

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

Re: Mill Lane Development Co., Inc.
Application #2W0942-2-EB
Docket #726

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. SUMMARY OF DECISION

In this case, Mill Lane Development Co., Inc., (“Applicant”) seeks a permit amendment approving a ten-lot residential subdivision, construction of related road improvements and installation of underground utilities (“Project”) located on 124.5 acres of land off Boyd Hill Road in the Town of Wilmington, Vermont.

The Environmental Board (“Board”) concludes in this decision that the Applicant’s application for a Land Use Permit Amendment pursuant to 10 V.S.A. §§ 6001-6092 (“Act 250”) complies with 10 V.S.A. § 6086(a)(1)(B) (waste disposal), 1(F) (shorelines), 2 (sufficient water available), 3 (burden on existing water supply), 4 (soil erosion), 6 (impact on schools), 8 (aesthetics), 8(A) (necessary wildlife habitat), 9(A) (impact of growth), 9(C) (forest and secondary agricultural soils), 9(F) (energy conservation), 9(H) (costs of scattered development), 9(J) (public utility service), 9(K) (public investments and facilities), and 10 (regional plan). Accordingly, the Board grants application #2W0942-2-EB, issues Land Use Permit Amendment #2W0942-2-EB and remands the case to the District 2 Environmental Commission (“District Commission” or “Commission”).

II. SUMMARY OF PROCEEDINGS

On December 16, 1998, the District Commission issued Findings of Fact, Conclusions of Law and Order (“Decision”) denying Applicant’s Land Use Permit Application #2W0942-2 (“Application”).

On January 11, 1999, the Applicant filed an appeal with the Environmental Board contending that the Commission erred with respect to granting Robin Joslin party status as to Criteria 2, 3 and 4; granting party status to Sheryl DiMauro and Ann Ottaviano as to Criteria 8 and 9(G); and finding that the Project, as proposed, does not comply with Criteria 1(B), 1(F), 2, 3, 4, 6, 8, 8(A), 9(A), 9(C), 9(F), 9(H), 9(I), 9(K), and 10. 10 V.S.A. § 6086(a).

On February 10, 1999, Board Chair Marcy Harding convened a prehearing conference in Montpelier, Vermont.

On February 12, 1999, Chair Harding issued a prehearing conference report and order ("Prehearing Order") which is incorporated here in by reference. The Prehearing Order set forth, among other things, a schedule of dates for the filing of prefiled evidence, the second preheating conference, the site visit, and the hearing.

The Applicant filed prefiled testimony, lists of witnesses and exhibits, and proposed findings of fact and conclusions of law during, April and June, 1999.

On June 25, 1999, Chair Harding convened a second prehearing conference by telephone.

On June 30, 1999, the Board convened a hearing in the Town of Wilmington with the following party participating: the Applicant by James P.W. Goss, Esq.' After the parties' opening statements, the Board conducted a site visit, placed its site visit observations on the record, and gave the parties an opportunity to place their own site visit observations on the record. The Board then heard testimony and closing argument from the Applicant. Exhibits labeled A-1 through A-29 were accepted into the record.

On July 13, 1999, in response to a request by the Board, the Applicant filed portions of its Federal Energy Regulatory Commission ("FERC") license and an enhanced site plan with the Board. These exhibits were Labeled A-30 and A-31 respectively and by way of this decision are now accepted into the record.

On July 28, 1999, the Board issued a Recess Order requiring the Applicant to submit supplementary data by August 20, 1999 pursuant to Environmental Board Rule ("EBR") 20. On August 18, 1999, upon motion by the Applicant, the Board issued a Revised Recess Order changing the deadline for submitting supplemental data to September 23, 1999. Applicant filed additional prefiled direct testimony with the Board on September 20, 1999, in the form of a document captioned "Prefiled Direct Testimony of Douglas Kennedy." This document was labeled A-32 and by way of this decision is now accepted into the record.

The Board conducted deliberative sessions on June 30, July 14, October 20, November 17 and December 15, 1999. This matter is now ready for decision. 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

1 Ann Ottaviano, *pro se*, and Mike Pensen, representative for the Town of Wilmington, were present at the hearing and gave brief opening statements. Neither Ms. Ottaviano nor Mr. Pensen cross-examined the witnesses presented by the Applicant.

Upper Valley Regional Landfill Corporation, 167 Vt. 228, 241-42 (1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983)

III. ISSUES

1. Whether, pursuant to 10 V.S.A. § 6086(a)(1)(B), the Project will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into the groundwater or wells.
2. Whether the Project is located on a shoreline and, if it is, whether pursuant to 10 V.S.A. § 6086(a)(1)(F), the Project must, of necessity, be located on the shoreline in order to fulfill its purpose and whether it will, insofar as possible and reasonable in light of its purpose, comply with sections (i) through (iv) of Criterion I(F).
3. Whether, pursuant to 10 V.S.A. § 6086(a)(2), there is sufficient water available for the reasonably foreseeable needs of the Project, or whether, pursuant to 10 V.S.A. § 6086(a)(3), the Project will cause an unreasonable burden on the water supply currently used by existing residences.
4. Whether, pursuant to 10 V.S.A. § 6086(a)(4), the Project will cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.
5. Whether, pursuant to 10 V.S.A. § 6086(a)(6), the Project will cause an unreasonable burden on the ability of the municipality to provide educational services.
6. Whether, pursuant to 10 V.S.A. § 6086(a)(S), the Project will have an undue adverse impact on the aesthetics, scenic or natural beauty of the area.
7. Whether, pursuant to 10 V.S.A. § 6086(a)(A), the Project will destroy or significantly imperil necessary wildlife habitat or any endangered species
8. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(A), the Project will significantly affect the Town of Wilmington's and the region's 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 Project if approved.
9. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(C)(i)-(iii), the Project involves the subdivision of forest or secondary soils and, if so, whether the Project will significantly

reduce the potential of those soils for commercial forestry, including but not limited to specialized forest uses such as maple production or Christmas tree production, of those or adjacent primary agricultural soils for commercial agriculture.

10 Whether, pursuant to 10 V.S.A. § 6086(a)(9)(F), the planning and design of the Project reflect the principles of energy conservation and incorporate the best available technology for efficient use or recovery of energy

11 Whether, pursuant to 10 V.S.A. § 6086(a)(9)(H), the Project is physically contiguous to an existing settlement and, if not, whether the additional costs of public services and facilities caused directly or indirectly by the Project outweigh the tax revenue and other public benefits of the Project

12 Whether, pursuant to 10 V.S.A. § 6086(a)(9)(5), there are necessary supportive governmental and public utility facilities and services available or they will be available under a duly adopted capital program or plan when the Project is completed, an excessive or uneconomic demand will not be placed on such facilities and services, and the provision of such facilities and services has been planned on the basis of a projection of reasonable population increase and economic growth

13 Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K), the Project involves the subdivision of lands adjacent to governmental and public utility facilities, services, and lands, and, if so, whether the Project will unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

14. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the Project is in conformance with the Windham Regional Plan.

N . FINDINGS OF FACT

The findings of fact below are organized into a general section followed by sections related to the specific issues. Because many findings are relevant to more than one issue, the findings should not be read as applicable only to the specific issue(s) under which they are contained. Where findings from the general category or another specific category are relevant, they are assumed and not repeated

General Findings

1. The Project consists of a ten-lot residential subdivision, construction of related road improvements, and installation of underground utilities on 124.5 acres of land (“Project Tract”) off Boyd Hill Road in the Town of Wilmington, Vermont. The Project Tract is located 2 miles south of the village of Wilmington.
2. The Project has access from Old Mill Lane, an existing woods road that extends from Boyd Hill Road westerly to the Harriman Reservoir (“Reservoir”). Old Mill Lane traverses the Project Tract.
3. The Applicant proposes to construct single family residences on the following eight of the ten lots: Lots 8, 9/10, 15/16, 17, 18, 19, 20, and 23. No construction on Lots 21 or 22 is proposed at this time.
4. The ten proposed lots will have the following approximate acreages:

Lot 8 - 10.01 acres	Lot 19 - 11.09 acres
Lot 9/10 - 20.01 acres	Lot 20 - 10.01 acres
Lot 15/16 - 17.44 acres	Lot 21 - 11.11 acres
Lot 17 - 10.15 acres	Lot 22 - 11.94 acres
Lot 18 - 10.08 acres	Lot 23 - 10.27 acres
5. The Applicant also owns Parcel D which adjoins Lot 23 and is included in the Project Tract. A cottage and septic system exist on Parcel D. The Applicant does not propose any subdivision of or development on Parcel D at this time.
6. There are four seasonal camps on land adjoining Parcel D (“Camps”) outside of the Project Tract.
7. The Applicant proposes to locate a recreation area on part of Lot 23. The site of the recreation area is within approximately 100 feet of the Reservoir.
8. Exhibit A-3.1 is accepted for purposes of its depiction of the Project property, its contours and subdivision boundaries. Exhibit A-3.1’s survey data regarding the road that traverses the Project property is inaccurate and is not accepted for purposes of depicting proposed improvements to the road.

- 9 The recreation area of Lot 23 is not planned for conversion to grass. It is instead to undergo selective cutting and be maintained as a combination of trees, shrubs, vegetation and lawn. (Hearing Testimony of Peter Bourgois) ²
- 10 The U S Generating Company (“USGC”) owns a strip of land that ranges from approximately 100 to 200 feet in width, separating Parcel D and Lots 20, 21, 22, and 23 of the Project Tract from the Reservoir. There are no restrictions preventing present or future owners of Parcel D or Lots 20, 21, 22 or 23 from gaining access to the Reservoir.

