

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re: *Central Vermont Public Service Corp.*
and Verizon New England (Jamaica)

Land Use Permit Application
#2W1146-EB (Altered)

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

Central Vermont Public Service Corporation (CVPS) appeals from permit conditions imposed by the District 2 Environmental Commission (Commission) in Land Use Permit #2W1146-EB concerning future utility line extensions. As set forth below, the Board grants the permit and deletes the challenged conditions.

I. Procedural History

On May 6, 2002, CVPS and Verizon New England (Verizon) filed Land Use Permit Application #2W1146 with the District 2 Environmental Commission (Commission) seeking authorization to construct 3,300 feet of single-phase electrical distribution line and telephone line along Schoolhouse Road in Jamaica, Vermont (the Project).

On October 30, 2002, the Commission issued Land Use Permit #2W1146 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision).

On November 13, 2002, CVPS filed an appeal from the Permit and Decision (Docket #817) with the Environmental Board (Board), alleging that the Commission erred in its imposition of Conditions 9, 10 and 11 in Permit #2W1146 and in its conclusions concerning 10 V.S.A. §6086(a)(8)(A), (9)(A), (9)(C), (9)(H) and (10)(Criteria 8(A), 9(A), 9(C), 9(H) and 10).

At the request of CVPS, this appeal was consolidated with the appeal of CVPS from the Commission's November 7, 2002 Memorandum of Decision in Land Use Permit Amendment Application #2S0301-1 (Docket #818). A joint prehearing conference was held on December 20, 2002. A Prehearing Conference Report and Order (PCRO) was issued on December 24, 2002. Among other things, the PCRO identified preliminary and merits issues, and provided an opportunity for certain persons to file petitions for party status.

On February 19, 2003, the Board deliberated on the remaining preliminary issue in Docket #818, and by Memorandum of Decision issued February 28, 2003, the Board ruled that *Stowe Club Highlands* does not apply in that proceeding. A Scheduling Order setting the consolidated matter for hearing was issued on the same date. The Board also deliberated on Docket #818 on April 16, 2003. A Memorandum of Decision and Remand Order was issued on April 17, 2003 remanding the Docket #818 matter to the Commission for consideration of the application on its merits.

On April 23, 2003, the Board convened a public hearing in Docket #817, Chair Moulton Powden presiding. The Board conducted a site visit, admitted exhibits, and

heard testimony. Immediately after the hearing, the Board commenced deliberations. The Board also deliberated on May 21, 2003.

On June 3, 2003, the Board issued a Hearing Recess Order requesting additional evidence and setting a reconvened hearing for July 2, 2003. The Agency of Commerce and Community Development entered an appearance through its General Counsel, John Kessler, Esq.

On July 2, 2003, the Board reconvened the hearing, admitted exhibits and heard testimony. The Board deliberated immediately after the hearing, and also deliberated on August 6, 2003 and August 27, 2003.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned.

On September 2, 2003, the Board issued its Findings of Fact, Conclusions of Law, and Order, and Land Use Permit #2W1146-EB. CVPS filed a Motion to Alter on September 30, 2003 and ACCD and DPS filed Motions to Alter on October 2, 2003. The Windham Regional Commission filed its opposition to the Motions to Alter on October 26, 2003. The Board deliberated on November 12, 2003.

The Board granted CVPS's Motion to Alter in part and denied it in part, and denied the motions of DPS and ACCD in a Memorandum of Decision issued today. An altered permit is issued today, in addition to this altered decision.

II. Issue

The issue is whether Conditions 9, 10 and/or 11 in Permit #2W1146 are necessary for the Project to comply with 10 V.S.A. Ch. 151 (Act 250). This issue includes CVPS's challenges on Criteria 8(A), 9(A), 9(C), 9(H) and 10. Conditions 9, 10, and 11 of Permit #2W1146 provide as follows:

9. The permittees shall provide a copy of this Permit and Findings of Fact and Conclusions of Law to any person seeking information regarding connecting to or extending the line approved in this permit. The permittees shall inform potential customers that service lines or extensions may require an Act 250 permit amendment and that prior to issuing a permit, the Commission will need to conclude the project conforms to the relevant Act 250 Criteria.

