (5/28/80). [EB #112]
- * Sales and service of automobiles facility conforms with Act 250 based upon stipulation as to lighting and sign improvements. *John L. McKenna*, #1R0156 (10/1/74). [EB #55]

762.2.3.6 Quarries, Gravel Pits, Asphalt Plants, etc.

- * The Court does not "require" Rivers to guarantee against fly rock. *In re: Rivers Dev. Act 250 Appeal*, #68-3-07 Vtec, Decision on Post-Judgment Motion to Alter at 6 (8/17/10).
- * It is reasonable to impose permit conditions preventing the unnecessary destruction of a scenic meadow because it will still allow the permittee to quarry at its maximum requested rate over the full duration of the permit. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 47

(6/07/05) [EB #853].

* Mitigation steps for a quarry included maintaining 200-foot woodland buffer around project; limiting height of grout piles to height of surrounding trees, only single story structures, protected conservation land, blasts limited to a 100 pound blast, dust suppression, noise limitations, and others. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 81 (12/8/00). [EB# 739]

* Mitigation conditions for fifty-year earth extraction project included landscaping, yearly growth rates; sufficiency of a berm; detailed set of days and hours of operation; and retained Commission jurisdiction over impacts from back-up beeper alarms. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]

* Permit conditions limiting earth extraction activities to certain number of days and months mitigated noise and dust. *John and Marion Gross d/b/a John Gross Sand and Gravel*, #5W1198-EB (4/27/95). [EB #606]

* Because extraction project can drastically alter landscape and generate noise, project's plan must include detailed mitigation component addressing land use reclamation and noise control. *Leonard R. Lemieux*, #3R0717-EB (8/12/93). [EB #581]

* Permit imposes traffic volume limitations (maximum annual extraction rates, limitations on use by passenger vehicles, and cap on weekly number of truck trips). *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]

* Permit for changes to gravel operation took all available mitigating steps to reduce noise impacts. *R.E. Tucker, Inc.*, #5W0829-EB (6/2/86), *aff'd in part / rev'd in part, In re R.E. Tucker, Inc.*, 149 Vt. 551 (1988). [EB #281]

* Annual substantiation of gravel extraction required to assure continued viability of findings and conditions under Criteria 1 and 8, along with prior notice to Commission of any addition of major equipment. *R.E. Tucker, Inc.*, #5W0829-EB (6/2/86), *aff'd in part / rev'd in part, In re R.E. Tucker, Inc.*, 149 Vt. 551 (1988). [EB #281]

* If Vermont Talc adheres to conditions imposed by Board, project will not have an undue adverse effect. *Vermont Talc/OMYA, Inc.*, #2W0551-1-EB (6/21/85). [EB #238]

* If done in accordance with conditions of permit, gravel pit expansion will not cause an undue adverse effect on area's scenic beauty. *Donald A. Rivers*, #4C0136 (9/11/74). [EB #47]

* Requiring a Quarrying operation to completely relocate their stone crusher rises past the level of mitigation and constitutes a wholly different project. "It is not [the] Court's role to instruct an applicant to design an entirely different project." *NE Materials Group, LLC et al Act 250*, No. 75-6-17 Vtec., at 39 (2018). **May Be Appealed**

* "By their nature, earth extraction operations produce some dust. Dust, in amounts compliant

with relevant regulations and permitting regimes, should therefore be expected at an existing quarry operation and from its associated industrial activities, such as rock crushing.” *NE Materials Group, LLC et al Act 250*, No. 75-6-17 Vtec., at 45 (2018). **May Be Appealed**

762.2.3.7 Communications Towers and Lines

* ”With respect to telecommunications towers, mitigating steps can include at least a tower’s design, materials, and appearance; a tower’s location within the project property with respect to landscape features and screening; a tower’s height; and whether alternative locations for the tower have been considered.” *In re Rinkers, Inc., d/b/a Rinkers Communications, and Beverly and Wendell Shepard*, No. 301-12-08 Vtec, Decision and Order at 19 (5/17/10).

* By not reducing radio tower’s height, and by not determining whether Cox Mountain was only available site for tower, applicant did not take all generally available and reasonable steps to mitigate tower’s adverse aesthetic effect . *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]

* Mitigation for communication tower requires scale-back of tower access trail after tower’s construction, and protection of farm complex. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]

* Condition requiring installation of shields so that tower lights are visible only from the air reasonably mitigates lights’ adverse aesthetic impact. *Stokes Communication Corp. and Idora Tucker*, #3R0703-EB (12/14/93). [EB#562]

* Transmitter tower construction will not have "undue" aesthetic impact if permit conditions both prevent undue proliferation of towers and encourage co-location. *Northshore Communications, Inc. and Carthusian Foundation of America, Inc.*, #8B0324-EB (6/6/85). [EB #239]

*As to aesthetics of proposed microwave relay tower, Board’s authority is limited to imposing reasonable conditions or denying the application. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]

762.2.3.8 Noise

* The *Barre Granite* noise standard, 70 dBA (Lmax) at the property line and 55 dBA (Lmax) at surrounding residences and outside areas of frequent human use, has guided Act 250 determinations for over the past decade. *In re Lathrop L.P.*, 2015 VT 49, ¶ 80 (citations omitted).

* No undue adverse impact from proposed campground if rules and procedures adjusted to include language prohibiting generator operation during quiet hours and provide a mechanism for reporting and remedying guest and neighbor noise complaints. *In re Harvey & West 65-unit Campground*, 110-7-10 Vtec, Decision and Order at 14-15 (11-09-2011).

* Board may exercise discretion within a range of values supported by the evidence, even though there were no noise level readings based on a sound source located at the precise point chosen by the Board as reasonable; argument to the contrary confuses the function of finding

facts with that of framing remedial or quasi-remedial orders fairly reflecting the facts. *In re R.E. Tucker, Inc.*, 149 Vt. 551, 559 (1988).

* Where noise modeling is credible and meets the Board's standards, project complies with Criterion 8; if the modeling turns out to be overly optimistic, permittee will have to modify its operations to meet its representations. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 48 (6/07/05) [EB #853]; And see *Re: George and Diana Davis*, #2S1129-EB, FCO at 12 (12/15/04) [EB#844].

* Noise from a commercial development near a residential neighborhood is limited at the nearest residences. *Re: Bethel Mills, Inc.*, #3W0898 (Altered)-EB, FCO at 14 (8/4/05) [EB#851]; *Re: Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO (Altered) at 25 (11/27/02).

* Board sets noise levels that a project must meet and then leaves applicants to determine how those levels will be met. *Re: George and Diana Davis*, #2S1129-EB, FCO at 11 (12/15/04) [EB#844]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 23 (11/27/02). [EB #791]

* For commercial operations such as quarrying operations, Board has set maximum sound levels (Lmax) at either project's property line or at relevant receptors on neighboring properties, or both. *Re: George and Diana Davis*, #2S1129-EB, FCO at 11 (12/15/04) [EB#844]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 22 (4/9/02). [EB #791]; *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, FCO at 33 (2/4/02); *Dominic A. Cersosimo and Dominic A. Cersosimo Trustee Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries Inc.*, and *Cersosimo Industries Inc* #2W0813-3 (Revised) - EB, FCO at 13 (4/19/01); *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 80 (12/8/00). [EB# 739]

* Board generally utilizes 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. *Re: George and Diana Davis*, #2S1129-EB, FCO at 11 (12/15/04) [EB#844], and see cases cited.

* Different standards for daytime and nighttime operations apply for projects whose sound impacts on residential areas. *Re: George and Diana Davis*, #2S1129-EB, FCO at 11 - 12 (12/15/04) [EB#844]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 24 (4/9/02). [EB #791]

* Noise Demonstration Protocol ordered for Board to observe. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, MOD at 3 (5/5/00). [EB# 739]

* Limiting noise from quarry to no more than 55 dB(A) Lmax at surrounding residences and no more than 70 dB(A) Lmax at quarry property line adequately mitigates any adverse noise impacts. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 80 (12/8/00). [EB# 739]

* Times of operation are limited to mitigate effects of noise from truck traffic exiting transfer station road. *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 31-40 (5/16/00). [WFP #38]

- * Noise from project, including vehicle and equipment back up alarms is adverse, but it is not undue because parties agreed to reasonable steps to mitigate impacts. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]
- * Construction conducted during a time of year when people are likely to be indoors, adequately mitigates any adverse noise impacts from the construction. *John and Joyce Belter*, #4C0643-6R-EB (5/28/91). [EB # 474]
- * Noise from golf course construction and operation can create adverse aesthetic effect, but if imposed mitigation conditions are followed, effect will not be undue. *Sherman Hollow*, #4C0422-5-EB (Revised) (2/17/89). [EB #366]
- * A sound level that may be considered adverse per the Quechee test in one situation may not be adverse in another. *NE Materials Group, LLC et al Act 250*, No. 75-6-17 Vtec., at 36 (2018).
May be appealed

762.2.3.9 Odor

- * Odors produced by a project may raise aesthetic concerns. *Re; John A. Russell Corporation*, #1R0489-6-EB, FCO at 52 (7/10/01). [EB #723]; *Larry and Diane Brown*, #5W1175-1-EB, FCO at 17 (6/19/95). [EB #591]; *Howard & Louise Leach*, #6F0316-EB, FCO at 18 (6/11/86). [EB #269]

762.2.3.10 Miscellaneous

- * Water reservoir project does not have an undue adverse aesthetic effect because applicants took available and reasonable mitigation steps. *Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB (9/23/98). [EB #704]
- * Proposed vegetation and lighting are not adequate mitigating steps; but permit conditions will alleviate undue adverse effects. *Richard and Barbara Woodard*, #5W1262-EB (12/18/97). [EB #676]
- * If forest management plan is successful and not undermined by subsequent action, applicants have taken reasonable steps to mitigate visibility of project. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick*, #4C0814-EB (8/14/91). [EB #492]
- * Board allows project subject to mitigation conditions to reduce visual impact. (landscaping around visually intrusive deck, removal of stairs in front of deck, and reduction of size of stabilizing poles) *Raponda Landing Corp.*, #2W0604-3-EB (1/25/91). [EB #371]
- * VAOT must be co-applicant (or good cause shown to waive requirement) for mitigative landscaping on land owned and controlled by AOT. *Liberty Oak Corporation*, #3W0496-EB (5/21/87). [EB #323]
- * Construction of berm to shield project from highway does not satisfy Criterion 8 when scenic and natural beauty will be impacted. *George Tardy*, #5W0534 (3/21/80). [EB #122]
- * Construction and operation of sawmill will not violate Act 250 if trees are planted to screen it

from view. *Jan Leland*, #2W0403-EB (9/10/79). [EB #98]

* Selective logging is permitted above 2500 feet subject to conditions regarding visual effect of activity. *Estate of John D. Colgan*, #1R0157 (1/15/75). [EB #57]

* Proposed clear cutting in connection with electric transmission line conforms with Act 250 subject to conditions regarding screening, cutting, and feathering. *Central Vermont Public Service*, #2W0001 (12/7/72). [EB #12]

762.4 Cases of Undue Adverse Effect

* Internally illuminated cross near private chapel in rural area had undue adverse effect at night, if illuminated from dusk to dawn during specified periods. No undue adverse effect if only lit for an hour at dusk. *In re Downing*, No.225-11-09 Vtec, Decision and Order at 12-14 (5/10/12) at 8-9.

* Criterion 8 not met where adverse impact found by project noise and activity being unique to area (including trucks downshifting and using jake brakes), Route 100B has been designated a scenic corridor, area has historically hosted residential and agricultural activities and continues to do so to this day, and quarry operation will continue for 30 years (compared to forestry of short duration in area), but not because distant views of portion of quarry are intrusive. Impact found "undue" because quarry noise travelling into 300 ft. scenic corridor contradict the very characteristics that brought the scenic designation upon this area; it will offend an average person visiting the area, expecting to enjoy its scenic quality, but not anticipating the noises emanating from the drilling, blasting, crushing, and loading of rock at an adjacent quarry. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 54-56 (3/25/10).

* Proposal to construct equipment building, fencing, and panel antennae on an existing permitted tower will not have undue adverse aesthetic effect. *Nextel Communications*, #3R0703-EB-2A-EB (3/10/99). [EB #718]

* Water reservoir project has adverse aesthetic effect, but effect is not undue. *Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB (9/23/98). [EB #704]

* Noise from proposed project, (including use of back up alarms on vehicles and equipment), would be adverse, but not unduly adverse. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]

* Master plan for 4 million SF industrial project (to be constructed over 20 years on 700 acres) will have adverse effect, but it will not be "undue." *Greater Burlington Industrial Corp. and Husky Injection Molding Systems*, #4C1007-1-EB (6/25/98). [EB #677]

* Project to construct storage units will have an adverse aesthetic effect, it will not be unduly adverse. *Richard and Barbara Woodard*, #5W1262-EB (12/18/97). [EB #676]

* Noise from 24 hour asphalt plant operation, no more than eight times/year will have adverse, but not unduly adverse, effect on the rural character of the area. *Pike Industries, Inc.*, #400008-2-EB (10/23/97). [EB #674]

- * Because project did not meet the first two subcriteria of Criterion 8, Board did not consider the final subcriterion. *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652]
- * Light fixtures for night-time skiing are adverse, but not undue. *Mt. Mansfield Co., Inc.*, #5L1125-4-EB (8/14/95). [EB #573]
- * As conditioned by the permit, hauling of aggregate materials from a stone quarry will not cause an undue effect on aesthetics. *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]
- * Noise from sand/gravel quarry will have an adverse, but not unduly adverse, aesthetic impact on surrounding residential and rural area. *Rockwell Park Associates*, #5W0772-5 (8/9/93). [EB #509]
- * Commission which believes that project will have undue adverse aesthetic effect may: 1) recess hearing to allow applicant to submit mitigation plan, or 2) deny application for failure to comply with Criterion 8. *OMYA, Inc.*, #1R0271-9-EB (2/7/91). [EB #482]
- * Although residential subdivision would cause adverse impact on aesthetics from loss of open space and visibility from road, impact is not undue. *James Davenport, Jr. and Barbara Davenport*, #1R0667-EB (7/9/90). [EB #449]
- * Proposed shopping center project will have an adverse effect; however, it will not be undue. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]
- * Proposed 25' road sign has adverse effect on area's scenic beauty because it represents an escalation in competition for visibility of commercial signs leading to more obtrusive signs; mitigation keeps effect from being "undue." *McDonald's Corp. & Murphy Realty Co.*, #100012-2-EB (2/10/89). [EB #410]
- * Multi-phase residential development will have adverse effect on aesthetics, but adverse impact is not undue. *Landmark Development Corporation*, #4C0667-EB (1/22/88). [EB #353]
- * Restriction in permit against use of white and other colors for houses in subdivision is void because such use of colors will not have undue adverse effect on area. *Hickock & Boardman*, #4C0662-EB (12/3/87). [EB #303]

763. Burden of Proof

- * The burden of proof with respect to aesthetics is "on any party opposing the applicant ... to show an unreasonable or adverse effect." *In re Denio*, 158 Vt.230, 236 (1992); *In re McShinsky*, 153 Vt. 586, 589 (1990); 10 V.S.A. § 6088(b); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 38 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: George and Diana Davis*, #2S1129-EB, FCO at 7 (12/15/04) [EB#844]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 24 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 23 (5/4/04) [EB #831]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 14 (4/13/04) [EB #814].
- * While the applicant never bears the risk of nonpersuasion of the Board as to the aesthetics criterion, the burden of proof is properly satisfied by the actual proof of adverse aesthetic

effect, " 'regardless of which party introduces the evidence. ' " *In re Denio*, 158 Vt.230, 237 (1992), quoting *In re Quechee Lakes Corp.*, 154 Vt. 543, 553 (1990).

* The absence of opposition does not mean that appellants automatically prevail on the aesthetics issue. *In re Denio*, 158 Vt. 230, 237 (1992), affirming, *Chester P. Denio*, # 1B0036-2-EB (3/27/89 ; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 24 (11/24/04) [EB #838]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at (4/9/02). [EB #791]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 35 (3/8/02). [EB #785]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 28 (2/22/01). [EB #758]; *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 31 (12/21/00). [EB #751]; *McDonald's Corporation*, #1R0477-5-EB, FCO at 17 (12/7/00). [EB# 747]; *Re: Herndon and Deborah Foster*, #5R0891-8B-EB, FCO at 12 (6/2/97); *Charles and Barbara Bickford*, #5W1186-EB (5/22/95)[EB #595]

* Applicant bears the initial burden of production under all applicable Act 250 criteria, but once this initial burden of production has been met, the burden of proof rests with the opposing parties to show that the proposed project will have the undue adverse effect that criterion 8 seeks to protect. 10 V.S.A. § 6088(b). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 33 and 49 (3/25/10)(citing *In re Route 103 Quarry*, No. 205-10-05 Vtec, at 8 (Nov. 22, 2006) (Durkin, J.), aff'd, 2008 VT 88); *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 4 (11/28/12).

* "When an applicant has made an adequate threshold showing under criterion 8, thereby fulfilling its evidentiary burden of proof, the evidentiary burden then shifts to the opposing party to show that the project will have an adverse impact." *In re Verizon Wireless/Barton Act 250 Permit Telecommunications Facility*, No. 6-1-09 Vtec, Decision on the Merits at 11 (4/21/11), aff'd, No. 2011-204 (mem.) (unpublished) (Vt. Supreme Ct. 5/1/12).

* Summary judgment to Applicant is granted where Applicant provided documentation, an affidavit, and an appraisal, and the record is devoid of any representation as to what Neighbors would likely produce at a hearing. *In re RCC Atlantic, Inc., and Sousa*, #163-7-08 Vtec, Decision on Multiple Motions at 8 (5/08/09).

* Although burden of proof under Criterion 8 is on opponent to project, 10 V.S.A. § 6088(b), applicant must provide sufficient information for Board to make affirmative findings. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 38 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Susan Dollenmaier and Martha Dollenmaier Spoor*, #3W0125-5-EB, FCO at 9 (2/7/05); *Re: George and Diana Davis*, #2S1129-EB, FCO at 7 (12/15/04) [EB#844]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 23 (5/4/04) [EB #831]; *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at 13 (4/9/02). [EB #791]; *Re: Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 28 (2/22/01); *Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, FCO at 19 (6/12/97).

* Even when there is no opposing party or evidence in opposition, applicant will not automatically prevail on Criterion 8. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, FCO at (4/9/02). [EB #791]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 35 (3/8/02). [EB #785]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 28 (2/22/01). [EB #758]; *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 31 (12/21/00). [EB #751]; *McDonald's Corporation*, #1R0477-5-EB, FCO

at 17 (12/7/00). [EB# 747]; *Re: Herndon and Deborah Foster*, #5R0891-8B-EB, FCO at 12 (6/2/97); *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]; *Chester P. Denio*, #1B0036-2-EB (3/27/89), *aff'd In re Denio*, 158 Vt. 230 (1992). [EB # 362]

* Where applicant failed to satisfy burden of production under Criteria 7, 8, and 9(A) and burden of production and persuasion under Criteria 9(B) - (L) and 10, Board could not assess potential impacts of extension of distribution utility line into a remote area. *Washington Electric Cooperative, Inc.*, #5W1036-EB (12/19/90). [EB #455]

* Applicant has burden of going forward to provide evidence that project would not have an impact on aesthetics and scenic and natural beauty of the area; lay evidence alone is not sufficient to satisfy this burden. *Lawrence E. Thomas*, #2W0644-EB (2/18/86). [EB #266]

* Criterion 8 requires applicants to demonstrate that proposed additions and alterations would no cause an undue adverse impact upon the aesthetics of the neighboring areas. 10 V.S.A. § 6086(a)(8). *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 1 (10/23/06).

764. Criterion 8 - Historic Sites

764.1 Three- stage analysis

* To determine compliance with Criterion 8(A) (historic sites) Board applies three-stage analysis: (i) whether project site is or contains a historic site, (ii) whether project will have an adverse effect on historic site, and (iii) whether such adverse effect will be undue. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 5 (5/27/04) [EB #837]; *Manchester Commons Associates*, #8B0500-EB (9/29/95). [EB #631]

764.1.1

"Historic site"

* If a structure is listed on the State register as an historic site, Act 250 has no discretion to declare such structure not to be historic. *Re: Stonybrook Condominium Owners Association*, DR #385, FCO at 9 (9/18/01); *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 39 (5/25/99), *aff'd, OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *New England Kurn Hattin Homes*, #2W0082-4-E, MOD at 4 (6/14/95). [EB #624M2]

* The Shrewsbury Peak Trail is not an "historic site" as defined by 10 V.S.A. § 6001(9). *Department of Forest, Parks and Recreation*, #1R0488-EB (1/11/84). [EB #211]

764.1.2

Adverse Effect

* Factors applied in evaluation of adverse effects on historic sites. *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 40 (5/25/99), *aff'd, OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00).

* When determining a project's "fit," special attention must be paid to whether the scenic qualities of certain "special features" will be maintained; these include ridge lines, steep slopes, shorelines, floodplains, and other aesthetically unique features such as historical structures, wetlands, and natural areas. *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]

764.1.3

Undue Adverse Effect

* Factors applied in evaluation of undue adverse effects on historic sites. *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 40-41 (5/25/99), *aff'd*, *OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00).

764.2 Cases

764.2.1

General

* No impact on historic sites found where relocating project from historic district would not cause any physical change to the historic features of the district, and no persuasive evidence that the district has any other historic quality that would be impacted by the project. *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 30 (12/31/02). [EB#800]

* Board might prefer that building had been designed in traditional New England style, failure to do so does not justify denial under Criterion 8; project's design is not shocking or offensive because it is minimally visible to passersby. *Old Vermonter Wood Products*, #5W1305-EB (8/19/99). [EB #721]

* After applying three-stage analysis, Board makes affirmative finding based on permit conditions. *Manchester Commons Associates*, #8B0500-EB (9/29/95). [EB #631]

* Although tower located in proposed retail shopping center project is an "historic site," its demolition will not cause an undue adverse effect. *The Switchyard*, #6F0192-1-EB (12/12/82). [EB #181]

* Road reconstruction will have an undue adverse effect on aesthetics but will not on historic sites or rare and irreplaceable areas. *Agency of Transportation (New Haven Project)*, #9A0071-EB (9/14/79). [EB #106]

* Demolition of a machine shop will not have an undue adverse effect on the site. *Myron Hunt & Central Vermont Railway*, #6F0192-EB (5/9/79). [EB #103]

* Excessive truck traffic through historic village will have undue adverse effect on historic site. *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 40-42 (5/25/99), *aff'd*, *OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00).

* Demolition of machine shop will not have an undue adverse effect on the site. *Myron Hunt & Central Vermont Railway*, #6F0192-EB (5/9/79). [EB #103]

764.2.2

Mitigating Steps and conditions

* Demolition of historic site had adverse effect, but effect is not undue because permit conditions require permanent photographic and narrative display of historic structures, and permittee offer of academic courses covering history of historic structure. *New England Kurn Hattin Homes*, #2W0082-4-EB (11/2/95). [EB #624]

* Demolition of historic site did not render moot appeal of permit authorizing such demolition because, after *de novo* hearing, Board may impose conditions to mitigate adverse impacts on historic site, or deny application and order site's restoration. *New England Kurn Hattin Homes*,

#2W0082-4-EB (5/3/95). [EB #624M1]

* Project has adverse effect on historic site where structure will be demolished or removed from site and historical setting, and where applicants have failed to take sufficient measures to mitigate adverse effect. *Dep't of State Buildings & Vermont State Colleges, #3R0581-4-EB (11/10/94)*. [EB #613]

* Subdivision has adverse effect on historic barn complex; but opportunities for public visitation and interpretation of barn complex mitigate such adverse effects. *Robert and Nancy Cioffi, #6F0370-2-EB (6/29/93)*. [EB #534]

* In order to ensure that steps to mitigate adverse effects on historic structure are taken, provisions of stipulation will be permanent condition of permit. *Robert and Nancy Cioffi, #6F0370-2-EB (6/29/93)*. [EB #534]

* While addition to an existing gymnasium would have an adverse effect on an acknowledged historic site, its effect was not undue, because applicant took mitigative steps to preserve site's historic character. *Middlebury College, #9A0177-EB (1/26/90)*. [EB #441]

764.2.3

Interference with Historic Qualities

* While addition to an existing gymnasium would have an adverse effect on an acknowledged historic site, its effect was not undue, because project did not interfere with public's ability to interpret or appreciate existing historic qualities. *Middlebury College, #9A0177-EB (1/26/90)*. [EB #441]

764.2.4

Unacceptable Impact

* While addition to an existing gymnasium would have an adverse effect on an acknowledged historic site, its effect was not undue, because project would have no cumulative effect on site's historic qualities so significant as to create a significant impact. *Middlebury College, #9A0177-EB (1/26/90)*. [EB #441]

764.2.5

Community Standard

* While addition to an existing gymnasium would have an adverse effect on an acknowledged historic site, its effect was not undue, because there was no applicable written community standard. *Middlebury College, #9A0177-EB (1/26/90)*. [EB #441]

765. Burden of Proof

* Under Criterion 8 (historic sites), the project opponent bears the burden of proof to show that the project will have an undue adverse effect. *In re St. Johnsbury Academy Act 250 Permit Amendment Application Appeal*, No. 13-1-14 Vtec, Decision on Motion for Summary Judgment at 7 (2/6/15); see 10 V.S.A. § 6088.

* Neighbor opponents failed to meet burden of demonstrating that a historic site was impacted and that any conditions imposed by the permit were inadequate to protect the site. *In re*

Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit, 2014 VT 5 ¶37 (01/17/14).

* Permittee failed to meet burden of producing enough evidence to enable Board to reach an affirmative conclusion that project will not have undue adverse effects on historic sites. *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, FCO at 27 (5/18/01). [EB #765]

* Proposed subdivision of a 3,915-acre tract of land into 33 lots does not comply with Act 250 where applicant provided insufficient information for Board to make affirmative findings with respect to historic sites. *New England Land Associates*, #5W1046- EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]

766. Criterion 8 - Natural Areas - Rare and Irreplaceable

* When determining a project's "fit," special attention must be paid to whether scenic qualities of certain "special features" will be maintained; these include ridge lines, steep slopes, shorelines, floodplains, and other aesthetically unique features such as historical structures, wetlands, and natural areas. *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]

766.1 Natural areas

* High quality cedar swamp containing identifiable type of ecological community, where natural conditions predominate over human influences is a natural area. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 83 (12/8/00). [EB# 739].

* Area in which a pine-oak sandplain community is located is a natural area. *Leo and Theresa Gauthier and Robert Miller*, #4C0842-EB (6/26/91). [EB #495]

* Act 250 protects natural areas which are not part of State forests and parks if those areas meet the qualifying provisions of Criterion 8. *Leo and Theresa Gauthier and Robert Miller*, #4C0842-EB (6/26/91). [EB #495]

766.2 Rare and Irreplaceable areas

* Swamp, which is a community of uncommon type in Vermont and contains rare and uncommon plants, is rare and irreplaceable. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 84 (12/8/00). [EB# 739]

* Pine-oak sandplain community is rare, because it is one of the five best examples of a community type which occurs infrequently in Vermont and usually occurs further south, and is irreplaceable, because conditions that caused it are unlikely to re-occur within foreseeable future. *Leo and Theresa Gauthier and Robert Miller*, #4C0842-EB (6/26/91). [EB #495]

* A listing as rare by the Heritage Program of a species not otherwise listed as threatened or endangered is probative of whether a species is rare but is not necessarily determinative under Criterion 8. *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]

* Existence of rare plants alone, while probative of a natural area's rare quality, may be insufficient to establish that the area is rare.. *Finard-Zamias Associates*, #1R0661-EB

(11/19/90). [EB #459]

* Where regional plan encourages protection of wetlands and of rare or irreplaceable natural areas, but determination has been made that a wetland is not a rare or irreplaceable natural area and regional plan does not include wetland as natural areas on its "natural or fragile areas" map, project conforms with regional plan with respect to such wetland. *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]

766.3 Undue Adverse Effect

* Non-winter use of new base lodge and non-winter operation of tramway will not have undue adverse effect on any rare or irreplaceable habitat or species. *Mt. Mansfield Company*, #5L1125-10-EB (12/28/95). [EB #612]

* Project will have adverse effect on pine-oak sandplain community, where such community must be of reasonable size to sustain itself, and where division of community into isolated portions will jeopardize the community's ability to continue. *Leo and Theresa Gauthier and Robert Miller*, #4C0842-EB (6/26/91). [EB #495]

* Elimination of other wetlands on project site will have minimal effect on wetland if resulting reduction in water level is much less than normal evaporation in summer and recharge in winter, and any adverse effect on such wetland will not be undue. *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]

* Gravel extraction operation in aesthetically unique area of high woodland falls, which is preserved by the State, is out of context and will cause an undue adverse impact. *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]

* Draining bog to create lake site would have undue adverse effect on rare natural area. *Haynes Brothers, Inc.*, #70001 (12/22/70). [EB #4]

766.3.1

Mitigating Steps and conditions

* Where project may cause adverse effects to rare and irreplaceable swamp by changing quantity or quality of water entering swamp, groundwater monitoring will sufficiently mitigate potential undue adverse effects. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 85 (12/8/00). [EB# 739]

* Under Criterion 8, a project's adverse effect will be undue where reasonably available steps to mitigate the effect have been not taken. *Leo and Theresa Gauthier and Robert Miller*, #4C0842-EB (6/26/91). [EB #495]

* Road reconstruction will have an undue adverse effect on aesthetics but will not on historic sites or rare and irreplaceable areas. *Agency of Transportation (New Haven Project)*, #9A0071-EB (9/14/79). [EB #106]

767. Burden of Proof

See 10 V.S.A. § 6088(b)

768. Criterion 8(A) - Wildlife Habitat and Endangered Species

* Under criterion 8(A), a permit's opponents have a dual burden: first, to show that the project "will destroy or significantly imperil necessary wildlife habitat or any endangered species," and second, to prove one of the three subcriteria. *In re Southview Associates*, 153 Vt. 171, 174 (1989); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 33 (11/24/04) [EB #838]

* Criterion 8(A) allows a party opponent to defeat a proposed project when they can show that it "will destroy or significantly imperil necessary wildlife habitat or any endangered species," but an applicant may still overcome a negative finding under criterion 8(A) by making certain showings that could mitigate the impact upon the necessary wildlife habitat or endangered species on the site. 10 V.S.A. § 6086(a)(8)(A), 6086(a)(8)(A)(i)–(iii). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 58 (3/25/10).

* Criterion 8(A) (Wildlife Habitat and Endangered Species) involves a three stage inquiry: (a) whether the alleged habitat constitutes "necessary wildlife habitat;" (b) if so, whether the Project will destroy or significantly imperil such habitat; and (c) if so, whether one or more of subcriteria (i) through (iii) is satisfied. *Mark and Pauline Kisiel*, #5W1270-EB, (8/7/98), *rev'd on other grounds*, *In re Kisiel*, 172 Vt. 124 (2000) [EB # 695]; *Re: Vermont Department of Forests, Parks and Recreation*, #5W0905-7-EB, FCO at 10 (9/7/05)[EB#840].

* Where project will not destroy or significantly imperil necessary wildlife habitat, Board need not reach subcriteria 8(A)(i)–(iii). *Henry J. and Jean A. LaVictoire and Ronald J. LaVictoire*, #1R0018-4-EB (3/16/93). [EB #569]

* It is incumbent upon [ANR] to candidly present relevant concerns in a case where sensitive resource is at issue. *Agency of Transportation (Vermont Route 64)*, #5W0653-EB (5/23/84). [EB #218]

* Subdivision meets Criterion 8(A) requirement for protection of necessary wildlife habitat. *White Sands Realty*, #3W0360-EB (2/25/82). [EB #171]

768.1 "Necessary" wildlife habitat

* Under Act 250, "necessary wildlife habitat" is a "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a particular species of wildlife at any period in its life including breeding and migratory periods." *In re Southview Associates*, 153 Vt. 171, 174-76 (1989); 10 V.S.A. § 6001(12); *In re Killington, Ltd.*, 159 Vt. 206, 216 (1992); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 6 (10/8/03). [EB #831]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 33 (11/24/04) [EB #838]

* Argument that because the evidence did not prove that all the deer would perish if the project were completed, the project's opponents failed to prove that the deeryard was "necessary wildlife habitat" misconstrues the terms of the statute. *In re Killington, Ltd.*, 159 Vt. 206, 216 (1992).

* While many of the individual animals might survive in another deeryard elsewhere in the state if the project were built, that does not render the area to be developed unnecessary to

their survival in the sense contemplated by the Act. *In re Killington, Ltd.*, 159 Vt. 206, 216 (1992); *In re Southview Associates*, 153 Vt. 171, 177 n.3 (1989).

* "Necessary wildlife habitat" is a "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods." *In re Southview Associates*, 153 Vt. 171, 174-75 (1989); 10 V.S.A. § 6001(12).

* "Necessary wildlife habitat" under Act 250 is habitat that is decisive to the survival of the population of a particular species that depends upon the habitat, not decisive to the survival of the entire population of deer in Vermont or the planet. *In re Southview Associates*, 153 Vt. 171, 176 and n. 1(1989).

* "[Criterion 8(A)] would be rendered meaningless if it were interpreted to mean that only the last deeryard in the state would be subject to review ... so that the state deer herd would have to be on the verge of extinction before Criterion 8(A) would apply." *In re Southview Associates*, 153 Vt. 171, 175 (1989).

* "Necessary wildlife habitat" must be "concentrated" and "identifiable," and of a certain quality. *In re Southview Associates*, 153 Vt. 171, 176 (1989).

* A concentrated, identifiable deeryard is "necessary wildlife habitat" if it is decisive to the survival of the white-tailed deer that use it during the winter--that is, if the deer require that sort of habitat to survive the winter. *In re Southview Associates*, 153 Vt. 171, 177 n.3 (1989).

* "Necessary wildlife habitat" need not be decisive to survival of species' entire population, but must be critical only to survival of portion of that population which is dependent on the identified habitat. *Southview Associates*, #2W0634-EB (6/30/87), *aff'd*, *In re Southview Associates*, 153 Vt. 171 (1989). [EB #296]

* Legislature could not have intended that only the last deeryard in Vermont would be subject to review under Criterion 8(A) so that State deer herd would have to be on verge of extinction before Criterion 8(A) would apply. *Southview Associates*, #2W0634-EB (6/30/87), *aff'd*, *In re Southview Associates*, 153 Vt. 171 (1989). [EB #296]

* Definition of "necessary wildlife habitat" applies to areas which are decisive to survival during part of year, even if area is not decisive all year. *Northeast Land Investment, Inc.*, #2W0036-4-EB (6/20/91). [EB #504]

* "Necessary wildlife habitat" need not meet all of the needs of a species but must be decisive to its survival at any period of its life including breeding and migratory periods. *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). [EB # 349] [EB #357]

* Stipulated facts insufficient for Board to determine whether project would comply with Criterion 8(A) without condition requiring relocation of recreational trail away from wetland complex. *Re: Department of Forests, Parks and Recreation (Phen Basin), #5W0905-7-EB, MOD at 8-10 (7/15/04).* [EB#840]

* Utility line extension will not impact bear travel corridor. *Re: Central Vermont Public Service Corp. and Verizon New England (Jamaica), #2W1146-EB, Findings of Fact, Conclusions of Law and Order (Altered) at 11 (12/19/2003).* [EB#817]

* A concentrated, identifiable deeryard is "necessary wildlife habitat" if it is decisive to the survival of the white-tailed deer that use it during the winter--that is, if the deer require that sort of habitat to survive the winter. *In re Killington, Ltd., 159 Vt. 206, 216 (1992); In re Southview Associates, 153 Vt. 171, 177 n.3 (1989).*

* Ledge overlooking quarry is not decisive to survival of bobcats that use it. *Re: Alpine Stone Corporation, ADA Chester Corporation and Ugo Quazzo, #2S1103-EB, FCO (2/4/02).* [EB#767]

* Eight acres which were logged before application, but were consistent with clearing land in preparation for creating subdivision, constituted identifiable deer wintering area because those acres provided a significant amount of softwood cover prior to logging. *Luce Hill Partnership, #5L1055-EB (7/7/92).* [EB #501]

* Deeryard, which is used by deer wintertime, which is a concentrated area of identifiable habitat necessary to survival of deer that it, and which has already been considerably degraded, is necessary wildlife habitat. *Robert P. Foley and Theodore R. Barnett, #5L1018-1-EB / #5L0426-6-EB (7/19/91).* [EB #490]

768.1.2

Endangered species

* A "necessary wildlife habitat" under Act 250 is one that is decisive to the survival of the population of a particular species that depends upon the habitat. *In re Killington, Ltd., 159 Vt. 206, 216 (1992); In re Southview Associates, 153 Vt. 171, 176 (1989).*

* Yellow panic grass is an endangered species within meaning of Act 250. *Leo A. and Theresa A. Gauthier and Robert Miller, #4C0842-EB (6/26/91).* [EB #495]

Until species on threatened list is removed from list, Board must afford it Criterion 8(A) protection), despite fact that subcommittee has proposed to take species off list. *Leo A. and Theresa A. Gauthier and Robert Miller, #4C0842-EB (6/26/91).* [EB #495]

768.2 "Destroy or imperil" habitat or endangered species

* The destruction or significant imperilment of the habitat of a population of wildlife triggers Criterion 8(A) review, irrespective of whether the species as a whole was threatened with extinction in the state. *In re Killington, Ltd., 159 Vt. 206, 216 (1992); In re Southview Associates, 153 Vt. 171, 175-76 (1989.)*

* Project will not significantly imperil necessary wildlife habitat where permit conditions require covenants that prohibit logging, tree-cutting and structures in deer-sensitive area, require

domestic dogs be leashed or otherwise controlled, and require that deeds reference all protections, restrictions and conditions concerning deer-sensitive area. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99). [EB #726]

* Project will not significantly impact wildlife habitats because houses would be located more than 350 feet from marsh, and dense vegetation and forested ridge provide barrier between marsh and project so it will cause less disturbance than that caused by existing homes and improvements. *Nile and Julie Duppsstadt*, #4C1013-EB (4/30/99). [EB #716]

* Project will destroy or significantly imperil deer wintering areas on project tract where project's habitat compensation ratio did not meet DF&W's 2:1 ratio for projects that will impact deer wintering habitat. *Mark and Pauline Kiesel*, #5W1270-EB, (8/7/98), *rev'd on other grounds*, *In re Kiesel*, 172 Vt. 124 (2000). [EB # 695]

* Non-winter use of base lodge and associated tramway service would not have an undue adverse effect on endangered species or rare and irreplaceable natural areas or wildlife habitat. *Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort*, #5L1125-10 and 10R-EB (Base Lodge) (Altered) (3/27/96). [EB #639(R)]

* Where project will not destroy or significantly imperil necessary wildlife habitat, Board need not reach subcriteria 8(A)(i)-(iii). *Henry J. and Jean A. LaVictoire and Ronald J. LaVictoire*, #1R0018-4-EB (3/16/93). [EB #569]

* Project would not destroy or significantly imperil necessary wildlife (deer wintering) habitat, where construction would not occur during winter, and visits to tower would be limited. *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92). [EB #471R]; *Norman R. Smith, Inc. and Killington, Ltd.*, #1R0593-1-EB (part I) (5/11/89) and *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (part II) (5/11/89), *aff'd*, *In re Killington, Ltd.*, 159 Vt. 206 (1992). [EB #349] [EB #357]; *J.P. Carrara & Sons, Inc.*, #1R0589-EB (2/17/88). [EB #337]; *Southview Associates*, #2W0634-EB (6/30/87), *aff'd*, *In re Southview Associates*, 153 Vt. 171 (1989). [EB #296]; *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92).

* Subdivision will not imperil necessary wildlife (deer) habitat provided that no structures are constructed in open space area, that domestic dog activity will be restricted, and that any trails proposed for open space are subject to review and approval of DF&W. *Horizon Development Corp.*, #4C0841 (8/21/92). [EB #518]

* If water withdrawal were restricted to allow minimum downstream flow at level so as not to significantly imperil or destroy habitat, the Criterion 8(A) subcriteria would not be relevant and withdrawal would satisfy Criterion. *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92). [EB#471R]

* Construction of homes will destroy or significantly imperil necessary wildlife habitat where clearing for home sites will destroy existing softwood cover, where rest of habitat will be rendered useless because of associated human activity, and where construction and associated activity will cause deer to cease using habitat. *Robert P. Foley and Theodore R. Barnett*, #5L1018-1-EB / #5L0426-6-EB (7/19/91). [EB #490]

* Project will not destroy or imperil species which is located in project area where management and mitigation will be explored and evaluated. *Leo A. and Theresa A. Gauthier and Robert Miller*, #4C0842-EB (6/26/91). [EB #495]

* Construction of a pond which will destroy wetland and create intrusion of human activities into an area will destroy or significantly imperil necessary wildlife habitat. *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). [EB # 349] [EB #357]

* Tree harvesting of concentrated beech stand and softwood cover critical to continued survival of bears will destroy or significantly imperil necessary wildlife habitat. *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). [EB # 349] [EB #357]

* Development that would destroy 10 acres of critical softwood cover in only remaining deeryard in will destroy and significantly imperil necessary wildlife habitat; a much larger area would be affected by secondary impacts from increase in level of human and pet activity in and around remaining deeryard. *Southview Associates*, #2W0634-EB (6/30/87), *aff'd, In re Southview Associates*, 153 Vt. 171 (1989). [EB #296]

* Residential project will not destroy or significantly imperil beaver and bear habitats. *Pomfret Associates*, #3R0403 (8/23/83). [EB #199]

* Residential subdivision will not destroy or significantly imperil necessary wildlife habitat. *White Sands Realty Co.*, #3W0360 (10/19/81). [EB #156]

* Subdivision will not destroy or significantly imperil necessary wildlife habitat because utility of such habitat will be destroyed or significantly impaired by surrounding development that has long been planned or approved for construction. *Quechee Lakes Corp.*, #3W0364-EB and #3W0365-EB (5/28/81). [EB #155]

* Subdivision will destroy or significantly imperil necessary deer habitat unless housing density is reduced. *Peter Guille, Jr.*, #2W0383-EB (3/18/80). [EB #97]

* Subdivision road will not imperil deer wintering yard if permit conditions regarding subdivision restrictions and sewage disposal are satisfied. *Dunmore Enterprises*, #3W0222 (10/29/76). [EB #74]

* Mobile home park will not destroy or significantly imperil or adversely affect woodcock breeding and nesting grounds. *Jerome and Juanita Reis*, #7C0157 (9/11/74). [EB #52]

768.3 The three subcriteria

* Opponents bear burden of proving that project will destroy or significantly imperil necessary wildlife habitat; but it is unclear as to who has burden of proof on Criterion 8(A) subcriteria. *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92). [EB #471R]

* If water withdrawal were restricted to allow minimum downstream flow at level so as not to significantly imperil or destroy habitat, the Criterion 8(A) subcriteria would not be relevant and withdrawal would satisfy Criterion. *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92). [EB#471R]

* Board cannot make positive findings under Subcriteria 8(A)(i) and 8(A)(iii) that benefits of project outweigh loss of habitat; but mitigation plan to purchase development and timber rights on 300 acres for deeryard management, would satisfy Criterion 8(A). *J.P. Carrara & Sons, Inc.*, #1R0589-EB (2/17/88). [EB #337]

768.3.1

8(A)(i): public benefits v. public costs from habitat loss

* Court affirms Board conclusion that the environmental and recreational loss to the public from the destruction and imperilment of the habitat is not outweighed by the economic, social, cultural, recreational, or other benefit to the public from the project. *In re Southview Associates*, 153 Vt. 171, 178-79 (1989).

* The existence of the deer in this area provides an opportunity to the public to hunt and to observe deer and provides the more intangible benefit of knowing that the deer exist; the loss of the deer in this area would be significant to the public who benefit from their existence. *In re Southview Associates*, 153 Vt. 171, 179 (1989).

* Criterion 8(A)'s economic subcriterion requires only a comparison of the relative benefits and losses of the particular project; that comparison must not be restricted to economic data only; as the statute requires that the Board assess the less tangible effects, which are not reducible to mathematical formulae. *In re Southview Associates*, 153 Vt. 171, 179 (1989).

* Subcriterion (i) requires determination that project's economic, social, cultural, recreational, or other benefit to public do not outweigh public's economic, environmental, or recreational loss from destruction or imperilment of habitat or species. *Mark and Pauline Kiesel*, #5W1270-EB, (8/7/98), *rev'd on other grounds*, *In re Kiesel*, 172 Vt. 124 (2000). [EB # 695]; *Southview Associates*, #2W0634-EB (6/30/87), *aff'd*, *In re Southview Associates*, 153 Vt. 171 (1989). [EB #296]

* In determining the "public benefit" of project subcriterion (i), definition of "public" is "the people as a whole; community at large;" public benefit does not include economic gain to applicant. *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). [EB # 349] [EB #357]

* Environmental and recreational loss to public from destruction and imperilment of habitat is not outweighed by economic, social, cultural, recreational, or other benefit to public from vacation homes in an area dominated by such homes. *Southview Associates*, #2W0634-EB (6/30/87), *aff'd*, *In re Southview Associates*, 153 Vt. 171 (1989). [EB #296]

* Applicant's economic loss from unrealized investment in project is not a factor considered under Criterion 8. *Southview Associates*, #2W0634-EB (6/30/87), *aff'd*, *In re Southview Associates*, 153 Vt. 171 (1989). [EB #296]

* Board disregards applicant's claimed rate on an investment made in anticipation of receiving Act 250 approval;. *Southview Associates*, #2W0634-EB (6/30/87), *aff'd, In re Southview Associates*, 153 Vt. 171 (1989). [EB #296]

* Improved safety from reconstructed highway outweighs loss to public of 70 acres of necessary wildlife habitat. *Agency of Transportation (Vermont Route 64)*, #5W0653-EB (5/23/84). [EB #218]

768.3.2

8(A)(ii):

mitigation to reduce destruction or imperilment of habitat

* Although project will destroy necessary wildlife (deer wintering) habitat, loss is sufficiently mitigated by perpetually protecting primary deer wintering area in a 3:1 ratio (more than the acceptable 2:1 ratio). *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 88 (12/8/00). [EB# 739].

* Under subcriterion (ii), all feasible and reasonable means of preventing or lessening destruction, diminution, or imperilment of deer wintering habitat on project tract had not been or would not continue to be applied. *Mark and Pauline Kisiel*, #5W1270-EB, (8/7/98), *rev'd on other grounds, In re Kisiel*, 172 Vt. 124 (2000). [EB # 695]

* Off-site mitigation should be considered only after on-site mitigation alternatives have been exhausted. *Northeast Land Investment, Inc.*, #2W0036-4-EB (6/20/91). [EB #504]

* In determining whether applicant has applied all feasible and reasonable means of mitigation, 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 law. *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). [EB # 349] [EB #357]

* Because project included implementation of measures to mitigate its effect on deeryard, it would not destroy or significantly imperil necessary wildlife habitat. *Leisure Living Parks*, #3W0466-2-EB (4/9/90). [EB 453A]

* While gravel extraction operation would significantly imperil necessary wildlife habitat during project's life, forest management plan will adequately lessen such imperilment. *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB #277]

768.3.3

8(A)(iii): other land owned or controlled by applicant (see [75.1.3](#), [78.3.2](#) and [109](#))

* Subcriterion (iii) is not met where applicants did not present evidence on reasonable, acceptable alternative sites which they own or control which would allow project to fulfill its intended purpose. *Mark and Pauline Kisiel*, #5W1270-EB, (8/7/98), *rev'd on other grounds, In re Kisiel*, 172 Vt. 124 (2000). [EB # 695]

* Feasibility of potential alternative site with respect to development on necessary wildlife habitat does not depend upon party's position taken in opposition to such site. *Killington, Ltd.*

and International Paper Realty Corp., #1R0584-EB-1 (9/21/90), *aff'd, In re Killington, Ltd.*, 159 Vt. 206 (1992). [EB #357]

769. Burden of Proof

*With respect to . . . Criteri[on] 8(A) . . . a party opposing the applicant has the burden of showing an undue adverse effect. 10 V.S.A. § 6088(b). Therefore, [the opposing party] has the burden of showing such an effect. [The opposing party] however, is entitled to question whether [the applicant] has provided sufficient evidence to meet its initial burden of production, or whether additional studies are required. *BlackRock Construction LLC Act 250*, No. 47-4-19 Vtec., Motion to Dismiss (6/19/19).

* Under criterion 8(A), a permit's opponents have a dual burden: first, to show that the project "will destroy or significantly imperil necessary wildlife habitat or any endangered species," and second, to prove one of the three subcriteria. *In re Southview Associates*, 153 Vt. 171, 174 (1989).

* Criterion 8(A) allows a party opponent to defeat a proposed project when they can show that it "will destroy or significantly imperil necessary wildlife habitat or any endangered species," but an applicant may still overcome a negative finding under criterion 8(A) by making certain showings that could mitigate the impact upon the necessary wildlife habitat or endangered species on the site. 10 V.S.A. § 6086(a)(8)(A), 6086(a)(8)(A)(i)–(iii). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 58 (3/25/10).

* Under Criterion 8(A)'s three stage inquiry, applicant bears burden of production and opponent bears burden of persuasion. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632]

* Opponents bear burden of proving that project will destroy or significantly imperil necessary wildlife habitat; but it is unclear as to who has burden of proof on Criterion 8(A) subcriteria. *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92). [EB #471R]

* Applicant provided insufficient information for Board to make affirmative findings under Criterion 8(A). *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]

* When dealing with natural resource as important as critical wildlife habitat, applicant must thoroughly investigate alternative ways to achieve its purpose and support its contentions with credible evidence. *Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1 (9/21/90), *aff'd, In re Killington, Ltd.*, 159 Vt. 206 (1992). [EB #357]

* Permittees offered sufficient evidence to shift burden to opponents to prove that wetland constitutes either a rare and irreplaceable natural area or a necessary wildlife habitat. *Palazzi Corp.*, #6F0322-EB (9/13/85). [EB #264]

J. Criterion 9 - Capability and Development Plan Conformance

781. General

* Fiscal criteria do not address shopping preferences or protect one style of store from another; fiscal criteria only ensure that municipalities can continue to provide services. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB, FCO at 50 (8/20/01). [EB #766]

* Competition between proposed project and local competitors is relevant to the extent it affects the local tax base. However, relevancy of fiscal impacts on public entities does not mean that Act 250 protects existing businesses from new competition. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 48. (8/20/01). [EB #766]

* Permittee's contribution of significant money to region far in excess of estimated direct and indirect fiscal impacts on region makes it unlikely that project's competition will adversely affect existing retail activities; even if such effects occurred, they are unlikely to: (1) place an undue, uneconomic or excessive burden on ability of local and regional governments or public utilities to provide services needed for project or other projects, or to accommodate growth; and (2) endanger public investments in, or jeopardize or interfere with, adjacent public facilities under Criteria 7, 9(A), 9(H), 9(J), and 9(K). *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB#459]

* Fiscal impacts of a mall project in comparison to available budget figures are insignificant. *Berlin Associates, Ltd.*, #5W0584-EB (4/13/83). [EB #195]

782. Criterion 9(A) - Impact of Growth

782.1 General

* Criterion 9(A) - Legislative Intent and History. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 85 (1997).

* Criterion 9(A) requires us to consider the population growth for the Town and region and whether the proposed project would "significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and rate of growth" generated in the Town and region generally, and that which the project will generate. 10 V.S.A. § 6086(a)(9)(A). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 40 (3/25/10).

* Criterion 9(A) requires Board to consider financial capacity of town and region to accommodate growth; if project will not result in growth, project complies with Criterion 9(A); otherwise, Criterion 9(A) analysis would be identical to Criterion 7. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 49. (8/20/01). [EB #766]

* Review under Criterion 9(A) does not require the same degree of technical data as review under Criterion 1(B) (waste disposal). *Heritage Group, Inc.*, #4C0730-EB (3/27/89). [EB #394]

782.2 Purpose of Criterion

* In the interest of general welfare, the police power may be exercised to protect citizens and their businesses in financial and economic matters, and it may be exercised to protect the

government itself against potential financial loss. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

* Common element in so-called "fiscal criteria" (Criterion 6, 7, 9(A), 9(H), and 9(K)) is the protection of government finances from burdens imposed by new development. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

782.2.1

Competition

* Competition between project and local competitors is relevant to extent it affects the local tax base. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 48. (8/20/01). [EB #766]

* Relevancy of fiscal impacts on public entities does not mean that Act 250 protects existing businesses from new competition. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 48. (8/20/01). [EB #766]; *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

782.2.2

Property values

* To the extent that a project's impact on existing retail stores negatively affects appraised property values, such impact is a factor that relates to the public health, safety, and welfare under Criterion 9(A), because a municipality's ability to pay for these services depends on its tax base, that is, the appraised value of property in the municipality's grand list. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

* Argument that property values will decrease as a result of project is not a cognizable argument under Criterion 9(A), which addresses impact of development generated costs on municipal services such as education, highways, water supply, sewage disposal, and police and fire service. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]

782.3 Growth considerations

* Criterion 9(A) involves commercial growth, as well as growth and population, despite use of phrase "growth in population" in the first sentence of the statute and principle of *eiusdem generis* which restricts general terms that follow specific terms in a series to those earlier specified, because express intent of the statute requires consideration of commercial and population growth. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 84 (1997).

* The Legislature intended the word "growth," as used in Criterion 9(A), to apply to economic, as well as population, growth. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 85 (1997).

* Criterion 9(A) met where no credible evidence that proposed project will directly encourage other residential or commercial developments or population growth or impede Town or region's ability to accommodate growth. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 40 (3/25/10).

* Criterion 9(A) met where regional population growth and anticipated growth considerations

lead to conclusion that proposed project will not significantly affect either total population growth or rate of growth, and factual determinations made on anticipated costs of education and other municipal services. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 36 (1/20/10).

* Developer of large scale retail project failed to meet burden of proof with regard to: (a) growth in population experienced by town and region; (b) the total growth and rate of growth which is otherwise expected for town and region; (c) total growth and rate of growth for town and region which will result from proposed project if approved; (d) anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety, and welfare; and (e), based on (a) through (d), that project will not cause an undue burden on existing and potential financial capacity of the and region in accommodating growth caused by project. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* Existence of similar stores owned by developer made study of potential growth impact of retail project, given project's likelihood to cause growth; feasible. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

782.3.1

Caused by project

* Criterion 9(A) requires Board to consider financial capacity of town and region to accommodate growth; if project will not result in growth, project complies with Criterion 9(A). *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 49. (8/20/01). [EB #766]

* Where sewer line project (or similar infrastructure project) will not cause or encourage increased residential or commercial growth beyond that which will occur in the region without project, project will not have a significant impact on existing municipal services. *Department of State Buildings*, #2W0609-EB (6/3/85). [EB #256]

782.3.2

Population

* Criterion 9(A) involves commercial growth, as well as growth and population, despite use of phrase "growth in population" in the first sentence of the statute and principle of ejusdem generis which restricts general terms that follow specific terms in a series to those earlier specified, because express intent of the statute requires consideration of commercial and population growth. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 84 (1997).

* The Legislature intended the word "growth," as used in Criterion 9(A), to apply to economic, as well as population, growth. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 85 (1997).

* Board does not consider "effective population" - which combines year round residences with average occupancy rates of second homes and lodging beds - because it flattens out peak impact periods. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 99 (2/22/02). [EB#778]

782.3.3**Secondary growth**

- * The plain language of Criterion 9(A) requires the Board to consider the growth caused by the project (secondary growth), the anticipated costs to the town and region, and the financial capacity of the town and region to accommodate the growth. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 82 (1997).
- * Board may require evidence of expected secondary growth and its associated costs and benefits to determine whether the project would cause an undue burden on the financial capacity of the town and the region under Criterion 9(A). *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 83 (1997).
- * The speculative nature of secondary growth projections affects the weight of the evidence not its admissibility. *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 82 (1997).
- * Where sewer expansion project would allow for growth that would otherwise occur, applicant failed to meet burden of production by failing to provide evidence on expanded service area's development potential, need for new municipal services, and analysis of what potential tax revenues may result directly or indirectly from project. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680].
- * Criterion 9(A) met based on permit condition that limits use of communication tower's electric power line solely to project, in order to prevent residential development in undeveloped area. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632].
- * Where sewer line project (or similar infrastructure project) will not cause or encourage increased residential or commercial growth beyond that which will occur in the region without project, project will not have a significant impact on existing municipal services. *Department of State Buildings*, #2W0609-EB (6/3/85). [EB #256]

782.4 Cases

- * Criterion 9(A) met where no credible evidence that proposed project will directly encourage other residential or commercial developments or population growth or impede Town or region's ability to accommodate growth. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 40 (3/25/10).
- * Criterion 9(A) met where regional population growth and anticipated growth considerations lead to conclusion that proposed project will not significantly affect either total population growth or rate of growth, and factual determinations made on anticipated costs of education and other municipal services. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 36 (1/20/10).
- * Where permittee will pay for necessary municipal improvements, and the project is unlikely to be the direct or indirect cause of future growth, the project conforms with Criterion 9(A) as it is unlikely to burden the town with growth expenses. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 19 (2/15/08).

- * Utility line extension will not facilitate significant secondary growth. *Re: Central Vermont Public Service Corp. and Verizon New England (Jamaica)*, #2W1146-EB, Findings of Fact, Conclusions of Law and Order (Altered) at 14 (12/19/2003). [EB#817]
- * Utility line extension in sparsely developed area held not to cause significant growth. *Re: Central Vermont Public Service Corp. and Verizon New England (Guilford)*, #2W1154-1-EB, Findings of Fact, Conclusions of Law and Order at 13-16 (Altered) (12/19/2003). [EB# 821]
- * Project will pay for significant part of infrastructure (roads, traffic control, waste disposal, water supply, fire protection, etc.), which minimizes adverse financial impacts to area municipalities, and because project results in only limited growth; thus, project satisfies Criterion 9(A). *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 100 (2/22/02). [EB#778]
- * Same analysis that Board applies to analysis of Criterion 6 applies to Criterion 9(A) analysis of project's impacts on costs for education. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99). [EB #726]
- * Project would not cause an undue burden on the existing and potential financial capacity of the town and region in accommodating growth caused by the project where the worst case scenario was an impact of no greater than 2.7% on the City of Burlington's tax base. *Maple Tree Place Associates*, #4C0775-EB, FCO at 36 (6/25/98). [EB #700]
- * Mixed use development will not significantly affect existing and potential financial capacity of the town / region to accommodate both total growth and rate of growth otherwise expected for town / region, and total growth and rate of growth which would result from project, in relation to highway access and maintenance. *Maple Tree Place Associates*, #4C0775-EB (6/25/98). [EB #700]
- * Where project will contribute to cost of traffic signal, so as to lessen burden of growth on city's financial capacity exacerbated by need for signal because of project, project will comply with Criterion 9(A) regarding growth-related impacts. *P.F. Partnership and Harlan and Jean Bodette*, #9A0169-EB (5/1/90), *aff'd and remanded*, *P.F. Partnership*, No. 90-276 (V.S.Ct.3/21/91). [EB #424]
- * Project's payments to city will ensure that project's impacts will not cause undue financial burden to city. *Ran-Mar, Inc.*, #5W0933-3-EB (1/16/89). [EB #417]
- * Chairlifts and ski trails do not unduly affect aesthetics or natural beauty of area under Criteria 8 and 9(A). *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]
- * Proposed subdivision of 15 lots will satisfy criterion if future sales and construction are done in phases. *Richard & Napoleon LaBrecque*, #6G0217-EB (11/17/80). [EB #140]

782.5 Burden of Proof

- * 10 V.S.A. § 6086(a)(9)(A): "Notwithstanding section 6088 of this title the burden of proof that

proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, *excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.*"

* Where secondary growth is expected, Board may require evidence of expected secondary growth and its associated costs and benefits to determine whether the project would cause an undue burden on the financial capacity of the town and the region under Criterion 9(A). *In Re Wal-Mart Stores, Inc.*, 167 Vt. 75, 83 (1997).

