

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

RE: Stratton Corporation  
Master Plan Application #2W0519-10-EB

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

This proceeding concerns a master plan application for 1,370 housing units, restaurants, shops, a theater, redeveloped Golf Clubhouse and Base Lodge, ice skating rink, improved pedestrian and vehicular circulation and expansion of the Sports Center, replacement of existing lifts, installation of additional lifts (total of 15 lifts at build-out), ski trail expansion of 220 acres, construction of 32,000 square feet of additional Base Lodge facilities in the Sun Bowl area with expanded parking, renovation of the Village Base Lodge, construction of a new Welcome Center, and an overhead people mover system to transport people from the Welcome Center parking area directly to the Village ("Project"). The Project is located on Stratton Mountain in the Towns of Stratton and Winhall on approximately 2,340 acres of land.

**I. PROCEDURAL SUMMARY**

On February 11, 1997, The Stratton Corporation ("Applicant") filed Master Plan Permit Application #2W0519-10 with the District # 2 Environmental Commission ("Commission") seeking authorization for the Project.

On September 30, 1999, the Commission issued Partial Findings of Fact, Conclusions of Law, and Order ("Decision") for the Project.

On October 28, 1999, Applicant and Stratton Area Citizen's Committee filed motions to alter the Decision. On October 29, 1999, the Vermont Natural Resources Council ("VNRC") filed a motion to alter the Decision.

On March 28, 2000, the Commission issued Revised Partial Findings of Fact and Conclusions of Law ("Revised Decision").

On April 27, 2000, VNRC filed an appeal with the Vermont Environmental Board ("Board") from the Revised Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A. §§ 6086(a) (1), (1)(A), (1)(B), (1)(E), (5), (8)(A), (9)(A), (9)(H), (9)(K), and (9)(L) ("Criteria 1, 1(A), 1(B), 1(E), 5, 8(A), 9(A), 9(H), 9(K), 9(L)") and by denying VNRC party status on Criteria 5 and 9(K). The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rule ("EBR") 6 and 40.

On June 15, 2000, Board Chair Marcy Harding convened a prehearing conference and on June 19, 2000, she issued a Prehearing Conference Report and Order ("PCRO"). In the PCRO, the Chair determined that Criteria 1 (water), 8(A), 9(A), 9(H), and 9(L) were ripe for this appeal because the District Commission had only made findings of fact sufficient to support conclusions of law on those Criteria. Subsequently, VNRC withdrew Criterion 8(A) from this appeal and no other party objected to it.

On August 1, 2000, the Applicant filed a motion to dismiss VNRC's appeal of Criterion 9(L).

On August 17, 2000, VNRC filed a reply to the Applicant's motion to dismiss VNRC's appeal of Criterion 9(L).

On September 20, 2000, the Board deliberated and issued a memorandum of Decision denying the Applicant's motion to dismiss VNRC's appeal of Criterion 9(L).

At the Second Prehearing Conference on October 6, 2000, the parties jointly requested that the hearing scheduled for October 11, 2000 be continued because of ongoing negotiations on Criterion 1.

On October 6, 2000, the Chair issued a Chair's Preliminary Ruling granting the parties' request.

On December 6, 2000, the Applicant, VNRC, and the Agency for Natural Resources ("ANR") submitted joint Findings of Fact and Proposed Settlement of VNRC's Appeal of Criterion 1.

On December 8, 2000 the Chair issued a Scheduling Order setting a hearing date of January 31, 2001 for the remaining Criteria.

On January 31, 2001, the Board convened an evidentiary hearing for the remaining Criteria. Present and participating in the hearing were the Applicant, VNRC, the Agency of Natural Resources, and the Windham Regional Commission.

On January 31, 2001, February 28, 2001, April 18, 2001, and April 25, 2001, the Board deliberated.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the board declared the record complete and adjourned. The matter is now ready for final decision.

## **II. ISSUES**

1. Whether, pursuant to 10 V.S.A. § 6086(a)(1), the Project will result in undue water pollution.
2. Whether and to what extent the Project will comply with 10 V.S.A. § 6086(a)(9)(A).
3. Whether and to what extent the Project will comply with 10 V.S.A. § 6086(a)(9)(H).
4. Whether and to what extent the Project will comply with 10 V.S.A. § 6086(a)(9)(L).

## **III. FINDINGS OF FACT<sup>1</sup>**

To the extent any proposed Findings of Fact and Conclusions of Law are included below, 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).

### *General Project Background*

1. Stratton ski area began operation in December of 1961.
2. Intrawest Corporation acquired the Stratton Mountain resort property in late 1994. Stratton Corporation, a wholly-owned subsidiary of Intrawest Corporation, set about a planning effort to develop a master plan to guide and sustain all future development. For the most part, the Master Plan proposes clustering of proposed real estate development within and adjacent to existing development.

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<sup>1</sup>The Board is presenting the Findings of Fact in the following order because it provides a more logical development of the facts than a presentation based on the order of the Criteria on appeal.

3. The proposed Master Plan includes a total of 1370 housing units, consisting of lodging rooms, single family estate-lots, and additional housing units, including provision for affordable housing. The Master Plan also includes restaurants, shops, a theater, a redeveloped golf clubhouse, an ice skating rink, improved pedestrian and vehicular circulation and expansion of the Sports Center, including a large outdoor pool, and other amenities. The Master Plan also calls for replacement of existing lifts and installation of additional lifts, for a total of 15 lifts at build-out, ski trail expansion of 220 acres, construction of 32,000 square feet of additional base lodge facilities in the Sun Bowl area with expanded parking, construction of the Snow Bridge area, renovation of the Village Base Lodge, and construction of a new Welcome Center, with an overhead people mover system to transport people from the Welcome Center parking area directly to the village base area ("VBA"). The Master Plan project is located on Stratton Mountain in the towns of Stratton and Winhall.

*Criterion 9(H)*

4. The VBA is accessed via an approximately 3 mile long uphill road that is relatively undeveloped.
5. With few exceptions, the VBA is private property owned and controlled by the Applicant.
6. The VBA is a compact European style alpine village and ski resort. There is a central commercial area with several lodging developments in the immediate vicinity.
7. There are approximately 25 commercial establishments, 10 of which are leased from the Applicant but are independently operated. The remainder are owned and operated by the Applicant.
8. An outdoor pedestrian-only mall runs through the heart of the commercial area of the VBA. The mall walkway is heated which prevents snow and ice from accumulating and allows pedestrian access all year. During the site visit which took place on a weekday morning in the height of the ski season, pedestrians could be observed.
9. The commercial establishments are generally located on the ground floor on both sides of the mall. There are lodging units above the commercial

establishments.

10. There are additional existing lodging units within walking distance of the VBA. Most of these lodging units are privately owned condominiums. A significant part of the Master Plan's proposed lodging facilities will be in-fill in nature, clustering around existing development and providing for pedestrian access to the VBA.

11. In the commercial area of the VBA, in addition to the ski related businesses, there are restaurants, a grocery store, a jewelry shop, a culinary supply store, and other non-ski related businesses.

12. There are no municipal offices in the VBA. There is a post office consisting of postal boxes and pick-up service in the back of the Stratton Mountain Provisions store.

13. There is a chapel in the VBA.

14. There are no public schools in the VBA. There is a private school on the outskirts of the VBA. School aged children from the VBA wishing to attend public school are transported by bus to and from Bondville to go to school.

15. There is no public library in the VBA.

16. There is a fire department in the VBA.

17. There are no manufacturing or other industrial uses in the VBA.

18. Approximately 14 people reside year round in the VBA comprising approximately 1% of the VBA's total lodging capacity.