Criteria 1(B) (waste disposal), 2 (sufficient water available), and 3 (adequate water supply)

- 11 The wastewater disposal systems, replacement areas, and water supply systems for the eight lots proposed for development comply with the Small Scale Waste Water Treatment and Disposal Rules of the Department of Environmental Conservation, Agency of Natural Resources, State of Vermont (“Waste Water Rules”). Because the eight lots currently proposed for development are all greater than ten acres in size, they are not required to comply with the Waste Water Rules or obtain a permit under such rules.
12. In connection with preparing the wastewater disposal and water supply system designs, the Applicant dug test pits on each of the Project lots in order to determine soil types, depth to groundwater and bedrock, and permeability. The test pits complied with the isolation distances from adjoining structures and water supplies set forth in the Waste Water Rules.
- 13 After locating areas with suitable soils, the Applicant prepared designs for wastewater disposal systems and water supply systems that comply with the Waste Water Rules. The Applicant incorporated these designs into plans submitted to the Board in Exhibit A-3.
- 14 The Applicant has stipulated to a permit condition providing that the water supply and waste water disposal systems for the lots shall be constructed as set forth in the plans submitted to the Board in Exhibit A-3.

The Applicant submitted conflicting evidence concerning the forest and vegetation management of the recreation area. Exhibit A-22 depicts the recreation area as “Conversion to Grass.” However, the Applicant’s Landscape Architect, Peter Bourgois, testified that the recreation area is *not* planned for conversion to grass but is instead to undergo selective cutting and be maintained as a combination of trees, shrubs, vegetation and lawn. (Hearing Testimony of Peter Bourgois). The Board finds in accordance with Mr. Bourgois’ testimony.

15. A number of the lots require sewage disposal easements on adjacent lots in connection with their system designs.
16. There are no streams, springs or existing water supplies in the Project area that could be adversely impacted by the wastewater disposal systems and water supply systems as designed
17. The isolation distances between the Project's wastewater disposal systems and the Reservoir will insure that no significant pollutants will enter the Reservoir from the Project Tract. The wastewater disposal system closest to the Reservoir is over 500 feet from the shore of the Reservoir.
18. The Applicant will not use any toxic substances in the construction of the road

Criterion 1(F) (shorelines)

19. The property line of the Project closest to the Reservoir is located in the recreation area of Lot 23, approximately 100 feet from the shoreline of the Reservoir based on the scaled distances depicted in Exhibits A-25 and A-3 1. The property lines of Lots 20, 21, 22 and Parcel D are approximately 200 feet or more from the shoreline based on the scaled distances depicted in Exhibits A-25 and A-3 1.
20. The closest building envelope proposed for the Project is approximately 475 feet from the shoreline of the Reservoir based on the scaled distances depicted in Exhibits A-25 and A-3 1.
21. The closest house proposed for the Project is at least 600 feet from the shoreline of the Reservoir based on the scaled distances depicted in Exhibits A-25 and A-3 1.
22. The purpose of the Project is to provide residential housing in a classic Vermont setting, with views of the Reservoir and distant mountains set off by close pastoral settings.
23. In the opinion of the Applicant's President, the Project must of necessity be located on the shoreline to fulfill its purpose.
24. The Applicant has designed the Project to be sensitive to the values of the shoreline and has left significant areas of the proposed subdivision undisturbed.
25. Outside the Project site, the public has free access to the Reservoir and the recreational opportunities provided by the Reservoir over the USGC land that

surrounds the Reservoir. There are six existing public accesses located around Harriman Reservoir off the Project site, and the Project will have no impact on those six accesses.

26. There is also an existing unspecified access to Harriman Reservoir through the Project property. This access will continue to exist once the subdivision has been established and sold out. Additionally, the owners of the Camps have a right-of-way over Old Mill Lane.
27. The closest improved area of Old Mill Lane will be at least 600 feet away from the shoreline of the Reservoir.
28. The erosion control and storm water drainage measures associated with Old Mill Lane will divert and dispose of storm water by sheet flow runoff and percolation into surrounding soils before reaching the shoreline of the Reservoir.
29. The improved portion of Old Mill Lane will be minimally visible, if at all visible, from the Reservoir because extensive vegetation will remain in place between the road and the shoreline of the Reservoir.
30. There is a wooded and vegetated buffer of varying widths between the Reservoir and Lots 20, 21, 22 and 23 and Parcel D, some of which is located on the USGC land.
31. The Project does not include any construction on the USGC land that separates Lots 20, 21, 22 and 23 and Parcel D from the Reservoir.
32. On April 4, 1997, the FERC issued a license to New England Power Company for the continued operation and maintenance of the **Deerfield** River Project ("License"). The Reservoir is part of the Deerfield River Project. The USGC acquired the **Deerfield** River Project from New England Power Company.
33. Article 18 of the License states.

So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting. Provided, that the Licensee may reserve from public access such portions of the project

waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property

34 Section P of the License states'

Public Access The Applicant shall allow public access to the project area for utilization of public resources, subject to reasonable safety and liability limitations. Such access shall be prominently and permanently posted so that its availability is made known to the public. Any proposed limitations of access to State waters to be imposed by the Applicant shall first be subject to written approval by the Department. In cases where an immediate threat to public safety exists, access may be restricted without prior approval, the Applicant shall so notify the Department and shall file a request for approval if the restriction is to be permanent or long term, within 14 days of the restriction of access.

Criteria 2 (sufficient water available) and 3 (burden on existing water supply)

35. The well locations of the Project are designed in accordance with the Waste Water Rules.
36. Adjoining residences to the Project are up slope from the Project wells
37. The Project will add eight wells to the Project Tract
38. The nearest existing residential water supply is over 500 feet from the closest Project well.
39. The number of gallons needed to supply residential water usage for the eight single-family residences proposed for the Project should not have a substantial impact on the aquifer supplying the area.
40. There are no other significant water users in the Project vicinity that could impact water availability.

Criterion 4 (soil erosion)

41. Old Mill Lane will remain a single lane road. The Applicant will improve Old Mill Lane by increasing its width to 12 feet in most places, 16 feet on curves and 20 feet in the vicinity of periodic turnouts.

- 42 The Applicant will add fill to Old Mill Lane so that the grade of the road will generally range from 0% to 10%. A few short sections of the road will have a grade of up to 18% to accommodate the existing terrain.
- 43 Old Mill Lane will be a gravel-based road with stone lined ditches and periodic culverts. First, the Applicant will remove a small portion of the surface and outside edges of the existing woods road. Next, the Applicant will make limited cuts and tills to stabilize the road base and improve grade, sight distances, and drainage. The native soil base will be shaped for drainage. Finally, the Applicant will cut ditches, install culverts and runoff areas, and complete the base and top dressing of the road.
- 44 The Applicant will maintain erosion control measures in conformance with the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites throughout the construction of Old Mill Lane. The Applicant will provide these erosion control standards to any contractor working on the site. The Project contractor will check and refurbish the erosion control measures until vegetation is re-established.
- 45 The Applicant has incorporated erosion control measures into the design of Old Mill Lane. Specifically, the placement of ditches and culverts are in conformance with the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites.
46. The size of the Project's culverts is based on the applicable drainage area and the plans submitted in Exhibit A-3.
- 47 The Applicant will control water runoff by using frequent culverts and runoff ditches.
- 48 The Applicant will use hay bale dams and silt joints to control water velocity during construction.
- 49 On the steeper slopes, the Applicant will establish silting/spreading basins for runoff catchments which will promote sheet flow and percolation into soils. These measures will be supplemented by use of matting and rip-rap.
- 50 During construction of the Project houses, the Applicant will comply with the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites. The Applicant will provide these erosion control requirements to any contractor working on the site.

Criterion 6 (impact on schools)

51. The Project's eight houses could generate from 9 to 20 children into the local school system (1.17-2.5 children per house x 8 houses).
52. The **Deerfield** Valley Elementary School and the Wilmington Middle-Senior High School are the schools that would receive the children from the Project. If the 9 to 20 children generated by the Project were split evenly between the elementary school and the middle-senior high school, each school would receive a maximum of approximately 10 additional students.
53. The **Deerfield** Elementary School and Wilmington Middle-Senior High School each have adequate capacity to accommodate up to 10 new students.
54. Neither school will incur capital costs in order to accommodate up to 10 students.

Criterion 8 (aesthetics)

55. The Project Tract is located two miles south of the Village of Wilmington between Boyd Hill Road and the eastern shore of the Reservoir. The general area surrounding the Project Tract contains a mixture of pasture land, open land, forests, and single family homes on lots of 10 acres or more. The topography is rolling, with most slopes trending toward the west in the direction of the Reservoir. The topography along the eastern side of the Reservoir (including the Project Tract) is characterized by rolling hills as opposed to the western side of the Reservoir where the higher ridges of the Green Mountains are visible.
56. Views from Boyd Hill Road and other roads in the Project area include background views of the mountains to the west, middle and foreground views of nearby hillsides, and foreground views of roadside vegetation and woodlands.
57. There are occasional distant views to the north of high ridges of the Green Mountains, including Haystack Peak, and distant westerly views to the ridge line site of the recently constructed wind turbines in Searsburg.
58. The Reservoir is a man-made impoundment built as part of a larger hydroelectric system that follows the **Deerfield** River Valley from Vermont into Massachusetts.
59. Lands directly adjacent to the Reservoir are moderately to steeply sloping forested woodlands with occasional homes. Numerous single family residences and camps on the lands surrounding the Reservoir are visible from the Reservoir.