* Burden of proof under Criterion 9(A) not met where applicants provided no evidence on anticipated costs for education, sewage disposal, water supply, police and fire services and other factors relating to public health, safety and welfare. *Mark and Pauline Kisiel*, #5W1270-EB, (8/7/98), *rev'd on other grounds, In re Kisiel*, 172 Vt. 124 (2000). [EB # 695]

* Where sewer expansion project would allow for growth that would otherwise occur, applicant failed to meet burden of production by failing to provide evidence on expanded service area's development potential, need for new municipal services, and analysis of what potential tax revenues may result directly or indirectly from project. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680].

* Developer of large scale retail project failed to meet burden of proof with regard to: (a) growth in population experienced by town and region; (b) the total growth and rate of growth which is otherwise expected for town and region; (c) total growth and rate of growth for town and region which will result from proposed project if approved; (d) anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety, and welfare; and (e), based on (a) through (d), that project will not cause an undue burden on existing and potential financial capacity of the and region in accommodating growth caused by project. *St. Albans Group and Wal-Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal-Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* Where applicant failed to satisfy burden of production under Criteria 7, 8, and 9(A) and burden of production and persuasion under Criteria 9(B) - (L) and 10, Board could not assess potential impacts of the extension of distribution utility line into remote area. *Washington Electric Cooperative, Inc.*, #5W1036-EB (12/19/90). [EB #455]

783. Criterion 9(B) - Primary Agricultural Soils

* "Criterion 9(B) addresses primary agricultural soils and requires an applicant to demonstrate, among other things, that its proposed project "either . . . will not result in a reduction in the agricultural potential of the primary soils; or . . . will not significantly interfere with or jeopardize the continuing agriculture . . . on adjoining lands or reduce their agricultural potential." *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, Decision on Motion for Party Status at 8 (7/1/11) (citing 10 V.S.A. § 6086(a)(9)(B)).

* Criterion 9(B) requires the applicant to demonstrate either that the proposed project will not reduce the agricultural potential of such soils, or that the proposed project will comply with all four subcriteria, including any appropriate mitigation called for by subcriterion (iv). *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 5

(12/8/10).

*There is a distinction between a particularized interest in protecting the agricultural potential of prime agricultural soils and an interest in the ancillary benefits of life in an agricultural area, such as pastoral views, wildlife, a dispersed settlement pattern, or an agricultural character of the neighborhood. Criterion 9(B) protects the former and other criterion, like 8, 9(H), and 9(L) protect the latter. *Snyder Group, Inc. Act 250, #107-10-18 Vtec.*, Decisions on Motions to Dismiss (5/22/19)

783.0 Change in statute; which law applies

* Under vested-rights doctrine, Environmental Court applies prior version of 10 V.S.A. 6086(a)(9)(B) where Applicant submitted complete application prior to change in applicable law, upon desire to avoid “extended litigation” and “protracted maneuvering.” See *In re Jolley Assocs.*, 2006 VT 132, ¶ 11, 181 Vt. 190 (citing *Smith v. Winhall Planning Comm’n*, 140 Vt. 178, 181-82 (1981)). *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 42-43 (1/20/10).

* Applicant cannot take advantage of the amended definition of primary agricultural soils in a 10 VSA 6087(c) proceeding to reconsider its original application. *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 10 & 13 (3/29/10), *aff’d* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* Where Applicant failed to correct deficiencies concerning Criterion 9(B), Applicant cannot avail itself of definition of prime agricultural soils amended during its litigation in order to secure compliance with 9(B). *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 13 (3/29/10), *aff’d* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

* Appellant’s particularized interests in preserving the potential for the future working landscape and agricultural character of the area are protectable under Criterion 9(B) because loss of the agricultural potential of the primary agricultural soils on the proposed project property would preclude the property’s use for agriculture in the future and would thus contribute to the loss of the working landscape and the reduction of the agricultural character of the area over time. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 7 (12/1/08).

* Criterion 9(B) does not require that primary agricultural soils actually be in use for agriculture; rather, it preserves their potential, minimizes their reduction, and preserves the remaining primary agricultural soils’ “capab[ility] of supporting or contributing to an economic or commercial agricultural operation.” *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 5 (5/1/08)(quoting 10 V.S.A. § 6001(15)), *aff’d in part / rev’d in part*, *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08).

* Project satisfies Criterion 9(B) if: (a) there are no primary agricultural soils on the project site, or (b) the project will not reduce the potential of the site’s primary agricultural soils, or (c) the project meets Criterion 9(B)(i) - (iv) (the subcriteria). *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 6 -7 (1/27/04) [EB #833]

* Board is mandated by Criterion 9(B) to preserve Vermont's primary agricultural soils. *Re: Allen Brook Investments, LLC and Raymond Beaudry, #4C1110-EB, FCO at 13 (1/27/04) [EB #833]*

* Preservation of primary agricultural soils can occur without an absolute prohibition against development such soils. *Re: Allen Brook Investments, LLC and Raymond Beaudry, #4C1110-EB, FCO at 13 (1/27/04) [EB #833]*

783.1 Primary Agricultural Soils

* The definition of primary agricultural soils has three separate parts: (1) a requirement of a scientific determination as to the soil composition and a determination that "soil map units . . . have . . . few limitations for cultivation or limitations that may be easily overcome"; (2) a list of acceptable present uses of the land that do not preclude a determination that primary agricultural soils exist; and (3) a requirement that the soils be of a size and location such that they would be capable of supporting or contributing to an agricultural enterprise following removal of any limitations. *In re Village Assocs.*, 2010 VT 42 ¶ 12 (citing 10 V.S.A. § 6001(15)).

* If primary agricultural soils are located on a proposed project site, Criterion 9(B) requires the applicant to demonstrate either that the proposed project will not reduce the agricultural potential of such soils, or that the proposed project will comply with subcriteria (i)–(iv). 10 V.S.A. § 6086(a)(9)(B). *In re: Brosseau/Wedgewood*, No. 260-11-08 Vtec, Decision and Order on Motion for Summary Judgment at 2 (6/9/09); *see also*, Decision and Order at 5 (12/8/10).

* "Primary agricultural soils" defined. *In re Spear Street Associates*, 145 Vt. 496, 499 (1985); 10 V.S.A. § 6001(15); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 51 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.)

* If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils. *In re Spear Street Associates*, 145 Vt. 496, 499 (1985).

* Contribution to an economic agricultural operation does not require contribution only to an on-site agricultural operation. *In re Spear Street Associates*, 145 Vt. 496, 499 (1985).

* The analysis of primary agricultural soils under Act 250 requires several steps; the first question is whether the soils on a parcel meet the statutory definition of primary agricultural soils in 10 V.S.A. § 6001(15); only if primary agricultural soils are located on a site does the analysis turn to Criterion 9(B) of Act 250, 10 V.S.A. § 6086(a)(9)(B). *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 5 (12/8/10).

* For the purposes of facilitating an accurate analysis in any Act 250 Criterion 9(B) case, the statutory definition of primary agricultural soils in 10 V.S.A. §6001(15) consists of two equally important components, both of which must be met for the soils on the project site to be considered as primary agricultural soils; the first component considers whether the soils have sufficiently favorable physical, chemical, drainage and topographic characteristics to give them a high enough NRCS rating; the second component considers the economics of farming and requires a determination as to whether the soils are capable of sustaining an economic or

commercial agricultural operation on the project parcel, or contributing to such an operation conducted off site. *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 8 (12/8/10).

* Board makes *de novo* determination of how many acres of primary agricultural soils are involved in project based on facts as they exist at time of proceedings. *Chester and Donna Brileya*, #1R0580-EB (5/1/86). [EB #286]

* Determining whether project involves development of "primary agricultural soils" involves case-by-case analysis that depends upon location, proximity to markets, and other circumstances; small tracts containing agricultural soils may well contribute to or support viable farming operations. *Chester and Donna Brileya*, #1R0580-EB (5/1/86). [EB #286]

* Soils known as Vergennes clay could satisfy primary agricultural soils definition; agricultural soils must have certain physical characteristics and must be capable of supporting or contributing to an economic agricultural operation under Criterion 9. *Spear Street Associates*, #4C0489-EB (10/26/82), *aff'd*, *In re Spear Street Associates*, 145 Vt. 496 (1985). [EB #179]

783.1.1

The physical component of the definition

* For the purposes of facilitating an accurate analysis in any Act 250 Criterion 9(B) case, the statutory definition of primary agricultural soils in 10 V.S.A. § 6001(15) consists of two equally important components, both of which must be met for the soils on the project site to be considered as primary agricultural soils; the first component considers whether the soils have sufficiently favorable physical, chemical, drainage and topographic characteristics to give them a high enough NRCS rating; the second component considers the economics of farming and requires a determination as to whether the soils are capable of sustaining an economic or commercial agricultural operation on the project parcel, or contributing to such an operation conducted off site. *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 8 (12/8/10).

* The first component of 10 V.S.A. § 6001(15), the physical, chemical, drainage and topographic characteristics of the soils, tracks the language used in the USDA-NRCS soils rating system, including the concept of whether the soils have limitations for cultivation and how hard it is to overcome those limitations; this component is the innate or natural potential of the soils for growing crops. *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 9 (12/8/10).

783.1.1.1

NRCS-rated soils and soils with NRCS-rated characteristics

* Soils categorized as prime, or as having statewide or local importance in the USDA-NRCS rating system, are presumed to qualify as primary agricultural soils, and soils which in fact have the requisite physical, chemical, drainage and topographic characteristics, but have not been so characterized in the USDA-NRCS rating system unless, such NRCS-rated and non-rated soils are shown to be incapable of supporting or contributing to an economic or commercial agricultural operation. *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 9 (12/8/10).

783.1.1.1.1 Limitations on cultivation

* Determination of whether the soils have few limitations that may be easily overcome first requires a determination as to the existence of a limitation; and if a limitation exists, the second step is to determine whether it can be easily overcome. *In re Village Assocs.*, 2010 VT 42 ¶ 14.

*Treed land can be primary agricultural soils; but cost of removal of trees is one of many factors to be considered when determining whether physical and practical difficulties of a limitation can be overcome. *In re Village Assocs.*, 2010 VT 42 ¶ 14.

* The economics of farming must be considered in order to avoid unnecessarily protecting “fictitious farms.” *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 8 n.4 (12/8/10)(citing *In re: Village Associates*, 2010 VT 42A, ¶19).

*The 2006 amendment to § 6001(15) including forests and forestland in types of land in the list of permissible uses merely precludes the Agency from eliminating forested land from its analysis of whether primary agricultural soils exist. *In re: Village Assocs.*, 2010 VT 42 ¶ 20.

* The cost of removing forest cover is considered in the analysis under the first (“limitations”) component of 10 V.S.A. § 6001(15), although the USDA-NRCS, Farmland Classification Systems for Vermont Soils (2006) at 10 states that “[n]ormally, the cost” of installing corrective measures to overcome limitations “should not be considered” deciding a soil’s rating. *In re: Village Associates*, 2010 VT 42A, ¶ 23; *In re Village Associates Act 250 Land Use Permit*, No. 6-1-08 Vtec, Decision and Order at 4-7 (1/6/11); *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 10 and n.5 (12/8/10).

Pre-2006 amendment cases

* No primary agricultural soils are involved because site is not sufficiently well drained to allow use of mechanized farm equipment and there are several limitations as to cultivation which are not easily overcome. *Lakeview-Farms, Inc.*, #4C0481-2-EB (11/7/84). [EB #232]; *Northwestern Developers, Inc. and Alferie & Mildred LaFleur*, #6F0416-EB (4/16/91). [EB #494]

* Soils on site of proposed residential subdivision were primary agricultural soils; no evidence was submitted concerning whether land had few limitations for cultivation or had limitations which might have been easily overcome. *Bernard & Suzanne Carrier*, #7R0639-EB (10/5/90). [EB #435]

783.1.1.1.2 Overcoming limitations on cultivation

* Because the cost of removing trees is \$2625/acre and strawberries can yield up to \$18,000/acre the cost of overcoming that limitation is not “so high that conversion of the land into agricultural use is not economically feasible.” *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 11 - 12 (12/8/10)(quoting *Village Associates*, 2010 VT 42A, ¶ 23).

783.1.2

The economic component of the definition (whether the soils are capable of sustaining or contributing to an economic or commercial agricultural operation)

* For the purposes of facilitating an accurate analysis in any Act 250 Criterion 9(B) case, the statutory definition of primary agricultural soils in 10 V.S.A. §6001(15) consists of two equally important components, both of which must be met for the soils on the project site to be considered as primary agricultural soils; the first component considers whether the soils have sufficiently favorable physical, chemical, drainage and topographic characteristics to give them a high enough NRCS rating; the second component considers the economics of farming and requires a determination as to whether the soils are capable of sustaining an economic or commercial agricultural operation on the project parcel, or contributing to such an operation conducted off site. *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 8 (12/8/10)

Pre-2006 amendment cases

* A parcel of land is not capable of contributing to or supporting an economic agricultural operation if, due to site's location, it is highly unlikely that the parcel would ever be used for agricultural production (proposed condominium project in pastoral setting). *Houston Farms Associates*, #5L0775-EB (4/27/87). [EB #260]

783.1.2.1 Size of parcel

* 27.4 acres of soils on the project parcel classified as prime, statewide, or local under the USDA-NRCS system, following removal of the trees, are of a size capable of contributing to an economic or commercial agricultural operation, raising berries or sweet corn, or even hay or silage corn. *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 12 - 15 (12/8/10),

783.1.2.2 Location of parcel

* The 27.4 acres of soils on the project parcel are not of a location, relative to adjoining (or even nearby) land uses, capable of supporting or contributing to an economic or commercial agricultural operation because the property is not located close enough or with convenient enough local road access to any commercial or economic agricultural operation to contribute to that operation, and is not located close enough to a farm stand or other market opportunity to sustain its own economic or commercial agricultural operation without a farmer living on or near the property. *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order at 12 - 15 (12/8/10),

* Evidence regarding whether soils are capable of supporting or contributing to an economic or commercial agricultural operation requires a showing of more than the mere distance between the location and the nearest farm. *In re: Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order on Motion for Summary Judgment at 2 (6/9/09)(citing *In re Village Associates Act 250 Land Use Permit*, No. 6-1-08 Vtec (4/30/09)(Wright, J.), *aff'd*, 2010 VT 42).

783.2 Existence of Primary Agricultural Soils on the site

* "Criterion 9(B) applies only if primary agricultural soils exist on the project site." *In re Times & Seasons, LLC Act 250 Reconsideration*, No. 45-3-09 Vtec, at 6 n.8 (3/29/10) (Durkin, J.), *aff'd* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11); *Re: Allen Brook Investments, LLC*, No.

4C1110-EB, Findings of Fact, Conclusions of Law, and Order, at 8 (Vt. Env'tl. Bd. Jan. 27, 2004); *see also In re Village Assocs. Act 250 Land Use Permit*, 2010 VT 42, ¶ 10 (noting that analysis under 9(B) is only triggered after a threshold determination that primary agricultural soils exist on a project site). *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 15 (7/2/10).

*The 2006 amendment to § 6001(15) including forests and forestland in types of land in the list of permissible uses merely precludes the Agency from eliminating forested land from its analysis of whether primary agricultural soils exist. *In re Village Assocs.*, 2010 VT 42 ¶ 20.

* The determination of whether a site contains primary agricultural soils or not is essentially a factual one. *In re Spear Street Associates*, 145 Vt. 496, 499 (1985).

* It is the Board's responsibility to hear the evidence on this issue, and based on that evidence, make factual findings and conclusions concerning the presence of primary agricultural soils on the site. *In re Spear Street Associates*, 145 Vt. 496, 499 (1985).

* In evaluating project for conformance with Criterion 9(B), Board must first determine whether site contains primary agricultural soils. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 51 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 6 (5/27/04) [EB #837]; *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 45 (3/8/02). [EB #785], citing, *In re Spear Street Associates*, 145 Vt. 496, 498-99 (1985).

783.3 “Potential” of the Primary Agricultural Soils

* The Criterion focuses on the *future* agricultural potential of primary agricultural soils on the project site and neighboring properties. Thus, the Criterion involves an interest predicated on future, or continued, agricultural uses at the neighborhood level. *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/28/19).

* “The Board interprets the word ‘potential’ to require a consideration of whether the design and location of the subdivision on the property will preclude agricultural use of the primary agricultural soils and not whether agricultural use of those soils is likely in light of current economics and surrounding land uses.” *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 51 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.), quoting *Re: Raymond Duff*, #5W0921-2R-EB (Revised), FCO at 13 (6/14/91); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 7 (5/27/04) [EB #837]; *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 9 (1/27/04) [EB #833] *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 46 (3/8/02)[EB #785]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 37 (2/22/01). [EB #758]; [EB #436] citing *Homer and Marie Dubois*, #4C0614-3-EB, FCO at 7 (5/18/98); *Flanders Lumber Company*, #4C0695-EB, FCO at 5 (4/18/88), modifying *Re: J. Philip Gerbode*, #6F0357R-EB, FCO at 9 (3/25/91) (revised by 1/29/92 FCO). [EB#486]

* Agricultural potential of primary agricultural soils at the tract was not significantly reduced because those soils had very little potential for agriculture; thus, Board did not require mitigation. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (8/14/97). [EB #666]

* Because it is unlikely that agricultural use will ever be made of proposed site, project will not

significantly reduce agricultural potential of soils. *Chester P. Denio*, #1B0036-2-EB (3/27/89), *aff'd*, *In re Denio*, 158 Vt. 230 (1992). [EB #362] But see, *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 37 (2/22/01). [EB #758]

* Threshold consideration of whether project will reduce soils' agricultural potential is based on physical and chemical characteristics of soils, rather than on whether agricultural use is likely in light of the uses of surrounding areas. *Flanders Lumber Company*, #4C0695-EB (4/18/88). [EB #350]

783.4 Reduction of potential

(Note: 2005 amendments changed the 9(B) language from "...will not

significantly

reduce the agricultural potential of the primary agricultural soils..." to "...will not result

in *any* reduction in the agricultural potential of the primary agricultural soils...")

* In determining the amount of primary agricultural soils that a proposed project will impact, precedent of the former Environmental Board did not mandate an exact calculation of the specific acreage, but regarded more than half to be "significant." *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on Request to Alter at 3 (3/27/08), quoting *Re: Reynolds and Cadreact*, No. 4C1117-EB, FCO at 7 (Vt. Env'tl. Bd. May 27, 2004).

* Criterion 9(B) requires that the Board determine whether the development will significantly reduce the agricultural potential of the primary agricultural soils. *In re Spear Street Associates*, 145 Vt. 496, 500 (1985); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 51 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 7 (5/27/04) [EB #837] (once Board has determined that site contains primary agricultural soils, it must determine whether project would significantly reduce the agricultural potential of the soils)

* If the Board determines that no significant reduction of agricultural potential will occur, the Board concludes its inquiry on the issue of primary agricultural soils. *In re Spear Street Associates*, 145 Vt. 496, 500 (1985).

* If the Board determines that a significant reduction will occur, then the Board must proceed to determine whether the four subcriteria have been satisfied. *In re Spear Street Associates*, 145 Vt. 496, 500 (1985).

* "[T]he very act of dividing the ownership of the parcel can significantly reduce the agricultural potential of the primary agricultural soils." *In re Spear Street Associates*, 145 Vt. 496, 501 (1985).

* Loss of one-third of primary agricultural soils on site is a significant reduction of agricultural potential of those soils. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 38 (2/22/01). [EB #758]

* Project which impacts only a very small part of a site which contains only 1.5 acres of primary agricultural soils will not significantly reduce agricultural potential of those soils. *Green*

Meadows Center LLC, The Community Alliance, and SEVCA, #2W0694-1-EB, FCO at 36 (12/21/00). [EB #751]

* Project significantly reduces soils' agricultural potential because two thirds of soils will be covered by house sites and related roads, and project fails to protect other third for agricultural purposes. *Nile and Julie Dupstadt, #4C1013-EB (4/30/99). [EB #716]*

* Project would not significantly reduce potential of primary agricultural soils because applicant attempted to keep large portion of a meadow open and also paid impact fee to mitigate loss of primary agricultural soils. *Town of Hinesburg and Stuart and Martha Martin, #4C0681-8-EB (9/23/98). [EB #704]*

* Criterion 9(B) is satisfied where project guarantees that portion site which is comprised of primary agricultural soils will remain in agricultural use. *Raymond Duff, #5W0921-2R-EB (Revised) (6/14/91). [EB #436]*

* Project will not significantly reduce agricultural potential of soils where, in combination with soils that are to be preserved under a mitigation agreement, 1/3 of total amount of agricultural soils will be developed, while 2/3 of agricultural potential will be permanently preserved. *J. Philip Gerbode, #6F0357R-EB (3/26/91). [EB #397]*

* Loss of 4% of the primary agricultural soils is not a significant reduction in agricultural potential of primary agricultural soils. *Edwin & Avis Smith, #6F0391-EB (5/11/89). [EB #398]*

* Gravel operations will significantly reduce soils' agricultural potential of because (i) they will not be available for agricultural use until final reclamation has been completed, (ii) soils reserved in past extraction activities have been permanently lost, and (iii) soils' potential to support deep-rooted crops will be destroyed by land-filling operation; but project has been planned with reclamation to return site to a state suitable for agricultural use. *H.A. Manosh Corp., #5L0690-EB (Revised) (8/8/86). [EB #289]*

* Project will not significantly reduce agricultural potential of primary agricultural soils where project constitutes 12 acres of a 1,000 acre farm, 12-18 inches will be removed and retrieved as top cover, site will be pasture land upon completion of project, and removal of trees from farming area will allow use of more soil for cultivation than now occurs. *Howard & Louise Leach, #6F0316-EB (6/11/86). [EB #269]*

* Subdivision of 40 acres of primary agricultural soils into single family residential lots significantly reduces soil's agricultural potential. *Spear Street Associates, #4C0489-EB (10/26/82), aff'd, In re Spear Street Associates, 145 Vt. 496 (1985). [EB #179]*

* Grant of party status under Criterion 9(B) requires the Act 250 applicant to demonstrate that the proposed project "will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining land reduce their agricultural or forestry potential." 10 V.S.A. § 6086(a)(9)(B)(i); *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 2 (3/14/2018); see also *In re Gingras Act 250 Amended Permit*, No. 22-3-15 Vtec, slip op. at 6-7 (Vt. Super. Ct. Envtl. Div. Aug. 21, 2015) (Durkin, J.)

783.5 The four subcriteria

NOTE 2005 Amendments which changed the 4 subcriteria.

* If there are primary agricultural soils on the site, an applicant's failure to satisfy its burden as to any one of the four Criterion 9(B) subcriteria is sufficient to merit a denial. *In re Spear Street Associates*, 145 Vt. 496, 501 (1985); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 14 -15 (5/27/04) [EB #837] (legislature's use of the word "and" between each of the subcriteria indicates that *all* of the subcriteria must be met and that each of the subcriteria is of equal weight)

* Environmental Court reinforced the extended positive factual findings by own analysis of 9(B)(i)-(iv) subcriteria finding subcriteria met: (i) undisputed evidence that agricultural use of project site fails to generate income even 4% of taxes; (ii) uncontested evidence that Applicant does not own any parcel, not containing agricultural soils, upon which a project like this could be located; (iii) project will eliminate agricultural potential of some prime soil but Applicant will preserve similar prime soils, no residential development is planned on site so no increased population density, and, although clustered planning (aka clustered development) is more often ascribed to residential developments, Wal-mart does cluster a variety of retail items; and (iv) there are no agricultural soils on lands that adjoin project site and nearest agricultural lands (Hudak Farm) are a third of a mile away. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 43-45 (1/20/10).

* There is no balancing test inherent in an analysis of the Criterion 9(B) subcriteria; the statute does not weigh a developer's desire to obtain a reasonable return on his land against the requirement that a project be "planned to minimize the reduction of agricultural potential" by clustering. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 14 (5/27/04) [EB #837]

* Nothing in the Criterion 9(B) subcriteria *exempts* an applicant from compliance with subcriterion (iii), and no language can be read to mean that subcriterion (iii) must bend to subcriterion (i) whenever the two may be perceived to be in conflict. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 15 (5/27/04) [EB #837]

* Project which will significantly reduce agricultural potential of primary agricultural soils must satisfy the four subcriteria of 9(B). *H.A. Manosh*, #5L0918-EB (8/8/88). [EB #359] ; *Lakeview-Farms, Inc.*, #4C0481-2-EB (11/7/84). [EB #232]

783.5.1

9(B)(i): interfere with/jeopardize/reduce potential of agriculture on adjoining lands

* Agricultural operations on adjoining parcels are protected only after it is determined that a proposed project will reduce the agricultural potential of primary agricultural soils on the project site. *In re Pion Sand & Gravel Pit*, #245-12-09 Vtec, Decision on Motion for Party Status at 15 (7/2/10)(citing *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, at 8 (12/1/08) (Wright, J.)).

* Criterion 9(B) does not require neighboring agricultural operations to be "commercial" or "economic" to be protectable interests. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 8-9 (12/1/08).

*The requirement of Criterion 9(B)(i) is “not keyed to the soils on the adjacent property; rather, it looks at the continuation of or potential for agriculture and forestry on adjoining lands.” This subcriterion “contains no requirement that the agriculture or forestry on adjoining lands meet any minimum size or commercial requirements.” *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 7-8 (5/1/08), *aff'd in part / rev'd in part*, *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08).

* Declaration of covenants and buffer area do not adequately address potential complaints by future residents of noise, dust, and odors associated with neighboring farm; since farmer could be driven out of area by encroaching development, and since he should not be the one to accommodate such an encroachment, subcriterion is not satisfied. *Nile and Julie Dupstadt*, #4C1013-EB (4/30/99). [EB #716]

* Project which will interfere with an adjoining agricultural operation does not comply with subcriterion. *John D. and Margaret O. Berkley*, #2W0942-EB (Revised) (10/27/94). [EB #602]; *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (6/26/91). [EB #466]

* Where adjoining lands are not under forestry or agricultural production, subcriterion is not applicable. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229].

* Appellants allegations that project may exacerbate the existing erosion problems, potentially affecting the soil they rely on for farming, as well as the dust and erosion caused by increased truck traffic, along with calcium chloride (which might be used to control dust), are sufficient to secure party status under Criterion 9(B)(i). *Katzenbach Act 250*, No. 124-9-17 Vtec Motion for Party Status at 2 (3/14/2018)

**Cases under former 9(B)(i) (before 2005 amendments to 10 V.S.A. §6086(a)(9)(B):
reasonable rate of return through other use**

* To the extent that the land can be used in other, economically beneficial ways, no taking occurs when Criterion 9(B)(i) prohibits uses that have greater agricultural impacts. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 13 (5/27/04) [EB #837]; and see 4.4.

* Elements of subcriterion (i) of Criterion 9(B). *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 46-48 (2/22/01) (first step to an analysis of subcriterion (i) is to establish land’s fair market price; second step is to calculate rate of return that could be reasonably anticipated in order to determine whether project is the *only* one which can provide fair rate of return on property’s fair market value); *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (6/26/91). [EB #466]

* Under subcriteria (i), an applicant must demonstrate that he “can realize a reasonable return on the fair market value of his land *only* by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential.” *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 52 - 53 (11/4/05), *aff'd in part, rev'd in part*, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 7 (5/27/04) [EB #837]; *Re: Marvin T. Gurman*, #3W0424-EB, FCO at 19 (6/10/85)

* Subcriterion (i) is satisfied only when the applicant is unable to realize a reasonable return on the fair market value of his land in agricultural use; Board is not asked to determine what its relative value might be upon conversion if this development plan were to succeed. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 53 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 8 (5/27/04) [EB #837], quoting *Re: Richard and Napoleon LaBrecque*, #6G0217-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Nov. 17, 1980)

* Applicant bears the burden to provide the evidence to satisfy the requirements of subcriterion (i). 10 V.S.A.

§ 6088(a); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, FCO at 9 (5/27/04) [EB #837]

* In order to meet subcriterion (i), project must show that there are no other land uses that will not significantly reduce soils' agricultural potential. *H.A. Manosh*, #5L0918-EB (8/8/88). [EB #359]; *Lakeview-Farms, Inc.*, #4C0481-2-EB (11/7/84). [EB #232]; *Homer & Marie DuBois*, #4C0614-3-EB (5/5/88). [EB #360]

* Applicants fail to meet burden of proof that other agricultural and non-agricultural uses of the site that do not diminish the soils' potential will not afford a reasonable return. *Marvin T. Gurman, Easley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

* Applicant must show that a reasonable return on land's fair market value can only be realized by directing soils to uses which will significantly reduce their agricultural potential. *Spear Street Associates*, #4C0489-EB (10/26/82), *aff'd, In re Spear Street Associates*, 145 Vt. 496 (1985). [EB #179]

* Where fair market value per acre is \$2,000 and agricultural return of is \$50/acre/year, applicants can realize reasonable rate of return on fair market value only by devoting soils to non-agricultural uses,. *Richard & Napoleon LaBrecque*, #6G0217-EB (11/17/80). [EB #140]

* Project allowed because applicant can realize reasonable return on land's fair market value only by devoting it to the contemplated uses. *John A. Russell Corp. and Mr. & Mrs. Robert Dezero*, #1R0257 (8/31/77). [EB #83]

783.5.1.1 former 9(B)(i): "fair market value"

* Applicant can establish fair market value through a "a contemporaneous purchase between a willing buyer and a willing seller made in good faith." *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 54 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.), citing *Barrett/Canfield, LLC v. City of Rutland*, 171 Vt. 196, 198 (2000) ("A bona fide sale is one that occurs between a willing buyer and a willing seller, at arms-length, in good faith, and not to 'rig' a fair market value."); and refining *Re: Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 48 (2/22/01) [EB #758].

* Applicant can establish fair market value by adjusting the Town's appraisal of the land by the

496 (1985)

* Subcriteria (iii) is not interpreted to include community-wide clustering. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact, #4C1117-EB, FCO at 16 -19 (5/27/04) [EB #837]*

* The phrase, in subcriterion (iii), "*the subdivision or development has been planned*" indicates a focus on planning at the project site of the subdivision or development itself, not on a project's location within the larger context of a town-wide plan. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact, #4C1117-EB, FCO at 17-18 (5/27/04) [EB #837]*

* Through the implementation of Act 250's criteria and permit conditions, the Board can regulate activities that occur on lands which are subject to the Act's jurisdiction. In this case, only the Project site is subject to the Act's control; absent an action that triggers jurisdiction, the Board cannot dictate what may occur in other parts of the Town of Milton. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact, #4C1117-EB, FCO at 18 (5/27/04) [EB #837]*

* Project that fails to comply with the clustering requirements of (9)(B)(iii) cannot enter into a mitigation agreement for the preservation of off-site agricultural lands. *Re: Allen Brook Investments, LLC and Raymond Beaudry, #4C1110-EB, FCO (1/27/04) [EB #833]*

The phrase "*to the extent reasonably feasible,*" does not allow applicant to avoid "clustering" provisions of subcriterion (iii) even in growth area. *Re: Allen Brook Investments, LLC and Raymond Beaudry, #4C1110-EB, FCO at 12 – 13 (1/27/04) [EB #833]*

* There is an inherent conflict between compliance with subcriterion (iii) as a prerequisite for the acceptance of a mitigation agreement under Criterion 9(B)(preservation of agricultural lands) and the goals of Act 200 (concentrating development in town core). *Re: Allen Brook Investments, LLC and Raymond Beaudry, #4C1110-EB, FCO at 12 - 13 (1/27/04) [EB #833], citing Southwestern Vermont Health Care Corporation, #8B0537-EB, FCO at 42 - 43 (2/22/01).*

* Subcriteria (iiii) requires "careful consideration of design alternatives that could reduce a project's impact on primary agricultural soils, and [requiring] adoption of a land-conserving design when it is reasonable to do so." *In re Spear Street Associates, 145 Vt. 496, 502 (1985) citing In re C & K Brattleboro Associates, #2W0434-EB (1/2/80).*

* Detached single family homes on separate lots are antithesis of cluster planning. *Nile and Julie Dupstadt, #4C1013-EB (4/30/99). [EB #716]*

* Project, which does not cluster and does not economize on land usage for purpose of minimizing reduction of agricultural potential, does not satisfy subcriterion (iii). *Nile and Julie Dupstadt, #4C1013-EB (4/30/99) [EB #716]; and see Southwestern Vermont Health Care Corp., #8B0537-EB, FCO at 50 (2/22/01). [EB #758]*

* Application fails subcriterion (iii) where improvements to be built on parcel's primary agricultural soils are not clustered. *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates, #4C0795-*

EB (6/26/91). [EB #466]

* Applicants failed to meet their burden to show that proposed population densities would minimize reduction of agricultural potential in soils (subcriterion (iii)). *Homer & Marie DuBois*, #4C0614-3-EB (5/5/88). [EB #360]

* Applicants failed to meet burden of proof that project has been designed to minimize reduction of soils' agricultural potential. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

* Residential project has not been planned to minimize reduction of agricultural potential by use of cluster planning and new community planning. *Spear Street Associates*, #4C0489-EB (10/26/82), *aff'd, In re Spear Street Associates*, 145 Vt. 496 (1985). [EB #179]

783.5.4

9(B)(iv): mitigation

* Conservation goals of Act 250 have always been balanced against economic necessity of development; off-site mitigation fees, which allow development in spite of the impact on primary agricultural soils for payment of a fee to conserve an alternate site, are an example of the sort of compromise between conservation and development that Act 250 fosters. *In re Village Assocs.*, 2010 VT 42 ¶ 17

* Because agricultural mitigation agreements have long been acknowledged as a proper vehicle for Criterion 9(B) conformance, the Environmental Court sees no substantive difference between the application of Criterion 9(B) before and after the 2007 amendments, particularly in light of the well reasoned precedent from the former Environmental Board. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on Request to Alter at 5 (3/27/08).

* Primary agricultural soils mitigation agreements are creations born out of the Board's case precedent; no statute or regulation establishes such agreements within the context of Criterion 9(B). *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 7 n.2 (1/27/04) [EB #833]

* Project that fails to comply with the clustering requirements of 10 V.S.A. § 6086(a)(9)(B)(iii) cannot enter into a mitigation agreement for the preservation of off-site agricultural lands. *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO (1/27/04) [EB #833]

* Off-site mitigation of primary agricultural soils can advance the goals of Criterion 9(B) and Act 200, but mitigation program must proceed carefully. *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 13 (1/27/04) [EB #833]

* Mitigation agreement under Criterion 9(B) must be between developer and Agency of Agriculture, not between developer and town. *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 14 (1/27/04) [EB #833]

* The agricultural off-site mitigation program is neither illegal or unwise. *Southwestern Vermont*

Health Care Corp., #8B0537-EB, FCO at 38-43 (2/22/01) [EB #758]; and see, *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 7 n.2 (1/27/04) [EB #833]

* The agricultural off-site mitigation program should be used only as a last resort. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 44 (2/22/01). [EB #758]

* Board will only accept agricultural off-site mitigation agreements when project meets subcriterion (iv) and where it meets subcriteria (ii) and (iii) to the extent reasonably feasible. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 44 (2/22/01). [EB #758]; and see *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 8 (1/27/04) [EB #833]; *Re: Ingleside Equity Group*, DR #397, FCO at 12 (8/15/01).

* Agricultural off-site mitigation agreements must take into consideration the particular agricultural attributes of the primary agricultural soils which will be lost to development of the site. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 45 (2/22/01). [EB #758]; and see *Re: Ingleside Equity Group*, DR #397, FCO at 13 (8/15/01).

* Project will not significantly reduce agricultural potential of soils where, 1/3 of the total amount of agricultural soils will be developed, but 2/3 of the agricultural potential will be permanently preserved under a mitigation agreement. *J. Philip Gerbode*, #6F0357R-EB (3/26/91). [EB #397]

* Offer to permanently protect 33 acres of primary agricultural soils in a previously-approved subdivision as mitigation for a proposed 95-acre subdivision is not acceptable because the 33 acres are not part of current application and because permit for first subdivision is already contingent upon preserving said 33 acres. *Homer & Marie DuBois*, #4C0614-3-EB (5/5/88). [EB #360]

783.6 Reserved

783.7 Cases

* Criterion 9(B), however, does not include interests related to pastoral views or wildlife concerns, which may fit within the scope of other criteria. These ancillary interests are protected by, and must remain confined to, more relevant Act 250 criteria, like Criteria 8, 9(H), and 9(L). *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/28/19).

* Limitation imposed by existing forest cover is a limitation that may easily be overcome. Therefore, the entire 10.85 acres constitutes primary agricultural soils. *In re: Village Associates*, No. 6-1-08 Vtec, Decision and Order at 7-9 (4/30/09); 2010 VT 42.

* A neighbor's concerns regarding the impacts of subdivision of a nearby working farm on the character of the area and on the area's settlement patterns are not particularized interests under Criterion 9 (B) - although they may be relevant to Criterion 8 (Aesthetics), and Criteria 9(H) or 9(L). *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motions regarding Party Status at 6 (5/1/08), *aff'd in part / rev'd in part*, *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal (12/1/08).

- * Primary agricultural soils are adequately protected through Board-approved stipulation agreement and revised permit conditions. *John D. and Margaret O. Berkley, #2W0942-EB (Revised) (10/27/94)*. [EB #602]
- * Board makes determination of "involved land" *de novo* as facts exist at the time of proceedings; here, involved land did not include primary agricultural soils. *Chester and Donna Brileya, #1R0580-EB (5/1/86)*. [EB #286].
- * Industrial park satisfies Criterion 9(B) because an alternative design would not result in the retention of any usable areas of primary agricultural soil. *C & K Brattleboro Associates, #2W0434-EB (1/2/80)*. [EB #125]
- * Criterion 9(B) governs a proposed project whether or not AOT can negotiate agreements to purchase the primary agricultural soils affected; a purchase agreement would not be basis for a permit amendment to a road reconstruction project unless the agency also demonstrates compliance with Act 250. *Agency of Transportation (New Haven Project), #9A0071-EB (9/14/79)*. [EB #106]
- * Road reconstruction must be modified to retain four barns that are essential to preservation of agricultural soils and economic viability of agricultural units under Criteria 8, 9(B), and 10. *Agency of Transportation (New Haven Project), #9A0071-EB (9/14/79)*. [EB #106]
- * When State has reasonable alternatives to disruption of environment and to causing adverse impact on the livelihood of private property owners, State, like private development, must use those alternatives; State interest in providing safe highways should not override or be in conflict with goal of preserving primary agricultural soils. *Agency of Transportation (New Haven Project), #9A0071-EB (9/14/79)*. [EB #106]
- * Subdivision that contains 58 acres of primary agricultural soils will significantly reduce their agricultural potential; Criterion 9(B) means that a reasonable return on land's fair market value should be realized by designing project that utilizes cluster planning and economizes on land use, and which will result in use of agricultural soils for purposes that do not destroy their agricultural potential. *Marlene P. Davison, #5L0444 (7/21/78)*. [EB #91]

783.8 Burden of Proof

- * The applicant for the permit bears the burden of proof regarding Criterion 9(B). 10 V.S.A. § 6088(a); *In re Spear Street Associates, 145 Vt. 496, 500 (1985)*; *Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB (Altered), FCO at 51 (11/4/05), aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC, 2008 VT 7 (Vt. S. Ct.)*; *Re: Steven L. Reynolds and Harold and Eleanor Cadreact, #4C1117-EB, FCO at 5 (5/27/04)* [EB #837]; *Re: Allen Brook Investments, LLC and Raymond Beaudry, #4C1110-EB, FCO at 7 n.1 (1/27/04)* [EB #833]
- * If there are primary agricultural soils on the site, an applicant's failure to satisfy its burden as to any one of the four Criterion 9(B) subcriteria is sufficient to merit a denial. *In re Spear Street*

Associates, 145 Vt. 496, 501 (1985).

* Permittee failed to meet his burden of producing enough evidence to enable affirmative conclusion that project satisfies Criterion 9(B). *Josiah E. Lupton, Quiet River Campground*, Land Use Permit Application #3W0819 (Revised)-EB, FCO at 29 (5/18/01). [EB #765]

* Where applicant failed to satisfy burden of production under Criteria 7, 8, and 9(A) and burden of production and persuasion under Criteria 9(B) - (L) and 10, Board could not assess potential impacts of the extension of distribution utility line into remote area. *Washington Electric Cooperative, Inc.*, #5W1036-EB (12/19/90). [EB #455]

* Once Board concludes that a site contains primary agricultural soils, applicant has burden of demonstrating compliance with Criterion 9(B). *Flanders Lumber Company*, #4C0695-EB (4/18/88). [EB #350]

* Although applicant has submitted stipulation with State of Vermont regarding primary and secondary agricultural soils, applicant still has burden of proof as to Criteria 9(B) and 9(C); conclusions of other State agencies are not evidence on which Board can make affirmative findings. *Landmark Development Corporation*, #4C0667-EB (7/9/87). [EB #320]

784. Criterion 9(C) - Forest and Secondary Agricultural Soils

784.1 Existence of Forest and Secondary Agricultural Soils on the site

784.2 “Potential” of the Forest and Secondary Agricultural Soils

* Project satisfied Criterion 9(C) for reasons similar to those stated for Criterion 9(B); also: (i) tract was adjacent to other properties developed for lakeside residential purposes and no commercial forestry operations existed in project’s vicinity, and (ii) by virtue of its small size (~10 acres) tract was not suitable for commercial forestry purposes. *Bernard and Suzanne Carrier*, #7R0639-EB (Reconsideration) (8/14/97). [EB #666]

784.3 Significant reduction of potential

* Project, which is located within a 20-acre limited clearing area and which has covenants requiring maintenance of remainder of project tract (~ 138 acres) as forest land, does not significantly reduce potential of forest soils for commercial forestry. *Mark and Pauline Kiesel*, #5W1270-EB (8/7/98), *rev’d on other grounds, In re Kiesel*, 172 Vt. 124 (2000). [EB # 695]

* Project, which will significantly reduce soils’ potential by using nearly all of tract for proposed residential lots and related roads and driveways, fails the first Criterion 9(C) test. *George, Mary, and Rene Boissoneault*, #6F0499-EB (1/29/98). [EB #678]

* Project will significantly reduce potential of secondary agricultural soils where many proposed house lots are on such soils. *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (6/26/91). [EB #466]

784.4 The three subcriteria

* Project, which does not meet any of the three statutory subcriteria, fails the second Criterion 9(C) test: (i) applicants provided no financial data concerning farming operation, evidence of site's fair market value, or evidence indicating consideration of designs or other land uses that would not significantly reduce agricultural potential; (ii) the applicants presented no evidence on whether other properties they own are "reasonably suited to the purpose;" and (iii) the applicants took no steps in project's design to minimize the reduction of agricultural potential. *George, Mary, and Rene Boissoneault*, #6F0499-EB (1/29/98). [EB #678]

784.4.1 **9(C)i: reasonable rate of return through non-agricultural use**

784.4.2 **9(C)ii: no other land owned or controlled**

784.4.3 **9(C)iii: minimize reduction of agricultural potential**

784.5 Cases

* To protect the resource and maintain the productivity of the soils, project must establish a landowners association to be guided by a professional forester. *Summit Associates*, #4C0307 (10/18/78). [EB #90]

784.6 Burden of Proof

* Where applicant provides insufficient information to allow affirmative findings with respect to Criterion 9(C) (forest soils), subdivision of tract into 33 lots fails Act 250. *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]

* Applicant has burden of proof under Criterion 9(C). *Landmark Development Corporation*, #4C0667-EB (1/22/88). [EB #353]

* Although applicant has submitted stipulation with State of Vermont regarding primary and secondary agricultural soils, applicant still has burden of proof as to Criteria 9(B) and 9(C); conclusions of other State agencies are not evidence on which Board can make affirmative findings. *Landmark Development Corporation*, #4C0667-EB (7/9/87). [EB #320]

785. Criterion 9(D) - Earth Resources

786. Criterion 9(E) - Extraction of Earth Resources

* "Criterion 9(E) provides that a permit for earth extraction and processing will be granted if: (i) the extraction will not have an unduly harmful impact upon the environment or surrounding land uses"; and (ii) the applicant proposes an adequate reclamation plan such that the site will be left by the applicant in a condition suited for an approved alternative use or development after the applicant's

extraction operation is complete. 10 V.S.A.. § 6086(a)(9)(E). The burden of proof under Criterion 9(E) is on the applicant. 10 V.S.A. § 6088(a); *In re Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88, ¶ 16, 184 Vt. 283.” *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 24 (2/16/2017).

* Criterion 9(E) provides specific protections from the “unduly harmful impact upon the environment or surrounding land uses and development” of earth resource extraction projects, and further restricts the allowable extraction projects to those that show “a site rehabilitation plan which insures that upon completion . . . [the site] will be left by the applicant in a condition suited for an approved alternative use or development.” 10 V.S.A. §§ 6086(a)(9)(E)(i) & 6086(a)(9)(E)(ii). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 61 (3/25/10).

* Before issuing a permit for the extraction or processing of mineral and earth resources, including fissionable material, the Board must find that, (i) the extraction or processing operation and the disposal of waste will not have an unduly harmful impact upon the environment or surrounding land uses and development; and (ii) there is a site rehabilitation plan which insures that upon completion of the extracting or processing operation the site will be left by the applicant in a condition suited for an approved alternate use or development. 10 V.S.A. § 6086(a)(9)(E); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 48 - 49 (6/7/05) [EB #853]; *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 88 (12/8/00). [EB# 739]

786.1 Unduly harmful impact

* The analysis of Criterion 9(E) and 8 are overlapping and related. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 62 (3/25/10) citing *Re: John and Marion Gross, d/b/a John Gross Sand and Gravel*, #5W1198-EB, FCO at 12 (4/27/95) (relying upon the findings and conclusion under criterion 8 to buttress and provide foundation for initial findings and conclusions under criterion 9(E)(i)). *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 24 (2/16/2017).

* “Where adjoining property owner’s use of their land per-dates the proposed earth extraction operation, greater weight shall be given to their use and enjoyment of their land. See *John Gross Sand and Gravel Application*, No. 5W1198-EB, Findings of Fact, Conclusions of Law, and Order, at IV, B.” *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 24 (2/16/2017).

* Criterion 9(E) includes and goes beyond aesthetic impacts on adjoining landowners to encompass interference with enjoyment of the land, and to seek to prevent such interference from becoming undue. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 49 (6/7/05) [EB #853], citing *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 88 (12/8/00). [EB# 739]; *Re: John and Marion Gross*, #5W1198-EB, FCO at 16 (4/27/95). [EB #606]

* Environmental Court declines to rely on a decision from the Division of Property Valuation and Review of the Vermont Department of Taxes stating decline in property value explained in general terms by an undefined “public perception” of the prospect that applicant may construct and

operate a quarry on its adjoining property. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 63-64 (3/25/10).

* In regards to evidence concerning impact on property values, speculative estimate of impact upon the value of an adjoining property cannot satisfy heightened threshold of “unduly harmful” impact upon environmental or surrounding land uses. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 64 (3/25/10).

* Evidence of determination in a tax assessment appeal presenting a valuation that appears speculative at best; it is founded upon “public perception” of the Rivers quarry; provides no foundation that such “perception” is accurate or even casually related to the project and is inadmissible under Rule 403 In regards to evidence concerning impact on property values, speculative estimate of impact upon the value of an adjoining property cannot satisfy heightened threshold of “unduly harmful” impact upon environmental or surrounding land uses. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 64 (3/25/10).

* Criterion 9(E)(i) not met where proposed quarry blasting will bring activities and noise not yet experienced in area and require neighbors within 1,500 feet to remain indoors at least as frequently as a dozen times each operational season. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 62 (3/25/10).

* Where adjoining landowners' residential use pre-dates a sand/gravel crusher plant, Board gives great weight to adjoining landowners' use and enjoyment of land. *John and Marion Gross*, #5W1198-EB (4/27/95). [EB #606]

786.1.1

Conditions imposed to prevent

* Conditions to maintain field, preserve vegetative buffer, and maintain the physical barrier provided by the ridgeline will minimize noise from the expanded operation and therefore the project will not result in undue impacts under Criterion 9(E)(i). *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 25 (2/16/2017).

* Condition requiring excavation and landscaping business to plant a row of pine trees to minimize visual and aural impacts on neighbor altered to require balsam fir trees where pine trees could adversely affect abutter’s fence and vegetation. *In re: Cota Act 250 Land Use Permit (altered)*, No. 114-6-07 Vtec, Decision at 7-8 (1/14/09).

* Permit condition altered to allow use of tandem-axle dump trucks under limited conditions at excavation and landscaping business where no sound measurements or expert evidence was presented as to whether noise was louder than one-ton dump truck and use of tandem-axle dump trucks would result in fewer trips. *In re: Cota Act 250 Land Use Permit (altered)*, No. 114-6-07 Vtec, Decision at 5-6, 9 (1/14/09).

* While credible evidence supports a conclusion that the use of explosives at quarry, if conducted as designed, should not cause adverse impacts on neighboring business, Board will require quarry to install and monitor seismographs. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 49 - 50 (6/7/05) [EB #853]

- * 10 V.S.A. § 6086(a)(9)(E)(ii) is the *only* Act 250 provision in which the Legislature has specifically *required* that, once the permitted activity is completed, the site on which that activity has occurred must undergo remediation. *Re: Richard and Elinor Huntley*, DR #419, MOD at 8 (7/3/03), rev'd, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).
- * Considerable conditions will successfully mitigate any undue harm to environment or neighboring land uses; mitigation includes limited hours of operation, noise limits, and a detailed operations and maintenance plan and blasting procedures. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 89 (12/8/00). [EB# 739]
- * Phased earth extraction project does not have unduly harmful impact where permit conditions set hours and days of operation limitations; \$10,000 bond to ensure reclamation; dust control measures; and project operator being co-applicant with absentee owner. *George and Marjorie Drown*, #7C0950-EB (6/19/95). [EB #607]
- * Fifty-year earth extraction project will not have unduly harmful environmental impact, due to permit conditions requiring amendment application prior to commencement of subsequent project stages; \$100,000 bond; monthly compliance affidavits; and project operator being co-permittee with project owner. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]
- * As conditioned by the permit, operation of a stone quarry will not have an unduly harmful impact upon the environment or surrounding land uses. *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]
- * Criterion 9(E) will be satisfied where project leaves forested buffer, stockpiles and replaces topsoil, replants extraction area, and excavates no more than five acres at a time. *Forestdale Heights, Inc.*, #4C0329-16-EB (1/8/93). [EB #543]
- * Saturday operation of a gravel pit, limited to reasonable hours, will not have an unduly harmful impact upon the environment or surrounding land uses. *DuBois/Coltey/Tucker*, #5W0837-EB (1/14/87). [EB #309]
- * Traffic volume limitations in permit for gravel pit modified. *H.A. Manosh*, #5L0690-EB (11/9/86). [EB #307]
- * Permit conditions impose traffic volume limitations (maximum annual extraction rates, limitations on use by passenger vehicles, and cap on weekly number of truck trips) in order to achieve positive conclusions under Criteria 8 and 9(E). *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]
- * Board's authority to regulate noise is explicit in Criterion 9(E). *H.A. Manosh Corp.*, #5L0690-EB (Revised) (8/8/86). [EB #289]

786.2 Reclamation/remediation

- * Site need not look exactly as it did before extraction. Reclamation plan including the following

elements was sufficient to meet criterion 9(E)(ii): final slope 1 on 1.5, 2-4 inches of topsoil, seed and mulch to create a grassed slope, plant softwood trees to reforest areas where trees were removed (about 600-800 per acre), follow a deer habitat re-vegetation plan approved by the Department of Fish and Wildlife, and post a surety of \$40,000 that can only be released once reclamation is complete. *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 26 (2/16/2017).

* Criterion 9(E)(ii) requires a showing that reclamation will leave the site "in a condition suited for an approved alternative use or development." 10 V.S.A. § 6086(a)(9)(E)(ii). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 65 (3/25/10); *McCullough Crushing Inc. Act 250 Exp.*, No. 3-1-10, Altered Decision on the Merits at 25 (2/16/2017).

* Criterion 9(E)(ii) met where Applicant not required to return site to original contours and appearance, as requested by opposing parties, and planned to make site stable and unlikely to suffer material erosion or other disturbances once quarry activities are completed and reclamation is accomplished. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 65 (3/25/10).

* 10 V.S.A. § 6086(a)(9)(E)(ii) is the *only* Act 250 provision in which the Legislature has specifically *required* that, once the permitted activity is completed, the site on which that activity has occurred must undergo remediation. *Re: Richard and Elinor Huntley*, DR #419, MOD at 8 (7/3/03), *rev'd*, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

* Since Legislature was aware that some earth extraction projects would not be subject to local zoning regulations, see 10 V.S.A. § 6001(3)(A)(ii), word "approved" in 10 V.S.A. § 6086(a)(9)(E) means approval of "use or development" by Commission or Board. *Re: Richard and Elinor Huntley*, DR #419, MOD at 9(7/3/03), *rev'd*, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

* 10 V.S.A. § 6086(a)(9)(E)'s remediation requirement is evidence of a special legislative concern regarding earth extraction activities: because of the particularly serious impact that can result from such projects, remediation must occur. *Re: Richard and Elinor Huntley*, DR #419, MOD at 9 (7/3/03), *rev'd* on other grounds, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004).

* Board has required, as permit condition, posting of bonds to ensure that remediation occurs after earth extraction has been concluded. *Re: Richard and Elinor Huntley*, DR #419, MOD at 9 n.6 (7/3/03), *rev'd* on other grounds, *In re: Richard and Elinor Huntley*, No. 2004 VT 115 (2004); (Board decision cites *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, FCO at 38 (2/4/02) [EB#767] (project must set up escrow account to cover costs of reclamation, with annual, declining payments over quarry's life), and cases cited therein.)

* Blasting for quarry project will satisfy Criterion 9(E) and no site reclamation is necessary. *J.P. Carrara & Sons, Inc.*, #1R0589-EB (2/17/88). [EB #337]

786.3 Burden of Proof

* The burden of proof is on the applicant to show compliance with Criterion 9(E). 10 V.S.A. § 6088(a); *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 16 (2008); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 49 (6/7/05) [EB #853].

* The Vermont Supreme Court finds no basis to reverse a decision by the Environmental Court that an applicant seeking a permit amendment for a quarry operation satisfied its burden of demonstrating compliance with Criterion 9(E), when the record below included undisputed evidence that 1) “previously allowed and currently requested level of blasting satisfied US Bureau of Mines standards, and 2) that compliance with such standards established a great degree of certainty that there would be no adverse effect from the blasting.” *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 9 (2008) (quoting *In re Shantee Point, Inc.*, 144 Vt. 248 (2002).

*The Environmental Court acted “well within its discretion” when, in granting an amended permit request to a quarry operation, contingent upon applicant monitoring its blasting, it concluded that “evidence of past permit violations, without evidence of any pending violations of allegations of noncompliance, would not provide a legal foundations for denying [applicant’s] amended permit request.” *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 11 (2008).

* With respect to Criterion 9 (E), when development involves extraction of minerals or earth resources, the permit will only be issued if the extraction and disposal of waste “will not have an unduly harmful impact upon the environment or surrounding land uses.” *Re: Route 103 Quarry (Carrara)*, at 23, No. 205-10-05 Vtec, Decision (11/22/06), *aff’d*, *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008).

* With respect to Criterion 9 (E), when the proposed mineral extraction contemplates the use of explosives, the Court’s evaluation of impact on neighboring properties is “additionally focused.” *Re: Route 103 Quarry (Carrara)*, at 23, No. 205-10-05 Vtec, Decision (11/22/06), *aff’d*, *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008).

* The burden of proof is on the applicant to show compliance with Criterion 9(E). 10 V.S.A. § 6088(a); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 49 (6/7/05) [EB #853].

787. Criterion 9(F) - Energy Conservation

* To ensure that project does not pose excessive or uneconomic demand on utility during peak periods, use of any electric water heaters is limited to non-peak hours. *Richard Bartholomae*, #8B0472-EB (3/3/94). [EB #585]

* Where project has investigated various alternative technologies, and use of electrical energy over other heating sources is justified, electric heating is approved. *Raymond and Ann Mohr*, #8B0120-3-EB (12/9/92). [EB#544]

* Project which is oriented to take advantage of solar heat during winter as much as practicable given project site’s westward-sloping nature, reflects energy conservation principles with regard to solar orientation. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick*, #4C0814-EB (8/14/91). [EB #492]

- * By revising project design to increase net south-facing glass and rotating buildings to increase southerly exposure, project reflects a reasonable attempt to use the best available technology for efficient energy use and conservation. *Twin State Development Associates*, #5W1021-EB (6/11/90). [EB #448]
- * Because the low-E glass at project provides the maximum feasible energy conservation, a condition requiring installation of thermal curtains is not necessary. *Killington 43 Associates, Inc.*, #1R0522-8-EB (11/3/87). [EB#355]
- * Chairlifts and ski trails reflect energy conservation principles and incorporate the best available technology for efficient use or recovery of energy. *Killington, Ltd.*, #1R0525-EB and #1R0530-EB (12/4/86). [EB #283]
- * Burden is on applicant to demonstrate that it has investigated other available technology and to establish why the selected equipment is the most energy efficient. *Killington 43 Assoc., Inc.*, #1R0522-4-EB (8/20/86). [EB #290]
- * Legislature wants Board to take a broad view of energy conservation and the impact which new development has on the demand for public utility services; therefore, Board will assess the potentially cumulative impact of industrial projects on energy conservation. *Killington 43 Assoc., Inc.*, #1R0522-4-EB (8/20/86). [EB #290]
- * Changes to originally-approved project (gas fired saunas, kitchen ranges, and not more than 100 amp electrical service) reduce project's overall electric demand, reflect energy conservation principles, and incorporate the best available technology for the efficient use of energy. *Killington 43 Assoc., Inc.*, #1R0522-4-EB (8/20/86). [EB#290]
- * Installation of storm doors and other energy conservation measures in residential condominiums, rather than airlock vestibules, is sufficient to satisfy Criteria 9(F). *S & A Development*, #2W0676-EB (8/7/86). [EB #298A]
- * While a project may be built to meet the principles of energy conservation, Criterion 9(F) also requires the incorporation of the best available technology for the efficient use of energy; thus, applicant who does not present evidence concerning alternative available heating equipment using fuel sources other than electricity will be denied permit. *Piper Ridge Associates*, #2W0112-3-EB, FCO at 4 - 5 (4/12/84).
- * Proposed residential subdivision reflects the principles of energy conservation. *White Sands Realty Co.*, #3W0360 (10/19/81). [EB #156]
- * Subdivision does not satisfy Act 250 because energy conservation measures are left entirely to discretion of purchasers and developers. *Peter Guille, Jr.*, #2W0383-EB (3/18/80). [EB #97]
- * Proposed apartment building is approved subject to conditions regarding sewer flow, landscaping, and energy conservation. *Abraham Brown*, #6F0209-EB (7/17/79). [EB #108]

788. Criterion 9(G) - Private Utility Services

* “Criterion 9(G) serves two protective functions: it protects a municipality from incurring unnecessary costs when it is required to assume responsibility for a substandard road or utility and it protects the individual beneficiaries of the privately owned utilities or roads from subpar infrastructure.” *In re Big Spruce Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 6 (4/21/10).