*Criterion 9(L)*

19. The Stratton Mountain Master Plan covers a mountainous region that is mostly forested. The Stratton Mountain Resort is adjacent to large tracts of public lands. The area surrounding, and including, the Stratton Mountain Resort provides an overall rural sense created by large open and natural resource areas punctuated by concentrations of development.

20. Both the Winhall Town Plan and the Stratton Town Plan characterize the

area as rural.

21. The Windham Regional Plan Proposed Land Use Map recommends the following uses for Stratton and Winhall in the vicinity of the resort center: "Rural Residential," "Productive Rural," and "Resource" land.

22. The area covered by the Stratton Mountain Master Plan is considered a Regional Growth Center in the Windham Regional Plan. The Regional Plan defines Regional Growth centers as, "areas within the Windham Region with specific boundaries established by the involved municipalities, with the assistance of the Windham Regional Commission, including, but not limited to existing built-up urban areas or towns, major tourist or resort areas, or areas designated for future regional economic growth, and which: 1) are a focus for regional activities, including employment, trade, regional tourism, housing, cultural and recreational activities, and regional institutions, and have the potential or need for reinvestment to support these activities; or 2) have vacant or underutilized land appropriate, based on Vermont Planning Law goals and policies, for projected development with a potential for regional impact, and which plan to have the infrastructure to serve such development."

23. The Stratton Mountain Resort has also been identified in the Winhall and Stratton Town Plans as an area where new resort growth will be encouraged. Moreover, the existing Stratton Mountain Resort and associated existing projects are located in an area which currently can be described as a growth area because of the existing growth patterns and the growth-inducing influences of the Resort.

24. The vast majority of the Project tract is above 1500 feet in elevation and within a watershed of 20 square miles or less.

25. There are several streams which flow through the Project tract, including the VBA.

26. There is necessary wildlife habitat for bears north and southeast of the VBA. There is necessary wildlife habitat for bicknell thrush south of the VBA.

27. The Master Plan includes approximately 1,000 acres preserved under a conservation easement because the land is important to wildlife.

*Criterion 9(A)*

28. Neither the Town of Stratton nor the Town of Winhall has a duly adopted capital improvement plan.

29. In January 1996, over 80%, or 555 of 661 of the Vermont resident employees of Stratton Mountain Resort lived in the two-county region defined by Bennington and Windham Counties.

30. The primary area within which the impacts of the proposed Master Plan will occur will be the counties of Bennington and Windham.

31. Data from the Vermont Department of Health and the Center for Rural Studies of the University of Vermont indicate that Vermont's population grew by a total of 79,427 persons or 4,413 person per year from 1980 to 1998, a 15.5% increase over the 1980 level or 0.8% per year.

32. The population of Windham county grew by a total of 5,423 persons or 301 persons per year over the 1980 to 1998 period, an increase of 14.7% over the eighteen year period or 0.9% per year.

33. The population of Bennington County grew by a total of 2,137 persons or 119 residents per year over the 1980 to 1998 period, an increase of 6.4% for the eighteen year period or 0.4% per year.

34. The primary impact area within Bennington County and Windham County will be the towns of Stratton, Winhall, Jamaica, and Wardsboro.

35. The population growth of the combined 4-town primary impact area was 359 persons or 20 residents per year over the 1980 to 1998 period. That represented a 20.7% rate of growth for the 1980-98 period or 1.1% growth per year.

36. The fastest rate of growth in resident population among the 4-town primary impact area occurred in the Town of Winhall which grew by a total of 159 persons or 9 persons per year, representing a 48.6% rate of increase over the eighteen year period or 2.2% per year.

37. The slowest rate of resident population growth in the 4-town primary impact area among the growing towns was in the Town of Jamaica, where the total number of residents increased by 55 over the 1980-98 period or by four

residents per year. That population growth translated into a population growth rate of 8.1% over the eighteen year period or 0.4% per year.

38. The population decreased in the Town of Stratton by one person or 0.8% over the 1980 to 1998 period.

39. The population growth of the Town of Wardsboro was 146 persons or 8.1 residents per year over the 1980 to 1998 period, representing a 28.9% increase for the 1980-98 period or 1.4% growth per year.

40. The historical trend in population growth for all of the communities included in this impact analysis, including the host communities of Stratton and Winhall, varied widely by municipality within the study area over time. Among the communities located in the impact area, population growth ranged from population declines of 0.2% per year or 3.8% over the eighteen year period in the Town of Grafton to the greater than 2.0% rate of population increase per year over the 1980 to 1998 period in the communities of Vernon (which had the greatest rate of population growth over the eighteen year period) and Winhall (which ranked second fastest during the 1980 to 1998 period).

41. It is estimated that the population of Stratton and Winhall will increase by 181 approximately residents over the 1998-2009 impact assessment period with approximately 51 residents in the Town of Stratton and 130 in the Town of Winhall.

42. It is estimated that the population of the total impact area will experience an increase of approximately 1,530 over the 1998-2009 impact assessment period. The combined total population increase is expected to be comprised of approximately 854 residents in Bennington County and approximately 676 residents in Windham County.

43. Under the Stratton Mountain Community Plan and the Mountain Improvement Plan, the Applicant plans to build roughly 1,370 seasonal/second home housing units in total, with 1,170 units located in the Town of Stratton and 200 units located in the Town of Winhall. The Applicant also plans to expand and improve ski facilities and equipment on the mountain (increasing the resort's Comfortable Carrying Capacity to 15,800), improve recreational and transportation infrastructure at the resort and in surrounding communities, and construct an additional \$4.1 million in commercial facilities in the VBA.

44. In light of the location, price (at an average of over \$200,000 per unit) and seasonal/second home nature of the units to be constructed, the direct impacts associated with the addition of the new seasonal housing units in the two host communities will result in an estimated increase of a total of eight school-age children in the Town of Stratton and three school-aged children in the Town of Winhall. These estimates indicate that 2.5% of these newly constructed units will be occupied by year-round residents, a full one and one-half percentage points higher than the current year-round resident occupancy percentage of the VBA (at 10 of 1,019 units as of February 1, 1998 or 1.0% of existing units at the resort).

45. In developing its Master Plan, the Applicant will likely hire approximately 311 direct permanent full-time and part-time employees (a total of 292 employment opportunities resulting from the Stratton Mountain Community Plan and a total of 19 from the Mountain Improvement Plan) by the end of the 13-year project development period, which will be largely served (at 8.5 of every ten employment opportunities) by local and regional labor markets.

46. Construction employment tends to be seasonal and temporary in nature. Nevertheless, the Board finds that approximately 15% of the construction jobs during the anticipated build-out period will be filled by in-migrants into the defined impact assessment region.

47. To date there has been little to no in-migration of construction workers resulting from the construction of projects included in the Applicant's Master Plan, including the Bridges, Stratton Springs, installation of an upgraded sewage treatment facility, and the Valley View project, which is currently under construction<sup>2</sup>.

48. The proposed Master Plan is not expected to adversely affect the ability of the school districts to provide educational services.

49. Elementary and secondary school capacities in the region have no significant capacity problems that would be made worse by approval of the proposed Master Plan.

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<sup>2</sup>Some components of the Master Plan have been permitted and constructed or are under construction. However, the build-out of the Master Plan is occurring at a slower pace than originally planned for in the Master Plan.