- 60 Viewed from its east side, the Project Tract is located on a downward-sloping hill in the vicinity of the Reservoir. It is a mixed forested woodland (hardwoods and conifers) with evidence of past human activity such as stone walls, overgrown orchards, sugar bushes, and Old Mill Lane which bisects the property. Slopes vary from 0%- 10% in the areas proposed for house development.
- 61 On the property adjacent to the Project Tract, there are seasonal camps along the shoreline of the Reservoir. Within the view from the Reservoir there are single-family residential houses set back from the Reservoir on lots similar in character and density to those the Applicant proposes.
- 62 The Project is located in a presently undeveloped, mixed forested woodland area. The Project will convert this undeveloped area into a subdivision with single-family homes.
- 63 The Project houses will be visible from Old Mill Lane only in the immediate vicinity of each house.
- 64 Paragraph 8.1 of the General Protective Covenants for Mill Lane Development Company, Inc ("Covenants") provides that the Covenants "may be amended or modified by the Lot Owners by resolution of a majority of the Lot Owners executed by the Secretary of the Association and recorded in the Wilmington Land Records, except that no such amendment or modification shall alter, revoke or modify Article 2 in its entirety and Paragraphs 4.5-4.5.10, 5.1, 6.1, 7 and 7.1 hereof."
- 65 Paragraph 4.5.2 of the Covenants states, in part:
- The design and appearance of all structures to be established upon any Lot shall be approved in advance by the Sponsor, or the Association following termination of the Sponsor's design review power as described under subparagraph 4.5.4 hereof. All structures shall be architecturally designed either on a contract or preprinted plan basis. No reflective roofs shall be permitted. No cement block chimneys shall be permitted; no house shall be constructed with more than two stories and an attic.
- 66 Paragraph 4.5.3 of the Covenants states:
- Tree cutting on and improvement and clearing of the Lots shall be limited exclusively to the designated building envelopes depicted on the Site plan and to the area of the Road and utility corridors and areas. The remainder

of the Lots shall be subject to the Provisions of the Forest and Vegetation Management Plan prepared by John Redd and dated September 1997, as the same may be amended with the approval of the Department of Fish and Wildlife from time to time. The Association through its Board of Directors may take all acts or action on behalf of the Lot Owners, or any of them, necessary in administering said Plan. No construction of improvements, except for the Road, water storage tank and utility lines, and no logging or clearing of any kind may take place outside the designated building envelopes except in conformity with said Plan, provided, however, that proceeds from any permissible logging shall be the property of the respective Lot Owners upon whose Lot said logging occurs.

67. There is no evidence of a clear written community standard intended to preserve the aesthetics or scenic beauty of the Project area.

Criterion 8(A)(necessary wildlife habitat)

68. The Project Tract contains a band of mixed conifer forest that is an important deer wintering area.
69. The Vermont Department of Fish and Wildlife (“DFW”) identified and requested protection of a deer-sensitive area and 300 foot buffer strip located on parts of Lots 9/10, 15/16, 17, 18 and 19 by imposition of the following conditions:
- a. There shall be no construction or building activities of any type, excluding construction of the access road as depicted on the subdivision site plan;
 - b. No forest management activities shall occur without the prior approval of a District Wildlife Biologist. All approved forest management activities shall be conducted so as to enhance and perpetuate the critical habitat following DFW guidelines.
 - c. There shall be no construction or maintenance of trails (snowmobiling, skiing, etc.) without the prior approval of a District Wildlife Biologist;
70. In addition, for all residences in the Project, the DFW requested a condition that domestic pets, specifically dogs, must be leashed or otherwise under owner’s control at all times.

71 Paragraph 6.1 of the Covenants states

By acceptance of a deed to their respective Lots, the Lot Owners of Lots 9/10, 15/16, 17, 18 and 19 acknowledge that a Deer Sensitive Area and appurtenant 300 foot isolation buffer are located on portions of said Lots in the location depicted on the Site plan. Said Lot owners covenant and agree that no logging or tree cutting may occur either within the Deer Sensitive Area or the appurtenant isolation zone without the prior permission of the Vermont Department of Fish and Wildlife, and no structures of any kind may be erected in the Deer Sensitive Area and related buffer without the express permission of the Department.

72 Paragraph 4.5.9 of the Covenants states, in part

All domestic dogs shall be kept leashed, tied or otherwise under control at all times and dogs shall not be allowed to roam free on the Subdivision.

73 The Applicant initially presented plans indicating that a 20,000 gallon water storage tank would be constructed within the 300-foot buffer zone for the deer sensitive area. The Applicant has changed the location of the water tank by moving it out of the buffer zone.

Criterion 9(A) (impact of growth)

74 The population impact from the Project will be approximately 31 people. Spread over the planned 4-year build out of the Project, this translates into an increase in population of approximately 8 people per year.

75 The Town of Wilmington's population will increase by approximately 26% annually as a result of the Project.

76 The Town of Wilmington is projected to experience a 4% annual growth rate between 1995 and 2000 and a 1% annual growth rate between 2000 and 2005. Windham County growth rates for the same two time periods are projected at 1.2% and 5% annually, respectively.

77. The Town of Wilmington has the capacity to provide the following services to the Project: fire protection, police protection, solid waste disposal, and public road maintenance.

78. Deerfield Valley Rescue, Inc has the capacity to provide rescue services to the Project.
79. Anticipated annual municipal costs for fire and police services, solid waste disposal, public road maintenance, rescue services and other factors relating to the public health, safety and welfare resulting from the Project will be approximately \$600 for each of the Project's eight housing units, or a total of approximately \$4,800. However, total annual municipal property tax revenues generated by the Project will be in excess of \$17,300. Municipal property tax revenues resulting from the Project will therefore exceed municipal costs by approximately \$12,500 per year ($\$17,300 - \$4,800 = \$12,500$).
80. As noted above in Findings 53 and 54, Deerfield Valley Elementary School and the Wilmington Middle-Senior High School have adequate capacity to accommodate all of the students that the Project could generate. Neither will incur capital costs to accommodate these students.
81. The proposed Project will require no new extensions of municipal services.

Criterion 9(C) (forest and secondary agricultural soils)

82. The Project Tract contains forest soils.
83. The Project Tract will be subject to a Forest and Vegetation Management Plan ("FMP"), which will be defined as consisting of the written "Forest and Vegetation Management Plan" prepared by John Redd, Exhibit A-14; the "Forestry Management Plan Map," Exhibit A-22;" and the hearing testimony of Peter Bourgois indicating that only selective cutting of trees will occur in the recreation area of Lot 23 and that the recreation area will be maintained as a combination of trees, shrubs, vegetation and lawn.
84. The Project Tract is not managed presently for forestry purposes. Consequently, its productivity is low. Under the FMP as defined above, the Project Tract will be managed as a single unit for forestry purposes and the forestry potential of the soils will be preserved. Management in accordance with the FMP may offset the reduction in forest soils resulting from house site development.

Excluding the depiction of the recreation area of Lot 23 as "Conversion to Grass," but including the depiction of Parcel D as part of the forest management area.

85 The written Forest and Vegetation Management Plan (Exhibit A- 14) is incorporated into Paragraph 4 5 3 of the Covenants The Lot Owners Association is specifically charged with administering the written Forest and Vegetation Management Plan over all of the Project lots. Paragraph 8 1 of the Covenants prohibits the land owners and Lot Owners Association from amending or modifying Paragraph 4 5 3

86 The “Forest Organization” section of the written Forest and Vegetation Management Plan states:

As with most Vermont forests, this property is a reflection of the historical land uses of farming and logging. There are three remnant sugar maple groves, two former apple orchards, and several former pasture areas Steep and/or rocky areas were logged and tend to contain the more mature trees, except in the southwest portion of the property. This area appears to have been cut about 40 to 50 years ago, then regenerating with white birch and maple

87 The “Correlation with Other Forest Land Uses“ section of the written Forest and Vegetation Management Plan states, in part

State wildlife biologists have identified a deer sensitive area (DSA) that generally follows a coniferous draw through the middle of the property. The conifers provide cover in the winter and adjacent hardwoods are heavily browsed. Limited harvesting in these browsed areas will be beneficial for the deer by resulting in additional regeneration (i.e food

area 9(F) (energy conservation) and 9(J) (public utility services)

88. Paragraph 4.5.5 of the Covenants states:

All dwellings erected on any Lot shall conform to the Residential Building Energy Standards established and amended from time to time pursuant to 21 V.S.A., Section 266, et seq. In the event that no such standards are in effect on the date when construction of the dwelling is commenced on a Lot, then such dwelling shall be insulated with material having an R value of at least R-19 in the exterior walls, at least R-38 in the roof or cap and at least R-10 around the foundation or slab. No electrical resistance heating may be used as a primary heating method in any dwelling erected on the Lots

89. The Applicant will construct approximately one mile of underground electric utility at its own expense. Because the majority of the line extension is at 7200 volts, there will be minimal line losses and virtually no voltage drop
90. The line from which the extension will be tapped is constructed with #4AWAC wire with the capacity to serve economically 200 residential customers. The line presently serves 16 residential customers. The addition of new customers will not increase line losses or create an unacceptable voltage drop
91. The building envelopes are designed so that the Project houses will take maximum advantage of passive solar heating.