10. Prior to contracting to provide either a service line or extension of the line approved in this permit, the permittees shall request and obtain a Project Review Sheet or a jurisdictional opinion as to whether the

proposed work constitutes a material or substantial change, thereby requiring a permit amendment.

11. For the purpose of giving adequate notice to all property owners or potential purchasers that may be impacted by the conditions of this permit, CVPS shall complete the following steps to ensure adequate notice in the Jamaica Land Records:

1) All future easements received by the permittees for service lines or line extensions shall include a specific reference to this permit and the book and page in which it is recorded.

2) CVPS shall prepare and record in the Jamaica Land Records a notice disclosing the fact that this permit requires that future service lines or extensions be reviewed by the District 2 Environmental Commission Coordinator to determine if an Act 250 permit is required. The notice shall list the properties which are or may be serviced by this line, including all properties over which the permittees have an easement for the utility line subject to this permit, as well as all abutting property owners to the west of the Manzke property at the terminus of the line extension authorized in this permit. The list shall include the names of all property owners and the book and page references to the deeds to the properties and any easements granted to the permittees. The notice shall include specific references to this permit and the book and page in which it is recorded. The notice shall be recorded in the grantee/grantor index under the names of all persons whose property is referenced in this condition.

III. De Novo Review and Official Notice

A. De Novo Review

The Board generally hears appeals from district environmental commission decisions *de novo*. See 10 V.S.A. § 6089(a)(3). This means that the Board must take evidence on the matter as if there had been no prior hearing before the district commission. *In re Killington, Ltd.*, 159 Vt. 214, 214 (1992)(citing *In re Green Peak Estates*, 154 Vt. 363, 372 (1990)). Thus, the Board cannot consider any exhibit or testimony submitted to the Commission, including the application, unless it is introduced into this proceeding as an exhibit and admitted by the Board, or unless it is officially noticed by the Board.

In this case, the Board has taken official notice of several documents in the Commission file, as set forth below. However, the Board has not taken notice of the entire Commission file. See, *In re White*, 172 Vt. 335 (2001).

B. Official Notice

At the hearing in this matter, the Windham Regional Commission and the Jamaica Planning Commission requested that the Board take official notice of the Windham Regional Plan and the Jamaica Town Plan, respectively. The Windham Regional Commission also requested that the Board take official notice of the Permit and Decision. These requests were granted at the hearing.

The Vermont Administrative Procedures Act authorizes the Board to take official notice of judicially cognizable facts in contested cases such as Act 250 appeals. 3 V.S.A. § 810(4); *see also*, 3 V.S.A. § 801(b)(2)(contested cases). According to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); *see also*, 3 V.S.A. § 810(1) (rules of evidence apply in contested cases); *In re Handy*, 144 Vt. 610, 612 (1984). Official notice may be taken whether requested or not and may be taken at any stage of the proceeding, 3 V.S.A. § 810(4); *In re Nelson Lyford*, Declaratory Ruling #341, Findings of Fact, Conclusions of Law, and Order at 3-4 (Dec. 24, 1997)(citing V.R.E. 201(c) and (f)). In this case, the contents of the documents in question are not subject to dispute, so this material is appropriate for official notice. Moreover, CVPS did not object to the Board's taking official notice of these documents.

IV. Findings of Fact

To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. *See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983). Topic headings are for organizational purposes only. Facts stated and terms defined in the procedural summary are incorporated herein.

General

1. CVPS proposes to install 3,300 feet of utility line along Old Schoolhouse Road, an extension from existing line to a recently built home owned by Warner Manzke, in Jamaica, Vermont. There will also be a telephone line on these poles.
2. Mr. Manzke phoned CVPS in the fall of 2001 to request electric service to his home. No assurance was given to Mr. Manzke that electric and/or telephone service would be available. The decision to build the Manzke home had already been made by the time electric service was requested.

3. CVPS started planning the Project, which included staking the area for fifteen poles, obtaining necessary easements, and redesigning the Project at the request of neighbors.
4. After the easements were signed, CVPS applied for an Act 250 permit.
5. Old Schoolhouse Road is a town trail, which has been upgraded. The town is not responsible for maintenance of town trails. 19 V.S.A. § 302(a)(5).
6. The Project can supply more power than Mr. Manzke needs, because it would be impractical for CVPS to have to upgrade the Project for any new users.