50. With approval of the applicant's Master Plan, there will be an increase of 40 new year-round residents in the two host communities due to the direct impacts of proposed Master Plan. These impacts include an increase of 32 year-round residents in Town of Stratton and 8 additional year-round residents in the Town of Winhall during the 13 year impact assessment period.

51. Visitors who remain for a limited period of time require a significantly lower level of services than full time residents. For example, owners of condominiums who reside elsewhere do not send their children to local schools. Other services such as police, fire, water, emergency, and sewer require the capacity to meet the peak populations that will result from the build-out under the Master Plan. The Applicant has agreed to supplement municipal services to accommodate periods of peak population.

52. Over the thirteen year impact assessment period, the proposed Master Plan build-out is expected to increase municipal services demand in the two host communities by a total of \$6.405 million, with a total of \$5.284 million in increased municipal services demand growth projected for the Town of Stratton and \$1.122 million in additional municipal services demand in the Town of Winhall.

53. It is estimated that combined municipal revenues will be \$7.576 million over the thirteen year impact assessment period for the two host communities resulting from the direct impacts of the proposed Master Plan at constant 1997 tax rates. This estimate includes a total of \$5.816 million in additional municipal tax revenues for the Town of Stratton under the proposed Master Plan, and a total of \$1.760 million in additional municipal services revenues under the proposed Master Plan for the Town of Winhall.

54. Comparing estimated increased municipal tax revenues to estimated increased municipal services demand over the thirteen year impact assessment period, the direct impacts of the proposed Master Plan will result in a combined \$1.171 million municipal services surplus for the two host communities. This includes a projected cumulative municipal services surplus of \$0.533 million for the Town of Stratton over the thirteen year period, and a \$0.638 million municipal services surplus in the Town of Winhall over the impact assessment period as well.

55. Full development of the Stratton Master Plan will result in the in-migration of 89 new households into the region due to the expected expansion of

employment opportunities at the Stratton resort and in the regional economy.

56. Without mitigation, the largest in-migration impacts will occur in only 5 of the 48 towns studied, including 4 in the Town of Athens, 8 in the Town of Jamaica, 4 in the Town of Stratton, 8 in the Town of Wardsboro, and 7 units in the Town of Winhall. Together, these communities would account for over one-third of the total households which might move to the area due to the approval and development of the proposed Stratton Master Plan.

57. The financial costs and benefits for the towns of Stratton and Winhall related to the provision of educational services and municipal services would be positive over the 13-year impact assessment period. Development of the Master Plan will also provide significant resources to the State of Vermont for the provision of education services.

58. No business within the primary impact area had been closed as a result of the partial development of the Stratton Master Plan to date. Moreover, no party identified any specific impacts associated with the Stratton Master Plan that had not been sufficiently addressed.

59. No persuasive evidence was produced demonstrating that towns outside the primary impact area will be detrimentally impacted by the Master Plan. No towns from outside the primary impact area testified about their concerns about the impacts of the Master Plan.

60. No persuasive evidence was produced to indicate that the Master Plan would adversely impact existing businesses in the region or adversely affect real estate values due to potential over-building.

61. There was no persuasive evidence produced that the Master Plan will result in overbuilding and attendant bust. All of the units in the Bridges and Stratton Springs projects have been sold, all but 6 of the 142 unit-Long Trail House have been sold, and most of the units of Phase I of the Valley View project were pre-sold, consistent with the Stratton/Intrawest policy of not beginning construction unless and until 50% of the permitted units are pre-sold.

62. Under the so-called "Okemo Formula," the provision of 36 units (totaling 85 bedrooms) of affordable housing will mitigate the combined direct and indirect population and economic impacts related to the approval of the proposed Stratton Master Plan.

63. In order to meet the Applicant's commitment to providing affordable housing to appropriately mitigate the direct and indirect growth impacts of its Master Plan, Stratton has agreed to pursue a joint effort with the Vermont Housing and Conservation Board ("VHCB") to subsidize a total of 36 units of affordable housing.

64. The Applicant's agreement with the VHCB will provide direct financial assistance for affordable housing projects to support a mix of 36 perpetually affordable housing units to families at 60% and 80% of median income in the impact region. The agreement calls for an initial payment by the applicant to the VHCB of \$92,409 for the 250 units already sold by the Applicant under the Master Plan through calendar year 2000. The 250 units already sold includes 36 units in the Bridges Project which preceded the Master Plan application. The agreement focuses on an eleven town area in Bennington and Windham counties. The agreement calls for future per unit payments by the applicant to the VHCB for units sold in each year thereafter with a firm per unit inflation escalator of 3% per year to be applied to the \$369.64 per unit amount in calendar 2000.

65. In addition, on an as needed basis, the Applicant has agreed to continue to address the need for short-term rental housing for construction workers by working with the Applicant's general contractors to secure suitable short-term housing for all employees of contractors working at the resort. The Applicant will utilize existing housing/lodging stock to fulfill this expected short-term, seasonal housing need, and thus will not require the construction of new housing for those contractor employees.

66. The Applicant completed a Municipal Services Agreement ("MSA") with the Town of Winhall on August 2, 2000.

67. The Applicant's MSA with the Town of Winhall will provide direct financial assistance to the Town for the municipal services impacts associated with the Master Plan development, recognizing that the tax revenue benefits from unit developments planned for the Town of Winhall will likely occur later in the Applicant's proposed development calendar. The agreement resulted in an initial payment by the Applicant to the Town of Winhall of \$50,000 and the Applicant has agreed to an annual payment stream through the Winhall-Stratton Fire District 1 tied to development of the Master Plan that calls for an average annual payment in excess of \$45,000 per year. The Applicant also has made a

second payment of \$25,000 to the Town's Recreation Committee under the agreement, and has similarly paid the sum of \$10,000 to the Town of Winhall to reimburse the Town for its legal expenses associated with the negotiation of the MSA. The agreement also includes Applicant-funded improvements to the access road, and an anticipated 50%-50% split between the two parties for improvements to the intersection of the access road with Route 30 and for the annual maintenance of the access road as well.

68. The Applicant has proposed over \$5.5 million in mitigation over and above the estimated \$7.3 million in local property tax revenue benefits which are expected to inure to the Towns of Stratton (an estimated \$5.5 million) and Winhall (an estimated \$1.8 million) over the 13 year impact assessment period. The mitigation includes: (1) a fully executed MSA with the Town of Winhall designed to fully address the services demand increases within the context of the proposed development schedule where development in Winhall is expected to occur later in the proposed project time line. Total payments under the MSA are projected to total \$1.3 million for access road improvements and increased annual maintenance, reimbursement of Winhall's legal expenses during MSA negotiations, Stratton's contribution to the Winhall recreation budget, Stratton's contribution to the Emergency Medical Services capital fund, and payments for general services support. This total does not include cost estimates for MSA elements such as Route 30 intersection improvements and other items such as access road re-paving included in the MSA. However, the MSA requires the Town of Winhall to cost share some of these expenses. In addition, mitigation plans for the Stratton Master Plan include \$3.5 million in water and waste water infrastructure improvements, over \$0.5 million in direct financial support for 36 units of affordable housing in the region through the Vermont Housing and Conservation Board.

