

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

Re: Killington, Ltd., et al. (Master Plan)
Application #1R0835-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (PARTIAL)

This proceeding concerns the Master Plan review of Phase One of the Killington Resort Village Master Plan. Killington, Ltd., et al ("Killington") proposes in Phase One to construct 520 hotel rooms, 700 hotel suites, 160 townhouses, 20 duplexes or single family homes, 180,000 square feet of retail/commercial space, 50,000 square feet of public assembly/indoor sports space, 96.5 acres of new trails and other on-mountain improvements at Killington ski resort, 22.3 acres of new trails and other on and off-mountain improvements at Pico ski resort, and three new parking lots at Killington ski resort, all located in the Town-of Killington, Vermont ("Project" or "Phase One Project").

In this decision, the Environmental Board ("Board") addresses two threshold issues relating to the Project's compliance with 10 V.S.A. §§ 6086(a)(Q)(H) (costs of scattered development) and (Q)(L) (rural growth areas) ("Criteria Q(H) and Q(L)"). Specifically, these threshold issues are 1) whether the Project is physically contiguous to an existing settlement pursuant to Criterion Q(H); and 2) whether it constitutes development in a rural growth area ("RGA") pursuant to Criterion Q(L). For reasons detailed below, the Board is unable to render findings of fact or conclusions of law with respect to the development proposed for the Pico ski area. With respect to the development proposed for the Killington ski area, the Board concludes that the Project 1) is not contiguous to an existing settlement under Criterion Q(H); and 2) does not constitute development in an RGA under Criterion Q(L).

I. PROCEDURAL SUMMARY

On September 14, 1998, Killington, Ltd., Pico Pond Associates, State of Vermont Department of Forests, Parks & Recreation, Grand Summit Properties, Inc., and American Skiing Company Resort Properties, Inc. (collectively, "Killington") filed Master Plan Application #1 R0835 ("Application") seeking master plan review of Phase One of the Killington Resort Village Master Plan pursuant to Environmental Board Rule 21.

On April 21, 1999, the District #1 Environmental Commission ("Commission") issued Findings of Fact and Conclusions of Law ("Decision")

regarding the Application, in which it concluded that the Project complies with 10 V.S.A. § 6086(a)(l)(D), (9)(B), (9)(D), (9)(E), and (9)(L) ("Criteria l(D), 9(B), 9(D), 9(E) and 9(L)").

On May 20, 1999, Vermont Natural Resources Council ("VNRC") filed an appeal with the Board from the Decision alleging that the Commission erred in its findings concerning 10 V.S.A. §§ 6086(a)(l)(A), (l)(B), (6), (7), (8), (9)(A), (9)(H), and (9)(L) ("Criteria l(A), l(B), 6, 7, 8, 9(A), 9(H), and 9(L)). VNRC also challenged aspects of the Master Plan process.

On June 3, 1999, Killington filed a cross-appeal alleging that the Commission erred in requiring it to obtain approval of the Agency of Natural Resources ("ANR") prior to submitting a required Restoration Plan to the Commission. The appeal and cross-appeal were filed pursuant to 10 V.S.A. § 6089(a) and EBRs 6 and 40.

On June 28, 1999, Mount Holly Mountain Watch ("MHMW") filed a letter requesting party status under Criteria 5, 6, 9(A), 9(H), 9(K), and 9(L) ("Criteria 5, 6, 9(A), 9(H), 9(K) and 9(L)").

On June 28, 1999, Board Chair Marcy Harding ("Chair") issued a Prehearing Conference Report and Order ("PHCRO"). Among other things, the PHCRO set forth several preliminary issues and a related briefing schedule. It also addressed the issue of MHMW's party status.

The Board considered the preliminary issues in a Memorandum of Decision ("MOD,,) dated October 22, 1999, and determined, among other things, that 1) the Board has jurisdiction to conduct partial review of the master plan for the Project under 10 V.S.A. § 6086(b) and EBR 21 despite the fact that construction is not yet ready to commence as to any aspect of the Project; 2) there is no authority for the parties to appeal, or for the Board to consider an appeal, concerning any Criterion for which the Commission was unable to issue findings of fact sufficient to support a conclusion of law; and 3) the Commission essentially made findings of fact sufficient to support a conclusion that the Project complies with Criterion 9(H), so that this Criterion is ripe for appeal.

As a result of earlier rulings in regard to this application,' the only issues remaining in this appeal are whether the Project complies with Criteria 9(H) and 9(L).

On November 1, 1999, Killington, ANR, VNRC, MHMW and the Killington Planning Commission jointly requested that filing and hearing dates for the case be extended and that the Criteria 9(H) and 9(L) issues be determined according to a bifurcated procedure, with threshold questions being determined first.

A November 4, 1999, Chair's Preliminary Ruling ("CPR") approved the parties' requests and indicated that the case would be heard according to the following bifurcated procedure:

(1) In regard to the question of whether and to what extent the Killington Master Plan Project will comply with 10 V.S.A. §6086(a)(9)(H), the Board will first determine whether the Proposed Project is physically contiguous to an existing settlement. If the Board determines that the development is physically contiguous to an existing settlement, no further evidentiary hearings in regard to this Criterion will be needed. If the Board determines that the Project is not physically contiguous to an existing settlement, the Board will convene a prehearing conference to schedule further proceedings to determine the Project's compliance with Criterion 9(H).