Criterion 9(H)(costs of scattered development)

92. The Project is not physically contiguous to an existing settlement
93. The Project's lot owners will maintain Old Mill Lane.
94. The Applicant anticipates that the Project's properties will be appraised at an average of \$375,000 each **after** the houses are built. At this appraisal level, each of the developed lots would generate \$10,894⁴ in property tax revenue per year.
95. The Applicant will pay the costs of upgrading Old Mill Lane and installing underground utility lines to the Project.
96. Although the additional municipal costs of public services and facilities resulting from the Project will total approximately \$4,800 per year, municipal property tax revenues generated will exceed these costs by approximately \$12,500 per year.

Criterion 9(K)(development affecting public investments)

97. The Project is located adjacent to land owned by the USGC and the Reservoir, which is utilized by the USGC for the generation of electricity.
98. The Reservoir and the USGC land are important recreational resources for boating, swimming, water skiing, fishing, sightseeing, and snowmobiling

Criterion 10 (conformance with regional plan)

⁴ Includes education taxes

99 The Town of Wilmington did not have a town plan in effect at the time the Applicant filed the Project Application with the Commission

100 The Windham Regional Plan (“Regional Plan”) includes the following regional goals that are relevant to the Project.

- To plan development so as to maintain the region’s historic settlement pattern of compact village and urban centers separated by rural countryside.
- To maintain and improve the quality of air, water, wildlife and land resources in the region
- To identify, protect and preserve regionally important natural and historic features of the Vermont landscape
- To promote development of housing suitable to the needs of the region and to insure the availability of safe and affordable housing for all citizens of the region
- To encourage energy conservation, the efficient use of energy, and the development of renewable energy resources.
- To maintain and enhance recreational opportunities for the region’s citizens and visitors, when in keeping with the carrying capacity of the recreational resource, the natural environment and the region’s public facilities.

101 The Regional Plan also specifies, in its Regional Priorities section concerning land use. that.

maintaining the region’s pattern of compact villages and downtown areas separated by less densely settled areas is of paramount importance. [I]nappropriate land use decisions that threaten this settlement pattern must be avoided. New residential development should be guided so that it is compatible with existing community character and other land use concerns

102 The Rural Land section of the Regional Plan states

In spite of difficult access, topography, or lack of waste water treatment facilities and/or water systems, many areas of rural lands have attracted more residential development. Such development is an appropriate use at

low densities in many areas, but it has encouraged and will continue to encourage rural sprawl if it becomes the dominant settlement pattern throughout the region's rural lands. This rural sprawl has caused the fragmentation of large land parcels containing significant productive rural lands and resource protection areas. The following rural lands categories are designed to reduce this fragmentation, protect important resources and provide for areas in which residential development can occur while maintaining the rural landscape.

103 The Regional Plan identifies four categories of Rural Lands. Hamlets, Rural Residential Lands, Productive Rural Lands, and Resource Lands.

104 The Project is located in a Resource Land District on the Proposed Land Use Map of the Regional Plan. The Regional Plan describes Resource Lands as follows:

Resource lands are predominated by lands requiring special protection or consideration due to their uniqueness, irreplaceable and fragile nature, or important ecological **function**. Resource lands include: fish and wildlife habitats; areas hosting state Natural Heritage or federally identified endangered and threatened species; unique and Fragile natural areas; wetlands; shore lands; floodplains; aquifer recharge areas; steep slopes; lands over 2500 foot elevation; ridge lines; essentially undeveloped forest lands which have limited access to an improved public road; and regionally significant scenic corridors and areas. Regional areas of special value should be preserved and protected to the greatest extent possible. Any development or land use in these areas should be designed to have a minimal impact on the resource. It is important to limit and manage human interaction in resource areas. Resource lands also include those areas that are currently in some form of legal conservation such as: public ownership, private non-profit ownership for conservation purposes, or conservation easements lands. The most appropriate land uses for resource lands are conservation, forestry, recreation, and low impact, very low density rural uses.

105. The Regional Plan contains the following Resource Land Policies:

1. Insure that new development reflects existing settlement patterns, is low on impact and intensity and does not conflict with the resources, but rather sustains these natural resources

2 Insure protection of fish and wildlife habitats; areas hosting Natural Heritage or federally identified endangered and threatened species, unique and fragile natural areas; wetlands; shore lands; floodplains; aquifer recharge areas; steep slopes; lands over 2500 foot elevation; ridge lines; essentially undeveloped forest lands which have limited access to an improved public road; and regionally significant scenic corridors and areas from development that would negatively impact the resource

3 Encourage protection of green space, particularly along streams and rivers, and other important lands that are valued for trails, open space, wildlife habitat and scenic enjoyment

4 Avoid extension of roads, energy transmission facilities, and other services into and through Resource Lands.

5 Construct corridors for new energy transmission facilities only when needed, and then adjacent to and parallel to existing operational energy transmission facility corridors. Minimize their visual impact on ridge lines, slopes and open areas, and avoid important natural and historic resources.

6 Avoid fragmentation of wildlife habitat by protecting wildlife corridors that join large tracts of resource land.

106 The Project Tract is not designated as a natural area, fragile area, or wildlife resource on the Regional Plan's Natural Areas, Fragile Areas, and Wildlife Resources map.

V. CONCLUSIONS OF LAW

A Jurisdiction

There is Act 250 jurisdiction over the Project because it a) involves the construction of more than 800 feet of road incidental to the sale or lease of land; b) is a subdivision of ten lots, and c) is a substantial change to Land Use Permits #2W0942 (Revised) and #2W0942-EB EBR 2(A)(6), 2(B), and 2(G)

B Burden of Proof

10 V S A. § 6081(a) provides that no person shall commence construction on a development or commence development without a permit. 10 V S A § 6081(a)

The term "burden of proof" refers to two separate burdens the burden of going forward and producing evidence, and the burden of persuasion See Re. Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan 27, 1987) 10 V.S.A § 6088 operates in conjunction with the requirement that before a permit can be issued, the Board (or Commission) must make the affirmative findings required under the 10 criteria. See 10 V.S.A. § 6086(a).

The Applicants have the burden of production with respect to all criteria on appeal. Pratt's Propane, supra at 5. The Applicants also bear the burden of persuasion with respect to Criteria 1(B), 1(F), 2, 3, 4, 9(A), 9(C), 9(F), 9(J), 9(K), and 10

C Criterion 1(B) (Waste Disposal)

Under Criterion 1, before issuing a permit the Board must find that the Project will not result in undue water or air pollution 10 V.S.A. § 6086(a)(1) Pursuant to subcriterion 1(B), the Applicant must demonstrate that:

in addition to all other applicable criteria, the [Project] will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells.

The burden of proof is on the Applicant under Criterion 1(B). 10 V.S.A. § 6088(a). When a water supply and wastewater disposal permit is entered into the record, however, a rebuttable presumption arises that waste materials and wastewater can be disposed of without undue water pollution. EBR 19(E)(1). This presumption transfers the burden of proof to the opponent who can rebut the presumption as follows:

If a preponderance of the evidence shows that undue water pollution is likely to result, the [B]oard shall rule that the presumption has been rebutted. Technical non-compliance with the applicable health, water resources, and Agency of Natural Resources rules shall be insufficient to rebut the presumption without a showing that the noncompliance will result in, or substantially increase the risk of, undue water pollution

EBR 19(F). See, e.g., Re: Herbert and Patricia Clark, #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 26-27 (Apr. 3, 1997); Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 22-23 (Aug. 19, 1996). If the opponent rebuts the presumption, the Applicant must be permitted the opportunity to

submit additional evidence. EBR 19(F); Re: MBL Associates, #4C0948-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 35 (Jan 30, 1996)

The Applicant has not entered a water supply and wastewater disposal permit into the record in this case because such a permit was not required for the Project. The Applicant has, however, complied with the Agency of Natural Resource's Waste Water Rules even though it was not required to obtain a permit. The Applicant provided the Board with wastewater disposal (including replacement areas) and water supply system plans for all lots proposed for construction. The isolation distances between the Project's wastewater disposal systems and the Reservoir will insure that waste materials will not enter the Reservoir from the Project Tract. Additionally, there are no streams or springs in the Project area that could be adversely affected by the Project's waste disposal systems.

The Applicant has stipulated to a permit condition providing that the wastewater disposal and water supply systems for the eight lots shall be constructed as set forth in the plans submitted to the Board as Exhibit A-3. With this condition, the Board concludes that the Project will meet applicable health and environmental conservation department regulations regarding the disposal of wastes and will not involve the injection of waste materials or any **harmful** or toxic substances into groundwater or wells. Therefore, the Project complies with Criterion 1(B)

D Criterion 1(F) (Shorelines)

Before granting a permit for a Project located on a shoreline, the Board must find that:

the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the [Project], and the [Project] will, insofar as possible and reasonable in light of its purpose

- (i) retain the shoreline and the waters in their natural condition,
- (ii) allow continued access to the waters and the recreational opportunities provided by the waters,
- (iii) retain or provide vegetation which will screen the development or subdivision from the waters, and
- (iv) stabilize the bank from erosion, as necessary, with vegetation cover.