Criterion 8(A)

7. The Project site is in bear production habitat. A significant travel corridor for black bear goes along the ridge to the north of Schoolhouse Road, approximately one-half mile north, and to the west, of the Project site. This corridor is identified as regionally significant bear travel corridor on a map in the 2001 Windham Regional Plan.
8. The poles and wires from the Project will not have an adverse impact on bear habitat.

Criterion 9(A)

9. Old Schoolhouse Road is not a town-maintained road. It is a trail that has been improved by Mr. Manzke.
10. Old Schoolhouse Road is relatively narrow, steep in places, and is not in as good condition as most town roads. There are no plans to improve it, or to have maintenance taken over by the town.
11. Beyond the Manzke home on Old Schoolhouse Road, there is an existing home which appears to have no electric utility service. Closer to the Manzke home is a small camp, in some disrepair, which also appears to have no electric utility service.
12. There are several homes in Jamaica that are not served by an electric utility (i.e. are "off the grid").
13. The land along Old Schoolhouse Road appears suitable for residential development.

14. The Project site is within fifteen miles from Stratton and the Mt. Snow ski areas, and about three-and-one-half miles from Jamaica village.
15. Single-phase overhead electric lines are valued at \$28,200 per mile, plus \$602 per customer. This assessment is subject to depreciation.
16. The tax rate in Jamaica for 2002 was \$2.2723 per \$100 in assessed value. The assessed value of the electric line, as proposed, would have been \$12,867.32. This would have produced approximately \$292.47 in property tax revenue for the year.
17. The current population of Jamaica is approximately 935 people. It was approximately 946 in 2000 and 754 in 1990.
18. Population growth in the Windham County region grew by 7 percent from 1990 to 2000, or .7 percent per year. The increase in housing demand exceeds the increase in population growth somewhat because average household size is declining, consistent with a national trend.
19. Most recent development in Jamaica has been second home development, with quite a few full-time residences, owned primarily by retirees. There is nothing to bar retirees or second-home owners from selling these homes to families with children for use as primary residences.
20. The construction and maintenance of the poles and wires involved in the line extension will not directly result in any significant costs to the Town of Jamaica for educational or municipal services.
21. Properties with direct access to utility services may be less expensive to develop than those without such access.
22. Electric utility lines alone do not cause growth that would otherwise be impossible, but may encourage growth.
23. The Manzke home has been built without electric service from CVPS.
24. Homes can be and are built in remote locations without taking service from the electric grid.
25. Under the terms of CVPS's approved line extension tariff, the cost of extending distribution lines to serve new homes is borne entirely by the requesting customer. No public funds are used for this construction.

26. If additional users wish to connect to a line extension after it is built, then those users are responsible for paying a portion of the initial construction costs for a defined number of years. For the first five years after construction, additional users must pay 100% of their share of construction costs, based on their location, plus 100% of the cost of any additional facilities. These costs are thereafter depreciated in a straight line for a period of ten years, so that at the end of fifteen years after construction, additional users may attach to a line extension free of charge, by paying only for the facilities necessary to reach their own premises.
27. No party presented any evidence suggesting that the Town of Jamaica will not be able to provide necessary services now or at any time in the future as a result of this line extension.

Criterion 9(C)

28. Old Schoolhouse Road winds up a hill toward Mr. Manzke's home. The land to either side of Old Schoolhouse Road is forested, with occasional log landings or other clearings.
29. Much of the wood along the Project site is mature white pine with an understory of evolving beech trees. At the top near the Manzke home, there is mature beech and birch forest.
30. The Project will directly result in very little clearing or trimming of trees along Old Schoolhouse Road.

Criterion 9(H)

31. The Project is not a compact, existing community center with mixed uses including a significant residential component, and it is not physically contiguous to such an existing settlement.

Criterion 10

32. The December 2001 Windham Regional Plan and the Jamaica Town Plan (adopted June 25, 2001) apply to the Project.
33. The Windham Regional Plan establishes several regional land use categories: Regional Centers, Regional Growth Centers, Resort Centers, Villages, and Rural Lands.
34. The Windham Regional Plan states, in the section entitled "Rural Lands," that:

In spite of difficult access, topography, or lack of wastewater treatment facilities . . . 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.