(2) In regard to the question of whether and to what extent the Killington Master Plan Project will comply with 10 V.S.A. §6086(a)(9)(L), the Board will first determine whether the Project constitutes development of a rural growth area. If the Board determines that the Project does not constitute development in a rural growth area, no further evidentiary hearings in regard to this Criterion will be needed. If the Board determines that the Project does constitute development of a rural growth area, it will convene a prehearing conference to schedule further proceedings to determine the Project's compliance with Criterion 9(L).

1

See *Killington, Ltd., et al.* (Master Plan), #1R0835-EB, Memorandum of Decision (October 22, 1999).

On February 25, 2000, a second prehearing conference was held in preparation for the hearing of the two threshold questions.

The hearing on the threshold questions was held on March 1, 2000. Present and participating in the hearing were Killington, Killington Town Planner Richard Horner, VNRC and MHMW. A site visit was conducted on the same date.

The Board deliberated on March 1, March 29, April 19, May 17, June 28, and July 19, 2000.

The record is now complete and the threshold issues are ready for decision.

II. ISSUES

The issues remaining in this appeal are:

1. Whether and to what extent the Killington Master Plan Project will comply with 10 V.S.A. §6086(a)(9)(H); and
2. Whether and to what extent the Killington Master Plan Project will comply with 10 V.S.A. §6086(a)(9)(L).

The threshold issues--the focus of the present proceeding--are:

1. Whether the Project is physically contiguous to an existing settlement pursuant to Criterion 9(H); and
2. Whether the Project constitutes development in a rural growth area pursuant to Criterion 9(L).

III. FINDINGS OF FACT

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Secretary, *Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

1. The Killington ski area first opened in 1958.

2. In 1968, Killington acquired from the State of Vermont 400 acres of land in Killington Basin and began planning and development in what is now referred to as the resort's "400 Acre Planned Unit Development" ("400 Acre PUD").
3. In 1997, Killington and the State of Vermont participated in a land exchange in which Killington conveyed approximately 3,000 acres of undeveloped land known as Parker's Gore to the State for the permanent protection of a bear habitat and a section of the Appalachian and Long Trails. In exchange, the State conveyed to Killington approximately 1,070 acres of land in Killington Basin.
4. In the planning process that ensued, Killington identified 408 of the 1,070 acres it obtained in the land exchange as being suitable for development. It has designated these lands as a second Planned Unit Development (the "408 Acre PUD"). The 408 Acre PUD adjoins the 400 Acre PUD along the latter's northwestern boundary. Both the 400 Acre PUD and the 408 Acre PUD are part of an overall plan for possible future development of the Killington and Pico resorts, known as the Killington Resort Village Master Plan ("Plan"). Phase One of this Plan is the subject of the pending application.*
5. In 1998, the existing development in the 400 Acre PUD included 701 residential dwelling units; 243 hotel units; 42,150 square feet of commercial space; 62,343 square feet of public assembly space; 4,661 square feet of indoor sports space; wastewater treatment facilities; a tennis center; and an 18-hole golf course. Subsequently, the Killington Grand Hotel, a large hotel and conference center four or more stories tall, has been built in the southwest corner of the 400 Acre PUD near the Snow Shed/Ram's Head Base Area. Existing development in the 408 Acre PUD includes the Killington Base Lodge, a very large parking lot, ski trails and the Killington Administration Building.

2

The Board notes that it is not considering the Killington Resort Village Master Plan document itself, which describes the details of all three phases of potential development at the Killington and Pico ski areas. The Board took official notice of this document, but has not relied on it because Killington's Vice President for Planning Carl Spangler testified that several aspects of the Plan-- including the mix of units, phasing, amount of commercial square footage, parking and overall "numbers"--changed after its publication. The Board has reviewed the Phase One Project only as Killington described it in its **prefiled** testimony, exhibits and evidence adduced at the hearing.

6. The Phase One Project proposes improvements for both the Killington ski area and the Pico ski area. In broad outline, Killington proposes in the Phase One Project to construct 520 hotel rooms, 700 hotel suites, 160 townhouses, 20 duplexes or single family homes, 180,000 square feet of retail/commercial space, 50,000 square feet of public assembly/indoor sports space, 96.5 acres of new trails and other on-mountain improvements at the Killington ski area, and 22.3 acres of new trails and other on and off-mountain improvements at Pico ski area. It also proposes to construct three new parking lots at Killington. For the Project, Killington seeks only partial findings of fact and conclusions of law. It does not seek a construction permit at this time.

7. The primary focus of the Phase One Project is the construction of a ski resort "village" in the Snow Shed/Ram's Head Base Area of the Killington ski area.

8. All of the development proposed for the Killington ski area is in the general location of the Killington and Snow Shed/Ram's Head Base Areas.

