



# MEMORANDUM OF DECISION AND ORDER

## on Motion to Alter

State of Vermont

Natural Resources Board

District 4 Environmental Commission

111 West Street

Essex Junction, VT 05452

<https://nrb.vermont.gov/>

[phone] 802-879-5614

**RE:** The Burton Corporation  
180 Queen City Park Road  
Burlington, VT 05401

Memorandum of Decision and Order  
10 V.S.A. §§ 6001-6111 (Act 250)  
Act 250 Application #4C0174-6,4C0368-3(Altered)

### I. Summary

On November 13, 2020, The Burton Corporation, 180 Queen City Park Road, Burlington, VT 05401 (the "Applicant"), submitted application number 4C0174-6,4C0368-3 (the "Application") for a project generally described as redevelopment of an existing 83,000-square foot manufacturing building into a mixed-use facility, including a performing arts center, and associated parking improvements. The project is located at 180 and 266 Queen City Park Road in Burlington, Vermont (the "Project").

The procedural and hearings history of the Application is detailed in the District Commission's January 5, 2022 Findings of Fact, Conclusions of Law, and Order (the "Order").

#### *Motion to Alter*

In a timely filed Motion to Alter dated January 20, 2022, the Application opponents represented by Attorney James A. Dumont (the "Neighbors") requested that the Commission reconsider portions of the Order and the Permit. The Applicant filed its Memorandum in Opposition to that Motion on January 28, 2022. The Commission will now address the merits of the Neighbors' Motion.

#### **Requested Alteration #1**

The Commission issued findings of fact and conclusions of law under Criterion 1 with regard to the health effects of noise.

The Neighbors request the withdrawal of the Commission's conclusions of law with regard to the health effects of noise, and either a denial of the permit under Criterion 1, or the modification of the Permit condition that establishes operating hours.

The Commission has reviewed the Neighbors' memorandum in support of its requested Alteration #1 and will not withdraw its conclusions of law under Criterion 1 or deny the permit

under Criterion 1 as requested. The Commission reiterates its statement from its conclusions of law that the sound of a car horn honking is not unique to the proposed Project. Furthermore, the Commission agrees with the Applicant's citation of *In re JSCL, LLC CU Permit*, 2021 VT 22, in which the Vermont Supreme Court found that the fact that vehicles entering and exiting a property could emit maximum sound pressure levels in excess of certain thresholds at the property line does not mean that the project is out of compliance with permitted noise thresholds, where the noise levels at the property line emanating from the proposed project itself will otherwise be less than those permitted levels. The evidence demonstrates that noise generated by the operation of the Project falls under the World Health Organization ("WHO") threshold guidelines for both annoyance and sleep disturbance, and the Commission will not modify the permitted operating hours.

### **Requested Alteration #2**

The Commission issued findings of fact and conclusions of law under Criterion 8 with regard to the aesthetic impacts of noise.

The Neighbors request the amendment of the Commission's conclusions of law with regard to the aesthetic effects of noise, the addition of permit conditions limiting hours of operation, and the addition of conditions requiring compliance with a 45 dBA LFmax standard at residences.

The Commission has reviewed the Neighbors' memorandum in support of its requested Alteration #2. Based upon the facts provided, the Applicant's mitigation measures, and the noise condition established in the permit, the Commission reiterates its finding and conclusion that the Project is not offensive or shocking to the average person and complies with Criterion 8, Aesthetics.

Uncontroverted noise modeling provided by the Applicant provided modeled 1-hour averaged values at the most impacted residence that are comparable to measured nighttime (10 PM to 7 AM) background sound levels for the neighborhood, which are generally between 40 and 45 dBA (Leq) (1 hour). In addition, background sound levels are generally between 35 and 55 dBA (Lmax) at night, although there are some maximum sound levels between 60 and 70 dBA (Lmax) at night. Given these facts, it would be unreasonable and practically unenforceable to establish an instantaneous standard of 45 dBA LFmax at residences.

With the exception of the aforementioned car horns, addressed under Requested Alteration #1 above, all modeled values under all noise modeling scenarios presented to the Commission fell beneath the WHO guidelines to prevent sleep disturbance. Furthermore, the Applicant provided modeled sound levels during a hard rock concert and sound levels at the end of a sold-out concert when people are leaving the site. Model results indicated that all modeled receptors will experience sound levels of 45 dBA (Leq, 1-hr) or less. These modeled values fall beneath the WHO guidelines to protect against moderate annoyance between 7 AM and 11 PM

(50 dBA averaged over a 16-hour period) and the WHO nighttime guideline to allow people to sleep with the bedroom windows open between 11 PM and 7 AM (45 dB averaged over an 8-hour period).

For the foregoing reasons, the Commission will amend its findings of fact and conclusions of law under Criterion 8 to clarify its conclusions under this criterion, but declines to modify or impose additional conditions as requested.

### **Requested Alteration #3**

The Commission included the following condition in the Permit:

28. When any PAC event attracts over 1,200 attendees, the Permittee shall provide shuttle service to the UVM and Champlain College Campuses and downtown Burlington as described in Exhibit #155, unless one of the following conditions is met for the event:
- a. Comparable shuttle or bus service is provided directly by area college(s) and/or transit provider(s); or
  - b. A minimum of 520 parking spaces are provided for the event, within a 1/3-mile radius of the venue.

The Neighbors request the withdrawal of clause b in Condition #28. At page 10 of their Memorandum in support of their Motion, the Neighbors state:

Neighbors respectfully submit that if any off-site parking is to be provided, that parking will affect new landowners, raise new impacts, and will require a new or amended Act 250 permit after notice to newly affected property owners. *In re Application of Lathrop L.P. I, 2015 VT 49 ¶¶ 107-110, 199 Vt. 19, 121 A.23d 630.* Those potential off-site parking spaces cannot be approved of, or relied upon, in the present proceedings.

At pages 6-7 of its Memorandum in Opposition, the Applicant rejoins:

There is no need for alteration of Condition #28, which requires and relates to the use of shuttle bus services. This condition does not contemplate off-site parking, nor is off-site parking relied upon in the Commission's findings to satisfy the criteria. Rather the offsite parking clause serves to appropriately define and limit the need for shuttle services. The existing clause creates administrative efficiencies in the event that offsite parking is secured in the future, including avoiding excess permit amendments, and should be retained. The question of what legal requirements or authorizations control offsite parking is not before the Commission at this time and the Opponents' concern is unwarranted.

The Commission pondered these points and reached the conclusion that it should not have included clause b in Condition #28. Contrary to the Applicant's argument, clause b does involve, at least with reasonable potential, materially changing the Project by virtue of including contracted off-site parking in the Project's vicinity. We think it best to defer action on that eventuality to a request for a Permit amendment.

Accordingly, the Commission strikes Permit Condition #28b.

## **II. Decision and Order**

The Commission has considered the Neighbors' three requested alterations. Considering all the factors, the Motion to Alter is denied. However, the Commission approves the following change in response to the Neighbors' requested Alteration #3:

Condition #28b is stricken, and that condition shall read as follows:

28. When any PAC event attracts over 1,200 attendees, the Permittee shall provide shuttle service to the UVM and Champlain College Campuses and downtown Burlington as described in Exhibit #155, unless comparable shuttle or bus service is provided directly by area college(s) and/or transit provider(s).

For the reasons set forth in the Order and herein, the Commission denies the Neighbors' Motion and affirms its decision to approve the project. The Commission will issue an altered decision to incorporate the change to Condition #28. The terms and conditions of Land Use Permits #4C0174, 4C0368, and all amendments remain in full force and effect. If any party has any questions regarding this Memorandum of Decision, please contact State Coordinator Aaron Brondyke at 802-595-2735.

Dated this 3<sup>rd</sup> day of March, 2022.

By /s/Thomas A. Little  
Thomas A. Little, Chair  
District 4 Environmental Commission

Commissioners participating in this decision:

Monique Gilbert

Pamela Loranger

This is an amended decision issued pursuant to Act 250 Rule 31.

If the District Commission issued this amended decision on its own motion, any party may file a motion

to alter with the Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A). If the District Commission issued this amended decision in response to a motion to alter filed by a party, then no additional motions to alter this amended decision may be filed.

Any appeal of the Commission's decisions must be filed with the Superior Court, Environmental Division within 30 days of the date this amended decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

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For additional information on filing appeals, see the Court's website at:  
<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

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# LAND USE PERMIT AMENDMENT

State of Vermont

Natural Resources Board

District 4 Environmental Commission

111 West Street

Essex Junction, VT 05452

<https://nrb.vermont.gov/>

[phone] 802-879-5614

**CASE NO:** 4C0174-6,4C0368-3(Altered)  
The Burton Corporation  
180 Queen City Park Road  
Burlington, VT 05401

**LAWS/REGULATIONS INVOLVED**

10 V.S.A. §§ 6001 - 6111 (Act 250)

The District 4 Environmental Commission hereby issues Land Use Permit Amendment #4C0174-6,4C0368-3(Altered), pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6111. This permit amendment applies to the lands identified in Book 1145, Page 616; and Book 1006, Page 496, of the land records of the City of Burlington, Vermont, as the subject of deeds to Burton Corporation.

**This permit specifically authorizes the redevelopment of an existing 83,000-square foot manufacturing building into a mixed-use facility, including a performing arts center, and associated parking improvements (“the Project”). The Project is located at 180 and 266 Queen City Park Road in Burlington, Vermont.**

Jurisdiction attaches because the Project constitutes a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rule 34.

1. The Permittee, and its assigns and successors in interest, is obligated by this permit to complete, operate, and maintain the Project as approved by the District 4 Environmental Commission (the “Commission”) in accordance with the following conditions.
2. The Project shall be completed, operated, and maintained in accordance with: (a) the conditions of this permit, (b) Findings of Fact and Conclusions of Law #4C0174-6,4C0368-3(Altered), and (c) the permit application, plans, and exhibits on file with the Commission and other material representations. In the event of any conflict, the terms and conditions of this permit and the conclusions in the findings shall supersede the approved plans and exhibits. The approved plans are:



- Sheet L100 - "Layout and Materials Plan," dated 3/13/20, last revision 11/8/20 (Exhibit #027);
- Sheet L200 - "Planting Plan," dated 3/13/20, last revision 11/8/20 (Exhibit #028);
- Sheet L300 - "Details," dated 3/13/20, last revision 11/8/20 (Exhibit #029);
- Sheet L500 - "Photometric & Lighting Plan," dated 3/13/20, last revision 11/8/20 (Exhibit #030);
- Sheet C1.1 - "Existing Conditions," dated 3/13/20, last revision 11/25/20 (Exhibit #032a);
- Sheet C1.2 - "Erosion Prevention and Sediment Control Plan," dated 3/13/20 (Exhibit #033);
- Sheet C1.3 - "Demolition Plan 1 of 2," dated 3/13/20, last revision 10/15/20 (Exhibit #034);
- Sheet C1.4 - "Demolition Plan 2 of 2," dated 3/13/20, last revision 10/15/20 (Exhibit #035);
- Sheet C1.5 - "Site Layout Sheet 1 of 2," dated 3/13/20 (Exhibit #036);
- Sheet C1.6 - "Site Layout Sheet 2 of 2," dated 3/13/20, last revision 11/25/20 (Exhibit #037a);
- Sheet C2.1 - "Grading and Utility Plan," dated 3/13/20, last revision 11/25/20 (Exhibit #038a);
- Sheet C2.2 - "Sewer Profile 1 of 2," dated 3/13/20, last revision 10/15/20 (Exhibit #039);
- Sheet C2.3 - "Sewer Profile 2 of 2," dated 3/13/20, last revision 10/15/20 (Exhibit #040);
- Sheet C3.1 - "Site Details 1 of 3," dated 3/13/20 (Exhibit #041);
- Sheet C3.2 - "Site Details 2 of 3," dated 3/13/20 (Exhibit #042);
- Sheet C3.3 - "Site Details 3 of 3," dated 3/13/20 (Exhibit #043);
- Sheet C3.4 - "Stormwater Details 1 of 2," dated 3/13/20 (Exhibit #044);
- Sheet C3.5 - "Stormwater Details 2 of 2," dated 3/13/20 (Exhibit #045);
- Sheet C3.6 - "Sewer Details," dated 3/13/20, last revision 10/15/20 (Exhibit #046);
- Sheet C3.7 - "Water Details," dated 3/13/20, last revision 10/15/20 (Exhibit #047); and
- Sheet C3.8 - "EPSC Details," dated 3/13/20 (Exhibit #048).
3. All conditions of Land Use Permits #4C0174, 4C0368, and amendments are in full force and effect except as further amended herein.
  4. The Permittee shall comply with all of the conditions of the following Agency of Natural Resources Permits:

- a. Wastewater System and Potable Water Supply Permits #WW-4-0489-4 issued on December 21, 2020, and #WW-4-2436-2 issued on January 7, 2021, by the ANR Drinking Water and Groundwater Protection Division;
  - b. Authorization of Notice of Intent #3128-9020.1 under Construction General Permit 3-9020 issued on April 10, 2020 by the ANR Watershed Management Division; and
  - c. Authorization of Notice of Intent #3128-9015 under General Permit 3-9015 (Stormwater Discharge General Permit), issued on March 16, 2020 by the ANR Watershed Management Division.
5. Any nonmaterial changes to the permits listed in the preceding condition shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.
  6. Representatives of the State of Vermont shall have access to the property covered by this permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.
  7. A copy of this permit and plans shall be on the site at all times throughout the construction process.
  8. No change shall be made to the design, operation, or use of the Project without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
  9. No further subdivision, alteration, and/or development on the tracts of land approved herein shall be permitted without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
  10. Pursuant to 10 V.S.A. § 8005(c), the Commission may at any time require that the permit holder file an affidavit certifying that the Project is in compliance with the terms of this permit.
  11. The conditions of this permit and the land uses permitted herein shall run with the land and are binding upon and enforceable against the Permittee and their successors and assigns.
  12. Construction hours shall be limited to Monday through Friday from 7:00 AM to 5:30 PM, and Saturdays from 8:00 AM to 4:30 PM. There shall be no construction on Sundays and federal holidays.
  13. As conditioned by the City of Burlington's Conditional Use Permit, daytime use of the performing arts center (the "PAC") is limited to 300 patrons. Doors will not open for daytime uses of the PAC before 9:00 AM, and events will not end between 4:00 PM and 6:00 PM.



14. On weekdays, doors will open for evening events no earlier than 6:30 PM, and on weekends and holidays, no earlier than 6:00 PM. All evening events shall terminate by no later than 2:00 AM.
15. The Permittee shall apply and maintain water and/or other agents approved by the Watershed Management Division in the Project's Erosion Prevention and Control Plan on all roadways or disturbed areas within the Project during construction and until pavement and/or vegetation is fully established to control dust.
16. Immediately upon initial roadway clearing (grading or excavation), a stabilized construction entrance must be installed and maintained as shown on Sheet C1.2 (Exhibit #033) along Queen City Park Road. At a minimum, this entrance must be constructed and maintained in accordance with the specifications as described in the Vermont Department of Environmental Conservation's *Low Risk Site Handbook for Erosion Prevention and Sediment Control* (February 2020). No further clearing or construction may occur until the stabilized construction entrance is complete.
17. The building approved herein is not approved for the on-site disposal of any process wastes. The Permittee shall apply and receive amended approval from the District Commission for any change in the use of the buildings which involves the storage or handling of any regulated substances or the generation of hazardous wastes.
18. No floor drains shall be installed without first obtaining a permit or submitting other necessary documentation, as required by the Vermont Department of Environmental Conservation.
19. The Permittee and all subsequent owners or lessees shall install and maintain only low-flow plumbing fixtures in any buildings. Any failed water conservation measures shall be promptly replaced with products of equal or better performance.
20. The Permittee shall be obligated to implement the Construction Site Waste Reduction Plan approved by the Agency of Natural Resources Solid Waste Management Program and included as Exhibit #013a.
21. The Permittee shall comply with Exhibits #001b, 033, and 048 for erosion prevention and sediment control. The Permittee shall prevent the transport of any sediment beyond that area necessary for construction approved herein. All erosion prevention and sediment control devices shall be periodically cleaned, replaced, and maintained until vegetation is permanently established on all slopes and disturbed areas.
22. All mulch, siltation dams, water bars and other temporary devices shall be installed immediately upon grading and shall be maintained until all roads are permanently surfaced and all permanent vegetation is established on all slopes and disturbed areas. Topsoil stockpiles shall have the exposed earth completely mulched and have siltation checks around the base.

23. All areas of disturbance must have temporary or permanent stabilization within 14 days of the initial disturbance. After this time, any disturbance in the area must be stabilized at the end of each workday. The following exceptions apply: i) Stabilization is not required if work is to continue in the area within the next 24 hours and there is no precipitation forecast for the next 24 hours. ii) Stabilization is not required if the work is occurring in a self-contained excavation (i.e., no outlet) with a depth of 2 feet or greater (e.g., house foundation excavation, utility trenches).
24. All disturbed areas of the site shall be stabilized, seeded, and mulched immediately upon completion of final grading. All disturbed areas not involved in winter construction shall be mulched and seeded before October 15. Between the periods of October 15 to April 15, all earth disturbing work shall conform with the "Requirements for Winter Construction" standards and specifications of the Vermont Department of Environmental Conservation's *Low Risk Site Handbook for Erosion Prevention and Sediment Control* (February 2020).
25. In addition to conformance with all erosion prevention and sediment control conditions, the Permittee shall not cause, permit, or allow the discharge of waste material into any surface waters. Compliance with the requirements of this condition does not absolve the Permittee from compliance with 10 V.S.A. (§§ 1250-1284) Chapter 47, Vermont's Water Pollution Control Law.
26. The Permittee shall maintain an undisturbed, naturally vegetated Class II wetland and 50-foot wetland buffer zone on the Project Tract, with the exception of those pre-existing disturbances as depicted on Exhibit #032a. The term "undisturbed" means that there shall be no activities that may cause or contribute to ground or vegetation disturbance or soil compaction, including but not limited to construction, earth-moving activities, storage of materials, tree trimming or canopy removal, tree, shrub or groundcover removal; plowing or disposal of snow, grazing or mowing.
27. The Permittee shall consistently implement and comply with the Operational Management Plan (Exhibit #010a).
28. When any PAC event attracts over 1,200 attendees, the Permittee shall provide shuttle service to the UVM and Champlain College Campuses and downtown Burlington as described in Exhibit #155, unless comparable shuttle or bus service is provided directly by area college(s) and/or transit provider(s).
29. The Permittee shall pay a proportional transportation impact fee toward the Champlain Parkway project pursuant to Act 145 – Transportation Impact Fees (2014). The transportation impact fee for the Champlain Parkway project is \$2,069 per PM peak hour trip. The Applicant is afforded a 5% reduction in transportation impact fee as a result of the proposed traffic demand management (TDM) efforts consisting of the construction of carpool parking spaces that will encourage the use of ride sharing. The transportation

fee is calculated as follows: \$2,069/PM peak hour trip × 44 trips × 95%. The Permittee shall pay a total transportation impact fee of **\$86,484** to the Vermont Agency of Transportation before commencement of construction (payment should be remitted to the Vermont Agency of Transportation Development Review and Permitting Services Section, Barre City Place, 219 North Main Street, Barre, VT 05641, Attn: Christopher Clow).