* Radio tower complies with Criterion 9(G) where applicant stipulated to condition that power line would be used only by project and no others. *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]

* Landfill does not comply with Criteria 7, 9(G), and 9(J) where town might have to provide water to those water supplies contaminated by landfill, where sufficient funds may not be available to ensure proper landfill closure, and where inadequate or improper closure of the landfill could result in financial burden on town. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Applicant which offers no evidence to show that project conforms with town capital program or plan must post surety to protect town in the event town assumes responsibility for sewer lines. *Raymond Duff*, #5W0921-2R-EB (6/14/91). [EB #436R]

* Applicant satisfied Criterion 9(G) by posting various bonds and sureties to protect the municipality from unwarranted expense. *Raymond Duff*, #5W0921-2R-EB (Revised) (6/14/91). [EB #436]

* A surety under Criterion 9(G) to protect municipality from financial burden of assuming responsibility for private utility sewage system should include an escrow account and capital replacement fund necessary to assure replacement of the system should it fail. *Hawk Mountain Corporation*, #3W0347-EB (8/21/85), *aff'd in part / rev'd in part, In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). [EB #251]

* Commission may require that an adequate surety be provided to protect towns from possibility that applicants may fail to maintain sewer system; Commission may therefore require municipality to assume responsibility for system's operation and maintenance. *Hawk Mountain Corporation*, #3W0299-EB (11/29/79). [EB #123]

789. Criterion 9(H) - Cost of Scattered Development

* Criterion 9(H), often described as the criterion that protects against “scattered development,” prohibits developments that do not generate sufficient municipal tax revenues “and other public benefits” that do not outweigh “the additional costs of public services and facilities caused directly or indirectly by the proposed development.” 10 V.S.A. § 6086(a)(9)(H). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 40 (3/25/10).

789.1 Purpose of criterion

* Common element in so-called "fiscal criteria" (Criterion 6, 7, 9(A), 9(H), and 9(K)) is the protection of government finances from burdens imposed by new development. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* Outlying or scattered development tends to have a negative domino effect upon municipal expenditures. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 40 (3/25/10).

* Criterion 9(H) where propose quarry requires no municipal services and is unlikely to encourage new residential or commercial developments to move to outlying area. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 40-41 (3/25/10).

* Intent of Criterion 9(H) is to discourage scattered development beyond boundaries of community centers if such development will damage community's financial capacity to maintain governmental services; growth should occur in the existing community centers, but may occur outside of those centers if scattered development does not impose public costs which outweigh public benefits. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

789.1.1

Competition

* Project's competitive effect on existing businesses is relevant only to the extent that Act 250 protects the tax base of the relevant localities from "undue adverse" impacts. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd on grounds other than 9(H), In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* Relevancy of fiscal impacts on public entities does not mean that Act 250 protects existing businesses from new competition. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd on grounds other than 9(H), In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

789.2 "Existing settlement"

* Project lacks a residential component and is therefore not an existing settlement by itself. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 103 (2/22/02). [EB#778]

* Existing settlements can extend from one political boundary to the next, as long as they contain a balance of uses including residential, commercial, and industrial. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 52. (8/20/01). [EB #766]

* "Existing settlement" means an extant community center similar to the traditional Vermont center, compact in size and containing a mix of uses (including commercial, industrial and

residential); it is a place in which people may live and work and in which the uses largely are within walking distance of each other; the term specifically excludes areas of commercial, highway-oriented uses commonly referred to as "strip development;" compatibility in terms of size and use is relevant to determining if an existing group of buildings constitutes an existing settlement in relation to a proposed project. *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 37 (12/21/00) [EB #751]; *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]; see *Waterbury Shopping Village*, #5W1068-EB, FCO at 18 (7/19/91).

* Sewer line extension would not be contiguous to an "existing settlement" where it would extend to developed areas which are considered strip development. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680]

789.3 "Contiguous"

* Where nearest existing settlement is two miles away, project is not contiguous to an existing settlement. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 103 (2/22/02). [EB#778]

* To determine whether project's location is within an existing settlement, the first step is to define the geographic parameters of the existing settlement. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 51 (8/20/01). [EB #766]

* Project which is connected by a continuous mix of development to the central downtown area is part of the existing settlement. *The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet* #1R0048-12-EB FCO at 52 (8/20/01). [EB #766]

* Where a proposed subdivision is physically contiguous to two existing subdivisions, Board need not balance public costs against public benefits. *Horizon Development Corp.*, #4C0841-EB (8/21/92). [EB #518]

* Contiguity to existing settlement is not shown by the theoretical or potential burden on the settlement, but by being next to an actual settled area. *Waterbury Village Shopping Center Inc.*, #5W1068-EB (7/19/91). [EB #503]

* Project is like strip development because it is along a major rural highway; is outside existing village centers; is orientated primarily towards the automobile; has broad road frontage; is not connected to existing settlements by anything except highway; is not accessible to pedestrians; and is uncoordinated with surrounding projects in terms of design, signs, lighting, and parking. *Waterbury Village Shopping Center Inc.*, #5W1068-EB (7/19/91). [EB #503]

* Project is not considered scattered development where it will be at the edge of an existing commercial center within a town. *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]

789.4 Weighing public costs v. public benefits

- * Additional costs of public facilities caused directly or indirectly will be minimal since project is paying most of cost; significant tax revenues and other public benefits, such as increased recreational opportunities, outweigh costs. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 103 (2/22/02). [EB#778]*
- * Non-capital education costs are excluded in balancing municipal costs of public services against increases in municipal property tax revenues and other public benefits. *Mill Lane Development Co., Inc., #2W0942-2-EB (12/17/99). [EB #726]*
- * Under Criterion 9(H), Board may issue permit for scattered development when its public costs do not outweigh its public benefits. *Green Meadows Center LLC, The Community Alliance, and SEVCA, #2W0694-1-EB, FCO at 37 (12/21/00). [EB #751]*

789.5 Burden of Proof

- * Applicants submitted evidence regarding project's public benefits but submitted no evidence regarding project's public costs; Board could not balance costs vs. benefits, and applicants did not meet burden of proof. *Mark and Pauline Kisiel, #5W1270-EB (8/7/98), rev'd on other grounds, In re Kisiel, 172 Vt. 124 (2000). [EB # 695]*
- * Applicant failed to meet its burden of proof to demonstrate that a sewer line extension's additional direct and indirect public costs would not outweigh the public benefits where the applicant failed to analyze the cost of public service and facilities caused directly or indirectly by the project, and the tax revenue and the public benefits of the project or the provision of needed and balanced housing accessible to existing or planned employment centers. *Town of Stowe, #100035-9-EB (5/22/98). [EB #680]*
- * Where opposing experts could not predict with certainty effect of proposed project on educational services (given the uncertainty surrounding Act 60,) Board lacked sufficient evidence on which to make a determination. *George, Mary, and Rene Boissoneault, #6F0499-EB (1/29/98). [EB #678]*
- * Where applicant provides insufficient information to allow Board to make affirmative findings with respect to Criterion 9(H) (costs of scattered development), project fails Act 250. *New England Land Associates, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]*

790. Criterion 9(J) - Public Utility Services

- * Criterion 9(J) seeks to protect against "an excessive or uneconomic demand" caused by developments that require "supportive governmental and public utility facilities and services" that are either not yet available in a community, or for which the community has not yet planned. 10 V.S.A. § 6086(a)(9)(J). *In re: Rivers Dev. Act 250 Appeal, 68-3-07 Vtec, Decision on the Merits at 41 (3/25/10).*

- * While "Societal Test" is important and useful in weighing costs and benefits of various utility investments and programs, the test is not refined enough to apply to decisions by end-users and consumers; thus, use of test is not required in determining whether project meets Criterion 9(J). *Richard Bartholomae*, #8B0472-EB (3/3/94). [EB#585]
- * Where total demand for electrical services is not expected to exceed that of applicant's predecessor in interest, Criterion 9(J) has been met. *Raymond and Ann Mohr*, #8B0120-3-EB (12/9/92). [EB #544]
- * Landfill does not comply with Criteria 7, 9(G), and 9(J), where town might have to provide water to those water supplies contaminated by landfill, where sufficient funds may not be available to ensure proper landfill closure, and where inadequate or improper closure of the landfill could result in financial burden on town. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]
- * Where applicant will pay over one-third of cost of traffic signal, project will not place excessive or uneconomic demand on a city to pay for such traffic signal. *P.F. Partnership and Harlan and Jean Bodette*, #9A0169-EB (5/1/90), *aff'd and remanded*, *P.F. Partnership*, No. 90-276 (V.S.Ct.3/21/91) (entry order). [EB #424]
- * Where there is no evidence that cost of a sidewalk will pose a burden on city, project will comply with Criterion 9(J). *P.F. Partnership and Harlan and Jean Bodette*, #9A0169-EB (5/1/90), *aff'd and remanded*, *P.F. Partnership*, No. 90-276 (V.S.Ct.3/21/91) (entry order). [EB #424]
- * Criterion 9(J) requires that Board find that (i) electric service will be available to the project when it is completed, (ii) an excessive or uneconomic demand will not be placed on the electric utility, and (iii) provision of electric service has been planned on the basis of reasonable population and economic growth projections. *Killington 43 Assoc., Inc.*, #1R0522-4-EB (8/20/86). [EB #290]
- * Legislature wants Board to take a broad view of energy conservation and the impact which new development has on the demand for public utility services; therefore, Board will assess the potentially cumulative impact of industrial projects on energy conservation. *Killington 43 Assoc., Inc.*, #1R0522-4-EB (8/20/86). [EB #290]
- * Applicant has not met its burden to show that the project will not place an excessive or uneconomic demand on Central Vermont Public Service Corporation. *Pinnacle Associates*, #1R0415-8-EB (4/12/84). [EB #217]
- * Construction of fire ponds and reservoirs in a proposed residential subdivision are unnecessary and their absence will not place an unreasonable burden on government services; supporting facilities are available under Criterion 9(J). *White Sands Realty Co.*, #3W0360 (10/19/81). [EB #156]

791. Criterion 9(K) - Public Investment

- * Criterion 9(K) directs that when a proposed development is on lands "adjacent to governmental

and public utility facilities,” or other such facilities in which the public has an investment, the development must be shown to “not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, . . . or materially jeopardize or interfere with the function, efficiency, or safety of, or the public’s use or enjoyment of or access to the facility, service, or lands.” 10 V.S.A. § 6086(a)(9)(K). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 66 (3/25/10); *Re: Bergmann*, No. 158-8-05 Vtec, Decision and Order at 3-4 (4/11/06); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 56 - 57 (11/4/05), *aff’d in part, rev’d in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Vermont Department of Forests, Parks and Recreation*, #5W0905-7-EB, FCO (9/7/05)[EB#840]; *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 50 (6/7/05) [EB #853]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 33 (11/24/04) [EB #838]; *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 7- 8 (11/16/04) [EB#850]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 21 (5/4/04) [EB #831]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 16 (4/13/04) [EB #814]; *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 37 (12/21/00). [EB #751]; *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 44 (5/25/99), *aff’d, OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *Munson Earth-Moving Corporation*, #4C0986-EB, FCO at 11 (4/4/97), *rev’d on other grounds, In re Munson Earth Moving*, 169 Vt. 455 (1999). [EB #660]; *Swain Development Corp. and Philip Mans*, #3W0445-2-EB, FCO at 33 (8/10/90). [EB #430]

* Criterion 9(K) protects public investments which are established, not those which are speculative. *In re Munson Earth Moving*, 169 Vt. 455 (1999), *reversing. Munson Earth-Moving Corporation*, #4C0986-EB (4/4/97). [EB #660]

* Criterion 9(K) addresses project’s effect upon public’s investments in facilities and services and does not speak to public’s investment in project which is subject of application. *Barre City School District*, #5W1160-EB (1/30/95). [EB #596]; *Rutland Public Schools*, #1R0038-4-EB (1/29/92). [EB #530M]

* Scope of Criterion 9(K) does not examine whether public’s investment in a school may be jeopardized by contamination from a landfill. *Rutland Public Schools*, #1R0038-4-EB (1/29/92). [EB #530M]

791.1 Purpose of criterion

* Common element in so-called "fiscal criteria" (Criterion 6, 7, 9(A), 9(H), and 9(K)) is the protection of government finances from burdens imposed by new development. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff’d, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* The purposes of Criterion 9(K) include promoting the Park’s recreational values, while protecting its scenic and natural qualities. *Re: Vermont Dept. of Forests, Parks and Recreation*, #5W0905-7-EB, FCO at 14 (9/7/05)[EB#840]; *Re: Vermont Dept. of Forests, Parks, and Recreation*, #1R0488-EB, FCO at 7 (1/11/84).

*This criterion “seeks to protect state and local governments from adverse fiscal impacts on public

facilities and investments that are adjacent to the proposed project.” *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 10 (3/13/13) (citing *In re St. Albans Grp. & Wal-Mart Stores, Inc.*, No. 6F0471, Mem. of Decision, at 9 (Vt. Env'tl. Bd. Apr. 15, 1994).

791.1.1 Individual economic issues

* Relevancy of fiscal impacts on public entities does not mean that Act 250 protects existing businesses from new competition. *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered) (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* Individual economic interests are not cognizable under either Criteria 5 or 9(K). *L & S Associates*, #2W0434-8-EB (11/24/92). [EB #557M2]

791.1.2 Relation to Criterion 5

* “[C]riterion 5 of Act 250 explicitly encompasses proposed highways whereas criterion 9(K) does not.” *In re Munson Earth Moving Corp.*, 169 Vt. 455, 465 (1999).

* Criterion 9(K) applied to local highway as public investment provides for a lower threshold than Criterion 5 (traffic) since its focus is upon whether the proposed project will “materially jeopardize or interfere with the function, efficiency, or safety of, or the public’s use or enjoyment of or access to the facility, service, or lands.” 10 V.S.A. § 6086(a)(9)(K). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 67 (3/25/10).

* In contrast to Criterion 5, Criterion 9(K) asks whether project will materially jeopardize or interfere with public facility's function, safety, or efficiency or public's use or enjoyment of or access to such facilities; because project may be denied under Criterion 9(K), inquiry into safety under Criterion 9(K) involves a higher threshold than that under Criterion 5. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 57 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 22 (5/4/04) [EB #831]; *Re: The Van Sicklen Limited Partnership*, #4C1013R-EB, MOD at 8 (6/8/01); *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 23 (12/31/02) [EB#800]; *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91) [EB #453R]; *Re: Swain Development Corp. and Philip Mans*, #3W0445-2-EB, FCO at 34 (8/10/90) [EB #430]

* Individual economic interests are not cognizable under either Criterion 5 or 9(K). *L & S Associates*, #2W0434-8-EB (11/24/92). [EB #557M2]

* Under Criterion 5, the Board will impose certain conditions to mitigate the potential negative impacts of utility roadway excavation on traffic safety and on municipal sewers and roads as public investments, including test engineering performance standards secured by three year warranty against cracking or depression. *Vermont Gas Systems, Inc.*, #4C0609-EB (11/22/85), *rev'd, In re Vermont Gas Systems, Inc.*, 150 Vt. 34 (1988). [EB #267]

791.2 “Adjacent to”

* Webster’s II College Dictionary (2005) and the website Dictionary.com define “adjacent” as being “near to” and “close”; the latter resource provides the additional definitions of “contiguous; adjoining” and given the breadth of these definitions Rt. 100B and the Mad River, although it is over 1,000 feet away, constitute adjacent public investments, but that the other facilities suggested by the opposing parties, including public facilities in the Village, are beyond the reach of “adjacent” public investment, as the term is used in criterion 9(K). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 66-67 (3/25/10).

* Criterion 9(K) applies to proposed development activities contiguous to previously constructed governmental facilities. *Munson Earth-Moving Corporation*, #4C0986-EB (4/4/97), *rev'd on other grounds*, *In re Munson Earth Moving*, 169 Vt. 455 (1999). [EB #660]

* The term "adjacent" per Criterion 9(K) is a relative term that must be considered in the context of the scale of the project. *L & S Associates*, #2W0434-8-EB (6/2/93). [EB #557]

* Question of whether proposed development must "necessarily" be located at a particular site only arises if finding is made that project will endanger public or quasi-public investment. *Berlin Associates*, #5W0584-14-EB (1/10/92). [EB #521M]

791.3 Public Investment in Public Facilities, Services or Lands

* 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. *In re McShinsky*, 153 Vt. 586, 593 (1990); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 34 (11/24/04) [EB #838] (White River)

* Public facilities include public highways. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 57 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Upper Valley Regional Landfill*, #3R0609-EB, FCO 45 - 47 (revised 11/12/91; previous version 7/26/91). [EB #453R]; *Swain Development Corp. and Philip Mans*, #3W0445-2-EB, FCO at 34 (8/10/90). [EB #430]

* Public facilities include public ponds. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 58 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.)

* Where the Town has discretion over maintenance expenditures of a road, it would be mere speculation to assume that the Town would make the choice to provide maintenance, repairs, or improvements to the road in the event that the proposed project would require it, and so appellant fails to show that the project would have an adverse fiscal impact on the Town based on the project's effect on the road. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 11 (3/13/13).

* Interstate highway system is considered Criterion 9(K) public facility; project adjacent to interstate

must be reviewed for project's impact on public's visual enjoyment of interstate corridor. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 34 (11/24/04) [EB #838] (I 89 and River Road in Sharon); *J. Philip Gerbode*, #6F0357R-EB, FCO at 10 (3/26/91) [EB #397]; *Re: Heritage Group, Inc. and H. Warren Lyon*, #4C0730-EB, FCO at 4-5 (3/27/89).

* Bike path and Lake Champlain are Criterion 9(K) public lands. *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 22 (5/4/04) [EB #831]; *Northshore Development, Inc.*, #4C0626-5-EB, FCO at 12 (12/29/88). [EB #391]

* Historic village center is not a public land, service or facility protected under Criterion 9(K). *Re: Pittsford Enterprises, LLP, and Joan Kelley*, #1R0877-EB, FCO at 36-37 (12/31/02). [EB#800]

* A building or structure is not protected by Criterion 9(K) merely because public funds have been invested in it. *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 45 (5/25/99), *aff'd, OMYA Inc. v. Town of Middlebury*, No. 99-282 (7/26/00); *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered), FCO at 54 (6/27/95), *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997). [EB #598R2]

* Criterion 9(K) addresses effect of development upon the public's investments in facilities and services and does not speak to the public's investment in the project which is the subject of the application. *Barre City School District*, #5W1160-EB (1/30/95). [EB #596]; *Rutland Public Schools*, #1R0038-4-EB (1/29/92). [EB #530M]

* Section of river is a public investment where river is used for fishing and other recreation by the public, and State has stocked it with rainbow trout. *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92). [EB #471R]

* Where the public investment is project itself (i.e. a public high-school), public entity's governing body which proposes project has discretion to decide whether it is an appropriate public investment and is responsible for the consequences. *Rutland Public Schools*, #1R0038-4-EB (1/29/92). [EB #530M]

* Lands along the Lamoille River, Kenfield Brook, and Terrill Gorge, used extensively by the public for fishing, canoeing, and swimming, are a public investment. *H.A. Manosh*, #5L0918-EB (8/8/88). [EB #359]

* "Irreplaceable natural area" qualifies as "public investment". *Paul & Dale Percy*, #5L0799-EB (3/20/86). [EB#277]

791.3.1

Facility

* There is no precedent for applying Criterion 9(K) to an unbuilt highway. *In re Munson Earth Moving Corp.*, 169 Vt. 455, 463 (1999).

* "[C]riterion 5 of Act 250 explicitly encompasses proposed highways whereas criterion 9(K) does not." *In re Munson Earth Moving Corp.*, 169 Vt. 455, 465 (1999).

* Construction of the circumferential highway through person's land is too speculative to conclude that it is an extant governmental "facility" under Criterion 9(K). *In re Munson Earth Moving Corp.*, 169 Vt. 455, 466 (1999).

791.4 Unnecessary or unreasonable endangerment; material jeopardy or interference

791.4.1 Unnecessary or unreasonable endangerment

* Criterion 9(K) met where project will not materially jeopardize nor interfere with function, efficiency, or safety of neither Rt. 100B nor Mad River. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 67 (3/25/10).

* With additional mitigation measures, quarry project will not unnecessarily or unreasonably endanger public investment in town highways. *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 51 (6/7/05) [EB #853]

* Proposed subdivision did not endanger public investment in adjacent park land, so as to warrant denial of land use permit by Board, where endangerment to park land depended on assumption that increased costs of condemning landowner's property for construction of proposed highway would ultimately force AOT to consider a realignment through park land. *In re Munson Earth Moving Corp.*, 169 Vt. 455, 462-63 (1999).

* Project satisfies Criterion 9(K) where exacerbation of flood-related erosion would not damage public facilities upstream of project. *Re: Woodford Packers, Inc., d/b/a WPI*, #8B0542-EB, FCO (10/5/01), *motion to alter denied*, MOD (12/20/01), *aff'd In re Woodford Packers, Inc.*, 2003 VT 60 (6/26/03). [EB #774]

* Project will not unnecessarily or unreasonably endanger, but rather will support and justify, public's investment in adjacent public facilities. *Main Street Landing Company and City of Burlington*, #4C1068-EB, FCO at 22 (11/20/01). [EB #790]

* Quarry project does not unnecessarily or unreasonably endanger public investment in town highways where project agrees to upgrade and maintain such highways. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 90 (12/8/00). [EB# 739].

* Proposed ground water collection system protects and does not materially jeopardize or interfere with function, efficiency, or safety of, or public's use or enjoyment of or access to school. *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 22 (7/20/00). [EB #696].

* Subdivision would not unnecessarily or unreasonably endanger public investment in Reservoir. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99). [EB #726]

* Project complies with Criterion 9(K) where project (i) grants public trail easement to Town to

permit access to Municipal Forest for biking, hiking, and horseback riding, (ii) proposes construction of trail parking area, and (iii) grants logging easement to Town for logging purposes. *Mark and Pauline Kiesel*, #5W1270-EB (8/7/98), *rev'd on other grounds*, *In re Kiesel*, 172 Vt. 124 (2000). [EB #695]

* Non-winter use of base lodge and tramway service would not endanger public's investment in scenic vistas, summit trails, arctic tundra, alpine bogs, natural areas and wildlife habitat. *Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort*, #5L1125-10-EB and #5L1125-10R-EB (Base Lodge) (Altered) (3/27/96). [EB #639(R)]; *Mt. Mansfield Company*, #5L1125-10-EB (12/28/95). [EB #612]

* As conditioned by permit, stone quarry will not interfere with function, efficiency, and safety of, or public's use and enjoyment of, and access to town road. *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]

* If forest management plan is successful and subsequently undermined, project (with additional conditions) will not endanger public's investment in Lake Champlain and town beach. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick*, #4C0814-EB (8/14/91). [EB #492]

* Project will not endanger public investments where applicant will pay for turning lanes and traffic signals and land swap will enhance State forest's value. *Waterbury Village Shopping Center Inc.*, #5W1068-EB (7/19/91). [EB #503]

* Project's storm water runoff will not endanger public investment in road or impair its function, efficiency or safety, where such runoff will not increase, and therefore will not affect existing culvert's ability to handle runoff. *City of Burlington and Burlington International Airport*, #4C0331-4-EB (4/26/91). [EB #488]

* Project will not endanger public investment in highway, where project will build and pay for all planned highway improvements and other improvements which are needed to ensure adequate level of service at project's driveways. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]

* Because project mitigates its effect on deeryard, it would not destroy / imperil necessary wildlife habitat or endanger public investment in deeryard. *Leisure Living Parks*, #3W0466-2-EB (4/9/90). [EB 453A]

* Project satisfies Criteria 5, 7, and 9(K) by its agreement with town to contribute to road maintenance, thus reducing burden on municipal services caused by project and protecting public's investment in the roads. *Colchester Hotel Group*, #4C0288-14-EB (4/21/88). [EB #372]

* Game farm/zoo endangers public investment in public lands and materially interfere with public's enjoyment of those lands. *Wildlife Wonderland*, #1R0117 (10/17/74), *aff'd*, *In re Wildlife Wonderland*, 133 Vt. 507 (1975). [EB#45]

efficiency, safety of facility; or public's use, enjoyment of, or access to facility

- * Criterion 9(K) met where project will not materially jeopardize nor interfere with function, efficiency, or safety of neither Rt. 100B nor Mad River. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 67 (3/25/10).
- * Project makes efficient use of public's investment in park land by enabling public to utilize it; project also creates safe area for public to enjoy park and views of Lake Champlain and waterfront. *Main Street Landing Company and City of Burlington*, #4C1068-EB, FCO at 22 (11/20/01). [EB #790]
- * Subdivision would not jeopardize or interfere with function, efficiency, or safety of public's use and enjoyment of or access to Reservoir. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99). [EB #726]
- * Project complies with Criterion 9(K) where project (i) grants public trail easement to Town to permit access to Municipal Forest for biking, hiking, and horseback riding, (ii) proposes construction of trail parking area, and (iii) grants logging easement to Town for logging purposes. *Mark and Pauline Kiesel*, #5W1270-EB (8/7/98), *rev'd on other grounds, In re Kiesel*, 172 Vt. 124 (2000). [EB #695]
- * Sewer line extension project complied with Criterion 9(K), notwithstanding concern that project's secondary growth impacts would cause unreasonable congestion or unsafe highways conditions. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680]
- * Non-winter use of base lodge and associated tramway service will not materially jeopardize or unreasonably interfere with public's use and enjoyment of Mt. Mansfield area. *Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort*, #5L1125-10-EB and #5L1125-10R-EB (Base Lodge) (Altered) (3/27/96). [EB #639(R)]; *Mt. Mansfield Company*, #5L1125-10-EB (12/28/95). [EB #612]
- * As conditioned by permit, stone quarry will not interfere with function, efficiency, and safety of, or public's use and enjoyment of, and access to town road. *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]*
- * Increase in tractor trailer trips will materially interfere public's ability to use public road and will therefore fail Criterion 9(K). *L & S Associates*, #2W0434-8-EB (6/2/93). [EB #557]
- * Limited (and extensively conditioned) road closure during non-skiing season will not materially interfere with public's use and enjoyment of such road. *Okemo Mountain, Inc.*, #2S0351-7A-EB (8/31/92). [EB #527]
- * If water withdrawal is restricted to protect habitat by required minimum downstream flows, public's investment in and use and enjoyment of river will not be materially jeopardized. *Okemo Mountain, Inc.*, #2S0351-12A-EB (revised 7/23/92; previous version 3/27/92; minor alteration 11/13/92). [EB #471R]

- * Measures to mitigate negative visual impact ensure that project will not interfere with public's enjoyment of views from interstate. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]
- * If forest management plan is successful and subsequently undermined, project (with additional conditions) will not jeopardize or interfere with the public's use and enjoyment of Lake Champlain and town beach. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick*, #4C0814-EB (8/14/91). [EB #492]
- * Because expansion of an existing retail complex would exacerbate serious pre-existing traffic congestion and unsafe conditions, it fails Criteria 5 and 9(K). *Shimon & Malka Shalit*, #8B0334-3-EB (2/8/91). [EB #438]
- * Project fails Criterion 9(K) where delays caused by project will interfere with the function and efficiency of an adjacent highway. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]
- * Although project's impact upon bike path is minimal, it materially interferes with public's enjoyment of Lake Champlain because of its undue adverse effect on the area. *Northshore Development, Inc.*, #4C0626-5-EB (12/29/88). [EB #391]
- * Noise, dust, and fumes from sand and gravel extraction would diminish peacefulness and defeat State's investment in lands along Lamoille River, Kenfield Brook, and Terrill Gorge, used extensively by public for fishing, canoeing, and swimming. *H.A. Manosh*, #5L0918-EB (8/8/88). [EB #359]
- * Campground along banks of White River would diminish public's access to and enjoyment of that segment of the river which is extensively used for recreational purposes. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff'd, In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348]
- * Timber cutting on public land is consistent with goals of scenic and natural beauty and will not jeopardize or interfere with public's use or safety of Shrewsbury Peak Trail. *Dep't of Forest, Parks and Recreation*, #1R0488-EB (1/11/84). [EB #211]
- * Setback from Interstate 89, together with landscaping, building color, screening, and absence of signs will not unreasonably endanger public investment or materially interfere with public's use and enjoyment of Interstate's scenic corridor. *Ammex Warehouse Co., Inc.*, #6F0248-EB (8/3/81). [EB #160]
- * Board approved campground for two year period at which time permittee must petition for a renewal under Criterion 9(K) regarding impact on highway as a public investment. *John Poor*, #8B0100 (4/14/76). [EB #65]
- * Game farm/zoo interferes with public's enjoyment public lands. *Wildlife Wonderland*, #1R0117 (10/17/74), *aff'd, In re Wildlife Wonderland*, 133 Vt. 507 (1975). [EB #45]

791.5 Burden of proof

- * With respect to Criterion 9 (K), the applicant's burden of persuasion is "somewhat low." *Re: Route 103 Quarry* (Carrara), at 23, No. 205-10-05 Vtec, Decision (11/22/06), aff'd, *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008).
- * The burden of proof under Criterion 9(K) is on the applicant. 10 V.S.A. § 6088(a); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 56 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: George Huntington*, #3R0279-1 (Altered)-EB, FCO at 8 (11/16/04) [EB#850]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 21 (5/4/04) [EB #831].
- * Simply listing facilities without articulating impacts to facilities is insufficient to demonstrate that project will interfere with public's use and enjoyment, or function, efficiency, or safety of such facilities. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30 (2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 104-5 (2/22/02). [EB#778]
- * Where sufficient information on existing traffic in project area has not been submitted, project has not met burden of proof to demonstrate that it will not unnecessarily or unreasonably endanger public investment in the highways. *Berlin Associates*, #5W0584-9-EB (2/9/90). [EB #379]
- * Board or Commission may decline to reach a conclusion on Criterion 9(K) in a request for partial review of a proposed residential and commercial development where insufficient information is submitted. *Heritage Group, Inc.*, #4C0730-EB (3/27/89). [EB #394]
- * Applicant sustained burden of proof that installation of two microwave dishes on an existing mast will not endanger public or quasi-public investment in facilities. *Karlen Communications, Inc.*, #5L0437 (8/28/78). [EB #89]

791.6 Summary Judgment

- * Unopposed motion for summary judgment on Criterion 9(K) granted where engineer's affidavit and related exhibits stated that town roads have capacity to accommodate the project's 25-50 vehicle trips, and that the project does not unnecessarily or unreasonably endanger the public investment in town roads in the vicinity, will not require stop lights, stop signs, or materially increase wear-and-tear or maintenance of town roads. *In re: Bergmann*, No. 158-8-05 Vtec, Decision and Order at 3 (4/11/06).

792. Criterion 9(L) - Rural Growth Areas; SUPERSEDED effective 6/1/14; see 793. Criterion 9(L) – Settlement Patterns

- * Philosophy behind 10 V.S.A. § 6086(a)(9)(L); why what appears to be "curious" and paradoxical is not. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 35 - 37 (11/24/04) [EB #838] (discussing cases).

* Criterion 9(L) requires clustering of all projects in rural growth areas; language of the criterion is mandatory. *New England Ventures*, #6F0433-EB (12/6/91). [EB #524M2]

* Criterion 9(L) does not weigh costs vs. benefits; rather public costs must be reduced to the extent possible through the planning techniques listed in criterion. *New England Ventures*, #6F0433-EB (12/6/91). [EB #524M2]

* To say that Criterion 9(L) means nothing more than that one must comply with four other criteria would render 9(L) a nullity; there would have been no reason for Legislature to enact 9(L) because compliance with such other criteria is required. *New England Ventures*, #6F0433-EB (12/6/91). [EB #524M2]

792.1 Purpose of criterion

* Purpose of Criterion 9(L) is to promote orderly and well-planned growth in rural growth areas by providing for reasonable population densities and rates of growth, using clustered development and new community planning techniques to conserve land and the costs of services that stem from development. *Stratton Corporation*, 2W0519-10-EB, FCO at 30 - 35 (5/8/01); *New England Ventures*, #6F0433-EB (12/6/91) [EB #524M2]

792.2 "Rural growth area" defined

* A "rural growth area" is defined in terms of what it is *not*. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 35 (11/24/04) [EB #838], quoting 10 V.S.A. § 6001(16): "'Rural growth areas' means lands which are *not* natural resources referred to in § 6086(a)(1)(A) through (F), § 6086(a)(8)(A) and § 6086(a)(9)(B), (C), (D), (E) and (K) of this title." (emphasis added).

* To be a rural growth area, the area must be predominately rural in character and be an area in which resources referenced in § 6001(16) are *absent*. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 35 (11/24/04) [EB #838]; *Re: Horizon Development Corp.*, #4C0841, FCO at 26 (8/21/92). [EB #518];

* Because vast majority of proposed construction area is headwaters area, and other referenced natural resources are present in said area, there is no rural growth area. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, FCO at 106 (2/22/02). [EB#778]

* Project was not in rural growth area where it was close to U.S. Route 4 and Route 22-A; area surrounding project was densely settled along these roadways; uses existing on these roadways dominated the area; local high school and residences were visible from project; and resources identified in 10 V.S.A. § 6086(a)(1)(A)-(F), (8)(A), and 9(B), (C), (D), (E), and (K) were completely lacking from the area. *Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB (4/16/96), *aff'd, In re Fair Haven Housing Limited Partnership*, Docket #96-228 (V.S.Ct.4/3/97) (Unpublished). [EB #643]

* To be a rural growth area, the area must be predominately rural in character and be an area in which resources referenced in 10 V.S.A. § 6001(16) are absent. *Re: Horizon Development Corp.*, #4C0841, FCO at 26 (8/21/92). [EB #518]; *Re: New England Ventures*, #6F0433-EB, MOD at 3 (12/6/91) [EB #524M2]

* Site is not rural growth area where project site contains necessary wildlife habitat. *Re: Horizon Development Corp.*, #4C0841, FCO at 26 (8/21/92) [EB #518]

792.3 “Rural”

* The word "rural" describe areas which are not densely settled and which may consist of small villages surrounded by mostly open, farmed, or undeveloped country. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 37 n.9 (11/24/04) [EB #838], quoting *Re: New England Ventures*, #6F0433-EB, MOD at 2 - 3 (12/6/91). [EB #524M2]

* Area may be rural even if contiguous to existing settlement. *New England Ventures*, #6F0433-EB (12/6/91). [EB #524M2]

* Word "rural" describes areas which are not densely settled and which may consist of small village surrounded by mostly open, farmed, or undeveloped country.

793. Criterion 9(L) – Settlement Patterns

K. Criterion 10 - Local or Regional Plan

* There are several “key principles used to guide the determination of whether a project complies with a local plan: First, a determination of nonconformity must be based upon a “specific policy’ set forth in the plan.” (quoting *In Re Green Peak Estates*, 154 Vt. 363, 369 (1990)); second, the specific policy must be stated “in language that ‘is clear and unqualified, and creates no ambiguity.’” (*John A. Russell Corp.*, 176 Vt. 520, 523 (2003) (quoting *In re MBL Assocs.*, 166 Vt. 606, 607 (1997)); third, while “broad policy statements phrased as ‘nonregulatory abstractions’” may not be given “the legal force of zoning laws,” (*John A. Russell Corp.*, 176 Vt. 520, 523 (2003) (quoting *In re Molgano*, 163 Vt. 25, 31 (1994)), zoning bylaws are “designed to implement the town plan, and may provide meaning where the plan is ambiguous. (*In re Kisiel*, 172 Vt. 124, 130 (2000)) *In re Cetrangelo and DeFelice*, No. 66-3-06 Vtec, Decision at 7-8 (4/11/07).

* The importance of local planning in the review and approval of developments and subdivisions: towns can, and should, control their own futures through comprehensive planning, zoning and subdivision regulations; reliance on Act 250 alone to address development places decisions on a town’s future beyond its control. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 43 n.10 (11/24/04) [EB #838], cited in *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 - 47 (11/4/05), aff’d in part, rev’d in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7.

* A strong town plan, accompanied by clear zoning regulations and the enforcement thereof, offer communities very effective tools for controlling growth. Act 250 was never intended to enforce comprehensive land use planning goals that are not clearly stated in the town or regional plans. *Re: Central Vermont Public Service Corp. and Verizon New England (Jamaica) #2W1146-EB*, FCO (Altered) at 15 (12/19/03); *accord, Re: Central Vermont Public Service Corporation, and Verizon New England, #2W1154-1-EB*, FCO (Altered) at 15 (12/19/03).

* Criterion 10 requires that a proposed project conform to a duly adopted Town and Regional Plans and Capital Improvement Programs. 10 V.S.A. § 6086(a)(10). *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 69 (3/25/10).

800. General

* Because the purpose of Criterion 10 is to ensure consistency with local planning and zoning, it is logical to measure conformance at the time a complete zoning application is filed, if diligently pursued prior to applying for an Act 250 permit. *In re B&M Realty Act 250 Application*, No. 103-8-13 Vtec, Decision on Motion for Partial Summary Judgment, at 4 (10/7/14).

* Project only conflicts with a plan when the plan's standards are stated in clear, unqualified language that creates no ambiguity. Broad policy statements and nonregulatory abstractions are not equivalent to enforceable restrictions. *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 ¶138 (01/17/14)(citing *In re John A. Russell Corp.*, 2003 VT 93 ¶16 (mem.)).

* Court gives great deference to the Board's decision construing town plan. *In re Kisiel*, 172 Vt. 124, 133 (2000), citing *In re MBL Assocs.*, 166 Vt. 606, 607 (1997).

* A prime purpose of zoning is to bring about the orderly physical development of the community by confining particular uses to defined areas. *In re Ross*, 151 Vt. 54, 57 (1989).

* Abstract policy statements in town plan that lack specific enforcement standards cannot be enforced under Criterion 10. *In re Pion Sand and Gravel Pit*, No. 245-12-09 Vtec, Decision on Motion for Party Status at 18 (7/2/2010).

* Criterion 10 of Act 250 requires that the proposed development be in accordance with any duly adopted local or regional plan. *Lathrop Limited Partnership*, 64-3-06 Vtec, Decision and Order on Pending Motions at 4 (11/29/2006) (citing 10 V.S.A. § 6086(a)(10)).

* Board has often urged towns to take a more active role in regulating land uses within their borders. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 46 - 47 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.), *citing Re: EPE Realty Corporation and Fergessen Management, Ltd*, #3W0865-EB, FCO at 43 n. 10 (11/24/04)

* Before issuing a permit, Board must find that the Project is in conformance with "any duly adopted local or regional plan(s) or capital program under Chapter 117 of Title 24." 10 V.S.A. § 6086(a)(10). *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 58 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 51 (6/07/05) [EB #853]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 37 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 26 (5/4/04) [EB #831]

* There are two inquiries that the Board must make in its evaluation of whether a project conforms to a Town Plan. The Board asks two separate questions: Is the language in the town plan mandatory or does it merely provide guidance? And, are the town plan's provisions specific or ambiguous? *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 58 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, FCO at 51 (6/07/05) [EB #853]; *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 38 - 40 (11/24/04) [EB #838], quoting extensively from *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 18 - 21 (4/13/04) [EB #814]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 27 (5/4/04) [EB #831]; *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 9 (4/19/01). [EB #763]; *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 53 (2/22/01). [EB #758]; *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, FCO at 39 (12/21/00). [EB #751]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 40 (5/16/00). [WFP #38]

* While Town Plans do not often use the prohibitory language that one may find in zoning regulations and statutes, this does not mean that they are legally meaningless. Town Plans by their very nature are, as the Board has recognized, aspirational. They indicate the direction that a Town wants to take in terms of its development; they often do not set absolute restrictions or prohibitions on development in a Town. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 58 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: John A. Russell Corporation and Crushed Rock, Inc.* #1R0489-6-EB (Remand)-EB, FCO at 49 (1/17/02)

* Despite the fact that town plans are often couched in "abstract and advisory" language, and see *In re Molgano*, 163 Vt. 25, 31 (1994) (referring to the nonregulatory abstractions in town plans), Act 250 requires that projects comply with a local or regional plan, "if one or both exist. 10 V.S.A. § 6086(a)(10). The Board is therefore "obliged by the language of the law itself to give regulatory effect to a document which, because its purpose is otherwise, is often not written in regulatory language." *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 58 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); quoting *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 38 (11/24/04) [EB #838], quoting *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 19 (4/13/04) [EB #814]

* A town plan is "merely an overall guide to community development. . . . Often stated in broad, general terms, [a town plan] is abstract and advisory. Zoning bylaws, on the other hand, are specific and regulatory." *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 41 (5/16/00). [WFP #38], citing *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225 (1979).

* Board is required to conduct independent examination of town plan and reach conclusions concerning Criterion 10. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett, #3W0424-EB (6/10/85)*. [EB #229]

* Court considers conformity with both the town plan and the regional plan, unless those plans conflict with one other. 24 V.S.A. § 4348(h)(1) (“the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan”); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 30, Decisions on Motion for Summary Judgement (Oct. 11, 2017), *In re: Gizmo Realty/VKR Associates, LLC* (Appeal of Act 250 Permit #3R0990), No. 199-9-07 Vtec, slip op. at 9–10 (Vt. Envtl. Ct. Apr. 30, 2008) (Durkin, J.) (after finding no conflict between local and regional plans, holding that the “Regional Plan must be given an effect equal to that given the Municipal Plan when considering whether this project conforms with Criterion 10”) (citing 24 V.S.A. § 4348(h)(1)).

* When analyzing the project under Criterion 10, if the regional and local plans conflict, then “the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact.” 24 V.S.A. § 4348(h)(2); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court considers project’s conformity with both town and regional plans because parties have not alleged relevant provisions of Town and Regional plans conflict, nor has the Court identified any conflicting provisions. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* “Regional and local plans are enforceable to the extent they are ‘sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what is proscribed.’” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re B&M Realty, LLC*, 2016 VT 114, ¶ 34 (Oct 21, 2016) (quoting *Brody v. Barasch*, 155 Vt. 103, 110, (1990)).

* “[E]ven where regional and town plans are clear, they are only enforceable against a would-be developer through Criterion 10 to the extent that they set out mandatory requirements, as opposed to guidance, recommendations, or general policy.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 35 (Oct 21, 2016).

* Court construes provisions set out in local and regional plans to effect the intent of the drafters, relying on the plan’s plain language where it is clear, and reading that plain language in context of the whole plan. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 36 (Oct 21, 2016).

* Normally, there is no need to consider conformity “with respect to the detailed requirements of all ordinances, regulations and policies adopted in furtherance of” a town plan in order to satisfy

Criterion 10. 10 V.S.A. § 6086(a)(10). Diverging Diamond Interchange, Nos. 50-6-16, 169-12-16 Vtec at 33, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing Horizon Dev. Corp., No. 4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Vt. Env'tl. Bd. Aug. 21, 1992).

800.1 Board, not other entities, decides Criterion 10

* The Board is the forum that decides whether a project complies with Criterion 10. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 40 (11/24/04) [EB #838]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04); *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 7 (9/3/03) [EB #828].

* The only municipal entity charged with determining town plan conformance is development review board; otherwise, Board and Commissions determine a project's conformance with town plan. *Manchester Commons Associates*, #8B0500-EB (9/29/95). [EB #631]

* Approval by a planning commission or zoning board does not necessarily mean that a project conforms with the town plan. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]

* Although 10 V.S.A. § 6086(d) authorizes Board to adopt a rule under which municipality's approval of a project would constitute a presumption of compliance with Criterion 10, Board has not adopted such a rule. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]

* Board is not bound by superior court order which binds town in regard to project's conformance with zoning ordinance. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

800.2 Board considers only conformance with local/regional plan, not other rules

* Absent a town plan, Board does not consider project under zoning bylaws and, under such circumstances, zoning bylaws are irrelevant. *Charles and Barbara Bickford*, #5W1186-EB (9/12/95). [EB #595M]

* Criterion 10 does not require Board to determine whether project conforms with the detailed requirements of all town ordinances, regulations, and policies. *Horizon Development Corp.*, #4C0841-EB (8/21/92). [EB #518]

* Criterion 10 does not require or authorize Board to review conformance of a project with subdivision regulations. *Trapper Brown Corp. (TBC Realty)*, #4C0582-15-EB (12/23/91). [EB #420]

800.3 Evidence considered in interpreting Plans (see [802.1.2.2](#))

* See 2001 amendments to 10 V.S.A. § 6086(a)(10), which make it clear that, while it can chose to do so, the Board need not consider or be bound by interpretations of a town plan, even those of members of the Town Selectboard or Planning Commission. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 60 n.7 (11/4/05), aff'd in part, rev'd in part, *In re Appeal*

of Times & Seasons, LLC, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 40 (11/24/04) [EB #838]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 - 21 (4/13/04); *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 7 (9/3/03) [EB #828].

* Where there is ambiguity in the wording of a Town Plan, Board must look to the interpretation of the plan by the municipal bodies responsible for its implementation and enforcement. *In re Kisiel*, 172 Vt. 124, 133 (2000), superseded, 10 V.S.A. § 6096(a)(10) (2001) (Board may, but need not, consider prior actions of local authority in determining compliance with Criterion 10).

* While Act 250 gives the Board the power to override a town's implementation of its own Town Plan, this power should be exercised only when the local construction of the plan is plainly erroneous. *In re Kisiel*, 172 Vt. 124, 135 (2000), superseded, 10 V.S.A. § 6096(a)(10)(2001) (Board may, but need not, consider interpretations of local authority in determining compliance with Criterion 10).

* Board must give deference to determinations of local bodies in applying their Town Plans. *In re Kisiel*, 172 Vt. 124, 135 (2000), superseded, 10 V.S.A. § 6096(a)(10)(2001) (Board may, but need not, consider interpretations of local authority in determining compliance with Criterion 10).

* The town plan speaks for itself; "the town plan *itself is the evidence*, and the Board must make its independent judgment" about whether a project conforms to a plan. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 40 (11/24/04) [EB #838]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 6 (10/8/03). [EB #831], quoting *J. Philip Gerbode*, #6F0396R-EB-1, FCO at 17 (29/92) (but Board considers opinion testimony from towns and other parties concerning whether a particular project conforms with the town plan).

* Board need not, and usually does not, hear "evidence" as to what a town plan "means." *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 6 (10/8/03). [EB #831], citing 2001 amendments to 10 V.S.A. § 6086(a)(10).

* Participation by persons with Criterion 10 party status is usually limited to presenting facts regarding the project as they relate to compliance with the plan and legal argument as to whether the project complies with the criterion. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 6 - 7 (10/8/03). [EB #831]

* 2001 amendments to 10 V.S.A. § 6086(a)(10) make it clear that, while it can choose to do so, the Board need not consider or be bound by interpretations of a town plan, even those of members of the Town Selectboard or Planning Commission. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 7 (9/3/03) [EB #828].

* When a local zoning board has issued a decision on whether a project conforms with local zoning regulations, Board is hesitant to revisit or second-guess the local process, and an appeal from zoning board's decision must be made to the Environmental Court, pursuant to 24 V.S.A. §§ 4471 and 4472, which states that review of zoning board decisions is exclusively before the Environmental Court;

the Act 250 process cannot be substitute for such review. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 8 (9/3/03) [EB #828].

but note that the zoning board *did not decide* whether project complies with the Town Plan; nor is Environmental Board acceding to an interpretation, by local authorities, of the Town Plan relative to Criterion 10 compliance. Here, the Board's acknowledgment that zoning board has the authority to judge project's conformity with its own zoning regulations does not represent an abdication by the Board of its obligations to decide Criterion 10; no deference, in this regard, has been given by the Board to any Town authority. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 9 (9/3/03) [EB #828].

* 24 V.S.A. § 4348(a) guides decision-making under Criterion 10 with respect to the applicability of local and regional plans. *Vermont Talc/OMYA, Inc.*, #2W0551-1-EB (6/21/85). [EB #238]

* Town planning representatives who participated in preparation of town plans, worked with them, and articulated their meaning are best interpretive guidance source. *George & Barbara Musbek*, #2W0600-EB (1/13/86). [EB#262]

* Board must interpret a town plan according to its plain language. *George & Dorothy Carpenter*, #5W0976-EB (1/19/90), *aff'd, In re Carpenter*, No. 90-96 (Vt. S. Ct. 11/9/90). [EB #433]

*The purpose of zoning and planning is to regulate the physical use of land in order to minimize adverse impacts on that land, the community, and the surrounding environment, and therefore the Court did not consider the identity of the owner/user or their motivations in establishing the use when determining conformance with the town plan. *In re Barefoot Act 250 Application*, 46-4-12 Vtec at 5 (11/13/13).

*Normally, there is no need to consider conformity “with respect to the detailed requirements of all ordinances, regulations and policies adopted in furtherance of” a town plan in order to satisfy Criterion 10. 10 V.S.A. § 6086(a)(10). *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 33, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Horizon Dev. Corp.*, No. 4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Vt. Env'tl. Bd. Aug. 21, 1992).

* When a relevant Town plan provision specifically refers to the Zoning Regulations, Subdivision Regulations, and Public Works Standards and Specifications for guidance, the Court will follow that reference in its analysis. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 33, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Although the Court will follow the references to zoning and subdivision regulations and public works standards and specifications in its Criterion 10 analysis of compliance with Town Plan, it will not take those references to mean that those ordinances and standards are incorporated in the Town Plan; thus the Court is not required to then determine whether the project conforms those zoning ordinances and standards. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 33 n. 18, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* A grant fund report is not further evidence of the meaning of the Town Plan. 10 V.S.A. § 6086(a)(10). *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 34, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Horizon Dev. Corp.*, No. 4C0841-EB at 29 (Aug. 21, 1992).

* Court finds language of regional plan does not show an intent on the part of the regional plan drafters to “incorporate” the 2008 Bicycle and Pedestrian Plan into the regional such that a project being analyzed under Criterion 10 must also comply with the 2008 Bicycle and Pedestrian Plan. 10 V.S.A. § 6086(a)(10). *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 34, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Horizon Dev. Corp.*, No. 4C0841-EB at 29 (Aug. 21, 1992).

* Court analyzes the term “development” in the Town Plan within context, as it not defined in the Town Plan. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Richards v. Nowicki*, 172 Vt. 142, 149 (2001).

* “Under 10 V.S.A. § 6086(a)(10), the Court must consider any ambiguous Town Plan provisions in light of the zoning ordinances.” *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018).

* Zoning ordinances are not considered at the first step of the Criteria 10 analysis in determining whether a Town Plan provision is mandatory or merely advisory. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018).

800.4 Other

* Where project is located on boundary line of two towns, a town plan cannot be given effect to the part of project outside of town boundaries. *P.F. Partnership and Harlan and Jean Bodette*, #9A0169-EB (5/1/90), *aff'd and remanded*, *P.F. Partnership*, No. 90-276 (V.S.Ct.3/21/91). [EB #424]

801. What Plan applies

* At the applicant's request, Town Plan amendments which occur after the application date and which favor an applicant may govern. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 24-25 (2/15/08); *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 18 (4/13/04) [EB #814]; *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 - 5 (9/3/03) [EB #828]; *Juster Development Corp.*, #1R0048-8-EB, FCO at 33 (12/19/88). [EB #367]

* The town plan in effect as of the time that application is filed ordinarily is the plan that governs application. *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 18 (4/13/04) [EB #814]

* Board rejects argument that earlier Town Plan (in effect at time of *construction* in violation of Act 250) should apply: “The Board is not in the business of encouraging noncompliance with Act 250.” *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 10 - 12 (8/29/03) [EB #814]

- * Developer who files *incomplete* application with Commission, while amendment of town plan was being considered, did not have vested right to have proposal considered under town plan in effect at time application to Commission was made, rather than under town plan as amended. *In re Ross*, 151 Vt. 54, 59 (1989).
- * Town plan in effect on date a complete application is filed applies; an application filed under 10 V.S.A. § 6086(b), which allows applicant to file first under Criteria 9 and 10, is not a complete application. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd*, *In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB#347]
- * Permit applications are reviewed under laws and regulations in effect at the time of filing the application. *Walker Construction*, #5W0816-1-EB (1/14/87). [EB #313]; *John and Ray Poor*, DR #64 (2/10/75), *overruled in part by Renbel Richmond Trust, Carl & Esther Parker, and Waylen & Dorothy Bowen*, #4C0818-EB (1/15/91).
- * Court considers conformity with both the town plan and the regional plan, unless those plans conflict with one other. 24 V.S.A. § 4348(h)(1) (“the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan”); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 30, Decisions on Motion for Summary Judgement (Oct. 11, 2017), *In re: Gizmo Realty/VKR Associates, LLC* (Appeal of Act 250 Permit #3R0990), No. 199-9-07 Vtec, slip op. at 9–10 (Vt. Envtl. Ct. Apr. 30, 2008) (Durkin, J.) (after finding no conflict between local and regional plans, holding that the “Regional Plan must be given an effect equal to that given the Municipal Plan when considering whether this project conforms with Criterion 10”) (citing 24 V.S.A. § 4348(h)(1)).
- * When analyzing the project under Criterion 10, if the regional and local plans conflict, then “the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact.” 24 V.S.A. § 4348(h)(2); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017).
- * Court considers project’s conformity with both town and regional plans because parties have not alleged relevant provisions of Town and Regional plans conflict, nor has the Court identified any conflicting provisions. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017).
- * “Regional and local plans are enforceable to the extent they are ‘sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what is proscribed.’” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re B&M Realty, LLC*, 2016 VT 114, ¶ 34 (Oct 21, 2016) (quoting *Brody v. Barasch*, 155 Vt. 103, 110, (1990)).
- * “[E]ven where regional and town plans are clear, they are only enforceable against a would-be developer through Criterion 10 to the extent that they set out mandatory requirements, as opposed to guidance, recommendations, or general policy.” *Diverging Diamond Interchange*, Nos. 50-6-16,

169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 35 (Oct 21, 2016).

* Court construes provisions set out in local and regional plans to effect the intent of the drafters, relying on the plan's plain language where it is clear, and reading that plain language in context of the whole plan. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 36 (Oct 21, 2016).

801.1 Vested rights (see [229.1](#))

* Rights vest in regional plan in effect when complete zoning application is filed, where developer diligently pursues municipal approval for its project, even when regional plan is revised prior to filing of complete Act 250 application. *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on the Merits at 2-3 (3/10/09).

* "In Vermont, land use rights normally vest under the version of the municipal or state land use regulations in effect at the time a proper and complete application is submitted." The "appropriate first approach to the vesting analysis may not be to look only at the commencement of the local application process, as was the approach in *Burlington Broadcasters*, but first to see if the developer's good faith and diligence carried over to its pursuit of an Act 250 permit." *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 7 (4/30/08)(discussing *In Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 9 (11/25/03) [EB#734M4]) subsequent Decision on the Merits (3/10/09).

* Applicant who filed complete Act 250 permit application approximately one month after having received approval for a municipal permit application acted in good faith and diligently pursued his land use approvals, so is entitled to review of his Act 250 application under the version of the Regional Plan in effect when complete zoning application was filed. *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 5, 8 (4/30/08) subsequent Decision on the Merits (3/10/09).

* Vermont follows the minority rule regarding vested rights: that no litigant has a vested right in a statute or rule that is remedial or procedural in nature. *South Village Communities, LLC*, 74-4-05 Vtec, Decision on Appellee-Applicant's Motion to Reconsider and Amend at 4 (09/14/2006).

* To determine compliance with Criterion 10, Board will apply town or regional plan, and zoning regulations if needed to resolve any ambiguity in town plan, in effect at the time that complete zoning application was filed, where applicant obtains zoning permit prior to applying for Act 250 permit. *Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane*, #4C1004R-EB, MOD at 9 (11/25/03) [EB#734M4]; but see *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 11 (1/27/04) [EB #833] (distinguishing *Burlington Broadcasters* as applied to Criterion 9(B)).

- * Where developer diligently pursues a proposal through the local and state permitting processes before seeking an Act 250 permit, conformance with a town plan under 10 V.S.A. § 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, 27 and 32-33 (1994) (note that this case does *not* hold that the Plan in effect at the time of the zoning application controls; merely that the regulations that one might use to interpret the Plan are those that were in effect at the time the zoning process commenced); 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 under 10 V.S.A. § 6086(a)(10)); see also *In re Taft Corners Assocs.*, 160 Vt. 583, 593-94 (1993) (vested right in town plan in effect at time of original Act 250 umbrella permit); cf. *In re Ross*, 151 Vt. 54, 57-58 (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).
- * Criterion 10 was closed and TCA's rights vested in the 1987 plan when the period for appealing the umbrella permit expired; thus, the Board must determine de novo whether the amendment application complies with town and regional plans in effect in 1987. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 594 (1993).
- * If the Board finds that the application is not in compliance with Plan, and that it constitutes a substantial change to the development approved in the umbrella permit, then it may remand the application to the district commission to consider as a new application, which would be subject to town and regional plans in effect at the time it was filed. *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 593 (1993).
- * Developer who files *incomplete* application with Commission, while amendment of town plan was being considered, did not have vested right to have proposal considered under town plan in effect at time application to Commission was made, rather than under town plan as amended. *In re Ross*, 151 Vt. 54, 59 (1989).
- * *Smith v. Winhall Planning Comm'n*, 140 Vt. 178 (1981), should not be interpreted as an open-ended right to "freeze" the applicable regulatory requirements by proposing a development with inadequate specificity. *In re Ross*, 151 Vt. 54, 56 (1989).
- * Person cannot base a vested right on an application that was properly denied because person failed to supply sufficient information to enable the Commission to render a decision. *In re Ross*, 151 Vt. 54, 56 (1989).
- * To give effect to an incomplete applicaiton is to elevate form over substance to a degree unnecessary to create "certainty in the law and its administration." *In re Ross*, 151 Vt. 54, 58 (1989), quoting *Smith v. Winhall Planning Commission*, 140 Vt. 178, 182 (1981).
- * 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. *In re Ross*, 151 Vt. 54, 59 (1989).