9. Killington submitted no evidence concerning any of the proposed improvements at Pico ski area.

10. Concerning the improvements proposed for the Killington ski area, Killington submitted only minimal evidence. Almost no evidence concerning the proposed new ski trails and "other on mountain improvements" at the Killington ski area was submitted, and very little evidence concerning the three proposed parking lots. Regarding the latter, Killington's representative could not pinpoint the location of one of the proposed lots, and no site map or other document depicts it in any way. The only information Killington's representative could provide about this lot was that it is "on leased lands" somewhere northwest of and close to the Calvin Coolidge State Forest, outside the 400 Acre and 408 Acre PUDs.

11. Killington has not identified all of the individual elements of the Project, and there are no scaled maps, measurements or other evidence from which the general layout of the Project or its physical proximity to existing development can be determined. No single exhibit or combination of exhibits depicts all of the Project elements, and none depicts all of the pertinent existing development.

12. At least one exhibit (K-IO) depicts development that does not presently exist, but that is not included in Killington's narrative description of the Phase One Project either. This exhibit also warns: "Building footprints and site plan do not necessarily represent the final layout of the Resort Village."

13. Killington Exhibit K-3, the primary exhibit that Killington offered to show the physical contiguity of the proposed development at Killington, depicts only the general contours of unscaled "Net Developable Areas" that Killington has identified as suitable for development at some time in the future. It does not identify specific Phase One Project elements or contain footprints for the proposed development, and it obscures or omits footprints of some existing development.

14. Exhibit K-4, which depicts the development proposed for the Snow Shed/Ram's Head Base Area, includes footprints of both the proposed and existing development, but fails to indicate whether these representations are to scale or what the scale is. In addition, this exhibit is cropped in such a way that not all surrounding existing land uses are visible.

15. The Killington Road is the main access road to the Killington ski area. It is approximately 4.5 to 5 miles long and follows a generally uphill grade from the intersection of Vermont Routes 4 and 100 to its terminus at the Killington Base Area. Traveling south from the intersection of Routes 4 and 100 for approximately one mile, the Killington Road climbs steadily uphill, passing through a primarily wooded area with a few single-family residences and a cluster of condominiums.

16. Over approximately the next 2 $\frac{1}{4}$ miles, continuing generally uphill, land uses are almost exclusively commercial, including a great deal of commercial lodging. Interspersed among lodging places is an array of ski shops, restaurants, gas stations, rental agencies, nightclubs, tourist services, and retail and outlet stores. Although the town fire station and **wastewater/sewage** treatment facilities are located along this part of the Killington Road, and the town's public elementary school is approximately $\frac{1}{2}$ mile off the Killington Road, commercial uses dominate.

17. Continuing south over approximately the next mile, the Killington Road passes the former Calvin Coolidge State Forest, an undeveloped area at the north end of the 408 Acre PUD.

18. In its final $\frac{3}{4}$ mile, the Killington Road continues south through the 408 Acre PUD to the Killington ski area itself, passing more commercial lodging, skier service facilities and related resort development in the Snow Shed/Ram's Head and Killington Base Areas. The road ends near the parking lot and base lodge for the Killington Base area.

19. The development along the Killington Road is similar to that which the Board observed along the Stowe Mountain Road in Town **of Stowe**,

#100035-9-EB, Findings of Fact, Conclusions of Law and Order at 55 (May 22, 1998). In both cases, the development around the road is linear. Both areas are automobile-dependent and characterized by low density development scattered over an extended area. Both are commercial, the Killington Road being overwhelmingly so. Commercial uses in both locations have separate parking lots and curb cuts; in fact, along the Killington Road, most commercial uses have these features. Both the Mountain Road and the Killington Road show little overall integration among uses.

20. The Killington resort itself shows some coordination and integration of uses between buildings, but development along most of the Killington Road does not. The Killington Road is sprawl. Commercial uses are separated by large lots. Most development is close to the road and lacking in depth. There are sidewalks and pedestrian crosswalks on some sections of the Killington Road, but the steep grade of the road, coupled with the large separations between uses, discourages pedestrians from walking from use-to-use.

21. During its site visit, which took place on an otherwise busy day at the height of Vermont's ski season, the Board observed only two pedestrians on a twice-through viewing of the Killington Road.

22. Few dwellings along the Killington Road appear to be year-round residences. Lodging units are designed primarily for transients, seasonal, occasional and other short-term guests. Overall, the mix of commercial and residential development along the Killington Road is unbalanced. The large amount of commercial development is out of proportion with the small amount of year-round residential development.

23. The residential settlement pattern off the Killington Road and throughout the entire Town of Killington is scattered and non-compact. Approximately 850 to 1,000 people are year-round residents of the Town of Killington. Approximately one half of these individuals (425 to 500 people) live within one half mile of either side the Killington Road. These 425 to 500 people reside in a widely scattered pattern.

24. Most of the land surrounding the Killington ski area is undeveloped forest lands, conservation lands and low density residential development. The conservation lands include the 3,000 acres of undeveloped land that the State of Vermont acquired from Killington in the 1997 land exchange.

25. Killington's year-round population is far smaller than the 2,500 maximum figure that the Census recognizes as rural.

26. Streams permeate the 400 and 408 Acre PUDs where most of the proposed development will occur. Roaring Brook and its East Branch are the only named streams; however, many additional unnamed tributaries are scattered across this area.

