MASTER PERMIT
GUIDANCE DOCUMENT

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ENVIRONMENTAL BOARD
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LEGAL ANALYSIS RE: MASTER PERMITTING IN ACT 250

This outline provides a discussion of legal precedent relating to the review of large complex projects in Act 250 and also provides a history of the umbrella permit policy, no longer in existence, and the Environmental Board's master permit policy and procedure for partial findings of fact, adopted February 23, 1998. This discussion relies on Environmental Board and Vermont Supreme Court decisions and the work of Professor Richard Brooks in his treatise on Act 250, Toward Community Sustainability: Vermont's Act 250, Volume II.

I. UMBRELLA PERMIT POLICY

The Environmental Board adopted Act 250 Permit Policy and Procedures, Industrial Parks on March 12, 1975 pursuant to legislative intent expressed in Subchapter 3 of Chapter 12, Title 10 VSA. This policy was superseded in 1978 by the Board's adoption of the Industrial Park Permit Policy and Procedure, dated May 22, 1978.[1] The policy was originally intended to serve public, non-profit development corporations involved in the creation of industrial parks but was later expanded to serve private entities as well, as noted in the Blair Park case cited below. In 1980, the Environmental Board ruled that:

> The chief purposes of the umbrella permit policy are to facilitate the environmental review of industrial developments and decrease the cost and uncertainty of the Act 250 process for prospective industrial park tenants, while at the same time insuring that the vital interests of the public and the natural environment are safeguarded as required by the Act. To achieve these goals, the District Environmental Commissions, the applicants for industrial park permits, and other parties to the Act 250 permit process must work to establish clearly the scope of review and approval for the umbrella permit and the scope of review that will remain for individual industrial tenants... 2W0434-EB; C&K Brattleboro Associates, January 2, 1980.

An appellant in the Blair Park case argued that the district commission did not have the authority to grant an umbrella-type permit for this project because it is a private, commercial, for-profit project not comprehended within the terms of the Board's Industrial Parks Permit Policy. The Board did not accept this argument ruling:

> The Act must be applied flexibly within its broad terms and in support of its broad objectives - to facilitate reasonable, planned economic development as well as to minimize the undesirable economic and environmental effects of proposed developments. The Act grants broad discretion to the District Commissions to achieve these goals through the permit process... We conclude, in general, that the Commission's use of a broadly-conditioned permit process for the commercial park was within the discretion granted to the District Commission by the Act and the Rules of the Environmental Board,

[1] Professor Richard Brooks, Toward Community Sustainability: Vermont's Act 250, Volume II, Chapter XI at 45.

> and was neither governed by nor precluded by the Board's specific policy for review of nonprofit industrial park projects. #4C0388-EB; Paul E. Blair Family Trust, June 16, 1980.

The so-called "umbrella permit" policy was vacated by the Environmental Board in 1993 because of confusion in its implementation and the fact that vested rights were being granted under certain criteria of the Act contrary to current Board and Vermont Supreme Court precedent. A principal problem concerned the rights that were being vested under "umbrella permits" for terms of 20 years or more despite a provision in the policy that stated: The term of a conditional permit, subject to extensions upon petition and review, should not exceed five years. These rights often went beyond the natural resource criteria and construction of infrastructure and involved unreviewed impacts under economic, local and regional plan criteria. The classic case in point involved Taft Corners Associates, Inc. in Williston, which was approved as an industrial/commercial park by the District #4 Commission in 1987. In 1991, Taft Corners Associates sought an amendment to combine lots in the approved subdivision and construct a Wal-Mart store and a Sam's Discount Price Club. The District #4 permit was appealed to the Board which ruled that the umbrella permit had been improperly issued in 1987 and remanded the case to the District #4 Commission for a full review under Criteria 6, 7, 9(A), 9(K), and 10. Ultimately, the Board's decision was overturned by the Vermont Supreme Court in a decision which effectively upheld the umbrella permit that had been issued in 1987 and the 1988 amendment, and affirmed vested rights in those permits regarding economic, local and regional plan issues**.** In re Taft Corners Associates, 160 Vt. 583, 593 (1993). In that decision, the Court ruled:

> Because neither the 1987 umbrella permit nor the 1988 amendment was appealed to the Board, the findings, conclusions and permits are final and are not subject to attack in a subsequent application proceeding, whether or not they were properly granted in the first instance. (Emphasis added).

