

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A., Chapter 151

RE: Juster Development Company by Findings of Fact and  
Jon Readnour, Esq. Conclusions of Law  
Carroll, George & Pratt and Order  
Drawer 530(J) Land Use Permit  
Rutland, VT 05701-0530 #1R0048-8-EB

On November 11, 1987, an appeal was filed with the Environmental Board by the Juster Development Company (Juster) through its attorneys, Carroll, George & Pratt, from the District #1 Environmental Commission (District Commission) decision dated October 15, 1987. The District Commission denied Juster's proposal for the construction of a 177,000 square foot addition (the Expansion) to the previously-approved Rutland Mall (the Mall) located in the Town of Rutland, Vermont. Juster appealed the District Commission's decision to deny the project under Criteria 1, 1(B), 5, 7, 9(F), 9(J), and 9(K).

On November 12, 1987, an appeal was filed with the Environmental Board by the Town of Rutland (Town), through its attorneys, Langrock, Sperry, Parker & Wool, concerning the same decision. The Town appealed the District Commission's findings under Criteria 5, 7, 9(J), and 9(K).

On November 19, 1987, a notice of appearance was filed by Marble Bank and MARCO Properties through their attorney, Bartley J. Costello. On November 20, 1987, a notice of appearance was filed by Richard S. Davis through his attorneys, Abatiell and Abatiell. On November 30, 1987, a notice of appearance was filed by the City of Rutland through its attorney, John D. Hansen.

On December 1, 1987, a prehearing conference was held by Environmental Board (Board) acting Chair Jan S. Eastman in Center Rutland, Vermont. The following parties participated in the prehearing conference:

Juster Development Company (Juster) by Jon S. Readnour, Esq.  
Town of Rutland Selectmen and Planning Commission (Town) by William Miller, Esq., and Joseph Zingale, Jr.  
Agency of Natural Resources (ANR) by Frederic Emigh, Esq.  
City of Rutland and Planning Commission (City) by John D. Hansen, Esq.  
M.T. Associates & Midway Oil Corporation (M.T.) by Joseph Merone  
Richard S. Davis by Tracee A. Oakman, Esq., Abatiell & Abatiell  
Blair Campbell

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At the prehearing conference the City filed a notice of appeal of the District Commission's decision under Criteria 1(D), 1(E), 1(F), 1(G), 4, 8 (aesthetics), 9(E) and 10.

On December 10, 1987, a second notice of appearance was filed by the City through its attorney, Henry C. Brislin.

On December 15, 1987, a preliminary hearing was held in this matter. On December 21, 1987, a Prehearing Conference Report and Order was issued. On March 29 and 30, 1988, a public hearing was convened in Chittenden, Vermont. The Board deliberated on April 13, 1988, and requested additional information on April 21, 1988. The hearing was continued on June 16, 1988. The following parties participated in the hearing.

Juster Development Company (Juster) by Jon S. Readnour, Esq.  
Town of Rutland Selectmen and Planning Commission (Town) by Mark L. Sperry, Esq. and Joseph Zingale, Jr.  
City of Rutland and Planning Commission (City) by John D. Hansen, Esq.  
Agency of Natural Resources (ANR) by Frederic Emigh, Esq. and Mark Sinclair, Esq.  
M.T. Associates & Midway Oil Corporation (M.T.) by Joseph Merone  
Richard S. Davis by Anthony F. Abatiell, Esq.  
Blair Campbell  
Marble Bank and MARCO Properties by Joseph Jeloty, Esq.

At the request of the Board, representatives of the Vermont Agency of Transportation (Agency) also testified at the June 16, 1988 hearing.

The hearing was recessed on June 16, 1988, pending the filing of proposed findings and memoranda by the parties, a review of the record and deliberation by the Board. On July 15, 1988, the parties filed proposed Findings of Fact and Conclusions of Law and legal memoranda. On August 12, 1988, certain parties filed responsive memoranda. The Board deliberated on August 18, October 20, and November 29. On December 14, 1988, the Board completed its review of the record, declared the record complete, and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearings including a site visit by the Board. To the extent the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein: otherwise, said requests are hereby denied.

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I. ISSUES IN THE APPEAL

Juster filed an appeal from the District Commission's denial of its proposal for the construction of a 177,000 square foot addition to the Mall located in the Town of Rutland, Vermont. Juster objects to the District Commission's findings and conclusions under Criteria 1, 1(B), 5, 7, 9(F), 9(J), and 9(K). The Town also filed an appeal, objecting to the District Commission's findings under Criteria 5, 7, 9(J), and 9(K). The City filed a cross-appeal of the District Commission's decision, objecting to the District Commission's findings and conclusions with regard to Criteria 1(D), 1(E), 1(F), 1(G), 4, 8 (aesthetics), 9(E), and 10.

A. Criterion 1 (Air Pollution)

Juster argues that no undue air pollution will result from vehicular sources as a result of the Expansion. The City argues that based upon the evidence presented, the Board cannot make such a finding.

Juster also argues that the District Commission was in error when it required the construction of a wood fence to reduce noise during construction. Juster argues that noise is not a proper issue for consideration under the air pollution criterion. Juster also appeals the requirement for an escrow account to ensure compliance with the conditions concerning noise.

B. Criterion 1(B) (Stormwater Disposal)

Juster contends that the Expansion meets applicable Health Department and Environmental Conservation Department Regulations and will not involve the injection of pollutants into ground or surface waters. The City disputes this claim and argues that the Expansion does not meet applicable regulations and will involve the injection of pollutants into ground or surface waters.

C. Criterion 1(D) (Floodways), Criterion 1(E) (Streams), and Criterion 1(G) (Wetlands)

Juster contends that the Expansion meets the requirements of Criteria 1(D), 1(E), and 1(G). The City, however, argues that the Expansion will reduce the effectiveness of an existing floodway, divert an existing stream unnecessarily, and have an adverse impact upon an existing wetland.

Richard Davis agrees with the City's position and further argues that the Expansion has an adverse impact upon Dunkley Pond, some distance downstream of the Mall.

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D. Criterion 4 (Soil Erosion)

Juster argues that there will be no undue soil erosion as a result of the Expansion. However, the City and Richard Davis argue that as a result of the Mall there is accelerated siltation of Dunkley Pond, which will be exacerbated by the Expansion.

E. Criterion 5 (Traffic)

Juster believes that the Expansion will not cause unreasonable congestion and unsafe conditions with regard to Routes 4 and 7, city streets and the internal mall roads. Further, Juster contends that the Board cannot deny the Expansion on the basis of Criterion 5, as such a denial is prohibited by statute. The Town agrees with Juster. However, the City, M.T., Blair Campbell, and Marble Bank and MARCO Properties argue that the Expansion as proposed will cause unreasonable congestion and unsafe conditions with respect to the traffic and the use of the highways.

F. Criterion 7 (Impact upon Municipal or Governmental Services)

Juster argues that the Expansion will not place an unreasonable burden on the City's ability to provide traffic-related services. Further, Juster contends that there is no basis on which impact fees for the City can be imposed. The Town agrees with this position.

G. Criterion 8 (Aesthetics)

The City argues that Juster's plans failed to incorporate a fence and suitable vegetative screening along that portion of Juster's property that abuts its boundaries with the City. The City argues that such a fence is necessary to prevent the continued use of lands owned by the City and residents within the City for pedestrian as well as two- and three-wheeled vehicle access to the Mall. Juster argues that the Expansion does not have an undue adverse effect on the scenic or natural beauty of the area or aesthetics under Criterion 8 and consequently should be approved.