IV. CONCLUSIONS OF LAW

Following a thorough review of the evidence, the relevant law and the arguments of the parties, threshold issue 1 is decided in the negative. Threshold issue 2, except for the proposed development at the Pico ski area, is decided in the affirmative.

A. State of the Evidence

The Board first addresses the state of the evidence, as it finds that the evidence submitted by Killington is deficient in several respects.

Under 10 V.S.A. §6088, the burden of proof with respect to both Criteria 9(H) and 9(L) is on the applicant. The burden of proof includes the burdens of both production and of persuasion. *Re: Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law and Order at 4-6 (Jan. 27, 1987)[EB#311 M]*. An applicant has the burden of production with regard to all Act 250 Criteria, and can fail if the evidence produced concerning a Criterion is insufficient to allow the Board to issue findings of fact in support of a conclusion that the project complies with that Criterion. See *Re: Herndon and Deborah Foster, #5R0891-8B-EB, Findings of Fact, Conclusions of Law and Order at IO-11 (Jun. 2, 1997)*.

The law with respect to the burdens of production and persuasion is no different for applicants seeking partial Master Plan review pursuant to EBR 21 than for applicants seeking full review pursuant to EBR 10. Just as the party who bears the burden of proof in regard to a Criterion in an EBR 10 proceeding must persuade the Board by a preponderance of the evidence that its position is correct, see *Finard-Zamias Associates, #1R0661-EB, Findings of Fact, Conclusions of Law and Order at 14 (Nov. 19, 1990)*, so must the party with the burden of proof in a Master Plan application. Nothing in the Master Plan policies and procedures, and nothing in the Board's rules, suggests otherwise. See *Master Permit Policy and Procedure for Partial Findings of Fact (Adopted February 25, 1998, Amended March 29, 2000); Master Plan Guidance Document (Adopted May 19, 1999), EBR I-60*. Indeed, given that a finding of compliance with a Criterion under the Master Plan procedure may be binding for a period of up to five years, *Policy, supra at 1; Guidance Document, supra at 7*, during which

time the applicant may obtain a construction permit without submitting any additional evidence with regard to that Criterion, it would be contrary to the purposes of both Act 250 and the Master Plan procedure to allow a less rigorous standard of proof. See Policy, *supra* at I; EBR 21(D).

Killington admitted during the hearing that it has submitted no evidence concerning the elements of the Project proposed for the Pico ski area. It therefore fails to meet its burden of production as to the improvements proposed for the Pico ski area, and threshold issues 1 and 2 must be decided in the negative with regard to these improvements.

In addition, with regard to the proposed development at the Killington ski area, Killington submitted no evidence identifying all of the Project elements, and no scaled maps, measurements or other evidence from which the Board could accurately ascertain the proximity of the Project elements to existing development. To demonstrate that a proposed development is “physically contiguous” to an existing settlement under Criterion 9(H), an applicant must provide evidence demonstrating that the project is “within or immediately next to” such a settlement. *Re: St. Albans Group and Wal*Mart Stores, Inc., #6F0471-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) at 36 (June 27, 1995), *aff’d on other grounds, In re Wal*Mart Stores, Inc., 167 Vt. 75 (1997)*; see *a/so Waterbury Shopping Village, Inc., #5W1068-EB*, Findings of Fact, Conclusions of Law and Order, at 34 (July 19, 1991). Killington has not provided such evidence.³

Although threshold issue 1 with respect to the proposed development at Killington is decided in the negative for reasons set forth below in Section IV. B, the Board would reach the same conclusion even absent these reasons because of Killington’s failure to meet its burden of production on contiguity.

3

An applicant need not describe a proposed project with metes and bounds precision to show that the Project is “physically contiguous.” Nor must the applicant show every detail of each surrounding existing land use. It need only show the location of each element and the relation between these elements and existing land uses with sufficient specificity to permit the Board to determine that the Project is “within or immediately next to” existing development constituting an existing settlement. The evidence Killington submitted is inadequate to allow such a determination.

In the remainder of this decision, references to the "Phase One Project" or "Project" shall be interpreted to include only those elements of the Phase One Project that are proposed for the Killington ski area.

B. Existina Settlement

Criterion 9(H) provides:

Costs of scattered development. The district commission or board will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement whenever it is demonstrated that, in addition to all other applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as **increased** employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.

10 V.S.A. § 6086(a)(9)(H).

Act 250 does not define the phrase "existing settlement." See 10 V.S.A. §§ 6001-6092. Rather, the case law has done so. See *Wal*Mart, supra*; *Waterbury Shopping Village, supra*. The basic intent of Criterion 9(H) is to discourage scattered development beyond the boundaries of community centers **if** such development will damage the ability of the communities to maintain themselves. *Wal*Mart, supra* at 37-39. Its purpose is also to encourage **large-scale** development to locate within existing community centers. *Town of Sfove, supra* at 55 (May 22, 1998).

1. Case Law

In *Waterbury Shopping Center, supra*, the Board noted that:

In Vermont, development historically has been concentrated in small, compact centers surrounded by rural countryside. In these centers, retail shops are typically located near each other, within walking distance. Buildings in the centers often consist of multiple stories and have diverse uses. **Offices** and apartments are frequently on the second or third floors of the buildings with retail uses and services on the first floor. Combined parking facilities in the centers serve a diversity of uses and developments and are typically centrally located within the center. Street lighting is

usually shared. The proximity of the buildings to each other often forces design and **signage** to be compatible.