II. STATUTORY AUTHORITY AND IMPORTANT PRECEDENT

The Environmental Board is empowered by the Legislature to "establish criteria [by rule] under which applications for permits under this chapter may be classified in terms of complexity and significance" under the criteria of the Act. However, this statutory authority is geared towards creating "simplified or less stringent procedures than [would] otherwise [be] required" under the law. 10 V.S.A. Section 6025(b)(1). It does not provide any explicit authority to create special requirements for the review of "master plans". However, Board Rule 10(B) does provide for the following:

> (B) The board shall from time to time issue guidelines for the use of commissions and applicants in determining the information and documentation that is necessary or desirable for thorough review and evaluation of projects under applicable criteria. The board or a commission may require such additional information or supplementary information as the board or a commission deems necessary to fairly and properly review the proposal…

The Board believes that there is limited authority to require the preparation and submission of a master plan except for certain factual situations as outlined below. These instances are limited to those projects in which there is a clear plan to build out a larger project in phases over time and/or the applicant has proposed for review the construction of major infrastructure which is for the obvious purpose of serving a larger development. In these instances, the Board or a district commission may request additional information to complete the review pursuant to Board Rule 20 which states:

> (A) Supplementary information. The board or district commission may require any applicant to submit relevant supplementary data for use in resolving issues raised in a proceeding, and in determining whether or not to issue a permit. When necessary to an adequate evaluation of an application under the criteria set forth in 10 V.S.A. Section 6086(a)(1) through (a)(10), the district commission or board may require supplementary data concerning the current or projected use of the property owned by the applicant or others adjoining the project site. (Emphasis added).

This rule provides clear authority for the Board and district commissions to require additional information to resolve issues raised under the criteria of the Act during the review process.

There are several Board decisions which serve to interpret the meaning of this rule and provide a rationale by which to implement its purpose. On August 9, 1984, the Environmental Board issued Bruce J. Levinsky, Declaratory Ruling # 157. In this decision, the Board made a number of important findings of fact and conclusions of law. In one of the conclusions of law, the Board found the application to be incomplete and stated:

> We conclude that the project proposed by the Petitioner is not the Phase II sewer line standing alone. Rather, Petitioner clearly intends to intensively develop his 425 acre tract as a residential and/or commercial subdivision and the Phase II line will serve as one constituent support service for a larger undertaking.
>
> Therefore, ... the term land refers to Mr. Levinsky's entire 425 acre tract, the intended use of that land is residential/commercial subdivision, the proposed improvements are not limited to the Phase II line but instead include all construction necessary to accomplish the land subdivision, and the details of the project include a description of all uses proposed for the land.

In the resulting Rockwell Park application (concerning the same 425 acre tract of land owned by Levinsky), the Board, on appeal, took notice of the fact that: "...the Rockwell Subdivision Sketch Plan would constitute a document sufficiently firm and detailed to give notice [the permit process] contemplates and which is constitutionally required, and which is also essential to effect its purposes." The Board cited to In re Agency of Administration, 141 Vt. 68, 82 (1982). Arguing against a fragmented approach to reviewing the project, the Board also stated:

> Furthermore, Board Rule 10(B) pertaining to permit application provides, in part: The board or a district commission may require such additional information or supplementary information as the board or commission deems necessary to fairly and properly review the proposal. In determining what additional information may be required to fairly and

> properly evaluate a proposal, we must turn to Act 250 itself. The Board and District Commissions are directed by 10 V.S.A. Section 6086(a) to make several affirmative findings which would be rendered difficult if we subscribed to Petitioner's fragmented approach to project review.