H. Criterion 9(E) (Extraction of Earth Resources)

Juster contends that the proposed borrow area and its subsequent rehabilitation conform to the requirements of Criterion 9 (E).

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I. Criterion 9(F) (Energy Conservation)

Juster contends that the District Commission's condition which required Juster to install roof insulation with an R value of at least 28 is unnecessary. Juster argues that an R value of 18 is adequate for a building of this type. No parties opposed this position.

J. Criterion 9(J) (Public Utility Services)

Juster contends that the Expansion will not place an excessive demand on governmental services. Juster argues that the District Commission's inclusion of highways as part of the governmental services to be considered under this criterion is an improper interpretation of Criterion 9(J). Such an interpretation, Juster argues, results in a permit denial based on the Expansion's burden on existing traffic and municipal services which is prohibited by statute. The Town of Rutland agrees with Juster's position.

K. Criterion 9(K) (Public Investments)

Juster contends that the Expansion will not unreasonably endanger the public investment and adjacent highways and will not interfere with the function, efficiency, and safety of the highways. Juster further contends that the District Commission's denial on this criterion results in a permit denial based on the Expansion's burden on existing traffic and municipal services which is prohibited by statute. The Town agrees with Juster's position. The City, M.T., Blair Campbell, Marble Bank and MARCO Properties argue that the Expansion does unreasonably interfere with some public investments.

L. Criterion 10 (Town Plan)

Juster contends that the Expansion is in conformance with the duly adopted Rutland Town Plan.

M. Summary of Issues

In summary, at issue and open for review before the Board in this appeal are Criteria 1 (air pollution), 1(B), 1(D), 1(E), 1(G), 4, 5, 7, 8 (aesthetics), 9(E), 9(F), 9(J), 9(K) and 10.

II. PARTY STATUS

Pursuant to Board Rule 14(A) (3), party status was granted to Joseph Merone on behalf of M.T. Associates and Midway Oil Corporation. M.T. Associates and Midway Oil Corporation own and operate businesses on property which

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adjoins the Juster site. They were granted party status with regard to Criteria 5 (traffic) and 9(K) (public investments) because of the possible impact that the reconfiguration of the highway might have on these businesses.

Pursuant to Rule 14(B)(1), Richard Davis was granted party status on Criteria 1(B) (stormwater disposal), 1(D) (floodways), 1(E) (streams) and 4 (soil erosion) because stormwater runoff and soil erosion from the Expansion might have an impact upon the water quality of Dunkley Pond. Richard Davis's property abuts Dunkley Pond into which Tenney Brook flows.

Pursuant to Rule 14(A)(3), Blair Campbell was granted party status on Criterion 5 (traffic). Mr. Campbell owns property on Route 4 across from the Mall and is concerned that the traffic lights may be moved, thereby affecting his business's access to Route 4.

On February 10, 1988, the Board received a written request for party status from Bartley J. Costello, Esq., on behalf of Marble Bank and MARCO Properties Corporation. Marble Bank and MARCO Properties sought party status pursuant to Board Rule 14(B) under Criterion 5 (traffic). Marble Bank and MARCO Properties own property on U.S. Route 4 adjoining the Juster property and are concerned that the Expansion will cause unreasonable traffic congestion and unsafe highway conditions and that the reconfigured highway will obstruct the access to their property and prevent its use for business purposes. This request for party status was not filed in a timely fashion. However, as there were no objections to the party status request, the Board granted limited party status to Marble Bank and MARCO Properties on the understanding that they would not delay these proceedings and that participation would be limited to cross-examination of the witnesses of other parties and submission of documents.

### III. FINDINGS OF FACT

1. Juster owns and operates an existing mall known as the Rutland Mall located on U.S. Route 4, Woodstock Avenue, in the Town of Rutland, Vermont, approximately 1,500 feet northeast of the City of Rutland/Town of Rutland boundary line.
  - 2 . The Mall was completed in 1975 and covers approximately 600,000 square feet, including parking areas. This represents a gross leasable area of approximately 213,000 square feet. The Mall has approximately 1,143 parking spaces.
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3. Juster has purchased a 21.9 acre parcel of land adjacent to the Mall. A portion of this land will be used as the site for the Expansion. Still another portion will include a relocated stream and mitigation pond. The remaining property to the north will be undeveloped. Juster has agreed that this remaining portion of land will be maintained for use exclusively as a wildlife sanctuary.
  4. The Expansion will include approximately 177,000 square feet of additional gross leasable area. It will also have 18,000 to 25,000 square feet of air conditioned interior mall, corridors, manager's office, and maintenance facilities.
  5. The Expansion will also include approximately 400,000 square feet for additional parking, service area and circulation. The Expansion will increase the parking capacity by adding 899 additional parking spaces, for a total of 2,042 parking spaces.
  6. The land owned and controlled by Juster which is the subject of this application abuts the City of Rutland's boundary line and actually abuts lands owned by the City, formerly known as the Poor Farm.
  7. Midway Oil Corporation and M.T. Associates are adjoining landowners to the Mall, directly west of the entrance to the Mall.
  8. Richard Davis owns property which abuts Dunkley Pond. Tenney Brook flows into Dunkley Pond.
  9. Blair Campbell owns property and operates a business across Route 4 from the Mall.
  10. Marble Bank and MARCO Properties own property on Route 4 in the Town of Rutland which adjoins land owned by Juster which is used or will be used for mall purposes.
- A. Criterion 1 (Air Pollution)
11. The Expansion falls within the definition of a modified indirect source of air pollution and requires a permit under Vermont Air Pollution regulations.
  12. The ANR issued a permit and certification of compliance with regard to air quality on March 26, 1987.
  13. The Vermont and National Ambient Air Quality Standard for carbon monoxide (CO) is 9.0 parts per million (ppm) over an eight hour period.
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14. Six intersections were analyzed to determine maximum eight hour CO levels using a modelling approach accepted by the Agency of Natural Resources. Maximum eight hour CO levels for the Mall and Expansion ranged from 1.4 to 7.8 ppm.
  15. Additional analysis was performed for the intersection of Woodstock Avenue and Main Street in the City taking into account additional dead-time (time spent waiting at intersections). Maximum CO level results show 7.5 ppm for the 1991 build situation. The 1991 build situation includes the Expansion. Using a pass-by percentage of 38%, the results show 7.5 ppm for the 1991 build situation. Using a 30% pass-by percentage, the results show 7.6 ppm. "Pass-by trips" are those trips by vehicles on the road for another primary purpose and thus not attributable to the Mall or the Expansion as a generator of traffic.
  16. Assuming 4 seconds of dead-time and a 30% pass-by percentage, the maximum predicted CO concentration at the intersection of Woodstock Avenue and Main Street is 7.8 ppm, below the state and National Ambient Air Quality Standard.
  17. The Expansion as conditioned will not result in undue air pollution pursuant to 10 V.S.A. § 6086(a)(1).
- B. Criterion 1(B) (Stormwater Disposal)
18. The Mall and Expansion received a stormwater discharge permit from the Agency of Environmental Conservation and Department of Water Resources and Environmental Engineering (now Agency of Natural Resources and Department of Environmental Conservation). The discharge permit was issued on February 6, 1987.
  19. The stormwater drainage system collects surface rain water and discharges it directly to the tributaries of Tenney Brook adjacent to the Mall or indirectly to the same tributaries through overland flow.
  20. Drainage from off-site comes onto the property at three different points. The discharge point for the drainage system is into the 72-inch storm sewer which passes under the Mall. That same 72-inch storm sewer carries the off-site drainage. Tenney Brook itself flows onto the property from the east.
  21. Rainwater falling on the parking areas is diverted by the slope of the paved areas into combination catch basins/grit chamber assemblies. These assemblies
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separate the grit and any floatable material, such as litter and oils, from the runoff. The stormwater then goes into a piping network which ultimately enters the stormwater detention basin. This stormwater detention basin is designed to meet state regulatory requirements existing at the time of the Mall's construction. It requires that water discharged from the Mall's parking lot not result in more than a 10% increase in the flow to Tenney Brook during the designed 100-year return storm.