10 V.S.A § 6086(a)(1)(F). The burden of proof is on the Applicant under Criterion 1(F) 10 V.S.A. § 6088(a).

The Applicant contends that Criterion 1(F) is not applicable to the Project because the Project is not located on a shoreline. “‘Shoreline’ means the land adjacent to the waters of lakes, ponds, reservoirs and rivers. Shorelines shall include the land between the mean high water mark and the mean low water mark of such surface waters ” 10 V S A § 6001(17). “Black’s Law Dictionary defines ‘adjacent’ as lying near or close to. The Board’s precedent indicates that the word ‘adjacent’ is a relative term that must be considered in the scale of a project.” Re: L & S Associates, #2W0434-8-EB, Findings of Fact, Conclusions of Law, and Order at 37 (June 2, 1993)

The Board concludes that the Project is located on a shoreline because it is “land adjacent to the waters-of [the Reservoir].” 10 V.S.A §6001(17). The property line of the Project closest to the Reservoir, on the recreation area of Lot 23, is located approximately 100 feet from the shoreline of the Reservoir. Five of the Project lots, including the Lot 23 recreation area, are separated **from** the Reservoir by a strip of land ranging from approximately 100 to 200 feet wide owned by the USGC. There are no restrictions with respect to crossing the **USGC’s** property for access to the Reservoir. Under its FERC License, the USGC is required to allow public access to the Reservoir and the adjacent lands for navigation and outdoor recreational purposes, including fishing and hunting. Therefore, it is reasonable to expect that the Project lot owners will use **USGC’s** property for access to the Reservoir, especially in the recreational area. Based on the Project lots’ unrestricted access to the Reservoir across the USGC land, the Board concludes that the Project Tract is adjacent to waters of the Reservoir. Therefore, the Project is located on a shoreline. See Re: John and Joyce Belter, #4C0643-6R-EB, Findings of Fact, Conclusions of Law, and Order at 16 (May 28, 1991) (Board concluded that project was located on a shoreline where, although the lot lines ended between 75 and 100 feet from a river, there was nothing to prevent the lot owners **from** using the buffer stnp retained by the Applicants).

Because the Project is located on a shoreline, the Applicant must demonstrate that the Project must of necessity be located on a shoreline in order to fulfill its purposes. The purpose of the Project is to provide residential housing in a classic Vermont setting, with views of the Reservoir and distant mountains set off by close pastoral settings. The Applicant designed the Project to be sensitive to the environmental values of shorelines, as discussed below in regard to the Project’s compliance with the four subcriteria of §6086(a)(1)(F), and has let? significant areas of the subdivision undisturbed The Board concludes that the Project must of necessity be located on a shoreline in order to fulfill the purpose of the Project.

The Board further concludes that the Applicant has met its burden of demonstrating compliance with the 4 subcriteria of Criterion 1(F) With regard to retention of the shoreline and waters in their natural condition, 10 V.S.A. § 6086(a)(1)(F)(i), the Board notes that the closest proposed house is at least 600 feet from the shoreline of the Reservoir, and the closest proposed building envelope is approximately 475 feet from the shoreline. The property line of the Project closest to Harriman Reservoir, located in the recreation area of Lot 23, is approximately 100 feet from the shoreline By permit condition, only selective cutting will be permitted in the recreation area of Lot 23, and clearing will be limited to that necessary for picnic tables The permit will also be conditioned with requirements that the recreation area be maintained as a combination of trees, shrubs, vegetation and lawn; that the Applicant accurately establish the property boundaries of Lot 23 before any tree-cutting or construction takes place; and that no cutting of **vegetation** occur between the developed areas of the Project and the shoreline of the Reservoir except in conformity with the FMP as defined herein. Perhaps most important, the permit will be conditioned with an absolute requirement that an undisturbed naturally wooded buffer a minimum of 50 feet wide be maintained between the shoreline and any disturbed area of Lot 23, including the proposed recreation area of Lot 23. With the above conditions and others specified the permit, the Project will satisfy the requirements of 10 V.S.A. § 6086(a)(1)(F)(i)

The Project will also allow continued access to the waters and the recreational opportunities provided by the waters pursuant to 10 V.S.A. § 6086(a)(1)(F)(ii). Outside the Project Tract, the public has free access to the Reservoir and the recreational opportunities provided by the Reservoir over the USGC land that surrounds the Reservoir. There are six existing public accesses located around Harriman Reservoir off the Project site and the Project will have no impact on those six accesses. Within the Project Tract, the Applicant's President Brian Palmiter testified that there is existing access to Harriman Reservoir through the Project property, and that this **access** will continue to exist once the subdivision is established and sold out. (Exhibit A-1, p. 11) However, Mr. Palmiter's testimony did not specify whether this existing access is public or private. To insure that any **existing public** access to the Reservoir is not diminished or eliminated as a result of the proposed Project, the Board will condition the permit to preserve whatever rights of public access to the Reservoir the Project property currently provides. With this condition, the Project will meet the public access requirements of 10 V.S.A. §6068(a)(1)(F)(ii).⁵

Nothing in this decision should be interpreted as creating a public right of access through the Project property if none currently exists, or as diminishing or eliminating any such right if one does currently exist.

The Project will retain vegetation which will screen the Project from the waters of the Reservoir as required by 10 V.S.A. § 6086(a)(1)(F)(iii). As noted above, the Board is conditioning the permit with an absolute requirement that an undisturbed naturally wooded buffer a minimum of 50 feet wide be maintained between the shoreline of the Reservoir and any disturbed area of Lot 23, in particular the recreation area. In addition, assuming compliance with the above condition, the Applicant will be permitted to conduct only selective cutting in the recreation area of Lot 23, and will be required to maintain that area as a combination of trees, shrubs, vegetation and lawn. Also, no cutting of vegetation will be permitted between the developed areas of the Project and the Reservoir, except in conformity with the FMP as defined herein. With these conditions, the Project will retain vegetation which will screen the Project from the waters of Harriman Reservoir.

Finally, the Project will stabilize the bank from erosion, as necessary, with vegetation cover. 10 V.S.A. § 6086(a)(1)(F)(iv). The Project Tract is not located on the bank of the Reservoir. The Project does not include any construction or removal of vegetation cover on the USGC land that surrounds the Reservoir and separates the Project Tract from the Reservoir. Therefore, the Project complies with Criterion (1)(F)(iv).

Based on the above, the Board concludes that the Project must of necessity be located on a shoreline in order to fulfill the purpose of the Project and that the Project will comply with the four subcriteria of Criterion 1(F). Therefore, the Project complies with Criterion 1(F).

E. Criterion 2 (Sufficient Water Supply)

Before granting a permit, the Board must find that the project has “sufficient water available for the reasonably foreseeable needs of the subdivision or development.” 10 V.S.A. § 6086(a)(2). The burden of proof is on the Applicant under Criterion 2. 10 V.S.A. § 6088(a).

The well locations of the Project are designed in accordance with the Waste Water Rules. The number of gallons to supply residential water usage for the Project’s eight residential wells, which are spread over 124.5 acres of land, should not have a substantial impact on the aquifer supplying the area. Adjoining residences to the Project are up slope from the Project wells and the nearest existing residential water supply is over 500 feet from the closest Project well. In addition, the Applicant has agreed to the imposition of a permit condition requiring that the Project water supply systems be constructed as set forth in the plans submitted in Exhibit A-3. Based on the above, the Board concludes that there is sufficient water available for the reasonably foreseeable needs of the Project. Therefore, the Project complies with Criterion 2.

F Criterion 3 (Burden on Existing Water Supply)

Before issuing a permit, the Board must find that the Project “will not cause an unreasonable burden on an existing water supply, if one is to be utilized.” 10 V.S.A. § 6086(a)(3) Criterion 3 addresses the “impacts on the ability to meet the demand of neighboring wells or water sources if those other wells or water sources share the same basic source of water such as an aquifer or common spring.” Re: MBL Associates, #4C0948-EB (Altered) at 28 (May 2, 1995)[EB#610]. The burden of proof is on the Applicant under Criterion 3 10 V.S.A. § 6088(a).

The Project’s eight residential wells will place a minimal demand on the local aquifer. Adjoining residences to the Project are up slope from the Project wells and the nearest existing residential water supply is over 500 feet from the closest Project well. Based on the above, the Board concludes that the Project will not cause an unreasonable burden on the existing water supply. Therefore, the Project complies with Criterion 3.

G Criterion 4 (Erosion)

Before granting a permit, the Board must find that the Project “[w]ill not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.” 10 V.S.A. § 6086(a)(4). The burden of proof is on the Applicant under Criterion 4. 10 V.S.A. § 6088(a).

The Applicant has met its burden. Applicant will maintain erosion control measures in conformance with the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites during the construction of Old Mill Lane and the Project houses. It will provide these erosion control requirements to any contractor working on the site. The Project contractor will check and refurbish the erosion control measures until vegetation is re-established. Additionally, the Applicant has incorporated the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites into the design of Old Mill Lane. Specifically, placement of ditches and culverts is in conformance with the Handbook. The Applicant will control water runoff by using frequent culverts and runoff ditches and will use hay bale dams and silt joints to control water velocity during construction. The size of the Project’s culverts will be based on the applicable drainage area and the plans submitted in Exhibit A-3. On the steeper slopes, the Applicant will establish stilling/spreading basins for runoff catchments which will promote sheet flow and percolation into soils. These measures will be supplemented by use of matting and rip-rap.

To insure that the Project will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water, the Board will condition the permit with the above and related necessary measures

The Board concludes that with these conditions, the Project will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result. Therefore, the Project complies with Criterion 4.

H. Criterion 6 (Burden on Municipality to Provide Educational Services)

Act 250 requires that, before issuing a land use permit, the Board must find that the proposed project “[w]ill not cause an unreasonable burden on the ability of a municipality to provide educational services ” 10 V.S.A. § 6086(a)(6). With respect to Criterion 6, the burden of proof is on the opponents to the application. 10 V.S.A § 6088(b). The Applicant, however, first must provide sufficient information for the Board to make affirmative findings. E.g., Re: Fair Haven Housing Limited Partnership, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 16, 1996); Re: St. Albans Group and Wal*Mart Stores, Inc., #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 50 (June 27, 1995), aff’d, In re WalMart Stores, Inc., 167 Vt. 75 (1997).