30. Prior to operation of the PAC, and until at least such time as a permanent bicycle and pedestrian sidewalk or side path is constructed along the length of Queen City Park Road, the Permittee shall install, or cause to be installed, two crosswalks across Queen City Park Road with user-activated Rectangular Rapid Flashing Beacon (RRFB) warning signs in the following approximate locations: near the intersection of Central Avenue and Queen City Park Road, and near the northernmost driveway entrance to the Burton property across from the Green Mountain Transit facility.
31. Any extracted stumps shall be disposed of on-site above the seasonal high water table and not in any wetland, or at a state-certified stump and inert waste disposal facility, so as to prevent groundwater pollution.
32. The Permittee and all assigns and successors in interest shall continually maintain the landscaping as approved in Exhibits #028 and 029 by replacing any dead or diseased plantings within the season or as soon as possible after the ground thaws, whichever is sooner.
33. Prior to any site work, the Permittee shall install and maintain temporary fencing around trees to be retained as depicted on Exhibit #028.
34. Breakout concert sound from of the building shall be mitigated by constructing the building to meet the acoustical performance standard outlined in Condition 35. Mitigation measures should be designed with due regard to the varying attenuation of breakout sound by frequency, as described in Section 5.3 of the Noise Assessment. At minimum, mitigation measures shall include the following:
  - a. Drywall shall be added to the underside of the existing steel trusses;
  - b. Framing, insulation, and 5/8" type X drywall shall be added to the interior side of the southern wall;
  - c. The main entrance and the exit to the outdoor lounge area shall have double sets of doors that act as a sound lock; and
  - d. A sound attenuation barrier no less than 8 feet in height shall be installed along the south and west sides of the outdoor lounge, enclosing the area.
35. Noise from the Project shall not exceed 60 dBA (LFmax) measured facing the PAC within one meter of the exterior wall of any residential structure. The noise meter shall be set to the "fast" setting.

36. The Permittee's Conditional Use approval from the City of Burlington requires the Permittee to conduct an operational noise assessment of three full-capacity events within the first six months of operation to determine whether additional sound mitigation is needed. The Permittee must report its findings to the Burlington DRB and provide a copy of this report to the District 4 Commission at that time.
37. The Permittee's Conditional Use approval from the City of Burlington requires the Permittee to conduct a traffic assessment within the first six months of PAC operation to determine whether the proposed traffic mitigation measures outlined in the OMP should be increased or decreased. The Permittee must provide its assessment to the Burlington DRB and provide a copy of this assessment to the District 4 Commission at that time.
38. The installation of exterior light fixtures is limited to those approved in Exhibit #031, and shall be mounted no higher than 18 feet above grade level. All exterior lighting shall be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view beyond the perimeter of the area to be illuminated.
39. The Permittee shall not erect exterior signage without prior written approval from the District Coordinator or the Commission, whichever is appropriate under the Act 250 Rules. Signage includes banners, flags, and other advertising displays, excepting temporary real estate marketing signs and temporary Grand Opening signs.
40. Pursuant to 30 V.S.A. § 53, the energy design and construction shall comply with Vermont's Commercial Building Energy Standards (CBES) in accordance with the NRB Criterion 9(F) Procedure effective at the time of construction.
41. The installation and/or use of electric resistance space heat is specifically prohibited unless (i) it is approved in writing by the District Commission and/or (ii) it specifically qualifies as an exception to the prohibition of electric-resistance building heating, pursuant to Section C403.2.3 of the 2020 Vermont Commercial Building Energy Standards.
42. The Permittee, upon completion of the construction of each commercial building and prior to use or occupancy, shall submit to the District Commission a copy of the certification submitted to the Public Service Department as described under 30 V.S.A. § 53(d).
43. Should the City of Burlington ("City") at any time agree to accept any private utilities being then operated by the Permittee and/or its assigns and successors in interest, the Permittee and/or its assigns and successors in interest shall be responsible to improve the same to City specifications and shall deed all lands involved with said improvements to the City. Such improvements may require a land use permit amendment.

44. The Permittee shall provide each prospective purchaser of any interest in this Project a copy of the Land Use Permit Amendment and the Findings of Fact before any written contract of sale is entered into.
45. Pursuant to 10 V.S.A. § 6090(b)(1), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein. Notwithstanding any other provision herein, this permit shall expire three years from the date of issuance if the Permittee has not commenced construction and made substantial progress toward completion within the three-year period in accordance with 10 V.S.A. § 6091(b).
46. All site work and construction (of roadways and utilities) shall be completed in accordance with the approved plans by **October 15, 2024**, unless an extension of this date is approved in writing by the Commission. Such requests to extend must be filed prior to the deadline and approval may be granted without a public hearing.
47. The Permittee shall file a Certificate of Actual Construction Costs, on forms available from the Natural Resources Board, pursuant to 10 V.S.A. § 6083a(g) within one month after construction has been substantially completed. If actual construction costs exceed the original estimate, a supplemental fee based on actual construction costs must be paid at the time of certification in accordance with the fee schedule in effect at the time of application. Upon request, the Permittee shall provide all documents or other information necessary to substantiate the certification. Pursuant to law, failure to file the certification or pay any supplemental fee due constitutes grounds for permit revocation. The certificate of actual construction costs and any supplemental fee (by check payable to the "State of Vermont") shall be mailed to: Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201; Attention: Certification.
48. Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated at Essex Junction, Vermont, this 3<sup>rd</sup> day of March, 2022.

By /s/Thomas A. Little  
Thomas A. Little, Chair  
District 4 Commission

Members participating in this decision:

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Pamela Loranger

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# FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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**LAWS/REGULATIONS INVOLVED**

10 V.S.A. §§ 6001 - 6111 (Act 250)

## I. INTRODUCTION

On November 13, 2020, The Burton Corporation, 180 Queen City Park Road, Burlington, VT 05401 (the "Applicant"), submitted application number 4C0174-6,4C0368-3 (the "Application") for a project generally described as redevelopment of an existing 83,000-square foot manufacturing building into a mixed-use facility, including a performing arts center, and associated parking improvements. The two involved tracts of land consist of 15.6 acres. The Applicant's legal interest is ownership in fee simple described in deeds recorded on July 27, 2007, in Book 1006, Page 496, and on August 17, 2011, in Book 1145, Page 616, of the land records of the City of Burlington, Vermont. The project is located at 180 and 266 Queen City Park Road in Burlington, Vermont (the "Project").

The Application was determined to be incomplete under Act 250 Rule 10(D) for reasons stated in a letter from the District Coordinator to the Applicant dated November 23, 2020. The Application was resubmitted with the required supplemental information on December 2, 2020, and deemed complete on December 3, 2020.

The Commission convened a prehearing conference for the Application on January 13, 2021, for the purpose of identifying contested facts and legal issues, discussing party status, and discussing a hearing schedule. Pursuant to Executive Order 01-20 and associated Addenda and Directives issued by Governor Phil Scott based upon the coronavirus (COVID-19) emergency, and as authorized under Act 92 (2020), and with the consent of the parties, this prehearing conference was conducted remotely via the Microsoft Teams video conferencing software. The prehearing conference was conducted pursuant to Act 250 Rule 16, with Chair Thomas A. Little presiding. Just prior to the prehearing conference, a site visit was held at the project site. At the site visit, the Applicant's representatives gave a brief overview of the Project and led a walk around the building at 266 Queen City Park Road, stopping at various places to point out

features of the land and the Project. The site walk also went to and across the single-lane, two-way bridge spanning the Vermont Railway tracks at the southeasterly corner of the Project site. The site walk enabled the Commission to view neighboring properties (in Burlington and in South Burlington) from a reasonable distance.

The Commission held a hearing on the Application on March 10, 2021. For the reasons previously given, this hearing was also conducted remotely via the Microsoft Teams video conferencing software. Pursuant to Act 250 Rule 13(B), the Commission recessed the hearing pending submittal of additional information. The Commission issued Hearing Recess Orders on March 26, 2021 and May 20, 2021, requesting supplemental information. On July 6, 2021, the Commission issued a Third Order to continue the hearing recess, and to schedule a supplemental hearing, pending submittal of additional supplemental information by the Parties. On August 25, 2021, the Commission issued a Fourth Order concerning prefiled testimony. On September 30, 2021, the Commission re-convened the recessed hearing. Pursuant to Act 250 Rule 13(B), the Commission recessed the hearing pending submittal of additional information.

On October 29, 2021, the Applicant and a group of neighboring residents, represented by James Dumont, Esq. (the “Neighbors”) submitted supplemental proposed findings of fact, conclusions of law, and permit conditions in response to the Commission’s Fifth Hearing Recess Order. On November 5, 2021, the Applicant filed a memorandum in response to the Neighbors’ October 29, 2021, filing, stating its opposition to the Neighbors’ revised proposed conditions. On November 12, 2021, the Neighbors filed a motion to strike the Applicant’s November 5, 2021, filing. On November 16, 2021, the Applicant filed a response to the Neighbors’ November 12, 2021, filing, encouraging the Commission to deny the Neighbors’ November 12, 2021, motion to strike, arguing that the Neighbors’ proposed conditions introduced a significant new issue into this proceeding, and that proper administrative process under the Vermont Administrative Procedures Act requires that Burton have an opportunity to respond and present argument “on all issues involved.” 3 V.S.A. § 809 (c).

While the Commission did not invite follow-up memos after the Parties’ submissions of supplemental findings of fact and conclusions of law, it did not forbid them. The Commission agrees that an applicant should have an opportunity to respond to distinctly new issues raised in a filing by an opposing party. As is its practice, the Commission will consider and give each memo and accompanying materials filed after October 29, 2021, such weight as it merits. We note that the advocacy of both sides has been energetic and thorough.

The Commission adjourned the hearing on December 21, 2021, after receipt of the additional information, an opportunity for parties to respond to that information, and the completion of Commission deliberations.



In a timely filed Motion to Alter dated January 20, 2022, the Application opponents represented by Attorney James A. Dumont (the “Neighbors”) requested that the Commission reconsider portions of the Order and the Permit. The Applicant filed its Memorandum in Opposition to that Motion on January 28, 2022.

On February 22, 2022, the Commission denied the Neighbors’ Motion and affirmed its decision to approve the project. However, the Commission agreed to alter its decision to incorporate changes to Condition #28.

As set forth below, the Commission finds that the Project complies with 10 V.S.A § 6086(a) (Act 250).

## **II. JURISDICTION**

Jurisdiction attaches because the Project is a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rule 34.

## **III. OFFICIAL NOTICE**

Under 3 V.S.A. § 810(4) of the Administrative Procedure Act (“APA”), notice may be taken of judicially cognizable facts in contested cases. See 10 V.S.A § 6007(c) and 3 V.S.A. § 801(b)(2). This is a contested case. Under § 810(1) of the APA, “[t]he rules of evidence as applied in civil cases . . . shall be followed” in contested cases. Under the Vermont Rules of Evidence, “(a) judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” V.R.E. 201(b); See *In re: Handy*, 144 Vt.601, 613 (1984).

The Commission may take official notice of judicially cognizable facts whether requested or not, and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Commission may make findings of fact based on matters officially noticed. A party is entitled, upon timely request, to an opportunity to be heard on the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Accordingly, official notice is hereby taken of the following documents, subject to the filing of an objection on or before 30 days from the date of this decision, pursuant to Act 250 Rule 6:

- planBTV: South End, Adopted March 2019, Prepared for the City of Burlington by Goody Clancy, Civic Moxie, and Dubois & King.
- 2018 Chittenden County ECOS Plan, Adopted 6/20/2018 by the Chittenden County Regional Planning Commission and the Greater Burlington Industrial Corporation.
- The Burlington Noise Control Ordinance (§ 21-13).

#### **IV. AMENDMENT APPLICATION - RULE 34(E)**

The threshold question on an amendment application is “whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.” Act 250 Rule 34(E)(1).

In this Application, the Applicant does not seek to amend such a critical permit condition, so the Commission may consider the merits of the Application without conducting the rest of the Rule 34(E) analysis.

#### **V. PARTY STATUS AND FRIENDS OF THE COMMISSION**

##### **A. Parties by Right**

Parties by right to the Application pursuant to 10 V.S.A § 6085(c)(1)(A)-(D) and who attended the hearing are:

1. The **Applicant**, by John Caulo of LandPlan; Justin Worthley, Mike Fialko-Casey, and Eric Bergstrom of The Burton Corporation (“Burton”); Alex Crothers, Alan Newman, and Mark Balderston of Higher Ground; Kurt Muller, PE and Jennifer Conley, PE, PTOE of VHB; Eddie Duncan of RSG; Brian Dunkiel, Jonathan Rose, and Malachi Brennan of Dunkiel Saunders Elliott Raubvogel & Hand PLLC; and Tyler Barnard, EI, and Paul Boisvert, PE of Engineering Ventures.
2. The **City of Burlington**, by Kimberlee J. Sturtevant, Esq., Assistant City Attorney, and Susan Molzon, Senior Public Works Engineer.
3. The **City of South Burlington**, by Meaghan Emery, Vice-Chair of the South Burlington City Council, and the Council’s attorney, Andrew Bolduc, Esq. of McNeil Leddy & Sheahan, P.C.
4. **South Burlington Fire District #1**, by Sharon Behar, Steve Cafilisch, and Stephen Crowley, Assistant Operator.
5. The **Chittenden County Regional Planning Commission** did not attend the hearing, but Executive Director Charlie Baker submitted comments (Exhibit #068).
6. The **Vermont Agency of Transportation**, by Christopher Clow, PE.
7. The **Vermont Agency of Natural Resources**, by Jennifer Mojo, Senior Planner.

##### **B. Interested Parties**

Any person who has a particularized interest protected by Act 250 that may be affected by an act or decision of the Commission is also entitled to party status. 10 V.S.A § 6085(c)(1)(E).

##### **i. Preliminary Party Status Determinations**

Pursuant to Act 250 Rule 14(E), the District Commission made preliminary determinations concerning party status at the commencement of the hearing on the Application. The following persons requested party status pursuant to 10 V.S.A § 6085(c)(1)(E), and were either admitted as parties or denied party status, as indicated below:

8. **Lawrence (Laurie) Smith and Laura Waters** (50 Central Avenue, South Burlington, VT 05403), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).
9. **Michael Turner** (110 Central Avenue, South Burlington, VT 05403), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).
10. **Luc Logan** (39 Central Avenue, South Burlington, VT 05403), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).
11. **Diane de Terra** (39 Central Avenue, South Burlington, VT 05403), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).

12. **Doug Goodman** (66 Central Avenue, South Burlington, VT 05403; 364 Queen City Park Road, Burlington, VT 05401), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).
13. **Almy Landauer** (161 Austin Drive, Unit 139, Burlington, VT 05401), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas), 8(A) (Necessary Wildlife Habitat & Endangered Species), and 1(A) Headwaters.
14. **Wendy Bratt** (52 Central Avenue, South Burlington, VT 05403), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), and 9(K) (Public Investments); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas), 8(A) (Necessary Wildlife Habitat & Endangered Species), and 10 (Local & Regional Plans).
15. **Sharon O'Neill** (20 Arthur Court, Burlington, VT 05401), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).
16. **Dana Walrath** (42 Central Avenue, South Burlington, VT 05403), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 5(B) (Alternative

- Transportation), 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).
17. **Stephanie Herrick** (161 Austin Drive, Unit 151, Burlington, VT 05401), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 5(A) (Traffic), and 8 (Aesthetics); preliminarily denied party status under Criteria 1(A) Headwaters, 1(B) (Waste Disposal), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas), 8(A) (Necessary Wildlife Habitat & Endangered Species), 9(K) (Public Investments), and 10 (Local & Regional Plans).
  18. **Janice Ellis** (161 Austin Drive, #83, Burlington, VT 05401), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas), 8(A) (Necessary Wildlife Habitat & Endangered Species), and 1(A) Headwaters.
  19. **Wendy Copp** (11 Maple Ave, South Burlington, VT 05403), by James A. Dumont, Esq., Robert W. Rand, ASA, INCE (Member Emeritus); Gregory C. Tocci, P.E.; and Michael Santos, PE, PTOE: Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).
  20. **Kerry Anderson** (3 Maple Ave, South Burlington, VT 05403): Preliminarily granted party status under Criteria 1 (Air Pollution), 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).
  21. **Sabrinajoy Milbury** (8 Maple Ave, South Burlington, VT 05403): Preliminarily granted party status under Criteria 1(B) (Waste Disposal), 5(A) (Traffic), 5(B) (Alternative Transportation), 7 (Cost of Local Government Services), 8 (Aesthetics), 9(K) (Public Investments), and 10 (Local & Regional Plans); preliminarily denied

party status under Criteria 8 (Scenic or Natural Beauty, Historic Sites and Rare & Irreplaceable Natural Areas) and 8(A) (Necessary Wildlife Habitat & Endangered Species).

ii. Final Party Status Determinations

Prior to the close of the hearings, the District Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A § 6086(c)(6) and Act 250 Rule 14(E) and found no reason to change its preliminary determinations.

**VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Applicant has met the burden of proving compliance with the following criteria through submittal of the Application:

- |                                              |                                       |
|----------------------------------------------|---------------------------------------|
| 1 – Water Pollution                          | 9(B) – Primary Agricultural Soils     |
| 1(A) - Headwaters                            | 9(C) - Productive Forest Soils        |
| 1(C) - Water Conservation                    | 9(D) - Earth Resources                |
| 2 - Water Supply                             | 9(E) - Extraction of Earth Resources  |
| 4 - Soil Erosion                             | 9(F) - Energy Conservation            |
| 6 - Educational Services                     | 9(G) - Private Utility Services       |
| 8 – Natural Areas                            | 9(H) - Costs of Scattered Development |
| 8 – Historic Sites                           | 9(J) - Public Utility Services        |
| 8(A) - Wildlife Habitat & Endangered Species | 9(L) – Settlement Patterns            |
| 9(A) - Impact of Growth                      |                                       |

Therefore, the Application shall serve as the Findings of Fact on these criteria.

The findings of fact are based on the Application, Exhibits #001 - 179, and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear, and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

Under Act 250, projects are reviewed for compliance with the 10 criteria of Act 250, 10 V.S.A § 6086(a)(1)-(10). Before granting a permit, the District Commission must find that the Project complies with these criteria and, therefore, is not detrimental to the public health, safety or general welfare. The burden of proof under Criteria 1 through 4 and 9 and 10 is on the Applicant, and the burden is on the opponent under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.

**Criterion 1 - Air Pollution:**

### Findings of Fact and Conditions

1. All commercial or industrial construction in the Project will have high efficiency heating, ventilation and air conditioning equipment in accordance with the recommendations of the Vermont Department of Public Service and the current version of the Vermont Guidelines for Energy Efficient Commercial Construction. Exhibit #001b.
2. Construction hours shall be limited to 7:00 AM to 5:30 PM Monday through Friday; and 8:00 AM to 4:30 PM Saturday. Exhibit #001b.
3. The maximum range of normal weekday evening operating hours for the Project's performing arts center shall be 6:30 PM – 2:00 AM. The performing arts center will open not more than one hour prior to the published start time of each scheduled event. The Applicant has clarified that this means that doors will open at 6:30 PM or later for weekday events (or 6:00 PM or later on holidays or weekend evenings). Exhibit #008.
4. The existing commercial buildings, which the Project will make use of, are currently heated and cooled with a combination of natural gas-fired and electric HVAC equipment. The performing arts center ("PAC") in the 266 Property building will use the same type of HVAC equipment, including new roof-top mounted units. Exhibit #001b at 10.
5. The Project is located within Burlington's Enterprise-Light Manufacturing (E-LM) zoning district, which is intended primarily for manufacturing, processing, distribution and other similar, non-residential uses, though the district also allows commercial uses to support a wide range of services and employment opportunities. Exhibit #001b.
6. The Project does not require blasting, either for construction or use. Exhibit #001b.
7. RSG, Inc. prepared a Noise Assessment for the proposed PAC use on November 4, 2020 (the "Noise Assessment"), and supplemental memoranda on February 25, 2021, and April 14, 2021. Exhibits #001b, 009, 085, 146, and 162.
8. RSG quantified background sound levels on several occasions throughout the Project area on past projects. In June of 2017, RSG conducted background sound monitoring at the property line of a residence along Queen City Park Road in Burlington. In June and July of 2010, RSG conducted background sound monitoring near the property line of a residence along Maple Avenue in South Burlington. Exhibit #009.
9. Background sound levels (Leq) in the Project area during the day (the "day," for purposes of these Findings of Fact, Conclusions of Law and Order, covers the hours

- of 7:00 AM to 10:00 PM) are generally between 47 and 52 dBA. During the quietest day times, the sound levels can be down in the upper 30s dBA. The primary sources of noise during the day are local and distant traffic, aircraft flyovers, and equipment at the surrounding industrial, utility, and transportation facilities. Exhibit #009.
10. Background sound levels (Leq) at night (the “night,” for purposes of this decision, covers the hours of 10:00 PM to 7:00 AM) are generally between 40 and 45 dBA. During the quietest times at night, sound levels currently can be in the low 30s dBA. The primary sources of noise during the night are similar to the daytime sources (distant traffic and mechanical/electrical equipment at surrounding properties) but are at lower levels than during the day due to less traffic on roads and less equipment that is in use at night. Exhibit #009.
  11. Several manufacturers located near the Project site run night shifts. Exhibit #159a.
  12. Existing maximum background sound levels (Lmax) during both the day and night (as defined in Items 9 and 10, above) are higher than measured average (Leq) levels. Background sound levels are generally 50-70 dBA (Lmax) during the day and between 35 and 55 dBA (Lmax) at night, although there are some maximum sound levels between 60 and 70 dBA (Lmax) at night. Exhibit #009.
  13. RSG modeled anticipated sound propagation throughout the area surrounding the Project using the International Standards Organization ISO 9613-2 standard, “Acoustics – Attenuation of sound during propagation outdoors, Part 2: General Method of Calculation,” as implemented in the CadnaA acoustical modeling software. Exhibit #009.
  14. RSG modeled sound levels resulting from the proposed Project at 192 nearby residences based on Vermont E911 data. Exhibit #009.
  15. The Noise Assessment and RSG’s Responses to the Second and Third Hearing Recess Orders took into account anticipated noise associated with interior concert events; associated exterior noise, including new and existing rooftop mechanical equipment and voices in the outdoor lounge area; and the post-concert exit of vehicles from the parking lot. Exhibits #001b, 009, 159a and 162.
  16. The primary interior noise source for the PAC is amplified music, the type and level of which will vary from concert to concert. Exhibit #009.
  17. To represent a loud concert for its Noise Assessment, RSG conducted sound level monitoring at Higher Ground’s existing facility in South Burlington during a “hard rock” concert on August 17, 2019. The concert was selected in consultation with



- Higher Ground to ensure that it would be representative of an event that produces high sound levels compared to other events that are held by the venue. Most other genres are expected to produce lower sound levels than those of a hard rock concert. Exhibit #009.
18. The monitored representative concert produced a moderately consistent sound level (Leq) of 99 dBA in the "diffuse field" measured within the interior of the performance space, with the quietest 10% (L90) of music at 95 dBA and the loudest 10% (L10) of music at 101 dBA. Exhibit #009.
  19. During brief periods, the monitored interior sound level exceeded 99 dBA, with a one-second Lmax value over the course of the evening of 106 dBA. Exhibit #009.
  20. The 99 dBA (Leq) value is representative of the effect of the diffuse field (where the sound pressure is nearly the same around the room, except near the sound source) that would impinge on the building envelope while music is being played, and was therefore used to model "breakout noise," i.e., noise that is not wholly contained within the structure. The Noise Assessment also takes into account interior sound propagating from adjacent interior spaces such as backstage and the lobby. RSG also provided analysis using the one-second Lmax value of 106 dBA. Exhibit #009.
  21. To evaluate "120 dBA concert peak sounds"—a generalized value of how loud a typical hard rock concert can get—RSG modeled how sound propagated within the concert venue and then through the building's structure to the outdoor environment (known as "breakout sound"). Exhibits #009 and 159a.
  22. The breakout sound of the facility is primarily a function of the diffuse field sound level, which represents the sound filling the inside of the venue away from the speaker focus area. RSG determined that a sound level of 120 dBA measured 5 feet from the speakers would result in a diffuse sound field of 106 dBA (Lmax). Exhibit #159a.
  23. A diffuse field sound level of 106 dBA (Lmax) is the same as the maximum level observed during RSG's sound monitoring conducted during a loud hard rock concert at the existing Higher Ground location; this value was previously modeled in the Noise Assessment for Lmax concert breakout sound. Exhibits #009 and 159a.
  24. RSG also modeled a number of exterior sound sources. On the rooftop of the 266 Queen City Park Property building, eight new air-handling units supplying the PAC concert venue and food services area will supplement 11 existing air-handling units, five new hood exhaust fans, and five new hood intake fans. RSG modeled the sound

- emissions of this rooftop mechanical equipment based on manufacturer data. Exhibit #009.
25. RSG modeled the use of the outdoor lounge area based on 50 loud male voices speaking simultaneously, representing approximately 100 people socializing in the lounge area. Exhibit #009.
  26. The contribution of the outdoor lounge conversational noise to ultimate sound pressures at the closest receiving residences is 8 dBA out of a total 42 dBA. Exhibit #009.
  27. Because decibel levels are logarithmic, this value (8 dBA) represents a *de minimis* contribution, and any variance in the realized sound from the outdoor lounge is unlikely to impact the total sound level. Duncan Hearing Testimony (3/10/21).
  28. RSG modeled the sound associated with vehicles entering or exiting the parking lot under two scenarios: 100 vehicles accessing the lot while a concert was underway, and 500 vehicles—approximately a full lot capacity from a sold-out show— exiting the parking lot at the end of the show. Exhibit #009.
  29. The Noise Assessment model also includes sound mitigation measures that attenuate the interior sound sources. Exhibit #009.
  30. The two acoustically weakest areas of the building shell on the 266 Property require mitigation. These are the ceiling-roof assembly and portions of the southern exterior walls that are solely metal siding. Exhibit #146.
  31. Breakout concert sound through these two acoustically weak portions of the building can be mitigated by a permit condition specifying an acoustical performance standard that the final building construction must meet. The condition will reflect that attenuation of breakout sound in the performance standard varies by frequency, as described in Section 5.3 of the Noise Assessment. Exhibits #009 and 146.
  32. The performance standard for the exterior wall can be met using standard construction materials and methods by framing up an interior wall with insulation and 5/8-inch Type X sheetrock. Exhibit #146.
  33. Additional mitigation conditions will include double sets of doors at the main entrance and at the exit to the outdoor lounge area that act as a sound “lock” to prevent the sound of music traveling outside through an open door. In addition, a sound-dampening barrier will be installed along the south and west sides of the outdoor lounge enclosing that area. The design proposed in the Application is 10

- feet high, with the top two feet being open metal slats, making an effective 8-foot-high sound attenuation barrier. Exhibit #009.
34. The Applicant's first Noise Assessment modeled sound pressures experienced at 192 nearby residences under two scenarios: an ongoing hard rock concert with all rooftop mechanical equipment (including HVAC) running at full capacity and 100 cars driving in the parking lot, and an end-of-show scenario with 500 cars leaving a sold-out performance and all rooftop mechanical equipment running at full capacity. In both scenarios, RSG reports the sound pressure values as one-hour averages. Exhibit #009.
  35. The acoustic power emitted by vehicles driving through the parking lot was modeled based on the FHWA Reference Energy Mean Emission Level for automobiles cruising at 15 mph. These were modeled as distributed throughout the parking area as an area source. Exhibits #009 and 159a.
  36. The South Burlington Zoning Regulations use a Leq (1-hour) sound measurement standard for measuring and regulating the creation of noise. Exhibit #009.
  37. The rooftop mechanical equipment produces steady sound levels over time and is the loudest expected source of sound from the Project under either of RSG's operating scenarios modeled in its first Noise Assessment. Because this sound source fluctuates little, Leq values for the Project are nearly equivalent to the Lmax values. Exhibit #009.
  38. The Leq sound level experienced at the closest residence (20 Arthur Court) during the concert scenario was modeled at 42 dBA, comprised of the following component parts: rooftop mechanical equipment, 41 dBA; Vehicles, 34 dBA; Music, 32 dBA; Outdoor Lounge, 8 dBA. Exhibit #009.
  39. The sound level experienced at that same residence during the end-of-concert scenario was modeled at 44 dBA, with the vehicles exiting the parking lot. Exhibit #009.
  40. For all other residences beyond Arthur Court, the modeled noise levels fall below 40 dBA. Exhibit #009.
  41. RSG's first Noise Assessment also evaluated the impact of modeling the maximum concert sound levels in addition to Leq values. Using the observed 106 dBA (Lmax) of music during the concert scenario resulted in a modeled value of 44 dBA experienced at 20 Arthur Court. Rooftop mechanical equipment remained the greatest contributor to total sound levels in that scenario as well. Exhibit #009.
  42. The World Health Organization (WHO) publishes Community Noise Guidelines to

guide environmental health authorities. World Health Organization, editors Birgitta Berglund, Thomas Lindvall, and Dietrich H. Schwela, *Guidelines for Community Noise* (2000). Exhibit #112.

43. The WHO Guidelines state that “in dwellings, the critical effects of noise are on sleep, annoyance and speech interference. To avoid sleep disturbance, indoor guideline values for bedrooms are 30 dB (LAeq) for continuous noise and 45 dB (LAm<sub>ax</sub>) for single sound events. Lower levels may be annoying, depending on the nature of the noise source. The maximum sound pressure level should be measured with the instrument set at “Fast.” Exhibit #112.
44. The WHO Community Noise Guidelines provide guidelines for sleep disturbance at night. The guideline to protect against sleep disturbance at night with an open bedroom window is 45 dBA (LAeq) (or 60 dB (LAm<sub>ax</sub>) using the fast setting) averaged over an 8-hour period, so that people may sleep with bedroom windows open. These values have been obtained by assuming that the noise reduction from outside to inside with a window partly open is 15 dB. Noise measurements are to be taken outside, at about 1 meter from facades of living spaces. Exhibits #009 and 112.
45. The WHO guideline to protect against serious annoyance is 55 dBA averaged over a 16-hour daytime period from 7 AM to 11 PM outside of a residence and to protect against moderate annoyance the WHO recommends a limit of 50 dBA averaged over a 16-hour daytime period. The WHO guideline for night (11 PM to 7 AM) is 45 dBA averaged over an 8-hour period to protect against sleep disturbance. Exhibit #009.
46. If the Hub Project meets the WHO’s nighttime limit (45 dBA averaged over an 8-hour period), it will also meet the WHO’s annoyance limits and the ANSI limits for being compatible with urban/suburban residential areas. Exhibit #009.
47. Model results indicate that all modeled receptors will experience sound levels of 45 dBA (Leq, 1-hr) or less. These projected sound levels are comparable to existing nighttime sound levels in the area and below the WHO’s nighttime noise guideline of 45 dBA Leq, 8-hr. Exhibit #009.
48. Leq is an appropriate metric for assessing the noise impact of noise sources that are steady over time, such as rooftop mechanical equipment. Exhibit #009.
49. Standards that utilize L<sub>max</sub> help to evaluate startle, particularly from sources that have rapid increases and decreases of sound that are high relative to the background. For example, trucks passing by a sensitive receptor on a remote roadway or a tailgate banging as it loosens material from the back of a dump truck. Exhibit #009.

50. When measuring or modeling maximum sound levels produced by short transient sound sources such as a car horn, a gunshot, or an engine quickly revving, fast LFmax better represents the response of the human ear. The slow LSmax would tend to underestimate the level perceived by the human ear and should not be used for short transient sounds. Exhibit #171a.
51. The sound pressure level of a car driving by, traveling 30 mph at a distance of 50 feet, is typically between 60 and 70 dBA. Exhibit #009.
52. The Applicant's noise expert, Eddie Duncan of RSG, modeled the sound of one car horn honking in the southern part of the proposed parking lot at 7, 9, 11, & 13 Arthur Court and at 364 Queen City Park Road, at 61 dBA (LFmax). Exhibit #162.
53. A group of neighboring residents, represented by James Dumont, Esq. (the "Neighbors") oppose the Project. They provided a noise expert, Gregory Tocci, who modeled the sound of one car horn honking in the northern part of the proposed parking lot at 20 Arthur Court, the nearest residence, at 64 dBA (LAFmax). Exhibit #171a.
54. With the exception of the sound of one car horn honking in the proposed parking lot, the projected sound levels are below the WHO's nighttime noise guideline to protect against sleep disturbance at all modeled receptors. Exhibits #009, 159a, 162, and 171a.

#### Conclusions of Law

Under Criterion 1, the Commission must find that the Project will not result in undue air pollution. 10 V.S.A. § 6086(a)(1). The burden of proof under Criterion 1 is on the Applicant. Air pollution can include noise, dust, and other air pollutants. *Re: Pike Industries, Inc. and Inez M. Lemieux*, Land Use Permit #5R1415-EB, FCO at 31 (Vt. Env. Bd., Jun. 7, 2005). We find, however, that the operation of this Project will not create any process emissions, dust, or smoke.

Noise may constitute undue air pollution if the impacts of the noise rise "above annoyance and aggravation to cause adverse health effects such as hearing damage." *Re: Talon Hill Gun Club' Inc. and John Swinington*, No. 9AO192-2-EB, 1995 WL 405039 at \*7 (Vt. Env. Bd., June 7, 1995). Burton's expert testimony and evidence demonstrates that noise generated by the operation of the Project falls under the World Health Organization ("WHO") threshold guidelines for both mild annoyance and sleep disturbance. Modeled values for the sound of a single car horn honking at the most impacted residence ranged from 61 dBA (LFmax) to 64 dBA (LFmax), depending upon the modeled location of the horn. This modeling exceeded the WHO sleep disturbance guideline of 60 dBA (LFmax) for non-continuous sounds by one to four decibels. This evidence shows that the Project will not result in noise pollution sufficient to cause adverse

health effects. The Commission concurs with the Applicant's observation that this particular instantaneous sound could be occurring now in any of the surrounding parking lots at businesses that employ night shifts, and furthermore, the sound of a car horn is not uncommon in parking lots constructed for any land use. The sound of a car horn honking is unpredictable in any setting, and not unique to the proposed Project. According to evidence submitted by the Applicant, the sound of a car driving by at a distance of 50 feet generates a similar noise level, and is also not uncommon in residential settings. The Commission also notes that these values (61 dBA (LFmax) to 64 dBA (LFmax)) were determined by modeling the single horn honking at the closest possible distances from the most impacted residences, and without any intervening vehicles to attenuate the sound. These facts, established by credible, uncontroverted expert testimony and taken in the aggregate, persuade the Commission that the chances of the sound of a car horn in the proposed parking lot reaching those particular noise levels at neighboring residences on a regular basis are very unlikely.