- * The intervening adoption of a municipal plan cannot derail proceedings validly brought and pursued in good faith to implement rights available under previous law. *In re Preseault*, 132 Vt. 471, 474 (1974).
- * In an EBR 31(B) reconsideration proceeding, applicable town and regional plans are those that were in effect when original application was filed. *Barre City School District*, #5W1160-EB (1/30/95). [EB #596]
- * Town plan in effect on date a complete application is filed applies; an application filed under 10 V.S.A. § 6086(b), which allows applicant to file first under Criteria 9 and 10, is not a complete application. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd*, *In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB#347]
- * Where public interest in applying the recently adopted regional plan does not outweigh applicant's interest in applying the plan in effect when the application was filed, Board will apply the earlier regional plan in its consideration of Criterion 10. *Town of Barre*, #5W1167-EB (6/2/94). [EB #589]
- * Regional plan which expired before application was filed, does not apply to proposed project. *J.P. Carrara & Sons, Inc.*, #1R0589-EB (2/17/88). [EB #337M]
- * Vermont's "vesting" rule protects an applicant from changes in zoning ordinances (that restrict the applicant's rights) enacted after application has been filed; laws and regulations in effect at time application is filed govern. *J.P. Carrara & Sons, Inc.*, #1R0589-EB (2/17/88). [EB #337M]
- * Section 16 of Act 200 does not revive an expired town plan; where applicant filed application after such town plan had expired, applicant had no vested right to have project reviewed for conformance with expired town plan. *Renbel Richmond Trust, Carl & Esther Parker, and Waylen & Dorothy Bowen*, #4C0818-EB (1/15/91). [EB #465] (*Re: Poor*, DR #64 (1/30/75), is OVERRULED with respect to proposition that the local and Act 250 permit processes are one process for purpose of vesting rights; *but see In re Frank A. Molgano, Jr.*, 163 Vt. 25 (1994).
- * Vesting rule is not intended to apply when landowner has been operating illegally for a number of years and then files an application to authorize its operation several months before a new town plan is adopted. *George & Dorothy Carpenter*, #5W0976-EB (1/19/90), *aff'd*, *In re Carpenter*, No. 90-96 (Vt. S. Ct. 11/9/90). [EB #433]
- * Permit applications are reviewed under laws and regulations in effect at the time of filing the application. *Walker Construction*, #5W0816-1-EB (1/14/87). [EB #313]; *John and Ray Poor*, DR #64 (2/10/75), *overruled in part by Renbel Richmond Trust, Carl & Esther Parker, and Waylen & Dorothy Bowen*, #4C0818-EB (1/15/91).
- * Project approved under all criteria, but which must satisfy a water and sewer treatment condition, cannot be reviewed under Criterion 10 under revised town plan *J.D. Apartment Corporation*, #1R0408-3-EB (12/19/84). [EB#224]

* Where local zoning changed pending court review of an appeal, applicant is entitled to review under terms of local zoning ordinance as to density in effect at the time local building permit was appealed to Supreme Court. *Albert & Doris Stevens*, #4C0227-3-EB (7/28/80). [EB #139]

801.1.1 Town plan amendments that benefit applicant

* At the applicant's request, Town Plan amendments which occur after the application date and which favor an applicant may govern. *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 18 (4/13/04) [EB #814]; *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 4 - 5 (9/3/03) [EB #828]; *Juster Development Corp.*, #1R0048-8-EB, FCO at 33 (12/19/88). [EB #367]

801.1.2 Pending ordinance rule

* Analysis of the application of pending ordinance rule to Town Plans. *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (Remand)-EB, FCO (1/17/02) [EB #723], *rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 , ¶¶ 11 - 15 (V.S.Ct.10/15/03) (citing 24 VSA § 4387(d)).

* Vesting rule applies only to situations where no amendments to the town plan had been proposed or were in the process of enactment. *Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989). [EB #347]; *George & Dorothy Carpenter*, #5W0976-EB (1/19/90), *aff'd, In re Carpenter*, No. 90-96 (Vt. S. Ct. 11/9/90). [EB #433]

801.2 Does Local or Regional Plan apply?

* Where both a local and a regional plan are relevant to issues raised by a particular project and they are not in conflict, the provisions of the regional plan are to be given effect. *In re Green Peak Estates*, 154 Vt. 363, 367-68 (1990); 24 V.S.A. § 4348(h)(1) (this does not say that the Town Plan is not to be given effect in such cases).

* Where both a local and a regional plan are relevant to issues raised by a particular project and they are not in conflict, the provisions of the regional plan “must be given an effect equal to that given the Municipal Plan when considering whether [a] project conforms with Criterion 10.” *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 10 (4/30/08); subsequent Decision on the Merits (3/10/09).

* Where local and regional plans conflict, the regional plan shall be given effect only if it is demonstrated that the project under consideration would have a substantial regional impact. 24 V.S.A. § 4348(h)(2); *In re Green Peak Estates*, 154 Vt. 363, 368 (1990); *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 3 (4/30/08), subsequent Decision on the Merits (3/10/09); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 67 n.13 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.) (but finding no conflict); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 30 (5/4/04) [EB #831]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 24 (4/13/04) [EB #814]; *Richard Provencher*, #8B0389-EB, FCO at 13

(10/19/88). [EB #354].

* When town and regional plans do not conflict, project will be reviewed for its conformance with both plans. *Green Peak Estates*, #8B0314-2-EB, FCO at 9 (7/22/86), *aff'd*, *In re Green Peak Estates*, 154 Vt. 363 (1990). [EB #280] *Heritage Group, Inc.*, #4C0730-EB (3/27/89)[EB #394]; *George & Barbara Musbek*, #2W0600-EB (1/13/86). [EB#262]

* When no town plan was in effect at time application was filed, and Commission reviewed project's compliance with Criterion 10 only under regional plan, Board would not consider project's compliance with new town plan in effect at time of appeal. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (3/30/99). [EB #726]

* Regional plan will apply where town has not adopted a local plan. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff'd*, *In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348]; *Didace & Susan LaCroix*, #3W0485-EB (4/27/87). [EB #292]

* If a municipality acted outside of its authority in adopting such an ordinance or plan, no ordinance or plan exists for the Environmental Court to apply. *In Re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 4 (E.O. on Mot. to Dismiss) (11/8/12) (citing *Saman ROW*, No. 176-10-10 Vtec, slip op. at 1 n.1 (citing *In re Paynter 2-Lot Subdivision*, 2010 VT 28, ¶¶3, 7-8, 187 Vt. 637 (mem.); *JAM Golf, LLC*, 2008 VT 110, ¶¶ 12-14, 17-19)).

* Court considers conformity with both the town plan and the regional plan, unless those plans conflict with one other. 24 V.S.A. § 4348(h)(1) (“the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan”); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 30, Decisions on Motion for Summary Judgement (Oct. 11, 2017), *In re: Gizmo Realty/VKR Associates, LLC* (Appeal of Act 250 Permit #3R0990), No. 199-9-07 Vtec, slip op. at 9–10 (Vt. Env'tl. Ct. Apr. 30, 2008) (Durkin, J.) (after finding no conflict between local and regional plans, holding that the “Regional Plan must be given an effect equal to that given the Municipal Plan when considering whether this project conforms with Criterion 10”) (citing 24 V.S.A. § 4348(h)(1)).

* When analyzing the project under Criterion 10, if the regional and local plans conflict, then “the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact.” 24 V.S.A. § 4348(h)(2); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Court considers project’s conformity with both town and regional plans because parties have not alleged relevant provisions of Town and Regional plans conflict, nor has the Court identified any conflicting provisions. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

801.3 Issues Within the Scope of Criterion 10

* Once a criterion is appealed, all issues within that criterion are before Board; thus, when cross-appeal mentions only the Town plan, Regional Plan should also be at issue. *Town of Barre*, #5W1167-EB (12/23/93). [EB #589M1]

* Issues with regard to local and regional plans under Criterion 10 are limited to those sections of those plans which relate to the other criteria on appeal. *Wake Robin Associates Limited Partnership, Wake Robin Corp., and Dunbar Bostwick*, #4C0814-EB (8/14/91). [EB #492]

* How non-driving parent will travel to a new consolidated school is beyond Criterion 10's scope in that applicable regional and local plans do not address this issue. *Barre City School District*, #5W1160-EB (1/30/95). [EB #596]

801.4 Projects in more than one town

* If a project is in more than one town it must comply with both towns' plans, as Criterion 10 includes "all local plans which apply to the property in question." *Re: P.F. Partnership*, #9A0169-EB, FCO at 10 (May 1, 1990)

802. Local Plans

* In review of a Town Plan, Board (or Court) asks two separate questions: (1) is the language in the Town Plan mandatory or merely a guidance? (2) are the Town Plan's provisions specific or ambiguous? *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 18 (4/13/04) [EB #814]; *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, 7-1-12 Vtec at 2 (E.O. on Mot. to Dismiss) (11-8-2012) (citing *In re John A. Russell Corp.*, 2003 VT 93, ¶16, 176 Vt. 520) (quoting *In re Green Peak Estates*, 154 Vt. 363, 369 (1990)).

* The Supreme Court has cautioned that to support a conclusion that a proposed project conflicts with a town or regional plan, the plan language relied upon must be "stated in language that is clear and unqualified, and creates no ambiguity." *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257 and Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 27 (1/17/13) (citing *In re Appeal of JAM Golf, LLC*, 2008 VT 110, ¶ 17, 185 Vt. 201; *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520), *aff'd In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14); *In Re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 4 (E.O. on Mot. to Dismiss) (11/8/12).

*The Environmental Court will not require Appellant's project to comply with "aspirational" language contained within the (municipal) plan, even if such language refers to projects such as the one proposed. *In Re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 3 (E.O. on Mot. to Dismiss) (11/8/12) (citing *In re Rivers Dev., LLC*, Nos. 7-1-05 Vtec and 68-3-07 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. Jan 8, 2008)(Durkin, J.).

* Determining whether a project conforms with a municipal plan is a two-step inquiry. First, the

Court must determine whether language is “mandatory rather than aspirational.” If the language is mandatory, the Court then determines whether the provision is specific, or “general in nature or ambiguous.” *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018), quoting *In re Twin Pines Hous. Trust & Dismas of Vermont Conditional Use*, Nos. 95-7-11, 96-7-11 Vtec, slip op. at 11-12 (Vt. Super. Ct. Envtl. Div. Sep. 20, 2012) (Walsh, J.) (citing *In re John J. Flynn Estate & Keystone Dev. Corp.*, #4C0790-2-EB, slip op. at 27-28 (Vt. Envtl. Bd. May 4, 2004)).

802.1. Whether a Plan is specific or ambiguous

* A plan provision evinces a specific policy if it “(a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within [that area or district]; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding.” *In re Cetrangelo and DeFelice*, No. 66-3-06 Vtec, Decision at 8 (4/11/07)(citing *In re Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 59-60 (11/4/05), aff’d in part, rev’d in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *In re John J. Flynn Estate and Keystone Dev. Corp.*, #4C0790-2-EB, MOD at 28 (10/8/03) [EB #831]

* Pursuant to *In re Molgano*, 163 Vt. 25, 31 (1994), Act 250 must first determine whether town plan provisions at issue are ambiguous or specific; if provisions are ambiguous, Act 250 should next examine relevant zoning by-laws for provisions which resolve the ambiguity; if provisions are specific and unambiguous, then they should be applied to project without reference to zoning by-laws. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 59 (11/4/05), aff’d in part, rev’d in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 39 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 28 (5/4/04) [EB #831]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04); *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 10 (4/19/01). [EB #763]; *Southwestern Vermont Health Care Corporation*, #8B0537-EB, FCO at 53 (2/22/01) ; *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652] *In re Frank A. Molgano, Jr.*, 163 Vt. 25 (1994), reversing *Frank A. Molgano*, Application #8B0468-EB, FCO (12/25/92); *Manchester Commons Associates*, #8B0500-EB (9/29/95). [EB #631]

*Broad policy statements phrased as “nonregulatory abstractions,” may not be given “the legal force of zoning laws,” which “are designed to implement the town plan, and may provide meaning where the plan is ambiguous. “[T]he regulations control the plan.” *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 2 (E.O. on Mot. to Dismiss) (11-8-2012) (citing *In re Molgano*, 163 Vt. 25, 31 (1994); *In re Kisiel*, 172 Vt. 124, 130 (2000); *Smith*, 140 Vt. at 183, 436 A.2d at 762).

*“To argue that an intentionally aspirational document (municipal plan) not principally designed to provide enforceable legal standards is, in some unspecified way, too ambiguous to enforce seems to be an attack premised upon the very purpose of the document.” *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 2 (E.O. on Mot. to Dismiss) (11-8-2012).

* “Regional and local plans are enforceable to the extent they are ‘sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what is proscribed.’” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), quoting *In re B&M Realty, LLC*, 2016 VT 114, ¶ 34 (Oct 21, 2016) (quoting *Brody v. Barasch*, 155 Vt. 103, 110, (1990)).

* “[E]ven where regional and town plans are clear, they are only enforceable against a would-be developer through Criterion 10 to the extent that they set out mandatory requirements, as opposed to guidance, recommendations, or general policy.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 35 (Oct 21, 2016).

* If the municipal plan provision is ambiguous, then the Court can refer to applicable zoning ordinances to resolve that ambiguity. *Diverging Diamond Interchange SW Permit No. 50-6-16 Vtec* at 3 (Motion for Reconsideration) (3/15/2018), citing *In re Rivers Dev., LLC*, Nos. 7-1-05, 68-3-07 Vtec, slip op. at 9–10 (Vt. Envtl. Ct. Jan. 8, 2008) (Durkin, J.).

802.1.1 When a Plan is specific

* Town plan is not ambiguous where "Town's prior actions with respect to the project--which represented the local community's interpretation of, and response to, the plan's broad language" were clear. *In re Kiesel*, 172 Vt. 124, 125 (2000), superseded, 10 V.S.A. § 6096(a)(10)(2001) (Board may, but need not, consider prior actions of local authority in determining compliance with Criterion 10).

* To determine if provision is specific, Court determines whether provision is: (1) pertains to a specific location in that earth resources are site specific; (2) is intended to guide conduct; (3) it is sufficiently clear to guide the average person. *Rivers Development, LLC*, Nos. 7-1-05, 68-3-07 Vtec, at 10 (1/8/08).

* A town plan provision evinces a specific policy if provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 59 (11/4/05), aff'd in part, rev'd in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 39 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 28 (5/4/04) [EB #831]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04); *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 52 (3/8/02). [EB #785]; *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 10 (4/19/01). [EB #763]; *Southwestern Vermont Health Care Corporation*, #8B0537-EB, FCO at 53 (2/22/01); *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (8/19/99, [EB #723], and see subsequent case of *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (Remand)-EB, FCO (1/17/02) [EB #723], *rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 (V.S.Ct.10/15/03); *Mark and Pauline Kiesel*, #5W1270-EB

(8/7/98), *rev'd*, *In re Kisiel*, 172 Vt. 124 (2000). [EB # 695]; *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]

* If a Town Plan's provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 59 (11/4/05), *aff'd in part, rev'd in part*, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 39 (11/24/04) [EB #838]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04) [EB #814]

802.1.1.1 Cases

* Town plan defined scenic areas specifically and the site of the proposed project was clearly listed on the town plan's scenic areas inventory. *Southwestern Vermont Health Care Corporation*, #8B0537-EB, FCO at 54 (2/22/01); *Herbert and Patricia Clark*, #1R0785-EB (4/3/97). [EB #652]

802.1.2 When a Plan is ambiguous

* Town plan is not ambiguous where "Town's prior actions with respect to the project--which represented the local community's interpretation of, and response to, the plan's broad language" were clear. *In re Kisiel*, 172 Vt. 124, 125 (2000), superseded, 10 V.S.A. § 6096(a)(10)(2001) (Board may, but need not, consider prior actions of local authority in determining compliance with Criterion 10).

* Board is not compelled to conclude that a Town Plan provision is unclear merely because a party asserts that the provision, or any part of it, is ambiguous. *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 41 (5/16/00). [WFP #38]; *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (8/19/99)[EB #723], and see subsequent FCO (1/17/02), *rev'd in part, aff'd on other grounds*, *In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 (V.S.Ct.10/15/03); *cf. Re: Nextel Communications of the Mid-Atlantic d/b/a Nextel Communications*, DR #362, FCO at 17 (11/18/98); *See also Re: J. Philip Gerbode*, #6F0396R-EB-1, FCO at 17 (1/29/92) (revising 3/25/91 FCO). [EB #486]

*"Outdoor recreation" is not defined in the Town Plan, therefore the Court applied the term's plain and ordinary meaning. *In re Barefoot Act 250 Application*, 46-4-12 Vtec at 5 (11/13/13) citing *In re Trahan*, 2008 VT 90, 19, 184 Vt. 262; Vtec at 5 (11/13/13).

*When both parties present plausible interpretations of a term "we must ascertain legislative intent through consideration of the entire statute, including its subject matter, effects and consequences, as well as the reason and spirit of the law." *In re Barefoot Act 250 Application*, 46-4-12 Vtec at 5 (11/13/13) citing *In re Estate of Cote*, 2004 VT 17, 10, 176 Vt. 293.

* Court construes provisions set out in local and regional plans to effect the intent of the drafters, relying on the plan's plain language where it is clear, and reading that plain language in context of the whole plan. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on

Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 36 (Oct 21, 2016).

* Passage in Town Plan is not mandatory because it lacks a mandatory verb and lacks clear standards; it simply points to a hypothetical mandatory requirement and does not by itself create an enforceable provision. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 4 (Motion for Reconsideration) (3/15/2018).

* Court finds the phrase “road projects . . . should implement the proposed improvements to the greatest extent possible” contained within a Town Plan too ambiguous, and therefore unenforceable under Criterion 10. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 4 (Motion for Reconsideration) (3/15/2018), citing *In re Times & Seasons, LLC*, 2008 VT 7, ¶ 23, 183 Vt. 336.

* Court distinguishes cases where “should” was found to be mandatory language in a Town Plan by noting that in those cases, “should” is coupled with clear directives regarding what is required or prohibited, whereas in the present case, “should” is combined with the qualifier “to the greatest extent possible,” finding this is ambiguous. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 4 (Motion for Reconsideration) (3/15/2018), citing *In re Times & Seasons, LLC*, 2008 VT 7, ¶ 23, 183 Vt. 336, distinguishing *In re Green Peak Estates*, 154 Vt. 363, 368–69 (1990); *Re: Herbert and Patricia Clark*, No. 1R0785-EB, slip op. at 40–41, (Vt. Envtl. Bd. Apr. 3, 1997); *Swain Dev. Corp.*, No. 3W0445-2-EB, slip op. at 37 (Vt. Env. Bd. Aug. 10, 1990).

* If the municipal plan provision is ambiguous, then the Court can refer to applicable zoning ordinances to resolve that ambiguity. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018), citing *In re Rivers Dev., LLC*, Nos. 7-1-05, 68-3-07 Vtec, slip op. at 9–10 (Vt. Envtl. Ct. Jan. 8, 2008) (Durkin, J.).

* When “development” is undefined in Town Plan, Court will “analyze the term in context of the Plan as a whole, and the chapter of the Plan in which it is found.” *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 12 (2/8/2018), citing *Richards v. Nowicki*, 172 Vt. 142, 149 (2001).

* To avoid the rule of surplusage, Court reviews Town Plan term “road projects” as different from the Plan’s undefined term “development” because the Town Plan repeatedly uses the term “development” in proximity to, but distinct from, different terms used to describe transportation and infrastructure. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 13 (2/8/2018); citing *In re Miller*, 2009 VT 36, ¶ 14, 185 Vt. 550 (in reading regulations and statutes, courts must assume that “all language . . . is inserted for a purpose...”

* Court grants motion to dismiss the question of whether, under the Town Plan, the Project is a “development” that requires sidewalks and multi-use paths because Town Plan distinguishes development from transportation projects and the Project is not categorized as “development” under the Town Plan; thus, this requirement of the Town Plan is inapplicable to the Project. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 14 (2/8/2018).

802.1.2.1 Use of zoning bylaws to interpret the Plan

- * If the applicable municipal plan provisions are ambiguous, for interpretive purposes the Court or commission must consider zoning bylaws, but only to the extent that they implement and are consistent with those plan provisions, and it need not consider any other evidence. 10 V.S.A. § 6088(a). *In re Cetrangelo and DeFelice*, No. 66-3-06 Vtec, Decision at 7 (4/11/07).
- * If the municipal plan provision is ambiguous, then the Court can refer to applicable zoning ordinances to resolve that ambiguity. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018), citing *In re Rivers Dev., LLC*, Nos. 7-1-05, 68-3-07 Vtec, slip op. at 9–10 (Vt. Envtl. Ct. Jan. 8, 2008) (Durkin, J.).
- * "Zoning bylaws are designed to implement the town plan, and may provide meaning where the plan is ambiguous." *In re Kiesel*, 172 Vt. 124, 130 (2000), citing *In re Molgano*, 163 Vt. 25, 30 (1994). *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 39 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, FCO at 28 (5/4/04) [EB #831] (if a town plan's provisions are general in nature or ambiguous, the Court's *Molgano* decision instructs the Board to examine relevant zoning regulations to attempt to resolve the ambiguity); *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04); *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 52 (3/8/02). [EB #785]; *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 10 (4/19/01). [EB #763]; *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]; *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]; *Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB (4/16/96), *aff'd*, *In re Fair Haven Housing Limited Partnership and McDonald's Corporation*, No. 96-228 (Vt. S. Ct. 4/23/97) (Unpublished). [EB #643]; *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd*, *In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]
- * Where developer diligently pursues a proposal through the local and state permitting processes before seeking an Act 250 permit, conformance with a town plan under 10 V.S.A. § 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, 27 and 32-33 (1994), 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 under 10 V.S.A. § 6086(a)(10)); see also *In re Taft Corners Assocs.*, 160 Vt. 583, 593-94 (1993) (vested right in town plan in effect at time of original Act 250 umbrella permit); cf. *In re Ross*, 151 Vt. 54, 57-58 (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).
- * Zoning bylaws are more than strong indications of legislative intent in determining the meaning of an ambiguous town plan; they are the specific implementation of the plan. *In re Molgano*, 163 Vt. 25, 30 (1994).
- * Zoning bylaws must conform to the plan that guides their creation. *In re Molgano*, 163 Vt. 25, 30(1994).

* A town may not adopt zoning regulations unless it has adopted a town plan. *In re Molgano*, 163 Vt. 25, 30 (1994) citing 24 V.S.A. § 4401(a).

* The law specifically requires that zoning bylaws "have the purpose of implementing the [Town] plan, and shall be in accord with the policies set forth therein." 24 V.S.A. § 4401(a); *In re Molgano*, 163 Vt. 25, 30 (1994); see *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225 (1979) (zoning regulations must reflect town plan).

* "The regulations as adopted may indeed be inconsistent with the Town Plan, but the total consistency upon which this argument is predicated is not a legal requirement. The plan is a general guideline to the legislative body, an overall guide to community development. Partial implementation is not unusual; the specific implementation is the part adopted in the zoning regulations. The regulations control the plan." *In re Molgano*, 163 Vt. 25, 30 (1994), quoting *Smith v. Winhall Planning Commission*, 140 Vt. 178, 183 (1981) (emphasis added).

* "Although the [Town] plan may recommend many desirable approaches to municipal development, only those provisions incorporated in the bylaws are legally enforceable." *In re Molgano*, 163 Vt. 25, 30 (1994), quoting *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225-26 (1979).

* Because Board's interpretation would effectively give nonregulatory abstractions in the Town Plan the legal force of zoning laws, Board erred as a matter of law in concluding that the Town's zoning bylaws were not germane to the meaning of the Town Plan. *In re Molgano*, 163 Vt. 25, 31 (1994) (if a Plan's provisions are ambiguous, the Board and Commission should next examine the relevant zoning bylaws for provisions which resolve the ambiguity), *reversing*, *Frank A. Molgano*, #8B0468-EB (12/25/92); *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 52 (3/8/02). [EB #785]; *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 10 (4/19/01). [EB #763]; *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]; *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]; *Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB (4/16/96), *aff'd*, *In re Fair Haven Housing Limited Partnership and McDonald's Corporation*, No. 96-228 (Vt. S. Ct. 4/23/97) (Unpublished). [EB #643]; *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd*, *In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]

* Use of zoning regulations to interpret town plan does not mean that the Board conducts a general review of a project for its compliance with the zoning regulations; rather, it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 60 (11/4/05), *aff'd* in part, *rev'd* in part, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 39 (11/24/04) [EB #838]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04); *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, Findings of FCO at 9 (4/19/01); *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB, FCO at 19 (4/16/96), *aff'd*, *In re Fair Haven Housing Limited Partnership and McDonald's Corporation*, Docket No. 96-228 (Apr. 23, 1997) (unpublished).

* If a Town Plan's provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04) [EB #814]

* When a local zoning board has issued a decision on whether a project conforms with local zoning regulations, Board is hesitant to revisit or second-guess the local process, and an appeal from zoning board's decision must be made to the Environmental Court, pursuant to 24 V.S.A. §§ 4471 and 4472, which states that review of zoning board decisions is exclusively before the Environmental Court; the Act 250 process cannot be substitute for such review. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 8 (9/3/03) [EB #828].

but note that the zoning board *did not decide* whether project complies with the Town Plan; nor is Environmental Board acceding to an interpretation, by local authorities, of the Town Plan relative to Criterion 10 compliance. Here, the Board's acknowledgment that zoning board has the authority to judge project's conformity with its own zoning regulations does not represent an abdication by the Board of its obligations to decide Criterion 10; no deference, in this regard, has been given by the Board to any Town authority. *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 9 (9/3/03) [EB #828].

* Examination of relevant zoning bylaws in order to resolve ambiguity does not mean that Board reviews a project for its compliance with the zoning regulations, but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 52 (3/8/02). [EB #785]; *Southwestern Vermont Health Care Corporation*, #8B0537-EB, FCO at 53 (2/22/01); *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB, FCO at 19 (4/16/96), *aff'd*, *In re Fair Haven Housing Limited Partnership and McDonald's Corporation*, Docket No. 96-228 (Vt. 4/23/97) (unpublished).

* While Town Plans do not often use the prohibitory language that one may find in zoning regulations and statutes, this does not mean that they are legally meaningless. Town Plans by their very nature are, as the Board has recognized, aspirational. They indicate the direction that a Town wants to take in terms of its development; they often do not set absolute restrictions or prohibitions on development in a Town. *Re: John A. Russell Corporation and Crushed Rock, Inc*, #1R0489-6-EB (Remand)-EB, FCO at 49 (1/17/02)

* Zoning regulations which pre-date the town plan by several years are not relevant to its interpretation. *John A. Russell Corporation and Crushed Rock, Inc*, #1R0489-6-EB (Remand)-EB, FCO at 42 (1/17/02), *rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 (V.S.Ct.10/15/03) (later action by town in refusing to adopt new zoning bylaws constituted readoption of older bylaws such that they were relevant to a present town plan's interpretation); same case: *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (8/19/99). [EB #723].

* Board is not bound by court order binding town with regard to project's conformance with zoning ordinance. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

* When a relevant Town plan provision specifically refers to the Zoning Regulations, Subdivision Regulations, and Public Works Standards and Specifications for guidance, the Court will follow that reference in its analysis. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 33, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Although the Court will follow the references to zoning and subdivision regulations and public works standards and specifications in its Criterion 10 analysis of compliance with Town Plan, it will not take those references to mean that those ordinances and standards are incorporated in the Town Plan; thus the Court is not required to then determine whether the project conforms those zoning ordinances and standards. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 33 n. 18, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

802.1.2.1.1 Town plans vs. zoning bylaws

* "The regulations as adopted may indeed be inconsistent with the Town Plan, but the total consistency upon which this argument is predicated is not a legal requirement. The plan is a general guideline to the legislative body, an overall guide to community development. Partial implementation is not unusual; the specific implementation is the part adopted in the zoning regulations. The regulations control the plan." *In re Molgano*, 163 Vt. 25, 30 (1994), quoting *Smith v. Winhall Planning Commission*, 140 Vt. 178, 183 (1981) (emphasis added).

* Since the authority to enact ordinances is considered to be derivatory from State authority, an ordinance stands no better than a statute, certainly, and subject to the same policy limitations. *In re Preseault*, 132 Vt. 471, 474 (1974).

* A town plan is "merely an overall guide to community development Often stated in broad, general terms, [a town plan] is abstract and advisory. Zoning bylaws, on the other hand, are specific and regulatory." *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 41 (5/16/00). [WFP #38], citing *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225 (1979).

* When a relevant Town plan provision specifically refers to the Zoning Regulations, Subdivision Regulations, and Public Works Standards and Specifications for guidance, the Court will follow that reference in its analysis. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 33, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* Although the Court will follow the references to zoning and subdivision regulations and public works standards and specifications in its Criterion 10 analysis of compliance with Town Plan, it will not take those references to mean that those ordinances and standards are incorporated in the Town Plan; thus the Court is not required to then determine whether the project conforms those zoning ordinances and standards. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 33 n. 18, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

802.1.2.1.2 When zoning bylaws can't help to interpret the Plan

* While Town Plans do not often use the prohibitory language that one may find in zoning regulations and statutes, this does not mean that they are legally meaningless. Town Plans by their very nature are, as the Board has recognized, aspirational. They indicate the direction that a Town wants to take in terms of its development; they often do not set absolute restrictions or prohibitions on development in a Town. *Re: John A. Russell Corporation and Crushed Rock, Inc.*, #1R0489-6-EB (Remand)-EB, FCO at 49 (1/17/02)

* If a plan is ambiguous, zoning bylaws cannot aid in its interpretation, either because they do not exist or are not relevant, Board attempts to construe the plan as best it can, based on various rules of construction or supporting evidence of municipal legislative intent. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.*, #2W0813-3 (Revised)-EB, FCO at 11 (4/19/01). [EB #763]; *Herndon and Deborah Foster*, #5R0891-8B-EB (6/2/97). [EB #665]; *Bull's Eye Sporting Center and David and Nancy Brooks*, #5W0743-2-EB, FCO at 20 (2/27/97). [EB #649]; *The Mirkwood Group and Barry Randall*, #1R0780-EB, FCO at 25 (8/19/96). [EB #641]

802.1.2.1.2.1 Bylaws that pre-date the Plan

* Zoning regulations which pre-date the town plan by several years are not relevant to its interpretation. *John A. Russell Corporation and Crushed Rock, Inc.*, #1R0489-6-EB (Remand)-EB, FCO at 42 (1/17/02), *rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 (V.S.Ct.10/15/03) (later action by town in refusing to adopt new zoning bylaws constituted readoption of older bylaws such that they were relevant to a present town plan's interpretation); same case: *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (8/19/99). [EB #723].

* While zoning bylaws are the implementation of the town plan, zoning bylaws date back to 1948 even though the town plan was adopted in 1991. *Howe Center Limited*, #1R0770-EB, FCO at 36 n.2 (5/4/95). [EB #614]

802.1.2.2 Use of other evidence to interpret the Plan

* When a Town Plan is ambiguous, Board should give deference to actions of the Town (through the issuance of permits) in interpreting its own Town Plan, unless those interpretations are clearly erroneous. *In re Kisiel*, 172 Vt. 124 (2000), *rev'd* by amendments to 10 V.S.A. § 6086(a)(10) in Act 40 (2001 Sess); *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04) [EB #814] (2001 amendment reflects the *Molgano* decision, and also makes it clear that Board *need not consider or be bound by interpretations of the Town Plan, even those of members of the Town Selectboard or Planning Commission*:)

While Board may consider arguments from parties concerning whether a particular project conforms with the town plan, the document B the Town Plan B speaks for itself, and Board must make its own independent judgment about whether a project conforms to the Plan. *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04) [EB #814]; *J. Philip Gerbode*, #6F0396R-EB-1, Findings of Fact, Conclusions of Law, and Order (Jan. 19, 1992).

- * Approval by planning commission or zoning board does not necessarily mean that a project conforms with the town plan. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]
- * While Board considers opinion testimony from towns and other parties concerning whether a particular project conforms with the town plan, town plan itself is the evidence and Board must make its own independent judgment. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB #486]
- * Town planning representatives who participated in the preparation of town plans, worked with them, and articulated their meaning are the best source of interpretive guidance. *George & Barbara Musbek*, #2W0600-EB (1/13/86). [EB #262]
- * Where two statutory provisions deal with the same subject matter, and one is general and the other specific, the more specific provision is to be given effect; while a town plan is not a statutory enactment, this rule of statutory construction is helpful to resolve disputes regarding the plan. *Chester Pasho*, #3W0635-EB (6/11/91). [EB #485]

802.1.2.3 Cases

- * Town plan is not ambiguous where "Town's prior actions with respect to the project--which represented the local community's interpretation of, and response to, the plan's broad language" were clear. *In re Kiesel*, 172 Vt. 124, 125 (2000), superseded, 10 V.S.A. § 6096(a)(10)(2001) (Board may, but need not, consider prior actions of local authority in determining compliance with Criterion 10).
- * Town may not use Act 250 to retroactively apply a new zoning regime to a development to which it is not applicable. *In re Kiesel*, 172 Vt. 124, 136 (2000), citing *In re Molgano*, 163 Vt. 25, 32-33 (1994).
- * Town plan was ambiguous where it provided that land use district was for "suitable" businesses, the "predominant" use in the district was for "small scale" retail and service commercial uses, and the district's policies were to "encourage" and "support" certain types of development. *Ronald Carpenter*, #8B0124-6-EB (10/17/95). [EB #635]
- * Court dismisses questions that ask whether Project must conform with official town map, the town's Public Works Standards, the Regional Bicycle Plan, the AASHTO Guide for the Development of Bicycle Facilities, or the Vermont Pedestrian and Bicycle Facility Planning and Design Manual because Criterion 10 only requires projects to conform "with any duly adopted **local or regional plan** or capital program under 24 V.S.A. chapter 117." 10 V.S.A. 6086(a)(10) (emphasis added) *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 11* (2/8/2018).

802.2. Mandatory provisions vs. mere guidances

- * Project only conflicts with a plan when the plan's standards are stated in clear, unqualified language that creates no ambiguity. Broad policy statements and nonregulatory abstractions are

not equivalent to enforceable restrictions. *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 ¶138 (01/17/14)(citing *In re John A. Russell Corp.*, 2003 VT 93 ¶16 (mem.)).

* The Court is obligated “to give regulatory effect to a document [the municipal plan] which, because its purpose is otherwise, often not written in regulatory language.” *In re Cetrangelo and DeFelice*, No. 66-3-06 Vtec, Decision at 7-8 (4/11/07).

* The language of the municipal plan can be considered “sufficiently mandatory,” despite qualifying language. *In re Cetrangelo and DeFelice*, No. 66-3-06 Vtec, Decision at 7-8 (4/11/07).

* "In the absence of pertinent zoning bylaws, the Board may not 'give nonregulatory abstractions in the Town Plan the legal force of zoning laws.'" *In re Kisiel*, 172 Vt. 124, 130 (2000), citing *In re Molgano*, 163 Vt. 25, 31 (1994), but see 10 V.S.A. § 6096(a)(10)(2001) (In determining compliance with Criterion 10 Board need consider zoning bylaws only if Plan is ambiguous).

* Absent some objective measure to guide enforcement of a prohibition in a town plan, there is no basis for the Board to conclude that the project does not comply. *In re Kisiel*, 172 Vt. 124, 130 (2000), citing *In re Green Peak Estates*, 154 Vt. 363, 368 (1990) (enforcing specific standard prohibiting development on slopes in excess of 20 percent.).

* Only language that “is clear and unqualified, and creates no ambiguity,” (e.g. “shall not,” “must,” and “prohibited”) can be read to create specific restrictions. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 45, 47 (1/20/10), citing *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520 (mem.) (quoting *In re MBL Assocs.*, 166 Vt. 606, 607 (1997) (mem.)).

* Criterion 10 met where project found to follow aspirational goals in Town and Regional Plans, and neither Plan contains specific, regulatory land use prohibitions that project disregards. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 47 (1/20/10).

* Town Plans (24 V.S.A. Ch. 117) are intended to provide the Town citizens with policy direction and goals for land use development based on an intimate understanding of the Town's natural resources; a Town Plan provides a framework upon which the zoning regulations are built; they do not typically contain words or phrases such as "prohibited" or "shall not be allowed;" thus, while they indicate the direction that a Town wants to take in terms of its development; Town Plans often do not set absolute restrictions or prohibitions on development in a Town. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 57 - 58 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 38 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 27 (5/4/04) [EB #831]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 19 (4/13/04) [EB #814]; *see John A. Russell Corporation and Crushed Rock, Inc.*, #1R0489-6, FCO (8/19/99), *citing, Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225 (1979); and *see subsequent case of Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (Remand)-EB, FCO (1/17/02) [EB #723], *rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 (V.S.Ct.10/15/03); *Casella Waste Management Inc.*, #8B0301-7-WFP, FCO at 41 (5/18/00).

* Board is *obliged by the language of the law itself* to give regulatory effect to a document which, because its purpose is otherwise, is often not written in regulatory language; to do otherwise would be comparable to ignoring Criterion 10's requirement that a project conform to town and regional plans, something which the Board cannot do. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 57 - 58 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 39 (11/24/04) [EB #838]; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 27 (5/4/04) [EB #831] *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 19 (4/13/04) [EB #814], citing *State v. Stevens*, 137 Vt. 473, 481 (1979) (in construing a statute, every part of the statute must be considered, and every word, clause, and sentence given effect if possible); *State v. Racine*, 133 Vt. 111, 114 (1974) (presumption that all language is inserted in a statute advisedly).

* Where a town plan uses ineffectual language, the Board will not read that language to prohibit a project. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 59 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 39 (11/24/04) [EB #838] referencing case examples; *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 27- 28 (5/4/04) [EB #831]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 19 (4/13/04);

* Use of the word "shall" makes Town Plan provision mandatory. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 61 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.); *Southwestern Vermont Health Care Corp.*, #8B0537-EB, FCO at 54 (2/22/01). [EB #758] (use of the phrase "shall be protected")

* Because the Town Plan specifically defines "should" as a non-mandatory term, the Board will respect the Town's intent. *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 23 (4/13/04) [EB #814]

* Phrases such as "strongly encourages" and "should focus its efforts to encourage" indicate nonmandatory elements of a town plan. *The Van Sicklen Limited Partnership*, #4C1013R-EB, FCO at 55 (3/8/02). [EB #785]; and see *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO at 61 (11/4/05), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.) (The use of the word "should" in the Town Plan is not the equivalent of "shall," nor is "discourage" the equivalent of "prohibited," "nor is "encouraged" the equivalent of "required.")

* Words such as 'direct,' 'encourage,' 'promote,' and 'review,' may provide guidance in the interpretation of a Plan, but are not mandatory. *Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2W0694-1-EB, FCO at 42 (12/21/00). [EB #751]

*Where Plan explicitly defines the word "should" as a "[k]ey word identifying that a requirement is encouraged but not mandated," use of word "should" is not indicative of a mandatory requirement. *Re: MBL Associates*, #4C0948-EB, FCO (Altered) (1/30/96), *aff'd, In re MBL Associates*, 166 Vt. 606, 606 (1997).

* Board previously has construed the word "should" as mandatory. *Re: Swain Development Corporation #3W0445-2-EB*, FCO at 37 (8/10/90).

*To the extent that statutes and zoning regulations incorporate (by reference) mandatory provisions of municipal plans, it is important to examine those plan provisions to ensure that individuals' rights are not violated by standardless provisions. *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 3 (E.O. on Mot. to Dismiss) (11-8-2012) (citing *In re Rivers Dev., LLC*, Nos. 7-1-05 Vtec and 68-3-07 Vtec, slip op. at 9 (Vt. Super. Ct. Env'tl. Div. Jan. 8, 2008) (Durkin, J.)).

*If the Environmental Court determines in an appeal that a municipal plan contains mandatory language applicable to the proposed project that is nevertheless too ambiguous to be enforceable, the Court will not enforce that language. *In Re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 3 (E.O. on Mot. to Dismiss) (11/8/12) (citing *In re Appeal of JAM Golf, LLC*, 2008 VT 110, ¶¶ 12–14, 185 Vt. 201).

*An applicant must show that the project conforms to any mandatory provisions of a plan but need not show conformance with provisions meant only to provide general guidance. *In re Barefoot Act 250 Application*, 46-4-12 Vtec at 4 (11/13/13) citing *In re Rivers Dev., LLC*, Nos. 7-1-05 Vtec and 68-3-07 Vtec, slip op. at 9 (Vt. Env'tl. Ct. Jan. 8, 2008).

*"[E]ven where regional and town plans are clear, they are only enforceable against a would-be developer through Criterion 10 to the extent that they set out mandatory requirements, as opposed to guidance, recommendations, or general policy." *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 35 (Oct 21, 2016).

*Project not required to put in sidewalks because town plan provisions calling for sidewalks are non-mandatory, as it states general objectives rather than specific requirements. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 36 (Oct 21, 2016), citing *In re B & M*, 2016 VT 114, ¶ 35 ("Mandatory language includes terms like "must" and "shall" and it sets forth a requirement rather than a recommendation.").

* "Shall" "sets forth a requirement rather than a recommendation" in Town Plans. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018), quoting *In re B & M Realty, LLC*, 2016 VT 114, ¶ 35 (Oct. 21, 2016).

* When "shall" is coupled with "take into consideration" within a Town Plan, "the provision becomes general in nature or advisory, as opposed to mandatory, because it is not clear what action is required by 'take into consideration.'" *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018), quoting *Rivers Dev.*, Nos. 7-1-05, 68-3-07 Vtec, slip op. at 9–10 (Jan. 8, 2008).

* Court distinguishes cases where “should” was found to be mandatory language in a Town Plan by noting that in those cases, “should” is coupled with clear directives regarding what is required or prohibited, whereas in the present case, “should” is combined with the qualifier “to the greatest extent possible,” finding this is ambiguous. *Diverging Diamond Interchange SW Permit No. 50-6-16 Vtec at 4* (Motion for Reconsideration) (3/15/2018), citing *In re Times & Seasons, LLC*, 2008 VT 7, ¶ 23, 183 Vt. 336, distinguishing *In re Green Peak Estates*, 154 Vt. 363, 368–69 (1990); *Re: Herbert and Patricia Clark*, No. 1R0785-EB, slip op. at 40–41, (Vt. Env'tl. Bd. Apr. 3, 1997); *Swain Dev. Corp.*, No. 3W0445-2-EB, slip op. at 37 (Vt. Env. Bd. Aug. 10, 1990).

* Passage in Town Plan is not mandatory because it lacks a mandatory verb and lacks clear standards; it simply points to a hypothetical mandatory requirement and does not by itself create an enforceable provision. *Diverging Diamond Interchange SW Permit No. 50-6-16 Vtec at 4* (Motion for Reconsideration) (3/15/2018).

802.3 Construction of

* Board is required to follow ordinary rules of statutory construction in construing town plan. *In re Kiesel*, 172 Vt. 124, 133 (2000).

* Court gives great deference to the Board's decision construing town plan. *In re Kiesel*, 172 Vt. 124, 133 (2000), citing *In re MBL Assocs.*, 166 Vt. 606, 607 (1997).

* “[E]ven where regional and town plans are clear, they are only enforceable against a would-be developer through Criterion 10 to the extent that they set out mandatory requirements, as opposed to guidance, recommendations, or general policy.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 35 (Oct 21, 2016).

* Court applies the rules of statutory construction in construing a town plan. *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 12* (2/8/2018), citing *In re Kiesel*, 172 Vt. 124, 133 (2000) (citation omitted).

802.4 Cases

* Even substituting “adjacent” for “adjoining,” farm was not an adjacent property requiring a specific compatibility analysis under the ordinance because “numerous uses separated the... farm operations ...from the project site.” *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶¶21 - 23, 30 A.3d 641, 650-651 (Vt 2011).

* Criterion 10 not met where proposed quarry is in conflict with the scenic features of the Route 100B/Mad River corridor and the use and enjoyment of neighboring properties as described in Town Plan. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 71 (3/25/10).

* Project located in rural Resource Conservation District and Agricultural/Residential District and which is 2.4 miles by road and 1.6 miles by crow from South Royalton Village is not "close to" the Village and therefore does not comply with Royalton Town Plan which reads: "Where feasible, commercial development *shall be located* within or close to South Royalton Village or Royalton Village, re-using existing sites where possible, or in other locations specifically recommended in this plan and its amendments." *Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB (Altered), FCO at 61 - 67 (11/4/05), aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC, 2008 VT 7 (Vt. S. Ct.)* ("where feasible" does not provide sufficient standards)

* Where provisions of the town and regional plans essentially mirror the requirements of Criterion 1(F) and do not add additional or stricter protections, Project complies with Criterion 10. *West River Acres, Inc., et al. #2W1053-EB, FCO at 20 (7/16/04) [EB #832].*

Because the Town Plan specifically defines "should" as a non-mandatory term, the Board will respect the Town's intent. *Re: Peter S. Tsimortos, #2W1127-EB, FCO at 23 (4/13/04) [EB #814]*

* Project complies with the Burlington 1996 Municipal Development Plan where it provides commercial development on the Waterfront; limits use of surface parking; provides access to westerly views; links the Waterfront with the Central Business District; creates public spaces for pedestrians; utilizes public transportation systems; creates ADA compliant walkways and links from Battery Street to the Waterfront; provides additional performing arts space; provides improvements and maintenance to public park. *Main Street Landing Company and City of Burlington, Land Use Permit #4C1068-EB, FCO at 24 (11/20/01). [EB #790]*

* As conditioned, gravel pit will not conflict with Vernon Town Plan provisions prohibiting pits from resulting in an inconvenience or burden on neighbors; Board applies a higher standard under Criterion 10 than Criterion 8 aesthetics standard (noise); Board applies decibel maximums at residences, not property lines. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc., #2W0813-3 (Revised)-EB, FCO at 12 - 14 (4/19/01). [EB #763]*

* Proposed ground water collection system conforms with town plan's provision providing that "[d]isposal of hazardous wastes as identified and listed in the U.S. Resource Conservation and Recovery Act of 1976, Section 3001, shall be prohibited in Williamstown;" since the treated effluent will contain tetrachloroethylene concentrations of less than or equal to 1 part/billion, it is not "hazardous wastes" as described in plan. *Re: Unifirst Corporation and Williamstown School District, #5R0072-2-EB, FCO (Altered) at 23 (7/20/00). [EB #696]*

* Where affirmative finding under Criterion 10 relies on applicant's representations that the discharged effluent will contain levels of tetrachloroethylene at concentrations of less than or equal to 1 part/billion, permit will require project to achieve this level of performance. *Re: Unifirst Corporation and Williamstown School District, #5R0072-2-EB, FCO (Altered) at 23 (7/20/00). [EB #696]*

* Construction and operation of an asphalt plant at a previously permitted dolomite rock quarry is not compatible with residential uses. *Russell Corp. and Crushed Rock Inc., #1R0489-6-EB (8/19/99). [EB #723]* and see subsequent case of *Russell Corp. and Crushed Rock Inc., #1R0489-6-EB (Remand)-*

EB, FCO (1/17/02) [EB #723], *rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 (V.S.Ct.10/15/03)

* Even if Board looked to the zoning regulations, it would still conclude that project does not conform to town because: (i) the zoning regulations pre-date the town plan by sixteen years and the districts set forth in the plan are more numerous and more specific than those established in the regulations and (ii) even if Board determined that the regulations were relevant to the plan's interpretation, the project site is in the "Residential-Commercial" district of the zoning map, and project is an industrial or "manufacturing" use (allowed only as a conditional use). *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (8/19/99) [EB #723], and see subsequent case of *Russell Corp. and Crushed Rock Inc.*, #1R0489-6-EB (Remand)-EB, FCO (1/17/02) [EB #723], *rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc.*, 2003 VT 93 (V.S.Ct.10/15/03)

* Project does not conform to City of South Burlington plan because it would be built in the city's southeast in a rural area, and does not adhere to innovative design to promote rural character as clustering houses. *Nile and Julie Dupstadt*, #4C1013-EB (4/30/99). [EB #716]

* Because project's houses would not be placed so as to maximize potential of land for open space and natural resources preservation, scenic view protection, and/or continued agricultural use as specified in zoning regulations, project does not comply with city plan. *Nile and Julie Dupstadt*, #4C1013-EB (4/30/99). [EB #716]

* Proposal to construct equipment building, fencing, and panel antennae on an existing permitted tower conforms with the town plan. *Nextel Communications*, #3R0703-EB-2A-EB (3/10/99). [EB #718]

* Project was not in compliance with two specific provisions of Waitsfield Town Plan. *Mark and Pauline Kisiel*, #5W1270-EB (8/7/98), *rev'd, In re Kisiel*, 172 Vt. 124 (2000). [EB # 695]

* Mixed use development conform with town plan where it is based on a grid pattern of streets, will create a "more pedestrian friendly environment," creates "green spaces," and has other features set forth in plan. *Maple Tree Place Associates*, #4C0775-EB (6/25/98). [EB #700]

* Project is consistent with certain provisions in Stowe's town plan pertaining to sewer extensions, is partially consistent with other provisions, and in direct conflict with other provisions; project is denied under Criterion 10. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680]

* While town plan encouraged development of new businesses and industry, plan also provided that such development must occur in areas that are appropriate for such uses and be in compliance with conditions imposed for the involved land use district. *Herndon and Deborah Foster*, #5R0891-8B-EB (6/2/97).

* Where town plan required that at least 50% of project's property must be actively maintained as open space, and also required that location of individual structures and landscaping must allow for unobstructed views of contiguous open areas, a project which by its very scale and lot coverage

would exceed these standards was not in conformance with town plan. *Herndon and Deborah Foster*, #5R0891-8B-EB (6/2/97).

* Radio tower did not comply with town plan. *The Mirkwood Group and Barry Randall*, #1R0780-EB (8/19/96). [EB #641]

* Project did not conform to town plan's specific policies that commercial development be in those areas serviced by town water and sewer. *Donald and Gary Thomas*, #2S0993-EB, FCO (11/20/95). [EB #630]

* Project does not conform to the town plan's specific provisions. *Leonard and Rose Lemieux*, #3R0717-EB (3/1/95). [EB #581]

* Zoning bylaws' conditional use standards implement ambiguous town plan land use description such that when use of northern half of right-of-way is barred by permit condition, use of southern half of right-of-way by commercial traffic is consistent with town plan. *Larry and Diane Brown*, #5W1175-1-EB (6/19/95). [EB #591]

* Large scale retail project conforms to specific town plan provision. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]

* As conditioned by permit, operation of stone quarry will conform with applicable town plans. *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]

* Town plan provision that prohibits building on slope of more than 20 percent prohibits proposed subdivision. *Dorest/McNamara Associates*, #8B0458-EB (1/22/93). [EB #536]

* Town plan section which calls for regular review of enrollment projections and plans is too vague for Board to determine that project is not in conformance with section. *Horizon Development Corp.*, #4C0841-EB (8/21/92). [EB #518]

* Town plan section which specifies that subdivisions do not "infringe" upon wildlife and deer yards calls for a higher level of protection of deer yards than Criterion 8(A), but where restrictions have been imposed on project, it still meets Criterion 8(A). *Horizon Development Corp.*, #4C0841-EB (8/21/92). [EB #518]

* Large industrial/commercial development complies with town plan where plan designates project area for commercial/industrial development. *J. Philip Gerbode*, #6F0396R-EB-1, FCO (1/29/92) (revising 3/25/91 FCO). [EB#486]

* Where a master plan speaks favorably of a location for an industrial park and contains no language that would prohibit construction of a service center, construction of a building for such service center complies with Criterion 10. *Trapper Brown Corp. (TBC Realty)*, #4C0582-15-EB (12/23/91). [EB #420]

- * Continued operation of landfill, without assurance that the public's water supplies are either safe in the long-term or replaced with a new system of potable water, violates town plan provisions that call for preservation of natural resources and protection of drinking water. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]
- * Application is denied for nonconformance with pertinent and specific provisions of town plan. *Chester Pasho*, #3W0635-EB (6/11/91). [EB #485]
- * Project includes an adequate water discharge treatment system, and there is no connection between on-site wetlands and groundwater flowing under site; project complies with a town plan containing general policies concerning protection of wetlands. *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]
- * A gravel pit operation does not comply with a town plan's provisions which designate an adjacent road as a scenic road and which exclude commercial/industrial developments from scenic roads. *George & Dorothy Carpenter*, #5W0976-EB (1/19/90), *aff'd, In re Carpenter*, No. 90-96 (Vt. S. Ct. 11/9/90). [EB #433]
- * Required open space set-aside conforms to town plan which requires that the size of commercial uses in a highway commercial district be restricted to protect the residential character of the district. *Lake Realty, Inc.*, #9A0175-EB (10/20/89). [EB #437]
- * Project for construction of two additional rental storage buildings conforms with the town plan if road improvements are made and landscaping is provided. *A Safe Place Ltd.*, #8B0404-EB (6/20/89). [EB #375]
- * Condominium project violates local plan's sewer policy, fails plan's natural slope restrictions, and violates low density development provision in regional plan. *Stoneworks Group*, #8B0383-EB (9/8/87). [EB #346]
- * Radio communications tower is a commercial structure that does not conform with the town plan guidelines for residential and farming uses. *Lawrence E. Thomas*, #2W0644-EB (2/18/86). [EB #266]
- * A cemetery site can be an historic resource to be reviewed under town and regional plans. *George & Barbara Musbek*, #2W0600-EB (1/13/86). [EB #262]
- * Gravel extraction pit is incompatible with land uses in town and regional plan provisions. *George & Barbara Musbek*, #2W0600-EB (1/13/86). [EB #262]
- * Condominium project does not conform with the preservation of farmland goals of the local and regional plans. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]
- * A microwave relay tower will be in conformance with local and regional plans under Criterion 10. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]

- * Residential project which will improve road will not conflict with town plan. *Pomfret Associates*, #3R0403 (8/23/83). [EB #199]
- * Herb processing facility is consistent with local plan. *Dr. Duenner AG of America*, #5L0674-EB (4/19/82). [EB #173]
- * Residential subdivision is in conformance with general area of use described in the local plan. *Lee and Catherine Quaglia*, #1R0382-EB (2/11/82). [EB #172]
- * Condominium project will satisfy Criterion 10. *Woodstock Heritage, Inc.*, #3W0373-EB (11/10/81). [EB #167]; *Domestic Capital Corporation*, #8B0042 (10/21/73). [EB #41]
- * Subdivision satisfies the local plan where lots not initially subject to Act 250 jurisdiction are lawfully sold and are no longer within the ownership and control of the applicants, but all such lots will be considered under the Act 250 criteria. *Richard & Napoleon LaBrecque*, #6G0217-EB (11/17/80). [EB #140]
- * Tent and trailer park does not conform to municipal development plan. *George Tardy*, #5W0534-EB (3/21/80). [EB #122]
- * Project will not comply with Criterion 10 until a legal mechanism for common ownership is created because site meets the ordinance requirements only when much of the total parcel is held in common ownership. *William B. Kohlhepp*, #1R0332-EB (10/29/79). [EB #115]
- * Road reconstruction must be modified to retain four barns that are essential to the preservation of agricultural soils and the economic viability of agricultural units under Criteria 8, 9(B), and 10. *Agency of Transportation (New Haven Project)*, #9A0071-EB (9/14/79). [EB #106]
- * Installation of two microwave dishes on an existing mast conforms with town plan. *Karlen Communications, Inc.*, #5L0437 (8/28/78). [EB #89]
- * Sanitary landfill satisfies Act 250 criteria subject to permit conditions. *Palisades, Inc.*, #5W0164 (4/24/73). [EB #30]
- * Permit denied where all lots in proposed subdivision were not in conformance with minimum lot size requirements of local plan. *Albert Rossi*, #800003 (12/22/70). [EB #5]
- *“By demonstrating a particularized interest in the enforcement of City Plan provisions related to railways, specifically citing such provisions, and alleging the possibility of harm to its interest in the enforcement of those provisions as a result of Applicants’ proposed project, VTR made an adequate threshold showing of party status. Whether or not VTR’s cited provisions are actually enforceable goes to the merits of VTR’s claim, not VTR’s standing to bring the claim, and is therefore not justiciable by the Court at this stage of the appeal.” *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec at 4 (E.O on Mot. to Alter) (11/14/12).

*The Project complies with Criterion 10 because it uses aspirational phrases such as “should” and “is encouraged to occur”. *Zaremba Group Act 250 Permit*, 36-3-13 Vtec, Decision on the Merits at 23 (02/14/14).

803. Regional Plan

803.1 General

* Language of regional plan should be enforced under criterion 10 when it is "clear and unqualified, and creates no ambiguity". *In re Kisiel*, 172 Vt. 124, 128 (2000), citing *In re MBL Assocs.*, 166 Vt. 606, 607 (1997).

* Project will not have substantial impact on town center that regional plan seeks to protect. *In re Gizmo Realty/VKR Associates, LLC*, No. 19909-07 Vtec, Decision on the Merits at 8-9 (3/10/09).

* If the meaning of a regional plan is clear, it must be followed according to its express terms. *In re MBL Associates*, 166 Vt. 606, 607 (1997).

* Court will not engage in comparing the Board's interpretations of various regional plans. *In re MBL Associates*, 166 Vt. 606, 607 (1997).

* Because a regional plan does not necessarily receive any consideration in the local permitting process, a rigid view would suggest that municipal proceedings should not trigger a vesting of rights under a then-existing regional plan. However, Vermont’s vested rights jurisprudence suggests the development application process ought to be viewed as a combined process for the purpose of adjudicating the vesting of a developers’ rights.” *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 6 (4/30/08), subsequent Decision on the Merits (3/10/09).

* Where town does not have a duly adopted plan, the regional plan applies. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff’d*, *In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348] *Didace & Susan LaCroix*, #3W0485-EB (4/27/87). [EB #292].

* Legislature has emphasized that duly adopted regional plan provisions are not merely guidance documents or vague descriptions of regional planning goals; rather, 24 V.S.A. § 4348(h) affirms applicability of those provisions of duly adopted regional plan which are relevant to determination of any issue in proceedings under Act 250. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (Reconsideration) (8/27/97). [EB #659]

* State statute, mandating application of regional plans, overrides regional planning commission’s resolution that its plan not be applied. *Taft Corners Associates, Inc.*, #4C0696-11-EB (5/5/95) (Revised - on Remand from 160 Vt. 583 (1993)). [EB #532R2]

*Court finds language of regional plan does not show an intent on the part of the regional plan drafters to “incorporate” the 2008 Bicycle and Pedestrian Plan into the regional such that a project being analyzed under Criterion 10 must also comply with the 2008 Bicycle and Pedestrian Plan. 10

V.S.A. § 6086(a)(10). *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 34, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *Horizon Dev. Corp.*, No. 4C0841-EB at 29 (Aug. 21, 1992).

* When analyzing the project under Criterion 10, if the regional and local plans conflict, then “the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact.” 24 V.S.A. § 4348(h)(2); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

803.2 Construction of

* Provisions of a regional plan, like zoning ordinances, should be construed according to the ordinary rules of statutory construction. *In re MBL Associates*, 166 Vt. 606, 607 (1997).