In the final conclusion section, the Board outlined several options for the applicant and summarized the decision by stating:

> While we have concluded that Petitioner's application in #5W0772 is not complete for its failure to address associated subdivision of the Rockwell tract, we do not conclude the Petitioner must prepare final project plans for a comprehensive proposal. Should Petitioner be prepared to submit such a master development plan for the Rockwell land, application for final commission approval is an available option. However, other interim alternatives are available to the applicant.
>
> At a minimum, prior to further development associated with future use of the tract, Petitioner must identify the components of the development or subdivision to be served by the Phase II sewer line. <u>This identification need not include final architectural design or final engineering design of support services.</u> (Emphasis added.) The plan must, however, identify the uses to which the 425 acres is to be put, the location of various uses on the tract, and the intensity of those uses (i.e. number of dwelling units, length of utility lines and roadways, extent of commercial space, estimated water demand, estimated sewage discharge, estimated vehicle trips to be generated, and similar information). Petitioner may then pursue two alternatives, both of which are available under and encouraged by Board Rule 21:
>
> 1) review of a master plan under all criteria of 10 V.S.A. Section 6086(a); or
> 2) partial review of the project under selected criteria in a sequence determined by Petitioner, with the approval of the Commission, as most practicable, taking into consideration the natural resource concerns most salient to his proposal and the availability of information to support affirmative findings under each criterion.

The limitation on the Board's authority to require the preparation of generic master plan applications beyond the natural resource concerns articulated in the Rockwell Park case can be found in two important Vermont Supreme Court decisions; <u>In re Agency of Administration</u> , 141 Vt. 68, 82 (1982) and <u>In re Vermont Gas</u>, 150 Vt. 34, 39 (1988). In both cases, the Environmental Board was overturned in its attempt to assert jurisdiction based upon the assumption that there was a clear plan to pursue a larger development project. These cases were both dependent on the fact that, in the Court's opinion, a concrete plan for development did not exist and therefore Act 250 jurisdiction did not attach.

The In re Agency of Administration case involved the proposed demolition of a building which was considered by the Environmental Board to be the commencement of construction for the Capital Complex, as part of a larger undertaking in accordance with a plan. The Court did not agree while making an important ruling on the definition of "development" in Act 250:

> We believe that this legislative history discloses a well-considered intent on the part of the Legislature to define as development only that activity which has achieved such finality of design that construction can be said to be ready to commence....

In re Vermont Gas issued by the Supreme Court in 1988 reversed the Environmental Board in its attempt to assert jurisdiction over Vermont Gas Systems transmission and distribution system using a master plan approach. Citing In re Agency of Administration, the Court stated that: under Act 250, jurisdiction does not attach until construction is about to commence...

In that case, the court further stated:

> ...While we agree that the master plan approach would have advantages—including efficiency, the promotion of systems-wide impact analysis and the facilitation of uniform permit conditions—it does not follow that the Board has been empowered by the legislature to assert jurisdiction on that basis...

The Master Permit Policy and Procedure for Partial Findings of Fact, adopted in February of 1998, is written as an option that applicants are encouraged to follow. The Board decisions in Levinsky and Rockwell Park need to be read in concert with the cautionary language underlying both Supreme Court decisions; In re Agency of Administration and In re Vermont Gas.

MASTER PERMIT GUIDANCE FOR APPLICANTS AND PARTIES

I. MASTER PERMIT POLICY AND PARTIAL FINDINGS OF FACT.

1. Objective of the Master Permit Policy

The objective of the master permit policy and procedure, pursuant to Board Rule 21, is to provide guidance and greater predictability to the applicant in the review of complex development projects. Pursuant to Board Rule 21, the applicant may seek permission from the district environmental commission, or the Board on appeal, to proceed with review under specific criteria of the Act in order to gain a greater degree of assurance that future development projects may be approved on a proposed development tract. This procedure will allow for greater efficiency in the environmental review process and therefore avoid unnecessary and unreasonable costs to the applicant. In addition, it provides those afforded party status an opportunity to participate in the review of long-term master plans for complex development projects.

2. When is a Master Permit Application Required?

The Environmental Board's Master Permit Policy and Procedure for Partial Findings of Fact is an option that applicants are encouraged to follow when seeking approval for complex and multi-phased projects. Under this procedure, applicants may seek any level of finality of findings or permits, from full permits for construction to a "weather report" on the likely scope and content of review required for current and future phases of development.