22. The stormwater runoff from the parking areas associated with the Mall, with the exception of the area immediately behind Montgomery Ward, goes into the stormwater drainage network. The stormwater runoff from the service dock area behind Montgomery Ward goes by sheet flow across the pavement and directly to the stream.
  23. Sand and salt will continue to be applied to the parking lot in the winter. The amount of salt reaching Tenney Brook could be minimized by limiting the location of snow dumping to ensure the snow melt passes through the wetland area for treatment.
  24. All of the drainage associated with the Mall, which does not come from paved areas, goes to a separate area of piping. That drainage system does not go through the detention basin, but joins at the outlet of the detention basin into a 72-inch storm sewer that discharges behind the Mall.
  25. The majority of the Expansion's parking lot surface area will be treated by directing surface water by sheet flow to a series of drainage swales, which in turn connect to sedimentation basins. A portion of the new parking lot will collect stormwater drainage through catch basins and grit chamber assemblies similar in concept to those in the existing mall. This stormwater will be discharged into the drainage swale and sedimentation basin structure to the rear of the Expansion.
  26. Stormwater from the roof of the Expansion will be collected and directed through pipes under the parking lot to the drainage swale and sedimentation basins to the north of the Expansion. It will be discharged through riprap onto the grass and meadowland area and will flow overland through this area to the north and west of the parking area, and then into a mitigation pond.
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27. The 72-inch reinforced concrete storm sewer, which presently conducts drainage through the site, will be extended to a location where it joins the existing channel of Tenney Brook. The extension of this concrete storm sewer will discharge through a riprap section 15 feet wide and 30 feet long.
  28. Tenney Brook will be relocated to the north of the new parking area and will ultimately discharge into a newly created mitigation pond.
  29. The existing stormwater retention basin will also be modified. A steel orifice plate will be installed over the existing outlet structure. This will reduce the outlet diameter from approximately 12 to 15 inches down to a 6-inch diameter outlet.
  30. The existing roof drainage system will be incorporated into the roof drainage system for the Expansion and will flow through a piping network to the riprap discharge points to the north of the Expansion and the meadowland area.
  31. The Expansion will use standard accepted practices to control soil erosion. Each discharge point from the sedimentation basins and the discharge points from the roof headers are riprapped.
  32. The proposed stormwater management system for the Expansion requires occasional cleaning of the catch basins, mowing the grass associated with the grassy swales and cleaning out the new sedimentation basins when necessary.
  33. The stormwater discharge system, as conditioned, will meet the standards specified by applicable state regulations 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).
  - C. Criterion 1(D) (Floodways); Criterion 1(E) (Streams) and Criterion 1(G) (Wetlands)
  34. The construction of the Expansion requires the relocation of a segment of Tenney Brook and the filling of the associated 100-year floodway and floodway fringe. The relocation has received a Section 401 Water Quality Certification from the Vermont Agency of Natural Resources and a Section 404 permit from the United States Army Corps of Engineers.
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35. The land immediately north of the Mall is overgrown meadowlands. The land has in the past been used for farming and artificial channels were created for drainage. The existing channel of Tenney Brook at issue in this appeal is likely the result of dredging for drainage and subsequent agricultural activities.
  36. The meadow vegetation is predominantly gramanoid (grass-like) in nature. Most of the grasses present in this area are introduced species. Animal species in the wetland include moles, shrews, and small rodents. A few bird species have been observed in the wetlands, mostly sparrows and warblers and ground-nesting species. The few shrubs and small trees found in this area provide limited nesting opportunities.
  37. No plant or animal species listed on the Vermont or federal endangered species list were found in the area to be affected by the Expansion.
  38. The existing branch of Tenney Brook runs through the center of the proposed building. The relocation of the brook swings to the east of the new parking area. It runs in a meandering path to the north, then to the west, ultimately rejoining the existing stream channel.
  39. The existing tributary of Tenney Brook is a small stream averaging approximately three feet in width and one foot in depth. Juster proposes to relocate this branch of Tenney Brook from its present straight alignment to one which would simulate its natural configuration. The new stream will have a natural aggregate bottom and consist of eleven pool and riffle areas, specifically designed to provide habitat for trout. No pool and riffle areas exist in the present brook as it passes through this property. The banks of the relocated stream will be landscaped using native plant species including shrubs and trees. Tree branches will provide shade and result in cooler water temperature to enhance fisheries habitat.
  40. For the new stream an average gradient approximating the existing stream channel will be maintained. In addition, the new stream will have pools and riffles. The first 900 feet of relocated stream will follow the new parking lot edge. The minimum distance to the stream from the new parking lot edge will be 35 feet and the slope to the lot line will be 1:2.5. Common to all sections of the stream will be erosion matting and variation in stone and boulder size, depending upon gradient. Graded gravel varying in size from  $\frac{1}{4}$  to 2" will be placed in the stream bed throughout its length to create fish habitat.
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41. No stream alteration permit was required for the stream relocation.
  42. Juster also proposes to construct a 1.05 acre pond. The relocated stream will go into a diversion structure just before it reaches the pond. Habitats will be provided for both warm and cold water fish. The flow of the stream will be split, putting part of it into the pond and the rest going into the stream around the pond to provide a flow of water for the cold water species.
  43. The pond has been designed to provide a diversity of habitats including shallow and deep water areas, muddy and sandy shores, and areas of emergent vegetation. The pond design also includes an island. The island will be accessible by causeway, which is part of a nature trail that traverses both the surrounding wet meadow and the adjacent woodlands.
  44. This pond will be approximately 25 feet by 50 feet by five feet deep and lined with large stones. The pond will be dug into the existing grade about five feet and will be retained by a concrete dam with two weirs to control flow to either the stream or the pond.
  45. The pond is designed to carry the major flow of water in a deeper channel along the south side of the pond to provide a cooler channel for fish and to circulate the water in the pond more thoroughly. The channel will average about five feet in depth but will generally be three to four feet deep.
  46. The expanded stormwater drainage system will increase the peak flow of the stream between 0.25% and 0.75%.
  47. The 100-year flood plain at the downstream edge of the Mall is 635.4 NGVD. The flood stage of the proposed mitigation pond is calculated to be 635.0 NGVD.
  48. The predevelopment flood storage capability in the area of the Expansion is equal to 234,400 cubic feet or approximately 5.38 acre-feet. The post development flood storage capability is equal to approximately 233,000 cubic feet or approximately 5.35 acre-feet. Post development flood storage includes a relocated Tenney Brook and the construction of a mitigation pond.
  49. The new stream channel would have a storage area of 16.2 acres and would have a storage volume in a 100-year storm event of 5.35 acre-feet. The new stream
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channel could carry water at a rate of 592 cubic feet per second, which is sufficient capacity to avoid significant increase in upstream flood levels.