* Criterion 10 met where project found to follow aspirational goals in Town and Regional Plans, and neither Plan contains specific, regulatory land use prohibitions that project disregards. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 47 (1/20/10).

* In analyzing regional plans, the Environmental Court “does not give effect to abstract statements of policy that give no specific standards for implementation or that are best, ambiguous.” *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision at 9 (4/30/08)(declining to inquire further into intent of a Regional Plan, which, in addressing an Interchange Area, contained only a narrative of existing conditions around the interchange and some history of the area’s development, without presenting specific development provisions).

* Where the policies of a regional plan are specific by their own terms and without reference to any other document or regional plan provision, they are to be given the effect intended and should be evaluated in view of the document’s overall purpose. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (Reconsideration) (8/27/97). [EB #659]

* Provisions of a regional plan, like zoning ordinances, should be construed according to the ordinary rules of statutory construction; fundamental rule in construction of statutes is to give effect to legislature’s intention. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (Reconsideration) (8/27/97). [EB #659].

* A regional plan that does not prohibit specific uses in specific areas can be used as a guide with reference to the general goals of the plan. *Didace & Susan LaCroix*, #3W0485-EB (4/27/87). [EB #292]

* Board need not accept the conclusion of the regional planning commission but may independently evaluate a project’s conformance with Criterion 10. *Robert B. & Deborah J. McShinsky*, #3W0530-EB (4/21/88), *aff’d*, *In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990). [EB #348]

* Court construes provisions set out in local and regional plans to effect the intent of the drafters, relying on the plan’s plain language where it is clear, and reading that plain language in context of

the whole plan. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 31, Decisions on Motion for Summary Judgement (Oct. 11, 2017), citing *In re B&M Realty, LLC*, 2016 VT 114, ¶ 36 (Oct 21, 2016).

803.3 Mandatory provisions vs. guidance

* Where regional plan expressly defines "should" as "identifying that a requirement is encouraged but not mandated," requirement is not mandatory. *In re MBL Associates*, 166 Vt. 606, 607 (1997).

* Regional plan provision that extraction should "minimize[] adverse effects on aesthetics . . . and specially community resources (such as historic sites . . .)," and should not "interfere with or have negative impacts on . . . historic sites" are not enforceable standards under Criterion 10. *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 ¶41 (01/17/14).

803.4 Cases

* Language in regional plan that limiting density to one unit per ten acres or density prescribed in applicable local zoning bylaws is clear and unambiguous. *In re MBL Associates*, 166 Vt. 606, 607 (Mar. 6, 1997).

* Because, in this case, compliance with regional plan depends on compliance with municipal bylaws, Board may look to such bylaws to determine whether the project satisfied the regional plan's density restrictions even if Board has not found regional plan's density requirements ambiguous. *In re MBL Associates*, 166 Vt. 606, 606 (1997); c.f. *In re Molgano*, 163 Vt. 25, 30-31, 653 A.2d 772, 775 (1994) (if town plan is ambiguous, zoning bylaws determine conformance with plan).

* Court reverses Board's finding that development was not in conformance with the Regional Plan. *In re Molgano*, 163 Vt. 25, 31 (1994).

* Given the specific policy in the regional plan against residential development on slopes exceeding twenty percent, the Board's findings are sufficient to support its conclusion that the project does not conform to the plan. *In re Green Peak Estates*, 154 Vt. 363, 369 (1990).

* To find from Regional Plan that a specific location is barred by the mere possibility of residential development is to read too much specificity into the requirement of conformance and is unwarranted. *In re Patch*, 140 Vt. 158, 167 (1981).

* Trial court's ruling that proposed landfill failed to conform to regional plan in Act 250 proceedings held erroneous where evidence of nonconformance was insubstantial and regional plan encouraged sanitary landfill refuse disposal. *In re Patch*, 140 Vt. 158, 167 (1981).

- * Mixed-use project near interchange does not conflict with the Regional Plan, even though it could have been located in town center or downtown. *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on the Merits 7-8 (3/10/09).
- * Applicant acted in good faith and diligently pursued its local land use approvals where: 1) its permit application was approved; 2) it sought an Act 250 permit approximately one month after securing local permit approval, and 3) appellant Regional Commission failed to dispute Applicant's assertion that it had diligently pursued the local permitting process, having confined its argument to whether the issue of which Regional Plan applies was preserved on appeal. *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 8 (4/30/08) subsequent Decision on the Merits (3/10/09)..
- * Having determined that the Applicant acted in good faith and diligently pursued its local land use approvals, the Court concluded that the Applicant was entitled to review of its pending Act 250 application under the version of the Regional Plan in effect at the time Applicants submitted their complete zoning application to the Town. *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 5, 8 (4/30/08) subsequent Decision on the Merits (3/10/09).
- * In the absence of town plan and any clear guidance from regional plan, quarry project complies with Criterion 10; regional plan has no specific language addressing development of quarries in rural areas, and given the location of Vermont's mineral resources, it would be unusual for a regional plan to prohibit quarry development from occurring in rural or remote areas. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, FCO at 92 (12/8/00). [EB# 739].
- * Project complied with provisions of Regional Plan and *Duppstadt* requirements. *Mill Lane Development Co., Inc.*, #2W0942-2-EB (12/17/99). [EB #726]
- * Proposal to construct a 10' by 20' equipment building, fencing, and 12 panel antennae on an existing permitted tower conforms to regional plan. *Nextel Communications*, #3R0703-EB-2A-EB (3/10/99). [EB #718]
- * Residential subdivision project complies with regional plan which has no specific policies controlling this type of project; plan allows project under future land use map and matrix, and plan does not restrict density at a specific level outside of designated growth centers. *Nile and Julie Duppstadt*, #4C1013-EB (4/30/99). [EB #716]
- * Regional plan does not conflict with local plan; both plans allow for residential development; but local plan addresses more specific conformance standards than regional plan, and therefore, under local standards, project does not comply with Criterion 10. *Nile and Julie Duppstadt*, #4C1013-EB (4/30/99). [EB #716]
- * While "Land Use Element" section of Regional Plan contains general policies regarding forest land, resource protection, natural and fragile areas, critical wildlife habitat, ground water recharge areas, surface waters, wetlands, scenic areas, and development, it does not contain specific provisions which prohibit the project; therefore, project complies with Criterion 10 (regional plan). *Mark and*

Pauline Kiesel,#5W1270-EB (8/7/98). [EB # 695] *rev'd on other grounds, In re Kiesel*, 172 Vt. 124 (2000).

* Mixed use development conforms to regional plan. *Maple Tree Place Associates*, #4C0775-EB (6/25/98). [EB #700]

* Project conforms to regional plan in large measure because much of the extraction activities occurred prior to enactment of Act 250, regional plan policies are not sufficiently clear and unqualified so as to prohibit continued extraction of earth resources, and continued extraction would facilitate site's reclamation, making it suitable for alternative uses compatible with the village area in which it is located. *Pike Industries*, #1R0807-EB (6/25/98). [EB #693]

* Sewer plant and line extension comply with regional plan's general policy statements, and such policies are not clear and unqualified policies that prohibit project. *Town of Stowe*, #100035-9-EB (5/22/98). [EB #680]

* Specific language of a regional plan setting forth mandatory prohibitions is sufficient to support denial of permit if Board cannot make affirmative findings under Criterion 10 with respect to those provisions. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (Reconsideration) (8/27/97). [EB #659]

* Because regional plan adopted as its implementing standard "community aesthetic values," and because radio tower violated zoning ordinance (a clear, written community standard under Criterion 8), radio tower did not comply with regional plan. *The Mirkwood Group and Barry Randall*,#1R0780-EB (8/19/96). [EB #641]

* Regional plan endorsed automobile dealership with regard to location along Route 7A. *James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised) (8/19/96). [EB #629R]

* Project, which is located in plan's description of a town center, served by municipal water and sewer, is in central location for commercial activities and schools, and is a multi-unit high density facility, complies with regional plan. *Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB (4/16/96), *aff'd, In re Fair Haven Housing Limited Partnership*, Docket #96-228 (V.S.Ct.4/3/97). [EB #643]

* Project meets regional plan's density requirement for an agricultural area. *MBL Associates*, #4C0948-EB (Altered) (1/30/96), *aff'd, In re MBL Associates, Inc.*, 166 Vt. 606 (1997). [EB #610]

* Auto-dealer project, which is contiguous to existing development, accessible to public services, will not result in growth in rural areas, and is subject to review under the zoning regulations, is consistent with regional plan. *Ronald Carpenter*, #8B0124-6-EB (10/17/95). [EB #635]

* Communication tower project did not conform to regional plan's policy discouraging new sites in favor of using existing facilities where applicant failed to demonstrate that it sought lease space on

existing towers as an alternative to new tower. *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (10/11/95). [EB #632].

* Project conformed to regional plan's requirement that there be "adequate" parking. *Manchester Commons Associates*, #8B0500-EB (9/29/95). [EB #631]

* Where regional plan encourages preservation of scenic views, but does not prohibit ridge line or hilltop development, project conforms to plan. *Charles and Barbara Bickford*, #5W1186-EB (5/22/95). [EB #595]

* Project did not comply with regional plan's specific policies. *Leonard and Rose Lemieux*, #3R0717-EB (3/1/95). [EB #581].

* As conditioned by permit, stone quarry operation conforms with regional plan where the plan does not bar through traffic and expressly endorses a balanced regional economy. *Crushed Rock*, #1R0489-4-EB (2/18/94). [EB #572]

* 1000' buffer corridor between houses complies with regional plan requirement that measures be taken to minimize adverse effects on deer habitat. *Dorest/McNamara Associates*, #8B0458-EB (1/22/93). [EB #536]

* Landfill operation does not comply with regional plan which encourages source reduction of waste and water quality protection, and discourages development which threatens quality of recreational waters. *Upper Valley Regional Landfill*, #3R0609-EB (revised 11/12/91; previous version 7/26/91). [EB #453R]

* Where regional plan encourages protection of wetlands and of rare or irreplaceable natural areas, and wetland is not a rare or irreplaceable natural area, and where regional plan does not include the on-site wetlands as natural areas on its "natural or fragile areas" map, project conforms with the regional plan with respect to such wetlands. *Finard-Zamias Associates*, #1R0661-EB (11/19/90). [EB #459]

* Proposed shopping center does not conform with regional plan which contains strong statements that commercial development should be located in village centers. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB (8/10/90). [EB #430]

* Project conforms with regional plan with regard to density, water service, and strip development. *P.F. Partnership and Harlan and Jean Bodette*, #9A0169-EB (5/1/90), *aff'd and remanded*, *P.F. Partnership*, No. 90-276 (V.S.Ct. 3/21/91). [EB #424]

* Where a regional plan contains policies that require safe roads, and the use of road near project will cause unsafe traffic conditions, the project fails Criterion 10. *Berlin Associates*, #5W0584-9-EB (2/9/90). [EB #379]

* Project is sensitive to regional scenic resources because of its architecture, overall layout, landscaping, and commitment to maintaining tree and foliage backdrops along the river behind the

project. *W. Thompson Cullen & Barry Reardon*, #2W0720-1-EB and #2W0720-2-EB (8/10/89). [EB #431]

* Project involving extraction of sand and gravel does not conform to regional plan. *H.A. Manosh*, #5L0918-EB (8/8/88). [EB #359]

* Condominium project violates the low density development provision in the regional plan. *Stoneworks Group*, #8B0383-EB (9/8/87). [EB #346]

* Landfill is compatible with the urban service area of a regional plan and it will not conflict with the goal of preserving groundwater resources. *Howard & Louise Leach*, #6F0316-EB (6/11/86). [EB #269]

* Cemetery site can be an historic resource to be reviewed under town and regional plans. *George & Barbara Musbek*, #2W0600-EB (1/13/86). [EB #262]

* Gravel extraction pit incompatible with land uses in town and regional plan provisions. *George & Barbara Musbek*, #2W0600-EB (1/13/86). [EB #262]

* Condominium project does not conform with the preservation of farmland goals of the local and regional plans. *Marvin T. Gurman, Espley-Tyas Vermont, Inc. and D. Truman Barrett*, #3W0424-EB (6/10/85). [EB #229]

* Microwave relay tower will be in conformance with local and regional plans under Criterion 10. *Vermont Electric Power Corporation*, #7C0565-EB (12/13/84). [EB #227]

* Activities are consistent with regional plan which encourages timber cutting and forest management on public forest and park lands. *Department of Forest, Parks and Recreation*, #1R0488-EB (1/11/84). [EB #211]

* Residential project which will improve road will not conflict with regional plan. *Pomfret Associates*, #3R0403 (8/23/83). [EB #199]

* Condominium project satisfies Criterion 10. *Woodstock Heritage, Inc.*, #3W0373-EB (11/10/81). [EB #167]

* Multi-family project is in conformance with regional plan where it meets the density requirements of the zoning ordinance. *Albert & Doris Stevens*, #4C0227-3-EB (7/28/80). [EB #139]

* Commercial shopping center conforms with regional plan. *Justgold Holding Corp.*, #1R0048 (7/19/73). [EB#31]

* Court dismisses questions that ask whether Project must conform with official town map, the town's Public Works Standards, the Regional Bicycle Plan, the AASHTO Guide for the Development of Bicycle Facilities, or the Vermont Pedestrian and Bicycle Facility Planning and Design Manual because Criterion 10 only requires projects to conform "with any duly adopted **local or regional**

plan or capital program under 24 V.S.A. chapter 117.” 10 V.S.A. 6086(a)(10) (emphasis added) *Diverging Diamond A250 50-6-16 Vtec M amend SOQ at 11 (2/8/2018)*.

804. Growth Centers

804.1 Collocation of Communications Infrastructure

* Principle of physical collocation of communication towers favors a strong public policy of maintaining integrity of Vermont’s scenic resources - specifically its mountaintops and contiguous ridge lines. *Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB (Reconsideration) (8/27/97)*. [EB #659]

* Collocation, if executed properly, will greatly mitigate the environmental impacts associated with the rapidly developing sector of the economy involving telecommunications, wireless services, and broadcasting. *Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB (Reconsideration) (8/27/97)*. [EB #659]

805. Sprawl

* Sprawl is not itself an independent criterion; a project cannot be denied because it constitutes “sprawl.” *Re: EPE Realty Corporation and Fergessen Management, Ltd., #3W0865-EB, FCO at 34 (11/24/04)* [EB #838]

* Board precedent refers to sprawl only within the context of other criteria, such as Criterion 8 (aesthetics), *Re: EPE Realty Corporation and Fergessen Management, Ltd., #3W0865-EB, FCO at 41(11/24/04)* [EB #838], citing *Re: Waterbury Shopping Village, Inc., #5W1068-EB, FCO at 18 (7/19/91)*; Criterion 9(H), *Re: tratton Corporation 2W0519-10-EB FCO (5/18/01)*; *Re: Killington, Ltd., et al. (Master Plan), #1R0835-EB, FCO at 15 - 16 (7/20/00)* and Criterion 10 (Town or Regional Plan); *Re: Central Vermont Public Service Corp. and Verizon New England (Jamaica), #2W1146-EB, FCO (Altered) at 8 (12/19/03)*; *Southwestern Vermont Health Care Corporation, #8B0537-EB, FCO at 23 (2/22/01)*; *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action, #2W0694-1-EB, FCO at 26 (12/21/00)*.

806. Burden of Proof

* Summary judgment to Applicant is granted and party status to Neighbors is denied where Applicant provided documentation, an affidavit, and an appraisal, and the record is devoid of any representation as to what Neighbors would likely produce at a hearing. *In re RCC Atlantic, Inc., and Sousa, #163-7-08 Vtec, Decision on Multiple Motions at 8 (5/08/09)*.

* The burden of proof under Criterion 10 is on applicant. 10 V.S.A. § 6088(a); *Zaremba Group Act 250 Permit, 36-3-13 Vtec, Decision on the Merits at 23 (02/14/14)*; *In re Barefoot Act 250 Application, 46-4-12 Vtec at 4 (11/13/13)*. *Re: Pike Industries, Inc. and Inez M. Lemieux, #5R1415-EB, FCO at 51 (6/07/05)* [EB #853]; *Re: John J. Flynn Estate and Keystone Development Corp. #4C0790-2-EB, FCO at 26 (5/4/04)* [EB #831]

* Subdivision does not comply with Act 250 where applicant provided insufficient information for Board to make affirmative findings with respect to Criterion 10 (local and regional plans). *New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version 10/1/91). [EB #472R]

* Applicant failed to satisfy burden of production under Criteria 7, 8, and 9(A) and burden of production and persuasion under Criteria 9(B) - (L) and 10, and Board could not assess potential impacts of extension of distribution utility line into remote area. *Washington Electric Cooperative, Inc.*, #5W1036-EB (12/19/90). [EB#455]

XII. APPEALS TO VERMONT SUPREME COURT

820. General

* 2003 Amendments to Act 250 apply only to proceedings that commence after January 31, 2005. *In re Ochs*, 2006 Vt. 34, ¶2

* Court will not honor a party's claim that it should have prevailed before an inadequately informed Board. *In re Killington, Ltd.*, 159 Vt. 206, 211 (1992).

820.1 Grounds for relief

* In order to obtain relief on appeal, party must show that an asserted error prejudiced its rights. *In re Killington, Ltd.*, 159 Vt. 206, 211 (1992).

820.2 Issues on appeal

* Failure to object on appeal to Board's findings of fact makes such findings controlling. *In re Orzel*, 145 Vt. 355, 358 (1985).

820.2.1 Constitutional claims

* Constitutional claims will not be considered by Supreme Court, unless the disposition of the case requires it. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 520 (1975).

820.3 Requirement of final decision

* Board's decision that a project site contains primary agricultural soils is not a final decision for purposes of appeal to Supreme Court. *Flanders Lumber Company*, #4C0695-EB (11/23/87). [EB #350M]

821. Who may appeal

* Eligibility to appeal Board decision is "strictly limited to those parties expressly designated in the statute." *In re Stokes Communications Corp.*, 164 Vt. 30, 34 (1995), *In re George F. Adams & Co.*, 134 Vt. 172, 174 (1976).

* "In appropriate circumstances, V.R.A.P. 29 may provide the proper avenue for an interested person, who is not a statutory party, to participate in the appellate process." *In re Stokes Communications Corp.*, 164 Vt. 30, 35 (1995); see, e.g., *In re Taft Corners Assocs.*, 160 Vt. 583, 588-89 (1993) (interested property owners participated in appeal as amicus curiae after initial request to participate as appellees was refused).

* Lacking party status, adjoining property owner cannot take an appeal to Supreme Court. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518-19 (1975); 10 V.S.A. ' 6089(b).

* Environmental Court cannot decide procedural issues regarding appeal to the Vermont Supreme Court because that court has sole jurisdiction to determine if it will hear an appeal. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 5 (3/20/06)

821.1 Merits of a permit

* 10 V.S.A. § 6085(c)(1) applies only to appeals of decisions granting or denying permits. *In re Ochs*, 2006 Vt. 34, ¶¶2, 3.

* 10 V.S.A. § 6089 applies the limitations of 10 V.S.A. § 6085(c) only to permit appeals. *In re Ochs*, 2006 Vt. 34, ¶3.

* A party, not entitled to appeal, is also precluded from obtaining review in the nature of an appeal by filing a petition for extraordinary relief: *City of Burlington v. State of Vermont Environmental Board*, 164 Vt. 607 (1995) (Entry Order), citing *In re Cabot Creamery Coop.*, 164 Vt. 26 (1995).

* "Where ... legislation does not affirmatively indicate that review is 'available by law,' ... review by this Court is nonetheless permitted by a petition for extraordinary relief" pursuant to V.R.C.P. 75. *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 28 (1995), quoting *Hunt v. Village of Bristol*, 159 Vt. 439, 440 (1992).

* Act 250 is not silent on the right to appeal; it explicitly limits the right to appeal a Board decision to certain enumerated persons. *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 28 (1995), citing 10 V.S.A. §§ 6085(c), 6089(b).

* The word "appeal" as used in 10 V.S.A. ' ' 6085(c) refers to appeals to the Vermont Supreme Court. *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 28 (1995), citing *In re George F. Adams & Co.*, 134 Vt. 172, 174-75 (1976).

* Legislature intended to exclude from the appellate process participants in the administrative proceeding who were not explicitly enumerated in 10 V.S.A. § 6085(c). *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 28 (1995), citing *In re George F. Adams & Co.*, 134 Vt. 172, 174-75 (1976).

* Permissive parties, such as adjoining landowners, are not among the enumerated parties and

therefore are affirmatively prohibited from appealing to Supreme Court. *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 28 (1995), citing 10 V.S.A. § 6085(c).

* As a permissive party, petitioner was allowed to participate in administrative proceedings, but he had no statutory right of appeal from the Board's decision on the merits. *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 29 (1995) citing *In re Carrier*, 148 Vt. 635, 635 (1987) (mem.) .

* Petitioner may not challenge the merits of an Environmental Board decision by relying on the extraordinary relief provided by V.R.C.P. 75; petitioner may not do indirectly what he cannot do directly. Such an end run circumvents the Legislature's intent. *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 29 (1995).

* Adjoining property owner lacks standing to participate in Court appeal even though he had appeared before the Board. *In re Stokes Communications Corp.*, 164 Vt. 30, 34 (1995); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518-19 (1975).

* VNRC is not enumerated as an appropriate party appellant under 10 V.S.A. § 6085(c). *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 7 (1974).

* The determination of whether the planning commission is entitled to appeal is a fact finding matter and requires Board to make findings of fact on the issue after a hearing is held. *In re Quechee Lakes Corp.*, 130 Vt. 469, 471 (1972).

821.2 Party status

* Supreme Court's standard of review on Board's decision denying party status is "abuse of discretion;" Court will reverse only upon finding that the Board "withheld its discretion entirely or.... exercised [discretion] for clearly untenable reasons or to clearly untenable extent" *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶6 (2007), citing *In re Putney Paper Co.*, 168 Vt. 608, 609 (1998) (mem.) (quoting *Vt. Nat'l Bank v. Clark*, 156 Vt. 143, 145 (1991)).

* Court reviews WFP decisions regarding party status for abuse of discretion. *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998); *In re Chittenden Recycling Servs.*, 162 Vt. 84, 88 (1994).

821.3 Declaratory Rulings

* Act 250 incorporates the Vermont Administrative Procedure Act unless otherwise specifically stated. *In re Ochs*, 2006 Vt. 34, ¶2

* The Legislature intended to subject jurisdictional opinions to the Vermont Administrative Procedure Act. *In re Ochs*, 2006 Vt. 34, ¶2.

* 10 V.S.A. § 6085(c)(1) applies only to appeals of decisions granting or denying permits. *In re Ochs*, 2006 Vt. 34, ¶¶2, 3.

* 10 V.S.A. § 6089 applies the limitations of 10 V.S.A. § 6085(c) only to permit appeals. *In re Ochs*,

2006 Vt. 34, ¶3.

822. Role of the Court

* Court is not a higher environmental agency entrusted with the power to make environmental law and policy de novo or with the power to apply the policy it develops to the facts it finds. *Conservation Law Foundation, et al. v Burke*, 162 Vt.115, 126 (1994), citing *Department of Taxes v. Tri-State Indus. Laundries, Inc.*, 138 Vt. 292, 297 (1980) and *Chioffi v. Winooski Zoning Bd.*, 151 Vt. 9, 13 (1989) (in zoning appeals, "court must resist the impulse to view itself as a super planning commission").

* Supreme Court has duty to ensure that Board does not overreach in enforcing Act 250. *In re BHL Corp.*, 161 Vt. 487, 492 (1994).

* The courts may intervene where Board exceeds the bounds of its enabling legislation. *In re Taft Corners Associates, Inc.*, 60 Vt. 583, 590 (1993).

* Court does not invite Board to arbitrarily expand its jurisdiction. *In re Vitale*, 151 Vt. 580, 584 (1989); *In re Agency of Administration*, 141 Vt. 68, 76 (1982).

* Where agency exercises its adjudicative function, court will be especially vigilant, since proper utilization of the judicial process is unrelated to expertise in any particular subject matter. *In re Agency of Administration*, 141 Vt. 68, 75 (1982).

* The function of a court of law is not to construe the Legislature's acts as going to the limits of its power in each instance. *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 152 (1979).

* "Even when conducting an evidentiary [de novo] hearing, the court owes deference to agency interpretations of policy or terms when: (1) that agency is statutorily authorized to provide such guidance; (2) complex methodologies are applied; or (3) such decisions are within the agency's 'area of expertise.'" *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 20 (April 13, 2018); citing *Plum Creek Me. Timberlands, LLC v. Vt. Dept. of Forests, Parks & Rec.*, 2016 VT 103, ¶ 25, 203 Vt. 197, 155 A.3d 694 (explaining agency determinations regarding "the proper interpretation of policy or methodology within the agency's expertise are entitled to deference, even where there is a de novo hearing within the superior court"); *In re Woodford Packers, Inc.*, 2003 VT 60, ¶ 12, 175 Vt. 579, 830 A.2d 100 (mem.) (deferring to agency interpretation of "floodway" and "floodway fringe" in Act 250 permit proceeding because ANR had authority to define terms based on plain language of statute).

822.1 Limitation on agency's powers

* An administrative body may promulgate only those rules within the scope of its legislative grant of authority. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 210-11 (2002); *In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982) (agency cannot use its rule-making authority to exceed or compromise its statutory purpose).

- * The courts may intervene where Board exceeds the bounds of its enabling legislation. *In re Taft Corners Associates, Inc.*, 60 Vt. 583, 590 (1993).
- * Court does not invite Board to arbitrarily expand its jurisdiction. *In re Vitale*, 151 Vt. 580, 584 (1989); *In re Agency of Administration*, 141 Vt. 68, 76 (1982).
- * Under our constitutional system, administrative agencies are subject to the same checks and balances which apply to our three formal branches of government. *In re Agency of Administration*, 141 Vt. 68, 75 (1982).
- * "An agency must operate for the purposes and within the bounds authorized by its enabling legislation, or this Court will intervene." *In re Spencer*, 152 Vt. 330, 336 (1989), quoting *In re Agency of Administration*, 141 Vt. 68, 75 (1982).
- * While "[d]ecisions made within the expertise of such agencies are presumed correct, valid, and reasonable," the deference owed to agency determinations is not absolute. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 21 (April 13, 2018), Citing *Plum Creek Me. Timberlands, LLC*, 2016 VT 103, ¶ 31.
- * "An agency's authority to define terms within its statutory purview will be given deference unless that authority is applied 'arbitrarily and capriciously' such that it 'give[s] rise to a violation of due process.'" *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 21 (April 13, 2018), quoting *Woodford Packers, Inc.*, 2003 VT 60, ¶ 17, 175 Vt. 579, 830 A.2d 100 (mem.)
- * "Agency determinations regarding complex methodologies are entitled to deference by the court, unless the opposing party can demonstrate the agency decision was 'wholly irrational and unreasonable in relation to its intended purpose.'" *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 21 (April 13, 2018); citing *Plum Creek Me. Timberlands, LLC v. Vt. Dept. of Forests, Parks & Rec.*, 2016 VT 103, ¶ 28 203 Vt. 197, 155 A.3d 694.
- * "Even when conducting an evidentiary [de novo] hearing, the court owes deference to agency interpretations of policy or terms when: (1) that agency is statutorily authorized to provide such guidance; (2) complex methodologies are applied; or (3) such decisions are within the agency's 'area of expertise.'" *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 20 (April 13, 2018); citing *Plum Creek Me. Timberlands, LLC v. Vt. Dept. of Forests, Parks & Rec.*, 2016 VT 103, ¶ 25, 203 Vt. 197, 155 A.3d 694 (explaining agency determinations regarding "the proper interpretation of policy or methodology within the agency's expertise are entitled to deference, even where there is a de novo hearing within the superior court"); *In re Woodford Packers, Inc.*, 2003 VT 60, ¶ 12, 175 Vt. 579, 830 A.2d 100 (mem.) (deferring to agency interpretation of "floodway" and "floodway fringe" in Act 250 permit proceeding because ANR had authority to define terms based on plain language of statute).
- * Supreme Court finds the Environmental Division owed deference to ANR's methodology for complex calculation and interpretation of the terms "floodway" and "floodway fringe" in conducting its evidentiary hearing, because ANR was given broad statutory authority to define those terms. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 22 (April 13, 2018).

- * The Environmental Division's mere disagreement with ANR's interpretation of "floodway and floodway fringe" is insufficient to allow the lower court to substitute its own interpretation, especially in light of the broad statutory authority given to the ANR in applying those terms. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 22 (April 13, 2018), citing *Plum Creek Me. Timberlands, LLC v. Vt. Dept. of Forests, Parks & Rec.*, 2016 VT 103, ¶ 30 203 Vt. 197, 155 A.3d 694.
- * Supreme Court holds that the Environmental Division erred when it substituted its own judgement in the place of ANR's by determining that the methodology applied by Korrow's expert, or the methodology of the court, was superior to that employed by ANR. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 24 (April 13, 2018).
- * "Absent a violation of due process or evidence that the agency decision was arbitrary and capricious, the [lower] court should have deferred to the agency's interpretation of the terms at issue and applied them when assessing the project." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 25 (April 13, 2018).
- * "The fact that the court disagreed with the ANR's assessment is insufficient to demonstrate the ANR's methodology was unreasonable." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, n.2 (April 13, 2018).
- * "ANR's methodology for calculating the fluvial erosion hazard area was an established practice, not arbitrarily or capriciously applied to the Korrow project; ANR provided ample support, including testimony, maps, and exhibits, to support its interpretation of the Act 250 "floodway." The ANR was well within its statutory bounds when calculating the "floodway" here, and its authority should not have been usurped by the court." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, n.2 (April 13, 2018).
- * Supreme Court applied ANR's definition and find that Korrow's project was within the "floodway" under 10 V.S.A. § 6001(6), thereby triggering analysis of project compliance with Act 250 Criterion 1 (D). *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 26 (April 13, 2018).

823. Exhaustion of Administrative Remedies

- * Requiring preservation of jurisdictional issues in an administrative forum, usually under the rubric of exhaustion of administrative remedies, is common in American law and must be viewed as an exception to the general rule that subject-matter jurisdiction can be raised at any time. *In re Denio*, 158 Vt.230, 234 (1992).
- * Three factors are considered in determining whether exhaustion of administrative remedies is required with respect to a jurisdictional issue: (1) the extent of injury from pursuit of an administrative remedy; (2) degree of apparent clarity or doubt about administrative jurisdiction; and (3) involvement of specialized administrative understanding in the question of jurisdiction. *In re Denio*, 158 Vt.230, 234 (1992).

824. Extraordinary Relief

* Superior Court's dismissal for claim for extraordinary relief affirmed, because plaintiff lacked standing to appeal; plaintiff could not bring an action for extraordinary relief since a party not entitled to appeal from a Board decision is also precluded from obtaining review in the nature of an appeal by filing a petition for extraordinary relief; as adjoining landowner, plaintiff can request a hearing before the Board, but cannot appeal. *Hendricks v. Environmental Board*, No. 96-246, (Vt. S. Ct. 4/4/97) (Unpublished).

825. Interlocutory (see [507](#) for all cases)

826. Preservation of issues below

* Supreme Court "will not consider issues raised for the first time in this Court." *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶13 (2007), citing *In re Whitney*, 168 Vt. 209, 214 (1998); *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 21 (10/26/12) (citing *Mann v. Levin*, 2004 VT 100, ¶ 26, 177 Vt. 261, 861 A.2d 1138).

* Supreme Court will not address arguments not properly preserved for appeal. *In re Ochs*, 2006 VT 122, ¶16 n.2 (2006); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶19 (2003); *In re White*, 172 Vt. 335, 343 (2001); *In re Stokes Communications Corp.*, 164 Vt. 30, 35 (1995) ("No objection that has not been urged before the Board may be considered by the Supreme Court."), citing 10 V.S.A. § 6089(c); *In re Denio*, 158 Vt. 230, 234 (1992); ("issues not raised below, even those having a constitutional dimension, need not be considered when presented for the first time on appeal.") quoting *In re Burlington Housing Auth.*, 143 Vt. 80, 81-82 (1983); *In re Vermont Gas Systems, Inc.*, 150 Vt. 34, 40 (1988) (Party cannot maintain an appeal regarding a question that never became an issue and was never ruled upon); *In re Lunde Constr. Co.*, 139 Vt. 376, 380-81 (1981) (issue which is not central to the questions in appeal and which has not had timely presentation will not be considered by appellate court); *In re Barker Sargent Corp.*, 132 Vt. 42, 47 (1973).

* To properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it. *In re White*, 172 Vt. 335, 343 (2001).

* The very purpose of the preservation rule is to ensure that the original forum is given an opportunity to rule on an issue prior to our review. *In re White*, 172 Vt. 335, 343 (2001).

* Court has been particularly solicitous regarding preservation of issues requirement in the context of appeals from the Board, given that preservation is statutorily required as part of the Act 250 scheme. *In re White*, 172 Vt. 335, 343 (2001), citing *In re Denio*, 158 Vt. 230, 234-36 (1992) (holding that even jurisdictional challenges must be raised before the Board as a prerequisite to their consideration on appeal by this Court); 10 V.S.A. § 6089(c).

* Questions of fairness involving procedural rights afforded by administrative bodies must be examined when they approach due process problems of constitutional dimension. *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 9 (1974).

*An argument not raised below is not preserved for review by the Vermont Supreme Court. *In re: Eric and Geraldine Cota*, No. 2005-120 (unpublished mem.)(Vt. 2006)(citing 10 V.S.A. § 6089(c); *In re: White*, 172 Vt 335, 343 (2001)).

826.1 Jurisdictional issues

* Barring "extraordinary circumstances," failure to raise a jurisdictional challenge to Board forecloses the issue from being raised before Supreme Court on appeal. *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993); *In re Denio*, 158 Vt. 230, 234 (1992) (Because of 10 V.S.A. § 6089(c), claim of Board's lack of subject-matter jurisdiction must be raised before Board and may not be raised for the first time in the Supreme Court); 10 V.S.A. § 6089(c); but see *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 8 (1974) ("extraordinary circumstances" [e.g. gross irregularities or such "egregious error" that Court cannot in conscience allow the ruling below to stand] can justify Supreme Court's consideration of an objection not raised below or briefed by the parties).

* Language of 10 V.S.A. § 6089(c) (requiring raising of issues below) is broad and contains no exception for jurisdictional issues. *In re Denio*, 158 Vt.230, 235 (1992).

* For an administrative board of limited jurisdiction virtually any disagreement with its actions can be phrased in jurisdictional terms. *In re Denio*, 158 Vt.230, 235 (1992).

* If applicants can avoid raising jurisdictional challenges before the Board, and seek a ruling for the first time in this Court if they are dissatisfied with the Board's action on the merits, the most important decisions on the scope of Act 250 will be made without involvement of the Board or its expertise. *In re Denio*, 158 Vt.230, 235 (1992).

826.2 Waiver of

* Party waives requirement that Board is required to enter its observations from the site visit on the record by failing to raise it in response to the Board's proposed decision. *In Re Petition of Halnon*, 174 Vt. 514, 516 (2002); *In re Denio*, 158 Vt.230, 238 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 552 (1990).

* Appellant waives an argument not raised in a post-decision motion made under EBR 31, which provides a party with an opportunity to object or move to alter to a Board decision. *In re Quechee Lakes Corp.*, 154 Vt. 543, 552 n.7 (1990), citing 10 V.S.A. § 6089(c).

*An argument not raised below is not preserved for review by the Vermont Supreme Court. *In re: Eric and Geraldine Cota*, No. 2005-120 (unpublished mem.)(Vt. 2006)(citing 10 V.S.A. § 6089(c); *In re: White*, 172 Vt 335, 343 (2001)).

827. Remand / Further Review or Action / Refined or new findings or conclusions

* There was no abuse of discretion by the Board on remand when it refined its preremand findings

and conclusions and added new findings and conclusions. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 297 (1998).

* Where Supreme Court remands permit to Board for new hearing, Board must, in fairness to parties, promptly hold such hearing. *Re: Lawrence White*, #1R0391-8-EB (Remand), MOD (1/17/02). [EB #689]

* On remand from Supreme Court, Board dismissed for lack of prosecution, based on permittee's express intention not to participate in any further Board proceedings and his failure to meet filing deadlines; permit that had been subject of the Court appeal is allowed to stand. *Re: Lawrence White*, #1R0391-8-EB (Remand), MOD (1/17/02). [EB #689]

* By not participating in Board proceedings on remand, permittee cannot take advantage of Supreme Court success; status of permitted operations are as if no appeal had been taken. *Re: Lawrence White*, #1R0391-8-EB (Remand), MOD (1/17/02). [EB #689]

* Original paragraph 37 deleted and replaced with paragraph noting that the lower court's imposition of a permit condition was adequately supported by testimony, and thus, the condition imposed by the court "was a reasonable exercise of the court's police power and adequately addressed the concerns under Criterion 8." *Citing* 10 V.S.A. § 6087(b); *In re Denio*, 158 Vt. at 240, 608 A.2d at 1172 (1992). [In re North East Materials Group, LLC](#), 2017 VT 43 Motion for Reargument Denied, Decision Revised, at 1-2 (9/22/2017)

* Portion of original paragraph 38 deleted and substituted with the court affirming the lower court's imposition of the condition, based on the ability of the developer to comply with the condition. [In re North East Materials Group, LLC](#), 2017 VT 43 Motion for Reargument Denied, Decision Revised, at 2 (9/22/2017)

828. Standard of Review

* Challenges to the findings and conclusions of the Environmental Division are limited and must overcome a deferential standard of review. *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 8 (Vt. Oct. 1, 2016); *see In re Route 103 Quarry*, 2008 VT 88, ¶ 4, 184 Vt. 283, 958 A.2d 694.

* Court defers to Environmental Division's expertise in matters of land-use permitting and its conclusions on a proposed project's environmental impacts. Conclusions will be upheld absent an abuse of discretion, provided that conclusions are supported by factual findings. *In re Lathrop L.P.*, 2015 VT 49, ¶ 75.

* Environmental Division's decision to admit or exclude evidence is highly discretionary and will be reversed only where discretion has been abused or withheld and prejudice has resulted. *In re Lathrop L.P.*, 2015 VT 49, ¶ 90 (citation omitted).

* The Vermont Supreme Court employs a *de novo* standard for questions of law when reviewing a decision from a part of the judicial branch, and where the Court is "not reviewing a decision by an agency charged with promulgating and interpreting its own rules." *In re SP Land Co., LLC Act 250*

Land Use Permit Amendment, 2011 VT 104, ¶ 13 ---A.3d--- (Vt 2011) (quoting *In re Village Assocs. Act 250 Land Use Permit*, 2010 VT 42A, ¶ 7 n.2, 188 Vt. 113, 998 A2d 712).

* In considering arguments on the merits, Court applies “a deferential standard of review.” *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶7 (2007), citing *In re EHV-Weidmann Indus., Inc.*, 173 Vt. 581, 582 (2002) (mem.).

* Court approaches its review of administrative agency action with a gingerly step. *In re Agency of Administration*, 141 Vt. 68, 74 (1982).

*We review the Environmental Division’s “interpretation of zoning ordinances and findings of fact for clear error.” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 16 (10/26/12) (citing *Armitage*, 2006 VT 113, ¶ 3).

*“We uphold legal conclusions by the Environmental Division that are reasonably supported by the findings.” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 16 (10/26/12) (citing *In re Eastview at Middlebury, Inc.*, 2009 VT 98, ¶ 10, 187 Vt. 208, 992 A.2d 1014).

*“We will overturn (Environmental Division’s) factual findings (with respect to the Act 250 permit) only where the appellant shows ‘that there is no credible evidence to support them.’” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 30 (10/26/12) (Citing *In re Entergy Nuclear Vt. Yankee Discharge Permit 3-1199*, 2009 VT 124, ¶ 15, 187 Vt. 142, 989 A.2d 563 (quoting *In re Miller Subdivision Final Plan*, 2008 VT 74, ¶ 13, 184 Vt. 188, 955 A.2d 1200)).

*Where a town’s regulations provided no requirement that a certain construct (a tandem driveway) need meet the specifications of another type of construct (a parking lot), the Environmental Court’s decision that the first construct was in line with the town’s regulations despite the fact that it did not meet the specifications of the second type of construct was not clearly erroneous, and the Supreme Court defers to the lower court’s decision. *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 18 (10/26/12).

*“We have held that a ruling on a motion to continue involves trial court discretion and will be overturned only if the discretion is “exercised upon grounds clearly untenable, or to an extent clearly unreasonable.” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 36 (10/26/12) (citing *Kokoletsos v. Frank Babcock & Son*, 149 Vt. 33, 35, 538 A.2d 178, 179 (1987)).

**In re Stowe Highlands Merger/Subdivision Application*, 2013 VT 4 at ¶9 (1/11/13) (citing *In re Stowe Highlands Resort PUD to PRD Application*, 2009 VT 76, ¶7).

* Supreme Court reviews the Environmental Court's factual findings for clear error and its findings of law de novo. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 17 (April 13, 2018), citing *In re Vill. Assocs. Act 250 Land Use Permit*, 2010 VT 42, ¶ 7, 188 Vt. 113, 998 A.2d 712.

* Supreme Court will determine that a court's factual findings are clearly erroneous in limited circumstances--"only if they are supported by no credible evidence that a reasonable person would rely upon to support the conclusions." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 17 (April

13, 2018), Quoting *In re Zaremba Gr. Act 250 Permit*, 2015 VT 88, ¶ 6, 199 Vt. 538, 127 A.3d 93.

828.1 Presumption of validity of Board action

* Although court approaches the examination of actions of an administrative body under a presumption of validity, adjudicatory functions of an administrative body are reviewed with special vigilance. *In re Vermont Verde Antique International Inc.*, 174 Vt. 208, 211 (2002); see, *In re Agency of Administration.*, 141 Vt. 68, 75 (1982) ("Where [an administrative body] exercises its adjudicative function we will be especially vigilant, since proper utilization of the judicial process is unrelated to expertise in any particular subject matter.").

* Rulings of administrative agencies on party status in Act 250 proceedings "are infused with a presumption of validity and cannot be overcome unless clear and convincing evidence is presented." *In Re Chittenden SWD*, 162 Vt. 84, 90 (1994), quoting *In re Great E. Bldg. Co.*, 132 Vt. 610, 612 (1974).

* In reviewing act of administrative agency, court begins with presumption that the act is correct and that the orders and decisions of the agency are valid and reasonable. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 292 (1998); *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610 (1998)(mem.); *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 638 (1984); *In re Burlington Housing Auth.*, 143 Vt. 80, 83 (1983).

* The Board's application of Act 250 to a specific project is entitled to a presumption of validity. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 283 (1995); *In re Burlington Hous. Auth.*, 143 Vt. 80, 83 (1983).

* The presumption in favor of the validity of the administrative determination is a strong one, and clear and convincing evidence is required to overcome it. *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986); *In re Burlington Housing Auth.*, 143 Vt. 80, 83 (1983).

828.2 Deference given to Board

* Level of deference afforded to jurisdictional decisions depends on the character of the decision; fact-intensive jurisdictional determinations that rely on agency expertise are generally given more deference than purely legal determinations. *In re Green Crow Corp.*, 2007 VT 137 ¶ 13 (12/14/07).

* Supreme Court is "not bound by, and, indeed, do[es] not defer to, Environmental Board and Environmental Court precedent that conflicts with [their] established vested rights doctrine and the principles that underlie it." *Times and Seasons, LLC*, 2011 VT 76, ¶ 15 (7/8/11) (citing *In re Village Assocs. Act 250 Land Use Permit*, 2010 VT 42A, ¶ 7, ___ Vt. ___, 998 A.2d 712).

* Board's determination of whether conditions on permit for high-elevation logging may attach to low-elevation activities is not entitled to great deference because it is not fact bound. *In re Green Crow Corp.*, 2007 VT 137 ¶ 13 (12/14/07).

* Court "recognize[s] that the Board has 'special expertise' to determine whether a project falls within Act 250 jurisdiction and will uphold the Board's decision so long as it is not clearly erroneous." *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶7 (2007); *In re Commercial Airfield*, 170 Vt. 595, 595 (2000)(mem.) (Court has "often recognized the Board's special expertise in determining . . . the scope of its authority") (quoting *In re Stokes Communications Corp.*, 164 Vt. 30, 35 (1995)); and see *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610 (1998)(mem.); *In re Taft Corners Associates, Inc.*, 160 Vt. 583, 590 (1993); *In re Killington, Ltd.*, 159 Vt. 206 (1992).

* When reviewing a decision of the Environmental Board, this Court gives deference to the Board's "interpretations of Act 250 and its own rules, and to the Board's specialized knowledge in the environmental field." *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 4 (6/26/03).

* Resolution of question of what qualifies as "large scale development," as a matter of statutory interpretation, is committed to the Board as the agency charged with the responsibility to execute the Act and deemed to have expertise in that regard. *In re BHL Corp.*, 161 Vt. 487, 491 (1994), citing *In re Killington, Ltd.*, 159 Vt. 206, 210 (1992).

* The Board's decisions as to matters within its jurisdiction are treated with great deference. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 4 (6/26/03); *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 532 (2000); *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 292 (1998); *In re Wal*Mart Stores, Inc.*, 167 Vt. 75, 79 (1997); *In re MBL Associates*, 166 Vt. 606, 607 (1997); *In re Killington, Ltd.*, 159 Vt. 206, 210 (1992).

* "In numerous cases, [the Supreme Court has] recognized the specialized expertise of the Board in determining whether it has jurisdiction over a particular development proposal." *In re John Rusin*, 162 Vt. 185, 188 (1994), quoting *In re Denio*, 158 Vt. 230, 235 (1992); accord, *In re Stokes Communications Corp.*, 164 Vt. 30, 35 (1995); *In re Taft Corners Assocs.*, 160 Vt. 583, 590 (1993); *In re H.A. Manosh Corp.*, 147 Vt. 367, 370 (1986) (the Court will "defer to the Board's expertise").

* Court defers to Board's specialized knowledge in the environmental field. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 628 (1993).

* Decisions made within the expertise of an administrative agency are presumed to be correct, valid and reasonable, and Court will normally defer to its determinations. *In re Denio*, 158 Vt. 230, 239 (1992); *In re Burlington Housing Auth.*, 143 Vt. 80, 83 (1983); *In re Agency of Administration*, 141 Vt. 68, 74 (1982).

* In appeals from actions of administrative bodies, Court applies a "deferential standard of review to claims of insufficiency of evidence." *In re Greg Gallagher*, 150 Vt. 50, 52 (1988).

* Bathed in a singleness of concern and anointed with an aura of expertise, administrative actions have traditionally kept reviewing courts an arm's length away. *In re Agency of Administration*, 141 Vt. 68, 74 (1982).

828.2.1

Discretionary matters

* Court will uphold WFP's decision absent a showing that the Panel " withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent." *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998), *In re Chittenden Recycling Servs.*, 162 Vt. 84, 88 (1994).

* For this Court to reverse the actions of the Board with regard to a matter committed to its discretion, "there must be shown an abuse of discretion which caused prejudice." *In re Greg Gallagher*, 150 Vt. 50, 52 (1988); *In re Lunde Constr. Co.*, 139 Vt. 376, 379 (1981) (discretionary rulings are always subject to the limitations that such discretion not be withheld or abused).

* Board's failure to give parties opportunity to present evidence is abuse of discretion. *In re Greg Gallagher*, 150 Vt. 50, 53 (1988).

* Abuse of discretion is defined as the purported exercise of discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. *In re Lunde Constr. Co.*, 139 Vt. 376, 379 (1981).

* In determining the application of limits on discretion, the statutory objectives are of first consideration. *In re Lunde Constr. Co.*, 139 Vt. 376, 379 (1981).

* Since the use of the discretionary power is limited by statutory objectives, a review of the exercise of discretionary power must reach the question of whether they were sufficiently taken into account. *In re Lunde Constr. Co.*, 139 Vt. 376, 379 (1981).

828.3 Evidence

* Court reviews evidentiary rulings under V.R.E. 401 for an abuse of discretion. *In re White*, 172 Vt. 335, 348 (2001).

* Court applies a deferential standard of review where the sufficiency of the evidence is challenged on review. *In re McShinsky*, 153 Vt. 586, 589 (1990); 10 V.S.A. § 6089(c).

* Where there is conflicting evidence, resolution of the conflict lies with the Board as the trier of fact. *In re Quechee Lakes Corp.*, 154 Vt. 543, 554-55 (1990); *In re McShinsky*, 153 Vt. 586, 589 (1990); *In re Barker Sargent Corp.*, 132 Vt. 42, 45 (1973) (resolution of controverted issues of fact is the responsibility of the trier of the facts subject only that such determination had appropriate evidentiary support).

* On appeal, evidence is viewed in a light most favorable to the prevailing party and modifying evidence is excluded. *In re Hawk Mountain Corp.*, 149 Vt. 179, 183 (1988).

* Court presumes that all evidence bearing upon issues considered by the trier was heard with impartial patience and adequate reflection. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 513 (1975).

* A decision contrary to the desires of a party is not inconsistent with the proposition that the evidence proffered by that party was given its natural probative effect. *In re Wildlife Wonderland*,

Inc., 133 Vt. 507, 513 (1975).

828.3.1 Weight/sufficiency of the evidence

* The weight and sufficiency of the evidence is for the determination of the Board, not the Court. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 297 (1998); *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610 (1998) (mem.); *In re Denio*, 158 Vt. 230, 239 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 554-55 (1990); *In re Barker Sargent Corp.*, 132 Vt. 42, 48 (1973).

* Where the sufficiency of the evidence is questioned on appeal from a decision of the Board, Court employs a deferential standard of review. *In Re Petition of Halnon*, 174 Vt. 514, 517 (2002); *In re Sherman Hollow, Inc.*, 160 Vt. 627, 627 (1993); *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993); *In re Quechee Lakes Corp.*, 154 Vt. 543, 554 (1990); citing *In re Gallagher*, 150 Vt. 50, 52 (1988); 10 V.S.A. § 6089(c).

* Court will not reweigh conflicting evidence, reassess the credibility or weight to be given certain testimony, or determine on its own whether the factual decision is mistaken. *In re Quechee Lakes Corp.*, 154 Vt. 543, 555 (1990); *In re McShinsky*, 153 Vt. 586, 589-90 (1990), quoting *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975); and see *In re Hawk Mountain Corp.*, 149 Vt. 179, 183 (1988).

828.3.2 “Substantial evidence”

* "Substantial evidence" is evidence properly before the Board that is relevant and which a reasonable person might accept as adequate to support a conclusion. *In Re Petition of Halnon*, 174 Vt. 514, 517 (2002); *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610 (1998); *In re John Rusin*, 162 Vt. 185, 188 (1994); *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 633 (1993); *In re Denio*, 158 Vt. 230, 236 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 554 (1990); *In re McShinsky*, 153 Vt. 586, 589 (1990); see 10 V.S.A. § 6089(c).

* Where record discloses substantial evidence in support of Board's finding, no error is found. *In re Barker Sargent Corp.*, 132 Vt. 42, 47 (1973).

828.3.3 Credibility of witness

* It is up to the court to assess the evidence and discern the credibility of the witnesses. *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 ¶ 30 (01/17/14)(citing *In re McShinsky*, 153 Vt. 586, 591 (1990)).

* Trial court determines witness' credibility, and Supreme Court will not disturb findings unless clearly erroneous. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶¶15 – 16

* It is the Environmental Court's prerogative to assess the credibility of witnesses and weigh the evidence." *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 4 (2008) (quoting *In re Shantee Point, Inc.*, 144 Vt. 248 (2002)).

* It is the Board's job to judge the credibility of witnesses. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 629 (1993).

* The trier of fact has the right to believe all of the testimony of any witness, or to believe it in part and disbelieve it in part, or to reject it altogether. *In re Quechee Lakes Corp.*, 154 Vt. 543, 555 (1990); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975).

* Court does not reassess the credibility to be given to particular testimony. *In re Hawk Mountain Corp.*, 149 Vt. 179, 183 (1988); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975).

828.3.4

Errors in evidentiary rulings (see [381.6](#))

* Error in the exclusion of evidence leading to prejudice is grounds for a new hearing. *In re White*, 172 Vt. 335, 347 (2001); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518-19 (1975) (where claim is that error was committed when Board considered allegedly improper matters, applicant it has the burden to show prejudice).

* Court reviews evidentiary rulings under V.R.E. 401 for an abuse of discretion. *In re White*, 172 Vt. 335, 348 (2001).

* The Supreme Court does not owe deference to the Commission regarding its findings of fact when conducting its own evidentiary hearing and will defer to the trial court's findings of fact unless they are clearly erroneous. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 27 (April 13, 2018), citing *Zaremba Gr. Act 250 Permit*, 2015 VT 88, 16.

* The Environmental Division's mere disagreement with ANR's interpretation of "floodway and floodway fringe" is insufficient to allow the lower court to substitute its own interpretation, especially in light of the broad statutory authority given to the ANR in applying those terms. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 22 (April 13, 2018), citing *Plum Creek Me. Timberlands, LLC v. Vt. Dept. of Forests, Parks & Rec.*, 2016 VT 103, ¶ 30 203 Vt. 197, 155 A.3d 694.

* Supreme Court holds that the Environmental Division erred when it substituted its own judgement in the place of ANR's by determining that the methodology applied by Korrow's expert, or the methodology of the court, was superior to that employed by ANR. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 24 (April 13, 2018).

* "Absent a violation of due process or evidence that the agency decision was arbitrary and capricious, the [lower] court should have deferred to the agency's interpretation of the terms at issue and applied them when assessing the project." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 25 (April 13, 2018).

* "The fact that the court disagreed with the ANR's assessment is insufficient to demonstrate the ANR's methodology was unreasonable." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, n.2 (April 13, 2018).

* “ANR's methodology for calculating the fluvial erosion hazard area was an established practice, not arbitrarily or capriciously applied to the Korrow project; ANR provided ample support, including testimony, maps, and exhibits, to support its interpretation of the Act 250 "floodway." The ANR was well within its statutory bounds when calculating the "floodway" here, and its authority should not have been usurped by the court.” *In re Korrow Real Estate*, 2017-133, 2018 VT 39, n.2 (April 13, 2018).

828.4 Findings of Fact

* Trial court’s findings may not be disturbed because they are contradicted by substantial evidence where credible evidence otherwise supports them. *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶17

* The Vermont Supreme Court “will not disturb a trial court’s factual findings unless, taking them in the light most favorable to the prevailing party, they are clearly erroneous.” *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶¶ 4 and 17 (2008) (quoting *In re Shantee Point, Inc.*, 144 Vt. 248 (2002)).

* “We will accept the Board's findings unless the appealing party demonstrates that they are clearly erroneous.” *In re Woodford Packers, Inc.*, 2003 VT 60 ¶17 (6/26/03); *In re Agency of Administration*, 141 Vt. 68, 82 (1982).

* On appeal, Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. 10 V.S.A. § 6089(c); *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 532 (2000); *In re Munson Earth Moving Corp.*, 169 Vt. 455, 462 (1999); *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610 (1998); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 80 (1997); *In re Stokes Communications Corp.*, 164 Vt. 30, 39 (1995); *In re John Rusin*, 162 Vt. 185, 188 (1994); *In re BHL Corp.*, 161 Vt. 487, 490 (1994); *In re Sherman Hollow, Inc.*, 160 Vt. 627, 627 (1993); *In re Killington, Ltd.*, 159 Vt. 206, 210 (1992); *In re Denio*, 158 Vt. 230, 236 (1992), *In re Quechee Lakes Corp.*, 154 Vt. 543, 554 (1990); *In re Southview Associates*, 153 Vt. 171, 177-78 (1989) (even if the record contains contradictory evidence); *In re Greg Gallagher*, 150 Vt. 50, 52 (1988); *In re Hawk Mountain Corp.*, 149 Vt. 179, 183 (1988); *In re R.E. Tucker, Inc.*, 149 Vt. 551, 557 (1988); *In re Spear Street Assoc.*, 145 Vt. 496, 499 (1985); *In re Agency of Administration*, 141 Vt. 68, 74 (1982); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975); *In re Barker Sargent Corp.*, 132 Vt. 42, 47 (1973).

* Court reviews the Board's findings of fact to determine whether they are based on relevant and substantial evidence properly before the Board. *In re Munson Earth Moving Corp.*, 169 Vt. 455, 462 (1999); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 80 (1997).

* Where Board's findings and conclusions are supported by the evidence, Court will not disturb the Board's determination. *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 297 (1998); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 80 (1997) (Court will affirm the Board's findings if based on evidence properly before the Board that is relevant and that a reasonable person might accept as adequate to support a conclusion); *In re Denio*, 158 Vt. 230, 236 (1992).

- * Board's factual finding must be upheld on appeal, absent compelling indications of error. *In re Vitale*, 151 Vt. 580, 583-84(1989); see *Committee to Save the Bishop's House, Inc. v. MCHV, Inc.*, 137 Vt. 142, 151(1979).
- * Board may not avoid a searching judicial review of its decision by labeling its determination a finding of fact. *In re Vitale*, 151 Vt. 580, 584 (1989).
- * Court will reverse even findings of fact by the Board when such findings are clearly erroneous. *In re Vitale*, 151 Vt. 580, 584 (1989); *In re Spear Street Assoc.*, 145 Vt. 496, 499 (1985).
- * Court does not determine on its own whether the factual decision is mistaken. *In re Hawk Mountain Corp.*, 149 Vt. 179, 183 (1988); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975).
- * Failure to object on appeal to Board's findings of fact makes such findings controlling. *In re Orzel*, 145 Vt. 355, 358 (1985); *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 638 (1984) (where party does not appeal trial court's findings, they are controlling and will be read to support the judgment if they reasonably may be).
- * Supreme Court finds Korrow's project is a "development" subject to Act 250 because it is a commercial project constructed on a 6.5-acre parcel in a municipality that has not adopted permanent zoning and subdivision bylaws. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 3 (April 13, 2018).
- * Supreme Court reviews Environmental Court's findings of fact--whether the project was within a "floodway" and/or on a "shoreline"--for clear error, and its legal conclusions--whether the project complied with Criteria I(D) and I(F) in light of its placement--de novo. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 18 (April 13, 2018).
- * Supreme Court will determine that a court's factual findings are clearly erroneous in limited circumstances--"only if they are supported by no credible evidence that a reasonable person would rely upon to support the conclusions." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 17 (April 13, 2018), Quoting *In re Zaremba Gr. Act 250 Permit*, 2015 VT 88, ¶ 6, 199 Vt. 538, 127 A.3d 93.
- * Supreme Court reviews the Environmental Court's factual findings for clear error and its findings of law de novo. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 17 (April 13, 2018), citing *In re Vill. Assocs. Act 250 Land Use Permit*, 2010 VT 42, ¶ 7, 188 Vt. 113, 998 A.2d 712.