Whatever the level of finality desired, it is clear from the Legal Analysis section that a master plan application may be required when an application includes:

1. A proposal for a growth facility and/or potentially growth-inducing infrastructure, including the construction or extension of sewer lines, other municipal, public, or private utility infrastructure, that will clearly serve future development; OR,
2. Clear evidence of a plan for development beyond what is presented for construction permits; AND,
3. There is a clear and direct relationship between the development infrastructure for which construction permits are being sought and plans for future growth and development.

An applicant may seek complete findings or partial findings under specified criteria in the context of a master plan application. Board Rule 21 provides for:

1. review of a master plan under all criteria of 10 VSA Section 6068(a); or
2. partial review of the project under selected criteria in a sequence determined by Petitioner, with the approval of the Commission, as most practicable, taking into consideration the natural resource concerns most salient to the project and the availability of information to support affirmative findings under each criterion.

Pre-application conferences with the district coordinator will allow applicants to explore the scope and content of review to be required for a project before partial or complete findings are sought. Additional specificity can be added by the district commission during the prehearing conference for a large, multi-phased project.

4. Seeking Partial Findings of Fact

Obtaining partial findings of fact under certain criteria can help applicants gain greater certainty for master plan projects. Before the district commission or Board can grant a master permit with partial findings of fact for a master plan project, it must be able to make affirmative findings under all of the criteria for those aspects of the project seeking construction approval.

In many instances, a land use permit may be granted authorizing construction for a smaller portion of the total project (including infrastructure) with partial findings of fact for the remainder of the project under relevant criteria. These partial findings of fact will provide guidance and greater predictability to the applicant in preparing final plans for the project or for subsequent stages.

Partial findings of fact should be issued for a period not to exceed five years since this represents a reasonable planning period within which potential impacts under the relevant criteria can be ascertained. Prior to expiration, partial findings of fact may be renewed and updated as necessary. In each Regional Office, district environmental coordinators are available to assist applicants in proceeding under 10 V.S.A. Section 6086(b) and Board Rule 21 which provide the legal framework for the full implementation of this policy and procedure.

II. PREHEARING CONFERENCE PROCEDURE

Board Rule 16. Prehearing Conferences and Preliminary Rulings.

(A) Purposes. The board or a commission acting through a duly authorized delegate may conduct such prehearing conferences, upon due notice, as may be useful in expediting its proceedings and hearings. The purposes of such prehearing conferences shall be to:
(1) Clarify the issues in controversy;
(2) Identify documents, witnesses and other offers of proof to be presented at a hearing by any party; and
(3) Obtain such stipulations of parties as to issues, offers of proof and other matters as may be appropriate.

(B) Preliminary rulings. The convening officer, if a member of the board or district commission, may make such preliminary rulings as to matters of notice, scheduling, party status, and other procedural matters, including interpretation of these rules, as are necessary to expedite and facilitate the hearing process. Such rulings may also be made by a commission chair or board chair without the convening of a prehearing conference. However, any such ruling may be objected to by any interested party, in which case the ruling shall be reviewed and the matter resolved by the board or district commission.

(C) Prehearing Order. The convening officer may prepare a prehearing order stating the results

of the prehearing conference. Any such order shall be binding upon all parties to the proceeding who have received notice of the prehearing conference if it is forwarded to the parties at least five days prior to the hearing. However, the time requirement may be waived upon agreement of all parties to the proceeding; and the board or a district commission may waive a requirement of a prehearing order upon a showing of cause, filing a timely objection, or if fairness so requires.

(D) Informal and non-adversarial resolution of issues. In the normal course of their duties, the board and the district commissions shall promote expeditious, informal and non-adversarial resolution of issues, require the timely exchange of information concerning an application and encourage participants to settle differences in any Act 250 proceeding. The board and district commissions may require the timely exchange of information regardless of whether parties are involved in informal resolution of issues. 10 VSA Section 6085(e).

III. INFORMATION TO BE SUBMITTED IN THE ACT 250 PROCESS

1. Project Description

In order to carry the burden of proof for receipt of a master permit with affirmative partial findings of fact, an applicant must carefully define the intended scope and nature of the proposed project. The extent to which the project description provides sufficient information to serve as the basis for a complete analysis under the criteria will determine the extent to which applicants can obtain guidance or affirmative findings from the commission or Board.