This Project could generate up to 20 children into the local school system (2.5 children per house x 8 houses). The elementary school and the middle-senior high school have adequate capacity to accommodate up to 10 students each without incurring capital costs. Under Vermont’s school financing system, non-capital costs of the 20 additional students will be financed entirely by the State Education Fund and by funds that the Town of Wilmington may elect to spend above and beyond the State’s block grant. This being the case, the Board concludes that the Project’s 20 additional students will not cause an unreasonable burden on the ability of the Town of Wilmington to provide educational services. The Project complies with Criterion 6.

I. Criterion 8 (Aesthetics)

Before granting a permit, the Board must find that a proposed project “[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.” 10 V.S.A. § 6086(a)(8) (aesthetics) The burden of proof is on the opponents under Criterion 8, 10 V.S.A. § 6088(b). but the Applicant must provide sufficient information for the Board to make affirmative findings See, e.g., Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Mar. 27, 1997) and cases cited therein

The Board uses a two part test to determine whether a project satisfies Criterion 8. First, it determines whether the project will have an adverse effect under Criterion 8. Hand, supra, Re. Ouechee Lakes Corp., #3W041 I-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17-20 (Nov 4 1985) [EB #254]. Second, it determines whether the adverse effect, if any, is undue. Hand, supra, at 24, Ouechee Lakes, supra, at 17-20

1 Adverse Effect

In determining whether a project will have an adverse effect,

[t]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will “fit” the context within which it will be located. In making this evaluation, the Board examines a number of specific factors including the nature of the project’s surroundings, the compatibility of the project’s design with those surroundings, the suitability for the project’s context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

Hand, supra at 25

The Project, a ten-lot residential subdivision and construction of related road improvements, will be located two miles south of the Village of Wilmington between Boyd Hill Road and the eastern shore of the Reservoir. Viewed from its east side, the Project Tract is located on a downward-sloping hill in the vicinity of the Reservoir that contains a mixed forested woodland (hardwoods and conifers). Slopes vary from 0%-10% in the areas proposed for house development. The area surrounding the Project Tract contains a mixture of pasture land, open land, forests, and single-family homes on lots of 10 acres or more. Lands directly adjacent to the Reservoir are moderately to steeply sloping forested woodlands with occasional homes.

The Project will not be in harmony with its surroundings. The placement of eight homes on separate lots with associated improvements on the forested Project Tract does not fit within the immediate surroundings, which are presently an undeveloped, mixed forested woodland area. The Project will convert this area to a subdivision with single family homes. Accordingly, the Project will have an adverse effect on the aesthetics of the area.

2 Undue

If the Board determines that a project will have an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is “undue” Id. The Board will conclude that an adverse effect is undue if it reaches a positive finding with respect to any one of the following factors

- 1 Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
2. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?
- 3 Have the Applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings?

See Black River, supra at 19-20; Hand, supra at 25-29; Ouechee Lakes, supra at 19-20

With respect to the first factor, the Board concludes that there are no clear, written community standards intended to preserve the aesthetics or scenic beauty of the area.

With respect to the second and third factors, the Board concludes that the Project will not offend the sensibilities of the average person, and that the Applicant has taken generally available mitigation steps which a reasonable person would take to improve the harmony of the Project with its surroundings. Although the Project Tract slopes downward toward the Reservoir, it is forested. Clearing will be limited to the building envelopes specified in Exhibits A-22 and A-25, and outside the building envelopes clearing will occur only in the areas of the road, water storage tank, utility corridors and as authorized by the FMP as defined herein. Only selective cutting will take place in the recreation area on Lot 23, and the Applicant will maintain a combination of trees, shrubs, vegetation and lawn there. The improved portion of Old Mill Lane will be minimally visible, if at all visible, from the Reservoir because extensive vegetation will remain in place between the road and the shoreline of the Reservoir. Moreover, as discussed above, the Board is conditioning its permit with an absolute requirement that an undisturbed naturally wooded buffer, a minimum of 50 feet wide, be maintained between the shoreline and any disturbed area of Lot 23. In addition, within the view from the Reservoir there are many single-family residential houses on lots similar in character to those proposed in this application. With the above conditions, the Board concludes that the Project will not offend the sensibilities of the average person and that the Applicant has taken generally

available mitigation steps which a reasonable person would take to improve the harmony of the Project with its surroundings

Based on the above, the Board concludes that the Project will not have an undue adverse effect on the scenic or natural beauty or aesthetics of the area. Therefore, the Project complies with Criterion 8 (Aesthetics)

J Criterion 8(A) (Necessary Wildlife Habitat and Endangered Species)

The Board will not grant a permit:

if it is demonstrated by any party opposing the Applicant that the development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonable acceptable alternative site is owned or controlled by the Applicant which would allow the development or subdivision to fulfill its intended purpose.

10 V.S.A § 6086(a)(8)(A)(i)-(iii)

“Necessary wildlife habitat’ means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods.” 10 V.S.A. § 6001(12)

Criterion 8(A) involves a three stage inquiry. (a) whether the alleged habitat constitutes “necessary wildlife habitat,” (b) if so, whether the Project will destroy or significantly imperil such habitat; and (c) if so, whether one or more of subcriteria (i) through (iii) is satisfied

There is necessary wildlife habitat on the Project Tract in the form of a mixed conifer forest that is an important deer wintering area

The Project will not destroy or significantly imperil the necessary wildlife habitat on the Project Tract. Paragraph 6.1 of the Applicant's Covenants provides that the owners of all lots on which the habitat is located covenant and agree (i) that no logging or tree cutting may occur either within the deer sensitive area or a 300 foot buffer zone around this area without the prior permission of the DFW, and (ii) that no structures of any kind may be erected in the deer sensitive area and related buffer without the express permission of the DFW. In addition, Paragraph 4.5.9 of the Covenants provides that the owners of all Project lots shall keep domestic dogs leashed, tied or otherwise under control at all times and shall not allow them to roam free on the Project Tract

To insure that the deer sensitive area and its 300 foot buffer strip will not be destroyed or significantly imperiled, the Board will incorporate into its permit the provisions of Paragraphs 4.5.9 and 6.1 of the Covenants, plus the conditions requested by the DFW. The Board will also impose a condition requiring that the deeds to all Lots and Parcel D describe all protections, restrictions and conditions pertaining to the deer-sensitive area and related buffer and reference all plans pertaining to these lands.

Finally, the Applicant presented plans to the Commission indicating that a 20,000 gallon water storage tank would be constructed within the 300 foot buffer zone for the deer sensitive area. The Applicant has changed the location of the water tank by moving it out of the buffer zone.

Based on the above, the Board concludes that the Project will not destroy or significantly imperil the necessary wildlife habitat on the Project Tract. Therefore, it is not necessary for the Board to determine whether one or more of subcriteria (i) through (iii) are satisfied, With the imposition of the conditions set forth above, the Project complies with Criterion 8(A).

K. Criterion 9(A) (Impact of Growth)

In considering an Act 250 application under Criterion 9(A), 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 party with the burden of proof must provide and prove the following

- 1 The growth in population experienced by the town and region in question
- 2 The *total* growth and *rate* of growth which is otherwise *expected for* the town and region
- 3 The *total* growth and *rate* of growth for the town and region which will result from the proposed project if approved
- 4 The anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare
- 5 Based on (1) through (4), that the proposed project will not cause an undue burden on the existing and *potential* financial capacity of the town and region in accommodating growth caused by the proposed project

10 V S A. § 6086(a)(9)(A); Re: St. Albans Group and WalMart Stores, Inc., supra, at 30 (June 27, 1995) [EB #598R2], aff'd, In re WalMart Stores, Inc., 167 Vt. 75 (1997)

The Board concludes that the Applicant's Project will not impose an undue burden upon the town and region in accommodating growth caused by the proposed development. With respect to growth in population (factors 1. through 3. above), there is no undue burden, due primarily to the Project's small size relative to background growth in the Town and region. While a larger project might raise concerns, this Project does not, as it will add only a maximum of approximately 8 people per year over its contemplated four-year build out.

With respect to the Project's impact on costs for education,⁶ highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the Project imposes no undue burden. There will be some municipal service-related impacts resulting from the Project, amounting to a Project total of approximately \$4,800' per year; however, municipal tax revenues generated by the Project will exceed these costs by approximately \$12,500 per

⁶ See the Board's analysis of Criterion 6 in section H. above. The same analysis of education costs applies to the analysis of this criterion.

⁷ This figure excludes education costs.

year Local and regional police, fire and rescue, road and elementary and high school officials foresee no adverse impact upon their ability to provide services and have verified their ability to serve the Project

Based upon the above, the proposed Project will not cause an undue burden on the existing and potential financial capacity of the town and region in accommodating growth resulting from the Project

L. Criterion 9(C) (Forest and Secondary Agricultural Soils)

Before issuing a permit for the development or subdivision of forest or secondary agricultural soils, the Board must find that the project will not significantly reduce the potential of those soils for commercial forestry or commercial agriculture or that

(i) the Applicant can realize a reasonable return on the fair market value of their land only by devoting the forest or secondary agricultural soils to uses which will significantly reduce their forestry or agricultural potential; and

(ii) there are no nonforest or secondary agricultural soils owned or controlled by the Applicant which are reasonably suited to the purpose; and

(iii) the Project has been planned to minimize the reduction of forestry and agricultural potential by providing 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.