*Criterion 1<sup>3</sup>*

69. On December 6, 2000 the Applicant submitted a document entitled "Findings of Fact and Proposed Settlement of VNRC's Appeal of Criterion 1,"

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The following Finding of Facts were adopted from the settlement on Criterion 1 between the Applicant, ANR, and VNRC. The names of the parties and the numbering of the findings were changed for purposes of internal consistency within this document. In addition, part of the agreement is incorporated into the Conclusions of Law section.

signed by counsel on behalf of the Applicant, ANR and the VNRC. The document includes a comprehensive proposed Condition in support of the settlement, setting out a detailed road map that ties successful implementation of the Applicant's Water Quality Remediation Plan ("WQRP") to Criterion 1 of subsequent Act 250 applications for Master Plan projects. The Board adopts the proposed Findings and Condition as jointly submitted by the Applicant, VNRC and ANR (with one clarifying change), as follows:

#### *Introduction*

70. ANR has listed certain water-body segments in the vicinity of the Stratton Mountain Resort on the draft 1998 biannual list of "impaired waters" submitted to USEPA as required by the Clean Water Act. These waters are Tributary 1 to Stratton Lake, Styles Brook, and North Branch Brook below Stratton Lake. Identified impacts have included hydrologic alterations and sediment export.

71. Tributary 2 to Stratton Lake has also been determined to be impacted by previous development, in particular the Stratton Mountain Golf Course. North Branch Brook below Stratton Lake has met Class B biocriteria since 1998, following the completion of remedial work performed by the Stratton Corporation in 1996 at Stratton Lake. ANR biologists have reviewed data collected below Stratton Lake and concurred with this assessment.

72. The Master Plan prepared by Intrawest following its purchase of the resort is proposed as a guide to future mountain and residential/commercial development at the resort. Key elements of the master planning have been the identification and avoidance of environmentally sensitive areas, the clustering of development, the redevelopment of existing disturbed areas, and the remediation of existing water quality impacts.

73. In order to address these water quality impairments, and in response to the request of the Commission, ANR requested that the Applicant prepare a WQRP as a component of its proposed Master Plan.

#### *Existing Conditions*

74. Existing conditions within Styles Brook indicate significant impacts associated with sedimentation, and may also include hydrologic modifications and increased peak flows. Existing Stratton Mountain Resort facilities that have been identified as significant sediment sources are parking lot #5 and the

maintenance/sand storage facility. The loading of sediment from these sources to Styles Brook has resulted in instability of the channel bed and banks.

75. Within Tributary 1, developments constructed by previous owners of the resort, including the VBA, parking lots, ski trails and work roads have resulted in substantial increases in projected peak runoff rates, in comparison to the nearby Kidder Brook watershed, which contains only ski trails and wooded lands. In addition, substantial volumes of sediment export have occurred from previously developed areas that do not currently have stormwater treatment or control systems in place. Impacts resulting from existing activities have principally included channel instability and sedimentation. Also, Tributary 1 is significantly warmer in the summer months particularly from the outlet of Snyder Pond to Stratton Lake. Elevated levels of iron and manganese are found in Tributary 1 beginning at the ski trail fill slope above Snyder Pond.

76. Tributary 2 is not in compliance with the Class B biocriteria, based on 1999 monitoring results. Within Tributary 2, a number of impacts to water quality have been identified. The causes of these impacts include inadequate stream buffers within the Stratton Mountain Golf Course, nutrient loading from the Golf Maintenance wash station, the presence of on stream ponds resulting in elevated temperatures and nutrient loadings, the presence of undersized or poorly designed culverts, and erosion from ski trails and work roads. Increased peak flows may also be a factor in the observed conditions.

77. Below Stratton Lake, North Branch Brook has shown significant water quality improvement since the completion of improvements to the Lake in 1996. Biologic data collected in 1998 and 1999 by ANR is within acceptable ranges with respect to Class B biocriteria. No further remedial actions are proposed or recommended within this reach of North Branch Brook. However, the stream will continue to be carefully monitored as there is evidence of sedimentation impacts and stream warming.

#### *Plan Objectives and Expectations*

78. An extensive and detailed plan for the remediation of water quality conditions in the impaired waters has been prepared. The plan specifies implementation steps and targets for water quality remediation. The plan also establishes a framework by which planned future development under the Master Plan will occur concurrently with implementation of water quality remediation

measures. In this way, specific design elements of future developments will be consistent with the objectives of the remediation plan, as development projects proceed during plan implementation.

79. The appropriate targets for tracking the success of implementation of remedial measures are aquatic biota and sediment measures. These targets are consistent with the Vermont Water Quality Standards ("VWQS"), and have further been chosen since they provide the most comprehensive overall assessment of water quality trends in the targeted impaired waters.

80. The overall goal of the plan is to improve and restore water quality conditions within the impaired waters such that the Vermont Water Quality Standards Class B criteria are met. The plan provides a description of the condition of the waters that are impaired, as well as the known impairments within these waters. These existing conditions have been the basis for design of remedial measures to be implemented to restore water quality conditions in the targeted impaired segments.

81. It is expected that the implementation of the remedial measures and future development controls proposed by the Applicant will be sufficient to enable the targeted impaired waters to be remediated such that Class B water quality criteria will be met.

#### *Components of WQ Plan Implementation*

82. Remedial measures have been specifically designed to address existing known sources of pollution within the targeted impaired watersheds, as well as sources identified through WQRP implementation and monitoring. The types of measures to be implemented include stormwater control and management systems, riparian buffer restoration, in stream habitat remediation, and implementation of a series of Best Management Practices.

83. An implementation schedule for these measures has been prepared, which began in 1999. Major water quality remediation actions are slated early on during the plan implementation, to provide time and opportunity for streams to respond. The front-loading of the implementation schedule has been undertaken independent of future development projects at the resort, and has involved the actual construction and implementation of a wide range of measures to improve water quality as soon as possible.

84. Implementation of remedial measures have been ranked based on the expected degree of water quality improvement. The plan has been designed such that a ranking of these measures has been performed and the measures expected to result in the greatest degree of water quality improvement will be implemented during the early years that the plan is in effect.

85. Within Tributary 1, the primary remedial measures involve stormwater treatment and control. The objective of the plan is to implement a series of specific measures that will significantly reduce the peak rates of stormwater runoff within this watershed below the rates that currently occur. In addition, treatment of stormwater runoff to remove contaminants, principally sediment, will occur as a result of plan implementation. Implementation of stormwater controls for some of these areas have already occurred, and others are currently in the design/permitting phase

86. Within Tributary 2, actions underway include the restoration of stream buffers where practicable on the Golf Course, the removal of undersized or decayed culverts and replacement with full span bridges, the paving of cart paths to reduce sediment loadings, the construction of a treatment facility for the Golf Maintenance wash station, and the stabilization of streambanks.

87. Within the Styles Brook watershed, the focus of remedial measures is principally on the control of sediment export, from existing developed areas, that is currently reaching the stream. The proposed measures will result in the elimination of significant existing sources of sediment to Styles Brook.

88. Measurable benchmarks and targets for water quality remediation have been established for the impaired waters. These targets consist of aquatic biota and sediment metrics. The biota targets are consistent with the ANR Class B biocriteria. A target date of 2004 has been set for the achievement of these values in Styles Brook. For Tributary 1, the target date is 2005.

#### *Monitoring of Water Quality Conditions*

89. An extensive monitoring plan to document existing conditions prior to remediation plan implementation, and to track the progress of water quality remediation, began in 1999. A total of 35 surface water quality monitoring stations have been identified. Stations are located within all impaired watersheds, as well as Tributary 2, Brazer's Brook, Sun Bowl Brook, Kidder

Brook, and North Branch Brook just above Pike's Falls. Reference stations in nearby forested watersheds are also included in the monitoring network.