828.4.1

Board, not appellate court, is the trier of fact

- * Appellate court is not fact-finding agency. *In re Southview Associates*, 153 Vt. 171, 178 (1989)
- * Resolution of controverted issues of fact is the responsibility of the trier of the facts. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975); *In re Barker Sargent Corp.*, 132 Vt. 42, 45 (1973) (subject only that such determination had appropriate evidentiary support).
- * Board is the trier of the fact. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975); *In re Barker*

Sargent Corp., 132 Vt. 42, 46 (1973).

828.5 Conclusions of Law

* "On appeal, an agency's conclusions of law will be upheld if they are fairly and reasonably supported by the findings of fact." *In re Barlow*, 160 Vt. 513, 522 (1993), quoting *In re Orzel*, 145 Vt. 355, 359 (1985).

* Court will affirm the Board's conclusions of law, provided they are rationally derived from a correct interpretation of the law and findings of fact based on substantial evidence. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 532 (2000); *In re Commercial Airfield*, 170 Vt. 595, 595 (2000)(mem.); *In re Munson Earth Moving Corp.*, 169 Vt. 455, 462 (1999); *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 297 (1998); *In re Wal*Mart Stores, Inc.*, 167 Vt. 75, 80 (1997); *In re MBL Associates*, 166 Vt. 606, 606 (1997); *In re John Rusin*, 162 Vt. 185, 188 (1994); *In re BHL Corp.*, 161 Vt. 487, 490 (1994); *In re Killington, Ltd.*, 159 Vt. 206, 210 (1992); *In re Southview Associates*, 153 Vt. 171, 178 (1989).

* Board may not avoid a searching judicial review of its decision by labeling its determination a finding of fact. *In re Vitale*, 151 Vt. 580, 584 (1989).

* Although findings of fact of an administrative agency will not be set aside unless clearly erroneous, conclusions of law are not so protected. *In re Agency of Administration*, 141 Vt. 68, 75 (1982).

* Supreme Court reviews the Environmental Court's factual findings for clear error and its findings of law de novo. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 17 (April 13, 2018), citing *In re Vill. Assocs. Act 250 Land Use Permit*, 2010 VT 42, ¶ 7, 188 Vt. 113, 998 A.2d 712.

* Supreme Court reviews the Environmental Court's legal conclusions will be upheld "if they are reasonably supported by the findings." *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 17 (April 13, 2018), Quoting *In re Zaremba Gr. Act 250 Permit*, 2015 VT 88, ¶ 6, 199 Vt. 538, 127 A.3d 93 (quotation omitted).

* Supreme Court reviews Environmental Court's findings of fact--whether the project was within a "floodway" and/or on a "shoreline"--for clear error, and its legal conclusions--whether the project complied with Criteria I(D) and I(F) in light of its placement--de novo. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 18 (April 13, 2018).

828.6 Interpretations

828.6.1 of Act 250 (see [25](#))

* The Supreme Court's review of whether the Environmental Court's determination as to whether a proposed application would adversely affect surrounding lands is deferential. *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 4 (2008) (quoting *In re Shantee Point, Inc.*, 144 Vt. 248 (2002) (citing to *In re John A. Russell Corp.*, 176 Vt. 520 (2003) (mem.)). See also, *Sec'y, Vt. Agency of Natural Res. v. Handy Family Enters.*, 163 Vt. 476 (1995) (according deference to

determinations made within expertise of environmental judge); *In re Denio*, 158 Vt. 230 (1992) (presuming validity of decisions made within expertise of Environmental Board); *In re Nehemiah Assocs.*, 168 Vt. 288 (1998) (“We accord deference to the Environmental Board’s interpretations of Act 250, its own rules, and to the Board’s specialized knowledge in the environmental field.”)

* When reviewing Board interpretations of Act 250 and of Board's own rules, court accords Board a high level of deference. *In re Real Audet*, 2004 VT 30, ¶ 9 (4/1/04); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 4 (6/26/03); *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 532 (2000); *In re Commercial Airfield*, 170 Vt. 595, 595 (2000)(mem.); *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 292 (1998); *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 79 (1997); *In Re Chittenden SWD*, 162 Vt. 84, 90 (1994); *Vermont Agency of Natural Resources v. Duranleau*, 159 Vt. 233, 237 (1992); *In re Gerald Costello Garage*, 158 Vt. 655 (1992); *In re Killington, Ltd.*, 159 Vt. 206, 210 and 212 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 549 (1990); *In re Southview Associates*, 153 Vt. 171, 175-76 (1989); *In re Vitale*, 151 Vt. 580, 582-83 (1989); *In re Ross*, 151 Vt. 54, 58 (1989); *In re Eastland, Inc.*, 151 Vt. 497, 499 (1989); *In re Spear Street Associates*, 145 Vt. 496, 499 (1985).

* Applying a deferential standard of review, Court has upheld a number of Environmental Board interpretations of Act 250. *In re Eastland, Inc.*, 151 Vt. 497 (1989); *In re Vitale*, 151 Vt. 580, 582-83 (1989); *In re Spear Street Associates*, 145 Vt. 496, 500-01 (1985); *In re Orzel*, 145 Vt. 355, 361 (1985).

* Absent compelling indication of error, court will defer to the Board's interpretation of Act 250. *In re Real Audet*, 2004 VT 30, ¶ 9 (4/1/04); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 4 (6/26/03); *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 292 (1998); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995); *In Re Chittenden SWD*, 162 Vt. 84, 90 (1994); *In re John Rusin*, 162 Vt. 185, 188 (1994); *In re BHL Corp.*, 161 Vt. 487, 490 (1994); *In re Molgano*, 163 Vt. 25, 29 (1994); *In re Killington, Ltd.*, 159 Vt. 206, 210 (1992); *In re Spear Street Associates*, 145 Vt. 496, 502 (1985).

* Without an explicit legislative mandate, Board can rely on its own reasonable interpretation of the Act and its rules in formulating a ruling. *In re BHL Corp.*, 161 Vt. 487, 491 (1994), citing *In re Vitale*, 151 Vt. 580, 582-83 (1989).

* The vast majority of Act 250 appeals involve jurisdictional issues, and in resolving them, we have accorded "a high level of deference" to the interpretation of Act 250 by the Board. *In re Denio*, 158 Vt.230, 235 (1992), citing *In re Vitale*, 151 Vt. 580, 582 (1989); accord, *In re Taft Corners Associates, Inc.*,160 Vt. 583, 590 (1993).

* "It is a 'venerable principle that construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" *In re Orzel*, 145 Vt. 355, 361 (1985), quoting *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 150-51 (1979), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *In re Eastland, Inc.*, 151 Vt. 497, 499 (1989); *In re Agency of Administration*, 141 Vt. 68, 74-75 (1982).

* Supreme Court finds the Environmental Division owed deference to ANR's methodology for complex calculation and interpretation of the terms "floodway" and "floodway fringe" in conducting its evidentiary hearing, because ANR was given broad statutory authority to define those terms. *In re Korrow Real Estate*, 2017-133, 2018 VT 39, ¶ 22 (April 13, 2018).

828.6.2 of Board Rules (see [32](#))

* When reviewing a decision of the Environmental Board, this Court gives deference to the Board's "interpretations of Act 250 and its own rules, and to the Board's specialized knowledge in the environmental field." *In re Real Audet*, 2004 VT 30, ¶ 9 (4/1/04); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 4 (6/26/03).

* Absent compelling indication of error, court will defer to and sustain Board's interpretation of its own duly promulgated rules. *In re Real Audet*, 2004 VT 30, ¶ 9 (4/1/04); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶ 4 (6/26/03); *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 292 (1998); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 79 (1997); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995); *In re John Rusin*, 162 Vt. 185, 188 (1994); *In re BHL Corp.*, 161 Vt. 487, 490 (1994); *In re Killington, Ltd.*, 159 Vt. 206, 210 and 212 (1992); *ANR v. Duranleau*, 159 Vt. 233, 237 (1992); *In re Vitale*, 151 Vt. 580, 582-83 (1989); *Stonybrook Condominium Owners Association*, DR #385, FCO at 13 (5/18/01).

* Court employs a deferential standard of review of an agency's interpretation of its own regulations. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 532 (2000); *In re Nehemiah Associates, Inc.*, 168 Vt. 288, 292 (1998); *In re Wal*Mart Stores, Inc.*, 167 Vt. 75, 79 (1997); *In re Stokes Communications Corp.*, 164 Vt. 30, 39 (1995); *In re BHL Corp.*, 161 Vt. 487, 490 (1994); *Conservation Law Foundation, et al. v. Burke*, 162 Vt.115, 121 (1994); *In re Verburg*, 159 Vt. 161, 165 (1992).

* Court's deferential review of Board interpretations "does not equate with mere judicial passivity in determining the propriety of Board 'interpretations' of its own rules," but is guided by the intent of the Legislature, as evidenced by the statutes themselves. *In re Real Audet*, 2004 VT 30, ¶ 9 (4/1/04); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 80 (1997); *In re Vitale*, 151 Vt. 580, 583 (1989); *In re Agency of Administration*, 141 Vt. 68, 80 (1982) (reversing Board's interpretation of terms "plan" and "construction of improvements" where the demolition of a building was not tied to any plan for construction).

* Agency's interpretation of its own regulations may be overcome only by compelling indications of error. *Conservation Law Foundation, et al. v. Burke*, 162 Vt.115, 121 (1994); *In re Verburg*, 159 Vt. 161, 165 (1992); *Rogers v. Watson*, 156 Vt. 483, 489 (1991).

* Despite court's deference to the Agency's interpretation of this regulation, the structure of the whole regulation precludes acceptance. *Conservation Law Foundation, et al. v. Burke*, 162 Vt.115, 122 (1994).

* Court accords substantial weight to an agency's interpretation of its own rules. *In re Barlow*, 160 Vt. 513, 521 (1993); *In re Killington, Ltd.*, 159 Vt. 206 (1992); *In re Quechee Lakes Corp.*, 154 Vt. 543, 549 (1990).

* "So long as the substantive requirements of the enabling statute are not compromised, the regulations are valid," and Court will defer to the Board's expertise. *In re H.A. Manosh Corp.*, 147 Vt.

367, 370 (1986), quoting *In re Orzel*, 145 Vt. 355, 361 (1985).

* "Where an agency's enabling legislation authorizes it to promulgate rules and regulations to carry out its statutory responsibilities, the validity of those rules and the interpretations which the agency gives to them, will be upheld if they are reasonably related to the purposes of the enabling legislation." *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 638 (1984); *Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont*, 137 Vt. 142, 150 (1979); *Stonybrook Condominium Owners Association*, DR #385, FCO at 13 (5/18/01).

* Court will uphold the validity of an administratively adopted rule where it can do so without compromising the intent of the statute which authorized rule. *In re Agency of Administration*, 141 Vt. 68, 74 (1982).

* Where an ambiguous term in an administrative rule can be construed to bring the rule within statute's requirements, and avoid the necessity for striking it, court will do so. *In re Agency of Administration*, 141 Vt. 68, 81 (1982).

829. Standing (see [V\(F\)](#))

* Because standing question goes to Board's jurisdiction, it is a threshold question that must normally be reviewed prior to the consideration of substantive questions. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.).

* Mere speculation about the impact of some generalized grievance, however, is not a sufficient basis to find standing. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, MOD at 7 (4/29/03) [WFP #40], citing *Re: Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982).

* The "injury" to the appellant's interest must be concrete and particularized, not an injury affecting the common rights of all persons. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, MOD at 7 (4/29/03) [WFP #40], citing *Parker v. Town of Milton*, 169 Vt. 74, 78 (1998).

* Motion to Dismiss DR Petition granted where petitioner lacks standing by failing to show how the JO may affect his individual interests; all of the 'impacts' that Petitioner identified are general in nature and do not involve *direct* impacts on his property. *Stone Cutter's Way / Winooski East Waterfront Redevelopment Project*, DR #391, MOD at 8 (Jun. 1, 2001), *appeal dismissed*, *In re Stone Cutter's Way/Winooski East Waterfront Redevelopment Project*, No. 2001-323 (Vt. 11/28/01). [DR #391]

830. Transcripts / Record on Appeal

* Board found no prejudice from lack of audiotapes from hearing where no appeal filed. VRAP 10(c) governs in the event of an appeal. *Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-3-EB, MOD on Motions to Alter at 3-4 (6/9/2003). [EB#792]

* In order for judicial review to proceed on the record, it is critical that the court have before it the

full agency record that was before agency at the time of decision. *Conservation Law Foundation, et al. v. Burke*, 162 Vt.115, 127 (1994).

* The record for review is not necessarily limited to that submitted by the agency; it " 'consists of all documents and materials directly or indirectly considered by agency decision-makers.' " *Conservation Law Foundation, et al. v. Burke*, 162 Vt.115, 127 (1994).

* Agency decision must stand or fall on reasons given contemporaneously with decision and not later revision of those reasons. *Conservation Law Foundation, et al. v. Burke*, 162 Vt.115, 128 (1994).

* Where certified statement of the question or questions of law to be reviewed is not in record on appeal, the record is not complete and the precise question or questions for decision are not before the Court. *In re Quechee Lakes Corp.*, 130 Vt. 469, 471 (1972).

* Where record is barren of any evidence or findings of fact on which this appeal can be decided by Supreme Court, case must be remanded to afford an opportunity for the parties to be heard on the issue apparently sought to be resolved. *In re Quechee Lakes Corp.*, 130 Vt. 469, 471 (1972).

* In connection with Supreme Court appeal, appellants filed a motion with Board for an order that no transcripts of Commission and Board hearings are required; motion is denied with regard to transcripts from Commission hearings because the Court may need to review the factual record; since applicants are willing to stipulate to waive the transcripts from the Board's hearing, the issue is moot. *Maple Tree Place Associates*, #4C0775-EB (3/16/89). [EB #413M]

831. Failure to appeal

* Where party does not appeal trial court's findings, they are controlling and will be read to support the judgment if they reasonably may be. *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 638 (1984).

Inadequate briefing

* Inadequately briefed arguments will not be considered by the Court. *In re Ochs*, 2006 VT 122, ¶16 n.2 (Vt. Sup. Ct. 11/27/06); *In re Commercial Airfield*, 170 Vt. 595, 595 n.1 (2000)(mem.); *In re Sherman Hollow, Inc.*, 160 Vt. 627, 628 (1993).

* Court will not search the record for error when not adequately briefed or referenced. *In re Sherman Hollow, Inc.*, 160 Vt. 627, 630 (1993); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 517 (1975).

* "Extraordinary circumstances" (e.g. gross irregularities or such "egregious error" that Court cannot in conscience allow the ruling below to stand) can justify Supreme Court's consideration of an objection not raised below or briefed by the parties. *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 8 (1974).

833. Decisions

* Court will not give controlling effect to unpublished decisions. *In re Barlow*, 160 Vt. 513, 518 (1993).

834. Affirmance / reversal / remand

* Court need not adopt trial court's rationale in affirming its conclusion. *ANR v. Short*, 165 Vt. 277, 281 (1996).

* Where record is barren of any evidence or findings of fact on which this appeal can be decided by Supreme Court, case must be remanded to afford an opportunity for the parties to be heard on the issue apparently sought to be resolved. *In re Quechee Lakes Corp.*, 130 Vt. 469, 471 (1972).

835. Stay

* Stay denied because appeal cannot be rendered moot by pending contested enforcement action, since issues on appeal are broader than those in enforcement action. *In re Treetop Development Company LLC*, No. 2015-168, Entry Order at 3 (4/20/15).

* Motion for emergency stay pending appeal under VRAP 8(a) denied where appellants failed to show that allowing permit to remain in place could cause irreparable injury or that stay would serve the public interest. *In re Route 103 Quarry (Carrara)*, 2006-546, Entry Order at 1 (9/21/07).

*“As the United States Supreme Court held in the leading case of *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), every court has the power “to control the disposition of the causes on its docket.” But, how this best can be done “calls for the exercise of judgment” and the party seeking a stay “must make out a clear case of hardship or inequity in being required to go forward” if there is a possibility that a stay will damage someone else. “Courts disapprove stays . . . when a lesser measure is adequate to protect the moving party’s interests.” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 36 (10/26/12) (citing *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936); *In re Application for Water Rights*, 101 P.3d 1072, 1082 (Colo. 2004)).

*Where parties asked the court for a stay on the ground related to the expenses of a trial, in particular the employment of expert witnesses, the court did not abuse its discretion in allowing a summary judgment proceeding to move forward because the issue before the court was one of law, and the record was generally sufficient to make the decision. *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 37 (10/26/12).

XIII. WASTE FACILITY PANEL

A. General

901. General

* WFPI, not court, has exclusive appellate jurisdiction over Secretary’s rehabilitation determination of 10 V.S.A. § 6605f (f) *Rapid Rubbish Removal, Inc.*, Interim Certification #CA-721-WFP (Remand),

MOD (2/4/98) and FCO (3/18/98). [WFP #35]

* EBR 31(A) motions to alter both denied based on soundness of original decision. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (1/31/97), aff'd, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31M]

* Prehearing Conference Report and Order statement of the issue sustained notwithstanding appellant's objection where statement of issue was virtually identical to appellant's notice of appeal. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96), aff'd, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31]

* Whether project complied with Indirect Discharge Rule § 14-404, Aquatic Permitting Criteria, was not an issue since this section only applies to sewage waste disposal projects, and project was the disposal of non-sewage waste; §14-402, which is the specific non-sewage waste disposal provision omits the Aquatic Permitting Criteria. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96), aff'd, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31]

* Before subpoena is issued, the information sought must not be otherwise available; subpoena will issue for: (i) testimony, upon a demonstration that the sought after testimony is reasonably likely to be relevant; or (ii) production of documents, upon a demonstration that the sought after documents are (a) reasonably likely to be relevant, or (b) significantly likely to lead to the discovery of other relevant evidence. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96), aff'd, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31]

* Statement that the information sought is "not to my knowledge available" was insufficient evidence of a reasonable search of the publicly available records. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96), aff'd, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31]

* Before WFP will issue an access order, the person seeking the order must demonstrate that the information sought by the testing is necessary, reasonable in scope, and relevant to the issues on appeal. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96), aff'd, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31]

* Panel operates under the Board Rules to the extent that the Rules are consistent with the Panel's enabling legislation. *Rapid Rubbish Removal, Inc.*, #CA-721-WFP (6/12/97). [WFP #29]; *Putney Paper Company, Inc.*, #WH-600-WFP (2/20/96), aff'd, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998); *Dorr Septic Systems Co.*, #I9220-WFP, MOD, (1/29/93). [WFP #16M]

* Failure to specifically reference a given statutory or regulatory provision does not bar provision from being an issue on appeal provided notice of appeal discusses the subject matter covered by the particular provision with reasonable specificity. *Putney Paper Company, Inc.*, #WH-600-WFP (1/10/96), aff'd, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998).

* In general, a project which merely involves the excavation of soil does not trigger WFP jurisdiction. *Putney Paper Company, Inc.*, #2W0436-7-EB (11/3/95). [EB #621]

- * Advisory opinions (issued before March 15, 1995) and not appealed by appellant are presumed to be correct in appeal proceeding. *C.V. Landfill, Inc.*, #AP-92-025-WFP and #5W1150-WFP (6/14/95).
- * Non-lawyer may represent appellants before Panel provided appellants make written designation of non-lawyer as their representative. *Town of Royalton*, #19426-WFP (4/18/95).
- * Conducting discovery is denied because of an interest in eliminating additional expense and delay, and for providing efficiency in administrative proceedings before the panel. *Vicon Recovery Systems Inc., and Sunderland Waste Management Inc.*, #8B0301-2-WFP, MOD, (4/19/91). [WFP #2]

902. Authority

- * WFP has no authority to invalidate EPA or ANR regulations. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, FCO at 18 (10/24/03). [WFP #40]; *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 3 (10/6/99).
- * WFP's authority is the same as that granted to the Secretary of ANR by the applicable laws and regulations. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, FCO at 18 (10/24/03). [WFP #40]; *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (11/8/96), *aff'd, In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31]
- * WFP has exclusive jurisdiction to review decisions and hear and determine appeals from ANR decisions concerning solid (and hazardous) waste management facilities. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, FCO at 18 (10/24/03) [WFP #40]; *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (11/8/96), *aff'd, In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31]; *Safety Medical Systems, Inc.*, Amended Air Pollution Control Permit #AP-93-012-WFP (3/2/95).
- * WFP may deny permit application even if one has been granted by ANR; grant a permit where one has been denied by ANR; or void a permit where a project has been voluntarily abandoned by the holder of the permit. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, FCO at 18 (10/24/03). [WFP #40]; *Safety Medical Systems, Inc.*, Amended Air Pollution Control Permit #AP-93-012-WFP (3/2/95).
- * WFP may issue Certification itself; matter need not be remanded to ANR for such issuance. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, FCO at 22 - 23 (10/24/03) [WFP #40], citing *Main Street Landing Company and City of Burlington*, #4C1068-EB, MOD at 4 (9/27/01).
- * WFP has no authority to address zoning-related issues. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 5 (9/9/99).
- * In proceedings on renewal of an interim certification of a solid waste management facility, WFP has exclusive appellate jurisdiction to make rehabilitation determination. *Rapid Rubbish Removal, Inc.*, Interim Certification #CA-721-WFP (Remand), MOD (2/4/98) and FCO (3/18/98). [WFP #35]

- * Panel may consider dismissal of any matter before it for reasons provided by the Board Rules, by statute, or by law. *Rapid Rubbish Removal, Inc.*, #CA-721-WFP (6/12/97). [WFP #29]; *Dorr Septic Systems Co.*, #I9220-WFP, MOD, (1/29/93). [WFP #16M]
- * Coordinator's JO regarding a waste management facility, like all JOs, is appealable only to Board and not to the WFP. *Putney Paper Company, Inc.*, DR #335 (5/29/97).
- * Purpose of WFP is to bring its specialized expertise to bear on the problems raised in consolidated appeals for Act 78 and Act 250 proceedings. *Putney Paper Company, Inc.*, #2W0436-7-EB (11/3/95). [EB #621]
- * WFP has jurisdiction over appeals from Commission decisions that are in respect of a solid or hazardous waste management facility, but Panel has no authority to adjudicate DR petitions. *Putney Paper Company, Inc.*, DR #305 (10/30/95).
- * Where permittee claimed an agreement with landowner to use certain parcel of land for the land application of sewage, WFP would not rule on agreement's validity despite landowner's contention that agreement was no longer valid; rather, such an inquiry should be left to the courts. *Town of Royalton*, #I9416-WFP (9/22/95).
- * Appeal of Commission decision in respect of a waste management facility is to the Panel, and is governed by the provisions and procedures applicable to appeals to Board. *C.V. Landfill, Inc.*, #AP-92-025-WFP and #5W1150-WFP (3/7/95); *C.V. Landfill, Inc.*, #AP-92-025-WFP and #5W1150-WFP (6/14/95).
- * Commission's interlocutory rulings may be appealed interlocutory to the Panel; however, party is not obligated to do so, and failure to bring interlocutory appeal does not constitute waiver of rights. *C.V. Landfill, Inc.*, #AP-92-025-WFP and #5W1150-WFP (6/14/95).
- * Applicant was not equitably estopped to challenge jurisdiction notwithstanding opponent's expenditure of limited resources. *C.V. Landfill, Inc.*, #AP-92-025-WFP and #5W1150-WFP (6/14/95).
- * Review of ANR permit for project which also requires an Act 250 permit prevents WFP from commencing its review until Commission issues final decision. *Safety Medical Systems, Inc.*, Amended Air Pollution Control Permit #AP-93-012-WFP (3/2/95).
- * In light of Act 78, Panel's role in reviewing a Certification that authorizes land application of sludge is limited to weighing the assumed public benefit of land application against the alternatives for the disposal of sludge at the particular site and the risks to public health and environment. *City of Rutland*, #I9125-WFP, Findings of Fact (10/30/92). [WFP #10]; *Fowler Septic Services Inc.*, #I9022-WFP, Findings of Fact (3/20/92). [WFP #3]
- * Because the requirement to monitor for surface water is imposed in 10 V.S.A. § 605b(c)(5), the Panel concludes that it is not within its discretion to waive the requirements for surface water monitoring. *City of Montpelier Solid Waste Management Facility*, #I9042-WFP, Findings of Fact,

(4/24/92). [WFP #7]

* In revocation proceeding, WFP does not have the authority to either change or amend original permit conditions or to review the adequacy of the original permit conditions. *Vicon Recovery Systems Inc., and Sunderland Waste Management Inc.*, #8B0301-2-WFP, Findings of Fact, (2/12/92). [WFP # 2].

* WFP's review is limited to determination of whether the original permit is subject to revocation. *Vicon Recovery Systems Inc., and Sunderland Waste Management Inc.*, #8B0301-2-WFP, Findings of Fact, (2/12/92). [WFP # 2]

*Consideration of public trust issue in revocation proceeding would be an unauthorized expansion of the jurisdiction conferred on the WFP in cases involving Act 250 permits. *Vicon Recovery Systems Inc., and Sunderland Waste Management Inc.*, #8B0301-2-WFP, MOD (4/19/91). [WFP # 2].

903. Evidence

903.1 General

* WFP's consideration of whether an individual is rehabilitated pursuant to 10 V.S.A. § 6605f (f) may include a number of factors, if applicable to the specific case, including the individual's performance of his sentence on the criminal act that triggered the review. *Rapid Rubbish Removal, Inc.*, Interim Certification #CA-721-WFP (Remand), MOD (2/4/98) and FCO (3/18/98). [WFP #35]

903.2 Burden of Proof

* Mere assertions that the applicant intentionally submitted erroneous information do not constitute credible evidence. *Vicon Recovery Systems and Sunderland Waste Management Inc.*, #8B0301-2-WFP, Findings of Fact, (2/12/92). [WFP #2]

* Once alleged violations and misrepresentations have been brought to WFP's attention, it should not ignore those allegations. *Vicon Recovery Systems and Sunderland Waste Management Inc.*, #8B0301-2-WFP, Memo of Decision, (2/4/92). [WFP #2]

903.2.1 Provisional certifications

*WFP must uphold issuance of *provisional* certification unless burden of proof is met by clear and convincing evidence that Secretary failed to meet statutory requirements for the issuance of a provisional certification. 10 VSA § 6103(b). *Bristol Waste Management Inc.*, #AD070-WFP, Findings of Fact, (9/12/91). [WFP#8]; *Upper Valley Regional Landfill Corporation*, #OG820-WFP, MOD at 5 -6, (4/24/91). [WFP # 5]

903.2.2 Interim certifications

*Applicant for an *Interim* Certification bears both the burden of production and the burden of persuasion in establishing the affirmative findings required. *City of Montpelier Solid Waste Management Facility*, #I9042-WFP, MOD, (4/24/91). [WFP #7]; *Upper Valley Regional Landfill*

Corporation, #OG820-WFP, MOD, (4/24/91). [WFP # 5]; *Fowler Septic Services Inc.*, #I9022-WFP, Findings of Fact, (3/20/92). [WFP #3]

* Burden of persuasion is on party who is seeking a certification (which is not a *provisional* certification) and is in possession of the evidence needed to support the required affirmative findings. *Upper Valley Regional Landfill Corporation*, #OG820-WFP, MOD at 6 (4/24/91). [WFP # 5]

* Absence of language placing the burden on persons challenging the issuance of an Interim Certification reflects a legislative intent that there be lesser burden of proof on an appellant in appeals of Interim Certifications than in appeals of provisional certifications and certifications of need. *Upper Valley Regional Landfill Corporation*, #OG820-WFP, MOD, (4/24/91). [WFP # 5]

903.3 Presumptions

* Where ANR air permit was voided due to developer's voluntary abandonment of proposed project, remand to Commission for further consideration of existing project was necessary since Commission relied upon now voided air permit as rebuttable presumption under EBR 19 and Criterion 1 in review of existing project. *C.V. Landfill, Inc.*, #AP-92-025-WFP and #5W1150-WFP (6/14/95).

* In the absence of a rule creating a presumption in favor of a permittee, the burden of production and persuasion in a de novo appeal of Interim Certification lie with applicant. *Upper Valley Regional Landfill Corporation*, #OG820-WFP, MOD, (4/24/91). [WFP #5]

903.4 Hearsay

* WFP will conditionally allow permittee to use witness for the sole purpose of offering another witnesses prefiled testimony; cross examination will be limited to the extent of the witnesses personal knowledge of the prefiled testimony; then Panel will issue a ruling on whether the prefiled testimony in whole or in part, will be admitted into evidence. *Dorr Septic Systems Co.*, #I9220-WFP, (9/22/93). [WFP #16]

* Proffered letters by newspapers, although they are hearsay, fall within an exception because WFP believes that it would be unreasonable for the representatives of the papers to appear before the Panel for the purpose of testifying in person as to the number of subscribers in the town of Putney. *Town of Putney*, #I9130-WFP, (3/16/93). [WFP #13]

904. Notice

*In proceedings before WFP, persons with an interest in an appeal should be given some reasonable period of time, after they are notified of the filing of an appeal, in which to raise issues they wish to address. *Dorr Septic Systems Co.*, #I9220-WFP, (1/29/93). [WFP #16M]

*Persons who have not received notice of filing on appeal, other than the notice published by WFP, and who request party status by the date of the prehearing conference and are determined to be eligible for party status, should be permitted to raise issues for consideration in the pending appeal at any time up to and including, the prehearing conference; any party should be able to raise issues for consideration up to and including the prehearing conference.

Dorr Septic Systems Co., #I9220-WFP, (1/29/93). [WFP #16M]

* Best evidence of the date of mailing is the post mark on the envelopes in which certification was mailed; an appeal is timely filed within 30 days of that date. *City of Rutland*, #I9125-WFP, (12/16/91). [WFP #10]

* Date of the Secretary's determination is the date on which the Secretary mails the certification or other decision to interested parties. *Upper Valley Regional Landfill Corporation*, #OG820-WFP, (4/24/91). [WFP #5]

* Statute governing appeals to WFP does not establish any specific requirements for the form or content of an appeal notice; Environmental Board has always construed the requirements of Rule 40 liberally in favor of appellants. *Upper Valley Regional Landfill Corporation*, #OG820-WFP, (4/24/91). [WFP #5]

905. Parties

* Uncertainty regarding effect of leachate on adjoining property and condition requiring monitoring wells constitute a sufficient direct effect on that property to warrant granting party status to adjoining property owner under 10 V.S.A. § 6102(b). *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998), affirming *Putney Paper Company, Inc.*, #WH-600-WFP (1/10/96).

* To qualify for party status in interim certification process under 10 V.S.A. § 6102(c) [V.R.C.P. 24], person must establish that (1) it had "an interest relating to the property or transaction which is the subject of the action," (2) the disposition of the proceeding before the Panel might "impair or impede [its] ability to protect that interest," and (3) its interest was not adequately represented by existing parties. *In Re Chittenden SWD*, 162 Vt. 84, 87 (1994).

* The standard of review in review of denial of party status in interim certification case is abuse of discretion. *In Re Chittenden SWD*, 162 Vt. 84, 88 (1994).

* Abuse of discretion requires a showing that the WFP "withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent." *In Re Chittenden SWD*, 162 Vt. 84, 87 (1994) citing *Vermont Nat'l Bank v. Clark*, 156 Vt. 143, 145 (1991).

* Any economic issues implicated by Act 250 and 10 V.S.A. § 6605b(b)(1) and (2) are for the protection of the general public, not competitors. *In Re Chittenden SWD*, 162 Vt. 84, 91 (1994).

* Because the party status statutes differ, a party with party status in an appeal from a Commission's Act 250 decision does not automatically obtain party status in an appeal from an ANR Certification. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 10-11 (1/20/2000).

* A person has an interest in the "property" if he has an ownership interest, mortgage, lien, or attachment in the property, and a person has an interest in the "transaction" involving certification of a solid waste facility if he demonstrates an interest in the subject matter which is greater than any other member of the public. *Putney Paper Company, Inc.*, #WH-600-WFP

(1/10/96), *aff'd In re Putney Paper Company, Inc.*, 168 Vt. 608 (1998).

* Not every landowner or resident in the community can be said to have a sufficient interest in land application of septage anywhere in his/her community to warrant the granting of party status. *Dorr Septic Systems Inc.*, #I9220-WFP, (1/29/93). [WFP # 16M]

* A party claiming a right participate in a proceeding bears no burden of proof on the issue of inadequate representation by other parties. *C.V. Landfill Inc., Georgia Commercial Transfer Station*, #FR221-WFP, (3/23/92). [WFP #11]

* WFP finds no reason to depart from Environmental Board standards as to who is an adjoining landowner. *Upper Valley Regional Landfill Corporation*, #OG820-WFP, (4/24/91). [WFP #5]

* Because parties demonstrated direct interest or interest in the operation of the landfill, and because the proceeding is the only opportunity for these parties to contest the Interim Certification, they are entitled to intervention of right unless the interest is adequately represented by existing parties. *Upper Valley Regional Landfill Corporation*, #OG820-WFP, (4/24/91). [WFP #5]

* Person has party status if she is an adjoining landowner, because she has an interest in the subject of the action, and because disposition of the matter may impair her ability to protect her interest which is not represented by any other party. *Fowler Septic Services Inc.*, #I9022-WFP, (2/4/91). [WFP #3]

* Although parties have expressed strong interest in the operation of the landfill, none has demonstrated that WFP will be materially assisted by their participation in the proceeding, and therefore have not met the tests for permissive party status. *Vicon Recovery Systems*, #I8B0301-2-WFP, (2/4/91). [WFP #5]

* Parties who do not have party status but have information relating to allegations of violations at issue may seek to present evidence witnesses for those persons that have party status. *Vicon Recovery Systems*, #I8B0301-2-WFP, (2/4/91). [WFP #5]

906. Standing

* Because standing question goes to Board's jurisdiction, it is a threshold question that must normally be reviewed prior to the consideration of substantive questions. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.).

* Mere speculation about the impact of some generalized grievance, however, is not a sufficient basis to find standing. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, MOD at 7 (4/29/03) [WFP #40], citing *Re: Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982).

* "Injury" to the interest of a party who seeks standing to bring action or appeal must be concrete and particularized, not an injury affecting the common rights of all persons. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, MOD at 7 (4/29/03) [WFP #40], citing *Parker v. Town of Milton*, 169 Vt. 74, 78 (1998).

* Where the interests of one party may be adequately represented by another party, WFP declines to hold that the first party has standing to participate before it. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 4-5 (9/9/99).

* Adjoining landowner to unlined paper sludge landfill had standing to appeal indirect discharge permit where he had five drinking water wells and leachate from the project may reach and pollute these wells. *Re: Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96). [WFP #31]

* Appellant established standing, as an adjoining landowner concerned over his drinking water supply, with an interest in an indirect discharge permit greater than any other member of the public; there was no other forum to challenge the indirect discharge permit; appellant had a legitimate interest in wanting a safe drinking water supply; disposition of the appeal could impair that interest; and the appellant's interests were not adequately represented. *Re: Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96) *aff'd In re Putney Paper Company, Inc.*, 168 Vt. 608 (1998). [WFP #31]

* Standing to appeal is not restricted to statutory parties and landowners; person entitled to party status under VRCP 24 may file an appeal to Board. *Upper Valley Regional Landfill Corp.*, #OG820-WFP, (4/24/91). [WFP #5]

907. Standard of Review

* Appeal is *de novo* as to all issues on appeal; evidence is heard and considered anew, and WFP determines evidence's probative value as though no decision had been previously rendered, and with no deference to ANR's issuance of the permits on appeal. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, FCO at 18 (10/24/03) [WFP #40]; *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (11/8/96), *aff'd*, *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998). [WFP #31] *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 9 (9/9/99); *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (11/8/96), *aff'd In re Putney Paper Company, Inc.*, 168 Vt. 608 (1998). [WFP #31]; *City of Montpelier Solid Waste Management Facility*, #19042-WFP, (4/24/92). [WFP #7]; *Upper Valley Regional Landfill Corporation*, #OG820-WFP, (4/24/91). [WFP #5]

* Determination of specific rationale of ANR Secretary's decision is not within scope of WFP's *de novo* review. *Rapid Rubbish Removal, Inc.*, Int. Cert. #CA-721-WFP (Remand), MOD (2/4/98) and FCO (3/18/98). [WFP #35]

* Failure by appellant to pre-file testimony or exhibits is not grounds for dismissal where applicant has burden of proof in *de novo* appeal. *Fowler Septic Service, Inc.*, #F9411-WFP (11/3/95).

908. Stays

* Stay request denied where impacts on water quality such that the effect upon public health, safety or general welfare would be minimal while appeal was pending. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96), *aff'd In re Putney Paper Company, Inc.*, 168 Vt. 608 (1998). [WFP #31]

* WFP's use of standard set out in *In Re Petition of Allied Power and Light Co.*, 132 Vt. 554 (1974) for considering stay request is overruled since EBR 42 is not inconsistent with the Panel's enabling legislation. *Putney Paper Company, Inc.*, #WH-600-WFP (1/10/96), *aff'd In re Putney Paper Company, Inc.*, 168 Vt. 608 (1998).

* Stay declined because, in absence of any compelling indication that Commission erred, WFP relies on the Commission's findings. *Chittendon County Solid Waste Management Dist.*, #CH930-WFP, (3/18/93) [WFP #12]

* Stay factors are (a) hardship to parties, (b) impact if any on values sought to be protected by Act 250, and (c) any effect upon public health, safety, or general welfare. *C.V. Landfill Inc.*, #FR221-WFP, (3/23/92). [WFP #11]

* Standard imposes a requirement of a higher degree of harm on party seeking the stay, who must show "irreparable" harm, whereas other parties must show "substantial" harm. *C.V. Landfill Inc.*, #FR221-WFP, (3/23/92). [WFP #11] (but note: *Putney Paper Company, Inc.*, #WH-600-WFP (1/10/96), *aff'd In re Putney Paper Company, Inc.*, 168 Vt. 608 (1998), holds test used is wrong).

* Stay need not be decided within 3-day period, even though the statute requires that the stay request be "acted upon" within 3-day time frame. *Bristol Waste Management Incorporated*, #AD070-WFP, (9/12/91). [WFP #8]

909. Interim Certifications

* In proceedings on renewal of an interim certification of a solid waste management facility, WFP has exclusive appellate jurisdiction to make rehabilitation determination. *Rapid Rubbish Removal, Inc.*, Interim Certification #CA-721-WFP (Remand), MOD (2/4/98) and FCO (3/18/98). [WFP #35]

* Both a Certification and an Interim Certification authorize the construction and operation of a solid waste management facility. *Town of Royalton*, #I9416-WFP, (9/22/95).

* There is no requirement in the rules for notification to landowners within a half mile radius or within 500 feet of the facility as is required for Full Certification in an Interim Certification. *Town of Putney*, #I9130-WFP, (3/16/93). [WFP #13]

* City must apply sludge at the sites under the terms of the Certification until such time as the planning process is completed and a Full Certification can be obtained. *City of Rutland*, #I9125-WFP, (10.30.92). [WFP #10]

* Because no implementation plan has been received by Rutland County Waste District, a Full Certification cannot be issued until the planning process is completed; thus WFD must apply sludge to Tinmouth sites until it is able to achieve a Full Certification. *Wallingford Fire District #1*, #I9122-WFP, 5/26/92). [WFP #9]

* Issuance of a Full Certification for any facility requires that facility be consistent with a regional plan that addresses solid waste management. *City of Montpelier Solid Waste Management Facility*, #I9042-WFP, (4/24/92). [WFP #7]

* Absence of language placing burden on persons challenging the issuance of an Interim Certification reflects a legislative intent that there be a lesser burden of proof on an appellant in appeals of Interim Certifications than in appeals of Provisional Certifications and Certifications of Need. *Upper Valley Regional Landfill Corporation*, OG820-WFP, (4/24/91). [WFP #5]

* Statute does not require that question of Act 250 jurisdiction over facility be finally resolved prior to review of an Interim Certification. *Fowler Septic Services*, #19022-WFP, (3/20/92). [WFP # 3]

B. Review of Provisional Certifications

911. General

* Panel will remand appeal to ANR if Agency has failed to conduct a review under relevant statutory or regulatory provisions, but not where a party merely disagrees with the quality or results of that review. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 6 (9/9/99).

* Panel must uphold issuance of the Certification unless burden of proof is met by clear and convincing evidence that Secretary failed to meet statutory requirements for a provisional certification. *Bristol Waste Management Inc.*, #AD070-WFP, (9/12/91). [WFP # 8]; *Upper Valley Landfill Corporation*, #OG820-WFP, (4/24/92). [WFP # 5]

* Absence of language placing burden on persons challenging the issuance of an interim certification reflects a legislative intent that there be a lesser burden of proof on an appellant in appeals of Interim Certifications than in appeals of Provisional Certifications and Certifications of Need. *Upper Valley Landfill Corporation*, #OG820-WFP, (4/24/92). [WFP # 5]

C. Review of Certificates of Need

921. General

* Absence of language placing the burden on persons challenging the issuance of an interim certification reflects a legislative intent that there be a lesser burden of proof on an appellant in appeals of Interim Certifications than in appeals of Provisional Certifications and Certifications of Need. *Upper Valley Landfill Corporation*, #OG820-WFP, (4/24/92). [WFP # 5]

D. Review of Agency Determinations

931. General

* Panel's findings that proposed cell otherwise complies with WQS and that there is no reasonable alternative method or location supported by the evidence, despite evidence in record that alternative site would be preferable. *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610 (1998)(mem.).

* Panel correctly applied the Ground Water Protection Rule and Strategy (GWPRS) § 12-707(1), which requires a point-of standards application if an activity may affect groundwater, where it

found that the groundwater under landfill flows toward Connecticut River and not through any adjoining properties. *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610-11 (1998)(mem.).

* When there must be a sanitary landfill, it has to be put somewhere. *In re Barker Sargent Corp.*, 132 Vt. 42, 49 (1973).

* The fact that it may offend the feelings of adjacent landowners the landfill should be located elsewhere, for that reason alone, has no validity. *In re Barker Sargent Corp.*, 132 Vt. 42, 49 (1973).

* WFP must defer to ANR's interpretation unless there are compelling indications that such interpretation is in error. *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, FCO at 18 (10/24/03) [WFP #40] *Bristol Waste Management Inc.*, #AD070-WFP, (9/12/91). [WFP #8]

* Panel will remand appeal to ANR if Agency has failed to conduct a review under relevant statutory or regulatory provisions, but not where a party merely disagrees with the quality or results of that review or the evidence relied upon.. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, #5W0840-6-WFP, MOD at 6 (9/9/99).

* In review of request for recertification, purpose of statute's mandatory time requirement is to ensure timely review of application and a timely denial, even if deficient. *Rapid Rubbish Removal, Inc.*, Interim Certification #CA-71-WFP (Remand), MOD (2/4/98) and FCO (3/18/98). [WFP #35]

* In calculating mandatory time period in a decision on recertification, when case is remanded for deficiency in initial determination, calculation of 90 day period begins anew. *Rapid Rubbish Removal, Inc.*, Interim Certification #CA-71-WFP (Remand), MOD (2/4/98) and FCO (3/18/98). [WFP #35]

* Although it was applicant's burden to demonstrate his rehabilitation, ANR Secretary was required to determine whether an applicant had been rehabilitated before denying certification. *Rapid Rubbish Removal, Inc.*, #CA-721-WFP (6/12/97). [WFP #29]

* Certification "shall be denied" if Secretary finds that applicant or any person required to be listed on the disclosure statement has been convicted of any of the disqualifying offenses under 10 V.S.A. § 6605f(a)(1); Secretary does not have discretion in deciding whether to deny a certification; she must apply this section, in conjunction with rehabilitation provisions of 10 V.S.A. § 6605f(f), whether or not she has promulgated rules regarding the rehabilitation determination. *Rapid Rubbish Removal, Inc.*, Interim Certification #CA-71-WFP (Remand), MOD (2/4/98) and FCO (3/18/98). [WFP #35]

* ANR Secretary may consider criminal convictions based on a plea of *nolo contendere* in applying the disqualifying criteria of 10 V.S.A. § 6605f(a)(1). *Rapid Rubbish Removal, Inc.*, Interim Certification #CA-71-WFP (Remand), MOD (2/4/98) and FCO (3/18/98). [WFP #35]

* Remand to ANR was necessary of appeal of solid waste management certification because applicant proposed substantial modification to project which had not yet been reviewed by ANR. *Town of Putney*, #F9615-WFP (1/17/97). [WFP #13]

- * Appeal of indirect discharge permit and solid waste certification were consolidated into a single proceeding, but such proceeding did not merge appeals into a single cause of action; consolidation allowed for taking of evidence which was relevant to both appeals regarding a single project in a single proceeding. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (11/8/96). [WFP #31]
- * A point of standards application was not required provided there were no intervening landowners between the source of the indirect discharge and the receiving stream. *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (11/8/96). [WFP #31]
- * Indirect Discharge Rules make a distinction between sewage waste and non-sewage waste, and between indirect and direct discharges. Since Water Quality Standard § 1.04A.5 is only applicable to the discharge of sewage waste and project was a non-sewage indirect discharge, project did not have to meet §1.04A.5 *Putney Paper Company, Inc.*, #WH-600-WFP and #ID-9-0257-WFP (5/16/96). [WFP #31]
- * Because 10 V.S.A. § 6605(b)(5) and (6) mandate certain certification provisions only "where appropriate," compliance with such sections is determined on a case-by-case basis with due regard to type of waste or wastes to be disposed of, the management option for which certification is sought, and the Solid Waste Management Rules. *Fowler Septic Service, Inc.*, #F9411-WFP (11/3/95); *Town of Royalton*, #19416-WFP (9/22/95).
- * Neither 10 V.S.A. § 6605 nor the Solid Waste Management Rules provide that non-compliance with a provision which ANR Secretary has discretion to make more or less stringent disqualifies applicant for a certification for a diffuse disposal facility. *Town of Royalton*, #19416-WFP (9/22/95).
- * When developer abandoned construction of lined landfill adjacent to unlined landfill, all rights under air pollution control permit were waived, air permit was voided, and appeal of air permit became moot. *C.V. Landfill, Inc.*, #AP-92-025-WFP and #5W1150-WFP (6/14/95).
- * WFP may deny permit application where one has been granted by ANR; grant a permit where one has been denied by ANR; or void a permit where a project has been voluntarily abandoned by the holder of the permit. *Safety Medical Systems, Inc.*, Amended Air Pollution Control Permit #AP-93-012-WFP (3/2/95).
- * Because ANR notice of Certification did not meet the requirements of the rules for published notice, ANR had no jurisdiction to issue Certification and it is therefore void. *Town of Putney*, #I9139-WFP, (3/16/93). [WFP # 13]
- * Legislature has clearly limited Panel's authority to review ANR's determinations with respect to Provisional Certifications. *Bristol Waste Management Inc.*, #AD070-WFP, (9/12/91). [WFP #8]
- * Panel delays its review of an appeal from an ANR decision until Commission issues its decision as to Act 250 jurisdiction over landfill. *Upper Valley Landfill Corporation*, #OG820-WFP, (4/24/91). [WFP #5]

E. Appeals of District Commission Decisions

941. General

- * Review of a project does not extend to offsite use and distribution of project's commercial product (compost). *Re: City of Montpelier and Ellery E. & Jennifer D. Packard, #5W0840-6-WFP, MOD at 10-12 (9/9/99).*
- * Appeal to the Panel is *de novo*. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard, #5W0840-6-WFP, MOD at 9 (9/9/99).*
- * Because Act 250 permit must be obtained before commencement of construction and operation, if permit is applied for after-the-fact, project is reviewed under criteria as of the date that a permit was required and not as of application date. *C.V. Landfill, Inc. and John F. Chapple, #5W1150-WFP (Unlined Landfill Facility) (2/3/97). [WFP #24M]*
- * Argument raised for first time in motion to alter would be denied for that reason alone. *C.V. Landfill, Inc. and John F. Chapple, #5W1150-WFP (Unlined Landfill Facility) (2/3/97). [WFP #24M]*
- * Requiring a discharge permit and consequently denying Act 250 permit application does not prevent ANR from pursuing remediation or enforcement. *C.V. Landfill, Inc. and John F. Chapple, #5W1150-WFP (Unlined Landfill Facility) (2/3/97). [WFP #24M]*
- * Appeals of Commission decisions with respect to waste management facility are to WFP and are governed by provisions and procedures applicable to appeals to Board, and WFP has exclusive jurisdiction. *C.V. Landfill, Inc. and John F. Chapple, #5W1150-WFP (Unlined Landfill Facility) (10/15/96). [WFP #24]*
- * Substantial changes at unlined landfill required Act 250 permit, denied under Criterion (1)(B) due to lack of discharge permit. *C.V. Landfill, Inc. and John F. Chapple, #5W1150-WFP (Unlined Landfill Facility) (10/15/96). [WFP #24]*
- * Commission improperly proceeded with partial review under 10 V.S.A. § 6086(b); remand was necessary in light of applicant's appeal of procedural defect. *F.P. Elnicki Rutland Storage Trailers, Inc., #1R0203-2-WFP (5/28/96). [WFP #32]*
- * Solid waste transfer station and recycling center did not have adverse effect on aesthetics where permit conditions regulated outside storage of equipment, parking of vehicles, and disposal of waste, and area surrounding project was commercial/industrial area. *Timothy and Mary Baker, #8B0506-WFP (1/10/96).*
- * If WFP reviews a project that is also an Act 250 development, Panel will not commence its review until Commission has issued a final decision. *Safety Medical Systems, Inc., Amended Air Pollution Control Permit #AP-93-012-WFP (3/2/95); C.V. Landfill Inc., #AP-92-025-WFP and #5W1150-WFP, (12/13/93). [WFP # 18]; Fowler Septic Services Inc., #I9022-WFP, (3/20/92). [WFP #3]; Upper Valley Regional Landfill Corporation, #OG820-WFP, (4/24/91). [WFP #5]*
- * Statute does not require that question of Act 250 jurisdiction over facility be finally resolved prior to review of an Interim Certification. *Fowler Septic Services, #I9022-WFP, (3/20/92). [WFP*

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F. Consolidation of Act 250 and ANR Review Proceedings

951. General

* If WFP reviews a project that is also an Act 250 development, Panel will not commence its review until Commission has issued a final decision. *Safety Medical Systems, Inc.*, Amended Air Pollution Control Permit #AP-93-012-WFP (3/2/95); *C.V. Landfill Inc.*, #AP-92-025-WFP and #5W1150-WFP, (12/13/93). [WFP # 18] ; *Fowler Septic Services Inc.*, #I9022-WFP, (3/20/92). [WFP #3] ; *Upper Valley Regional Landfill Corporation*, #OG820-WFP, (4/24/91). [WFP #5]

* WFP has jurisdiction over appeals from permits issued by ANR Secretary for waste management facility and hazardous waste management facility. *Safety Medical Systems, Inc.*, Amended Air Pollution Control Permit #AP-93-012-WFP (3/2/95).

* For purposes of Act 250 permit and Certification proceedings before WFP, consolidation is only intended to permit the taking of evidence which is relevant to more than one appeal in a single proceeding; consolidation does not merge separate appeals into a single cause or change parties' rights. *Palisades Landfill and Recycling Corp., Inc., and the Rainbow Trust*, #WA480-WFP and #WA480-WFP Amendment #1, (6/28/93). [WFP #15]

G. Appeals to Supreme Court

961. General

* Supreme Court is "not bound by, and, indeed, do[es] not defer to, Environmental Board and Environmental Court precedent that conflicts with [their] established vested rights doctrine and the principles that underlie it." *Times and Seasons, LLC*, 2011 VT 76, ¶ 15 (7/8/11) (citing *In re Village Assocs. Act 250 Land Use Permit*, 2010 VT 42A, ¶ 7, ___ Vt. ___, 998 A.2d 712).

* Court reviews WFP decisions regarding party status for abuse of discretion. *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998); *In re Chittenden Recycling Servs.*, 162 Vt. 84, 88 (1994).

* Court will uphold WFP's decision absent a showing that the Panel " withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent." " *In re Putney Paper Company, Inc.*, 168 Vt. 608, 609 (1998), *In re Chittenden Recycling Servs.*, 162 Vt. 84, 88 (1994).

* Court reviews WFP's findings of fact pursuant to 10 V.S.A. § 6089, which provides that the WFP's findings shall be conclusive "if supported by substantial evidence on the record as a whole." *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610 (1998); § 6089(c).

* Court presumes decisions made within the expertise of an administrative agency are correct, and court normally defers to an agency's determinations. *In re Putney Paper Company, Inc.*, 168 Vt. 608, 610 (1998)(mem.).

H. Authority to Transfer/Take Jurisdiction Over Matters Before Other Boards

971. General

XIV. Superior Court / Environmental Division

1000. General

* Environmental Court has no general supervisory role with respect to municipalities, ANR, District Commissions, or District Coordinators. Rather, it is the Natural Resources Board that is authorized to adopt rules of procedure for the District Commissions, 10 V.S.A. § 6025(a), and it is the Land Use Panel that is authorized to adopt substantive rules in relation to Act 250. *In re: Guite Act 250 Jurisdictional Opinion*, No. 265-11-08 Vtec, Decision and Order On Motion to Reopen and for Clarification of Scope of Remand at 3 (3/25/09)(citing *In re Entergy Nuclear/Vermont Yankee Thermal Discharge Permit Amendment*, No. 89-4-06 Vtec, at 4 (Nov. 24, 2008) (Wright, J.), and cases cited therein, and 10 V.S.A. § 6025(b)).

* No Rule of Environmental Court Procedure mandates disclosure of unverified transcripts of Act 250 District Commission proceedings, prepared by a party to those proceedings for his own use, and at his own expense. *In re Rivers Development LLC*, Nos. 7-1-05, 68-3-07, 183-8-07, and 248-11-07 Vtec, Decision on Motion to Compel Discovery at 2 (2/5/08).

1001. Jurisdiction (see 10.1 and 3.4)

* The Court's "real property jurisdiction is limited to the threshold determination of an applicant's interests and right to develop a property as proposed." *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 16 (8/6/14).

* Motion for party status reviewed under the V.R.C.P. 12(b)(6), which governs motions to dismiss for lack of subject matter jurisdiction. *Agri-Mark Inc*, No. 122-8-14 Vtec, Decision on Motion, at 3 (5/20/15); *Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 4-5 (2/13/15).

* Jurisdiction does not encompass all issues raised by an appealed application, but rather is limited to the factual and legal issues preserved for Environmental Court's review by the parties. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 4 (3/25/10), citing *In re Jolley Assoc.*, 2006 VT 132, ¶ 9 (quoting *In re Garen*, 174 Vt. 151, 156 (2002)); see also V.R.E.C.P. 5 (f) ("The appellant may not raise any questions on the appeal not presented in the statement [of questions] as filed"); *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257* and *Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 21 (1/17/13), *aff'd on other grounds, In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).

* EC has limited subject matter jurisdiction that does not include the adjudication of private property rights. *In re SP Land Co., et. al. Act 250 Permit, #257-11-08 Vtec*, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09)(citing *In re Leiter Subdivision Permit*, No. 85-4-07 Vtec, at 4 (1/2/08)), *reversed on other grounds, 2011 VT 104 (Vt. Supreme Ct. 9/22/11)*.

* Court lacks subject matter jurisdiction to consider impacts of proposed developments when

permit amendment authorized subdivision but no development at this time. *In re SP Land Co., et. al. Act 250 Permit, #257-11-08 Vtec*, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09), *reversed on other grounds, 2011 VT 104 (Vt. Supreme Ct. 9/22/11)*.

* Where Appellants filed for Act 250 permit after challenging jurisdiction, the Environmental Court concluded Appellants' jurisdictional appeal without addressing two issues raised in the Statement of Questions because it was more appropriate for the District Commission to address the remaining Questions in the first instance. *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 11 (7/24/08); *see also Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08).

* Where the District Commission has not yet ruled on the Abandonment Petition, and therefore no appeal has been filed regarding the Abandonment Petition, the Court has no jurisdiction regarding the way in which the District Commission investigates or proceeds on the Abandonment Petition, until and unless an appeal is filed pursuant to 10 V.S.A. Chapter 220. *In re: Guite Act 250 Jurisdictional Opinion*, No. 265-11-08 Vtec, Decision and Order On Motion to Reopen and for Clarification of Scope of Remand at 3-4 (3/25/09).

* Filing of timely notice of appeal is jurisdictional. *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Decision at 2 (5/30/07)(citing 10 V.S.A. § 8504(a)).

* The Environmental Court can address only "those issues which have been appealed." *In re: Free Heel, Inc.*, No. 217-9-06 Vtec, Decision at 4 (Mar. 21, 2007)(citing VRECP 5(f)).

* Filing of timely notice of appeal vests jurisdiction in Environmental Court. *In re: Three Church Street*, No. 174-7-06 Vtec, Decision at 2 (1/3/07).

* Environmental Court's jurisdiction must be statutorily provided. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 5 (3/20/06).

* Environmental Court has jurisdiction over any appeal filed after January 31, 2005, including party status determinations whether interlocutory or embedded in a final decision. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 5 (3/20/06).

* If no litigation over an application was pending at the time of Act 115's passage, then Act 115 rules will apply. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 6 (3/20/06).

*It is entirely within the jurisdiction of the Environmental Division to impose conditions on permits. *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 41 (10/26/12) (citing *Entergy*, 2009 VT 124, ¶ 54).

*Because the Environmental Court's subject matter jurisdiction is contained in 4 V.S.A. §34, and not 10 V.S.A. § 8504, a valid appeal of an Act 250 district commission decision gives the Court jurisdiction over the matter considered below. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 5 (8/17/12).

*Though the Environmental Division's jurisdiction is more limited than is the Civil Division's, the Environmental Division has jurisdiction to hear appeals of Act 250 district commission decisions.

In re Bennington Wal-Mart Demolition/Construction Permit, No. 158-10-11 Vtec at 8 (8/17/12).

*The Environmental Court's jurisdiction is not dictated by the statement of questions. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 9 (8/17/12)(citing 4 V.S.A. §34).

* Court was unable to consider "whether roads, signs, or new or moved shooting areas are improvements for purposes of Act 250" because none of these issues were raised on cross-appeal and were not included in the scope of the Statement of Questions. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 4 (9/29/2017).

1001.1 Motion to Dismiss for lack of jurisdiction

* Motion to dismiss untimely cross appeal granted. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Entry Order at 1-2 (9/15/10).

* Other than filing timely notice of appeal, failure to comply with VRECP is not grounds for dismissal for lack of jurisdiction. *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Decision at 2 (5/30/07) (appellant complied with rules concerning what must be in the notice of appeal, so court will not dismiss appeal); *In re: Three Church Street*, No. 174-7-06 Vtec, Decision at 2 (1/3/07) (failure to publish notice of appeal in a timely manner is not grounds for dismissal).

1001.2 Adjudication of property rights (see 3.4.1)

* Environmental Division's jurisdiction is limited to the Act 250 application on appeal; the Court will not determine property rights. *Re: Killington Resort Parking Project*, No 173-12-13 Vtec, Entry Order at 2 (05/13/15) (citing *Re: Britting Wastewater/Water Supply Permit*, No. 259-11-07 Vtec, slip op. at 3-4 (4/7/08) (Wright, J.) ("[R]esolution of adjacent landowners' rights regarding a disputed right-of-way is beyond the jurisdiction of this Court.")); *Re: Killington Village Act 250 Master Plan Application*, No. 147-10-13 Vtec, Entry Order at 2 (5/13/15).