Applicants should understand that affirmative findings can only be made when sufficient information on the proposed project exists to perform the analysis necessary to satisfy the burden of proof under each of the criteria. The more information on the scope and content of the project provided in the project description and under relevant criteria, the more definitive the document becomes.

2. Compliance with Existing Environmental Permit Conditions and Applicable Regulations

It is recommended that applicants review existing permits associated with the involved land. This should be done prior to submission of a master plan application to assure compliance with all existing conditions of those permits. The district commission or the Board may request an assessment by the applicant relative to project compliance with conditions set forth in existing permits. This will allow the reviewing entity to effectively ascertain total impacts associated with future master plan development.

Existing and newly issued Act 250 permits are for an indefinite term, as long as there is compliance with the conditions of the permit. However, The Board may revoke a permit in the event of a violation in accordance with Environmental Board Rule 38.

An administrative order may stay the effective date or processing of any new permit application when an applicant for a permit has one or more current violations, which when viewed together constitute substantial noncompliance and when the noncompliance or violation was caused by

the applicant, by a person under the applicant's control or by a person who has control of the applicant. 10 V.S.A. Section 8011.

3. Criterion 10 - Compliance with Local and Regional Plans.

Prior to issuing a permit, the district commissions or the Board must find that any proposed project is in conformance with any duly adopted local or regional plan or capital program under chapter 117 of title 24" (10 VSA 6086 (10)). The burden of proof under Criterion 10 is on the Applicants. Id. 6088(a).

The Board's analysis under Criterion 10 regarding conformance with the Town Plan is conducted in accordance with In re Molgano, 163 Vt. 25 (1994); The Mirkwood Group and Barry Randall (#1R0780-EB); and, Manchester Commons Associates (#8B0500-EB). In Molgano, the Supreme Court held that zoning by-laws are germane to interpreting ambiguous provisions of a town plan. Molgano does not assert that zoning by-laws control or override the specific policies of a town plan in an Act 250 proceeding. The Board must consider whether the relevant town plan provisions are specific policies or ambiguous. If such provisions are specific policies, they are applied to the proposed project without any reference to the zoning by-laws. If such provisions are ambiguous, however, the Board may examine the zoning by-laws for specific provisions which can help interpret the relevant town plan provisions in order to resolve their ambiguity.

In Mirkwood, the Board concluded that a provision of a town plan evinces a specific policy if the provision: a) pertains to the area or district in which the project is located; b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and, c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding.

Thus, it is critical that large, complex development projects be designed in a manner that is consistent with the town plan for the host community. This is not only important to ensure a project's conformance with town and regional plans under Criterion 10. Many of the essential issues associated with large development projects are best addressed through a comprehensive local and regional planning process. Matters that should be considered include: the capacity of municipal facilities and services, the management of secondary growth, and the relationship of large developments to the surrounding community and neighboring towns. This requires the cooperative involvement of local governments and public agencies.

Through a public planning process, communities can anticipate large projects and develop policies and programs to manage the likely long term impacts. The master permit process is not a substitute for community and regional planning. Rather, the lack or avoidance of a local planning process will require that many important questions related to a community's future will be addressed through the regulatory process, if at all.

4. Identification of Rural Growth Areas 9(L)

In certain situations or at the request of the applicant, a district commission or the Board may determine that it will be more expedient to issue a legal ruling regarding Criterion (9)(L), Rural

Growth Areas, prior to proceeding to a review of the criteria. If this is the case, the applicant should provide sufficient information upon which the decision making body can rely in making its determination. If a positive determination is made regarding a project's location within a "rural growth area," then it will be incumbent on the applicant to provide the expected rates and extent of growth and accompanying densities related to the proposed development or subdivision contained within the "rural growth area" since the commission or the Board will need to make findings and conclude whether the project has made sufficient "… use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage." 10 V.S.A., Section 6086(9)(L) and Board Rules 21(A), (B), and (C).

IV. BURDEN OF PROOF AND REQUIRED ANALYSIS FOR AFFIRMATIVE FINDINGS

1. Determination of Impacts or Partial Findings Related to Natural Resource Criteria

Applicants may seek a determination of impacts and partial findings related to natural resource criteria if sufficient inventories and mapping related to the Natural Resource Criteria are submitted. Such a determination shall be made by the district commission.