Id. at 18. Comparing this development pattern to that present in the area of a proposed 75,000 square foot retail shopping center off Route 100 in Waterbury Center, the Board denied the requested permit, based in part on findings that the proposed project had the following characteristics:

[I]t will be located in linear fashion off one curb cut along a highway; it will be uncoordinated with surrounding projects in terms of design, signs, lighting and parking; it will be situated very close to the highway in order to take advantage of that location; it will have broad road frontage of approximately 1,200 feet; it will be accessible primarily by vehicle and not by pedestrians; and it will not be connected by anything except highway to the nearby existing settlements of Waterbury Village, Colbyville and Waterbury Center.

Id. at 23.

A few years later, in *Wal*Mart, supra*, the Board was presented with an application proposing to build a *Wal*Mart* store two miles outside downtown St. Albans. The Board thoroughly reviewed not only the plain meaning of the words "existing" and "settlement," but also the purposes of Criterion 9(H), statements of legislative intent that were passed contemporaneously with Act 250 and prior decisions construing the phrase, and 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. Applying this definition to the Exit 20 area of Interstate 89 in St. Albans where the proposed project was to be located, the Board found that area surrounding the project, which was in transition from agricultural to commercial use, was marked by "fast food restaurants, gas stations, an auto dealership an appliance store and other [such uses]." *Id.* at 41. These uses, it noted, were

spread out along highways in a way that discouraged pedestrians, with each use having its own curb cut, circulation system and parking lot. *Id.* at 41-42. In addition, there were very few residences in the area. The Board denied the permit, based in part on conclusions that areas adjacent to the project were not a community center in the manner of the traditional Vermont center, did not have a significant residential component and lacked a compact mixture of buildings. *Id.* at 42.

In *Town of Stowe, supra*, decided in 1998, the Board reviewed an application for a sewer system extension along Stowe's Mountain Road, the main access road to the Stowe ski area. The applicant presented evidence dividing the Mountain Road into four distinct segments defined by terrain, vegetation, buildings, land use and traffic flows. The first segment was characterized by a linear development pattern dominated by large-scale buildings and expansive parking areas. *Id.* at 30. The second segment was similar to the first, but also contained a dense conifer forest. It impressed a connector between the first and third segments and possessed a distinct automobile-oriented landscape. *Id.* The third segment was characterized by broad, flat fields and "low density sprawl." *Id.* The fourth segment, at the top of the Mountain Road, was less developed. Commercial development was limited to older lodges, with mountain views dominating the landscape and groups of farm buildings that created "a classic Stowe scene." *Id.* at 31.

Applying a town bylaw definition of strip development,⁴ the Board determined that the first three segments of the Mountain Road constituted strip development. It therefore concluded that there was no "existing settlement" in the area surrounding the project.

2. Positions of the Parties

VNRC asserts that the Board's decision in *Town of Stowe* has conclusively established that ski area development can never be an "existing

4

The Stowe bylaw defined strip development as "a linear development pattern along well-traveled roads and highways lacking depth, as measured from **the** highway; uses characterized by a high dependence on the automobile resulting in a succession of parking lots and curb cuts; a predominance of commercial land uses (rather than residences, especially single family homes); a preponderance of single story structures and limited pedestrian accessibility or over-all integration with neighboring properties." *Town of Stowe, supra* at 31.

settlement.” It argues that the proposed Phase One Project meets none of *Wal*Mart’s* requirements, and that the Killington Road and resort area that surrounds the Project is a classic example of strip development. MHMW generally agrees, and emphasizes that the significant residential component required by *Wal*Mart* is not present in this case. ANR’s position is that even though the Killington Road area contains some elements of a settlement, such as stores, offices, a post office and a school, the uses are primarily commercial, lot mixed, and the overall settlement pattern is that of scattered development.

Killington, on the other hand, contends that even though the Killington Road does not look like a traditional Vermont settlement, it functions like one, and that even though it follows a linear development pattern, such patterns are typical of Bethel, Northfield, Granville and other traditional Vermont towns and villages. Its linear nature, Killington asserts, should not preclude a finding that the area surrounding this Project is an “existing settlement.” Killington argues that *Wal*Mart* has fostered a too narrow, “almost mythical” view of what constitutes an “existing settlement,” and that this view needs to be expanded to encompass the kind of development featured along the Killington Road. The only difference between the development found on the Killington Road, Killington asserts, and the development present in Bethel, Northfield, etc., is that Killington’s primary industry is recreation and tourism.

3. Discussion

The Board has thoroughly considered the arguments of the parties, its earlier pronouncements as to the meaning of “existing settlement,” the purposes of Criterion 9(H), and statements of legislative intent, and reaffirms the *Wal*Mart* decision. We disagree with VNRC that *Town of Stowe* forecloses the possibility that a ski area can ever be an “existing settlement.” But we also disagree that a mere collection of hotels, lodges, condominiums, ski trails and associated commercial buildings qualifies for the “existing settlement” designation. The Board believes that *Wal*Mart* standard, applied neither as rigidly as VNRC proposes, nor as loosely as Killington advocates, appropriately protects the values that Criterion 9(H) seeks to protect, by insuring that when an assessment of the public costs and benefits of a proposed development is warranted, such an assessment will be carried out.