Rural lands are easily transformed into suburbia. First come the needs for transportation and utilities as roads are widened, then paved and lined with poles for electricity, telephone, and cable. . . . The crux of the issue is the concept of rural living and its relation to suburban lifestyles.
. . .

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.

Windham Regional Plan, Page 22.

35. The Rural Lands categories are: Hamlets, Rural Residential Lands, Productive Rural Lands and Resource Lands.
36. The project is located on Productive Rural Lands under the Windham Regional Plan.
37. The Windham Regional Plan's policies for Productive Rural Lands are to:
 1. Ensure that new development reflects existing settlement patterns, is low in intensity, and does not conflict with the use and management of forest, agricultural and mineral resource lands, but rather sustains these natural resource commodities.
 2. Support a mix of rural land use including agriculture, housing, home businesses, small-scale commercial and industrial uses, commercial forestry and outdoor recreation, so long as these uses are compatible with one another and do not cause excessive noise, pollution, or disturbance.

3. Support long-term management of agricultural and forest lands for uses that promote a sustained yield of crops and timber products.
 4. Encourage the use of innovative land saving techniques such as cluster development and fixed area density allocation to protect agriculture, forest, and mineral resource lands from development and fragmentation.
 5. Support 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.
38. Under the Jamaica Town Plan, the Project is located in a "Rural Resource Area."
 39. The Jamaica Town Plan states that Rural Resource Areas are those with "accessible building land, agricultural land, productive forestland, and similar resource land." Jamaica Town Plan, Page 12.
 40. With respect to Rural Resource Areas, the Jamaica Town Plan states that: "the average density within each parcel proposed for development should not exceed one unit per 4 acres, equivalent to an overall density of 25 units per 100 acres." Jamaica Town Plan, Pages 12-13.
 41. The Jamaica Town Plan's land use policies include:
 1. Encourage the continued use of Conservation and Rural resource lands for forestry, agriculture, wildlife habitat and recreational/open space uses in order to keep these resources available and preserve the rural character of lands outside of those areas specifically designated for more intensive development (Villages and Commercial/Residential Areas).
* * *
 3. Development that is evident from great distances is disrupting to the landscape and is not in keeping with maintaining the rural character of the Town. Prominent ridgelines and peaks shall be left in their natural condition.
* * *
 11. Mixed land uses outside of the villages should be permitted only to the extent that a proposed new use of the land does not significantly interfere with the use and enjoyment of the predominant existing adjacent land uses.

12. Development should be designed to maximize the amount of undeveloped open space especially at those sites that contain unique or ecologically sensitive areas.

Jamaica Town Plan, Appendix at Pages i-ii.

42. Jamaica does not have zoning or subdivision regulations.

V. Conclusions of Law

CVPS seeks to delete conditions 9, 10 and 11 from the Permit. These conditions require that CVPS and Verizon (Permittees) provide notice to landowners and potential purchasers that future line extensions may need an Act 250 permit amendment, and that Permittees request a jurisdictional opinion or project review sheet to determine whether such a permit amendment is required, before contracting to provide any line extension. CVPS also challenges the Commission's conclusions under Criteria 8(A), 9(A), 9(C), 9(H) and 10, on which these conditions were based. As set forth below, the Board concludes that the Project complies with Criteria 8(A), 9(A), 9(C), 9(H) and 10 without the challenged conditions.

Act 250 authorizes reasonable permit conditions: "A permit may contain such requirements and conditions as are allowable proper exercise of the police power and which are appropriate with respect to (1) through (10) of subsection (a). . . ." 10 V.S.A. § 6086(c). "To constitute a proper exercise of the Commission's police power, a condition must bear a rational nexus to actual or potential impacts under Act 250." *Re: Alpine Stone Corporation, #2S1103-EB*, Findings of Fact, Conclusions of Law, and Order at 40 (Feb. 4, 2002).

With respect to the conditions at issue here, the notice requirements in Conditions 9 and 11 would ensure that notice is given to landowners and potential buyers that the utility may need and may not be able to obtain an Act 250 permit amendment, and the jurisdictional opinion/project review sheet requirement in Condition 10 would ensure an early determination of whether a permit amendment is required. While these conditions are not impermissible under Act 250, and might be construed as protective of both the permittees and the public, the question before the Board is whether they are necessary for the Project to comply with Criteria 8(A), 9(A), 9(C), 9(H) and 10. As discussed below, the Board finds that the Project complies with these criteria without the challenged permit conditions.