The evidence in this case demonstrates that the Project will not result in undue air pollution. The Commission concludes that this Project complies with Criterion 1 (Air Pollution).

**Criterion 1(B) - Waste Disposal:**

Findings of Fact

55. Waste generated by the Project will include construction debris, waste soil, sewage, commercial solid waste, recycling, and stormwater runoff. Exhibit #001b.
56. The Project's existing floor drains discharge to the municipal sewer system. Exhibit #001b.
57. The Project will produce a wastewater flow of 9,690 gallons per day. Exhibit #133.
58. On January 7, 2021, the ANR Department of Environmental Conservation issued Wastewater System and Potable Water Supply Permit #WW-4-2436-2 for the Project's changes to the building located at 266 Queen City Park Road. Exhibit #133.
59. On December 21, 2020, the ANR Department of Environmental Conservation issued Wastewater System and Potable Water Supply Permit #WW-4-0489-4 for the relocation of an existing sewer line on the 180 Queen City Park Road property as part of the Project. Exhibit #132.
60. The City of Burlington Department of Public Works has concluded that the City's water and wastewater facilities have sufficient capacity to handle flows associated with the Project. Exhibit #025.
61. The City of Burlington's Development Review Board has concluded that "[s]ufficient water and sewer service are available" to support the Project. Exhibit #008.
62. Although the Project will treat all stormwater on site, the Burlington Department of

- Public Works will charge Burton a fee in the amount of \$17,829.60 to offset increased wastewater flows which will remove stormwater elsewhere in the Burlington combined sewer system. This fee will be invoiced once the Project is fully permitted. Exhibit #025.
63. The Project will disturb approximately 6.6 acres of surface during construction. Exhibit #001b.
  64. During construction, the Applicant will employ erosion control measures contained in the Erosion Prevention and Sediment Control Plan including catch basin inlet protection, temporary stabilized construction entrances, permanent erosion control netting, and silt fencing downslope of disturbed soils and staging areas. Erosion control measures will be inspected weekly and within 24 hours of a significant rain event. Exhibits #001b, 033, and 048.
  65. The Applicant has obtained authorization from the State of Vermont to discharge stormwater during construction under General Permit 3-9020. Exhibit #011.
  66. Currently, the Project Site includes approximately 8.58 acres of impervious surface. After construction, the total impervious surface is expected to be reduced to approximately 8.48 acres. Exhibit #001b.
  67. The Project proposes to modernize the existing stormwater treatment system on the property in accordance with Act 64. Worthley Hearing Testimony (3/10/21).
  68. Currently, stormwater runoff from the property eventually reaches Lake Champlain with essentially no treatment. Caulo Hearing Testimony (3/10/21).
  69. The Applicant has obtained operational stormwater discharge coverage under the Vermont Agency of Natural Resources General Permit 3-9015. Exhibit #011.
  70. The Project will reconfigure existing parking areas and driveways to create space for a new gravel wetland treatment system located north of the treatment basin it will replace. Stormwater treatment for the parking area located immediately southeast of 180 Queen City Park Road will be provided in a small gravel wetland located east of the building. Exhibits #001b, 036, 037a, and 038a.
  71. To the maximum extent practical, Project-related construction debris will be recycled, and waste soil resulting from parking lot reconstruction will be exported from the Site in accordance with Vermont Department of Environmental Conservation regulations. Exhibit #001b
  72. Details of construction phase waste disposal are incorporated into a Waste Management and Prevention Division Construction Site Waste Reduction Plan. Exhibit #013a.
  73. Results from previous groundwater investigations indicate that depth to groundwater at the Project site is approximately 2 feet below ground surface (“fbgs”), and groundwater flow direction is to the northwest (Wehran, 1989). Exhibit #107.

74. The Neighbors and South Burlington Fire District #1 ("SBFD #1") have expressed concerns about the possibility that the Project will disturb contaminated soils. Those concerns arise out of (1) the Project Site's history as a contaminated site on which investigations and remediation efforts took place under the supervision of the Vermont Department of Environmental Conservation's Site Management Section ("SMS"), and (2) more recent investigations performed by the SMS under the State of Vermont's Investigation and Remediation of Contaminated Properties Rule, Environmental Protection Rules Chapter 35 (adopted July 6, 2019) (the "IRule"). Exhibits #083 and 086.
75. In 1998, a prior owner of the Project Site received a Site Management Activity Completed ("SMAC") designation from the SMS concluding that "the site does not pose any unacceptable risk to human health or the environment." Exhibit #012.
76. More recently, independent of the Act 250 review process, and pursuant to its authority under the IRule, the SMS asked the Applicant to provide a work plan to conduct further investigation of the Project Site. Exhibits #079 and 106.
77. The Applicant's consultant, VHB, produced the requested work plan on December 20, 2020. The Work Plan did not call for testing in any area to be disturbed by the Project. Caulo Hearing Testimony (3/10/21); and Exhibits #038a and #107.
78. The Applicant has committed to complete a pre-characterization of soils likely to be disturbed by the Project prior to construction. The pre-characterization process involves the sampling of soils by a qualified environmental consultant on a grid pattern across the Project Site, taking into account areas likely to be disturbed during construction. Caulo Hearing Testimony (3/10/21) and Exhibit #079.
79. At the Commission's request, the Applicant submitted a Scope of Work for Soil Pre-Characterization Sampling Prior to Parking Lot Reconstruction, prepared by VHB. Exhibit #148.
80. Exhibit #148 outlines the drilling of 49 soil borings in areas where site soils are to be disturbed during construction of the Project, a key part of the pre-characterization process. Material from each of those borings will be pre-screened for the presence of volatile organic compounds ("VOCs"). Composite samples will then be subject to testing for the presence of VOCs, semi-volatile organic compounds ("SVOCs"), polychlorinated biphenyls ("PCBs"), and a list of the following eight Resource Conservation and Recovery Act ("RCRA") metals: arsenic, barium, cadmium, chromium, lead, mercury, selenium, and silver. Exhibit #148.
81. In 1970, when the Project site was owned by a subsidiary of General Electric Corporation, a one-time 600-gallon etching solution release and treatment occurred at a location reportedly northwest of the current building located at 266 Queen City Park Road. According to official documents, the 600 gallons of etching solution was intentionally spread over ferrous aluminum sulfate in a shallow ditch, covered with



- lime, and then buried in soil (EPA, 1985; VT WMD, 1985). Lab records indicate that the composition of the etching solution was 30g/liter sodium dichromate, 3 g/liter sulfuric acid, and also contained chromium and aluminum (EPA, 1985). According to EPA (1985), the dimensions of the ditch were 30-feet long, 3-feet wide, and 5-feet deep. However, the orientation of the ditch was not described, and the location was not shown on a figure. Exhibits #104, 105, and 158.
82. The location of the etching solution release and treatment ditch was described to the EPA as “under the asphalt drive into the shipping and receiving yard at the northwest corner of the plant at the fence line surrounding the facility.” General Electric provided this information to the US EPA in 1981 on a CERCLA 103(c) Form. Exhibit #105.
  83. Plans for the proposed Project depict portions of lawn, parking, a stormwater forebay, and a stormwater detention area in the presumed location of the alleged etching solution disposal trench. Exhibits #028 and 038a.
  84. Existing application files do not conclusively confirm that the reported etching solution disposal event occurred at the Building 41 property [266 Queen City Park Road]. At the time of the alleged etching solution disposal, during normal operations, etching solution was shipped to General Electric’s then main facility at Lakeside Avenue in Burlington for treatment. It is possible that this alleged event occurred at the Lakeside Avenue facility, for which GE submitted a similar EPA CERCLA Section 103(c) notification letter. Exhibit #105.
  85. An EPA Potential Hazardous Waste Site Preliminary Assessment dated 12/31/85 states, “Potential Groundwater contamination could migrate to a municipal well.” “A municipal well owned by the S. Burlington fire district #1 is 1,050 feet from this site.” Exhibit #104.
  86. At the Commission’s request, VHB prepared a soil investigation, screening, and sampling protocol to identify if and where any impacts related to the one-time etching solution release may have occurred. This protocol is incorporated into VHB’s June 9, 2021 Supplemental Site Investigation Work Plan, which was approved by VT DEC on June 10, 2021. Exhibit #158.
  87. Based on VHB’s review of prior reports and research on etching solution, it does not appear that PCBs were used in the manufacturing of etching solution and therefore, analysis of PCBs will not be prescribed for the samples proposed to be collected in the area northwest of the building at this time. Exhibit #158.
  88. In order to evaluate for the presence of soil contamination associated with the etching solution release and treatment, soil borings will be done to collect soil samples at the location of the one-time etching solution release and disposal ditch. A total of 18 soil borings will be done in a 3’ by 6’ grid pattern with soil borings spaced approximately 15 feet apart centered at the location of the etching solution release and disposal ditch

under the asphalt drive into the shipping and receiving yard at the northwest corner of the plant at the fence line surrounding the facility. With this degree of inspection and analysis centered on the reported location of the ditch, if there was a significant release of pollutants to the environment, it should be identified in the results of the extensive soil screening and soil sampling. In the event that a potential release associated with the ditch is not detected during soil screening and sampling, a monitoring well will be installed at one of the 18 soil borings. If a significant release occurred resulting from past disposal activities in this area, the groundwater analytical results should identify it. Exhibit #158.

89. If contamination exceeding applicable residential standards is identified as a part of the pre-characterization process, VHB will report those results to the SMS and prepare a Soil Management Plan (“SMP”) that is compliant with the requirements of the IRule. Caulo Hearing Testimony (3/10/21); and Exhibits #079 and #148.

#### Conclusions of Law

Under Criterion 1(B), the applicant has the burden to demonstrate that 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 ground water or wells.” 10 V.S.A. § 6086(a)(1)(B). In general, water quality permits issued by the Agency of Natural Resources (“ANR”) create presumptions that a project complies with Criterion 1. See Act 250 Rule 19(E); see also, e.g., *In re Harvey & West 65-unit Campground Act 250 Application (Appeal of True)*, Docket No. 110-7-10 Vtec, Decision and Order at 9–10 (Nov. 9, 2011) (ANR Wastewater System and Potable Water Supply Permit creates rebuttable presumption of compliance with Criterion 1(B)). The Applicant has obtained Wastewater System and Potable Water Supply permits from ANR, as well as coverage under ANR general permits for construction and operational phase stormwater discharges. These permits create presumptions that the Project will comply with Criterion 1(B) for the areas of the Project covered by those permits. The Commission carefully considered all testimony and evidence on this point and concludes that those presumptions were not rebutted by any record evidence. We note that technical determinations made by ANR in issuing the permits are entitled to substantial deference. 10 V.S.A § 6086(d).

The Applicant has also presented evidence that construction debris and waste from construction will be disposed of in accordance with local and State regulations, and that to the maximum extent practicable, Project-related construction debris will be recycled, as described in its Waste Reduction Plan.

The Neighbors and South Burlington Fire District #1 raised concerns at the hearing and in pre-hearing filings about the fact that the Project Site was previously a contaminated site managed by the Vermont Department of Environmental Conservation (“DEC”) and about the DEC’s recent efforts to further investigate the site. There is, however, no evidence of any ongoing or

threatened release of hazardous materials at the Project Site. Site history documents indicate that historic contamination was addressed pursuant to prior DEC regulations and that areas identified by DEC for additional sampling and analysis as part of DEC's investigation will not be disturbed by Project construction.

If contaminants are ultimately located in an area likely to be disturbed by the Project, those contaminants will be reported and managed in accordance with DEC's Investigation and Remediation of Contaminated Properties Rule (the "IRule"), which is designed to protect against releases of hazardous materials.

As described above, at the Commission's request, the Applicant submitted a soil pre-characterization plan under which it will conduct extensive testing to "pre-characterize" site soils by testing them for a variety of contaminants of concern. If that screening process identifies any contamination exceeding residential screening values, the Applicant will report and manage any impacted soils in accordance with the IRule.

Thus, we find that the Applicant has satisfied its burden of demonstrating that the Project will meet all 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.

Accordingly, the Project complies with Criterion 1(B) (Waste Disposal).

### **Criteria 2 and 3 – Water Availability and Impact on Existing Water Supply:**

#### Findings of Fact

90. The current 266 Property building is permitted for a design flow of 1,350 gallons per day ("gpd") for bathrooms, drinking fountains, and cleaning purposes. Exhibit #001b.
91. The Project received Wastewater & Potable Water Supply Permit #WW-4-2436-2 from the ANR Drinking Water and Groundwater Protection Division on January 7, 2021, authorizing a design flow of 9,690 gpd to serve the Project's proposed uses. Exhibit #133.
92. The City of Burlington's water facilities have sufficient capacity to handle flows associated with the Project. Exhibit #025.
93. The Project will continue to be fully served by City of Burlington municipal and Champlain Water District systems. Exhibit #001b.
94. Because the Project is served by City of Burlington municipal system, the Project will not decrease the yield of neighboring wells. Exhibit #001b.

#### Conclusions of Law

The ANR Drinking Water and Groundwater Protection Division issued Wastewater & Potable Water Supply Permit #WW-4-2436-2 on January 7, 2021, which creates a presumption pursuant to Act 250 Rule 19 that the Project has sufficient water available for its reasonably foreseeable needs and complies with Criterion 2. No evidence was presented to rebut the presumption or challenge the technical determinations made by ANR.

Criterion 2, “water supply,” is considered in conjunction with Criterion 3, impact on “existing water suppl[ies],” which “specifically addresses whether a development will cause an unreasonable burden on neighboring water supplies.” *In re: Route 103 Quarry (J.P. Carrara and Sons, Inc.)*, 2008 VT 88 ¶ 18 (2008). The Project will receive its water from the City of Burlington municipal and Champlain Water District systems. There is no evidence of any other existing water supply that would be burdened by the Project. Burton has met its burden of showing that the Project has sufficient water available for its needs, and that the Project will not cause an unreasonable burden on an existing water supply.

The Commission concludes that there is sufficient water available to meet the reasonably foreseeable needs of this Project. The Project complies with Criterion 2.

The Project will not place an unreasonable burden on an existing water supply. The Project complies with Criterion 3.

### **Criterion 5 - Transportation:**

#### Findings of Fact

95. The Project is not located in a Transportation Improvement District (TID) established by VTrans pursuant to Act 145. If a project is not located in a TID and it has impacts on nearby transportation infrastructure, the commission may set a mitigation fee if the development will benefit from a state or municipal transportation capital project that is proposed to alleviate congestion in the area of the proposed development. 10 V.S.A. § 6105. VTrans has created a capital plan to address the transportation demands in the general area, and the Project will benefit from those transportation improvements.
  - a. The Project’s traffic impacts were assessed in a Traffic Impact Study and supplemental analyses, prepared by VHB. Exhibits #001b and 014–020.
  - b. As conditioned by the City of Burlington, the Project will result in a net increase of 74 additional vehicle trips during the evening peak hour. Exhibit #020.
  - c. The Project introduces traffic demand management (TDM) efforts with the construction of carpool parking spaces that will encourage the use of ride sharing. A reduction in transportation impact fees is permitted to account for Transportation Demand Management (TDM) programs offered by an applicant

(10 VSA § 6106 (b)(5)). VTrans recommends an additional reduction of 5% from the Act 145 fee based on this TDM strategy. Exhibit #060.

- d. The Applicant's proposed redevelopment is located close to the Champlain Parkway project that is included on the VTrans Capital Program (Project number MEGC M 5000(1)). The Applicant will pay a transportation impact fee of \$86,484 to VTrans relative to the Champlain Parkway project. Exhibit #060.
  - e. The Applicant will also pay municipal impact fees to the City of Burlington based on the square footage of the converted space. Exhibits #001b and 008.
96. The Project Site is an existing commercial development with approximately 2,350 linear feet of road frontage along Queen City Park Road ("QCPR"), a public road owned and maintained by the City of Burlington. Exhibit #001b.
  97. QCPR is a Class 2 Town Highway at the southernmost edge of Burlington, connecting Home Avenue in Burlington to the north with US-7/Shelburne Road in South Burlington to the southeast. Access to QCPR from the north is by Home Avenue and Pine Street, which connect to US-7 and downtown Burlington, respectively. Access to QCPR from the south is by the US-7 corridor and Interstate-189, which intersects with US-7 just north of the intersection with QCPR. Exhibit #014.
  98. The posted speed limit for the length of QCPR is 25 mph. Exhibit #014.
  99. According to the Burlington Department of Public Works, the 85<sup>th</sup> percentile speed on QCPR is 23 mph. Exhibit #128.
  100. South of the Project, QCPR crosses a single-lane bridge with no traffic signals. An adjacent pedestrian bridge provides for bicycle and pedestrian use of the bridge. Exhibit #014.
  101. South of the Project Site lies Central Avenue in South Burlington, which accesses the Queen City Park neighborhood. Central Avenue intersects QCPR at a three-way unsignalized intersection. Exhibit #014.
  102. There are currently six access points from Queen City Park Road onto the Project Site and its parking lots. Exhibits #001b and 032a.
  103. The proposed parking lot work reconfigures the Project Site's access points and existing parking. Exhibits #001b, 036, and 037a.
  104. The City of Burlington Department of Public Works ("DPW") has approved the Project access proposal. Exhibits #021 and 025.
  105. In preparing the TIS for the Burlington DRB, VHB worked with the Burlington DPW and produced a memo addressing traffic impacts to South Burlington incorporating input from South Burlington's DPW. Exhibits #001b and 015; and Conley Hearing Testimony (3/10/21).