2. Criterion 9(A): Impact of Growth

Statutory Requirements: Criterion 9(A) requires the district commission or the Board to review the impact that the proposed project will have on the ability of the town and region to accommodate two separate items: (a) growth that will occur generally regardless of the proposed project; and (b) growth that will occur specifically because of the proposed project.

Burden of Proof: The burden of proof is on the applicant under Criterion 9(A) where the town has a duly adopted capital improvement program. 10 V.S.A. § 6088(b) and § 6086(a)(9)(A). The burden of proof is on the opponents where the town does not have a duly adopted capital improvement program. 10 V.S.A. §6086(a)(9)(A). However, the applicant must provide sufficient information for the district commission or the Board to make affirmative findings. Pratt's Propane, Inc., #3R0486-EB (1987).

The party with the burden of proof must provide information and prove all of the following:

a. The growth in population experienced by the town and region in question.
b. The *total* growth and *rate* of growth which is otherwise *expected* for the town and region.
c. The *total* growth and *rate* of growth for the town and region which will result from the proposed project if approved.
d. The 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.
e. Based on (a) through (d), that the proposed project will not cause an undue burden on the existing and potential financial capacity of the town and region in accommodating growth caused by the proposed project. 10 V.S.A. § 6086(a)(9)(A); and, St. Albans Wal*Mart, supra, at 30, and Maple Tree Place, supra, at 25.

In the St. Albans Wal*Mart case, the Board concluded that the applicant had not met its burden of proof where it failed to provide adequate information under (a) through (d) above. In contrast, in the Maple Tree Place district commission case, the applicant provided the information required in (a) through (d) above, along with secondary growth information. Maple Tree Place, supra, at 36. The District #4 Commission concluded that the 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.

Market Competition. A project's impact on market competition is a relevant factor under Criterion 9(A) only to the extent that it will have an impact on the ability to provide educational and/or other governmental services. In re Wal*Mart Stores, Inc., No. 95-398, slip op. at 4 (Vt. 1997).

Secondary Growth. The district commissions or the Board may require a secondary growth study to satisfy criterion 9(A) when they conclude that a proposed project would accelerate and attract substantial secondary growth. St. Albans Wal*Mart-EB at 6.

Definition of Growth. The term "growth" in Criterion 9(A) includes economic as well as population growth. St. Albans Wal*Mart-EB at 9.

Definition of Region. In the Maple Tree Place case, at 34, the District #4 Commission determined that term "region" in Criterion 9(A) should be defined in terms of the area impacted by the project.

Criterion 9(H): Costs of Scattered Development

Statutory Requirements. Criterion 9(H) requires that, before issuing a permit, the district commission or the Board must find that the proposed project either is or is not physically contiguous to an existing settlement. If the proposed project is not physically contiguous to such a settlement, then a permit can not be issued unless the public costs of the project do not outweigh its public benefits.

Burden of Proof. The burden of proof under Criterion 9(H) is on the applicant. 10 V.S.A. § 6088(a).

Existing Settlement. The first issue under Criterion 9(H) is whether the proposed project is physically contiguous to an existing settlement. St. Albans Wal*Mart-EB at 36. This involves a determination of whether the area surrounding the site of the proposed project is such a settlement. Act 250 does not define "existing settlement." In the St. Albans Wal*Mart case, the Board concluded that "existing settlement" means:

> [a]n extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and importantly, a significant residential component. 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. Id. at 40-41.

The Board further concluded that, to be contiguous to an existing settlement, a proposed project must be within or immediately next to such a settlement. Id. at 41. If the proposed project is not contiguous to an existing settlement, as defined above, it constitutes scattered development.

Weighing of Public Costs and Public Benefits. The second issue under Criterion 9(H) is whether the additional costs of public services and facilities caused directly or indirectly by the proposed project outweigh the tax revenue and other public benefits of the proposed project. Under Criterion 9(H), the Board may issue a permit for scattered development if it concludes that the public benefits are not outweighed by the public costs. Id. at 44. Examples of public benefits include property tax revenues and increased state aid to education. Id. at 46. Examples of public costs include lost state aid to education, lost revenue to other municipalities due to changes in the Grand Lists caused by competition from the proposed project, lost revenue because of job loss in the region, cost of direct services to the proposed project, and loss of public funds invested in a city's historic downtown if a proposed project has a negative impact on the city. Id. at 48.