As the Board noted in the *Wal*Mart* decision, it is not the purpose of Criterion 9(H) to prohibit development outside existing community centers. *Id.* at 39. This Criterion does seek, however, to insure that when growth occurs outside such centers, it is accomplished without the accompanying burdens on government finances that can result from excessively scattered development

patterns. The “existing settlement” standard set forth in *Wal*Mart* facilitates the achievement of Criterion 9(H)’s objectives by requiring that development outside community centers undergo a public cost/benefit analysis.

The Findings of Fact above show that the Killington Road area simply lacks sufficient indicia of a community to qualify for the “existing settlement” designation. Similar to the Mountain Road in Stowe, the Killington Road is “sprawl.”⁵ It, like the Mountain Road, is characterized by low density commercial development scattered over an extended area, with the Killington Road being overwhelmingly commercial. See *Town of Stowe, supra* at 29-31. Both locales are automobile-dependent. *Id.* at 30. The Board’s site visit observation of only two pedestrians on a twice-through viewing of the Killington Road, during an otherwise busy day at the height of Vermont’s ski season, confirms that meaningful pedestrian use does not exist in the Killington Road area.

Moreover, while the Killington resort itself shows some integration of uses between buildings, the development along most of the road does not. The commercial uses along the Killington Road are separated by large lots. Most commercial uses have their own parking lots and curb cuts. Most development is close to the road and lacking in depth. Overall, there is no balance of commercial and residential uses.

Most important, the Killington Road is lacking in the “significant residential component” required by *Wal*Mart*. In this regard, the Board notes that the word “residential,” as used in *Wal*Mart*, does not refer to either short-stay hotels or to seasonal housing units such as ski resort condominiums. This is because, as was concluded in *Wal*Mart, supra*, a “settlement” is a place in which people live (or *intend to live*). *Id.* at 37. Transient, seasonal and occasional housing units therefore may not be counted in assessing an area’s residential component. The Board observed only a few dwellings along the entire Killington Road corridor that appear to be year-round residences, and residences off the road are scattered in a fashion that is inconsistent with the attributes of an “existing settlement.”

5

The Board defines “sprawl” as low density development outside compact urban and village centers, along highways and in rural countryside. Strip development is one form of sprawl, but the Board prefers the term “sprawl” because it better describes the variety of development patterns that Criterion 9(H) seeks to regulate.

Based on the plain meaning of the term “settlement,” the Board concludes that the presence of a significant number of long-term and year-round residents in the area surrounding a proposed development project is mandatory to qualify for an “existing settlement” designation under *Wal*Mart*. The absence of this factor in this case precludes a finding that the area surrounding the Phase One Project is an “existing settlement.”

This is not to say that Killington’s arguments are wholly without merit. The Board agrees with Killington that linear development is not always synonymous with strip development. Relatively linear, but non-strip type settlement patterns do characterize some Vermont towns and villages. For this reason, the presence of a linear development pattern alone does not preclude a determination that a developed area is an “existing settlement.” As discussed above, however, the pattern of development that characterizes the Killington Road is overwhelmingly commercial and lacks the balanced mix of uses that characterize an “existing settlement.” Its buildings do not functionally serve as a community center in the manner of the traditional Vermont settlement. These characteristics distinguish the development pattern found along the Killington Road from the development patterns in the linear but traditional Vermont settlements to which Killington directs our attention.

The Board does not agree with VNRC that Town *of Stowe* precludes the possibility that ski area development can be an “existing settlement.” Although the Board determined in Town *of Stowe* that the Mountain Road area through which the proposed sewer extension would run lacked sufficient indicia of an “existing settlement,” it by no means foreclosed the possibility that such a settlement (or several of them) **could** materialize in this location in the future. Indeed, the Board specifically noted that appropriate in-fill along a certain broad, flat portion of the third segment of the Mountain Road could one day transform the existing low density sprawl found there into more of a traditional village settlement. *Town of Stowe, supra* at 30. Neither *Town of Stowe*, nor *Wal*Mart*, nor any other Criterion 9(H) case reviewed by the Board to date either states or implies that ski area development is by definition incompatible with the concept of an “existing settlement.” With an appropriate balance of uses, a compact settlement pattern and other indicia of a community center, almost any kind of development may be an “existing settlement.” The determination must be made on a case-by-case basis.

The definition of “existing settlement” set forth in *Wal*Mart* appropriately moderates the interpretations offered by both VNRC and Killington. Were the Board to determine that ski area development can never be an existing

settlement, applicants might be subject to public cost/benefit scrutiny where the **circumstances** do not warrant it. On the other hand, were the Board to determine that the development pattern that characterizes the Killington Road **area** is not scattered development, much proposed development would improperly escape the public cost/benefit analysis, defeating Criterion 9(H)'s **purpose** to insure that growth in Vermont occurs without threatening the ability of **community centers** to financially sustain themselves. Moreover, Criterion 9(H)'s **purpose** to encourage development within the boundaries of community centers **would** be undermined, because even areas with very few indicia of a settlement **would** comply with the "existing settlement" definition. The question would no longer be whether the proposed project is physically contiguous to an existing "settlement," but rather whether it is physically contiguous to an existing "development." We must assume that the legislature intended the plain meaning of the word "settlement." See Vermont Egg *Farms, supra* at 8. Declaratory Ruling #317, Findings of Fact, Conclusions of Law and Order at 8 (June 14, 1996).