* Environmental Court has limited subject-matter jurisdiction that does not include the adjudication of private property rights. *In re SP Land Co., et. al. Act 250 Permit*, #257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 6 (12/1/09), *reversed on other grounds*, *In re SP Land Co.*, 2011 VT 104.

* Pending civil action regarding ownership does not warrant stay of Act 250 permit proceeding. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 7 (11/2/10).

1002. Power and Authority of the Court

* "The District Commission, and this Court sitting in its place, can impose reasonable conditions in an Act 250 permit to ensure that the permitted project complies with a given criteria." *Diverging Diamond A250 50-6-16 Vtec M amend SOQ* at 10 (2/8/2018). 10 V.S.A. § 6086(c); citing *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 36 (May 26, 2017), re-argument denied (Sept. 22, 2017).

* When the Court or district commissions do not "receive sufficient evidence to allow it to

render full findings and conclusions on all Act 250 criteria implicated” in the project on appeal, Act 250 Rule 21 (D) authorizes the commission and the Court to “make findings and legal conclusions as far as the evidence presented allow” instead of simply rejecting the pending application. *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 25 (8/6/14).

* Regarding criteria not originally sought for review at the district commission by the applicant “to the extent that we render partial findings on the future phases, we reserve the right to impose certain conditions to those findings, so that the Court may provide the ‘guidance and greater predictability’ that the Rule and Policy encourage.” *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 27 (8/6/14).

* Environmental Court is vested with the responsibility and discretionary authority to address de novo appeals in such a manner “as to ensure summary and expedited proceedings [to] a full and fair determination” of issues; including the discretion to determine what and how discovery may be had – V.R.E.C.P. 2(d) – and the obligation to address all questions of fact and law brought before it on a de novo basis. *In re: JLD Wal*Mart Act 250 LU Permit (Altered)*, No. 116-6-08 Vtec, Motion to Dismiss VNRC’s First Question on Appeal; No. 2 at 2 (10/10/08), quoting V.R.E.C.P. 1, and citing V.R.E.C.P. 2(d), and V.R.E.C.P. 5(g).

* Penalty in municipal enforcement action based on economic benefit and avoided costs achieved by homeowner, plus costs of enforcement, upheld because the court has the discretion to determine the amount of a fine, and, in doing so, to balance any continuing violation against the cost of compliance and to consider other relevant factors. *In re Beliveau NOV, Town of Fairfax v. Beliveau*, 2013 VT 41, ¶ 23 (6/14/13) (citing *In re Jewel*, 169 Vt. 605, 606-07 (1999)(mem.)).

* This Court has the authority to order remediation of a site or impose penalties if a project is constructed without permit approval. *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Stay) (2-7-2018). citing *In re Mahar CU Appeal*, No. 13-9-15 Vtec, slip op. at 3 (Vt. Super. Ct. Env’tl. Div. Dec. 2, 2016) (Durkin, J.) (citations omitted), *rev’d on other grounds* 2018 VT 20; *In re Moore Lot Subdivision*, No. 123-9-13 Vtec, slip op. at 2 (Vt. Super. Ct. Env’tl. Div. Jul. 28, 2014) (Walsh, J.).

* If the Appellants are successful in their appeal, this Court has the power to order VTrans to remediate the site. *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Stay) (2-7-2018).

1002.1.

Power to Require Testing

* The Environmental Court does have the authority to compel an applicant to undertake significant destructive testing (blasting). *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 14 (2008).

* The Environmental Court’s refusal to compel a test blast of a particular magnitude outside the context of a determination that the actual circumstances require such a blast does not necessarily constitute an unreasonable exercise of discretion. *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 16 (2008).

* The Environmental Court does have the authority to compel an applicant to undertake significant destructive testing (blasting). *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 14 (2008).

1003. Environmental Board Precedent

* The Environmental Court gives a well-reasoned and persuasive decision by the Environmental Board the same weight as one of its own well-reasoned and persuasive decisions. *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 5 (4/30/08)(citing 10 V.S.A. § 8504(m)),subsequent Decision on the Merits (3/10/09).

* Statute (10 V.S.A. §8504(m)) requires that prior decisions of the Environmental Board shall be given the same weight and consideration as decisions of the environmental court;” thus Environmental Board decisions are not binding, but they inform the court’s consideration of similar issues in subsequent cases. *In re Big Rock Gravel Act 250 Permit*, No. 45-3-12 Vtec at 5 (11/28/12); *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 n.4 (1/16/07).

1004. Substantive vs. Procedural Issues and Standards

* Party status determinations are procedural, not substantive. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 6 (3/20/06).

*Determination of which procedural rules apply depends on when the appeal was filed, not when the permit application was filed. *Re: Route 103 Quarry (Carrara)*, No. 205-10-05 Vtec., Interim Order at 2 (2/23/05).

1004.1 Substantive Standards

* In *de novo* appeals under 10 V.S.A. § 8504(h), the Environmental Court has a “basic obligation” “to ‘apply anew the substantive legal standards’ that were applicable before the tribunal appealed from, ‘as though no prior action has been taken [on the appealed issues].” *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 4 (4/30/08); subsequent Decision on the Merits (3/10/09).

* Court applies the same substantive standards that were applied in the District Commission. *In re: Maggio*, No. 166-7-06 Vtec, Decision at 6 (4/20/2007); *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner Lilienthals’ Motions for Relief from Judgment, at 6 (3/12/08).

* Court is required to apply substantive standards established by the NRB. *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 5 (1/16/07), citing 10 V.S.A. § 8504(h).

1005. Party Status

* Where neither party opposes and late filing, due to family emergency, does not cause unreasonable delay or prejudice the parties, court grants motion for leave to file late motion for party status under V.R.E.C.P. 5(d)(2). *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec,

Decision on Motion at 3 (2/13/15).

* Party status denied under Criterion 5 where appellants neither alleged an interest protected by Criterion 5, nor any possibility that they will be affected by the Commission's decision. *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 3 (2/13/15).

* Allegation that noise from project's dogs located 1,200 feet from neighbor's property is insufficient to grant party status under Criterion 1 (air) without allegation of adverse health impacts or other specific facts. *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 6-7 (2/13/15).

* General allegations that design capacity of a waste water system and waste from hound dogs could impact groundwater resources are insufficient to gain party status under Criterion 1(B) or Criterion 1 (water). *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 7-9 (2/13/15).

* Without any factual foundation, neighbors failed to establish either a particularized interest or a reasonable possibility that the kennel may affect an interest protected by Criterion 8. *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion (2/13/15).

* Standing is a jurisdictional issue and the court may examine it on its own motion. *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion (2/13/15)(citing *Old Railroad Bed, LLC v. Marcus*, 2014 VT 23 ¶16 n. 5).

* Motion to Intervene denied when moving party failed to show that the "disposition [of the case] may as a practical matter impair or impede [his] ability to protect" his interests, as required by V.R.C.P. 24(a), regulating intervention. *In re Guité Act 250 Jurisdictional Opinion #3-128 (Revised)*, #126-7-09 Vtec, Decision and Order at 6 (4/2/10).

* Motions to reconsider party status should be used sparingly, and should not be used to repeat arguments that have been raised and rejected by the court in the prior decision. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 4 (12/1/08).

*When a litigant's request for party status is challenged by a motion for summary judgment, we apply summary judgment evidentiary standards in determining whether the litigant is entitled to party status. *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 2 (E.O. on Mot. For Summ. J.) (11/8/12) (citing *In re Big Spruce Rd. Act 250 Subdivision*, No. 95-5-09 Vtec, slip op. at 5 (Vt. Super. Ct. Env'tl. Div. Apr. 21, 2010) (Durkin, J.)).

* Once a party who participated below files their notice of appeal or enters their timely appearance in a pending Environmental Court appeal, that party is entitled to present evidence on all issues preserved for review in the pending appeal, unless and until the Court specifically dismisses that party on the Court's own motion or by motion of another party. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 2-3 (2/15/08), quoting 10 V.S.A. § 6085(c)(1)(E) and citing V.R.E.C.P. 5(d)(2).

*Under V.R.E.C.P. §5(d)(2), automatic party status is granted before the Environmental Court to an aggrieved person who was granted party status by the district commission pursuant to 10

V.S.A. § 6085(c)(1)(E); participated in the proceedings before the district commission; and retained party status at the end of the district commission proceedings. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 4 (3/13/13) (citing 10 V.S.A. §§ 8504(a) & (d)(1)).

* Motion to dismiss party granted where notice of appearance filed “many months” after deadline, on grounds that notice was not “timely” as required by VRECP 5(c). *In re: JLD Properties Wal-Mart Stormwater Discharge Permit*, No. 129-5-06 Vtec and 221-10-07 Vtec, Motion to Dismiss R.L. Vallee as Interested Party No. 4 at 1 (2/11/09).

* An appealing party is “automatically accorded [party] status when the notice of appeal is filed”. *Re: Route 103 Quarry (Carrara)*, No. 205-10-05 Vtec, Decision at 4 (11/22/06), *aff’d*, *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 (2008).

* Party status determinations are procedural, not substantive. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 6 (3/20/06)

* Procedural statutory changes may be applied retrospectively. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 6 (3/20/06) (citing *Myott v. Myott*, 149 Vt. 573, 575-76 (1988)).

* Party status from the District Commission is continued in the Environmental Court until a motion to dismiss as a party is filed and granted. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 6 (3/20/06)

* If party status is not raised in a motion to dismiss as a party, it will be taken up with other issues on the merits of the appeal. *In re: Unified Buddhist Church, Inc.*, No.191-9-05 Vtec, Decision and Order at 7 (3/20/06)

* No reconsideration of party status on appeal to the Environmental Court except on a Motion to Dismiss a Party pursuant to V.R.E.C.P. 5(d)(2). *Re: Route 103 Quarry (Carrara)*, No. 205-10-05 Vtec., Interim Order at 2 (2/23/05).

*In order to successfully appeal denial of party status under Act 250 criteria, appellant must show, for each criterion for which he/she is seeking party status, that he/she has a particularized interest, that the interest is protected by one of the criteria being analyzed, and that there is a “reasonable possibility” that the Court’s decision on the application may affect appellant’s interest. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 5 (3/13/13) (citing *In Granville Mfg. Co.*, No. 2-1-11 Vtec, slip op. at 6 (Vt. Super. Ct. Env’tl. Div. July 1, 2011)(Durkin, J.)).

*The appellant’s interest protected by one of the Act 250 criteria must be particularized; general policy concerns shared with the general public are not a sufficient basis for individual party status. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 5 (3/13/13) (citing *In re Pion Sand & Gravel Pit*, No. 245-12-09 Vtec, slip op. at 7 (Vt. Super. Ct. Env’tl. Div. July 2, 2010)(Durkin, J.)) *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 4 (2/4/15); *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 5 (2/13/15).

* Party status before this Court is a preliminary issue of standing that we determine under

express procedural standards. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 3 (3/13/13); *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 2 (11/14/12) (citing *In re Pion Sand & Gravel Pit*, No. 245012009 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. July 2, 2012) (Durkin, J.) (citing 10 V.S.A. § 8504(a)). *In re Orlandi Act 250 Kennel Permit*, No. 71-5-14 Vtec, Decision on Motion at 4 (2/13/15).

*The appellant must demonstrate a causal link between a decision on a proposed project and an alleged harm to his or her particularized interests that may be protected under a specified criterion. A sufficient showing cannot be purely speculative, but the appellant need meet a minimal factual threshold, which must describe the evidence or testimony to be introduced at the merits hearing and that must be sufficiently concrete for the Court to understand the materiality of the evidence or testimony, to satisfy the showing requirement. The claimant need only show that the impact may occur; whether it will occur is a matter to be addressed at the merits hearing. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 5 (3/13/13) (citing *In Granville Mfg. Co.*, No. 2-1-11 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. July 1, 2011)(Durkin, J.); *In re RCC Atlantic, Inc.*, No. 163-7-08 Vtec, slip op. at 8-9 (Vt. Envtl. Ct. May 8, 2009)(Durkin, J.); *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 2 (11/14/12) (citing *In re Granville Mfg. Co.*, No. 2-1-11 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. July 1, 2011)(Durkin, J.)).

* Party status is a question that remains open throughout the Act 250 permit review process. As the Environmental Court must apply the standards applicable before the District Commission, it is obligated to reevaluate party status after the presentation of evidence at trial. *Snyder Group, Inc. Act 250*, #107-10-18 Vtec., Decisions on Motions to Dismiss (5/22/19).

1005.1 When challenge to standing/party status must be raised

* “An appellant seeking to appeal the district commission’s denial of party status and claim party status before this Court ‘must assert that claim by motion filed no later than the deadline for filing a statement of questions on appeal’” *In re Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions at 5 (2/4/15)(citing V.R.E.C.P., 5(d)(2); see 10 V.S.A. § 8504(d)(2)(B) (allowing a person aggrieved to appeal the denial of party status to the Environmental Division).

* Challenge to standing is not timely when it is not made until after Commission made party status determinations and after the close of evidence and trial at the Environmental Court. *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 30 (1/20/10).

1006. Procedure

*“Generally, proceedings before this Court are governed by the Vermont Rules of Civil Procedure.” *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 1 (E.O. on Motion for Enlargement of Time) (11/8/12) (citing V.R.E.C.P. 5(a)(2)).

1006.1 Environmental Court Rules of Procedure

* “Fairness and efficiency require that an applicant have some discretion in how it proceeds through the permitting process; neither the Court nor permit opponents should prevent this

process from moving forward unless appropriate to avoid unnecessary cost or delay.” *N.E. Materials Group Amended Act 250 Permit*, No. 35-3-13 Vtec, Entry Regarding Motion at 2 (7/2/14).

* Motion for continued coordination may be denied if the motion is based solely on the chance that an upcoming decision on a related action may have some effect on the pending appeal. *N.E. Materials Group Amended Act 250 Permit*, No. 35-3-13 Vtec, Entry Regarding Motion at 2 (7/2/14).

* Motion to dismiss cross-appeal by *pro se* parties granted where cross appeal was not timely filed and no motion to extend was filed. *Pro se* litigants are entitled to some assistance from the Court to prevent represented parties from taking unfair advantage, but *pro se* litigants are still bound to comply with procedural rules. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Entry Order at 2 (9/15/10).

* Site visits are an important tool, but do not constitute evidence upon which the Court can base its findings; any site visit observations or representations a party intends to rely upon must be repeated and referenced at trial. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on Request to Alter at 7-8 (3/27/08), citing V.R.E.C.P. 2(d)(2)(ix); *In re: Vermont RSA Limited Partnership d/b/a Verizon Wireless*, 2007 VT 23 ¶3 (referencing observations made during Board site visit); and *In re Herrick*, 170 Vt. 549, 551 (1999) (mem.) (passing reference in trial court decision to site visit, with adequate facts in the record to support findings, does not constitute error).

* Motion to dismiss party granted where notice of appearance filed “many months” after deadline, on grounds that notice was not “timely” as required by VRECP 5(c). *In re: JLD Properties Wal-Mart Stormwater Discharge Permit*, No. 129-5-06 Vtec and 221-10-07 Vtec, Motion to Dismiss R.L. Vallee as Interested Party No. 4 at 1 (2/11/09).

”V.R.E.C.P. 5(b)(3) requires the appellant to specify the party taking the appeal; the statutory provision under which that party claims party status; the decision appealed from; the address or location and a description of the property or development with which the appeal is concerned; and the name of the applicant for any permit involved in the appeal.” *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner’s Motions for Relief from Judgment at 9 (3/12/08).

* The notice required by V.R.E.C.P. 5(b)(3) and 10 V.S.A. § 8501 meets the fundamental requirements of due process. *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner’s Motions for Relief from Judgment at 9-10 (3/12/08) (citing *Town of Randolph v. Estate of White*, 166 Vt. 280, 283-87 (1997)).

* VRECP 5(b)(4)(B) and 10 V.S.A. § 8504(c)(1) require service of the notice of appeal upon all parties with party status at the end of the commission proceeding, as well as the NRB and any “friends of the commission,” and publication of the notice in a newspaper of general circulation. *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner Lilienthals’ Motions for Relief from Judgment, at 9 (3/12/08).

* VRECP 5(b)(4)(B) and 10 V.S.A. § 8504(c)(1) require service upon interested parties. *Re: Sports Venue Foundation, Inc.*, No. 168-8-07 Vtec, Decision and Order on Motion to Dismiss and

Motion for Clarification at 3 (12/18/07).

* VRECP 2(d)(1) requires all parties to attend all conferences, unless excused in advance by the court. *Re: Rivers Development, LLC*, Nos. 7-1-05 and 68-3-07 Vtec, Decision on Motions Related to Party Status & Consolidation at 2 (7/3/07).

* Other than filing timely notice of appeal, failure to comply with VRECP (here, failure to publish notice of appeal in a timely manner) is not grounds for dismissal for lack of jurisdiction. *In re: Three Church Street*, No. 174-7-06 Vtec, Decision at 2 (1/3/07).

* Court denies Rule 6(d) motion for continuance to file responsive affidavit because it has sufficient factual representations and legal arguments to decide pending summary judgment motions. *Lathrop Limited Partnership*, 64-3-06 Vtec, Decision and Order on Pending Motions at 2 (11/29/2006).

*“The Environmental Division follows the Vermont Rules of Evidence, except that we may admit evidence otherwise inadmissible under those rules “if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.”” *In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion)*, No. 116-8-12 Vtec at 2 (EO on Cross Mot for Sum J) (11/28/12) (citing V.R.E.C.P. 5(e)(1)).

*The Environmental Court has inherent power to address motions to reconsider or alter interlocutory orders or decisions that do not conclude a case. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 3 (8/17/12) (citing *Kelly v. Town of Barnard*, 155 Vt. 296, 307, 583 A.2d 614, 620 (1990))(quoting *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1121 (10th Cir. 1979)).

*Altering or amending an order or decision remains an extraordinary remedy for the Environmental Court. “Motions to reconsider serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.” *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 4 (8/17/12) (citing *Palmer v. Champion Mortg.* 465 F.3d 24, 30 (1st Cir. 2006))(quoting 11 Charles Alan Wright et al., *Federal Practice and Procedure* §2810.1 (2d ed. 1995)); 11 Wright, Miller & Kane, *Federal Practicie and Procedure: Civil 2d* §2810.1.

*The restrictive provisions of Rule 60(b) do not apply to reconsideration of interlocutory orders or decisions. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 4 (8/17/12) (citing *Dudley v. Snyder*, 140 Vt. 129, 131, 436 A.2d 763, 764-65 (1981)).

*In a de novo hearing, the issues properly raised to the Court are reviewed anew. The evidence must be heard anew by the Court, and the record produced by the Commission has no affect on any later proceedings before the Court. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 9 (8/17/12) (citing *In re Green Peak Estates*, 154 Vt. 363, 372 (1990)).

*A Commission’s denial of party status is not a structural error that de novo review by the Environmental Court cannot repair. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 10 (8/17/12).

* The Court follows the Vermont Rules of Evidence, except that it may admit evidence otherwise inadmissible under those rules “if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.” *In re Big Rock Gravel (JO Appeal)*, No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 2 (11/28/12) (citing V.R.E.C.P. 5(e)(1)).

* V.R.E.C.P. 2(d) gives the Court a “flexible case management tool,” allowing the Court to coordinate the conferences and hearings for multiple appeals concerning the same project. *In re McCullough Crushing Inc.*, Nos. 179-10-10 Vtec and 3-1-10 Vtec at 1(6/27/13) (citing Reporter’s Notes; V.R.E.C.P. 2).

* V.R.E.C.P. 2(b) “does not address full consolidation of proceedings, which by virtue of V.R.C.P. 42(a) may be ordered only with the consent of the parties.” True “consolidation of actions involves the substitution of a single docket number for multiple actions, concludes with a single ruling, and requires the parties’ consent.” *In re McCullough Crushing Inc.*, Nos. 179-10-10 Vtec and 3-1-10 Vtec at 1-2 (6/27/13) (citing *In re Allen Road Land Co.*, Nos. 62-4-11 Vtec and 63-4-11 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. July 6, 2011) (Durkin, J.)).

* Coordination of actions involves matters in which distinct docket numbers are maintained, but the matters are coordinated to allow for combined conferences and hearings. *In re McCullough Crushing Inc.*, Nos. 179-10-10 Vtec and 3-1-10 Vtec at 2 (6/27/13).

* Motion to coordinate stormwater and A250 appeals allowed under V.R.E.C.P. 2(b) and 10 V.S.A. §8504(g) where appeals all related to the same project and similar issues of fact and law. *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec at 2-3 (3/17/2017).

* Motion to coordinate MS4 appeal with A250 appeal denied because matters do not turn on common issues of law and the MS4 appeal involves a broader geographic area (although inclusive of A250 project). *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec at 3 (3/17/2017).

* “Expert testimony can provide substantial guidance to a trial court, but only when the expert provides an explanation of the factual foundation for the opinions that they offer. When the factual foundation is absent, the opinion testimony becomes untenable.” *Costco Act 250 Permit Amend JO* 157-12-16 Vtec MSJ at 9 (Dec. 8, 2017).

* “[M]ere conclusory allegations [by expert witnesses] without facts to support them” are insufficient to survive review during a summary judgment analysis. *Costco Act 250 Permit Amend JO* 157-12-16 Vtec MSJ at 9 (Dec. 8, 2017), quoting *White v. Quechee Lakes Landowners’ Ass’n*, 170 Vt. 25, 28 (1989) (quoting *Central Hudson G. & E. Corp. v. Hatzel & Beuhler, Inc.*, 202 N.Y.S.2d 818, 822 (N.Y. Sup. Ct. 1956), *aff’d*, 11 A.D.2d 707 (1960)).

* Appellant offers no facts to contradict factual representations presented by Costco’s experts; therefore, Court regards the Costco representations as true for the purpose of summary judgment. *Costco Act 250 Permit Amend JO* 157-12-16 Vtec MSJ at 9 (Dec. 8, 2017), V.R.C.P. 56(e)(2) and (3); *see also Gallipo v. City of Rutland*, 2005 VT 83, ¶ 33, 178 Vt. 244.

* Court rejects appellant’s assertion that there are material and significant impacts not

previously considered by the Court for the impacts upon wetlands, due to lack of factual foundation and insufficiency of Appellant's expert witness testimony showing no facts proving that stormwater would physically enter the wetland. *Costco Act 250 Permit Amend JO 157-12-16 Vtec MSJ* at 10 (Dec. 8, 2017).

* The Vermont Rules of Evidence apply to matters before the Environmental Division. V.R.E.C.P. 2(e). *Diverging Diamond Interchange*, Nos. 169-12-16, 50-6-16 Vtec at 1, Motion to Exclude Expert Report (2/8/2018).

* The V.R.E.C. P. allow the Environmental Division to relax evidentiary rules in appropriate circumstances. See, V.R.E.C.P. 2(e). *Diverging Diamond Interchange*, Nos. 169-12-16, 50-6-16 Vtec at 1 n. 1, Motion to Exclude Expert Report (2/8/2018).

* 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." V.R.E. 401. *Diverging Diamond Interchange*, Nos. 169-12-16, 50-6-16 Vtec at 1 n. 1, Motion to Exclude Expert Report (2/8/2018).

* Relevant evidence is generally admissible. V.R.E. 402. *Diverging Diamond Interchange*, Nos. 169-12-16, 50-6-16 Vtec at 1, Motion to Exclude Expert Report (2/8/2018).

* Court merits hearings are bench trials; therefore, the Court is generally liberal in allowing relevant evidence to be admitted. *Diverging Diamond Interchange*, Nos. 169-12-16, 50-6-16 Vtec at 1, Motion to Exclude Expert Report (2/8/2018), Citing *The Van Sicklen Ltd. P'ship*, No. 4C1013R-EB, slip op. at 1 (Vt. Env. Bd. Sep. 28, 2001).

* Court is more liberal with allowing relevant evidence to be admitted because unlike a jury, the Court is unlikely to be "unduly swayed by a questionable evidentiary offering." *Diverging Diamond Interchange*, Nos. 169-12-16, 50-6-16 Vtec at 1, Motion to Exclude Expert Report (2/8/2018), quoting *The Van Sicklen Ltd. P'ship*, No. 4C1013R-EB, slip op. at 1 (Vt. Env. Bd. Sep. 28, 2001).

* Once relevant evidence is admitted, Court affords it the weight it deserves, if any. *Diverging Diamond Interchange*, Nos. 169-12-16, 50-6-16 Vtec at 1-2, Motion to Exclude Expert Report (2/8/2018), citing *The Van Sicklen Ltd. P'ship*, No. 4C1013R-EB, slip op. at 1 (Vt. Env. Bd. Sep. 28, 2001); *In re Application of Lathrop Ltd. P'ship I*, 2015 VT 49, ¶ 90, 199 Vt.

* Court denies Appellant's motion to exclude expert witness report memo on stormwater produced by appellant's consultant, along with any expert testimony relating to that memorandum, on relevancy grounds as stormwater impacts are at issue; thus the memorandum and related expert testimony is generally relevant. *Diverging Diamond Interchange*, Nos. 169-12-16, 50-6-16 Vtec at 1, Motion to Exclude Expert Report (2/8/2018).

1006.2 Summary Judgment

* Moving party bears burden of showing that there is no genuine dispute as to any material fact, and that movant is entitled to judgment as a matter of law. *In re B&M Realty Act 250 Application*, No. 103-8-13 Vtec, Decision on Motion for Partial Summary Judgment, at 3 (10/7/14).

* In ruling on summary judgment motion, the Court accepts as true all factual allegations made in opposition and gives the nonmoving party the benefit of all reasonable doubts and inferences. *In re St. Johnsbury Academy Act 250 Permit Amendment Application Appeal*, No. 13-1-14 Vtec, Decision on Motion for Summary Judgment at 4 (2/6/15); *In re B&M Realty Act 250 Application*, No. 103-8-13 Vtec, Decision on Motion for Partial Summary Judgment, at 3 (10/7/14) (citing *Robertson v. Mylan Labs, Inc.*, 2004 VT 15 ¶15).

* In order to establish that a material fact is either disputed or undisputed a party must support its assertions with citations to materials in the record. *In re St. Johnsbury Academy Act 250 Permit Amendment Application Appeal*, No. 13-1-14 Vtec, Decision on Motion for Summary Judgment at 4 (2/6/15).

* Motion for summary judgment denied where there are insufficient undisputed facts to establish what conditions the applicant seeks to amend, whether those conditions were critical to the issuance of the underlying permit, and whether finality outweighs flexibility. *In re St. Johnsbury Academy Act 250 Permit Amendment Application Appeal*, No. 13-1-14 Vtec, Decision on Motion for Summary Judgment at 6 – 7 (2/6/15).

* Court may grant summary judgment only where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Court accepts as true factual allegations made in opposition to summary judgment as long as they are supported by affidavits or other evidentiary material. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status (4/12/12)

* “Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law.” *In re Times and Seasons, LLC*, 2011 VT 76, ¶ 8 (7/8/11) (citing V.R.C.P. 56(c)(3)); *Rueger v. NRB*, 2012 VT 33, ¶ 6 (4/26/12) (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)); *Re: WhistlePig, LLC*, No. 21-2-13 Vtec, Decision on Motions for Summary Judgment, at 5 (4/11/14)(citing *City of Burlington v. Fairpoint Communications, Inc.*, 2009 VT 59, ¶5).

* “To prevail on a motion for summary judgment, the moving party must satisfy a stringent two-part test: first, there must be no genuine issues of material fact, and second, the moving party must be entitled to judgment as a matter of law.” *In re Shenandoah LLC, et al.*, 2011 VT 68 at ¶ 20 (Skoglund, J., dissenting) (citing *Wesco, Inc. v. Hay-now, Inc.*, 159 Vt. 23, 26 (1992); *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 1 (E.O. on Mot. For Summ. J.) (11/8/12) (citing V.R.C.P. 56(a); V.R.E.C.P. 5(a)(2)).

* In opposing a motion for summary judgment, a party seeking to raise disputed facts is directed to file with the Court “a separate and concise statement of disputed facts, consisting of numbered paragraphs with specific citations to particular parts of materials in the record.” *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 1 (E.O. on Mot. For Summ. J.) (11/8/12) (citing V.R.C.P. 56(c)(1)(A)).

* “Courts are not empowered to try issues of fact on a motion for summary judgment; they examine affidavits or other evidence to determine whether a triable issue exists rather than for the purposes of resolving the issue.” *In re Shenandoah LLC, et al.*, 2011 VT 68 at ¶ 21 (Skoglund, J., dissenting) (*but note that, in this case, only the movant appeared in the Environmental Court*)

*“Both the party claiming that a material fact is undisputed and the party seeking to establish a dispute of material fact must support their assertions with citations to materials in the record.” *In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion)*, 116-8-12 Vtec at 2 (EO on Cross Mot for Sum J) (11/28/12) (citing V.R.C.P. 56(c)(1)).

* “In resolving motions for summary judgment, the Court can only issue judgment in favor of a party if the record shows both that ‘there is no genuine issue as to any material fact’ and that one of the parties is ‘entitled to judgment as a matter of law.’ When determining whether there are disputed material facts, the Court is directed to ‘accept as true the [factual] allegations made in opposition to the motion for summary judgment so long as they are supported by affidavits or other evidentiary material,” and to give the non-moving party the benefit of all reasonable doubts and inferences.” *In re Lathrop Limited Partnership*, No. 122-7-04 Vtec, Decision on Supplemental Pre-Trial Motion at 6 (4/12/11) (quoting V.R.C.P. Rule 56(c)(3); *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15); *In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion)*, No. 116-8-12 Vtec at 2 (EO on Cross Mot for Sum J) (11/28/12); *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 2 (E.O. on Mot. For Summ. J.) (11/8/12).

* Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 2 (7/30/10), citing *Montgomery v. Devoid*, 2006 VT 127, ¶ 9, 181 Vt. 154 (quoting V.R.C.P. 56(c)(3); *State v. Therrien*, 2003 VT 44, ¶ 8, 175 Vt. 342); *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 5 (2/2/10).

* In considering a summary judgment motion, the Court “place[s] the burden of proof on the moving party, and give[s] the opposing party the benefit of all reasonable doubts and inferences.” *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 5 (2/2/10), citing *Chapman v. Sparta*, 167 Vt. 157, 159 (1997); *In re Times & Seasons, LLC*, #45-3-09 Vtec, Decision on Multiple Motions at 6 (3/29/10)(citing *DeBartolo v. Underwriters at Lloyd’s of London*, 2007 VT 31, ¶ 8, 181 Vt. 609 (mem.); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990)); *aff’d on other grounds*, 2011 VT 76 (Vt. Supreme Ct. 7/8/11)..

* When presented with cross-motions for summary judgment, the Court is “directed to consider each motion in turn and to afford the party opposing the motion under consideration the benefit of all reasonable doubts and inferences.” *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 2 (7/30/10); *In re Big Rock Gravel Act 250 Permit (Appeal of Jurisdictional Opinion)*, No. 116-8-12 Vtec at 2 (EO on Cross Mot for Sum J) (11/28/12) (citing *City of Burlington v. Fairpoint Communications*, 2009 VT 59, ¶ 5, 186 Vt. 332) (citing *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990)).

* Affidavit in support of summary judgment must be based on personal knowledge and set forth facts that would be admissible and show that the affiant is competent to testify. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 10 (11/2/10).

* Applicant's motion for summary judgment challenging fifty conditions put on amendment of permit to subdivide denied in part and granted in part (conditions amended) and Applicant shall place \$10,000 in the Homeowner's Association stormwater maintenance fund upon completion of the access road. *In re Appeal of Michael Kokell*, #26-2-09 Vtec, Judgment Order at 3 (7/31/09).

* Summary judgment is only appropriate when there is no genuine issue of material fact and, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 4 (11/2/10); *In re: Snopeck & Telscher (Appeal of Act 250 Jurisdictional Opinion)*, No. 269-12-07 Vtec, Revised Decision on Motion for Summary Judgment at 5 (7/24/08)(citing *In re Carter*, 2004 VT 21, ¶ 6; V.R.C.P. 56(c); see also *Snopeck & Telscher*, No. 269-12-07 Vtec (6/26/08); *Re: Hamm Mine*, No. 271-11-06 Vtec, Decision on Appellant's Motion for Summary Judgment at 8-9 (9/27/07); see also: *In re: Hamm Mine Act 250 Jurisdiction*, Decision and Order (5/15/08), aff'd, 2009 VT 88 (mem.).

* Summary judgment granted where applicant failed to provide any credible evidence that there were material disputed facts regarding whether the proposed project could meet noise conditions critical to the issuance of the original permit. *In re O'Neil Sand and Gravel*, No. 48-2-07 Vtec, Decision and Order on Motion to Reconsider or to Alter at 12-13 (2/23/10).

* Summary judgment to Applicant is granted and party status to Neighbors is denied where Applicant provided documentation, an affidavit, and an appraisal, and the record is devoid of any representation as to what Neighbors would likely produce at a hearing. *In re RCC Atlantic, Inc., and Sousa*, #163-7-08 Vtec, Decision on Multiple Motions at 8 (5/08/09).

* When Applicant's motion is accompanied by affidavits and documentation, Neighbors faced increased duty under Robertson to present credible documentation or affidavits. *In re RCC Atlantic, Inc., and Sousa*, #163-7-08 Vtec, Decision on Multiple Motions at 7 (5/08/09).

* "When both parties seek summary judgment, 'each must be given the benefit of all reasonable doubts and inferences when the opposing party's motion is being evaluated.'" *In re Gizmo Realty/VKR Associates, LLC*, No. 199-9-07 Vtec, Decision on Cross Motions for Summary Judgment at 3 (4/30/08)(citing *DeBartolo v. Underwriters at Lloyd's of London*, 2007 Vt. 31, ¶8 (2007)); subsequent Decision on the Merits (3/10/09).

* Summary judgment denied on Criterion 9B issue where material facts remained in dispute as to what wetlands and other features segregate the site's agricultural soils from other soils on the site, as to whether the project is planned to minimize the project soils' reduction in agricultural potential, as to whether suitable mitigation has been proposed, and as to whether "appropriate circumstances" for off-site mitigation exist under § 6093(a)(3)(B). *In re: Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order on Motion for Summary Judgment at 4 (6/9/09), quoting 10 V.S.A. § 6093(a)(3)(B).

* A motion that requires the consideration of matters outside of the pleadings is more properly viewed as a motion for summary judgment than a motion to dismiss. *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St.*

Albans (Site Plan & Conditional Use Approval), No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 8 (3/16/09).

* When presented with cross-motions for summary judgment, the court must consider each motion in turn and afford all reasonable doubts and inferences to the party opposing the particular motion under consideration. *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 8 (3/16/09), citing *DeBartolo v. Underwriters at Lloyd’s of London*, 2007 VT 31, ¶ 8, 181 Vt. 609 (citing *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990)).

* Summary judgment denied on material change issue where material facts were in dispute as to the location and size of a shed on Appellees’ property. *Re: Carson*, No. 13-1-08 Vtec, Decision on Appellant’s Motion for Summary Judgment at 1 (10/6/08).

* “Even in cases in which no party files an opposition to a summary judgment motion seeking approval of a permit, it is not before the Court in the nature of a default judgment.” *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner’s Motions for Relief from Judgment at 6 (3/12/08).

* The Court must independently examine the material facts and may only grant summary judgment if the movants are entitled to summary judgment under applicable substantive law, because the Court is obligated to apply the substantive standards that were applicable before the tribunal appealed from. *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner’s Motions for Relief from Judgment at 6 (3/12/08), (citing 10 V.S.A. § 8504(h); V.R.E.C.P.(g); *In re Outdoors in Motion, Inc.*, Act 250 Amendment, No. 208-9-06 Vtec., Unpublished Entry Order (12/26/06)).

* Summary judgment is only appropriate when there are no genuine issues of material fact and, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *Re: Hamm Mine*, No. 271-11-06 Vtec, Decision on Appellant’s Motion for Summary Judgment at 8-9 (9/27/07); see also; *In re: Hamm Mine Act 250 Jurisdiction*, Decision and Order (5/15/08), *aff’d*, 2009 VT 88 (mem.).

* When ruling on a motion for summary judgment, the court must view the relevant evidence in a light most favorable to the non-moving party and may only grant the motion if the applicable legal standards require an entry of judgment in the moving party’s favor. *Lathrop Limited Partnership*, 64-3-06 Vtec, Decision and Order on Pending Motions at 3 (11/29/2006) (citing *Toys Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990)).

* Summary judgment granted where undisputed facts establish that permit condition requires permit amendment. *Re Eustance*, No. 13-1-06 Vtec, Decision at 10 (2/16/07), Judgment Order (3/16/07), *aff’d*, 2007-156 (Vt. S. Ct. 3/13/09).

* Court cannot grant summary judgment where undisputed facts do not establish whether the project constitutes a substantial or material change, and where the commission has not yet

ruled on the issue. *In re Eustance*, No. 13-1-06 Vtec, Decision at 14 (2/16/07), Judgment Order (3/16/07), *aff'd on other grounds*, 2007-156 (Vt. S. Ct. 3/13/09).

* Summary judgment is appropriate when pleadings and evidence show that there is not genuine issue of material fact and party is entitled to judgment as a matter of law. *Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 (1/16/07).

* Unopposed motion for summary judgment granted on Criteria 5, 7 and 9(K) where applicant submitted engineer's affidavit and exhibits showing that subdivision will not require stop lights, stop signs, or materially increase maintenance needs on town roads, and that proposed access road is safe and will not place an unreasonable burden on town's ability to provide municipal services. *Re: Bergmann*, 158-8-05 Vtec, Decision and Order at 3-4 (4/11/06).

* Summary judgment may be granted against moving party, despite lack of opposition, pursuant to V.R.C.P. 56(C)(3). *Re: Bethel Mills, Inc.*, No. 243-11-05 Vtec, Decision at 7 (4/9/06).

* Summary judgment granted where undisputed facts established that proposed wind tower project would constitute a substantial and material change to the permitted project, and would be subject to Public Service Board review under Section 248. *Re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 15 (8/3/06); *followed, Woodchip Power Plant*, No. 91-4-06, Decision and Order (1/30/07); *distinguished in, Dover Valley Trail*, No. 88-4-06 Vtec, Decision at 3 - 4 (1/16/07) (bike paths constructed by state/town).

* Summary judgment granted in applicant's favor when undisputed facts show that proposed signage is not inharmonious to the aesthetic character of section of Route 4 in Rutland. *Re: Outdoors in Motion, Inc.*, No. 208-9-06 Vtec, Entry Order at 2 (10/23/06).

* "Under V.R.C.P 56(e), "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c)," this Court has the discretion to "give an opportunity to properly support or address the fact." *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 3 (E.O. on Mot. For Summ. J.) (11/8/12).

* "In resolving motions for summary judgment, the Court can only issue judgment in favor of a party if the record shows both that 'there is no genuine issue as to any material fact' and that one of the parties is 'entitled to judgment as a matter of law.' When determining whether there are disputed material facts, the Court is directed to 'accept as true the [factual] allegations made in opposition to the motion for summary judgment so long as they are supported by affidavits or other evidentiary material,' and to give the non-moving party the benefit of all reasonable doubts and inferences." *In re Lathrop Limited Partnership*, No. 122-7-04 Vtec, Decision on Supplemental Pre-Trial Motion at 6 (4/12/11) (quoting V.R.C.P. Rule 56(c)(3); *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15); *In re Big Rock Gravel (JO Appeal)*, No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 2 (11/28/12).

* When presented with cross-motions for summary judgment, the Court is "directed to consider each motion in turn and to afford the party opposing the motion under consideration the benefit of all reasonable doubts and inferences." *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment at 2 (7/30/10); *see*

also, *In re Big Rock Gravel (JO Appeal)*, No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 2 (11/28/12)(citing *City of Burlington v. Fairpoint Communications*, 2009 VT 59, ¶ 5, 186 Vt. 332) (citing *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990)).

* “Both the party claiming that a material fact is undisputed and the party seeking to establish a dispute of material fact must support their assertions with citations to materials in the record.” *In re Big Rock Gravel (JO Appeal)*, No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 2 (11/28/12) (citing VRCP 56(c)(1) and Reporter’s Notes).

* A grant of “[s]ummary judgment is appropriate when, giving the benefit of all reasonable doubts and inferences to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *In re Beliveau NOV, Town of Fairfax v. Beliveau*, 2013 VT 41, ¶ 7 (6/14/13) (citing *Gade v. Chittendon Solid Waste Dist.*, 187 Vt. 7, 11 (2009)).

* “When both parties move for summary judgment, each is entitled to the benefit of all reasonable doubts and inferences when the opposing party’s motion is being judged.” *In re Beliveau NOV, Town of Fairfax v. Beliveau*, 2013 VT 41, ¶ 7 (6/14/13) (citing *City of Burlington v. Fairpoint Commc’ns, Inc.*, 186 Vt. 332, 336 (2009); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990)).

* Appellant’s motion for summary judgement granted in part, as 10 V.S.A. § 6086(a)(8) cannot be interpreted to regulate aircraft operation and noise due to the Federal Aviation Act preempting state and local law. *Brady Sullivan Act 250 Permit Application Appeal*, 38-4-17 Vtec Decision on Motion for Summary Judgement at 4 (1/19/2018).

* Court denied appellant’s motions for summary judgement in part, as it determined that it was not preempted by federal law to review potential noise impacts from a proposed private heliport under 10 V.S.A. § 6086(a)(8) because the heliport had not yet been built. “[C]onsidering noise when determining whether to permit a proposed aircraft landing site is different from attempting to regulate noise at an existing airport.” *Brady Sullivan Act 250 Permit Application Appeal*, 38-4-17 Vtec Decision on Motion for Summary Judgement at 9 (1/19/2018).

* Court regards appellee’s representations as true for the purposes of the summary judgement analysis and denies appellant’s motion for summary judgement because appellant offers no facts to contradict the factual representations presented by appellee’s experts. V.R.C.P. 56(e)(2) and (3). *Costco Act 250 Permit Amend JO 157-12-16 Vtec MSJ* at 10 (Dec. 8, 2017).

* Court grants summary judgment when the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(a); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 1, Decisions on Motion for Summary Judgement (Oct. 11, 2017).

* On motion for summary judgment, Court gives nonmoving party the benefit of all reasonable doubts and inferences. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 1, Decisions on Motion for Summary Judgement (Oct. 11, 2017), Citing *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356.

* “In an action for summary judgment, once the moving party meets the initial burden of showing no material facts are disputed, the burden shifts to the non-moving party to establish a triable issue of fact.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 1, Decisions on Motion for Summary Judgment (Oct. 11, 2017), citing *Pierce v. Riggs*, 149 Vt. 136, 138 (1987).

* In an action for summary judgment, “to establish that a fact is disputed or unsupported by the record, the non-moving party must cite to materials on the record or show that the materials cited by the moving party do not establish the absence of a genuine dispute.” V.R.C.P. 56(c); *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 1, Decisions on Motion for Summary Judgment (Oct. 11, 2017).

* “When considering cross motions for summary judgment, each party is entitled to the benefit of reasonable doubts and inferences when considered as the non-moving party.” *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 1, Decisions on Motion for Summary Judgment (Oct. 11, 2017), citing *Vermont Coll. of Fine Arts v. City of Montpelier*, 2017 VT 12, ¶ 7 (Vt. Feb. 10, 2017) (citation omitted).

* Court denies several of the applicant’s Questions on motion for summary judgment because the Questions are overly broad, and applicant has not provided sufficient information at this time for the Court to rule in its favor. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 27, Decisions on Motion for Summary Judgment (Oct. 11, 2017)

1006.3 Stays

* “As the United States Supreme Court held in the leading case of *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), every court has the power “to control the disposition of the causes on its docket.” But, how this best can be done “calls for the exercise of judgment” and the party seeking a stay “must make out a clear case of hardship or inequity in being required to go forward” if there is a possibility that a stay will damage someone else. “Courts disapprove stays . . . when a lesser measure is adequate to protect the moving party’s interests.” *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 36 (10/26/12) (citing *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936); *In re Application for Water Rights*, 101 P.3d 1072, 1082 (Colo. 2004)).

* Fairness and efficiency require that an applicant have some discretion in how it proceeds through the permitting process; neither this Court nor permit opponents should prevent this process from moving forward unless a stay is appropriate to avoid unnecessary cost or delay. *Re: Killington Resort Parking Project*, No 173-12-13 Vtec, Entry Order at 2 (05/13/15).

* Moving party “‘must make out a clear case of hardship or inequity in being required to go forward’ if there is a possibility that a stay will damage someone else.” *Re: Killington Resort Parking Project*, No 173-12-13 Vtec, Entry Order at 2 (05/13/15); *Re: Killington Village Act 250 Master Plan Application*, No. 147-10-13 Vtec, Entry Order at 1-2 (5/13/15).

* “The issuance of a permit by a district commission is not automatically stayed upon appeal of that decision. Rather, this Court is vested with the discretion to issue a stay of the permit when

‘it is necessary to preserve the rights of the parties.’” *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, EO on Motion to Stay at 1 (7/1/11) (citing V.R.E.C.P 5(e); V.R.C.P. 62(d)(2)).

* “It is not clear that a district environmental commission can take actions in connection with conditions included in a state land use permit when the issuance of the permit is on appeal before this Court, even if the permit itself is not stayed.” *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, EO on Motion to Stay at 2 (7/1/11).

* “When ruling on a motion to stay a decision, we ultimately ask if a stay would ‘preserve the rights of the parties on terms and conditions that are fair to all’ during the pendency of the appeal.” *In re Granville Manufacturing Co., Inc.*, No. 2-1-11 Vtec, EO on Motion to Stay at 1 (7/1/11) (citing Reporter’s Notes, V.R.E.C.P. 5).

* To prevail on motion for stay, movant must show: (1) a strong likelihood of success on appeal; (2) irreparable injury to the moving party if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public. *In re: Route 103 Quarry*, 205-10-05 Vtec, Decision on Pending Motions For Stay and to Strike at 3 (09/14/2007) (quoting *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995)).

* Court denies motion for stay because without a showing that the future action would cause the injury, granting a stay would cause unnecessary losses without affording relief. *In re: Route 103 Quarry*, 205-10-05 Vtec, Decision on Pending Motions For Stay and to Strike at 4 (09/14/2007).

* Court denies neighbors’ motion to stay Act 250 permit and permittee’s motion to strike coordinator’s affidavit filed in support of motion to stay, because decision can be read two ways regarding notice requirements for blasting, and Court holds that the more conservative interpretation requiring maximum notice of blasting should apply. *In re: Route 103 Quarry*, 205-10-05 Vtec, Decision on Pending Motions For Stay and to Strike at 2 (09/14/2007).

* Court denies petition to stay Act 250 permit because petitioner fails to show it is necessary to preserve the rights of the parties. *In re: Three Church Street*, No. 174-7-06 Vtec, Decision at 3 (1/3/07).

*Where parties asked the court for a stay on the ground related to the expenses of a trial, in particular the employment of expert witnesses, the court did not abuse its discretion in allowing a summary judgment proceeding to move forward because the issue before the court was one of law, and the record was generally sufficient to make the decision. *In re Woodstock Community Trust and Housing Vermont PRD*, 2012 VT 87, ¶ 37 (10/26/12).

* A stay is considered an “extraordinary remedy appropriate only when the movant’s right to relief is clear.” *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 1 (EO on Motion to Stay) (2-7-2018). Quoting *Howard Ctr. Renovation Permit*, No. 12-1-13 Vtec, slip op. at 1 (Vt. Super. Ct. Evtl. Div. Apr. 12, 2013) (Walsh, J.).

* The moving party bears the burden of demonstrating a stay is warranted. See *In re Search Warrants*, 2011 VT 88, ¶ 2 (mem.). *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Stay) (2-7-2018).

* This Court considers four factors when determining whether a motion to stay a permit should be granted: “(1) [the moving party’s] likelihood of success on the merits; (2) irreparable harm to the moving party should the stay be denied; (3) substantial harm to other parties should the stay be granted; and (4) the best interests of the public.” *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 1 (EO on Motion to Stay) (2-7-2018). Quoting 110 East Spring St. CU, No. 11-2-16 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Apr. 22, 2016) (Walsh, .) (citing *In re Tariff Filing of New England Tel. & Tel. Co.*, 145 Vt. 309, 311 (1984)).

* To show irreparable harm for a stay, harm is “irreparable” if it would impair the Court’s ability to effectively grant a remedy. 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2948.1. *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Stay) (2-7-2018).

* Court denied Motion to stay Act 250 permit and conditional use permit, as appellants have failed to establish a need for a stay. They fail to address their likelihood of success on the merits, that a stay will not substantially harm other parties, that a stay is in the best interest of the public, and fail to allege facts that adequately show irreparable harm resulted from VTRANS cutting trees at the subject property and scaling a rock cut. Therefore, Appellants have not shown irreparable harm because they have not shown how these construction impacts impair the Court’s ability to grant the available remedies. *In re 623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Stay) (2-7-2018).

1006.4 Remand

*

* Court grants motion to remand JO for reconsideration, based on district coordinator’s letter requesting remand, pursuant to VRECP 5(i). *Re: American Tower, Inc.*, No. 112-6-07 Vtec, Entry Order (6/19/07).

*It is within the Environmental Court’s discretion to remand, back to a municipal panel, an application arising in a de novo appeal of that panel’s decision. *In re Conlon CU Permit (Appeal of Planning Commission grant of a conditional use approval)*, No. 2-1-12 Vtec at 1 (EO on Mot to Remand) (8/30/12) (citing *In re Maple Tree Place*, 156 Vt. 494, 498-501 (1991); V.R.E.C.P. 5(i)).

*The remand of an application, arising in a de novo appeal of a municipal panel’s decision, in advance of the Court being given an opportunity to examine the substantive issues raised in a de novo appeal is rarely appropriate. *In re Conlon CU Permit (Appeal of Planning Commission grant of a conditional use approval)*, No. 2-1-12 Vtec at 1 (EO on Mot to Remand) (8/30/12).

*“Situations which might warrant remand include when an issue arises on appeal that was not presented to the lower tribunal, or when our interpretation of a zoning ordinance would be aided by the input of the administrative body responsible for applying it.” *In re Conlon CU Permit (Appeal of Planning Commission grant of a conditional use approval)*, No. 2-1-12 Vtec at 1 (EO on Mot to Remand) (8/30/12) (citing *Timberlake Assocs. V. City of Winooski*, 170 Vt. 643, 644 (2000) (mem.) (citing *In re Maple Tree Place*, 156 Vt. 494, 500 (1991)).

*Once a timely appeal of a district commission decision is taken by a party who either participated in before the district commission or is a party who was denied party status, the

Court can consider arguments by the appealing party raised under all of the Act 250 criteria for which the Court determines the appealing party has party status; the Court need not remand the matter back to the district commission if we determine that a prospective appellant who was denied party status below does qualify for such status and has the ability to appeal. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 6 (8/17/12) (citing 10 V.S.A. §8504(d)(2)(B) (citing 10 V.S.A. §§ 8504(d)(1) and 8504(d)(2)(B)).

*The court will not remand back to the district commission if it determines that doing so would be in contravention of securing “the just, speedy, and inexpensive determination” of the action. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 6 (8/17/12) (citing V.R.C.P. 1 and V.R.E.C.P. 1).

*The Environmental Court will follow the Environmental Board’s practice of hearing substantive issues, after reversing district commission decisions denying party status, without remand. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 7 (8/17/12).

1006.5 Discovery / Access to property (see 335)

* Motion to compel inspection granted where Appellant has party status under Criteria 1(G) and wishes to enter land to inspect wetland for purpose of arguing wetland should be categorized as significant. *In re Costco Act 250 Permit Amendment*, #143-7-09 Vtec, Entry Order (10/14/09).

* Discovery is a broad litigation tool, authorizing parties to make various inquiries “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” V.R.C.P. 26(a). Discovery is not even limited to evidence that would be admissible at trial; it may be had even of information that isn’t admissible, so long as “the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Inspection and entry upon lands for discovery purposes is specifically governed by V.R.C.P. 34. *In re Costco Act 250 Permit Amendment*, #143-7-09 Vtec, Entry Order at 2 (10/14/09).

* Structure and purpose of Act 250 imply power to compel applicant to grant site access to other parties regarding its application. *Finard-Zamias Associates*, #1R0661-EB (3/28/90). [EB #459M1]

1006.6 Motion to Dismiss

*Motion to dismiss for lack of standing reviewed under V.R.C.P. 12(b)(1), which requires that the Court take all uncontroverted factual allegations and construe them in the light most favorable to the nonmoving party. *Diverging Diamond Interchange A250*, No. 169-12-16 Vtec at 1 (3/17/2017).

*The 15 day deadline imposed by VRCP 78 on responses to written motions applies to memoranda in opposition of motions to dismiss. *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 1 (E.O. on Motion for Enlargement of Time) (11/8/12) (citing *Driver v. Driver*, 148 Vt. 560, 561 (1987)).

*VRCP 78 grants the Court discretion to consider a late response to a motion to dismiss. *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 2

(E.O. on Motion for Enlargement of Time) (11/8/12) (citing V.R.C.P. 78(b)(1)).

* “In considering the underlying motion to dismiss, we ‘take the factual allegations [of the nonmoving party] as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the [nonmoving party] to relief.’” *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 1 (Motion for Reconsideration) (3/15/2018), quoting *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1 (citations omitted).

* Court does not consider materials presented outside the pleadings by Appellant on a motion to dismiss. V.R.C.P. 12(b). *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 11, n. 4 (2/8/2018).

* In considering a motion to dismiss we “take the factual allegations [of the nonmoving party] as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the [nonmoving party] to relief.” *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 3 (2/8/2018), quoting *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1 (citations omitted).

* Court will not treat a motion to dismiss as a motion for summary judgement where motion does not include a statement of material facts, affidavits, or any other evidentiary material to support factual assertions. *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 3 (2/8/2018)

1006.6.1 For procedural defect

* Failure to fully comply with any subsequent procedural step, such as defective service, may allow dismissal, but does not require dismissal of a petition or notice. *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 16 (7/30/10); and see *Re: Clearwater Realty*, DR #318, FCO at 9 (9/27/96) (refusing to dismiss a request for declaratory ruling that was submitted within the filing deadline, despite the fact that it was not properly served on all parties and despite the fact that the rule was silent as to whether other procedural defects required dismissal)

* Dismissal of a case based on subsequent procedural defects is generally only warranted when it is found that a party acted in “bad faith or deliberate and willful disregard for the [tribunal’s] orders” and that there has been “prejudice to the party seeking the dismissal.” *In re: Lamoille Valley Rail Trail*, #208-10-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment 16 (7/30/10), citing *Kapitan*, Decl. Ruling #388, Dismissal Order, at 3 (citing *John v. Med. Ctr. Hosp. of Vt., Inc.*, 136 Vt. 517, 519 (1978)).

1006.7 Other Procedural Issues

* The Court the broad power under Rule 59(e), to alter or amend a judgment to prevent an unjust result on a party due to a “mistake or inadvertence” by the court. *Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions to Reconsider at 1 (7/7/16) citing *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588(1996).

* “There are four principal reasons for granting a Rule 59(e) motion: (1) ‘to correct manifest errors of law or fact upon which the judgment is based’; (2) to allow a moving party to ‘present

newly discovered or previously unavailable evidence’; (3) to ‘prevent manifest injustice’; and (4) to respond to an ‘intervening change in the controlling law.’” *Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions to Reconsider at 2 (7/7/16) citing 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2810.1.

* “Rule 59(e) motions are not intended as a means to reargue or express dissatisfaction with the Court’s findings of fact and conclusions of law, and a motion to alter or amend will be denied where it merely repeats arguments that have already been raised and rejected by the court.” *Hinesburg Hannaford Act 250 Permit*, No. 113-8-14 Vtec, Decision on Motions to Reconsider at 2 (7/7/16).

* In a bench trial, although *Daubert* applies, Court has discretion to admit questionable technical evidence, but must not give it more weight than it deserves. *In re Lathrop L.P.*, 2015 VT 49, ¶ 90 (citation omitted).

* Bare relevancy is sufficient for evidence to meet *Daubert*’s fitness requirement. *In re Lathrop L.P.*, 2015 VT 49, ¶ 95 (citation omitted).

* Fact that CADNA-A noise modeling evidence has limitations for projects with rugged terrain does not render it inadmissible at trial. *In re Lathrop L.P.*, 2015 VT 49, ¶ 89 (citations omitted).

* Pursuant to V.R.E. 702, scientific or technical testimony or evidence is admissible if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” *N.E. Materials Group Amended A250 Permit*, No. 35-3-13 Vtec, Entry Order at 2 (4/30/15).

* *Daubert* requires that judges act as gatekeepers of expert testimony, admitting it only if it is both reliable and relevant. *N.E. Materials Group Amended A250 Permit*, No. 35-3-13 Vtec, Entry Order at 2 (4/30/15).

* Evidence of determination in a tax assessment appeal presenting a valuation that appears speculative at best; it is founded upon “public perception” of the quarry; provides no foundation that such “perception” is accurate or even casually related to the project and is inadmissible under Rule 403 In regards to evidence concerning impact on property values, speculative estimate of impact upon the value of an adjoining property cannot satisfy heightened threshold of “unduly harmful” impact upon environmental or surrounding land uses. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 64 (3/25/10).

* Motion in Limine denied where expert opinion is based on sufficient facts, is the product of principles and methods relied upon by experts in the field, and expert has indicated how those principles support the opinion. The proper way to challenge such expert opinion is through cross-examination or to introduce contradictory evidence. *N.E. Materials Group Amended A250 Permit*, No. 35-3-13 Vtec, Entry Order at 2 (4/30/15).

* Board’s Motion to Amend Judgment pursuant to V.R.C.P. 59(e) granted to correct procedural record and clarify permit condition on sustained dog barking and vocalization. *Re: Hovey Act 250 Permit*, No. 130-9-13 Vtec, Entry Order at 2-3 (4/14/15), *appeal docketed*, No. 2015-205.

* Court treats Motion to Reconsider as a Motion to Alter or Amend under VRCP 59(e), which allows the Court to revise judgment to correct manifest error of law or fact, allow a party to

present newly discovered or previously unavailable evidence, to prevent manifest injustice, or to respond to an intervening change in controlling law.); *In re Rinkers, Inc.*, Decision and Order on Motion to Reconsider at 2-3 (10/20/10); *aff'd on other grounds*, 2011 VT 78 (Vt. Supreme Court 7/13/11).

* Motion to alter or amend under Rule 59(e) may be granted to correct manifest error of law or fact. *Re: Lathrop Limited Partnership*, Nos. 122-7-04, 210-9-08, 136-8-10 Vtec, Entry Order at 1 (4/17/14)(citing *In re UVM Certificate of Appropriateness*, No. 90-7-12 Vtec, slip op. at 1 (3/19/13)), *rev'd and remanded on other grounds, In re Lathrop, L.P.*, 2015 VT 49.