106. The TIS reviewed the design, operations, and safety of the existing transportation network. Exhibits #001b and 014.
107. The TIS considers the potential impact of the proposed Champlain Parkway project that is expected to be constructed in upcoming years. The Champlain Parkway is proposed to pass near the Project area and connect Interstate 189 and US-7 to the Burlington City Center District. The TIS evaluates future conditions both with and without the Champlain Parkway constructed. Exhibit #014.
108. The TIS focuses on trip generation and traffic impacts during the morning and evening peak hours, rather than daily totals because the PAC operates its largest events in the evening when existing traffic is low. Conley Hearing Testimony (3/10/21).
109. Trip generation as a result of the PAC use was based on the existing conditions at Higher Ground's current location in South Burlington. Exhibit #014 and Conley Hearing Testimony (3/10/21).
110. The existing Higher Ground location offers a total supply of 350 parking spaces. The existing Higher Ground location is able to accommodate a show with 1,050 attendees, generating an average of one vehicle trip per three attendees. Exhibit #014.
111. At this same rate, the proposed PAC during a peak occupancy event of 1,500 attendees would generate 500 trips per show. Exhibit #014. The Commission understands the generation of 500 trips to be 500 round trips. Exhibit #152.
112. Citing the Federal Highway Administration ("FHWA") trip generation guidelines ("Managing Travel for Planned Special Events"), Michael Santos testified on behalf of several of the Neighbors that the three attendees/vehicle rate is too high. Santos Hearing Testimony (3/10/21) and Exhibit #126.
113. The FHWA guidelines provide examples of average vehicle occupancy figures, calculated based on attendance figures at professional sports games in large cities, as well as multi-day food, jazz, and craft festivals. Vehicle occupancy figures in the FHWA guidelines range from 2.15 persons per automobile for the 1997 West Virginia Honey Festival to 3.1 persons per automobile for a San Diego Padres weekend evening baseball game. Exhibit #126.
114. The FHWA guidelines state that "a vehicle occupancy factor of 2.5 persons per vehicle represents a common assumption, however for forecasting purposes, practitioners should consider a range of factors from 2.2 to 2.8 depending on local conditions." Exhibit #126.
115. The FHWA guidelines predate ride-sharing services such as Uber. Conley Hearing Testimony (3/10/21).
116. The existing Higher Ground venue is within a reasonable walking distance (under one

- mile) from the University of Vermont and several hotels, which may attract a higher percentage of non-vehicular trips when compared to the proposed location. Due to the location of the existing venue, the overall parking demand (number of parking spaces per person of venue capacity) for the existing venue may be lower than the demand at the proposed venue. Santos Testimony (3/10/21).
117. The TIS included trip generation estimates for the other existing and proposed uses of the Project Site, including office use, R&D, manufacturing, retail, warehousing, dining, and an indoor skate park. Trip generation values for these uses are based on rates published by the Institute of Transportation Engineers. Exhibit #014.
  118. VHB's calculation of total trip generation estimated that 30 percent of PAC vehicle trips would occur during the commuter peak hour, although shows are expected to begin after the peak hour. Exhibit #014.
  119. VHB estimated that the Project will result in six additional trips during the morning peak hour and 222 additional trips during the evening peak hour when a sold-out event is scheduled at the PAC. Exhibit #014.
  120. Trip distribution for the Project was also evaluated by the TIS. For the Applicant's own employees and visitors to its existing facilities, trip patterns were assigned based on existing traffic patterns. For patrons of the current Higher Ground venue, VHB analyzed credit card data from concertgoers in the year preceding the TIS to determine where trips were likely to originate from. Based on this data, VHB predicted that approximately 30 percent of vehicles attending the PAC would approach from local origins to the north, 20 percent locally from the south, and 50 percent arriving from regional origin points via Interstate 89. Exhibit #014.
  121. Routing software was used to develop these likely trip patterns. Conley Hearing Testimony (3/10/21).
  122. VHB also considered how the proposed Champlain Parkway would impact likely trip patterns. Reviewing data developed for the Parkway, VHB concluded that the Parkway was unlikely to affect local trips unless congestion was present on US-7, but that trips along I-189 from regional points would most likely utilize the Champlain Parkway to access the Project site. Exhibit #014.
  123. Based on the trip distribution, the TIS reports anticipated congestion impacts on surrounding intersections, expressed as Level of Service ("LOS"). LOS levels range from A to F, with LOS A representing generally free-flowing conditions and LOS F representing generally congested conditions. Exhibit #014.
  124. Without construction of the Champlain Parkway, all signalized intersections would continue to operate at LOS C or better, with the exception of the I-189 ramp on US-7. That intersection currently experiences LOS E during the evening peak hour. The

- Project is expected to add less than four seconds of delay to that intersection and cause a drop to LOS F. Exhibit #014.
125. If the Parkway is constructed, the traffic impact on the US Route 7 and I-189 ramp intersection would improve from LOS E to LOS C in the PM peak hour. Exhibit #014.
  126. If built, the Champlain Parkway and Home Avenue intersection would experience delays of less than 19 seconds per vehicle in the evening peak hour due to traffic associated with the PAC. Exhibit #014.
  127. With or without the presence of the Champlain Parkway, with construction of the proposed PAC, local unsignalized intersections will experience LOS C or better with the exception of the intersection of US Route 7 and QCPR northbound (which will experience LOS D) and the intersection of Home and Pine Avenues. Exhibit #014.
  128. The Home Avenue and Pine Street intersection currently operates between LOS C and LOS F during both peak hours. Without the Champlain Parkway, the Project would increase delays during the evening peak hour at this intersection. Exhibit #014.
  129. Construction of the Champlain Parkway would alleviate any current or potential issues at the Home and Pine intersection, and the intersection would operate at LOS A with construction of the proposed Project. Exhibit #014.
  130. The one-lane bridge on QCPR currently operates as a yield control unsignalized intersection with vehicles yielding in the event there is a vehicle operating in the opposing direction on the bridge. Exhibit #014.
  131. Based on anticipated traffic patterns generated by Global Positioning System mapping software and smartphone apps, vehicles are more likely to access the Project Site during the peak hour from Home Avenue, rather than across the one-lane bridge. Exhibit #014.
  132. During the late evening hours, when the PAC traffic will be exiting and GPS mapping software and smartphone apps are more likely to route traffic toward the one-lane bridge, the typical traffic volumes on the bridge will be significantly lower than during the peak hour with little to no opposing traffic, and therefore able to accommodate the expected exiting eastbound traffic. Exhibit #014.
  133. At the direction of the City of Burlington's transportation consultant (CHA), VHB simulated traffic flow across the one-lane bridge. Under current conditions, the simulated delay at the bridge was less than eight seconds. The simulated impact of PAC operation indicates that the bridge will operate with similar delays during end-of-concert conditions, adding one second of delay. Exhibit #014.
  134. The City of Burlington's transportation consultant agrees with VHB's analysis for the one-lane bridge, finding that operations in the "build" scenario will be comparable to the "no-build" conditions during the morning and afternoon peak hours, and that these



- operations will have low vehicle delays and short queues. Exhibit #018.
135. In issuing the Applicant's Conditional Use permit, the City of Burlington DRB conditioned the hours of PAC operation to avoid overlap of PAC traffic and the commuter peak periods. Exhibits #001b, 008, and 020.
  136. As conditioned by the City of Burlington's Conditional Use Permit, daytime use of the PAC is limited to 300 patrons. Doors will not open for daytime uses of the PAC before 9:00 AM, and events will not end between 4:00 PM and 6:00 PM. Exhibits #008 and 010a.
  137. As conditioned by the City of Burlington's Conditional Use Permit, evening use of the PAC is limited to 1,500 attendees. Doors will not open for evening uses of the PAC before 6:30 PM on weekdays and 6:00 PM for weekends and holidays. No events will end later than 2:00 AM. Exhibits #008 and 010a.
  138. Removing the PAC trips during peak traffic periods significantly reduces trip generation associated with the Project during the higher volume evening peak. As conditioned by the City, the Project would now result in a net increase of 74 vehicle trips over current conditions. Exhibit #020.
  139. The operational impacts on area intersections outlined in the TIS are higher than what would be experienced with the proposed Project, as the Project incorporates the Burlington DRB conditions into the PAC's Operational Management Plan ("OMP"). The OMP provides mitigation measures to address traffic concerns, based on the impacts identified in the TIS and review and feedback from Burlington DPW and its transportation consultant. Exhibits #001b, 010a, and 020.
  140. During large events exceeding 1,000 patrons, the Applicant will provide event traffic control at the intersection of Home and Pine Avenue, the intersection of Central Avenue and QCPR, and at the one-lane bridge. Exhibit #010a.
  141. The Burlington DRB Conditional Use permit also requires the Applicant to conduct a traffic assessment within the first six months of operation to determine how the OMP is addressing traffic impacts and return to the DRB if modifications to the OMP are required. Exhibit #008.
  142. In the event that the traffic mitigation measures proposed in the Application require modification, the Applicant will augment, as needed, the following additional traffic congestion and traffic safety mitigation measures: alter PAC staffing, alter event signage, modify the level of traffic officer control, or direct traffic exiting the site away from more-impacted roadways and intersections. Exhibit #147.
  143. The PAC's security staff will coordinate with the Cities of Burlington and South Burlington to ensure that applicable on-street parking rules are followed. Exhibit #010a.
  144. Prior to large events (750 patrons or more), the PAC will place a partial barrier at the end

- of Central Avenue that indicates: “Dead End - No Event Parking” (pending approval and coordination with the City of South Burlington). Exhibit #010a.
145. In 2020, the City of Burlington re-striped QCPR with “advisory” shoulders that provide a prioritized space for bicycles and pedestrians on either side of the road. The City explained that this work was recommended by the planBTV Walk Bike Master Plan as part of Burlington’s long-term bikeway network. Exhibit #128.
  146. FHWA guidance indicates that advisory shoulders are most appropriate on streets with less than 3,000 average daily vehicle trips and operating speeds below 25 mph. Exhibit #128.
  147. Based on available traffic data from 2018, the average annual daily traffic volume on QCPR is 1,390 vehicles. As noted above, construction of the Champlain Parkway project is not anticipated to impact traffic volumes on QCPR. Burlington DPW concluded that based on the available traffic data, anticipated Project trip generation, and operating speeds on QCPR, that the advisory shoulders are acceptable and appropriate for QCPR. Exhibit #128.
  148. Two Neighbors testified to personal experiences with the advisory shoulders as pedestrians or cyclists. These Neighbors recalled situations where they felt fearful traveling the advisory shoulders and where opposing two-way traffic slowed or stopped as it encountered them. Bratt Hearing Testimony (3/10/21) and Waters Hearing Testimony (3/10/21).
  149. This testimony recounted that motor vehicle traffic slowed or stopped when confronted with the advisory lane striping and pedestrians. Conley Hearing Testimony (3/10/21).
  150. There is no formalized bicycle or pedestrian infrastructure along QCPR in the immediate vicinity of the Project site, with the exception of approximately 130 feet of sidewalk and a bus transit shelter in front of GMT’s facility across the street from the northern tip of the Project parcels and approximately 400 feet of side path across the street and south of the project site from Central Avenue to a pedestrian bridge adjacent to the single-lane bridge. These two short facilities are not connected to other active transportation facilities or the broader network like the sidewalks further east along QCPR, the sidewalks to the north on Home Avenue or Austin Drive, or the bike path that runs along the proposed Champlain Parkway corridor. Exhibit #014.
  151. Mr. Santos raised concerns related to the lack of pedestrian infrastructure that will accommodate patrons of the Project site. Currently, the side path along the south side of QCPR becomes part of the traveled roadway just east of the one-lane bridge, with no defined lanes. This lack of bike lanes creates a potentially hazardous safety condition for pedestrian and bicycling patrons of the PAC, especially when leaving the venue. A marked crosswalk is also not provided to allow people to safely exit the venue, cross QCPR, and walk or bike along the side path. Santos Hearing Testimony (3/10/21).

152. The Chittenden County Regional Planning Commission (CCRPC), in cooperation with the Cities of Burlington and South Burlington, is conducting a sidewalk scoping study to improve pedestrian safety and access along QCPR. This study will inform the design, and provide a construction cost estimate, for potential pedestrian infrastructure improvements. At the time of the initial hearings in this Application, it was anticipated that CCRPC would host the first public meeting for this scoping study in July 2021, a second public meeting to review alternatives in October 2021, and would be prepared to present a final report and recommendations in January 2022. Once the study is complete, the City of Burlington will advance the preliminary and final design and construction of sidewalks subject to the availability of funding from the City's capital program, outside grants, or other private sources to contribute to the project's costs. Exhibit #143.
153. Throughout this scoping process, public input will be received, and alternatives will be analyzed to determine if a sidewalk or side path along QCPR will be pursued and whether or not a crosswalk will be installed at the QCPR and Central Avenue intersection. Exhibit #143.
154. The City of Burlington's municipal zoning requirements prescribe 375 parking spaces for the PAC use (1 space per 4 seats – 1,500 proposed maximum capacity). Exhibit #008.
155. The Applicant calculates that during PAC events with maximum attendance of 1,500, there will be demand for a total of 520 parking spaces onsite. Given the onsite parking supply of 426 spaces, net demand will exceed parking supply by 94 parking spaces. Exhibit #155.
156. According to the Applicant's calculations, 94 vehicles equate to 282 event attendees (3 attendees per vehicle). Exhibit #155.
157. There are no municipal parking lots in the area, no on-street parking on QCPR, and limited on-street parking on the residential streets surrounding the proposed venue. Exhibit #095.
158. Neighbors and the SBF #1 assert that parking is insufficient at the venue and that PAC patrons might use Central Avenue and the SBF #1 property in the Queen City Park neighborhood as overflow parking. Exhibits #090, 091, 092, 094, 095, 096, 097, 100, and Caflisch Hearing Testimony (3/10/21).
159. Central Avenue, which intersects with QCPR at the Applicant's southerly parking lot, is a narrow road with homes close to the street. Exhibits #090, 091, 092, 094, 095, 096, 097, 100, and 122.
160. Arthur Court is close to the Applicant's southerly parking lot and might be inviting to PAC patrons who cannot find a space on the lot. Exhibits #092, 098, and 121.

161. Several industrial properties exist in close proximity to the Project site that have parking lots that are likely to be vacant at night. The Applicant may seek to enter into overflow parking agreements with these neighboring properties. Conley Hearing Testimony (3/10/21).
162. No commitments have yet been secured from neighboring property owners to enter into written agreements to provide additional parking capacity during PAC events, should the Project be approved. Exhibit #155.
163. In the event that some PAC attendee parking is relocated off the Project site, that parking will be managed with a detailed operations plan that outlines when the offsite parking is used and who actively directs the attendees to the remote parking. The Applicant will work with the City of Burlington regarding any necessary signage for that use. In addition, one additional outside staff person will be needed to safely cross patrons if attendees will be parking on the opposite side of QCPR. Exhibit #155.
164. The Applicant has discussed campus shuttles with each of the area colleges, but no written agreements or arrangements have been made regarding shuttle transit and events. Exhibit #155.
165. No commitments have been obtained from public transit providers to provide bus service during PAC events, should the Project be approved. Exhibit #155.
166. The Applicant has committed to implement shuttle buses and/or remote parking when events are anticipated to have over 1,200 attendees, in order to address the 94-parking space deficit. In this scenario, the Applicant will provide shuttles to and from area colleges and downtown Burlington to accommodate up to 300 attendees. In order to accommodate this, at a minimum, the Applicant will run buses that make multiple trips and carry up to 48 passengers on each trip. Between 6:00 PM and 8:00 PM, the route from UVM, Champlain College, and/or downtown Burlington is from 7 to 10 minutes long and requires a similar time on for a return trip. Allowing five minutes on each end for boarding and alighting results in pickups every 30 minutes during that period. It is anticipated that the shuttle will continue to run during these PAC events, but with longer headway. One hour before the anticipated completion of the event, the shuttle will begin half hour headways once again. These shuttles will require reservations to ensure that each person is on the correct shuttle and that all shuttle patrons are accommodated as reserved. Exhibit #155.
167. No commitments from transit providers have been made at this time, however, the Applicant has committed to hire shuttle service for the events as described above, until service is provided by colleges and transit providers and/or until offsite parking is obtained. Exhibit #155.
168. The Applicant has not identified where cars would be parked should an event be sold out to 1,500 patrons and none of the patrons chose to use public or private shuttle

transportation. Conley Hearing Testimony (9/30/21).

169. The Project Site is currently traversed by a system of pedestrian walkways. Exhibit #001b.
170. A total of 30 bicycle parking spaces will be included in the Project, including: 10 open spaces located along the west elevation of the #266 building, adjacent to the outdoor lounge area south of the primary building entrance; and 20 covered spaces located along the west elevation of the #266 building, under the proposed building canopy directly north of the primary building entrance. All bike spaces will be a typical rack system which will allow the bicycles to be secured. Exhibit #049.
171. The Applicant will reach out to Local Motion, a nonprofit bicycle advocacy group, to collaborate on managing bike parking during large events. Exhibit #017.
172. Ten priority car-pooling spaces will be available. Exhibit #017.
173. As part of initial marketing of the PAC use, and continuing into its operational plan, the Applicant will both educate and encourage employees and patrons to use alternative transportation modes to access the Project Site. Exhibit #017.

#### Conclusions of Law

Under Criterion 5(A), the Commission must find that the Project “will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.” 10 V.S.A. § 6086(a)(5)(A). The burden of proof in Criterion 5(A) is on those opposing the Project, but in each case the applicant must provide sufficient information for the Commission to make affirmative findings. *Re: Barre Granite Quarries, LLC, William and Margaret Dyott*, Land Use Permit Application #7C1079 (Revised)- EB, Docket No. 739, FCO at 50 (Vt. Env. Bd., Dec. 8, 2000). The Commission cannot deny a project an Act 250 permit on the basis of Criterion 5, but it may impose reasonable conditions to alleviate traffic burdens. *Re: Times and Seasons, LLC and Hubert K. Benoit*, Land Use Permit Application #3W0839-2-EB (Altered), FCO at 37 (Vt. Env. Bd., Nov. 4, 2005).

Increased trip generation associated with the Project is primarily due to the PAC use, which is proposed to operate at full capacity during the evening but after the peak commuter traffic has subsided. The Burlington DRB conditioned the PAC’s operating hours to ensure that vehicles of persons attending concerts would not overlap with commuters during peak congestion periods. The Applicant’s TIS study was completed before the DRB conditions were put in place; and therefore, the TIS likely over-estimates the Project’s traffic impacts on area intersections.