For all of the above reasons, the Board concludes that the area surrounding the Phase One Project is not an "existing settlement" under Criterion 9(H). Threshold issue 1 therefore must be decided in the negative. Accordingly, before the Board can assess whether the Phase One Project complies with Criterion 9(H), Killington will be required to show that the additional costs of public services and facilities caused directly or indirectly by the proposed Project do not outweigh the tax revenues and other public benefits of the Project under the second step of the Criterion 9(H) analysis. It may do so either by further pursuing its Master Plan application in regard to Criterion 9(H) in accordance with the CPR **in this** matter dated November 4, 1999, or by filing a permit application.

C. **Criterion 9(L)--Rural Growth Areas**

10 V.S.A. §6086(a)(9)(L) provides that:

A permit will be granted for the development or subdivision of **growth areas** when it is demonstrated by the applicant that in addition to all other applicable criteria provision will be made in accordance with subdivision (9)(a) "impact of growth," (G) "private **utility service**," (H) "costs of scattered development" and (J) "public utility services" of subsection (a) of this section for reasonable **population densities, reasonable rates of growth**, and the use of cluster planning and new community planning designed to

economize on the cost of roads, utilities and land usage.

The purpose of Criterion 9(L) is to promote orderly and well-planned growth in rural growth areas by providing for reasonable population densities and rates of growth, using clustered development and new community planning techniques to conserve land and the costs of services that stem from development. See *Re: New England Land Ventures, supra* at 2-3 (December 6, 1991).

Under this Criterion, the Board must determine as a threshold matter whether the proposed development is in a "rural growth area." Act 250 defines RGA's as:

lands which are not natural resources referred to in section 6086(a)(1)(A) through (F), section 6086(a)(8)(A) and section 6086(a)(9)(B), (C), (D), (E) and (K) of [Title 10].

10 V.S.A. § 6001(16).

1. "Rural"

The term "rural" is not defined in the Act, but the Board has defined the term as referring to "areas which are not densely settled and which may consist of small villages surrounded by mostly open, farmed, or undeveloped country." *Re: New England Ventures, supra* at 3 (December 6, 1991); see *a/so Re: Waterbury Shopping Village, supra* at 33) (stating that "an overall rural sense [is] created by large open and natural areas punctuated by village centers"). An area may be rural even if it is contiguous to an existing settlement, *New England Ventures, supra* at 3, and even if it is located within an area that contains three such settlements. *Id.*, *citing Waterbury Shopping Village, supra* at 34. Therefore, the Board has concluded that "to be a rural growth area, the area must not only be one in which the referenced resources are absent, but also must be predominantly rural in character." *New England Ventures, supra* at 3.

The area that surrounds the Project is "rural" within the meaning of Criterion 9(L). While Killington contends that the area "immediately adjacent to" the primary mountain base at **Snowshed** is well settled, and that on its busiest day Killington Ski area has accommodated a population of up to 21,000 skiers and snowboarders, these facts do not conclusively establish that the character of the Project area is not rural.

The description of the surrounding area in both the *New England Ventures* and *Waterbury Shopping Village* cases suggests that the proper referent for determining whether an area is rural is not the lands “immediately adjacent” to the proposed development, as Killington contends, but rather the broader surrounding countryside, an area large enough to sometimes encompass more than one settled or developed area. See *New England Ventures, supra*; *Waterbury Shopping Village, supra*. Based on the Findings of Fact above, the land surrounding the development proposed for the Killington ski area is “rural” for purposes of Criterion 9(L). Census and related data support this conclusion, as Killington’s year-round population of 850-1,000 people is far smaller than the 2,500 maximum figure that the Census recognizes as rural.

2. Natural Resources

Notwithstanding the conclusion that the land surrounding the Killington ski area is rural, the Project nonetheless is not a “Rural Growth Area” within the meaning of Criterion 9(L).

The 400 and 408 Acre PUDs where most of the proposed development will occur are permeated by one of the natural resources referenced in 10 V.S.A. § 6001(16), namely streams. See 10 V.S.A. § 6086(a)(1)(E). Although Killington at first represented that only two streams, Roaring Brook and its East Branch, are located within the Project lands, Killington Exhibit K-14, as well as testimony offered by its expert, Jeff Nelson, reveal that Roaring Brook and East Branch are only the *named* streams located on these lands. Many additional unnamed tributaries are also scattered across the area.