90. Water quality monitoring began in 1999, and will continue annually through the implementation of the remediation plan, to enable collection of data prior to, during, and following the implementation of remedial measures. Thus, changes in water quality conditions will be evident over time, as remedial measures are brought on line.

91. Monitoring parameters include water chemistry, temperature, sediment, aquatic habitat, aquatic biota, and stream geomorphology. The results of this monitoring will be summarized and provided in an Annual Report, to be prepared for each year of plan implementation. The Applicant has prepared this report for monitoring conducted during 1999. If the monitoring results do not indicate significant improvement by the third year of plan implementation, the Annual Report will contain recommendations for modifications to implementation measures or targets.

92. The Applicant prepared, and ANR approved, a Quality Control/Quality Assurance ("QA/QC") plan that will describe the specific details of monitoring locations, timing, parameters, and methods. The QA/QC plan is consistent with the monitoring network design and rationale as outlined in the WQRP and supplemental information.

93. The 1999 results provide a comprehensive picture of physical, chemical and biologic conditions in all streams in the vicinity of the resort prior to the implementation of the remediation plan.

#### *Agency Review and Approval*

94. An interdisciplinary team of ANR scientists participated in the review of the draft plan and the development of recommendations to the Applicant regarding necessary components of the final plan. In response to ANR review comments, the final plan was prepared dated May 20, 1999, with supplemental materials dated June 7, 1999, June 15, 1999, and September 3, 1999.

95. The final WQRP and QA/QC plan for monitoring plan which fully addressed the issues raised during ANR review. ANR concurred that the implementation of the plan would be expected to meet the established targets, and thus return the streams to compliance with Class B standards.

*Plan Implementation*

96. Since the approval of the plan by the ANR in 1999, the Applicant has moved forward beginning in summer 1999, with both the monitoring and remedial measure implementation aspects of the WQRP. Since the final Master Plan decision was not issued by the Commission until March 28, 2000, implementation of the plan prior to this date was done at the Applicant's risk, in order to accelerate water quality improvements.

97. During 1999, Stratton performed the specified monitoring of physical, chemical and biologic conditions at the complete monitoring network established by the plan, to the extent that the timing of plan approval allowed, given seasonal constraints on the collection of monitoring data. An annual report was prepared, as specified in the WQRP which provided the results of this monitoring and recommendations for additional specific remedial actions.

98. Walkovers of all ski trails, mountain work roads, and private roads at the resort within the impaired watersheds were completed during 1999. These walkovers resulted in the identification of specific locations where sediment controls, revegetation, iron seep management, or other measures were needed. Recommendations were made with respect to the implementation of these remedial measures. The applicant is currently implementing these recommended actions.

99. During 1999, implementation of actual remedial actions occurred at the following locations. A stormwater management system was designed, approved and constructed to control and provide treatment at existing parking lot 4. Existing parking lot 3, which had no stormwater treatment or control measures, was eliminated with the Act 250-permitted construction of the Long Trail House. Stream buffer plantings on the golf course were performed. A stream channel at the "old sprayfield" was relocated to its natural historic channel. A heating system for melting snow on the main street and walkways in the Village core was installed, which eliminated winter sand and salt use in this area. Stream buffer plantings and restoration work were begun at the Golf Course (Tributaries 1 and 2) and the Golf School (Styles Brook).

100. Design work was conducted during 1999 for the completion of stormwater management and sediment controls at existing parking lot 5, the maintenance/winter sand storage area, existing parking lot 2, and the VBA.

101. Implementation of Best Management Practices (BMPs) was begun at Stratton in 1999. These include snow disposal management, litter control, catch basin cleaning, iron seep control, ski trail revegetation, work road and water bar management, and others.

102. During 2000, monitoring is continuing in accordance with the approved QA/QC plan at the all approved stations established by the QA/QC plan.

103. Remedial measure implementation during 2000 to date has included construction of a stormwater management system for parking lot 5 and the maintenance/winter sand storage area, removal of undersized culverts on the golf course and associated stream channel restoration, relocation of a segment of the wastewater treatment plant road and associated stormwater management and stream buffer restoration, and implementation of recommended actions pursuant to the 1999 Annual Report resulting from on-mountain and private road walkovers.

104. The Applicant has met the implementation dates of the WQRP, and is continuing to actively complete design and permit application work to remain on schedule. The next major series of remedial measures includes the completion of Village Stormwater controls and Snyder pond removal by 2001. These projects represent a substantial undertaking of major significance from a water quality remediation perspective. The existing subwatershed is highly impervious, and lacks stormwater treatment or control mechanisms for existing development. Substantial increases in peak flow rates and resulting stream channel degradation have been documented as a result of the 1999 monitoring conducted by the applicant. Snyder pond has been shown to cause significant downstream water quality impacts. To address these impairments, various alternatives have been evaluated, and the Applicant is presently designing facilities to accomplish stormwater management for the VBA and to eliminate water quality impacts resulting from Snyder Pond.

105. Future development at Stratton will be subject to controls beyond those required in Vermont to date. First, the Applicant must obtain all necessary ANR permits and authorizations for each individual development project. Second, each development project must be determined to be consistent with the WQRP, meaning not causing changes to the hydrologic, sediment, or nutrient loadings which serve as the basis for the determination that Class B Water Quality Standards will be met in the future. Finally, the extensive ongoing

monitoring plan will provide a continuing check on the projections which have been made, with further remedial actions required should impairments recur.

#### **IV. CONCLUSIONS OF LAW**

##### *Criterion 1*

Before the Board can grant the parties' request to adopt their settlement for Criterion 1, the Board must conclude that doing so will not harm the public interest. The Board and District Commissions are charged to protect and conserve the lands and environment of the state. 10 V.S.A. Ch 151. An administrative agency has discretion to reject a settlement if it would prejudice the public interest the agency is charged to protect. *Cf., Re: Rockwell Park Associates and Bruce J. Levinsky, #5W0772-5-EB, Dismissal Order (Feb. 17, 1994); Re: H.A. Manosh Corp., Declaratory Ruling #247 (Dec. 13, 1991).* The Board concludes that the parties' settlement as adopted herein, and to be incorporated into any permit issued for a Master Plan component not yet permitted, will protect the public interest.

The Board applauds the principle under which the Applicant has developed, in close cooperation with ANR, and as approved by the Commission, an aggressive, front-loaded, comprehensive Remediation plan to address the water quality effects of older development, as an integral part of its proposed Master Plan. The Board also applauds the successful efforts by the Applicant, VNRC and ANR to reach agreement on Findings of Fact and a proposed Condition that brings additional clarity to the implementation of the WQRP in relation to subsequent Act 250 applications.

As a proposed settlement of VNRC's appeal of Criterion 1 (whether the project will result in undue water pollution) of the Commission's final Decision in Re: Stratton Corporation, Application #2W0519-10 (Revised), Findings of Fact and Conclusions of Law - Stratton Master Plan (March 28, 2000), the Applicant, VNRC and ANR agree that the following Condition may and should be imposed by the Board.