50. The wetland located on the northern edge of the property will not be affected by the Expansion.
51. A variety of site lay-outs for developing the Expansion were considered.
52. The Expansion, as conditioned, will not restrict or divert unnecessarily the flow of flood waters or endanger the health, safety and welfare of the public or of riparian owners during flooding, nor will it increase the peak discharge of the stream to endanger the health, safety, and welfare of the public or riparian owners. 10 V.S.A. § 6086(a) (1) (D).
53. The Expansion, as conditioned, will to the extent feasible maintain the natural condition of the stream and will not endanger the health, safety and welfare of the public or adjoining landowners. 10 V.S.A. § 6086(a) (1) (E).
54. Regulations as required by 10 V.S.A. § 905(9) have not yet been adopted by the Vermont Water Resources Board.

D. Criterion 4 (Soil Erosion)

55. Basic soil erosion control techniques will be implemented during and after construction. These techniques include temporary sedimentation basins, silt fences, and a perimeter drain.
  56. The typical erosion control procedures to be used will follow the Vermont Handbook for Soil Erosion and Sediment Control as a guideline. As proposed, the ponds, streams, and concrete work in wet areas will be constructed during winter construction periods on frozen ground. Erosion control devices used in stream construction will be jute matting, silt fencing, and hay bales to trap sediment. Materials for the stream construction will include suitable granular native soils, imported graded bank run gravel, and crushed or graded stones, varying in size from 1" to 4 to 6" or larger on riprapped slopes. After the stream has been shaped and the boulders and various ripraps have been placed, topsoil will be placed outside the "normal" stream channel an area four feet wide by two feet deep. Topsoil will be seeded with a conservation mix and
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covered with erosion matting. The perimeter of the parking lot will be mowed as lawn for a distance of three to five feet to create a neat appearance; otherwise, the balance of the site will revert to natural conditions.

57. Dunkley Pond downstream from Tenney Brook was created by a small stone and mortar dam. Tenney Brook flows through built-up areas and bottom land, and as a result carries suspended sedimentation during stormwater runoff events. As the stream loses velocity, the sediment suspended in the flowing stream will settle out.
58. Two sedimentation ponds are proposed for this project. One basin is located north of the Expansion, and the other is located to the west side of the proposed, or north, parking area. The newly relocated portion of Tenney Brook will flow through a sedimentation basin structure prior to its entry into the mitigation pond, or into the bypass stream to that pond, before it rejoins the existing channel of Tenney Brook. This sedimentation basin will remove some sediment from the existing Tenney Brook, although that is not its primary purpose nor would it totally remove sediment from this stream during major storm events.
59. The Expansion, as conditioned, will not cause unreasonable soil erosion or a 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).

E. Criterion 5 (Traffic)

60. The Mall and Expansion are located on U.S. Route 4 (Woodstock Avenue) in the Town of Rutland, Vermont. U.S. Route 4 is the principally travelled east-west highway in the Rutland area.
  61. The Mall drive off U.S. Route 4 provides the only access. It intersects Route 4 at an approximately 60° angle and provides two 11-foot lanes for each direction for entering and exiting traffic.
  62. Road improvements include a widening of Route 4 to facilitate construction of a second left-hand turn lane into the Mall. The two left-hand turn lanes will extend back from the entrance approximately 325 feet towards the City. In addition, the traffic signal light will be retimed.
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63. Under existing conditions, the signalized intersection at the Mall entrance operates at a level of service D under peak December conditions. Normal traffic growth over time will drop the level of service to a level of service E.
  64. The access being proposed by Juster entails expanding and slightly realigning the present access to the Mall. The existing intersection is a signalized intersection and has various auxiliary turn lanes that accommodate and facilitate movement of traffic through the intersection. At the immediate access point, with the improvements being offered as a result of the Expansion, the level of service for the intersection would be maintained at level of service C, which is indicative of stable traffic conditions during peak traffic times.
  65. With the Expansion, there will be some increase in traffic at other road intersections in the City. Improvements or adjustments to these other intersections will include modifying the phasing of the traffic signal systems that are already in place to adjust the timings that affect movement of traffic through the intersections during peak periods.
  66. As part of the Expansion, Juster proposes changes to the mall driveway intersection including: 1) realignment of the mall drive to the west and a relocation of Eastwood Drive so that the two drives are located directly opposite each other; 2) addition of a separate left-turn lane at the mall driveway approach to U.S. Route 4; 3) widening of U.S. Route 4 on the north side to accommodate an additional left-turn lane into the Mall; 4) construction of a right-turn lane out of the Mall; and 5) related pavement markings and signing.
  67. Customers traveling in an easterly direction on U.S. Route 4 must cross two lanes of traffic to gain access to M.T.'s property. With the proposed changes to the entrance to the Mall, customers would have to cross three and one-half lanes of traffic. When leaving M.T.'s property, to make a left turn, these same customers cross what is now three lanes, two driving lanes and one stacking lane. With the proposed changes and the widening of the road, these customers would cross five lanes of traffic to get to the east bound lane of U.S. Route 4.
  68. The Expansion proposes a double left-turn lane for eastbound traffic into the Mall. Juster's traffic analysis assumed equal distribution of incoming traffic
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between the two left-turn inbound lanes. Depending upon the length of traffic backed up on Route 4, it is possible that the traffic could back into the through lane.

69. The project designer designed a roadway to the "30th highest" hour standards.
  70. Using the December design hour trip rate and 177,000 square feet of gross leasable area, approximately 771 vehicle-trips will be generated by the Mall and the Expansion during the December peak design hour. Three hundred eighty-seven of these trips will be entering the Mall. One hundred fifty-nine of these 387 trips will be new to U.S. Route 4 as a result of the Expansion.
  71. Of the traffic generated by the Mall, approximately 80% comes from the west and 20% comes from the east.
  72. During a peak hour of December shopping, one can expect 600 to 700 vehicles to enter the Mall.
  73. Mechanical counts of traffic were taken on a number of days; however, the mechanical recorders were not working at all times. Adjustments were therefore made to the data. No counts of pedestrian traffic are available.
  74. The peak traffic day for 1987 was apparently the day before Christmas.
  75. The Rutland Vocational Center is located approximately 1,500 feet from the Mall to the west.
  76. Northeast School is an elementary school situated between Temple and North Streets.
  77. A sidewalk is proposed for the east side of the entrance driveway. However, there are no sidewalks proposed from the driveway to existing sidewalks located further east on Route 4.
  78. Although no sidewalks are located to the east of the Mall entrance towards the Rutland Vocational Center and Gleason Road, pedestrian traffic in that area is indicated by the worn paths that are visible along the edge of Route 4.
  79. No pedestrian cycle has been proposed for the traffic light at the intersection of the mall drive and Route 4.
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80. Once automobiles have turned into the mall driveway, a right-hand turn into the Bonanza parking lot is located approximately 60 feet from the intersection of the mall drive and Route 4.
81. The distance from the main internal mall intersection and the mall drive and Route 4 intersection is approximately 300 feet. This provides a stacking capacity of 15 cars in each lane.
82. The main internal mall intersection is a four-way intersection at which is located the Vermont National Bank and the Montgomery Ward store. There are no traffic lights at this intersection. Approaches from the north, the east and the west would be under stop sign conditions. The approach from Route 4 would not have a stop sign. A police officer control will be located at this intersection during peak Christmas shopping periods. There are two inbound lanes between the intersection of the mall drive and Route 4 and this internal intersection. Past this internal intersection there is only one inbound lane; a merge on the departure leg of the intersection is therefore required.
83. Vehicles exiting from the Vermont National Bank are not able to get back into the Mall stream of traffic unless they leave the Mall property.
84. Parking will be reorganized so that all the foot traffic will go down the parking lot road to a sidewalk along the new addition. This sidewalk will extend along the new addition and tie into the sidewalk that exists along the south face of the present mall buildings. A rear entrance has also been added to the structure with access onto a parking area. This parking area will be used primarily for peak Christmas shopping and at other times of the year for employees.
85. The majority of the parking has been planned to encourage access to the east entry, part of the Expansion, and includes space for approximately 860 cars. Additional parking is located along the northern edge of the paved area to the north of the Expansion and to the west of the back entrance of the Expansion, adding a total of over 900 spaces.
86. A service dock for small shops that back up to the interior mall is located between the existing Montgomery Ward store and the Expansion. This means that a portion of the sidewalk that runs between Montgomery Ward and the Expansion will also be a driveway for these service vehicles.