As the plain language of 10 V.S.A. § 6001(16) defines an RGA as an area where the specified natural resources are absent, and as the evidence shows that one of these resources permeates the Project lands, the Board concludes that the Project does not constitute development in an RGA. It is therefore exempt from further Criterion 9(L) scrutiny. Although VNRC encourages the Board to exclude from the protection of Criterion 9(L) only those parts of the Project lands on which the streams are actually physically located, we are unwilling in this case to depart from our precedent in *Re Horizon Development*

Corporation, #4C0841-EB, Findings of Fact, Conclusions of Law and Order (Aug. 21, 1992) and Re *Luce Hill Partnership*, #5L1055-EB, Findings of Fact, Conclusions of Law and Order (July 13, 1992).⁶

Killington need not submit additional evidence to show that the development it proposes for the Killington ski area complies with the requirements of Criterion 9(L). Except for the proposed development at the Pico ski area, the Project complies with the requirements of Criterion 9(L).

Parties to Act 250 permit applications, as well as the commissions and the Board, continue to struggle with the interpretation of a statute that defines rural growth areas by what they are *not*, rather than what they are. The meaning of 10 V.S.A. § 6001(16) is plain on its face, and the Board therefore must enforce it in accordance with its express terms. See *Re Vermont Egg Farms, Inc., supra* at B. However, the Board encourages legislative attention to 10 V.S.A. § 6001(16) to identify areas that are positively suited to growth, and to 10 V.S.A. § 6086(a)(9)(L), to insure that the goal of promoting orderly and well-planned growth in rural areas is carried out as the legislature intended.

V. ORDER

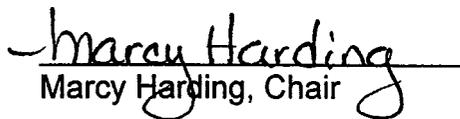
1. Threshold issue 1 is decided in the negative.
2. Threshold issue 2 is decided in the affirmative, except with respect to the proposed development at the **Pico** ski area.
3. With respect to the proposed development at the **Pico** ski area, threshold issue 2 is decided in the negative.
4. **With** respect to the proposed development at the Killington ski area, the Project complies with 10 V.S.A. § 6086(a)(9)(L).

6

The Board does not rule in this matter on the question of whether the de *minimus* presence of a natural resource specified in 10 V.S.A. § 6001(16) constitutes development in an RGA.

Dated at Montpelier, Vermont, this 20th day of July, 2000.

ENVIRONMENTAL BOARD


Marcy Harding, Chair

George Holland*
Samuel Lloyd
W. William Martinez***
Rebecca M. Nawrath
Alice Olenick **
Robert Opel****
Nancy Waples***
Jill Broderick, Alternate*** ****

* Board Member Holland, concurring:

I concur with the plurality's decision on threshold issue 1, however, I do so because I believe that Killington failed to provide sufficient evidence concerning the Killington Road area upon which to reach a positive finding that there is an "existing settlement."

** Board Member Olenick, concurring:

I concur with the plurality in regard to threshold issue 1, but for different reasons. In its discussion of the phrase "existing settlement" in *Wal*Mart*, the Board determined that, among other things, "compatibility in terms of size and use is relevant to determining if an existing group of buildings constitutes an existing settlement." *Wal*Mart, supra* at 40-41. The Board went on to analyze the proposed project to build the St. Albans Wal*Mart store in terms of this compatibility consideration, and concluded that even if it found that the area of the store was part of the existing settlement of St. Albans, the project nonetheless was not compatible in size and use with existing uses. *Id.* at 42. Killington may be unique among Vermont ski areas in the level of infrastructure on its access road. The proposed project, properly planned and developed, will serve to enhance and focus the existing settlement at Killington. However, the application for this master plan is extremely large in scale. Therefore, while I find

that the Killington Road area has a significant year-round residential component and other characteristics of an existing settlement, I nonetheless conclude that a review of the public costs and benefits of the Project under Criterion 9(H) is required.

*** Board Members Martinez, Waples and Broderick, dissenting:

We dissent from that portion of the Board's decision concluding that the Killington Road area does not constitute an "existing settlement." While we agree with the majority that Killington has not provided sufficient evidence to allow a determination as to any of the Phase One development proposed for the Pico ski area, or as to the contiguity of the development proposed for the Killington ski area, the evidence does allow a judgment about whether development surrounding the proposed Killington development is an "existing settlement."

A "settlement" is a place where people work and live. It cannot simply be an area of commercial and industrial uses, but must have a significant residential component. The buildings on the Killington Road include some commercial and municipal uses common to settlements, such as a gas station, a grocery store and a fire station. In addition, the public elementary school is located within approximately 1/2 mile of the Killington Road. Most significantly, approximately fifty percent of the full time residents of the Town of Killington live within approximately 1/2 mile of the Killington Road.

The majority, however, concludes that the Killington Road lacks a significant residential component. We disagree with the majority that the Killington Road area is "a mere collection of hotels, lodges, condominiums, ski trails and associated commercial buildings." See p. 14 above. We conclude that because fifty percent of the Town's full time residents live within approximately 1/2 mile of the Killington Road, and because other indicia of a settlement are also present (i.e., the fire station and public school), the Killington Road area is an "existing settlement."

**** Board Member Opel did not participate in the hearing of this matter, but thoroughly reviewed the record before participating in the decision of the "existing settlement" aspect of threshold issue 1. Mr. Opel participated in no other part of this decision. Board Member Broderick did not participate in the final deliberation, but reviewed the decision in its entirety. She agrees with the Board's decision with respect to threshold issue 2, and dissents from its decision with respect to issue 1 as set forth above.