A. Criterion 8(A)(necessary wildlife habitat)

To determine compliance with Criterion 8A, the Board asks: (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. *Re: Mark and Pauline Kisiel, #5W1270-EB, Findings of Fact, Conclusions of Law, & Order (Altered) at 37 (Aug. 7, 1998); aff'd in part, rev'd in part on other grounds, In re Kisiel, 171 Vt. 124 (2000).* The applicant bears the burden of production and the opponent bears the burden of persuasion on Criterion 8(A). 10 V.S.A. § 6088(b); *see also, Re: Nile and Julie Dupstadt, #4C1013 (Corrected)-EB, Findings of Fact, Conclusions of Law, and Order (Apr. 30, 1999)* ("The Applicant must provide sufficient information for the Board to make affirmative findings" on Criterion 8A.); *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings, Conclusions and Order at 8 (Oct. 11, 1995).*

"'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).

CVPS concedes that the ridge north of Schoolhouse Road is a significant travel corridor for black bears. However, the ridge is not on or directly adjacent to the Project site, and the utility lines from the Project itself will not have any adverse impact on this habitat. In addition, there is no evidence that any new home or other development would be built to access these utility lines in the future that might impact the bear habitat.

Should Permittees seek to add any new line extension or service drop to this permitted line extension, a permit amendment would be required under Board rules if the proposal might have an impact under Criterion 8(A), or any other Act 250 criterion. EBR 34; *see also, EBR 2(A)(12); EBR 2(G).* Under EBR 34, a permit amendment is required for any substantial or material change to a permitted project. EBR 34; EBR 2(A)(12); EBR 2(G). There was no evidence in this case that a permit condition would be necessary to enforce this requirement.¹ *Compare, Re: CVPS, #7C0734-EB, Memorandum of Decision at 2 (Aug. 6, 1991)* (noting in decision concerning coapplicancy of landowner that "the District Commission can require in the CVPS permit that any future extensions of this power line . . . will require an amendment to the permit.").

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The conditions in question do not require permit amendments, but rather, notice and a request for a Project Review Sheet or other Jurisdictional Opinion to determine whether the proposed extension is a substantial or material change to the permitted project under EBR 34. The conditions also require that the Permittees put landowners and potential buyers on notice that a permit amendment may be required. While these conditions may constitute good practice for any permittee to avoid future violations or misunderstandings, the conditions are not required under the facts and circumstances of this case.

The Project will not destroy or impair necessary wildlife habitat. The Project complies with Criterion 8(A) without the challenged conditions.

B. Criterion 9(A)(impacts of growth)

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

In considering an application, the District Commission or the Board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the district commission or the board shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.

10 V.S.A. § 6086(a)(9)(A).

There is no evidence that Jamaica has a duly adopted capital improvement program, so the burden of proof under Criterion 9(A) is on any party opposing the application. *Id.*

The Board must consider the following factors in reviewing a project under Criterion 9(A):

- a. The growth in population experienced by the town and region in question.
- b. The *total* growth and *rate* of growth which is otherwise expected for the town and region.

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

Re: *St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 30 (Altered)(June 27, 1995), *aff'd, In re Wal Mart Stores, Inc.* 167 Vt. 75 (1997).

The Board has considered the relevant growth totals and rates in evidence, and concludes that the Project will not cause any significant increase. Moreover, it is clear that the poles and wires from the Project itself will not burden government finances in any significant manner.

In this case there was no evidence that the homeowner relied on the availability of power and/or telephone service when he chose to build a home up Old Schoolhouse Road. To the contrary, the record is clear that Manzke built his home first and requested utility service later. Therefore, the Manzke home is not an indirect or secondary impact of this Project. The bigger issue is indirect impacts from growth that may be facilitated by this line extension in the future.

CVPS argues that the Project will not cause or facilitate any significant growth. As the Board has held the *Washington Electric Coop* case, a claim that the project will not encourage growth is not enough under the financial criteria:

Simply asserting that the area around the project is near the growing City of Barre is not enough; nor is it sufficient to merely counter that assertion by saying that the project will not encourage growth. What the Board needs, in addition to an analysis of power lines built in similar locations, is an assessment of those factors present in the area which may promote or discourage growth such as resources in the area, soil characteristics, topographic limitations, and access to employment.