87. Juster has applied for a permit for the road changes from the Vermont Agency of Transportation (VAOT) pursuant to 19 V.S.A. § 1111. No permit has yet been issued. VAOT reviews plans prepared by a developer and signifies whether they are acceptable or not acceptable, but VAOT does not review alternative proposals. The VAOT reviews proposed plans against a set of minimum criteria for safety and highway congestion. If a plan meets these minimum criteria, it will be approved. The so-called minimum criteria do not include an analysis of pedestrian access or the necessity for such access.
  88. VAOT has not yet reviewed detailed plans of the intersection of the mall drive and Route 4.
  89. VAOT has authority pursuant to Title 19, Vermont Statutes Annotated, to control access on state highways. By virtue of this law, VAOT controls any work within the corridor which is owned by the state or is under easements to the state. VAOT might make comments regarding other areas to the extent that those areas would affect safety aspects relating to the public at large, but it does not have statutory authority to review traffic issues outside of the state corridors. Thus, VAOT will not necessarily review internal traffic situations.
  90. Retiming the existing traffic signal at the mall drive and Route 4 will increase the present level of service from "D" to "C".
  91. Unless various conditions are met, the Expansion will cause unreasonable congestion and unsafe conditions with respect to the use of highways. 10 V.S.A. § 6086(a) (5).
  - F. Criterion 7 (Impact upon Municipal or Governmental Services)
  92. A combination of expanded market area, growth and reduced sales leakage generates enough market support for an additional 200,000 square feet of retail space without negatively affecting the City's downtown area.
  93. The Expansion should generate indirect benefits to the City.
  94. An intermunicipal agreement exists between the City and the Town with respect to sewer and water services. An additional 7,000 gallons for water and sewage have been
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requested for the Expansion. In the existing agreement a town user pays four times that of a city user for sewage service. In addition, the town user pays a so-called "ad valorem" premium on top of the five times rate for new town business such as the Expansion. The surcharge is equal to 20% of the real estate taxes the commercial development would pay to the Town. The town user also pays a premium above that paid by the city user for water service, but it is a much smaller proportion of the premium. The City would receive approximately \$45,650 annually due to the Expansion's water and sewer changes.

95. The City and Town provide water and sewer services to the Mall. The needs of the Expansion for water and sewer have been approved by the City and Town.
96. The Expansion will not place any significant demand on the Town or City with respect to traffic-related services. The Expansion should not generate significant additional needs for municipal services such as snow removal, street lighting, highway maintenance or police patrols.
97. The Expansion, as conditioned, will place no significant burdens on the City or Town with respect to municipal and governmental services. 10 V.S.A. § 6086(a) (7).

G. Criterion 8 (Aesthetics)

98. The proposed building will be similar in height, materials and design to the present structure. It will have a principal entrance from the new east parking lot, which is an extension of the parking lot behind the Bonanza Restaurant. A service courtyard will be included between the Montgomery Ward store and the Expansion. Other service areas for the Expansion are included along the north elevation of the building.
  99. Modifications will also be made to the existing entrance to the Mall.
  100. Planting along the road frontage of the Mall currently allows only filtered views into the site. Intervening parking lot planting will mitigate views of the Expansion. Adjacent commercial properties to the west and the existing mall structures prevent seeing the **Expansion eastbound on Route 4.**
  101. The proposed planting in the parking lot has been designed to direct traffic in a circular configuration past Bonanza and along the back of the Route 4 frontage
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parcels to the Expansion's entry area and its related parking. The existing parking lot between Bonanza and Montgomery Ward will also be replanted. The large central parking lot is a continuation of this lot northward across the existing stream. The northernmost parking lot is in the upland area and will be flanked by the stream and associated plantings along the stream.

102. Eighty-four ash trees, two inches in diameter, are the major parking island planting. A row of lindens will define the walkway along the western edge of the north lot and extend to the planting at the front of the building. Four islands, 40 by 36 feet in size, will punctuate the parking lot with four ten-foot pines in each island. One hundred five white pines six feet in height will be placed along the back edge of the frontage lots.
  103. Approximately 150 five-foot tall white cedar will be planted in clumps along the uphill side of the drainage swale leading to the sedimentation basins. Approximately 50 additional cedar trees will screen the service court between the Mall and the Expansion.
  104. The Expansion entry from the principal parking lot will have planters on either side of the entry and a paved and partially treed walk along the front of the building. The entry will be recessed with an extending glass canopy.
  105. The north elevation will be fenced and screened by planter islands, fences and trees.
  106. The pond edge will be planted with willows. In addition to the willows, eight 6-foot eastern larch, two 5-foot chatlow, and 85 dogwood and alder are proposed.
  107. The lights will be 400 watt, metal halide luminaires mounted on 25-foot high poles on 30-inch high concrete bases. They will be bronze in color and have cutoff luminaires to distribute the light downward and not beyond the parking lot. Service docks and security lights on the north and west sides will have similar cutoff characteristics.
  108. A new project sign for the Mall and the Expansion is proposed as part of the project.
  109. The Mall is visible from the back of certain lots located in the City. The average grade of the abutting lot lines in the City of Rutland is 705 feet. The
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grade varies from a high point of 710 and slopes in an easterly direction down to the base grade of the Mall of 657 feet. The west face of the Mall, a portion of which is visible from these back lot lines, is where the service doors enter the Mall, and is painted concrete blocks.