One measure of traffic congestion is the Level of Service (“LOS”) at roadway intersections. As found above, the Project will not significantly impact the anticipated LOS at most intersections

and roadways surrounding the Project site. However, the unsignalized intersection of Home Avenue and Pine Street presents congestion concerns related to the proposed development. This intersection already experiences reduced service and congestion during peak commuter hours. The TIS predicts that the Project will add to delays at this intersection during the evening commuter period. However, these impacts will likely be reduced by the aforementioned restricted PAC operational hours. The TIS indicates that the construction of the proposed Champlain Parkway would alleviate traffic issues at this intersection. The Applicant will be paying a transportation impact fee of \$86,484 to the Vermont Agency of Transportation, which is designated to be used for the Champlain Parkway project. This payment will help to mitigate transportation impacts created by the Project.

The Applicant has committed to implement mitigation measures to address concerns raised by the TIS and by the parties who oppose the Project. During large PAC events, traffic control will be employed at the Home Avenue/Pine Street intersection and at the one-lane bridge south of the Project site. The Applicant will also conduct a traffic assessment within the first six months of PAC operation to determine whether the proposed traffic mitigation measures outlined in the OMP should be increased or decreased. This further assessment must be submitted to the Burlington DRB and to the Commission. In the event that the traffic assessment determines that the mitigation measures proposed in the Application require modification, the Applicant will augment, as needed, PAC staffing, altering event signage, modifying the level of traffic officer control, and directing traffic exiting the site away from more impacted roadways and intersections.

Modeling performed by VHB in coordination with the Burlington DPW indicated that average delays at the one-lane bridge during end-of-concert scenarios are anticipated to increase by one second over current conditions. Vehicles exiting a show late in the evening should encounter very little oncoming traffic. The Project's operating plan does provide for traffic control at the one-lane bridge during large events.

The Neighbors questioned whether the Project would result in unsafe conditions along QCPR for pedestrians. This analysis overlaps with Criterion 5(B), under which the Commission must find that the Project will, as appropriate, "incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services." 10 V.S.A. § 6086(a)(5)(B). These concerns arise from the City of Burlington's existing striping of advisory shoulder lanes for bicyclists and pedestrians on QCPR. Neighbors testified to uncomfortable experiences that they have had with the advisory lanes and expressed concerns that the Project will significantly increase traffic on QCPR and thus exacerbate potentially unsafe conditions associated with the advisory lanes.

This testimony described disturbances to pedestrians and bicycle traffic. The testimony

indicated that drivers stopped and slowed when approaching pedestrians—which to the Commission demonstrates that the advisory lanes were functioning as intended - to avoid unsafe conditions. Burlington DPW has stated that advisory lanes are an appropriate measure for QCPR and do not pose a safety concern.

Neighbors and SBFD #1 have raised concerns that parking at the Project Site is insufficient and that PAC patrons will travel down Central Avenue, a narrow residential street, in search of parking. Prior to large events, the Applicant will provide traffic control and a partial barrier at the intersection of Central Avenue and QCPR. It will also cooperate with the Cities of South Burlington and Burlington to enforce parking requirements and ordinances, and has agreed to assist in the installation of additional signage if requested by South Burlington.

The Project site provides in excess of the 375 parking spaces for PAC use as prescribed by Burlington's zoning ordinances. However, based on the Applicant's traffic calculations, the Commission finds that the Project site currently lacks sufficient parking for PAC events that exceed 1,200 patrons. For such events, the Applicant has committed to provide its own shuttle service to and from area colleges and downtown Burlington until such time, if ever, that service is provided by colleges and transit providers and/or until off-site parking is obtained. The Commission concurs with VTrans that the proposed shuttle service would provide a multimodal option to patrons that might otherwise drive to the Project. The Commission considers the Applicant's provision of shuttle service for large events to be an appropriate mitigation measure that a reasonable person would take, given the type, scale, and transportation impacts of the proposed development. The Commission will condition the permit to require the provision of shuttle service when PAC events are anticipated to have over 1,200 attendees, until such service is provided by others. The Commission acknowledges that the Neighbors proposed that the Commission impose a permit condition limiting PAC event ticket sales above 1,000 to persons who use public transportation. The Commission has considered that proposed condition, but has declined to place such a condition in the land use permit amendment. Such a condition would be unenforceable and vulnerable to abuse by patrons who could purchase or reserve a bus or shuttle ticket solely for the purpose of obtaining a concert ticket, and then simply drive to the venue. In addition, such a condition would exclude patrons who would prefer to bike, walk, or utilize a commercial ride-sharing service to travel to the venue.

Criterion 5(B) requires that a project, "as appropriate . . . incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services." 10 V.S.A § 6086(a)(5)(B). In determining what is appropriate for a particular project, the Commission considers whether the measure is reasonable, "given the type, scale and transportation impacts" of the proposed project. *Id.*

The Project incorporates several transportation demand management strategies that are appropriate for the scale of the proposed development. The Applicant has committed to provide a total of 30 bicycle parking spaces, including 20 covered spaces located along the west elevation of the #266 building, under the proposed building canopy. Ten priority car-pooling spaces will be available. A scoping study is now underway to inform the design of a sidewalk or side path along QCPR. The Commission has reasonable confidence that after receiving community input, the Chittenden County Regional Planning Commission, in cooperation with the City of Burlington and the City of South Burlington, will advance a proposal for the construction of a pedestrian and bicyclist-friendly sidewalk or side path subject to the availability of funding from the City of Burlington's capital program. Until such a path is constructed, however, the Commission agrees with the Neighbors and the Neighbors' traffic expert that the lack of designated bike lanes, a sidewalk, or a side path along Queen City Park Road creates a potentially hazardous safety condition for pedestrian and bicycling patrons of the PAC, especially when arriving at or leaving the venue after dark. The existing advisory lanes on Queen City Park Road may well provide adequate safety for cyclists and pedestrians during average daytime traffic flows, but the Commission is not persuaded by the Applicant's evidence that those advisory lanes will provide safe conditions for bicyclists or pedestrians during the kinds of traffic flows that are anticipated shortly before and after evening PAC performances. Furthermore, as the Neighbors' traffic expert noted, the Applicant has not proposed any marked crosswalks to allow patrons to safely exit the venue, cross Queen City Park Road, and walk or bike along existing advisory bicycle and pedestrian pathways.

For these reasons, the Commission will condition the permit to require, prior to PAC operation, the installation of crosswalks with user-activated flashing signage near the intersection of Central Ave and Queen City Park Road, and on Queen City Park Road crossing at the Green Mountain Transit bus terminal property. This infrastructure shall remain in place at least until a permanent sidewalk or side path is constructed along the length of Queen City Park Road. The required crosswalks are a reasonable safety accommodation, given the type, scale, and transportation impacts of the proposed development. As conditioned, the project will provide safe access and connections between the project tract and adjacent existing pedestrian, bicycle, and transit networks and services.

The Commission came to this finding and condition after extended and careful deliberation, and not without some initial reluctance. This specific area of Burlington was established as an industrial zone in a place that at the time was a mostly isolated area of Burlington on the South Burlington border, very likely with little if any anticipation that its main street would come to serve as a significant pedestrian and bicycle route as its surroundings grew into dense residential neighborhoods and a popular natural area. But that is what has happened, and the Commission must consider and account for the traffic safety challenges presented by the Application. We believe that we have struck a fair balance in this regard by, instead of denying the Application, imposing reasonable conditions for the safety of all who will use Queen City



Park Road.

The Commission therefore concludes that, as so conditioned, the Project will not cause unreasonable congestion or unsafe conditions with respect to use of roads, highways, waterways, railways, airports, and other existing or proposed means of transportation. As so conditioned, the Project complies with Criterion 5(A).

The Commission concludes that the Project incorporates appropriate transportation demand management strategies and will provide safe access and connections to adjacent lands, facilities, and existing and planned pedestrian, bicycle, and transit networks and services. The Project thus complies with Criterion 5(B).

### **Criterion 7 - Municipal Services:**

#### Findings of Fact

174. The Project will utilize police, fire protection, and ambulance services, require road maintenance, and receive municipal water supply and sewage disposal. Exhibit #001b.
175. The Project will treat all stormwater on site. Exhibit #025.
176. The Burlington DPW, Electric Department, Fire Department, and Police Department have indicated that they are able to serve the needs of the Project without an unreasonable burden on municipal services. Exhibit #025.
177. The City of South Burlington requested consideration of whether recent force reductions in the Burlington Police Department ("BPD") would impact BPD's ability to serve the Project and require support from South Burlington police and emergency services. Exhibit #069.
178. Jon Murad, Acting Chief of Police for the BPD, stated that any BPD force reductions do not change BPD's support of the Project, noting that service disruptions would take place between 3:00 AM and 7:30 AM, when the PAC would not be operating. Exhibit #134.
179. BPD's ability to serve the PAC use is conditioned on the Applicant's implementation of its Operational Management Plan (OMP). Exhibits #025 and 134.
180. The OMP is based on Higher Ground's experience at its Williston Road location and at larger festival events with controlling patrons and ensuring safety. Balderston Hearing Testimony (3/10/21).
181. The Applicant's Conditional Use permit from the Burlington DRB requires consistent implementation of the OMP. Exhibit #008.

#### Conclusions of Law

Notwithstanding the requirement for a positive finding, the Commission may not deny a permit solely on the reasons set forth under Criterion 7. See 10 V.S.A § 6087(b). The Commission may, however, attach reasonable conditions to alleviate the burdens created. *Id.*

Under Criterion 7, the question is whether the Project places an unreasonable burden on the ability of the municipality to provide services. Relevant services include municipal fire, police, rescue, solid waste disposal, road maintenance, sewer and water service. *RE: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 77 (Vt. Env'tl. Bd. Dec. 8, 2000)*. The burden of proof is on opponents of the Project. *In re: Rivers Dev. Act 250 Appeal, Docket No. 68-3-07 Vtec, Decision on the Merits at 33, 39 (Mar. 25, 2010)*.

Under this criterion, the burden of production is on the Applicant. The Applicant provided "ability to serve" letters from all affected municipal departments in the City of Burlington. The City of South Burlington and the opposing parties have questioned whether the BPD has sufficient resources to respond to incidents at the PAC following ongoing force reductions at the direction of the Burlington City Council. After the parties raised this issue, BPD submitted an updated ability to serve letter reiterating its capacity to provide police services for the Project notwithstanding the force reductions. Burton's Operational Management Plan for the PAC addresses concerns raised by the BPD.

The Commission concludes that this Project will not place an unreasonable burden on the ability of either municipality to provide educational, municipal or governmental services. The Commission will condition the project to require compliance with the OMP. Accordingly, the Project complies with Criterion 7.

#### **Criterion 8 - Aesthetics:**

##### Findings of Fact: Aesthetics

182. The Project will be landscaped as shown on Exhibit #028.
183. The exterior of the building's materials and colors can be generally described as follows: Horizontal glass fiber reinforced concrete siding will be dark earth tones (browns). Vertical glass fiber reinforced concrete siding will be a charcoal color. Vertical metal siding will be painted to match the existing siding (i.e., dark brown/bronze). Fiberglass windows will be a grey color. Aluminum storefront will be clear anodized. Solar louvers will be wood. Steel tube framing for porches will be painted charcoal color. Exhibit #001b.
184. Existing site signage will be relocated to the new vehicular entry as shown on L100, Layout and Materials Plan (Exhibit #027). Three building-mounted signs are proposed for the west elevation of 266 QCPR and are shown on Page 6 of the architectural plan set submitted with the Application. While no specifics are available at this time with

- regards to size, illumination, or colors of the proposed signage, the Applicant's City of Burlington approval requires a separate submission of a detailed sign application to the City once the design details of the signage are finalized. Exhibits #001b and 026.
185. The Project site is an existing 15.6-acre commercial development within an industrial park. An active rail line bounds the Project to the east. Exhibit #001b.
  186. The site lies on open and flat ground and is improved with two commercial structures totaling 151,000 square feet and a 426-space parking lot. Exhibits #001b and 155.
  187. Beyond the boundaries of the industrial park are single- and multi-family residential developments to the west and east of the Project site. Exhibit #001b.
  188. Across the street and south of the Project site are: a large electrical substation; wastewater treatment facilities; Red Rocks Park, which is owned by the City of South Burlington; and the Queen City Park neighborhood in South Burlington. Exhibits #001b and 005.
  189. The scale, mass, and physical character of the existing buildings on the Project site will remain unchanged. The Project incorporates a retrofit to the 266 Property building façade along with updated parking lot construction, landscaping, illumination, and internal walkways. Exhibits #001b and 027.
  190. The current construction of the 266 Property building—metal-sided with a flat roof—is consistent with other structures in the industrial park along QCPR and similar manufacturing buildings throughout Burlington's E-LM district. Exhibit #001b.
  191. The proposed façade renovations will be consistent with the character of the area with dark and muted colors. Exhibits #001b and 026.
  192. Site lighting is dark-sky compatible, and fixtures are fully shielded for most applications. Exhibits #001b, 027, and 030.
  193. Electrical service to the Project is undergrounded. Exhibit #001b.
  194. Noise associated with construction is temporary and will last no longer than 12 months. The primary construction noise will be generated by trucks. Exhibit #001b.
  195. Projected noise impacts from the PAC use are presented in the RSG Noise Assessment discussed in detail under Criterion 1, and also in RSG's responses to the Commission's Hearing Recess Orders. Exhibits #009, 146, 159a, and 162.
  196. No Burlington regulation applies quantitative noise performance standards. The Burlington noise control ordinance (§ 21-13 (b)(1)) states:  
*General prohibition. It shall be unlawful for any person to make or cause to be made any loud or unreasonable noise. Noise shall be deemed to be unreasonable when it disturbs, injures or endangers the peace or health of another or when it endangers the health, safety or welfare of the*

*community. Any such noise shall be considered to be a noise disturbance and a public nuisance. Exhibit #009.*

197. The Burlington noise control ordinance (§ 21-13 (b)(2)(a)) also provides certain specific prohibitions for music, including the following:

*The following acts, which enumeration shall not be deemed to be exclusive, are declared to be noise disturbances:*

*. . . The operation or permitting the use or operation of any musical instrument, radio, television, phonograph, or other device for the production or reproduction of sound in such a manner as to be plainly audible through walls between units within the same building, from another property or from the street between the hours of 10:00 p.m. and 7:00 a.m. or in such a manner as to unreasonably disturb the peace, quiet or comfort of the public. Exhibit #009.*

198. South Burlington's Land Development Regulations have quantitative standards that prohibit creation of noise in excess of 45 dBA (Leq, 1-hour) at an adjoining property. These regulations do not apply to a land use in Burlington. Exhibit #009.
199. The anticipated average sound levels at the nearest and most impacted residence, 42 dBA (Leq,1-hr) during a conservatively loud concert and 44 dBA (Leq,1-hr) during one end-of-concert scenario, are below the WHO guideline for night (45 dBA averaged over an 8-hour period) and the ANSI guideline for annual average day-night sound level for urban/suburban residential areas (55 dBA). These sound levels are also below the South Burlington standard (45 dBA (Leq, 1-hour)). Exhibit #009.
200. With respect to sound attenuation, the weakest point in the 266 Property building's envelope is the ceiling assembly and a section of wall that is uninsulated metal siding. The Applicant shall retrofit these areas to a performance standard set out in the RSG Noise Assessment. This performance standard is achievable using standard drywall construction techniques, although other constructions are possible. Exhibits #009 and 146.
201. The detailed construction of the concert venue fit-up has not been planned yet. The design team for the fit-up will be able to take the acoustical performance standard from the Noise Assessment and design the walls and ceiling-roof assembly to meet that specification. The proposed improvements from the specified acoustical performance standards should be considered the minimum design requirements for the fit-up of the concert venue. Once the interior fit-up is planned, the acoustical performance of the constructions may exceed what is specified in the Noise Assessment, which could further reduce the breakout sound of the concert venue. Exhibits #009 and 146.
202. "Tailgating" activities, e.g., gatherings in the parking lot for socializing, is prohibited. Exhibit #010a.
203. Organized queueing in advance of doors opening will occur indoors in the lobby,

- supervised by security staff. This indoor lobby space is expected to accommodate guests for most shows. Exhibit #010a.
204. No music or amplified sound is permitted outdoors, including the patio area. Exhibit #010a.
  205. PAC staff will strive to ensure that guests exit the site as quickly and quietly as possible to minimize noise disruption to residential neighbors during end-of-concert conditions. PAC staff will be stationed in the parking lots to address excessive intoxication and excessive noise issues. Exhibit #010a.
  206. Traffic control measures shall be used to empty the parking lots within 30 minutes of the end of any event. Exhibit #010a.
  207. The Applicant will conduct an operational noise assessment of three full-capacity events within the first six months of operation to determine whether additional sound mitigation is needed. Sound monitoring shall be conducted within the same geographic area covered by the Project Noise Assessment prepared by RSG dated 4/20/20. The Applicant must report its findings to the Burlington DRB which may impose additional conditions at that time. A copy of this report shall be provided to the Commission at that time as well. If monitored sound levels from the performing arts center exceed 45 dBA Leq (1-hour) at night (10:00 PM – 7:00 AM) at residential areas, the City may require additional sound mitigation measures to bring noise levels into compliance (at or below 45 dBA Leq). Exhibits #008 and 010a.
  208. The proposed outdoor patio is separated from the homes on Arthur Court by the Applicant's 284 QCPR building. Exhibit #009.
  209. The southern and northern parts of the parking lot are not separated from Arthur Court by any buildings. Exhibit #009.
  210. The voices of a few people in the Project site's parking lot are currently heard by residential neighbors on Arthur Court and Austin Drive in their backyards and, during the warmer months, can be heard inside their homes. O'Neill hearing testimony (3/10/21) and Ellis hearing testimony (3/10/21).
  211. The Neighbors' noise expert, Mr. Tocci, explained the difference between fast Lmax and slow Lmax. Fast and slow are sound level meter response settings that serve to exponentially average sound over 1/8-second and 1-second time periods—1/8-second for fast meter response sound levels (LFp) and 1-second for slow sound level meter response (LSp). Exhibit #171a and Tocci hearing testimony (9/30/21).
  212. When measuring or modeling maximum sound produced by a constant source such as an air conditioner, LASmax is acceptable for representing how sound is heard by the human ear. Exhibit #171a and Tocci hearing testimony (9/30/21).