#### **Overall:**

a. As used in this proposed Condition, "water quality monitoring" includes required physical, chemical, and biological data, collected pursuant to a permit

or the WQRP, as well as evaluative assessments using best professional judgment and standard and accepted practice.

b. Applicant undertakes and recognizes its obligation to implement the WQRP as part of its Master Plan. Even if the Applicant decides that it will not proceed on a particular component of Master Plan development where waters do not meet the VWQS, Applicant shall implement the WQRP so that the subject waters, to the extent of Applicant's control, do come into compliance with the VWQS.<sup>4</sup>

Category I. In waters meeting the Vermont Water Quality Standards:

a. In watersheds that are not impaired, prior to the issuance of positive findings under Criterion 1 for an individual Master Plan project, Applicant must demonstrate that, during and after construction, the individual project will meet the VWQS.

b. Applicant shall immediately report any failure to meet the VWQS to ANR and provide a copy of that report to VNRC.

c. Within ten days of reporting any failure to meet the VWQS, Applicant shall schedule a meeting with ANR to evaluate the failure to meet the VWQS. Such evaluation shall include but not be limited to determining to what extent, if any, Applicant has caused or contributed to the failure to meet the VWQS or has failed to implement remedial actions identified as necessary to address the adverse water quality condition; and

d. If, based on water quality monitoring, ANR determines that Applicant's new development is causing or a significant contributor to the failure to meet the VWQS for that watershed, Applicant shall address the water quality problem prior to completing or commencing new development that would reasonably be expected to exacerbate the problem. "Address" means Applicant shall take such reasonable actions as approved by ANR that would be expected to rectify the water quality problem.

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<sup>4</sup> The prior stipulated wording of this sentence was that if Applicant decided to not proceed on a particular component of Master Plan development where waters do not meet the VWQS, Applicant "recognizes its good faith obligation to" implement the WQRP; the words in quotes have been replaced by the word "shall" implement, etc. The parties to the stipulation stated that do not object to this change.

Category II. In waters not meeting the VWQS:

a. Prior to the issuance of positive Findings under Criterion 1 for a proposed individual Master Plan project in an impaired watershed, Applicant must demonstrate compliance with all actions currently required in accordance with the time schedule in the WQRP. Further, Applicant must demonstrate that, during and after construction, the proposed project will not interfere with the success of the remediation plan, and, when monitoring data becomes available, Applicant must demonstrate progress in achieving aquatic biota and sediment targets set forth in the water quality remediation plan unless the VWQS have already been met. If the water quality monitoring indicates that Applicant is not making reasonable progress towards achieving the interim aquatic biota and sediment targets, and no compelling mitigating reason is offered for the lack of progress, Applicant, in order to gain positive findings under Criterion 1 for an individual project in that watershed, must then propose revisions to the proposed project or to the WQRP and demonstrate to the satisfaction of ANR and of the District Commission that such revisions if implemented are expected to result in compliance with the VWQS within the same time period as prescribed in the original WQRP. After the date prescribed in the original WQRP for compliance with the VWQS, in order for Applicant to obtain positive findings for a proposed individual Master Plan project, Applicant must demonstrate that the subject watershed is in compliance with the VWQS or provide a compelling mitigating reason for the non-compliance and a reasonable assurance that the VWQS will be met, in addition to demonstrating that the individual proposed project will not interfere with that watershed attaining full compliance with the VWQS.

b. If, based on water quality monitoring, ANR determines that Applicant's new development is causing or is a significant contributor to the failure to meet the interim or final aquatic biota and sediment targets established for that watershed in the WQRP, Applicant shall propose revisions to the project or to the WQRP and demonstrate to the satisfaction of ANR and of the District Commission that such revisions if implemented are expected to result in compliance with the VWQS. In the case of new development that is causing or is a significant contributor to the failure to meet interim aquatic biota and sediment targets the revisions shall be scheduled to result in compliance with the VWQS within the same time period as prescribed in the original WQRP. In the case of new development that is causing or is a significant contributor to the failure to meet final aquatic biota and sediment targets the revisions shall be scheduled to result in compliance with the VWQS as soon as practicable.

The Board takes note of and endorses paragraph #4 at page 23 of the District Commission's final Decision in this matter, under which Applicant shall provide a copy of all Water Quality Remediation progress reports submitted to the ANR to parties desirous of remaining informed of this work, and further under which Applicant must hold two meetings annually to discuss the implementation of the WQRP, with notice of such meetings at least to ANR, the Stratton Area Citizens Committee and VNRC. The Board affirmatively finds and concludes, pursuant to Environmental Board Rule 21(E), that if the Applicant implements the WQRP approved by ANR and the District Environmental Commission, and an individual Master Plan proposed project meets the terms of the WQRP and the above applicable terms, the individual project will not result in undue water pollution under 10 V.S.A. § 6086(a)(1). While much of the evidence gathered as a result of the remediation plan may be relevant to obtaining positive findings under Criteria 1(A), 1(B), and 1(E) for individual projects, the findings under Criterion 1 in the Master Plan do not relieve the Applicant of its obligation to meet Criteria 1(A), 1(B) and 1(E) for individual Master Plan project applications.

*Criterion 9(A)*

Criterion 9(A) requires the Board to review the impact that the proposed project will have on the ability of the town and region to accommodate two separate items: (a) growth that will occur generally regardless of the proposed project; and (b) growth that will occur specifically because of the proposed project. *Maple Tree Place Associates, #4C0775-EB, Findings of Facts, Conclusions of Law, and Order at 49 (June 25, 1998)*. Criterion 9(A) provides:

Impact of growth. In considering an application, the District Commission or the Board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the district commission or the board shall impose conditions which prevent undue burden upon the town and

region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.

The Towns of Stratton and Winhall do not have duly adopted capital improvement programs. Therefore, the burden of proof under Criterion 9(A) is on any party opposing the application. 10 V.S.A. 6088.

In *Re: St. Albans Group and Wal\*Mart Stores, Inc.*, Application #6F0471-EB, Findings of Fact and Conclusions of Law, and Order (Altered)(June 27, 1995), aff'd 167 Vt. 75 (1997) the Board held it will address the following factors for Criterion 9(A).

- a. The growth in population experienced by the town and region in question.
  - b. The *total* growth and *rate* of growth which is otherwise expected for the town and region.
  - c. The *total* growth and *rate* of growth for the town and region which will result from the proposed project if approved.
  - d. The anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to public health, safety, and welfare.
  - e. Based on (a) through (d), that the proposed project will not cause an undue burden on the existing and potential financial capacity of the town and region in accommodating growth caused by the proposed project.
- Id.* at 30.

Since the lodging units for sale are primarily high end and intended for seasonal use, the Board concludes that there will not be significant population growth in the area as a result of the construction of lodging units. However, the Board concludes that construction and operation of the Master Plan will result in some population growth due to the need for labor, even though to date the Applicant has been largely able to meet its labor needs by hiring workers from within commuting distance.

The Applicant has demonstrated that the proposed Master Plan build-out over a thirteen year period will likely increase the demand on the two municipalities by \$6.405 million but raise \$7.576 million in revenues. Thus, the Applicant predicts a surplus from the Master Plan Project of \$1.171 million for the two host communities, although most of the additional revenues will benefit the Town of Stratton. However, the Applicant has negotiated a MSA with the Town of Winhall to address the cost of municipal services and infrastructure needs associated with the Master Plan. In addition, the Applicant has entered into an agreement to build 36 units of affordable housing.

VNRC disagrees and asserts that the Master Plan would result in an undue burden on the existing and potential financial capacity of the town and region to accommodate the growth from the Master Plan Project. Specifically, VNRC argues that the Master Plan will harm local businesses, which will in turn decrease the local tax base. For example, VNRC asserts that the lodging industry in the surrounding area will suffer because there will be a greater sleeping capacity in the VBA.

The Applicant argues that unlike *Wal\*Mart*, ski areas do not compete in any significant way with local businesses. The Applicant argues that ski areas actually increase business at local establishments.