110. A 25-foot buffer containing the existing and additional vegetation provides some relief in this direction. Additional vegetation, consisting of rugosa rosa to create a barrier and six-foot pines to provide year-round screening, will be added on Juster's property. Pines will also be retained in the 25-foot buffer zone between the borrow area and the City lots.
  111. A barrier at the north end of the existing lot where an existing pedestrian path is located has been suggested.
  112. The Expansion, as conditioned, will not have an undue adverse effect on the scenic or natural beauty of the area or aesthetics. 10 V.S.A. § 6086(a) (8).
- H. Criterion 9(E) (Extraction of Earth Resources)
113. The area behind Zayre, Osco, and Martin's would be used as a borrow area to provide fill for the Expansion area.
  114. This borrow area abuts the residential subdivision of the City. The borrow area will be topsoiled and seeded immediately after the borrow operation is completed and will be planted with a conservation mix and allowed to regenerate to natural vegetation. The borrow area currently has approximately a 2 on 1 slope. Almost 50 feet of cut will be taken out of this embankment. The end result will remain a 2 on 1 slope.
  115. Upon completion, the borrow area will be graded, loamed, seeded and mulched to ensure long term stability and it will be compatible with the area.
  116. The proposed buffer strip and planting and screening program will eliminate any significant detrimental impact to adjoining landowners.
  117. The Expansion, as conditioned, will not have an unduly harmful impact upon the environment or surrounding land uses and will be left in a suitable fashion. 10 V.S.A. § 6086(a) (9) (E).
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I. Criterion 9(F) (Energy Conservation)

118. Juster proposes to use two layers of polyisocyanurate insulation in the building. This represents an approximate minimum thickness of 2.5 inches, resulting in a roof U value of .055 or an R value of 18.
119. Use of a roof insulation coefficient of  $U=.055$  ( $R=18$ ) will result in an insulation factor that exceeds that required by BOCA Energy Conservation Code and the ASHRAE (American Society of Heating, Refrigeration and Air Conditioning Engineers) Energy Conservation Standards in new building design.
120. A life cycle cost analysis, recommended by the Vermont Department of Public Service, indicates that using an R value of 28 as compared to 18 would require an additional \$500,000 of expenditures.
121. The Expansion, as conditioned, specifically, the use of insulation for the roof at an R value of 18, reflects the principles of energy conservation and incorporates the best available technology for efficient use of energy. 10 V.S.A. § 6086(a) (9) (E).

J. Criterion 9(J) (Public Utility Services)

122. Adequate water and sewer capability exists through the City and Town for the requirements of the Expansion.
  123. The traffic generated by the Expansion will not in and of itself reduce the level of service on area roads or at area intersections to unacceptable levels.
  124. The existing highway facilities in the Rutland region in general, and Routes 4 and 7 specifically, are adequate to carry the additional traffic that will be generated by the Expansion.
  125. Traffic-related services including roadway maintenance are adequate to meet any requirements generated by the Expansion.
  126. The Expansion, as conditioned, has all necessary and supportive governmental and public utility services available and will not place an excessive or uneconomic demand on such facilities and services. 10 V.S.A. § 6086(a) (9) (J).
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K. Criterion 9(K) (Development Affecting Public Investments)

127. Juster proposes to improve the intersection of the mall drive and Route 4. This will improve the traffic handling capability both for traffic turning into the Mall and for traffic passing through on Route 4.
128. The increased traffic levels associated with the Expansion do not decrease the level of service for area highways and intersections, if certain signal timing changes are made.
129. Pedestrian access to and use of this area can be improved by additional conditions as part of a permit amendment.
130. The Expansion, as conditioned, will not unnecessarily or unreasonably endanger the public or quasi-public investment in highways or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the highways. 10 V.S.A. § 6086(a) (9) (K).

L. Criterion 10 (Town Plan)

131. The Act 250 application for the Expansion was accepted for filing on February 25, 1986.
132. In March of 1987, an amendment to that part of the land use map which describes the commercial center district was approved by the Town of Rutland Board of Selectmen. The land use map is part of the town plan.
133. As indicated on the amended land use map, the Mall and the Expansion are located in the commercial center district. The commercial center district in the Rutland Town plan permits consolidation of a variety of retail and related commercial services.
134. The Expansion, as conditioned, is in conformance with the Rutland Town Plan. 10 V.S.A. § 6086(a) (10).

IV. CONCLUSIONS OF LAW

A. Criterion 1 (Air Pollution)

10 V.S.A. § 6086(a)(1) requires that, before granting an Act 250 permit, the Board or a district commission find that the project will not result in undue air pollution.

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The burden of providing evidence on this issue, as well as the burden of persuasion, is on the applicant. 10 V.S.A. § 6088(a). At issue in this appeal is whether vehicular services will create undue air pollution and whether a fence should be constructed to reduce noise levels offsite during construction.

In presenting its case, Juster relied upon the air quality certification issued by the Agency of Natural Resources as a presumption of compliance with this criterion as allowed by 10 V.S.A. § 6086(c) and Board Rule 19. The City presented evidence to rebut the presumption and the Board found that the presumption had been rebutted.

The City argues that the standard of presumption specified by Board Rule 19 is contrary to law. Section 810(1) of 3 V.S.A. requires that the Vermont Rules of Evidence, as applied in superior courts, be applied in all contested cases before administrative bodies. Evidence Rule No. 301 specifies a standard of presumption "except as otherwise provided by law." The City argues that the standard described in Evidence Rule No. 301 must therefore be applied in this proceeding, notwithstanding the more stringent standards specified by Board Rule 19.

The Board believes that 10 V.S.A. § 6086(c) is the statutory authorization referred to in Evidence Rule No. 301. Consequently, the Board will continue to apply the standards set forth in Board Rule 19.

Based upon a review of the evidence submitted, the Board concludes that no undue air pollution is likely to result from vehicular sources due to the Expansion, as conditioned.

The Board notes that a great deal of evidence was submitted relative to the underlying traffic figures used by **Juster** in its air pollution study. The Board agrees that original studies could have been more complete but believes that the modeling techniques used to obtain the air quality certification and presented to the Board are based on conservative assumptions. Furthermore, as the result of issues and questions raised by the City, additional analysis was performed based on even more conservative assumptions. The Board notes that even though the presumption under Rule 19 was rebutted, the Certification of Compliance issued by the Agency of Natural Resources and the underlying analysis **is evidence of compliance with Criterion 1.**

The Board further concludes that noise is a proper issue for consideration under the air pollution criterion depending upon the particular case. Indeed, at some point

noise may violate federal health standards and at that point possibly be considered "air pollution." However, in this case the evidence does not suggest violation of any such standards. Consequently, the Board will not require the construction of a wood fence to reduce noise levels offsite during construction nor will it require an escrow account relative to this matter.

B. Criterion 1(B) (Stormwater Disposal)

10 V.S.A. § 6086(a)(1)(B) requires that, before granting an Act 250 permit, the Board or a district commission find that a development will meet certain applicable state regulations and will not involve the injection of waste materials or any harmful substances into groundwater or wells. The burden of providing evidence on this issue as well as the burden of persuasion is on the applicant. 10 V.S.A. § 6088(a).

Based upon a review of the evidence submitted, the Board concludes that this project meets applicable Health Department and Environmental Conservation Department regulations and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. The Board notes that its review was limited to the issue of stormwater disposal.

Juster has applied for and received a discharge permit for the existing stormwater discharge system and the system proposed for the Expansion. According to Vermont Water Quality Standards, the Mall is considered a "major" stormwater discharge. The Board concludes that the system designed and approved for the Mall and the Expansion successfully addresses the issues raised by the Water Quality Standards. No technical evidence was offered by other parties to dispute the presentation made by Juster.

The Board will condition any permit issued to ensure that the system is operated and maintained properly.