213. When measuring or modeling maximum sound levels produced by short transient sound sources such as a car horn, a gunshot, or an engine quickly revving, fast meter response sound levels (LAFmax) better represent the response of the human ear. The LASmax would tend to underestimate the level perceived by the human ear and should not be used for short transient sounds. Exhibit #171a and Tocci hearing testimony (9/30/21).
214. The Commission requested analysis of maximum sound levels for specific hypothetical sources in the parking lot, which was provided for LSmax in RSG's Response to the Commission's Second HRO (Exhibit #159a) and for LFmax in RSG's Response to the Third HRO (Exhibit #162).
215. In its June 15, 2021 supplemental noise analysis, RSG's model stated that a concert that reached maximum noise levels of 120 dBA inside the proposed PAC—with HVAC running at 100 percent capacity, 100 cars entering the parking lot, and conversations ongoing in the outdoor lounge—would result in a noise level of 44 dBA (1-second Lmax) or 44 dBA (LFmax) at the most impacted local residence (20 Arthur Court). The model results for concert sound at 120 dBA LFmax are the same as those for concert sound at 120 dBA LSmax which were reported in RSG's response to the second recess order. Only the designated metric is different. Exhibits #159a and 162.
216. RSG's model showed that, in a post-concert scenario, where 150 loud voices were spread throughout the parking lot, 20 cars were starting their engines simultaneously, and 85 cars were driving through the parking lot at the same time, the resultant noise level at the most impacted local residence (20 Arthur Court) would be 49 dBA (1-second Lmax) or 51 dBA (LFmax). Exhibits #159a and 162.
217. RSG's model showed that, in a post-concert scenario, where 300 loud voices were spread throughout the parking lot, 85 cars were starting their engines simultaneously, and 200 cars were driving through the parking lot at the same time, the resultant noise level at the most impacted local residence (20 Arthur Court) would be 53 dBA (1-second Lmax) or 55 dBA (LFmax). Exhibits #159a and 162.
218. RSG's model indicated that the sound of one car door slamming in the southernmost parking area, approximately 480 feet from the nearest home at 13 Arthur Court, would result in a noise level at the most impacted local residence (20 Arthur Court) of 41 dBA (1-second Lmax) or 44 dBA (LFmax). The RSG model showed that all other residences modeled experienced lower sound levels. Exhibits #159a and 162.
219. RSG's model indicated that the sound of one car horn honking in the southernmost parking area, approximately 480 feet from the nearest home, and without any intervening vehicles, would result in a noise level at the most impacted local residence

- (13 Arthur Court) of 55 dBA (1-second Lmax) or 61 dBA (LFmax) at five most-impacted residences (7, 9, 11, and 13 Arthur Court and 364 QCPR). Exhibits #159a and 162.
220. RSG states that modeled sound impacts would be lower if the car door, or the car horn, were located elsewhere in the parking lot further from residences. RSG did not model the attenuation that could occur if other cars blocked the line-of-sight from the source to the receiver. Exhibit #162.
221. RSG located the single car horn that it modeled in the parking lot south of the Applicant's building, which is more distant from the nearest homes than the portion of the parking lot that is north of that building. Exhibit #171a and Tocci hearing testimony (9/30/21).
222. Mr. Tocci used the Cadna A software to relocate the single car horn to a part of the parking lot north of the subject building and therefore, nearer to the residences on Arthur Court. He then used the model to compute the LAFmax car horn sound level at 20 Arthur Court, the nearest residence, located 370 feet away. Using the RSG Cadna A model, a car horn maximum fast response sound level (LAFmax) of 64 dBA was computed at the nearest Arthur Court residence. Exhibit #171a and Tocci hearing testimony (9/30/21).

#### Conclusions of Law: Aesthetics

The Commission uses a two-part test to determine whether a project meets the portion of Criterion 8 relating to aesthetics and natural and scenic beauty. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. *In re Rinkers, Inc., No. 302-12-08 Vtec, Decision and Order at 12 (Vt. Env'tl. Ct. May 17, 2010)* (citations omitted); see also, *Re: Quechee Lakes Corporation, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18-20 (Vt. Env'tl. Bd. Nov. 4, 1985); In re Halnon, 174 Vt. 514 (mem.)* (applying Quechee test in Section 248 context).

The burden of proof under Criterion 8 is on any party opposing the project, 10 V.S.A § 6088(b), but an applicant must provide sufficient information for the Commission to make affirmative findings. *In re Rinkers, No. 302-12-08 Vtec, Decision and Order at 10-11 (Vt. Env'tl. Ct. May 17, 2010)* (citing *Re: Susan Dollenmaier, #3W0125-5-EB, Findings, Conclusions and Order at 8 (Vt Env'tl. Bd. Feb. 7, 2005); In re Eastview at Middlebury, Inc., No. 256-11-06 Vtec, slip op. at 5 (Vt. Env'tl. Ct. Feb. 15, 2008), aff'd, 2009 VT 98*. "Either party's burden, however, may be satisfied by evidence introduced by any of the parties or witnesses . . ." *In re McShinsky, 153 Vt. 586, 589 (1990)* (quoting *In re Quechee Lakes Corp., 154 Vt. 543, 553-54 (1990)*).

#### 1. Adverse Effect

To determine whether the Project will have an adverse aesthetic effect, the Commission looks to whether the Project will "fit" the context in which it will be located. In making this evaluation, the Commission examines a number of specific factors, including the following: the nature of the project's surroundings; the compatibility of the project's design with those surroundings; the suitability 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. *Quechee Lakes Corp et al. #3W0411-EB and #3W0439-EB Findings of Fact, Conclusions of Law and Order at 18 (Vt. Envtl. Bd., Nov. 4, 1985)* (cited in *Rinkers, No. 302-12-08 Vtec, Decision and Order at 12-13*).

The visual impact of the Project fits within the surrounding context of historically industrial buildings within the Enterprise-Light Manufacturing district. The building façade and landscaping are updated, but the built form remains the same. The Applicant has committed to install shielded exterior light fixtures, and the Commission will condition the permit accordingly. The evidence in this case demonstrates that the Project will not have any adverse visual impacts.

The Neighbors have raised concerns about the noise impacts associated with the PAC. Some adverse aesthetic impacts may occur, because the proposed PAC would increase public use of a light industrial area located in relatively close proximity to residential areas. The project could create adverse noise impacts relating to HVAC units, sounds from amplified music, automobile sounds, and human voices, potentially late at night. Therefore, the Commission must determine whether any adverse impacts are undue.

## *2. Undue Adverse Effect*

An adverse aesthetic impact is undue if any of the following is true: (1) the project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area; (2) the project offends the sensibilities of the average person, or is offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area; or (3) 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. *In re Rinkers, 302-12-08 Vtec, Decision and Order at 15 (May 22, 2010)* (citing *In re: Times & Seasons, LLC, 2008 VT 7, ¶ 8; In re McShinsky, 153 Vt. at 592*).

### *(a) Clear, Written Community Standard*

In evaluating whether a project violates a clear written community standard, the Commission looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists to be applied in review of aesthetic impacts of a project. *Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Envtl. Bd. 4/9/02)*. A clear, written community standard must be intended to preserve the aesthetics or scenic beauty of the area where the project is



located. *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action, #2WO694-I-EB, Findings of Fact, Conclusions of Law, and Order at 36 (Vt. Envtl. Bd. 12/21/00)*. A plan which states "consideration should be made . . ." is not a clear, written community standard. *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 81 (Vt. Envtl. Bd. Dec. 8, 2000)*.

The Commission has reviewed relevant portions of the City of Burlington noise ordinance. The Commission finds that the City's general prohibition of noise (§ 21-13 (b)(1)), which prohibits "any person" from making "any loud or unreasonable noise," is intended to address public nuisances that are "detrimental to the peace and good order of the community." This prohibition applies generally to the City at large, rather than to specific aesthetic resources in the project area.

Furthermore, the Commission finds that the portion of the City's noise ordinance regarding the operation of any musical instrument or other device for the production or reproduction of sound (§ 21-13 (b)(2)(a)) does not include a measurable decibel level. Its language about "plainly audible" is not specific enough to qualify as a "clear community standard." In addition, like the general "unreasonable noise prohibition," it applies to the City at large, rather than to specific aesthetic resources in the project area.

The Neighbors have presented several South Burlington ordinances to the Commission. These ordinances do not regulate land uses in Burlington and are not a community standard applicable to the Project. *Re: Talon Hill Gun Club, Inc. and John Swinington, Land Use Permit #9A0192-2-EB, 1995 WL 405039, at \*7 (Vt. Env. Bd., Jun. 7, 1995)*.

Therefore, under the applicable law and standard, the proposed Project does not violate a clear community standard.

*(b) Offensive or Shocking Character*

Criterion 8 "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from their property will remain the same forever." *Re: Okemo Mountain, Inc. #2S0351-S-EB Findings of Fact, Conclusions of Law, and Order (Dec. 18, 1986)*.

Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Rinkers, No. 302-12-08 Vtec, Decision and Order at 11-12; Horizon Development Corp., #4C0841-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. Aug. 21, 1992)*.

The opposing parties have raised concerns that noise from the proposed PAC will be shocking and offensive to park users enjoying Red Rocks Park before, during, and after evening

performances. The Commission agrees that Red Rocks Park is a very special place. However, the Commission is not persuaded by these arguments. Modeling provided by the Applicant shows that sounds from activities at the PAC leading up to and during evening performances will be similar to daytime background noises within Red Rocks Park, and that noise from the proposed PAC will not penetrate deep within the park's forested landscape. This modeling, combined with the diminished human visitation that the park receives during nighttime performance hours leads the Commission to conclude that PAC operations will not be shocking or offensive to the average park user. City parks are integrated into urban and suburban environments across Vermont and nation-wide. Their primary purpose is to provide opportunities for urban and suburban residents to connect with nature and recreate outdoors. For parks to remain conveniently accessible to all citizens, they must be located across the landscape, and integrated into the fabric of our communities. Often, land uses adjoining parks create externalities like sounds that are common in urban and suburban environments. Based upon all of the evidence and keeping in mind the burden of proof on this criterion, the sound levels modeled for the proposed Project are not high enough within Red Rocks Park to offend the sensibilities of the average park user, or so out of character with background noise levels in the area to be offensive or shocking. For similar reasons, the Commission believes that daytime noise from the proposed Project would not offend the sensibilities of the average person or be considered shocking or offensive during normal business hours.

The Commission was concerned that the sounds of up to 1,500 patrons and 350 or more cars leaving the PAC at night could potentially offend the sensibilities of the average person in a nearby residential neighborhood, due to the proposed late hours of operation. Based on testimony from nearby residents, the Commission had concerns about instantaneous noises, like the sounds of cars starting, horns honking, loud voices talking at once, and doors slamming in the proposed parking lot.

To address this concern, the Commission directed the Applicant to model several scenarios depicting common sounds that might be generated by patrons and automobiles exiting the venue after a performance. Under the most modest scenario modeled, the Applicant's consultant RSG modeled noise at 49 dBA (1-second Lmax) or 51 dBA (LFmax) at the most impacted residence. Under a more congested scenario, the noise was modeled at 53 dBA (1-second Lmax) or 55 dBA (LFmax) at the most impacted residence. These modeled results fall below the WHO sleep disturbance guideline of 60 dBA (Lmax) for non-continuous sounds.

Modeled values for the sound of a car door slamming at the most impacted residence were 41 dBA (1-second Lmax) or 44 dBA (LFmax), also below the WHO sleep disturbance guideline of 60 dBA (Lmax) for non-continuous sounds.

The Commission addressed the potential impacts of the sound of a single car horn honking under Criterion 1 (Air Pollution).

Noise modeling provided by the Applicant also provided modeled 1-hour averaged values of

42 dBA (Leq) and 44 dBA (Leq) at the most impacted residence for concert scenarios and end-of-concert scenarios, respectively. These values are below the WHO guideline to protect against moderate annoyance from 7 AM to 11 PM and the WHO nighttime guideline to allow people to sleep with the bedroom windows open between 11 PM and 7 AM (45 dB averaged over an 8-hour period). They are also comparable to measured nighttime (10 PM to 7 AM) background sound levels for the neighborhood, which are generally between 40 and 45 dBA (Leq) (1 hour). The Commission is satisfied that, through this modeling, the Applicant has met its burden of proving that the Project will protect against moderate annoyance at night.

Finally, the Commission had concerns about the potential for non-continuous sounds from concert performances to escape the building envelope. At the Commission's request, RSG provided 1-second Lmax and LFmax modeling of concert sounds at 120 dBA inside the venue, a typical decibel level for a loud rock concert. The results indicated that the noise at the most impacted residence would be expected to reach 44 dBA (Lmax). This figure is identical to the concert figure modeled by RSG for concert sounds at 106 dBA inside the PAC venue. The non-continuous (1-hour Leq) concert sound modeled at the same residence was 42 dBA. These figures fall below the WHO sleep disturbance guideline of 60 dBA (Lmax) for non-continuous sounds.

To ensure that noise from the Project does not exceed the WHO night-time guideline to allow people to sleep with the bedroom windows open, the Commission will condition the project to require a noise limit of 60 dBA (Lmax), measured outside at one meter from the external wall of the apartments located at Arthur Court, facing the PAC.

The Applicant's Conditional Use approval from the City of Burlington requires the Applicant to conduct an operational noise assessment of three full-capacity events within the first six months of operation to determine whether additional sound mitigation is needed. The Applicant must report its findings to the Burlington DRB which may impose additional sound mitigation measures at that time to bring noise levels to or below 45 dBA (Leq). The Commission will condition the project to require that a copy of this report be provided to the Commission at that time.

Given all of these considerations and conditions, we find that the Project is not offensive or shocking to the average person.

*(c) Generally Available Mitigating Steps*

The question under this factor of the aesthetics analysis is whether the Applicant has "failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings." *In re Times & Seasons, 2008 VT 7, ¶ 8*. If a project does have an adverse aesthetic effect, the applicant must "take generally available mitigating steps to reduce the negative aesthetic impact of a particular project," otherwise, "[f]ailure to take advantage of available alternatives may render an aesthetic impact unduly adverse." *In re Stokes Communications Corp., 164 Vt. 30, 39 (1995)* (quoted in *In re Rinkers, 302-12-*

*08 Vtec, Decision and Order at 19 (May 22, 2010)*). A generally available mitigating step “is one that is reasonably feasible and does not frustrate [either] the project's purpose or Act 250's goals.”

The Applicant has taken generally available mitigation measures to reduce the impacts of the PAC noise. The PAC building will be retrofitted with sheetrock and insulation to meet a readily achievable performance standard for sound attenuation that reduces concert breakout sound through the building, and will utilize double doors at all PAC entrances. An 8-foot sound attenuation barrier will be constructed around the outdoor lounge.

As discussed in detail earlier, the PAC Operational Management Plan also provides for operational mitigation measures, including prohibiting all outdoor music and tailgating, queuing patrons indoors, quickly and quietly emptying the parking lot after shows, and stationing staff to respond to excessive noise creation outside the venue.

Given all of these considerations, we find that the Applicant has taken the available mitigating steps to minimize the adverse impacts of the proposed Project on the scenic or natural beauty of the area.

*(d) Conclusion of Law*

Based on the above facts and analysis, the Commission concludes that the Project will not have an undue adverse effect on aesthetics or the natural and scenic beauty of the area. The Project complies with Criterion 8, Aesthetics.

COMMISSION'S DECISION ON APPLICANT'S MOTION TO STRIKE TESTIMONY

On September 15, 2021, the opposing parties filed testimony with the Commission in connection with the September 30, 2021 hearing that details an eyewitness (Mr. Margulius) account of a Higher Ground show in South Burlington on September 19, 2019, as experienced from the Higher Ground parking lot. The Commission agrees with the Applicants' objection to receiving such testimony (Exhibit #174). The Opponents' proposed new testimony from Mr. Margulius was not related to the limited purpose of the September 30, 2021 hearing continuation, which stemmed from evidence submitted by the Applicant in response to the Commission's Second Recess Order. The Commission agreed to reconvene the hearing on September 30, 2021, for the specific purpose of allowing the Opponents to question the Applicant's existing witnesses about noise and traffic, and to allow the Opponents to provide rebuttal testimony to the Applicant's additional noise modeling. The Opponents could have submitted Mr. Margulius' testimony during their direct case at or prior to the March 10, 2021 full evidentiary hearing, at which time the Applicant's witnesses, including Higher Ground personnel, were testifying to the Operational Management Plan that would address safety, traffic, and noise considerations at the proposed project site. Rather than being rebuttal testimony to the Applicant's additional noise modeling, the proposed Margulius testimony would have been simply an extension of

arguments that the Opponents previously presented. Accordingly, at the opening of the September 30, 2021 hearing the Commission announced it would not hear the Margulius testimony; we confirm that decision here, and thus will not consider Exhibit #172 as part of the evidentiary record.