Washington Electric Cooperative, Inc., # 5W1036-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Dec. 19, 1990).

In support of its claim, CVPS has submitted an analysis of 37 utility line extensions over 1,000 feet in length in CVPS's Brattleboro district. This analysis includes four line extensions in Brattleboro that serve planned housing developments. This analysis shows that, other than the four lines in Brattleboro, the maximum rate of

further development has been one new service drop per year. This data shows that growth rates have tapered off and that growth in this area is not rampant. This would tend to indicate that no significant further development is likely to occur along the Project site. However, the Board must also assess other factors in the area that promote or discourage growth.

The Town of Jamaica has no zoning or subdivision ordinance that would restrict or prohibit further development along Old Schoolhouse Road. There is no indication that soil or topographic conditions would significantly inhibit further residential development along the Project site, although Old Schoolhouse Road is fairly steep in places. The Project site is within a few miles of Jamaica village, and two different ski areas, Stratton and Mt. Snow. However, there was no evidence that the demand for housing serving these job markets is increasing or that there are any other pressures to develop along the Project site. CVPS has had no additional requests for electric service along Old Schoolhouse Road.

Old Schoolhouse Road is in fairly good condition for an improved town trail, but it is relatively narrow and certainly not in as good condition as most town roads. There are no plans to improve it further, or to improve it sufficiently to request that maintenance be taken over by the town. Should the condition of this road improve significantly, it could facilitate further development along the Project site. There was no evidence that further improvements would be made to this road.

The Board has previously determined that “electric power is essential to most development activities and especially residential development.” *St. Albans Wal*Mart*, Findings, Conclusions and Order at 50. Furthermore, such utility lines (and other infrastructure such as sewer and drinking water) clearly “influence both the amount and rate of growth a town or region experiences.” *Re: Department of State Buildings, #2S0609-EB*, Findings of Fact, Conclusions of Law, and Order (Jun. 3, 1985). The infrastructure project proposed in this case is the result of a single customer's request, and is clearly not of the same scale as a major water or sewer line. In fact, the evidence in this case indicates that the Project will have no significant effect upon total growth or rates of growth in Jamaica or the Windham County region. *See, Re: The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet, #1R0048-12-EB* Findings of Fact, Conclusions of Law, and Order at 49 (Aug. 20, 2001)(if project will not result in growth, project complies with Criterion 9(A)).

Similarly, the Project will not have a significant adverse impact on costs of governmental services or other factors relating to public health, safety, and welfare. Therefore, the Project will not cause an undue burden on the existing and potential financial capacity of the Town of Jamaica or the Windham County region. Accordingly, the Project complies with Criterion 9(A).

The Board recognizes that 30 V.S.A. § 2801 requires CVPS to provide electric service to customers upon request, but the Board reads this statute as being subject to other applicable laws, including Act 250. Nothing exempts CVPS from Act 250, and the Board must apply it here.

The Board empathizes with the concerns of the Jamaica and Windham Regional planning commissions that growth may creep into remote, undeveloped areas like that surrounding the Project site. The Board cannot and will not turn a blind eye to significant growth impacts of a given project, however, there is no indication that this Project will have any such impacts. It is worth noting that Act 250 review focuses on the individual project, the impacts of reasonably foreseeable growth that is facilitated by that project -- in the context of the project's benefits -- and, where appropriate, mitigation of growth costs through impact fees or other conditions.² A strong town plan, accompanied by clear zoning regulations and the enforcement thereof, offer communities very effective tools for controlling growth. The Town of Jamaica has not adopted zoning, and, as discussed below, the applicable town and regional plans do not clearly prohibit utility line extensions in the area of the Project site. Act 250 was never intended to enforce comprehensive land use planning goals that are not clearly stated in the town or regional plans.

C. 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 his 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

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See, e.g., 10 V.S.A. §§ 6086(a)(6) and (7)(requiring imposition of impact fees to mitigate impacts of growth on educational and other local services); *id.* § 6086(a)(9)(A)(allowing imposition of conditions to mitigate impacts of growth); see also, I Richard O. Brooks, *Toward Community Sustainability: Vermont's Act 250* § 9(A) at 16 (1996 & Supp. 1997)(concluding that the effectiveness of Criterion 9(A) to control gradual growth is limited).