* When ruling on a motion for judgment on the pleadings, as with summary judgment motions, the Court must construe all facts in a light most favorable to nonmoving party. *NRB Land Use Panel v. David Dodge*, No. 43-03-08 Vtec, Decision and Order on Motion for Judgment on the Pleadings at 3 (9/30/08), citing *Jordan v. State Agency of Transp.*, 166 Vt. 509, 511 (1997).

* Motions to reconsider party status should be used sparingly, and should not be used to repeat arguments that have been raised and rejected by the court in the prior decision. *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 4 (12/1/08).

* V.R.A.P. 5 requires that, to grant a motion for interlocutory appeal, the Court must find that the order or ruling “involves a controlling question of law” about which “there is substantial ground for difference of opinion,” and that “an immediate appeal may materially advance the termination of the litigation.” *In re Morgan Meadows/Black Dog Realty*, No. 267-12-07 Vtec, Decision and Order on Motion for Reconsideration and Motion for Interlocutory Appeal at 3 (12/1/08)(quoting V.R.A.P. 5(b)(1)).

* When an Act 250 applicant files an amendment application after contesting jurisdiction by appealing the JO, the Environmental Court’s most effective remedy is to dismiss the applicant’s appeal from the jurisdictional opinion but to do so without prejudice to the applicant’s right to request that the Court reopen that appeal, should he not receive the desired permit amendment. *In re: Lefgren Act 250 Appeal (JO #3-109 & 3-110)(incomplete application determination)*, No. 28-2-07, 240-11-07 Vtec, Decision and Order at 4 (4/15/2008).

* Court issued entry order to “protect and prohibit all parties” from making discovery requests not germane to the issues on appeal, but allowing discovery requests that “appear reasonably calculated to lead to the discovery of admissible evidence.” *In re: JLD Wal*Mart Act 250 LU Permit (Altered)*, No. 116-6-08 Vtec, Motion for Protective Order, No.1 at 2 (10/10/08), quoting V.R.C.P. 26 (a)(1) and citing V.R.C.P. 26(c)(1).

* Motions to reconsider are subject to “a very restrictive standard of review” and “should not be used to repeat arguments that have been raised and rejected by the Court in the earlier decision.” *In re: JLD Properties – Wal-Mart St. Albans (4-Lot Subdivision)* No. 242-10-06 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Site Plan & Conditional Use Approval)*, No. 92-5-07 Vtec, *In re: JLD Properties – Wal-Mart St. Albans (Act 250 Land Use Permit)*, No. 116-6-08 Vtec, Decision on Multiple Motions at 8 (3/16/09).

* VRCP 5(a)(2) generally authorizes the recording of all of the public proceedings in these matters, including the site visit; however, any party is entitled to file a motion to exclude

recording under Rule 79.2(b), which notes that anyone seeking to prevent recording “shall have the burden of proving, by a preponderance of the evidence, that the court should prohibit, terminate, limit or postpone the recording.” *In re: JLD Properties – Wal-Mart Strmwtr Disch Permit*, No.129-5-06 Vtec, 242-10-06 Vtec, 92-5-07 Vtec, 221-10-07 Vtec, 80-4-08 Vtec, 116-6-08 Vtec, Video Recording or Proceedings, No. 14 at 1 (6/10/09), quoting V.R.C.P. 79.2(b).

* Court denies motion to extend time for filing cross-appeal under VRAP 4 for lack of good cause where movant knew when the notice of appeal had been filed. *In re Rinker’s*, No. 302-12-08 Vtec.

* “Although V.R.C.P 60(b) is to be liberally construed and applied to prevent...injustice, it should not be applied to relieve a party from tactical decisions or free, calculated, and deliberate choices.” *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner’s Motions for Relief from Judgment at 10 (3/12/08) (citing *Cliche v. Cliche*, 143 Vt. 301, 306 (1983); *Sandgate School District v. Cate*, 178 Vt. 625, 626-27 (mem.)).

* Granting a under V.R.C.P. 60(b) motion to reopen an appeal, which had been filed a year earlier and decided by a final order issued four months earlier, would result in injustice when Petitioners chose not to file their own appeal; did not enter an appearance in Appellants’ appeal, even though they knew it had been filed; did not make inquiry as to the status of that appeal; and did not move to intervene during the pendency of that appeal. *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner’s Motions for Relief from Judgment at 11-12 (3/12/08).

* Motion for Relief from Judgment under V.R.C.P. 60(b) denied where neighbors and their attorney had received commission decision noting 30-day appeal period, and neighbor knew of appeal and mentioned it to attorney. *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner Lilienthals’ Motions for Relief from Judgment, at 11 (3/12/08).

* Even in de novo appeal in which no opposing party appears, the Court does not grant requested relief as if by default. *In re: Bergmann Act 250 Subdivision*, No. 158-8-05 Vtec, Decision and Order on Petitioner Lilienthals’ Motions for Relief from Judgment, at 6 (3/12/08).

* Court has discretion when deciding a motion to dismiss based on defective service. *Re: Sports Venue Foundation, Inc.*, No. 168-8-07 Vtec, Decision and Order on Motion to Dismiss and Motion for Clarification at 3 (12/18/07)(citing *Mountainview Association, Inc. v. Town of Wilmington*, 147 Vt 627, 629 (1987)).

* Court dismisses appeal for failure to remedy defective notice and file required certificate of service, and because appellant lost his individual interest in abutting commercial property. *Re: Sports Venue Foundation, Inc.*, No. 168-8-07 Vtec, Judgment Order, and Decision and Order on Motion to Dismiss and Motion for Clarification at 4-5 (12/18/07).

* Court grants motion to disqualify applicant’s counsel on procedural issues but disqualification does not apply to merits if case is reopened. *Re: Bergmann*, No. 158-8-05 Vtec, Decision and Order on Petitioners’ Motion to Disqualify, at 6 (3/23/07).

* A motion to alter or remand under V.R.C.P. 59(e) “allows the trial court to revise its initial judgment if necessary to relieve a party against the unjust operation of the record resulting

from the mistake or inadvertence of the court and not the fault or neglect of the party.” *South Village Communities, LLC*, 74-4-05 Vtec, Decision on Appellee-Applicant’s Motion to Reconsider and Amend at 1 (09/14/2006) (quoting *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588 (1996)). See also *Snowstone, LLC JO #2-308*, #151-11-17 Vtec., Entry Order on Limited Motion to Alter (2/21/19).

* V.R.C.P. 59(e) is an extraordinary remedy, which should be used sparingly and at the discretion of the court. *South Village Communities, LLC*, 74-4-05 Vtec, Decision on Appellee-Applicant’s Motion to Reconsider and Amend at 1-2 (09/14/2006).

* V.R.C.P. 54(b) provides that, in the absence of a final judgment by this Court, any decision adjudicating fewer than all of the claims of fewer than all of the parties in an action “is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 1 (11/14/12).

*“In addressing a motion to alter made pursuant to Rule 54(b), we apply the legal standard applicable to ruling on a Rule 59(e) motion to alter or amend a final judgment.” *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 1 (11/14/12) (citing *In re Bennington Wal-Mart Demolition/Const. Permit*, No. 158-10-11 Vtec, slip op. at 4 (Vt. Sup. Ct. Envtl. Div. Aug. 17, 2012) (Walsh, J.)).

* Court has discretion whether to grant the extraordinary remedy afforded by Rule 59, and there are four principal reasons for doing so: (1) to correct manifest errors of law or fact; (2) to allow a party to provide ‘newly discovered or previously unavailable evidence’; (3) to “prevent manifest injustice’; and (4) to respond to an ‘intervening change in the controlling law.’ *In re Champlain Parkway Act 250 Permit*, No. 68-5-12 Vtec, Entry Order on Motion to Alter, at 1 (11/14/12) (citing *Lathrop Ltd. P’ship I*, Nos. 122-7-04 Vtec, 210-9-08 Vtec, and 136-8-10 Vtec, slip op. at 10-11 (Vt. Super. Ct. Envtl. Div. Apr. 12, 2011) (Durkin, J.) (quoting 11 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* 2810.1)).

* “In order to be admissible, expert testimony must be both relevant and reliable.” *Diverging Diamond Interchange Act 250 and SW Permits*, No. 169-12-16, 50-6-16 Vtec at 2 (EO on Motion in Limine) (3/14/2018) citing *State v. Scott*, 2013 VT 103, ¶ 9, 195 Vt. 330 (citations omitted).

* Because the Court conducts bench trials, it is generally liberal in allowing relevant evidence to be admitted.” *Diverging Diamond Interchange Act 250 and SW Permits*, No. 169-12-16, 50-6-16 Vtec at 2 (EO on Motion in Limine) (3/14/2018) citing *Diverging Diamond Interchange A250 and SW Permits*, Nos. 169-12-16, 50-6-16 Vtec, slip op. at 1–2 (Vt. Super. Ct. Envtl. Div. Feb. 8, 2018) (Walsh, J.) (citing *The Van Sicklen Ltd. P’ship*, No. 4C1013R-EB, slip op. at 1 (Vt. Env. Bd. Sep. 28, 2001)).

*Unlike a jury, the Court is unlikely to be “unduly swayed by a questionable evidentiary offering.” *Diverging Diamond Interchange Act 250 and SW Permits*, No. 169-12-16, 50-6-16 Vtec at 2 (EO on Motion in Limine) (3/14/2018) quoting *Diverging Diamond Interchange A250 and SW Permits*, Nos. 169-12-16, 50-6-16 Vtec, slip op. at 1–2 (Vt. Super. Ct. Envtl. Div. Feb. 8, 2018) (Walsh, J.) (citing *The Van Sicklen Ltd. P’ship*, No. 4C1013R-EB, slip op. at 1 (Vt. Env. Bd. Sep. 28, 2001)).

- * Once relevant evidence is admitted, the Court affords it the weight it deserves, if any. *Diverging Diamond Interchange Act 250 and SW Permits*, No. 169-12-16, 50-6-16 Vtec at 2 (EO on Motion in Limine) (3/14/2018), citing *Diverging Diamond Interchange Act 250 and SW Permits*, Nos. 169-12-16, 50-6-16 Vtec, slip op. at 1–2 (Vt. Super. Ct. Envtl. Div. Feb. 8, 2018) (Walsh, J.); *In re Application of Lathrop Ltd. P’ship I*, 2015 VT 49, ¶ 90, 199 Vt. 19.
- * Court denies motion to exclude evidence of an alternative stormwater system and modeling in the form of expert witness testimony, finding the testimony on alternate systems and modeling systems relevant in order to determine whether the project can meet standards without using site balancing procedure. *Diverging Diamond Interchange Act 250 and SW Permits*, No. 169-12-16, 50-6-16 Vtec at 3 (EO on Motion in Limine) (3/14/2018)
- * “Reliable expert testimony is ‘sufficiently rooted in scientific knowledge,’ that is, grounded in scientific methods and procedures rather than mere ‘subjective belief or unsupported speculation.’” *Diverging Diamond Interchange Act 250 and SW Permits*, No. 169-12-16, 50-6-16 Vtec at 3 (EO on Motion in Limine) (3/14/2018), quoting *State v. Scott*, 2013 VT 103, ¶ 10, 195 Vt. 330 (quoting *State v. Streich*, 163 Vt. 331, 343 (1995)).
- * Courts may apply four non-exclusive factors to assess reliability of expert testimony: “(1) whether the applicable theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; and (4) whether it has been generally accepted by the scientific community.” *Diverging Diamond Interchange Act 250 and SW Permits*, No. 169-12-16, 50-6-16 Vtec at 3 (EO on Motion in Limine) (3/14/2018), quoting *State v. Scott*, 2013 VT 103, ¶ 10, 195 Vt. 330 (quoting *State v. Streich*, 163 Vt. 331, 343 (1995)).
- * Motion by applicant for compulsory or permissive joinder of Agency of Natural Resources as a party denied as premature, as there were no facts to indicate ANR was a necessary party under V.R.C.P. 19 or 20. *Gingras Act 250 Permit Amend., App.*, No. 22-3-15 Vtec at 2 (EO on Motion to Join ANR) (02-01-2018)
- * Preemptive coordination of potential appeal inappropriate, as no second appeal has actually been filed with the court. *Gingras Act 250 Permit Amend., App.*, No. 22-3-15 Vtec at 1 (EO on Motion to Join ANR) (02-01-2018)
- * The Agency of Natural Resources has discretion as to whether and when to participate in permit litigation. *Gingras Act 250 Permit Amend., App.*, No. 22-3-15 Vtec (EO on Motion to Join ANR) (02-01-2018)
- * Motion to continue granted so as to allow all parties to review applicant’s revised indirect discharge management plans which may become the basis of an Agency of Natural Resources permit and subject to further appeal; but also to encourage the potential for settlement between parties. *Gingras Act 250 Permit Amend., App.*, No. 22-3-15 Vtec at 1 (EO on Motion to Continue Trial) (02-01-2018)
- * Court will not exclude evidence in the present case because it was excluded in a similar related case; although precedent is important, “the responsibility for determining the admissibility of expert evidence remains with the trial judge.” *Diverging Diamond Interchange Act 250 and SW Permits*, No. 169-12-16, 50-6-16 Vtec at 3 (EO on Motion in Limine) (3/14/2018), citing *State v. Forty*, 2009 VT 118, ¶ 38, 187 Vt. 79 (quoting *State v. Kinney*, 171 Vt.

239, 249 (2000)).

* Court may grant motion for reconsideration for any of the following reasons: “(1) to correct manifest errors of law or fact upon which the judgment is based; (2) to allow a moving party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) to respond to an intervening change in the controlling law.” *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 1 (Motion for Reconsideration) (3/15/2018), quoting *Diverging Diamond Interchange SW and Act 250 Permit*, Nos. 50-6-16, 169-12-16 Vtec, slip op. at 1–2 (Vt. Super. Ct. Envtl. Div. Nov. 22, 2017) (Walsh, J.) (quotations and citations omitted).

* Court denies motion for reconsideration as Appellant failed to allege a change in law or manifest injustice, failed to show a Town Plan provision as mandatory, and failed to identify any error of law or fact in the Court’s underlying decision. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 5 (Motion for Reconsideration) (3/15/2018).

* Court denies motion to reconsider judgement on dismissal of questions as question is still overly broad and vague, Appellant has not identified any specific mandatory provisions in the Town Plan, and all that remains to support the question is Appellant’s allusion that it might identify one or more mandatory provisions at trial; this assertion lacks specificity and fails to put the other parties and the Court on notice as to the issues to be litigated as required by the Statement of Questions. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 5 (Motion for Reconsideration) (3/15/2018).

* Courts consider motions to reconsider under V.R.C.P. 59(e). *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 1 (9/29/2017).

* The court has discretion to grant motions to reconsider when “necessary to (1) correct manifest errors of law or fact; (2) allow a party to provide ‘newly discovered or previously unavailable evidence; (3) prevent manifest injustice’; or (4) respond to an ‘intervening change in the controlling law.’” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 1-2 (9/29/2017), citing *In re Grp. Five Invest., LLC*, No. 34-3-11 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Dec. 4, 2012) (Durkin, J.) (quoting 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1).

* “Mere disagreement with the decision is not grounds for reconsideration.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 2 (9/29/2017).

* A motion to reconsider has a narrow function—to correct the court’s mistake or inadvertence, not the party’s fault or neglect. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 2 (9/29/2017).

* Court denied both parties motions to reconsider for failure to meet VRCP 59(e), as neither party presented evidence “showing of an error of law or fact, new evidence, injustice, or change in the controlling law.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 2 (9/29/2017).

1006.7.1 Statement of Questions

- * Motion to clarify statement of questions granted to degree that issues raised are beyond personal impacts. *Gingras A250 Altered/Corrected*, 22-3-15 Vtec, Entry Regarding Motion (2/17/2017).
- * Court shall resolve matters efficiently and has authority under VRECP Rules 5(f) and 2(d)(2)(vi) to require neighbors to file an amended statement of questions limiting their scope. *In Re Atwood Planned Unit Development*, 2017 Vt 16 at ¶ 11-14 (2017).
- * Court is obligated to resolve all of the issues raised by the Amended Statement of Questions, even if broadly stated. *In Re Atwood Planned Unit Development*, 2017 Vt 16 at ¶ 15 (2017).
- * Whether the conditions raised in the statement of questions are appropriate with respect to Act 250 is within the Court's authority. *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 6 (8/6/14).
- * Statement of questions should "identify the portions of the Commission decision for which it seeks correction" in order to determine "whether the Court has jurisdiction to address those portions of the decision either on its own or through a remand to the Commission." *In re Killington Village Master Plan Act 250 Application Appeal*, No. 147-10-13 Vtec, Decision on Motion at 7 (8/6/14).
- * Questions on "the taking of evidence, burdens of proof, and presumptions within the Commission's proceedings" are irrelevant in a de novo appeal. Questions on whether the Commission erred are considered as asking whether the "Court should make certain findings or impose additional conditions on appeal." *In re Treetop Development Co. Act 250 Application*, No. 77-6-14 Vtec, Decision on Motion to Dismiss Appellant's Statement of Questions, at 2 (11/14/14), *appeal docketed*, No. 2015-168.
- *In reviewing a motion to dismiss or clarify questions submitted by an appellant, this Court utilizes the standards set out in V.R.C.P. 12. *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 1 (E.O. on Mot. to Dismiss) (11-8-2012).
- *The Court will grant a motion to dismiss a question from an appellant's statement of questions under V.R.C.P. 12(b)(1) if the question raises issues over which this Court lacks subject matter jurisdiction; under V.R.C.P. 12(b)(6) if the question fails to state a claim upon which the Court can grant relief *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 1 (E.O. on Mot. to Dismiss) (11-8-2012).
- *Under V.R.C.P. 12(f), the Court has the discretion to strike a question from a statement of questions if the question is redundant to other questions raised. *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 2 (E.O. on Mot. to Dismiss) (11-8-2012).
- *The Court may require a litigant to clarify a question under V.R.C.P. 12(e) if the question is "so vague or ambiguous that a party cannot reasonably be required to frame a respons[e]."" *In re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 2 (E.O. on Mot. to Dismiss) (11-8-2012) (citing V.R.C.P. 12(e)).

- * Appellant's statement of questions framed broad-enough to allow Environmental Court discretion to address issue raised. *SP Land Co., et al.*, #257-11-08 Vtec, Entry Order on Motion to Alter at 1 (8/3/10), citing *In re Jolley Assoc.*, 2006 VT 132 ¶ 9, 181 Vt. 190 (recognizing that this Court has jurisdiction to address issues "intrinsic" to the questions posed on appeal); *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).
- * Statement of Questions cannot serve as a motion for party status because it does not put opposing party on notice of ability or need to file a memorandum in opposition. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 8 (11/2/10).
- * Generally speaking, motions to amend a Statement of Questions should "be liberally granted, . . . when they do not prejudice the other parties." *B&M Realty Act 250 Application*, 103-8-13 Vtec at 2 (EO re Motion to Amend SOQ) (11-26-13); *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 11 (2/2/10)(citing *In re Fairfax*, No. 45-3-03 Vtec, at 5 (June 13, 2005) (Wright, J.)).
- * Motion to Strike and clarify granted where Appellant's statement of questions referring to another document was not a short and plain statement as required by V.R.C.P. 8(a). *In re Times & Seasons*, #45-3-09 Vtec, Entry Regarding Motion at 2 (8/11/09); *see also*, Decision on Multiple Motions (3/29/10), *aff'd on other grounds*, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).
- * Questions from an opposing party are just like a complaint and the statement of questions should be short, concise and plain to establish the scope of the appeal and ultimately the scope of the issues for trial. *Rivers Development, LLC*, Nos. 7-1-05, 68-3-07 Vtec, at 14 (1/18/08).
- * Only persons who are granted party status may file questions with the court, questions filed by non-party persons should be dismissed. *Appeal of Rivers Development, LLC*, Nos. 7-1-05, 68-3-07 Vtec, at 16 (1/18/08).
- * Other parties are entitled to a statement of questions that is not vague or ambiguous but sufficiently definite so that they are able to know what issues to prepare for trial. *In re Unified Buddhist Church Indirect Discharge Permit*, No. 253-10-06 Vtec, at 5 (5/11/07).
- *The Court limits its review in an appeal to the specific questions raised by appellants. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 9 (8/17/12) (citing V.R.E.C.P.5(f)).
- * Motion for more definite statement is appropriate where a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to respond. *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 3 (5/09/13)(citing V.R.C.P. 12(e)).
- * The statement of questions provides notice of the issues that are being appealed and sets the parameters of the appeal. *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 3 (5/09/13) (citing *In re Frostbite Mine*, 12-1-11 Vtec at 2 (11/03/11); *In re Sheffield Wind Project*, 252-10-08

Vtec at 15 (9/29/2009); *In re Unified Buddhist Church, Inc, Indirect Discharge Permit*, 253-10-06 Vtec at 5 (5/11/2007)).

- * No legal precedent for granting a request to make questions less, rather than more specific. *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 3 (5/09/13).
- * Court will deny a motion to amend a statement of questions where amendment will prejudice the other party. *In re Northeast Materials Group, LLC*, 143-10-12 Vtec at 3 (5/09/13) (citing *In re Ridgewood Estates Homeowners Ass'n*, 57-4-10 Vtec at 7 (1/26/11)).
- * An opposition to a motion to amend the Statement of Questions is not the appropriate means for arguing that a question is time barred. *B&M Realty Act 250 Application*, 103-8-13 Vtec at 2 (EO Motion to Amend SOQ) (11-26-13).
- * A statement of questions defines the scope of this Court's jurisdiction on appeal and provides notice to the other parties and this Court of the matters to be considered in litigation. See V.R.E.C.P. 5(f); *623 Roosevelt Highway*, No. 105-8-17 Vtec at 1 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018). Citing *In re Musty Permit*, No. 174-10-10 Vtec, slip op. at 2 (Vt. Super. Ct. Env'tl. Div. Jul. 28, 2011) (Durkin, J.), *aff'd* 2012 VT 42.
- * Court generally takes a liberal view in granting a motion to amend a statement of questions. *623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018). Citing *Buchwald Home Occupation CU Permit*, No. 181-12-13 Vtec, slip op. at 2 (Vt. Super. Ct. Env'tl. Div. Apr. 1, 2014).
- * The statement of questions must be sufficiently clear to give the Court and the other parties notice of the grounds on which the appellant's claims rest. Reporter's Notes, V.R.C.P. 8(a) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). *623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018).
- * Both the parties and the Court "are entitled to a statement of questions that is not vague or ambiguous, but is sufficiently definite so that they are able to know what issues to prepare for trial." *623 Roosevelt Highway*, No. 105-8-17 Vtec at 2 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018). Quoting *In re Unified Buddhist Church, Inc., Indirect Discharge Permit*, No. 253-10-06 Vtec, slip op. at 5 (Vt. Env'tl. Ct. May 11, 2007) (Wright, J.).
- * NRB's motion to clarify Question 9 is granted because Question 9 as stated is not sufficiently clear. *623 Roosevelt Highway*, No. 105-8-17 Vtec at 3 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018).
- * The Court notes that when submitting a clarified question, Appellants must avoid including factual and legal information that goes into arguing the merits of the action, as such statements are inappropriate in a Statement of Questions. *623 Roosevelt Highway*, No. 105-8-17 Vtec at 3, n. 3 (EO on Motion to Dismiss/Clarify SOQ) (2-27-2018). See *In re Conlon*, No. 2-1-12 Vtec, slip op. at 1-2 (Vt. Super. Env'tl. Div. Aug. 30, 2012) (Durkin, J.) (citing *Frostbite Mine*, No. 12-1-11 Vtec, slip op. at 2 (Vt. Super. Env'tl. Div. Nov. 3, 2011) (Durkin, J.)).

- * A Statement of Questions must be specific enough to notify the parties and the Court of the issues on appeal. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 5 (Motion for Reconsideration) (3/15/2018), citing *In re Atwood Planned Unit Dev.*, 2017 VT 16, ¶ 14 (Mar. 17, 2017) (citations omitted).
- * Where a Statement of Questions fails to meet the specificity standard, the Court may order the appellant to clarify the question. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 5 (Motion for Reconsideration) (3/15/2018), citing *In re Atwood Planned Unit Dev.*, 2017 VT 16, ¶ 14 (Mar. 17, 2017) (citations omitted).
- * “Because an appellant in the Environmental Division files a statement of questions, rather than a complaint, we depart from the civil practice of focusing on factual allegations made in the *complaint*, and instead look to factual allegations as made more broadly.” *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 1, n. 1 (Motion for Reconsideration) (3/15/2018); See, e.g., *R.L. Vallee, Inc., et al. MS4*, No. 122-10-16 Vtec, slip op at 1 n.2 (Vt. Super. Ct. Env’tl. Div. May 2, 2017) (Walsh, J.).
- * An appellant must file a Statement of Questions within 20 days of filing a notice of appeal. V.R.E.C.P. 5(f). *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 4 (9/29/2017).
- * “The Statement of Questions serves to define the scope of our jurisdiction on appeal, and to provide notice to the other parties and this Court of the matters to be considered during the litigation.” See V.R.E.C.P. 5(f); *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 4 (9/29/2017), citing *In re Musty Permit*, No. 174-10-10 Vtec, slip op. at 2 (Vt. Super. Ct. Env’tl. Div. July 28, 2011) (Durkin, J.).
- * “[M]atters not explicitly raised in the Statement of Questions, or intrinsic to the matters raised, are beyond our jurisdiction.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 4 (9/29/2017).
- * “When an interested party does not file its own appeal (cross-appeal), it cannot raise issues or questions beyond those delineated in the appellant’s statement of questions.” *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 4 (9/29/2017) citing *Eagles Place, LLC Construction Application*, No. 55-4-14 Vtec, slip op at 1 (Vt. Super. Ct. Env’tl. Div. Jan. 12, 2015) (Walsh, J.).
- * Court denied Neighborhood Group’s motion to amend the Statement of Questions to conform to the evidence as Group did not file a cross-appeal; as an intervening party it had no right or power to augment issues on appeal. *Laberge Shooting Range JO*, No. 96-8-16 Vtec, Decision on Motion to Reconsider at 4 (9/29/2017).
- * Court dismisses all of co-appellant Timberlake’s earlier Statement of Questions because Timberlake did not follow the court’s direction to dismiss or file a revised SoQ; instead adopting co-appellant Vallee’s revised SoQ. *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 2 (2/8/2018)

* “Because an appellant in the Environmental Division files a Statement of Questions, rather than a *complaint*, we depart from the civil practice of focusing on factual allegations made in the *complaint*, and instead look to factual allegations as made more broadly.” *Diverging Diamond A250* 50-6-16 Vtec M amend SOQ at 3 (2/8/2018).

1006.7.2 Prayer for Relief

* Prayer for relief under Equal Protection stricken where Appellant provided no to legal foundation for relief. *In re Times & Seasons*, #45-3-09 Vtec, Entry Regarding Motion at 3 (8/11/09); *see also*, Decision on Multiple Motions (3/29/10), *aff’d* on other grounds, 2011 VT 76 (Vt. Supreme Ct. 7/8/11).

1006.7.3 Scheduling Orders

* Court can require the use of prefiled testimony pursuant to Rule 2(e)(2) when it will expedite the proceedings without prejudice to the parties, however where the parties disagree about its use, the Court generally is cautious about mandating its use. *In re Smugglers’ Notch Snow Making Master Plan Permit*, No. 84-6-14 Vtec, Entry Regarding Motion at 1 (2/10/15).

1007. Appeals

1007.1 To the Environmental Division/Environmental Court

* Under Environmental Court rules, a notice of appeal is a relatively simple document, and “informality of form or title of the notice of appeal” will not result in dismissal. *In re: Jim Sheldon Excavating, Inc. and Taran Bros., Inc. Act 250 Land Use Permit (Appeal of Pelton)*, No. 54-4-09 Vtec, Decision and Order on V.R.A.P. 4 Motion for Extension of Time to File Appeal at 4 (6/8/09), citing V.R.E.C.P. 5(b)(3); *cf. Files v. City of Rockford*, 440 F.2d 811, 816 (7th Cir. 1971) (citing 9 Moore’s Federal Practice, § P204.13(3), at 978 (2d ed. 1970)) (denying motion to extend time to file an appeal under analogous federal rule 4 because “a notice of appeal is an extremely simple instrument to prepare and file and if it is subsequently ascertained that an appeal should not be pursued it can be dismissed”).

* Filing of timely notice of appeal is jurisdictional. *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Decision at 2 (5/30/07)(citing 10 V.S.A. § 8504(a)).

* Filing of timely notice of appeal vests jurisdiction in Environmental Court. *In re: Three Church Street*, No. 174-7-06, Decision at 2 (1/3/07)

* When a person wishes to appeal from an Act 250 district commission decision, 10 V.S.A. § 8504 and V.R.E.C.P. §5(d)(2) govern appellant’s party status claims and challenges. *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 4 (3/13/13).

* “During and after all disputed de novo hearings, the Environmental Court considers all evidence presented at trial, assesses its credibility and relevancy to the legal issues presented, and thereafter

makes factual and legal determinations.” *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257* and *Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 20 (1/17/13), *aff’d on other grounds, In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 (01/17/14).

1007.1.1 Who may appeal

* Organizations denied party status but granted Friends of the Commission status have standing to appeal denial under 10 V.S.A. § 8504(d)(2)(B), despite lack of participation on the merits below. *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 6 (4/12/12).

* Organization seeking party status on behalf of members must show that members are entitled to party status individually, that the interests asserted are germane to the organization’s purpose, and that the relief requested does not require individual members’ participation. *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 7 (4/12/12).

* Standing is a legal question that embodies a core constitutional concept as well as a prudential one. *In re Verizon Wireless Barton* 2010 VT 62 ¶ 7 (zoning appeal).

* Claim that any adjoining landowner are exempt from requirements of 10 V.S.A. § 8504(d)(1) and may appeal any criteria lacks merit because § 8504(d)(1) states “no aggrieved person may appeal” unless the person secures party status in the proceedings below and expressly limits that “the person may only appeal those issues under the criteria with respect to which the person was granted party status.” *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 8 (2/2/10).

* To appeal a Commission’s Act 250 decision, appellant must either have been granted party status, or appeal the denial of party status and assert that claim by motion filed with the notice of appeal. *In re Waitsfield Public Water System Act 250 Permit*, No. 33-2-10 Vtec, Decision on Cross-Motions for Summary Judgment at 8 (11/2/10); *In re Barefoot & Zweig Act 250 Application*, No. 46-4-12 Vtec at 4 (3/13/13).

* Generally, a party appealing an act or decision of a district commission to the Environmental Court must have (1) been granted party status by the district commission, (2) participated in the proceedings before the district commission, and (3) retained party status at the end of the district commission proceedings.” *In re Champlain Parkway Act 250 Permit (Appeal from Act 250 Permit No. 4C0438-17)*, No. 68-5-12 Vtec at 4 (10/12/12) (citing 10 V.S.A. § 8504(d)(1)).

* If the district commission denies an aggrieved person party status, that person may appeal the commission’s decision to the Environmental Division despite not having participated before the district commission. *In re Bennington Wal-Mart Demolition/Construction Permit*, No. 158-10-11 Vtec at 6 (8/17/12) (citing 10 V.S.A. § 8504(d)(2)(B)).

* To assert claim of party status in Environmental Court, appellants must file a timely motion for party status under V.R.E.C.P. 5(d)(2). *In re Verizon Wireless Barton*, 2010 VT 62 ¶ 19 (zoning appeal).

* “[J]ust as in appeals of municipal decisions, participation and party status are prerequisites for standing to appeal Act 250 decisions.” *Verizon Wireless Barton Act 250 Permit*, No. 6-1-09 Vtec, Decision on Multiple Motions at 6 (2/2/09).

*An appealing party who has a “particularized interest . . . that may be affected by an act or decision by a district commission” need not specifically request party status in appeals before the Environmental Court. *In re: Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, Decision on the Merits at 2-3 (2/15/08), quoting 10 V.S.A. § 6085(c)(1)(E) and citing V.R.E.C.P. 5(d)(2).

*“Any person aggrieved by an act or decision of a district commission in a proceeding to review an Act 250 permit application may appeal that act or decision to this Court.” *In re Champlain Parkway Act 250 Permit (Appeal from Act 250 Permit No. 4C0438-17)*, No. 68-5-12 Vtec at 4 (10/12/12) (citing 10 V.S.A. § 8504(a)).

1007.1.1.1 From a Commission Decision

* Appellant who loses ownership interest in abutting commercial property also loses individual party status.

Re: Sports Venue Foundation, Inc., No. 168-8-07 Vtec, Judgment Order, and Decision and Order on Motion to Dismiss and Motion for Clarification at 4-5 (12/18/07).

1007.1.1.2 From a Coordinator’s JO

* Under 10 V.S.A. § 6007(c) “any person” may request a JO from a District Coordinator but right to appeal a JO is limited by 10 V.S.A. § 8504(a) to “persons aggrieved” as defined by 10 V.S.A. § 8502(7). *In re JLD Properties of St. Albans, LLC*, #116-6-08 Vtec, Decision on the Merits at 28-29 (1/20/10).

* “The Court reads 10 V.S.A. §§ 8502(7) and 8503 as allowing an entity that lawfully requests a jurisdictional opinion from an Act 250 District Coordinator to have standing to take an appeal from an adverse j.o. determination.” *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Entry Order (Oct. 4, 2007).

* “Any person aggrieved by an act or decision of ... a district coordinator” may appeal a jurisdictional opinion
In re: Marcelino Waste Facility, No. 44-2-07 Vtec, Decision at 1 (May 30, 2007), citing 10 V.S.A. §8504(a).

* Definition of a “person aggrieved.” *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Decision at 2 (May 30, 2007), citing 10 V.S.A. § 8502(7).

1007.1.1.3 Requirement of participation below

* See 10 V.S.A. § 8504(d)(1)

* Neighbor's May 16, 2008 to Commission satisfies participation before the Commission requirement for party status upon appeal when Commission held hearing August 19, 2008 at which Neighbor was not present. *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 6, n.7 (2/2/10).

1007.1.1.4 Requirement of filing motion (when appealing denial of party status) (see 153.1.2)

* Vermont Rule of Environmental Court Procedure 5(d)(2) requires an appellant to file a motion and put the parties and the Court on clear notice of the exceptional circumstances that warrant an appeal under 10 V.S.A. §8504(d)(2). Appellants "must assert their claim of party status by motion filed with the notice of appeal." V.R.E.C.P. 5(d)(2). This mandatory directive requires strict compliance. Failing to file a motion for party status in an appeal pursuant to § 8504(d)(2)(B) is cause for dismissal. *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 7 (2/2/10)(citing *In re Verizon Wireless Barton*, No. 133-6-08 Vtec, at 8 (5/20/09) (Durkin, J.)).

1007.1.2 Who may intervene

* Motion to Intervene denied when moving party failed to show that the "disposition [of the case] may as a practical matter impair or impede [his] ability to protect" his interests, as required by V.R.C.P. 24(a). *In re Guité Act 250 Jurisdictional Opinion #3-128 (Revised)*, #126-7-09 Vtec, Decision and Order at 6 (4/2/10).

1007.1.3 When filed; timeliness of appeal (see 10.1.2, 504 and 552.4.2)

* Filing of timely notice of appeal is jurisdictional. *In re: Marcelino Waste Facility*, No. 44-2-07 Vtec, Decision at 2 (5/30/07)(citing 10 V.S.A. § 8504(a)).

1007.1.4 How filed (see 551.2.2)**1007.1.5 What issues may be appealed**

* Claim that any adjoining landowner are exempt from requirements of 10 V.S.A. § 8504(d)(1) and may appeal any criteria lacks merit because § 8504(d)(1) states "no aggrieved person may appeal" unless the person secures party status in the proceedings below and expressly limits that "the person may only appeal those issues under the criteria with respect to which the person was granted party status." *Verizon Wireless Barton*, #6-1-09 Vtec, Decision on Multiple Motions at 8 (2/2/10).

*A question phrased in a manner that presumes the Court, in conducting future de novo review, will obligate Appellant and its project to conform to provisions of the Village Plan that may be ambiguous or standardless is not ripe for review, since the Court cannot make such a determination. *In Re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 3 (E.O. on Mot. to Dismiss) (11/8/12).

1007.1.6

Interlocutory Appeals

* Denial of request for interlocutory appeal on party status does not bar appeal of final party status denial. *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 18-19 (4/12/12).

1007.2

To Supreme Court

* Environmental Court cannot decide procedural issue regarding appeal to the Supreme Court because Supreme Court has sole jurisdiction. *Re: Route 103 Quarry (Carrara)*, No. 205-10-05 Vtec., Interim Order at 2 (2/23/05).

* Vermont Supreme Court denies motion for emergency stay pending appeal under VRAP 8(a), where appellants fail to show irreparable injury or that stay would serve the public interest. *In re Route 103 Quarry (Carrara)*, 2006-546, Entry Order at 1 (9/21/07).

*Environmental Court has the discretion to certify the controlling questions of law for the Supreme Court to decide. *In re Bennington Wal-Mart Demolition/Constr. Permit (Appeal from District #7 Environmental Commission Determination)*, 158-10-11 Vtec at 1 (EO on Mot. For Interlocutory Appeal) (09-24-12) (citing *Brown v. Tatro*, 134 Vt. 248, 249-250 (1976)).

1007.3

Scope of Review

*The Court gives deference to the Environmental Division based on its “specialized knowledge in the environmental field” and “[a]bsent compelling indications of error, will sustain the [Division’s] interpretation on appeal.” *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 8 (Vt. Oct. 1, 2016) (quoting *In re Lathrop Ltd. P’ship I*, 2015 VT 49, ¶ 21, 199 Vt. 19, 121 A.3d 630).

* While the Environmental Division reviews appeals from the District Commission de novo, its authority is no larger than that of the District Commission and it cannot consider issues not presented to the Commission. *In re Lathrop L.P.*, 2015 VT 49, ¶ 104.

* Whether or not issue was expressed for the first time in Rule 59(e) motion, the applicability of Rule 34(D) was a question of law intrinsic to the Environmental Court’s summary judgment ruling and therefore well within the court’s discretion to reconsider on the appellant’s 59(e) motion. *In re SP Land Co., LLC Act 250 Land Use Permit Amendment*, 2011 VT 104, ¶ 15.

* Appellant’s statement of questions framed broad-enough to allow Environmental Court discretion to address issue raised. *SP Land Co., et al.*, #257-11-08 Vtec, Entry Order on Motion to Alter at 1

(8/3/10), citing *In re Jolley Assoc.*, 2006 VT 132 ¶ 9, 181 Vt. 190 (recognizing that this Court has jurisdiction to address issues “intrinsic” to the questions posed on appeal); *reversed on other grounds*, 2011 VT 104 (Vt. Supreme Ct. 9/22/11).

* The “court can hear evidence involving changes from an applicant’s original proposal so long as the changes do not materially alter the application.” *In re Lathrop Limited Partnership*, No. 122-7-04 Vtec, Decision on Supplemental Pre-Trial Motion at 4 (4/12/11).

* Jurisdiction does not encompass all issues raised by an appealed application, but rather is limited to the factual and legal issues preserved for Environmental Court’s review by the parties. *Zaremba Group Act 250 Permit*, 36-3-13 Decision on the Merits at 17 (02/14/14); *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 4 (3/25/10), citing *In re Jolley Assoc.*, 2006 VT 132, ¶ 9 (quoting *In re Garen*, 174 Vt. 151, 156 (2002)); see also V.R.E.C.P. 5 (f) (“The appellant may not raise any questions on the appeal not presented in the statement [of questions] as filed . . .”).

* The Environmental Court can address only “those issues which have been appealed.” *In re: Free Heel, Inc.*, No. 217-9-06 Vtec, Decision at 4 (Mar. 21, 2007)(citing VRECP 5(f)).

* This Court is not limited in the evidence it may consider in its review of this jurisdictional opinion to only that evidence offered by the person or persons who first requested the jurisdictional opinion at issue. In our de novo trial, we will consider evidence and legal arguments raised by all parties relevant to all Statement of Questions before the Court without regard to the evidence and arguments presented to the district coordinator. *In re Burlington Airport*, 42-4-13 Vtec at 2 (6/5/13).

*Whether the project’s proposed road maintenance activities qualify as coldplaning and resurfacing is a mixed question of law and fact—the meaning of the terms as set out in the Stormwater Management Rule is a legal question, and whether the proposed activities are coldplaning and resurfacing within the meaning of the Rule is a question of fact. *Diverging Diamond Interchange*, Nos. 50-6-16, 169-12-16 Vtec at 23, Decisions on Motion for Summary Judgement (Oct. 11, 2017), Citing *Sec’y, Vermont Agency of Nat. Res. v. Handy Family Enterprises*, 163 Vt. 476, 482 (1995); *In re Application of Lathrop Ltd. P’ship I*, 2015 VT 49, ¶ 39, 44, 199 Vt. 19.

* Relevant facts are determined by looking to the legal issues that a litigation presents. *Mountain Top Inn & Resort*, JO (#1-391), No. 23-3-17 Vtec, Entry Order on Motion to Compel at 3 (11/2/2017), citing *Vermont Turquoise Hospitality, LLC*, No. 131-8-14 Vtec, slip op. at 3 (Vt. Super. Env’tl. Div. Jun. 24, 2015) (Durkin, J.) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

1008. Enforcement

1008.1 General

*A district commission does not possess the authority to determine whether violations of Act 250 permits exist or to initiate enforcement actions. *In re N. E. Materials Grp., LLC*, 2017 VT 43, ¶ 6 (Vt. Oct. 1, 2016) (citing *In re Treetop Dev. Co. Act 250 Dev.*, 2016 VT 20, ¶ 14 __Vt.__143 A.3d 1086).

* “It is the NRB and ANR that have the power to enforce Act 250 and other environmental statutes

and it is within their discretion to determine whether a violation exists and to determine appropriate remedies for violations.” *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision Regarding Scope of Hearing at 3 (4/10/15); See 10 V.S.A. § 8003.

* There is no private right to enforce a permit condition. *In re Treetop Development Co. Act 250 Application*, No. 77-6-14 Vtec, Decision on Motion to Dismiss Appellant’s Statement of Questions, at 3 (11/14/14), *appeal docketed*, No. 2015-168.

* The authority to ensure compliance with the permit rests with the Natural Resources Board, through its enforcement powers. *In re Treetop Development Co. Act 250 Application*, No. 77-6-14 Vtec, Decision on Motion to Dismiss Appellant’s Statement of Questions, at 3 (11/14/14)(citing 10 V.S.A. § 6027(g)), *appeal docketed*, No. 2015-168.

* General discussion of enforcement statute. *Secretary v. Mountain Valley Marketing* (and other cases), No. 42-2-02 Vtec, Decision at 6 – 8 (9/13/06).

“The Board is not in the business of encouraging noncompliance with Act 250.” *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 11 (8/29/03).

1008.2 Service of Administrative Order

* “In person” service is different from “personal service” allowed by V.R.C.P. 4; thus leaving Administrative Order at the person’s house “with some person of suitable age and discretion then residing therein,” is not valid service under 10 V.S.A. § 8008(a). *Ronald J. Placzek and John S. Placzek*, #154-8-09 Vtec, Decision and Order on Pending Motions at 6 (11/25/09); *superseded by 2010 amendment to 10 V.S.A. § 8008(a)*.

1008.3. Time in which to file request for hearing

* The 15 day period to request hearing is triggered by actual receipt in person of the AO. *Ronald J. Placzek and John S. Placzek*, #154-8-09 Vtec, Decision and Order on Pending Motions at 5-6 (11/25/09).

1008.4. Prosecution

1008.4.1 Defenses to

1008.4.1.1 Statute of limitations

* Cause of action accrues upon discovery of facts sufficient to put person on inquiry which could lead to discovery. *ANR v. Towns*, 168 Vt. 449 (1998).

* Notice to attorney is imputed notice to client, even if attorney does not inform client. *ANR v. Towns*, 168 Vt. 449 (1998).

* Determination of when a claim accrues is a question of fact. *ANR v. Towns*, 168 Vt. 449 (1998).

* Where there is a continuing violation (such as the failure to obtain a permit for an as-built activity) the statute of limitations does not begin to run until the violation is resolved (i.e. the permit is issued). 10 V.S.A.

§ 8015(2); see *Secretary, ANR v. Rome Family Corp*, Dkt No. E92-021,Vtec (2/22/93).

1008.4.1.2 Selective prosecution

* Elements of selective prosecution. *Secretary v. Mountain Valley Marketing* (and other cases), No. 42-2-02 Vtec, Decision at 3 (9/13/06).

* Respondents fail to meet first prong of test – that they were treated differently from similarly situated defendants. *Secretary v. Mountain Valley Marketing* (and other cases), No. 42-2-02 Vtec, Decision (9/13/06).

Probing for information related to a improper or selective prosecution requires at least “some evidence.” *State v. Cumberland Farms, Inc.*, Decision and Order Motion to Compel, Superior Court, Docket No. 738-10-10 Wncv.

1008.4.1.3 Improper caption

* AO issued in the name of LUP, rather than the Secretary, exceeded delegated authority of LUP contrary to the specific requirements of 2008 Memorandum of Understanding. *Ronald J. Placzek and John S. Placzek*, #154-8-09 Vtec, Decision and Order on Pending Motions at 11 (11/25/09); *but see 2010 revisions to MOU to allow cases to be brought in name of Land Use Panel.*

1008.4.2 Jury trial

* No right to jury trial in environmental enforcement cases in which declaratory or injunctive relief or civil penalties are sought, as those are equitable, not legal, claims. *State of Vermont v. Irving Oil Corp.*, 2008 VT 42.

1008.5 Discovery

* Motion to compel disclosure of transcripts of Commission proceedings denied, where interrogatory question nominally relies upon the transcripts, the interrogatory is neither significant nor substantially unique, and the opposing party has not been unfairly prejudiced by the interrogatory’s reliance on the unverified transcripts. *In re Rivers Development LLC*, No. 7-1-05, 68-3-07, 183-8-07, and 248-11-07 Vtec, Motion to Compel Discovery at 2 (2/5/08).

* Power of court to control. *Secretary v. Mountain Valley Marketing* (and other cases), No. 42-2-02 Vtec, Decision at 3 (9/13/06).

* Scope of discovery is generally very broad; permitted inquiries are allowed “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” V.R.C.P 26(b)(1). *Mountain Top Inn & Resort, JO (#1-391)*, No. 23-3-17 Vtec, Entry Order on Motion to Compel at 1 (11/2/2017).

* Discovery of inadmissible evidence may be allowed, “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” V.R.C.P 26(b)(1). *Mountain Top Inn & Resort, JO (#1-391)*, No. 23-3-17 Vtec, Entry Order on Motion to Compel at 1 (11/2/2017).

* Court denied motion to compel discovery of appellant’s various detailed financial and information, including income gained from managing private rental homes owned by private homeowners, because the information provided no further revelations about the relationship between the appellant and the private homeowners, it was protected by confidentiality and trade secrets, appellant already disclosed redacted rental agreements, and movant had failed to offer sufficient justifications for why these protections should be breached. *Mountain Top Inn & Resort, JO (#1-391)*, No. 23-3-17 Vtec, Entry Order on Motion to Compel at 4 (11/2/2017).

* Court granted motion to compel discovery of impacts of Resort’s rental home program, as impacts may constitute a “material change” requiring an application for an amendment to an existing Act 250 permit. *Mountain Top Inn & Resort, JO (#1-391)*, No. 23-3-17 Vtec, Entry Order on Motion to Compel at 4 (11/2/2017).

1008.6 Judgment

*Based upon the above findings, the Court has no evidence of specific on-site activities outside of the permitted facility operation hours during the citation period because the noises heard after hours may have come from activities other than “operation of the facility.” *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 3 (03/19/14).

1008.6.1 Penalties

* All profits gained through a violation are not necessarily an economic benefit of the violation, but when the violation gives the violator a competitive advantage, profits correlating to the advantage are an economic benefit subject to penalty by confiscation. *In re Beliveau NOV, Town of Fairfax v. Beliveau*, 2013 VT 41, ¶ 24 (6/14/13) (citing 10 V.S.A. §§ 8001(2), 8010(b)(5)).

* The cost alternative approach is not applicable in cases where a violation consists of the start of business operations without a permit. *In re Beliveau NOV, Town of Fairfax v. Beliveau*, 2013 VT 41, ¶ 25 (6/14/13) (citing *Agency of Natural Resources v. Deso*, 175 Vt. 513, 515 (2003); *Agency of Natural Res. v. Godnick*, 162 Vt. 588, 597 (1994)).

* In July 2008, the Legislature made express that an economic benefit includes “a reasonable approximation of any gain, advantage, wrongful profit, or delayed avoided cost, financial or otherwise, obtained as a result of a violation. Economic benefit shall not be limited to only competitive advantage obtained.” *In re Beliveau NOV, Town of Fairfax v. Beliveau*, 2013 VT 41, ¶ 25 (6/14/13) (citing 10 V.S.A. § 8002(11)).

*The Court assessed a penalty against the Respondent in the total of \$1,250 based upon the evidence that Respondent completed improvements to an access road without first applying for or

receiving a necessary Act 250 permit. *Natural Resources Board v. Fuster Trucking, Inc.*, Merits Order, 1300920, Vtec (02/04/14).

*The Court assessed a penalty against the Respondent totaling \$1,250, based upon the evidence that Respondent has failed to complete improvements to an access road in conformance with Act 250 Permit, however penalty reduced to \$500 if improvements made by date certain or extension granted by the District Commission. *Natural Resources Board v. Fuster Trucking, Inc.*, Merits Order, Citation No. 1300923, Vtec (2/5/14).

1008.6.1.1 General

* *ANR v. Bean*, 164 Vt. 438 (1995).

1008.6.1.2 Elements of penalty calculation

* The relevant legal factors to be considered in assessing penalties include: impact on public health safety, welfare and environment, mitigating circumstances, whether respondents knew the violation existed, how long the violation existed and their record of compliance, the deterrent effect of the penalty and the state's actual costs of enforcement. *State of Vermont v. Nelson J. Dunn, Jr., Joni L. Dunn, and John D. Dunn*, , Order on Penalties, Docket No. 380-9-10 Bncv (8/2/12).

* Court need only consider the penalty elements; need not award penalty for each element. *ANR v. Bean*, 164 Vt. 438 (1995).

* Environmental harm need not be found; penalties can be assessed simply to deter others from violating the law. *ANR v. Bean*, 164 Vt. 438 (1995).

* *Land Use Panel v. Sheldon*, No. 188-9-05 Vtec, Decision at 10 - 12 (7/28/06)(discussion of penalty elements).

1008.7 Settlement

1008.7.1 AODs (Assurances of Discontinuance)

* The scope of an enforcement action before the Court is restricted to the violations contained in the AOD. *In re Treetop Development Company LLC*, No. 2015-168, Entry Order at 2 (4/20/15).

* Penalty amount agreed on by parties in an AOD may differ from what the court might have awarded for any number of reasons; no way to know why parties settled on a particular amount. *Secretary v. Mountain Valley Marketing* (and other cases), No. 42-2-02 Vtec, Decision at 7 (9/13/06).

1008.7.1.1 SEPs (Supplemental Environmental Projects)

* Noted. *Secretary v. Mountain Valley Marketing* (and other cases), No. 42-2-02 Vtec, Decision at 7 (9/13/06)

1008.7.2 Administrative Orders

* Administrative Orders may be settled by Consent Order. *Natural Resources Board v. Sunrise Plaza, Inc.* No. 139-8-10 Vtec, Order (9/13/10).

1008.8 Liability

*Corporate structure cannot shield against liability to comply with Act 250 permit where individual has held himself out before the NRB and its staff as the owner of the Project Tract and operator of the gravel pit. *NRB v. Donald Dorr, Dorr Oil Co. and MGC, Inc.*, 49-4-13 Vtec. at 11 (5/27/13).

1008.9 Evidence

1008.9.1 Burden of Proof

*For each violation of the citation, the NRB must prove that the violation is more likely to have occurred than not. 16-3 Vt. Code R. 600-25-9(a). *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 3 (03/19/14).

*If the NRB fails to meet its burden of proof, then the Court must reverse the citation. 10 V.S.A. §8012(b) (1). *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 3 (03/19/14).

1008.10 Cases

*Res judicata bars respondents from raising abandonment claim that could have been raised in a prior enforcement proceeding. *Land Use Panel v. Donald Dorr, et al.*, 2015 VT 1 ¶¶ 12-13 (1/9/15).

* The Court found that Condition 10 of the Permit (hours of operation) does not govern employee traffic or concrete and form trucks entering or exiting the site. *Natural Resources Board v. Harrison Concrete*, Entry Order, 13EC00925 Vtec at 4 (03/19/14).

1008.11 Public Participation in Enforcement

1008.11.1 Permissive intervention

* Motion for permissive intervention granted to homeowners association as aggrieved person under 10 V.S.A. § 8020. *NRB v. Stratton Corp.*, No. 106-7-14 Vtec, Entry Regarding Motions at 3 (11/14/14).

1008.11.1.1 Standard of Review

* An aggrieved person's motion for intervention is reviewed under 10 V.S.A. § 8020(h), which references the standard of review as provided in V.R.C.P. 24(b). *NRB v. Stratton Corp.*, No. 106-7-14 Vtec, Entry Regarding Motions at 2 (11/14/14).

1008.11.1.1.1 Aggrieved person

* An aggrieved person, is someone that alleges that an "injury to a particularized interest" protected by one of the environmental statute listed in 10 V.S.A. §8003(a), that the injury must be

attributable to respondent's violations," and that the "particularized injury" be redressable in a proceeding. *NRB v. Stratton Corp.*, 106 -7-14 Vtec at 2 (Apr. 26, 2016)

* Monetary penalties offers adequate deterrence to redress the injury, unless "the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote" that it cannot support standing. Here, monetary penalties sufficient to grant standing. *NRB v. Stratton Corp.*, 106 -7-14 Vtec at 3-4 (Apr. 26, 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, at 185- 88 (2007))

* No dispute that the Homeowners Association, which timely filed comments with the NRB, was an aggrieved person per 10 V.S.A. §§ 8020(a) and (e). *NRB v. Stratton Corp.*, No. 106-7-14 Vtec, Entry Regarding Motions at 2 (11/14/14).

* To maintain "aggrieved person" status, the Association must establish an additional interest it has at stake in the litigation, one that a larger monetary penalty will redress. *NRB v. Stratton Corporation*, No. 106-7-14 Vtec, Entry Regarding Motion to Amend Scheduling Order and Motion to Add Expert Witness, at 3 (10/27/2015)

* The Association will bear the burden of demonstrating its status as an aggrieved party. *NRB v. Stratton Corporation*, No. 106-7-14 Vtec, Entry Regarding Motion to Amend Scheduling Order and Motion to Add Expert Witness, at 3 (10/27/2015)(citing *Brod v. Agency of Nat. Res.*, 2007 VT 87, ¶ 9-10, 182 Vt. 234).

* To meet this burden, Association must allege specific facts that show that the Association has a particularized burden at stake; a generalized grievance about an inadequate penalty will not suffice. *NRB v. Stratton Corporation*, No. 106-7-14 Vtec, Entry Regarding Motion to Amend Scheduling Order and Motion to Add Expert Witness, at 4 (10/27/2015) (citing *Parker v. Town of Milton*, 169 Vt. 74 (1998)).

1008.11.1.1.2 VRCP Rule 24(b)(1)

* "The Supreme Court has directed trial courts to consider at least four factors in assessing timeliness of a motion to intervene: possible harm to plaintiffs; power to have sought intervention at an earlier stage; progress of the case; and the availability of other means to join the case." *NRB v. Stratton Corp.*, No. 106-7-14 Vtec, Entry Regarding Motions at 2 (11/14/14)(citing *Shahi v. Madden*, 2010 VT 56, ¶ 10, 188 Vt. 142 (citation omitted)).

* The limited scope of permissible intervention under 10 V.S.A. § 8020 "will sufficiently prevent any undue delay" of the "adjudication of the rights of the original parties," as required by V.R.C.P. 24(b). *NRB v. Stratton Corp.*, No. 106-7-14 Vtec, Entry Regarding Motions at 3 (11/14/14).

1008.11.2 Burden of Proof

1008.11.3 Hearing

* "By its own clear and unambiguous language § 8020 does not provide an avenue for a party to initiate a new enforcement proceeding by raising new violations not contained in the AOD." *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision Regarding Scope of Hearing at 3 (4/10/15).

* Reading 10 V.S.A. § 8020 to allow an intervenor to raise any violation, even alleged violations not contained in an administrative order or AOD, would read the second requirement out of the statute. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision Regarding Scope of Hearing at 3-4 (4/10/15).

* "The statutory framework, considered as a whole, makes clear that the Court's role is to serve as a check and balance within the enforcement system and to undertake a specific and limited review of Agency or Board's enforcement actions. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision Regarding Scope of Hearing at 4 (4/10/15).

1008.11.4 Cases

* Aggrieved persons bear the burden of proving, by a preponderance of the evidence, that the enforcement action is insufficient to meet the purposes of the chapter. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 6 (11/17/2016)(citing 10 V.S.A. § 8020(h)).

*State statute, 10 V.S.A. ch. 201, explicitly restricts the aggrieved person to contesting the sufficiency of the AOD." *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 6(11/17/2016).

*"State may also recapture economic benefit that the violator may have derived from the violation, up to the total maximum penalty allowed of \$17,000. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 7 (11/17/2016)(citing 10 V.S.A. § 8010(c)(2)).

*If the violator signs an AOD, agreeing not to dispute it, the final penalty may be reduced by 25%." *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 7 (11/17/2016).

* Failure to properly construct stormwater system with connection to previously impaired waterway creates a major potential for impact to the public health, safety, welfare and the environment." *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 10 (11/17/2016).

*Clearing two acres of hillside that caused erosion which impacted an intermittent stream and a wetland, created a rockfall, and caused excessive icing in the roads, garages and driveways was

potentially dangerous to people and therefore “major potential impact”. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 10-11 (11/17/2016).

*No mitigating circumstances to warrant penalty reduction where violation existed for over six years, Stratton took a long time to report the violations, and state agencies responded promptly once aware of the violations to bring the project into compliance. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 11 (11/17/2016).

*“Stratton knew of should have known about both its legal requirements under the permits and the facts of the violations for some years prior to reporting them to the state and seeking and obtaining permit amendments.” *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 11 (11/17/2016).

*“Repeat offenders can increase the penalty assessment under knowledge of a violation.” *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 11 (11/17/2016).

*Adjudicated violations determine past violations for purposes of assessing Respondents record of compliance. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 4 and FN2 and 11-12 and FN 10 (11/17/2016).

*Doubling of penalty supplied a sufficient deterrent effect where non-compliance was “egregious” and Respondent was uncooperative in fixing the problem with the stormwater management system. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 12 (11/17/2016).

* Environmental violations over a decade are sufficient to warrant a long duration. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 12 (11/17/2016).

* Penalty assessed sufficient to meet the purposes of the chapter. *Natural Resources Board v. Stratton Corp.*, No. 106-7-14 Vtec, Decision on the Merits at 13 (11/17/2016).