10 V.S.A. § 6086(a)(9)(C). The burden of proof is on the Applicant under Criterion 9(C). 10 V.S.A. § 6088(a).

Forest and secondary agricultural soils means:

[S]oils which are not primary agricultural soils but which have reasonable potential for commercial forestry or commercial agriculture, and which have not yet been developed. In order to qualify as forest or secondary agricultural soils the land containing such soils shall be characterized by location, natural conditions and ownership patterns capable of supporting or contributing to the present or potential commercial forestry or commercial agriculture. If a tract of land includes other than forest or secondary soils only the forest or secondary soils shall be affected by criteria relating specifically to such soils.

10 V.S.A. § 6001(8)

The Board has concluded that the agricultural potential of soils is significantly reduced where substantially all of a tract's agricultural soils are used by proposed residential lots and related roads and driveways. Re: George, Mary and Rene Boissoneault #6F0499- EB, Findings of Fact, Conclusions of Law, and Order at 22-23 (Jan. 29, 199'8) [EB #678]; Re: Thomas W Bryant and John P. Skinner, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 26 and 28 (June 26, 1991) [EB #466] (addressing primary and secondary agricultural soils). Cf., e.g., Re: Marvin R. Gurman, #3W0424-EB at 19 (June 10, 1985) [EB #229] (potential of primary agricultural soils significantly reduced where 45% of the site is covered by the proposed project and access to the rear portion of the site is impeded by vegetation and utility lines).

The Project Tract contains forest soils. The Board concludes, however, that the Project will not significantly reduce the potential of these soils for commercial forestry

The Board is imposing permit conditions requiring that the Project Tract be subject to the FMP as defined herein and prohibiting the cutting of trees outside the designated building envelopes except in conformity with the FMP. Under the FMP as defined herein, the Project Tract, including Parcel D, will be managed as a single unit for forestry purposes and the forestry potential of the soils will be preserved. As the Project is not presently managed for forestry purposes, productivity is low. Management in accordance with the FMP may offset the reduction in forest soils resulting from house site development. With the above-indicated conditions, the Board concludes that the Project will not significantly reduce the potential of the forest soils for commercial forestry. Therefore, it is not necessary for the Board to determine whether subcriteria (i) through (iii) are satisfied. The Project complies with Criterion 9(C).

M Criterion 9(F) (Energy Conservation)

Under Criterion 9(F), before issuing a permit the Board must conclude that the planning and design of the [Project] **reflect** the principles of energy conservation and incorporate the best available technology for efficient use or recovery of energy " IO V.S.A. § 6086(a)(9)(F).

The Board must make two inquiries with respect to the Project's compliance with Criterion 9(F): (1) whether the planning and design of the Project reflect the principles of energy conservation; and (2) whether the Project's planning and design incorporate the best available technology for efficient use or recovery of energy Re: Wake Robin Associates Limited Partnership, et al., #4C0814-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Aug 14, 1991) The burden of proof, which includes both the

burden of production and the burden of persuasion, is on the Applicant under Criterion 9(F). 10 V.S.A. § 6088(a).

The planning and design of the Project reflect the principles of energy conservation and incorporate the best available technology for efficient use or recovery of energy. Paragraph 4.5.5 of the Covenants requires all dwellings erected on the Project Tract to conform to Vermont's Residential Building Energy Standards. Additionally, Paragraph 4.5.5 prohibits the use of electrical resistance heating as a primary heating method in any dwelling erected on the Project Tract. Finally, the building envelopes are designed so that the Project houses will take maximum advantage of passive solar heating. To insure that the requirements of Paragraph 4.5.5 of the Covenants are followed, the Board will incorporate 4.5.5's requirements as a permit condition. With the above condition, the Board concludes that the planning and design of the Project will reflect the principles of energy conservation and incorporate the best available technology for efficient use or recovery of energy. Therefore, the Project complies with Criterion 9(F).

N. Criterion 9(H) (Costs of Scattered Development)

"[T]he 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." Re: St. Albans Group and Wal-Mart Stores, Inc., #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 36-50 (June 27, 1995) [EB #598R2], aff'd on other grounds, No. 95-398 (Vt. Aug. 29, 1997). Scattered development refers to residential development as well as commercial development. See e.g. Boissoneault, supra.

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

[a]n extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and importantly, a significant residential component. It is a place in which people may live and work and in which the uses largely are within walking distance of each other. The term specifically excludes areas of commercial, highway-oriented uses commonly referred to as 'strip development.' Compatibility in terms of size and use is relevant to determining if an existing group of buildings constitutes an existing settlement in relation to a proposed project.

Id. at 40-41 The Board further concluded that, to be contiguous to an existing settlement, a proposed project must be within or immediately next to such a settlement Id. at 41 If the proposed project is not contiguous to an existing settlement, it constitutes scattered development

If the Board determines that a project constitutes scattered development, then it cannot issue a permit unless it finds that

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

The Project constitutes scattered development. It is not located within or immediately next to an existing settlement and it does not contain a mix of uses that are within walking distance of each other. Therefore, in order to conclude positively under this criterion, the Board must determine that the additional costs of public services and facilities caused directly or indirectly by the Project will not outweigh the tax revenue and other public benefits of the Project.

The Board concludes that the additional costs of public services and facilities caused directly or indirectly by the proposed subdivision do not outweigh the tax revenue and other public benefits of the subdivision. As noted above in regard to Criterion 9(A), the additional municipal costs of public services and facilities resulting from the Project will total approximately \$4,800' per year However, municipal property tax revenues generated will exceed these costs by approximately \$12,500 per year. The Applicant has met its burden under Criterion 9(H).

0 Criterion 9(J) (Public Utilities Services)

Before being granted a permit the Applicant must demonstrate that

necessary supportive governmental and public utility facilities and services are available or will be available when the development is completed under

a duly adopted capital program or plan, an excessive or uneconomic demand will not be placed on such facilities and services, and the provision of such facilities and services has been planned on the basis of a projection of reasonable population increase and economic growth

10 V.S.A. § 6086(a)(9)(J) The burden of proof is on the Applicant under Criterion 9(J). 10 V.S.A. § 6088(a).

The Applicant must satisfy three elements to demonstrate that the Project complies with Criterion 9(J): (1) Necessary public utility facilities and services are or will be available to the proposed project under a duly adopted capital program or plan; (2) excessive or uneconomic demand will not be placed on such facilities and services, and (3) the provision of such facilities and services has been planned on the basis of a projection of reasonable population increase and economic growth. Re: Richard Bartholomae and I. Stanford Zecher, #8B0472-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Mar. 3, 1994)[EB #585].

The Applicant will construct approximately one mile of underground electric utility at its own expense. Because the majority of the line extension is at 7200 volts, there will be minimal line losses and virtually no voltage drop. The line from which the extension will be tapped is constructed with #4AWAC wire with the capacity to serve economically 200 residential customers. The line presently serves 16 residential customers. The addition of ten new customers will not increase line losses or create an unacceptable voltage drop. Based on the above, the Board concludes that (1) necessary public utility facilities and services are available to the Project; (2) excessive or uneconomic demand will not be placed on such facilities and services, and (3) the provision of such facilities and services has been planned on the basis of a projection of reasonable population increase and economic growth. Therefore, the Project complies with Criterion 9(J).

P. Criterion 9(K) (Public Investment)

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

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or

unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands

The burden of proof to show that the proposed development will satisfy Criterion 9(K) is on the Applicant. 10 V.S.A. § 6088(a) A failure to meet that burden may result in a denial of the Land Use Permit application. 10 V.S.A. § 6087.

The Board conducts two separate inquiries under Criterion 9(K) with respect to governmental and public facilities. First, the Board examines whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board is to examine whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency or safety of such facilities, or (b) the public's use or enjoyment of or access to such facilities. Re: Swain#3W0445-2-nf Corp., EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10,1990) [EB #430]

The Project is located adjacent to land owned by the USGC and the Reservoir, which is utilized by the USGC in the generation of electricity. The Reservoir and the USGC land are important recreational resources for boating, swimming, water skiing, fishing, sightseeing, and snowmobiling.

The Project will not unnecessarily or unreasonably endanger the public investment in the Reservoir. As stated above, the Project **complies** with Criteria 1(B) and 4. It will not cause undue water pollution or erosion. Additionally, as stated above under Criterion 1(F), the Project protects the Reservoir by (i) retaining the shoreline and the waters of the Reservoir in their natural condition, (ii) allowing continued access to the Reservoir and the recreational opportunities provided by the Reservoir, (iii) retaining vegetation which will screen the Project from the Reservoir, and (iv) stabilizing the banks of the Reservoir from erosion.

The Project will not materially jeopardize or interfere with the function, efficiency or safety of the Reservoir. There was no evidence that the Project would have any effect on the function or efficiency of the Reservoir. The Project will not interfere with the safety of the Reservoir because, as concluded above, it will not cause undue water pollution or erosion.

The Project will not materially jeopardize or interfere with the public's use or enjoyment of or access to the Reservoir. There are no restrictions with respect to crossing the USGC property for access to the Reservoir. Under its FERC License, the USGC is required to allow public access to the Reservoir and the adjacent lands for navigation and

outdoor recreational purposes, including fishing and hunting. In addition, there are six existing public accesses located around the Reservoir off the Project Tract. The Project will have no impact on those six accesses. Within the Project Tract, the Board will impose a permit condition requiring that any existing right of public access to the waters and recreational opportunities provided by the Reservoir continue to exist after the Project is built. To insure that the Project will be adequately screened from the Reservoir, the Board will impose a permit condition requiring that an undisturbed naturally wooded buffer a minimum of 50 feet wide be maintained between the shoreline and any disturbed area of Lot 23, including the proposed recreation area. With these conditions, the public will continue to have such use and enjoyment of and access to the Reservoir as already exists.