(iii) the subdivision or development 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). *Id.* § 6088(a).

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 (Jan. 29, 1998)(addressing secondary agricultural soils); *Re: Thomas W. Bryant and John P. Skinner, #4CO795-EB*, Findings of Fact, Conclusions of Law, and Order at 26 and 28 (June 26, 1991)(addressing primary and secondary agricultural soils). *Cf., e.g., Re: Marvin R. Gurman, #3W0424-EB* at 19 (June 10, 1985)(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 installation of the utility lines alone will not have any significant impact on the forests along the Project site. Again, should any proposal to expand the Project appear to have such impacts, a permit amendment would be required under current law. This is true regardless of whether a permit condition requires Permittees to obtain an opinion from the district coordinator as to whether an amendment is needed, and regardless of whether a permit condition requires Permittees to give notice to potentially affected parties that a permit amendment may be required.

Therefore, the Project complies with Criterion 9(C) without the challenged permit conditions.

D. Criterion 9(H)(costs of scattered development)

Criterion 9(H) recognizes that scattered development not related to an existing settlement can have adverse primary and secondary impacts and therefore, requires a stricter review than development that occurs within and adjacent to existing communities. Criterion 9(H) is intended to "preserve the viability of the traditional community centers of Vermont, to channel growth into such centers, to keep the growth proportionate to the existing sizes of Vermont's towns and villages unless a locality seeks otherwise, and to ensure that any growth outside of the traditional centers would not have an adverse financial impact on state and local government." *Re: St. Albans Group and Wal*Mart Stores, Inc., #6F0471-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) at 40-41 (June 27, 1995), *aff'd on other grounds, In re Wal*Mart*, 167 Vt. 75 (1997).

Criterion 9(H) provides:

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

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

Under 10 V.S.A. 6086(a)(9)(H), the Board must first determine whether the proposed project is physically contiguous to an existing settlement. If the proposed project is not its own existing settlement nor physically contiguous to such a settlement, then the applicant must demonstrate that the project's tax revenues and other public benefits outweigh the additional costs of public services and facilities caused by the project.

An "existing settlement" has been defined by the Board as follows:

[T]he phrase 'existing settlement' . . . means an extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and, importantly, a significant residential component. It is a place in which people may live and work and in which the uses largely are within walking distance of each other.

*St. Albans Group and Wal*Mart Stores, Inc.*, Findings, Conclusions and Order at 40-41. The Project is not physically contiguous to any existing settlement, so the question is whether the Project's tax revenues and other public benefits outweigh any additional costs of public services it causes.

The Project will generate tax revenues as found herein. And, as discussed above, the Project will generate no significant costs in terms of public services or facilities. Should any expansion of the Project through extension or service drops pose potential for significant impact under Criterion 9(H), a permit amendment will be required by law. There is no need for a permit condition setting this requirement out or imposing additional notice requirements upon Permittees with regard to potential purchasers and landowners. Therefore, the Project complies with Criterion 9(H) without the challenged conditions.

E. Criterion 10 (compliance with town and regional plan)

Before granting a permit, the Board must find that the project “is in conformance with any duly adopted local or regional plan or capital program of Title 24.” 10 V.S.A. § 6086(a)(10). The applicable plans in this case are the Jamaica Town Plan and the Windham Regional Plan. The burden is on the applicant to prove compliance with Criterion 10. 10 V.S.A. § 6088(a).

To determine whether a proposed development or subdivision complies with a town or regional plan, the Board first looks to whether there are pertinent provisions in the plan which evince a specific policy. A provision evinces a specific policy if it:

1. pertains to the area or district in which the project is located;
2. is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and
3. is sufficiently clear to guide the conduct of an average person, using common sense and understanding.

Re: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 90 (Dec. 8, 2000)(citing Duppstadt, Findings, Conclusions and Order at 45; Re: Herbert and Patricia Clark, Application #1R0785-EB, Findings of Fact, Conclusions of Law and Order at 40 (April 3, 1997); Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996)).