V. GUIDANCE FOR MASTER PLAN CONTENT AND ANALYSIS

Master plan applications for large scale projects should describe existing conditions and address the need for resource inventories and mapping. The applicant will need to describe proposed future uses of the tract and potential impacts on the natural resource criteria; and, if affirmative findings are sought under the fiscal impact criteria, provide sufficient information on the type and extent of proposed uses to allow an evaluation of fiscal and economic impacts and potential secondary growth impacts. This will allow the reviewing entity to effectively ascertain cumulative impacts associated with the project and future master plan development. If the applicant is seeking approval for construction within a five-year period, then detailed site plans, information, and projections should be provided for those elements of the project for which construction approval is being sought (similar to what is now required for any Act 250 major project). Otherwise, that level of detail would only be required when construction approval is sought.

1. Project Description

In order to carry the burden of proof for receipt of a master permit with affirmative partial findings of fact, an applicant must carefully define the intended scope of the development and quantify project impacts, to the extent practicable. The project that is proposed in the master plan should be described including the general nature of contemplated uses. For instance, a proposed project may be described as including one or more of the following components:

- An employer/producer

- A retail sales project
- A residential project
- A project with primary and secondary mixed uses
- A recreation project
- A downtown project
- A new mixed-use development in a locally- or regionally-designated growth center

Next, all applications should describe the magnitude of uses contemplated:

- How much land is involved in the master plan/area to be served by growth infrastructure?
- Square feet of each type of use?
- Residential units, and types?
- Total employment?
- Infrastructure capacity (sewage flow, utility capacity, roadway capacity, etc.)?
- Is this comparable to or larger/smaller than other developments in the general area?

For ski areas, the review may include:

- Extent and density of proposed mixed-use and/or residential development;
- Bed base expansion;
- Proposed uphill ski lift capacity;
- Proposed acreage of skiable terrain, including additional trail locations;
- Snowmaking system and percent of terrain covered by snowmaking;
- Non-winter season uses and number of users expected;
- Roadway, pathway and transit improvements or expansion;
- Water and sewer facilities;
- Other infrastructure.

2. Existing Conditions/Resource Inventories and Mapping

At the beginning of the master planning process, there needs to be a clear picture of what actually exists at the site of the proposed development. A site plan showing existing conditions, and, where deemed necessary, plans showing existing buildings and infrastructure, as constructed.

Among the items that may be considered:

- Ownership and boundary map;
- Resource maps;
- Existing infrastructure;
- Existing buildings and facilities;
- Existing environmental conservation measures/operations;
- Groundwater and wellhead protection areas;
- Water resources;
- Agricultural and forestry soils;

- Timber and gravel resources;
- Fish and wildlife habitats;
- Rare and endangered species;
- State designated natural and fragile areas;
- Historic and archaeological resources;
- Hiking, skiing and snowmobile trails; camping and other outdoor recreation facilities;
- Transportation facilities and information;
- Ambient air quality;
- Utilities;
- Scenic and aesthetic resources as identified in local and regional plans.

3. Scope of Secondary Impact/9(A) Analysis

Projecting secondary growth impacts in numerical or statistical terms beyond a five-year period and/or based on a well-defined development scheme is not reliable for applicants or parties. The general nature of the secondary growth impacts and the geographic extent of communities likely to be affected can be anticipated.

A secondary growth impact analysis should be evaluated based on the project description, components, magnitude, and impact areas and the analysis required to satisfy the burden of proof as outlined in (IV)(2) above. The scope and methodology of impact analysis should be addressed during the prehearing conference

What is the nature of the economic, land use and traffic activity that the whole master planned project will generate**,** and *what is the geographic "catchment area" for the impact* of those uses and users?

- Industrial employer: draws workers from a "commutershed" around it; draws supply/receiving traffic from another area.
- Retail development: draws shoppers from its market area and employees from a commutershed.
- Residential development: has primary municipal/school facility impacts within host town.
- Ski area: has a "sphere of influence" for second home development, secondary retail development and lodging, and a commutershed for day skiers and employees.