C. Criterion 1(D) (Floodways), Criterion 1(E) (Streams), and Criterion 1(G) (Wetlands)

10 V.S.A. § 6086(a) (1)(D) requires that, before granting an Act 250 permit, the Board or a district commission find that a development will not restrict or divert the flow of flood waters, nor endanger the health, safety and welfare of the public or of riparian owners during flooding, nor significantly increase the peak discharge within or downstream from the stream or endanger the health, safety and welfare of the public or riparian owners during flooding.

10 V.S.A. § 6086 (a)(1)(E) requires that, before granting an Act 250 permit, the Board or a district commission find that a development will, whenever feasible, maintain the natural condition of the stream and not endanger the health, safety and welfare of the public or of adjoining landowners.

10 V.S.A. § 6086(a)(1)(G) requires that, before granting an Act 250 permit, the Board or a district commission find that the development will not violate any rules adopted by the Water Resources Board relating to significant wetlands. The burden of providing evidence on this issue as well as the burden of persuasion is on the applicant. 10 V.S.A. § 6088(a).

The Board concludes that the project, as conditioned, meets the requirements of Criteria 1(D), 1(E), and 1(G). Based upon the evidence presented, the Board believes that the proposed development will not significantly increase the peak discharge of Tenney Brook within or downstream from the area of this development and consequently will not endanger the health, safety and welfare of the public or riparian owners or in flooding. Furthermore, although the relocation of Tenney Brook does divert the flow of possible floodwaters, it does so wholly within the premises owned by Juster, does not decrease the ability of Tenney Brook to handle any floodwaters, and should in fact enhance the ability of this area to hold floodwaters. In addition, the proposed expansion would increase the peak flow of the stream by less than 1%.

The Expansion includes the relocation of the remaining branch of Tenney Brook. As part of this relocation, the stream will be realigned to meander through the property north of the Expansion. The relocation also includes the construction of a pond. Ultimately the relocated Tenney Brook returns to its existing stream channel. All of this relocation occurs on Juster's property. Consequently, the Board can only conclude that the relocation will not endanger the health, safety and welfare of either the public or any adjoining landowners. In fact, the proposal will likely enhance the use of this property by fish and wildlife.

The evidence in this case indicates that as it crosses this property Tenney Brook is most likely the result of a manufactured agricultural drainage and/or irrigation ditch. Opponents to this project argue that as the brook has been in its location for a number of years, it is indeed in a "natural condition," notwithstanding the fact that it was most likely an artificial creation for agricultural purposes.

A general definition of the word "natural" reads "forming a part of, or arising from nature; in accordance with what is found or expected in nature; produced or existing in nature; real; not artificial or manufactured." See Webster's New World Dictionary, College Edition (1957).

The Board has reviewed the evidence presented in this case in light of the existing situation, which includes an existing mall and a brook that has most likely been artificially created for agricultural purposes. The Board concludes that Tenney Brook is not in its natural condition. Instead, Juster has proposed a stream relocation and pond addition that should enhance the "natural condition" of the stream and of the area in question.

As the Board has concluded that Tenney Brook is not in its natural condition, the feasibility of maintaining the natural condition is not relevant here.

The Board further concludes that it cannot find that the proposed expansion will have any additional undue impact upon Tenney Brook once it leaves Juster's property and consequently on Dunkley Pond.

The Board notes that at the time of hearings in this matter, the Water Resources Board had not adopted rules pursuant to 10 V.S.A. § 905(9) and consequently Criterion 1(G) is not at issue.

D. Criterion 4 (Soil Erosion)

10 V.S.A. § 6086(a)(4) requires that, before granting an Act 250 permit, the Board or a district commission find that a development will not cause unreasonable soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition may result. The burden of providing evidence on this issue as well as the burden of persuasion is on the applicant. 10 V.S.A. § 6088(a).

As discussed above, the Board concludes that the proposed expansion will not accelerate siltation of Dunkley Pond nor will it reduce the capacity of the land to hold water. However, the Board will condition any permit to enable the District Commission to review certain practices to ensure that no undue soil erosion results. Thus, the Board concludes that this project, as conditioned, complies with 10 V.S.A. § 6086(a) (4).

E. Criterion 5 (Traffic)

10 V.S.A. § 6086(a)(5) requires in part that, before granting an Act 250 permit, the Board or a district commission find that a development will not cause unreasonable

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congestion or unsafe conditions with respect to the use of the highways. The burden of providing evidence on this issue is on the applicant; however, the burden of persuasion is on any party opposing the project. 10 V.S.A. § 6088(b).

Juster proposes to realign the mall entrance drive at its access with Route 4, to add new striping on Route 4, to adjust the timing of the signalized intersection of Routes 4 and 7 at North Main Street, and to add additional parking and a revised internal circulation pattern for the Mall.

The Board has reviewed this proposal and concludes that various conditions must be attached to this permit in order to alleviate unreasonable congestion and unsafe conditions.

Although no actual count of significant numbers of pedestrian traffic is available for the Mall, the Board notes that the Mall and the Expansion are within walking distance of the area's vocational technical school, which facility is used for various area school athletic events and is close to other commercial activities along Route 4. This location and the presence of pedestrian paths along Route 4 leading to the Mall indicate that the Board must require installation of sidewalks along Route 4 between the mall access drive and require that the signalized intersection of the mall drive and Route 4 include an opportunity for pedestrians to interrupt the flow of traffic when necessary. The issue of traffic and pedestrian safety is an important one for the Board and the evidence in this case leads us to believe that if we do not review this issue, it will not be reviewed in any forum.

The project as proposed includes a relatively short access drive with various turning maneuvers which could potentially cause accidents. The nature and configuration of the internal mall circulation, especially the main internal intersection, is also of grave concern to the Board. We will therefore require that the entire circulation pattern be reconsidered. As a result of an accident, traffic could back up and clog Route 4, a major thoroughfare in this area. Furthermore, an emergency blockage of one access could at least delay access to the Mall by emergency vehicles to an unacceptable degree.

The Board, therefore, will require that the intersection of the mall drive and Route 4 be redesigned to include a pre-emption mode in case of emergency. Furthermore, the

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Board will require that the access drive and main internal intersection be redesigned to avoid potential conflicts and a second access for at least emergency purposes be added.

The Board agrees that it cannot deny a project for noncompliance with Criterion 5. See 10 V.S.A. § 6087(b). The Board's review of the evidence in this case, however, indicates that the issues of pedestrian access, emergency access, and the potential conflicts and possibilities for accidents and delays at both the access drive and Route 4 intersection and the main internal intersection are significant. Consequently, the Board can only approve this project if the changes described above are made.

F. Criterion 7 (Impact upon Municipal or Governmental Services)

10 V.S.A. § 6086(a)(7) requires that, before granting an Act 250 permit, the Board or a district commission find that a development will not place an unreasonable burden on the ability of local governments to provide municipal or governmental services. The burden of providing evidence on this issue is on the applicant; however, the burden of persuasion is on any party opposing the project. 10 V.S.A. § 6088(b).

The City argues that its contributions to facilities and projects outside its boundaries are substantial. The Board believes that the City has not adequately addressed this particular development and its burdens, if any.

Based upon the evidence submitted, the Board cannot conclude that an unreasonable burden will be placed on the City's ability to provide traffic-related services, if the project is completed as conditioned. As discussed above under Criterion 1, the Board concludes that no undue air pollution will result due to the Expansion. Consequently, the Board does not believe that Juster should be responsible for improvements to various highway intersections, other than those proposed as part of the project.