If there are no specific provisions in the town or regional plan which apply to the project, then the project complies with Criterion 10. *Kisiel, Findings, Conclusions and Order (Altered) at 47, rev'd on other grounds, In re Kisiel, 171 Vt. 124 (Dec. 29, 2000).*

The Board has reviewed both plans and finds no mandatory language in any applicable provision. Thus, there are no specific, enforceable provisions that are violated by the Project. As with the other criteria on appeal, Permittees are required by law to obtain a permit amendment for any proposed expansion of the permitted project that may have a significant impact under any Act 250 criterion. EBR 34. The challenged permit conditions, though they may be advisable practice for Permittees, are not necessary to guard against impacts from any future expansion. Again, at this point there are no plans for any such expansion.

The Board concludes that this Project complies with Criterion 10 without Conditions 9, 10 and 11 of the Permit.

IV. Order

1. The Board takes official notice of the Permit, Decision, the Windham Regional Plan and the Jamaica Town Plan.
2. The Project complies with Criteria 8(A), 9(A), 9(C), 9(H) and 10 without the challenged permit conditions. The merits issue is answered in the negative.
3. Land Use Permit #2W1146-EB is hereby issued.

DATED at Montpelier, Vermont this 19th day of December, 2003.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden

Patricia Moulton Powden, Chair

George Holland*

Donald Marsh†

Patricia Nowak*†

Alice Olenick

A. Gregory Rainville

Jean Richardson

† Board Members Donald Marsh and Patricia Nowak did not participate in the Board's August 27, 2003 deliberations, but have reviewed and join in this decision as noted herein.

*** Board Member George Holland CONCURS in part and DISSENTS in part, and is joined by Board Member Patricia Nowak:**

I concur with the majority in the issuance of Land Use Permit #2W1146-EB. However, I dissent those provisions of the decision that address inclusion of the residential development and any subsequent secondary residential development into the Act 250 permitting process for this utility line extension.

I agree with the arguments of CVPS that the utility line extension should stand alone in the permitting review and not include residences served by the utility unless that residential development by itself triggers Act 250 jurisdiction. CVPS has no control over the type, size, location, appearance or value of residences that request electrical service. Further it has no control over the number of school-age children that may or may not live in a home, nor the tax revenue the property will generate. CVPS is simply required to provide electric service on demand. All design and construction costs are borne by the requester. Further line extensions and service drops are subject to any new requesting customer sharing in the initial construction cost for a

period of up to fifteen years, a requirement that acts to dampen added development along the utility line, should any development ever in fact occur.

Attempting to include a new home or two into the Act 250 permitting process for the utility line's Act 250 permit is nothing more than a backdoor attempt to try and regulate residential development of a type specifically excluded from Act 250 review. It is a misguided use of the law and injects uncalled-for state authority in a matter that inarguably rests with the community to resolve through better written town plans and/or enactment of local zoning. Additionally, attempting to include analysis of secondary growth as well in the review can be likened to a will-o'-the-wisp attempt to predict development that is entirely unpredictable.

I further take issue with the Environmental Board comparing electrical distribution lines to sewer or water lines as a precursor to development. The latter two utilities are specifically planned, sized and constructed to accommodate and encourage new development. They require large amounts of capital up front to install, a feat normally only accomplished by a municipality or large developer. The development and any secondary growth are highly predictable. Electrical service, on the other hand, is planned, sized and constructed in *response* to a request for service to a proposed development. In the case of a new home this is oftentimes after the home's construction.

The *Washington Electric Coop* decision should be revisited by the Environmental Board in light of this case as well as the closely related CVPS appeal involving a line extension in Guilford. CVPS's ten-year study of utility line extensions and follow-on growth clearly demonstrates that a *Washington Electric Coop* approach to Act 250 electric distribution line permitting is unnecessary.

I would hope that changes could be made to clarify electric line extensions for new home construction and remove CVPS and other electrical communication providers from the burdensome permitting process as it was applied in this instance. Further, these changes should include provisions that exempt the utility from filing for an amendment to a permitted project for future extensions or service drops *unless* on their own they trigger Act 250 jurisdiction. It is apparent from testimony at the hearings in this case that this is exactly how it is now being done state-wide in the Act 250 process.

The Environmental Board should come to realize, as have the Department of Public Service and the Agency of Commerce and Community Development, that utility companies must be relieved of the responsibility of providing unnecessary, and oftentimes inventive, evidence and analysis on Act 250 criteria. The majority's decision does not do this.