The Board concludes that the Master Plan will attract a higher number of visitors to the area and increase revenue for non-lodging businesses in the area. This will have a positive impact on the local economy and tax base. The Board also concludes that the Master Plan will not significantly decrease demand for accommodations off the mountain. There are visitors who seek out accommodations on the mountain to be close to the action at the resort and visitors who prefer the peaceful environment found in many nearby quaint villages. The increase in choices for accommodations on the mountain will have little impact on the demand for B&B's in quiet villages. The fact that there was no record made of any lodging establishments going out of business as a result of the substantial lodging development in place on the mountain in previous years supports this conclusion. Even if as VNRC argues, the Master Plan would cause several lodging establishments to go out of business, the Board concludes that the impact would be negligible on the tax base and the municipalities' ability to accommodate growth.

VNRC also compares the tax base for the peak population for the level of growth proposed in the Master Plan to other towns of similar population. For

example, VNRC compares the peak projected population of Stratton and Winhall (19,000) to Rutland (17,000). Not surprisingly, the current non-school municipal budgets of Stratton and Winhall is just a small fraction of Rutland. VNRC argues that even if the host communities reap the largest sums of money projected by the Applicant, they would still be several million dollars below the level needed to meet the service needs of the population growth that would result from full implementation of the Master Plan.

The Applicant points out that the peak seasonal population figures are only reached a few weekends a year. Therefore, it argues that it is unfair to compare the seasonal population figures from Stratton and Winhall to the larger year-round populations of municipalities such as Rutland. VNRC argues that services in resort communities must be adequate to meet peak populations, not the lower year-round population.

The Board agrees with the Applicant that the peak population will only be reached a few weekends a year. While certain municipal services such as fire and police protection, traffic control, water and sewer capacity, etc. need to be able to meet peak demand, others do not. The Applicant has entered into multiple agreements to mitigate financial impacts, including, but not limited to, a Route 30 corridor agreement, a MSA with Winhall, an affordable housing agreement with the VHCB, a medical emergency services agreement, a solid waste agreement, and substantial investment in the Fire District's upgraded sewage treatment facility, all of which are in addition to substantial tax payments to the host towns over the build-out period.<sup>5</sup> Thus, the Applicant has demonstrated that the municipalities, with the Applicant's financial assistance, will be able to accommodate the growth from the Master Plan and provide services necessary for the peak population. Other services such as school capacity and library services do not need to meet peak population under the Master Plan because the vast majority of the peak population will not utilize those services.

In sum, the Board concludes that the population effect from the Stratton Master Plan and resulting fiscal impacts on the host communities and the region has not and will not result in an undue burden on the financial capacity of the host communities and the region to provide municipal services under Criterion 9(A).

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<sup>5</sup>Any permit issued for a Master Plan component not yet permitted shall incorporate the MSA.

*Criterion 9(H)*

Criterion 9(H) recognizes that scattered development not related to an existing settlement can have adverse primary and secondary impacts and therefore, requires a stricter review than development that occurs within and adjacent to existing communities. Criterion 9(H) is intended to "preserve the viability of the traditional community centers of Vermont, to channel growth into such centers, to keep the growth proportionate to the existing sizes of Vermont's towns and villages unless a locality seeks otherwise, and to ensure that any growth outside of the traditional centers would not have an adverse financial impact on state and local government." *Re: St. Albans Group and Wal\*Mart Stores, Inc., supra.*

Under 10 V.S.A. 6086(a)(9)(H), the Board must first determine whether the proposed project is physically contiguous to an existing settlement. If the proposed project is not physically contiguous to such a settlement, then the Applicant must demonstrate that the project's tax revenues and other public benefits outweigh the additional costs of public services and facilities caused by the project. The statute provides:

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.

In *Re: St. Albans Group and Wal\*Mart Stores, Inc., Id.*, the Board defined an "existing settlement" as follows:

[T]he phrase 'existing settlement' . . . means an 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 Board recently elaborated upon the meaning of "existing settlement" in Killington's proposed master plan project. *Re: Killington, Ltd., et al. (Master Plan)*, Application #1R0835-EB, Findings of Fact, Conclusions of Law, and Order at 12, 16-17 (July 20, 2000). In *Killington*, the Board addressed the extent to which ski area development can be considered an "existing settlement." The Board held:

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. 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.

*Killington, supra* at 16 (internal citations omitted).

The Applicant argues that the VBA is an existing settlement because it contains a diversity of residential and commercial uses within walking distance of each other. The Applicant points out that there are stores and restaurants concentrated along a pedestrian-only way, with nearby lodging, a chapel, school and fire department. The Applicant acknowledges that the year round community is small but argues that they are "vibrant".

VNRC counters that the area lacks a significant year round residential population. VNRC characterizes the VBA as a resort center, not a village.

In *Killington* the Board held that the residential component does not include short-stay hotels or seasonal housing units such as condominiums. *Id.* at 16. To state the obvious, a settlement is a place where people live (ie. settle), not where they come for limited periods of time to recreate. Thus, the lodging units, even privately owned

condominiums, must be lived in as a primary residence to satisfy the residential component of an existing settlement.

The VBA is compact, pedestrian friendly, and has a balance of commercial uses. However, it does not have a significant year round residential component. It is difficult in these circumstances to conclude regardless how vibrant they are, that 14 year round residents are a significant residential component. Therefore, the Board concludes that the Project is not contiguous to an existing settlement.

Since the Project is not contiguous to an existing settlement, the next question is whether the additional costs of public services and facilities caused directly or indirectly by the Project outweigh the tax revenue and other public benefits.

The Board notes that under the MSA, the Town of Winhall will have to share the costs with the Applicant for the improvements to the intersection of the access road and Route 30 and annual maintenance for the access road. However, in general the Board concludes that there will not be significant new infrastructure costs for public services and facilities because the area is already developed with services and facilities and all the proposed development will occur adjacent to existing development and facilities.

Over the 13 year impact assessment period, the Master Plan is expected to increase demand for municipal services in the Town of Stratton by \$5.284 million and in the Town of Winhall by \$1.122. However, over the 13 year impact assessment period, the Master Plan is estimated to increase tax revenue in the Town of Stratton by \$5.816 million and in the Town of Winhall by \$1.1760 million. In addition, the Master Plan will create approximately 300 employment opportunities for the area. Therefore, the Board concludes that the tax revenue and other public benefits outweighs the additional costs of public services and facilities and that the Master Plan satisfies Criterion 9(H).

*Criterion 9(L)*

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, #6F0433-EB, Memorandum of Decision at 2-3 (December 6, 1991).*

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

A permit will be granted for the development or subdivision of rural 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.

Under this Criterion, the Board must determine as a threshold matter whether the proposed development is in a "rural growth area." Act 250 defines "rural growth areas" 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 this title [Title 10].

10 V.S.A. § 6001(16).

In addition to the above statutory definition, the Board held in *New England Ventures*, that to be a rural growth area, the area must be predominantly rural in character. *Id.* at 3. The term "rural" is not defined in the statute. The Board concluded that the word "rural" describes areas which are not densely settled and which may consist of small villages surrounded by mostly open, farmed, or undeveloped country. *Id.* The Board concluded that an area may be rural even if it is contiguous to an existing settlement. *Id.*

The existing Stratton ski resort and associated existing projects are located in an area which is not densely settled and is surrounded by mostly open, undeveloped country. This area provides an overall rural sense created by large open and natural areas punctuated by concentrations of development. Much of the surrounding area consists of large forested tracts and large areas are publicly owned. While there is substantial development associated with the resort and major routes of access, this development does not create the impression of a highly developed, urban, commercial and residential area. Rather the predominantly rural character of the area surrounds and defines the character of existing commercial and residential uses. Therefore, the area that surrounds the Project is "rural" within the meaning of Criterion 9(L).