The costs of municipal water and sewer services to be provided by the City will be covered by payments made by Juster. There is no substantial evidence of any other possible burdens on the City. Consequently, any additional fees to cover the cost of City services cannot be factually supported in this case.

G. Criterion 8 (Aesthetics)

10 V.S.A. § 6086(a)(8) requires in part that, before granting an Act 250 permit, the Board or a district commission must find that a development will not have an undue adverse effect on the scenic or natural beauty of the area or aesthetics. The burden of providing evidence on this issue is on the applicant; however, the burden of persuasion is on any party opposing the project. 10 V.S.A. § 6088(b). Other issues raised by Criterion 8 were reviewed by the District Commission and are not a subject of this appeal.

Based upon a review of the evidence submitted, the Board concludes that the Expansion, as conditioned, does not unduly affect the aesthetics or scenic and natural beauty of the area. This conclusion is based upon the landscaping plans proposed and submitted by Juster as part of its application. The Board will require that Juster adhere to said plans. Furthermore, the Board will require that the landscaping be installed prior to the occupation of or use of any portion of the Expansion.

As discussed above, no evidence as to the necessity of a fence to reduce the offsite impacts of construction noise was submitted to the Board. Consequently, we cannot grant such a request at this time. However, the Board will require Juster to take reasonable steps to reduce unreasonable construction noise at the site.

H. Criterion 9(E) (Extraction of Earth Resources)

10 V.S.A. § 6086(a)(9)(E) requires that, before granting an Act 250 permit, the Board or a district commission find that the removal of earth resources will not have an unduly harmful impact upon the environment or surrounding land uses and development and that the site will be left in a suitable condition. The burden of providing evidence on this issue as well as the burden of persuasion is on the applicant. 10 V.S.A. § 6088(a).

Based upon a review of the evidence submitted, the Board concludes that the maintenance of a buffer strip and the planting program in the borrow area eliminate any possible significant impact upon surrounding areas. Furthermore, the finished grade will not change and in fact the proposed landscaping is likely to enhance this area and result in an acceptable site rehabilitation.

I. Criterion 9(F) (Energy Conservation)

10 V.S.A. § 6086(a)(9)(F) requires that, before granting an Act 250 permit, the Board or district commission find that the planning and design of the development reflect the

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principles of energy conservation and incorporate the best available technology for efficient use and recovery of energy. The burden of providing evidence on this issue as well as the burden of persuasion is on the applicant.  
10 V.S.A. § 6088(a).

The sole issue before the Board under this criterion relates to installation of roof insulation. As the proposal by Juster exceeds both BOCA and ASHRAE standards and as no party presented conflicting evidence on this issue, the Board concludes that Juster's proposal, as conditioned, is sufficient. Consequently, this permit will include a condition which requires the installation of roof insulation with an R value of 18.

J. Criterion 9(J) (Public Utility Services)

10 V.S.A. § 6086(a)(9)(J) requires that, before granting an Act 250 permit, the Board or a district commission find that all necessary supportive governmental and public utility facilities and services are available and that no excessive or uneconomic demand will be placed on such facilities and services. The burden of providing evidence on this issue as well as the burden of persuasion is on the applicant. 10 V.S.A. § 6088(a).

Juster contends that highways should not be included as part of the governmental services to be considered under this criterion. Juster argues that this is an improper interpretation and that any conclusion here resulting in a permit denial based on the project's burden on existing traffic and municipal services is in fact a prohibited denial, solely a Criterion 5 issue. The Board disagrees. Highways are indeed necessary supportive governmental facilities or services.

As discussed above, the Board cannot conclude based upon the evidence submitted that significant highway improvements are the necessary result of the Expansion. The Board has previously concluded that some signal changes are needed at various intersections but cannot conclude that the necessary highway facilities and services are not available. Furthermore, other governmental and public utility services, including water and sewer, are available.

As there is no evidence to suggest that an uneconomic or excessive demand will be placed on any of these facilities or services, the Board can only conclude that the project, as conditioned, satisfies 10 V.S.A. § 6086(a) (9) (J).

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K. Criterion 9(K) (Public Investments)

10 V.S.A. § 6086(a)(9) (K) requires that, before granting an Act 250 permit, the Board or district commission find that the development will not unnecessarily or unreasonably endanger the public or quasi-public investment in adjacent governmental and public utility facilities, services and lands, or materially jeopardize or interfere with the function, efficiency or safety of, or the public's use or enjoyment of or access to said facilities, services or lands. The burden of providing evidence as well as the burden of persuasion on this issue is on the applicant.  
10 V.S.A. § 6088(a).

No one argues in this case that the intersection of the mall drive and Route 4 does not involve an adjacent governmental facility -- a highway. As discussed above, the Board has not concluded that the vehicular traffic resulting from the Expansion will significantly interfere with traffic on area highways assuming changes in signal timing at various intersections. Consequently, it is not necessary for the Board to discuss whether area highways beyond the intersection referred to are "adjacent" for purposes of 10 V.S.A. § 6086(a) (9) (K).

The Board concludes that, with the required changes to the mall access drive and Route 4 intersection, the mall access drive, the internal circulation pattern including the main internal intersection, and the addition of a second access for at least emergency purposes, the project will not interfere with the function, efficiency and safety of Route 4 and the public's use of, enjoyment of, and access to Route 4.

Consequently, the Board concludes that the project, as conditioned, satisfies 10 V.S.A. § 6086(a)(9)(K).

L. Criterion 10 (Town Plan)

10 V.S.A. § 6086(a)(10) requires in part that, before granting an Act 250 permit, the Board or a district commission find that the project conforms to a duly adopted town plan. The burden of providing evidence as well as the burden of persuasion on this issue is on the applicant.  
10 V.S.A. § 6088(a).

The original application for the Expansion was accepted for filing by the District Commission on February 25, 1986. At that time, the project was not in conformance with the Rutland Town Plan (Plan) as it then existed. The Plan has

since been amended. As a result of such amendment, the Expansion conforms to the existing Plan which includes all of Juster's property within the commercial center district.

In a previous case the Board reviewed the issue of whether the plan that was in effect on the date an application was filed, or subsequent amendments, apply. See Re: J. P. Carrara & Sons, Inc., #1R0589-EB, January 9, 1987. In that case, the Board determined that a regional plan that had expired after the date of Act 250 application need not be applied to the particular case. 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 purpose.

Therefore, the Board concludes that the project, as conditioned, conforms to the Rutland Town Plan. 10 V.S.A. § 6086(a) (10).

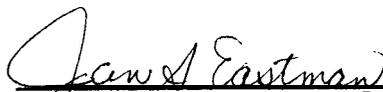
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V. ORDER

Land Use Permit Amendment #1R0048-8-EB shall be issued in accordance with the Findings of Fact and Conclusions of Law herein and in accordance with the Findings of Fact and Conclusions of Law of the District #1 Environmental Commission dated October 15, 1987. Jurisdiction over this matter is returned to the District Commission.

Dated at Montpelier, Vermont this 19th day of December, 1988.

ENVIRONMENTAL BOARD



Jan S. Eastman, Acting Chair  
Ferdinand Bongartz  
Elizabeth Courtney  
Samuel Lloyd  
Arthur Gibb

FF 1R0048-8-EB (18)