Given the general nature of the use and users, including some idea of the demographic characteristics of users, ***what types of secondary development or impacts can be expected from buildout of the master plan***?

- Industrial employer: Secondary growth within commutershed, service business growth near project.
- Retail development: Secondary retail development near project, potential shift in sales from existing retail centers within market area depending on demand/demographics/type of sales; employment and tax base impacts if sales at existing centers are reduced.
- Residential development: Secondary service development within residential market area.

- Ski area: second home development, secondary retail development and lodging, primary residential development/cost impacts.

Based on the general nature of the use of the project, what is the geographic impact area to be used throughout analysis of the master plan and project components?

- An employer/producer--commutershed.
- A retail/sales project--retail market area.
- A residential project--municipal finance and traffic impact area.
- A project with primary and secondary mixed uses--commutershed, retail/lodging, and second home "spheres of influence".

The impact areas and types defined above should then be incorporated into the prehearing order to the extent they have been identified. These areas and types should then form the basis for all 9(A) and other secondary growth analyses for all components of the master plan application.

5. Criterion 9(L) Analysis

If a district commission or the Board determines that the project is located in a "rural growth area" under Criterion 9(L), an applicant must provide information to establish that the primary project or subdivision will generate "reasonable population densities" and "reasonable rates of growth," the minimization of associated public costs through clustering and other planning techniques. Criterion 9(L) requires "the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage". 10 V.S.A., Section 6086(a) (9)(L) and New England Ventures (#6F0433-EB (1991)).

6. Phasing Plan

The anticipated time frame for completion of all elements for which construction is sought in the master plan should be specified. Large-scale developments, expected to be built in phases over several years, should submit a general phasing plan as part of master plan review. The Act 250 review process may outline what additional analysis or information is likely to be expected before further phases are approved for construction.

VI. CROSS BOUNDARY IMPACTS

For projects that have impacts that extend beyond the geographic boundary of the district in which the project is located, it is logical for the district commission with primary jurisdiction over the project to review those "cross boundary" impacts and impose any conditions deemed appropriate to mitigate the impacts wherever they may occur. Any conditions imposed must be in accordance with a proper exercise of the police power and must be appropriate to the criteria of the Act. In situations where a project may straddle a district boundary, the Chair of the Environmental Board may assign the case to the commission which has primary jurisdiction over a majority of the project. Any interpretations with respect to this policy will be made exclusively by the Chair of the Board.

VII. PERFORMANCE-BASED PHASING

If a large scale project is seeking "construction approval" for phased development, a "phasing plan" should be prepared containing performance standards by which each phase may be evaluated before proceeding with the next phase. For example, one phase may involve construction of facilities or infrastructure upon which subsequent phases depend. Therefore, demonstration of compliance with permit conditions may be required at the completion of construction of the first phase of development and prior to moving into the next phase. Performance-based review could apply to air quality, wastewater disposal, water supply, energy, traffic, growth impacts, as well as other criteria. In situations where monitoring will occur, it will be important to specify what data should be collected as part of the monitoring process as well as to determine who will collect the data and a timetable for completion of the monitoring. Any land use permit authorizing construction in accordance with an approved development plan "shall include dates by which there shall be full or phased completion" of the project pursuant to 10 V.S.A., Section 6091(d).

A district commission or the board may:

> "…review [of] those portions of developments and subdivisions that fail to meet their completion dates, giving due consideration to fairness to the parties involved, competing land use demands, and cumulative impacts on the resources involved. If completion has been delayed by litigation, proceedings to secure other permits, proceedings to secure title through foreclosure, or because of market conditions, the district commission or board shall provide that the completion dates be extended for a reasonable period of time.
>
> 10 V.S.A., Section 6091(d) added June 21, 1994.

In cases where the applicant is seeking "construction approval" for large scale phased development, the district commissions and the Board have the authority to require demonstration of compliance with land use permit conditions associated with earlier phases and make approval of subsequent phases contingent upon such compliance as noted above. This authority flows from the Board's general authority to impose "requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to" the criteria of the Act. 10 V.S.A., Section 6086(c).