The parties dispute whether the Project meets the statutory definition of a "rural growth area." The Applicant relies on *Horizon Development Corporation #4C0841-EB*,

Findings of Fact, Conclusions of Law and Order at 20 (August 21, 1992) for the proposition that if referenced natural resources are present anywhere on the project site, none of the project site is a rural growth area. The Applicant argues that since the Project site contains streams, headwaters above 1500 feet in elevation and necessary wildlife habitat, which are referenced resources, it can not be a rural growth area.

VNRC does not challenge the Applicant's factual arguments or interpretation of prior Board precedent. Instead, VNRC argues that the statute offers little guidance and that read literally, could encourage locating development in lands that contain the referenced resources. VNRC asserts that it is assumed the Legislature did not intend an interpretation that would lead to an absurd or irrational consequence. *Braun v. Bd of Dental Examiners* 702 A.2d 124, 128 (Vt 1997).

We disagree with VNRC that the statute offers little guidance and that read literally encourages development in areas with the referenced natural resources. However, we agree that the Board's language in some of its precedent has not contributed to a meaningful understanding of the intended effect of Criterion 9(L) and requires clarification.

In *New England Land Ventures*, the Board held that "Act 250 defines a rural growth area as an area where certain resources are absent." *Id.* at 3. The Board notes that the statute's definition of rural growth areas uses the term "lands". *New England Land Ventures* uses the term "area" which the Board interprets to be synonymous with "land". However, in subsequent cases the Board used different terminology with very different meanings in making its determination whether there was a rural growth area.

In *Luce Hill Partnership*, #5L1055-EB, Findings of Fact, Conclusions of Law, and Order (July 7, 1992), the Board held that "rural growth areas" are lands which are not in relevant part, necessary wildlife habitat. While that definition is correct, the Board then concluded that since the "*project site* contains necessary wildlife habitat, ... the *project site* is not a rural growth area." *Id.* at 13 (emphasis added).

In *Horizon*, the Board again used this "all or nothing" analysis, stating: "Since the Board has concluded that the *project site* contains necessary wildlife habitat, the Board concludes that the *project site* is not a rural growth area." *Id.* at 26 (emphasis added)).

Over the years the Board's use of the term "areas" in Criterion 9(L) analyses has evolved and grown in scope to encompass the "project site" and "project lands". As a result, the presence of one referenced natural resource anywhere in the project site

has meant that the entire project site is not a rural growth area, rather than simply the specific lands or areas in which the natural resource lies.

The Board has determined that this "all or nothing" analysis essentially nullifies Criterion 9(L) because it may be difficult, if not impossible, to find a rural project site in Vermont without a referenced natural resource, such as a stream, floodway, headwater, shoreline, necessary wildlife habitat, primary agricultural soil, forest or secondary agricultural soil, earth resource, or public investment present somewhere on the project site. As a result, lands proposed for development which contain a referenced resource have not been receiving the protection that Criterion 9(L) was intended to provide.

Nor do we believe that the statute requires an "all or nothing" analysis. A literal reading of the language of Criterion 9(L) is that if the land in question is a referenced natural resource, then that specific and limited land is not a rural growth area. However, other lands within the project site which are not referenced resources may constitute a rural growth area. For example, if a several hundred acre project site contains a stream, it does not automatically follow that the entire project site can not be a rural growth area. The stream and a buffer on either side may not be a rural growth area but the remainder of the project site, or portions of it, may be a rural growth area.

Although, the Board used the "all or nothing" analysis in *Luce Hill* and *Horizon*, it declined to do so in *Killington Ltd. et al.*, (Master Plan) #1R0835-EB, Findings of Fact, Conclusions of Law, and Order (Partial) (July 20, 2000). Instead, the Board concluded that since streams *permeated* the area proposed for development, the project did not constitute development in a rural growth area. (emphasis added). In a footnote, the Board raised but did not answer the question of whether there would be a different result if there was only a *de minimis* presence of a referenced natural resource in the area. *Id.* at 20 fn 6.

Thus, in *Killington*, the Board moved away from the "all or nothing" test of whether a referenced natural resource was present in the tract. The Board looked instead to the area proposed for development and determined that because streams permeated the area it was not a rural growth area. *Id.* at 19. The Board left open the possibility that if, in fact, portions of the lands on which the development was proposed were not referenced resources, those portions might constitute rural growth areas.

In the instant case we clarify and further develop that analysis. The correct inquiry is not whether there is a referenced natural resource located anywhere on the Project site. The correct inquiry is first to delineate the area on which the proposed development will occur. Second, determine whether that area is one or more of the

referenced natural resources. Third, if so, determine whether such land is of sufficient acreage that it is possible to carve out a meaningful and usable rural growth area.<sup>6</sup>

We believe this interpretation affords lands the protection the legislature intended when it adopted Criterion 9(L). Criterion 9(L) recognizes that lands that are the referenced natural resources already have protection under the other Criteria. Conversely, lands which are not the referenced natural resources do not have the benefit of protection from the other Criteria and will be under greater development pressure. As a result, Criterion 9(L) provides an alternative kind of protection that is not focused on specific resources but on preventing carte blanche development by requiring clustered development, reasonable rates of growth, reasonable population densities, and new community planning. This economizes the use of these lands and ultimately lessens development pressure on adjacent natural resources. Thus, an environmentally sensitive development that proposes developing in a rural growth area still needs to engage in the required planning to meet the complementary protection afforded rural growth areas. To the extent Luce Hill and Horizon relied on the "all or nothing" project site analysis, and are inconsistent with our holding in the instant case, they are overruled.

We now apply this three step analysis in the instant case. The area proposed for development by the Applicant extends from the VBA south east to the Sun Bowl area, north to the golf course, west to the Snow Bridge area, and south west to new ski trails. These areas are over 1500 feet in elevation and within a watershed of 20 square miles or less. The Applicant argues that the entire area is a headwaters area. VNRC does not challenge the fact that most of Stratton Mountain Ski Resort is a headwaters area, but argues that the VBA is intensively developed which would exclude it as a headwaters area under the definition in Criterion 1(A). The Board finds that the portion of the proposed development outside the VBA is a headwaters area and is therefore, not a rural growth area. The Board does not need to resolve the issue whether the VBA is intensively developed because there are several streams which flow through the VBA. Even accepting VNRC's argument, the streams make it impossible to carve out sufficient acres that are not the referenced natural resources to constitute a meaningful and useable rural growth area. The Board is not making a determination on the minimum size for a rural growth area. The Board is only holding, based on the record in

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<sup>6</sup>Conversely, if the Board determines that an area proposed for development is a referenced natural resource and thus, is not in a rural growth area, it does not mean that the remainder of the project site or a portion of such remainder can not be determined to be a rural growth area in a subsequent proposed development.

front of it, that there is no rural growth area here. Such determinations in future cases will be made based on the facts and circumstances of each case.

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**V. ORDER**

1. VNRC's appeal of Criterion 8(A) is dismissed.
2. The Master Plan complies with Criterion 1 (water), 9(A), 9(H), and 9(L).
3. Jurisdiction is hereby returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont this 8th day of May, 2001

ENVIRONMENTAL BOARD

\_\_\_\_\_/s/Marcy Harding\_\_\_\_\_  
Marcy Harding, Chair  
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