Based on the above, the Board concludes that the Project will not unnecessarily or unreasonably endanger the public investment in the Reservoir and that the Project will not materially jeopardize or interfere with (a) the function, efficiency or safety of the Reservoir, or (b) the public's use or enjoyment of or access to the Reservoir. Therefore, the Project complies with Criterion 9(K).

Q. Criterion 10 (Conformance with Regional Plan)

Before granting a permit, the Board must determine that the Project is in conformance with any duly adopted regional plan. 10 V.S.A. § 6086(a)(10). The burden of proof under Criterion 10 is on the Applicant. 10 V.S.A. § 6088(a).

The Board performs its analysis regarding regional plans consistent with Re Nile and Julie Debra Alden, Land Use Permit #4C1013 (Corrected)-EB, Findings of Fact, Conclusions of Law and Order at 44 (April 30, 1999). See In re een Peak Estates, 154 Vt. 363, 369-70 (1990)(Project was not in compliance with regional plan that contained a specific policy against the type of development at issue); In re Molgano, 163 Vt. 25, 31 (1994)(Project was in compliance with broad and vague regional plan that had no specific prohibitions against type of development at issue). See also Re Mark and Pauline Kisiel, 5W1270-EB, Findings of Fact, Conclusions of Law and Order (Altered) at 47 (August 7, 1998), appeal docketed. In re Mark and Pauline Kisiel, No. 98-371 (filed Aug. 12, 1998); Re The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law and Order (August 19, 1996). These cases indicate that the Board is to apply specific policies contained in a regional plan and that an ambiguous provision is not such a policy. Dupstadt, supra

For a regional plan's provisions to be deemed a specific policy, the applicable provisions must (a) pertain to the area or district in which the project is located; (b) intend to guide or proscribe conduct or land use within the area or district in which the project is located, and (c) be sufficiently clear to guide the conduct of an average person, using

common sense and understanding Id at 45; Re Herbert and Patricia Clark, Application #1R0785-EB, Findings of Fact, Conclusions of Law and Order at 40 (April 3, 1997); Mirkwood, supra at 29

The Regional Plan identifies four categories of Rural Lands- Hamlets, Rural Residential Lands, Productive Rural Lands, and Resource Lands. The Project is located in a Resource Land District on the Proposed Land Use Map of the Regional Plan. The Regional Plan contains the following Resource Land Policies:

- 1 Insure that new development reflects existing settlement patterns, is low impact and intensity and does not conflict with the resources, but rather sustains these natural resources.
- 2 Insure protection of fish-and wildlife habitats; areas hosting Natural Heritage or federally identified endangered and threatened species; unique and fragile natural areas; wetlands, shore lands; floodplains; aquifer recharge areas; steep slopes; lands over 2500 foot elevation; ridge lines; essentially undeveloped forest lands which have limited access to an improved public road; and regionally significant scenic corridors and areas from development that would negatively impact the resource.
- 3 Encourage protection of green space, particularly along streams and rivers, and other important lands that are valued for trails, open space, wildlife habitat and scenic enjoyment.
- 4 Avoid extension of roads, energy transmission facilities, and other services into and through Resource Lands.
- 5 Construct corridors for new energy transmission facilities only when needed, and then adjacent to and parallel to existing operational energy transmission facility corridors. Minimize their visual impact on ridge lines, slopes and open areas, and avoid important natural and historic resources.
- 6 Avoid fragmentation of wildlife habitat by protecting wildlife corridors that join large tracts of resource land

The Board concludes that the above provisions of the Regional Plan are specific, that the Project complies with these provisions and that the Duppstadt requirements are met. The Project complies with the first Resource Land policy that new development reflects existing settlement patterns. is low impact and intensity and does not conflict with

the resources, but rather sustains these natural resources. The Project's proposed home sites, lot sizes, and density are consistent with adjacent residential development in the area. The average Project lot size, is 12.2 acres. The existing single family home lots adjacent to the Project are approximately ten acres in size. And, because the currently unmanaged vegetated and wooded areas of the Project will by permit condition be subject to the FMP as defined herein, the Project may help to sustain the Project property's natural resources.

The Project complies with the second Resource Land policy that insures protection of wildlife habitats and shore lands from development that would negatively impact the resource. As stated above, the Project protects the deer sensitive area and a 300-foot buffer zone by imposition of permit conditions that prohibit construction of any type in the habitat area and buffer zone; prohibit forest management activities without the prior approval of a District Wildlife Biologist; prohibit construction or maintenance of trails without the prior approval of a District Wildlife Biologist; and require that lot owners throughout the Project keep dogs leashed or otherwise under the owner's control at all times. The Project protects the shore lands by requiring construction to occur within specifically defined building envelopes; maintaining a significant naturally wooded buffer between the building envelopes and the shoreline; and utilizing protective isolation distances between wastewater systems and the Reservoir.

The Project complies with the third Resource Land policy that encourages protection of green space, particularly along streams and rivers, and other important lands that are valued for trails, open space, wildlife habitat and scenic enjoyment. The Project protects green space by requiring construction to occur within specifically defined building envelopes and maintaining a significant naturally wooded buffer between the building envelopes and the shoreline.

The Project complies with the fourth Resource Land policy that specifies avoidance of extension of roads, energy transmission facilities, and other services into and through Resource Lands. By improving Old Mill Lane, a previously existing woods road, the Project avoids extension of a new road into and through Resource Lands. Power lines will be extended through the Project Tract, but they will be underground.

The Project complies with the fifth Resource Lands policy that requires construction of corridors for new energy transmission facilities only when needed, and then adjacent to and parallel to existing operational energy transmission facility corridors. There are no new energy transmission facilities associated with the Project.

The Project complies with the sixth Resource Lands policy that specifies avoidance of fragmentation of wildlife habitat by protecting wildlife corridors that join large tracts of resource land. The Project protects the deer sensitive area and a 300-foot buffer zone

from fragmentation by imposition of permit conditions prohibiting construction of any type in the habitat area and buffer zone, prohibiting forest management activities without the prior approval of a District Wildlife Biologist, and prohibiting construction or maintenance of trails without the prior approval of a District Wildlife Biologist. The permit also protects the deer area and its 300 foot buffer by requiring that Project lot owners keep dogs leashed or otherwise under their owner's control at all times.

Finally, the Board notes that the Project Tract is not designated as a natural area, fragile area, or wildlife resource on the Regional Plan's Natural Areas, Fragile Areas, and Wildlife Resources map.

Based on the above, the Board concludes that the Project conforms with the Regional Plan.⁹ The Project complies with Criterion 10¹

In sum, the Project meets the requirements of Act 250. It should be noted that in reaching the above conclusions, the Board has not relied on the fact that the Applicant proposes no construction on Lots 2 1, 22 and Parcel D at this time.

R CONDITIONS

10 V.S.A. § 6086 grants the District Commissions and the Board the authority, under the police power, to impose conditions necessary to alleviate adverse impacts with respect to the ten Act 250 criteria. As long as a condition constitutes a proper exercise of the police power and has an appropriate relationship to the criterion involved, it is within the authority of the Board to impose. In re Alpen Associates, 147 Vt 647 (1986); Re J. Phillip Gerbode, #6F0357R-EB, Findings of Fact, Conclusions of Law and Order (March 26, 1991); Re J.P. Carrara & Sons, Inc., #1R0589-EB, Land Use Permit (February 17, 1988); Re Clarence and Norma Hurteau, #6F0369 EB, Memorandum of Decision (March 25, 1988). Such conditions may expressly incorporate requirements imposed by any covenants that apply to or govern a subdivision. Duppstadt, supra at 30.

Based on the foregoing findings of fact and conclusions of law and the District Commission's positive findings below on several Act 250 criteria that were not appealed to the Board, the Board issues Land Use Permit #2W0942-2-EB simultaneously herewith. This permit requires compliance with the plans and testimony submitted by the Applicant to the Board and District Commission; the findings and conclusions of the Board set forth herein, and, to the extent consistent with the Board's findings and conclusions, the

⁹ We note that neither the Regional Planning Commission nor the Town of Wilmington participated in this matter.

findings and conclusions of the District Commission. It also includes conditions expressly noted by the Board and District Commission in reaching positive findings under Criterion 1(E) and conditions regarding abandonment by nonuse and permit term in accordance with statute.

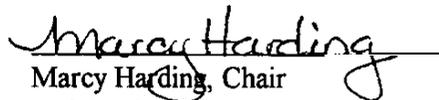
The above-referenced conditions are reasonable and appropriate under 10 V S A § 6086(c). With respect to the inclusion of District Commission findings, conclusions, and conditions on criteria which were not appealed, such inclusion is reasonable and appropriate because 10 V.S.A. § 6086(a) requires that a permit must be based on affirmative findings under all Act 250 criteria.

VI. ORDER

1. Exhibits A-30, A-31 and A-32 are accepted into the record of this case
2. Land Use Permit #2W0942-2-EB is hereby issued.
3. Jurisdiction over this matter is returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont, this 17th day of December, 1999

ENVIRONMENTAL BOARD


Marcy Harding, Chair

Jack Drake

George Holland

Samuel Lloyd

William Martinez

Rebecca M. Nawrath

Alice Olenick

Jill Broderick, Alternate Member