**Criterion 9(K) – Development Affecting Public Investments:**

Findings of Fact

223. SBFD #1 has expressed concerns that the potential disturbance of historical contamination on the site, described under Criterion 1(B), could pose a contamination risk to the public water well that SBFD #1 owns and operates. Crowley Hearing Testimony (3/10/21).
224. The SBFD #1 well is located within the Queen City Park neighborhood adjacent to Red Rocks Park. The Source Protection Area (“SPA”) for the SBFD #1 well extends into Red Rocks Park, but the Project is not located within the well’s SPA. Exhibit #130.
225. On August 7, 1998, the historical contamination associated with the Project site received a Site Management Activity Closed (“SMAC”) designation from the Vermont Department of Environmental Conservation, Sites Management Section. In that letter, DEC stated, “based on the information presented above . . . the site does not pose any unacceptable risk to human health or the environment.” Exhibit #012.
226. On October 23, 2020, DEC’s Sites Management Section reopened the SMAC designation because the historic site investigations do not meet current requirements outlined in the DEC’s Investigation and Remediation of Contaminated Properties Rule (IRule). Exhibit #106.
227. DEC directed the Applicant to develop a site investigation work plan in accordance with the IRule, and to submit a report on that investigation to DEC within 90 days of receiving final laboratory data. Exhibit #106.
228. There is currently no evidence of any release or threat of release of hazardous materials as a result of the Project. Exhibit #088.
229. In the event hazardous materials are identified as a part of the Applicant’s soil pre-characterization efforts, or in connection with construction of the Project, the Applicant will act in accordance with DEC’s IRule, which is designed to prevent the introduction of hazardous materials into sensitive receptors, such as wells. Exhibit #001b.
230. The current SBFD #1 water source is very high quality and not impacted by hazardous materials. Crowley Hearing Testimony (3/10/21).
231. A Preliminary Assessment Report completed by the State in 1985 recommended that a bedrock well serving 75 homes in the Queen City Park area, which is over 1,000 feet

- from the alleged 1970 etching solution release, be tested for chromium. The testing was done, and chromium was not detected. Exhibit #012.
232. Red Rocks Park is a forested park located on the shore of Lake Champlain. It is frequently visited by many of the individual parties in this matter, as well as many members of the broader public. City of South Burlington Testimony (3/10/21); and Prefiled Testimony and Hearing Testimony (3/10/21) by Smith, Walrath, Waters, Goodman, O'Neill, De Terra, and Ellis.
233. Red Rocks Park is regarded by South Burlington as the crown jewel of its parks. City of South Burlington Testimony (3/10/21).
234. The Park is operated by the South Burlington Recreation & Parks Department and maintained by the South Burlington Department of Public Works. Exhibit #137.
235. The 100-acre city park is divided into two sections for management. The eastern section is the "developed" zone that includes parking lots, a picnic area, beach, and a water line easement held by the Champlain Water District. This zone borders the Queen City Park neighborhood to the east and QCPR and the Project site to the north. Recreation access is the primary goal of this zone. Exhibit #137.
236. The western section is the "natural" zone that extends to the western boundary of the Park at Lake Champlain. Ecosystem health and wildlife values are prioritized in this zone. Exhibit #137.
237. The park sees heavy recreational use and faces several management challenges including invasive species, off-leash dog impacts, unofficial trail use, forest health, and park signage. Exhibit #137.
238. The Park is heavily trafficked by both people and dogs, and heavily trailed with sanctioned and unsanctioned trails. For Park wildlife, there may be few locations in the Park free from the stress and disruption of passing visitors. Exhibit #137.
239. The Red Rocks Park Management Plan states that one study showed that the presence of off-leash dogs affects animals like deer, rabbits, and small mammals (chipmunks, squirrels, and mice). The study found that deer activity was lower within 100 meters of trails and small mammal activity declined within at least 50 meters of trails used by dogs (Lenth, et al. 2008). Only a small area of Red Rocks is more than 50 meters from a trail, and no place in the park is more than 100 meters away from a trail. Even after dogs have left the park, certain carnivores may avoid areas that have been scent-marked by dogs, while others may increase surveillance along dog-marked trails. Exhibit #137.
240. Neighbors testified that the Park is currently heavily trafficked, including nighttime walks by people with and without dogs. Hearing Testimony by Walrath and Smith (3/10/21).

241. The RSG noise model results show sound levels above 40 dBA from a loud PAC event only in the northeast corner of Red Rocks Park closest to the Project Site. This area is within the “developed” zone of the Park, including the entrance and parking area. These sound levels are consistent with existing background sound levels in the area. Exhibit #009 and Duncan Hearing Testimony (3/10/21).
242. In the remainder of the Park, including in most of the “natural” zone, modeled sound levels drop steadily to below 30 dBA. Exhibit #009 and Duncan Hearing Testimony (3/10/21).
243. Neighbors and the City of South Burlington raised concerns that the Project’s proximity to Red Rocks Park would attract concertgoers to gather in the Park to its detriment. Exhibits #070 and 089 through 100.
244. Following PAC events of greater than 1,000 attendees, a dedicated security person will be posted near the parking lot exit in the southwest corner of the 266 QCPR property, to monitor and direct vehicle and pedestrian traffic to exit the area smoothly, and to discourage pedestrians from leaving the venue to go into Red Rocks Park. Exhibit #010a.
245. Prior to large events (750 patrons or more), the PAC will place a partial barrier at the end of Central Avenue, just north of the Red Rocks Parking area, that indicates “Dead End - No Event Parking” (pending approval and coordination with the City of South Burlington). Exhibit #010a.

### Conclusions of Law

Criterion 9(K) applies to projects that are adjacent to governmental and public utility facilities, services, or lands. With regard to such projects, the applicant bears the burden of proving that the Project 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. 10 V.S.A § 6086(a)(9)(K). Two public investments are at issue in this proceeding: the SBFD #1 public water supply and Red Rocks Park.

There is no evidence that the Project will impact the SBFD #1 well. The Project lies outside of the Source Protection Area (“SPA”) for the well and there is no current evidence of contamination at the well. There is no credible evidence that the Project will cause a release of any hazardous substances; and in the event that it did, the Applicant has committed to coordinate with DEC under the IRule, which is designed to protect sensitive receptors such as water supplies. The evidence shows that the Project will not unnecessarily or unreasonably endanger the public investment in the well and will not materially jeopardize its function or safety.

The City of South Burlington and some neighbors suggested that noise from the PAC operation would impact Red Rocks Park wildlife. Impacts on natural resources and wildlife may be considered under this criterion. *Re: Vermont Department of Forests, Parks, and Recreation (Phen Basin), Land Use Permit Amendment No #5W0905-7-EB, FCO, 2005 WL 2251941, at \*11 (Vt. Env. Bd., Sept. 7, 2005)*. The opposing parties, however, did not present evidence of impacts on Park wildlife beyond anecdotal recounting of wildlife observed. Modeled noise impacts from the PAC are comparable to existing background noise levels and are localized to the “developed” portion of the Park. Opponent parties testified that the Park is already heavily trafficked. The evidence shows that although Red Rocks Park is an important natural amenity enjoyed by many in the community, the existing public use likely already causes disruptions to wildlife, and there is no evidence that the Project will cause additional impacts.

Opposing parties have also suggested that the attendees of the PAC will visit Red Rocks Park before and after concerts and act in a manner disruptive to the public use of the park or to the detriment of park resources. There is no evidence, beyond speculation, to suggest what PAC attendees will do, or whether their lawful use of a well-frequented public park would cause impacts of concern under this criterion. The Applicant has designed its OMP to discourage attendees from visiting Red Rocks Park before or after large shows, and to quickly depart after all shows.

Taking into account these mitigation measures, the evidence demonstrates that the Project will neither endanger the public investment in Red Rocks Park nor materially jeopardize its functioning. Although the project could potentially increase public use and enjoyment of this public park, there is no evidence beyond speculation that the Project will materially jeopardize or interfere with the function, efficiency, safety, public use or enjoyment of, or access to Red Rocks Park.

The Commission concludes that the Project complies with Criterion 9(K).

#### **Criterion 10 – Town and Regional Plans:**

##### Findings of Fact

246. The City of Burlington’s Comprehensive Plan discusses commercial and industrial growth in the Enterprise – Light Manufacturing zoning district, where this project is located. It states, “this plan anticipates the implementation of projects and policies that will protect adjacent neighborhoods from impacts such as traffic, air quality, and noise from nearby uses, and that will improve pedestrian and bicycle safety, expand neighborhood-serving businesses and amenities, and increase connectivity to nearby parks and the lake.” Exhibit #113.
247. Burlington’s Comprehensive Plan states, “how this district grows should be guided by the detailed analyses and recommendations contained in the following planBTV



documents: DRAFT planBTV: South End Master Plan; Burlington Harbor Management Plan; Burlington Transportation Plan; planBTV: Walk/Bike; Railyard Enterprise Project.” Exhibit #113.

248. The City of Burlington’s *planBTV: South End*—the Municipal Development Plan covering the Project location—identifies the southern part of the City’s Enterprise - Light Manufacturing Zoning District (where the Project Site is located) as an important area to preserve for traditional and emerging industrial, R&D, and art/maker uses. At the same time, the Plan recognizes the challenge of preserving industrial uses given the market realities and cost of space across Burlington’s South End, and the need to come up with creative solutions to support these uses. Exhibit #127.
249. *planBTV: South End* states that within the Enterprise – Light Manufacturing District, retail and office uses should be prohibited or limited as standalone uses, except when wholesale or accessory to an enterprise function. *planBTV: South End*.
250. *planBTV: South End* includes a strategy to “advance land use policy changes to preserve and expand the value of the south end to the city.” It recommends evaluating “possible changes to the Enterprise - Light Manufacturing Zoning District that will reflect and enhance the experiences created by the built environment and types of activities within and around the district.” It states that “a more fine-grain approach to land use regulation within the Enterprise Zone will guide future growth, redevelopment and/or reinvestment in such a way that the arts, industry and creative enterprise can continue to coexist—alongside strong and desirable residential neighborhoods and important natural resources. Revised zoning regulations will address how and where to concentrate and support the arts and artists more directly; where the emerging creative and innovation economy can grow and flourish, and where more traditional manufacturing businesses can continue without direct competition from more sanitized development and land use.” *planBTV: South End*.
251. *planBTV: South End* identifies the area upon which the Project is located primarily as an opportunity for “infill development” with uses focused on “supporting the needs of light industrial, R&D and industrial arts/marker businesses,” and recommends the consideration of “performance standards to mitigate noise, smell, and/or traffic on nearby residences, and expand stormwater management.” Exhibit #069.
252. *planBTV: South End* states, “While the companies in the South End are not as noisy and dirty as they were once upon a time, businesses in this area need to be able to spread out, make some noise, and be accessible by heavy trucks.” *planBTV: South End*.
253. In 2019, the Burlington City Council passed an amendment to the City’s Comprehensive Development Ordinance (the City’s zoning ordinance) to expand the use of various non-industrial commercial uses in the E-LM district to help subsidize the cost of space for uses related to industrial and arts purposes. Exhibits #024 and 127.

254. The City of Burlington's 2019 zoning amendment expanded the geographic and size limitations for performing arts center uses in the E-LM district, provided the use is developed on a lot with an industrial use. The zoning amendment allows for performing arts centers as conditional uses, provided the use does not exceed 15,000 square feet (for properties fronting Queen City Park Road), and total non-industrial uses on the lot do not exceed 49% of gross floor area. Exhibit #024.
255. The Project falls within the size and percentage-use limitations of the City's zoning ordinance. Exhibit #008.
256. The City of Burlington's Office of City Planning has submitted a letter expressing the Planning Office's position that the Project is consistent with *planBTV: South End*. Exhibit #127.
257. The Burlington Development Review Board found that the performing arts center use proposed by Burton is "a newly allowable use of an acceptable size and serves to make Burton's primary industrial use more viable." Exhibit #008.
258. *planBTV: South End* acknowledges that the industrial uses prominent in the South End utilize large areas of pavement and other impervious surface, creating concerns about the impact of stormwater runoff from this area on the water quality of Lake Champlain. The Plan discusses the need to "seek out any and all opportunities to reduce and clean stormwater, ranging from retrofits to existing systems, to implementing the most effective and innovative systems in new public and private projects." *planBTV: South End* at 101.
259. The Project involves updating the Site's stormwater treatment system for compliance with the latest regulatory guidance, and will treat stormwater runoff that previously was untreated. Exhibit #001b and Worthley Hearing Testimony (3/10/21).
260. The Project falls within the area covered by the Chittenden County Regional Planning Commission's "ECOS Plan." Exhibit #001b.
261. The Project's two primary components—a new performing arts center and upgraded stormwater treatment systems—are consistent with numerous goals identified in the ECOS Plan. Exhibit #001b.
262. The ECOS Plan has 17 goals. Several of those goals are listed in the following findings. 2018 Chittenden County ECOS Plan.
263. Goal 1: Ecological Systems (Habitats, Water Quality, Air Quality) – Conserve, protect, and improve the health of native species habitats, water quality and quantity, and air quality. 2018 Chittenden County ECOS Plan.
264. Goal 3: Climate Change – Reduce greenhouse gas emissions contributing to climate change and adapt to become more resilient to a changing climate. 2018 Chittenden

County ECOS Plan.

265. Goal 7: Social Connectedness – Increase opportunities for people of all backgrounds to engage in the multicultural social fabric and activities of the community. 2018 Chittenden County ECOS Plan.
266. Goal 8: Arts, Culture and Recreation – Increase access to, and participation in, arts, culture, and recreation activities. 2018 Chittenden County ECOS Plan.
267. Goal 10: Economy – Retain and support existing employers and job growth; grow target sector employers and entrepreneurs; and work to attract a greater diversity of employers and employees. 2018 Chittenden County ECOS Plan.
268. Goal 13: Land Use – Encourage future growth in the Center, Metro, Enterprise, Suburban, and Village Planning Areas to maintain Vermont’s historic settlement pattern and respect working and natural landscapes. 2018 Chittenden County ECOS Plan.
269. The Enterprise Planning Area is identified in the ECOS Plan as an area planned for growth, and therefore the proposed Project is consistent with Strategy 2 of the Plan, which is, “strive for 80% of new development in areas planned for growth, which amounts to 15% of our land area.” Exhibit #068 and 2018 Chittenden County ECOS Plan.
270. The Chittenden County Regional Planning Commission submitted a letter to the Commission concluding that the Project is consistent with the ECOS Plan’s “Planning Areas” and stating that the Project does not cause any traffic concerns. Exhibit #068.
271. The City of Burlington has a duly adopted capital program. The Project is to be privately funded, and any development impact fees will be assessed and assigned as required. Exhibit #001b.

Conclusions of Law

Before issuing a permit, the Commission must find that the Project is in conformance with any duly adopted local or regional plan or capital program. 10 V.S.A § 6086(a)(10). The Commission has reviewed the City Plan and has determined that the City Plan is sufficiently specific. *Re: The Mirkwood Group #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Env’tl. Bd. August 19, 1996)*. Because the City Plan is clear and unambiguous it is unnecessary to review the zoning bylaws. See *In re Frank A. Molgano Jr.* 163 Vt. 25 (1994).

The Project conforms with the relevant municipal development plan, known as the City of Burlington’s *planBTV: South End*. *planBTV: South End* includes a strategy to advance land use policy changes to guide future growth, redevelopment and reinvestment in such a way that the arts, industry and creative enterprise can continue to coexist. The City’s 2019 zoning amendment allowing for the expansion of certain commercial uses— including performing arts centers—in the Enterprise District in connection with traditional industrial and artistic uses accomplishes that purpose. The Project is consistent with the standards set forth in that zoning

amendment and the broad goals of *planBTV: South End*.

The Project is also consistent with *plan BTV: South End's* goal to improve stormwater treatment and minimize phosphorous flow into Lake Champlain. As required under Act 64, the Project involves significant stormwater treatment enhancements designed to comply with the latest regulatory standards, and will treat substantial amounts of runoff from impervious surfaces that previously flowed, untreated, into Lake Champlain.

The Project is also consistent with Goals 1, 7, 8, 10, and 13 of the Chittenden County Regional Planning Commission's 2018 ECOS Plan. The stormwater upgrades to be completed as part of the Project will improve water quality. The PAC will increase opportunities for people of all backgrounds to socialize and engage in community activities. The Project will increase access to, and participation in, arts, culture, and recreation activities. The Project could help to support and retain significant area employers, and could help to attract a greater diversity of employees. Finally, the Project is located in the Enterprise - Light Manufacturing Planning Area, where growth is encouraged.

The Commission concurs with the City of Burlington Zoning Department's conclusion that the proposed Project complies with *planBTV: South End* by supporting the needs of light industrial, R&D, and industrial arts/maker businesses in the City's South End.

The Applicant has, therefore, satisfied its burden of demonstrating the Project's compliance with local and regional plans. The Project complies with Criterion 10.

## **VII. SUMMARY CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with the findings and conclusions of this decision and the conditions of Land Use Permit series #4C0174 and Land Use Permit series #4C0368, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

## **VIII. ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit #4C0174-6,4C0368-3(Altered) is hereby issued.

Dated this 3<sup>rd</sup> day of March, 2022.

By     /s/Thomas A. Little      
Thomas A. Little, Chair  
District 4 Environmental Commission

Commissioners participating in this decision:

Monique Gilbert  
Pamela Loranger

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This is an amended decision issued pursuant to Act 250 Rule 31.

If the District Commission issued this amended decision on its own motion, any party may file a motion to alter with the Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A). If the District Commission issued this amended decision in response to a motion to alter filed by a party, then no additional motions to alter this amended decision may be filed.

Any appeal of the Commission's decisions must be filed with the Superior Court, Environmental Division within 30 days of the date this amended decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at:

<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2<sup>nd</sup> Floor, Suite 303, Burlington, VT 05401.

Y:\NRB\Essex\DISTRICTS\DIST4\PROJECTS\300001-4C0250\4C0174\4C0174-6,4C0368-3(Altered)\Published Documents\District Commission Documents\4C0174-6,4C0368-3(Altered) Findings.docx

# Exhibit List



<b>Application #</b>	4C0174-6,4C0368-3 (11/16/21)
<b>Applicant(s)</b>	Burton Corporation
<b>Landowner(s)</b>	Burton Corporation
<b>Project Town(s):</b>	Burlington

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
000		000 Exhibit List	
001	11/13/20	001 Act 250 Application	Applicant
001a	11/25/20	001a Schedule B Revised 11-25-20	Applicant
001b	12/2/20	001b Schedule B Revised 12-02-20	Applicant
002	11/13/20	002 Schedule G	Applicant
003	11/13/20	003 Adjoining Landowner List	Applicant
004	11/13/20	004 Adjoining Parcel Map	Applicant
005	11/13/20	005 Project Location Map	Applicant
006	11/13/20	006 Burlington Zoning Map	Applicant
007	11/13/20	007 DRB CU approval 5-10-2019	Applicant
008	11/13/20	008 DRB CU approval 9-1-2020	Applicant
009	11/13/20	009 RSG Act250 Noise Assessment 11-4-2020	Applicant
010	11/13/20	010 Operational Management Plan 4-23-2020	Applicant
010a	3/5/21	010a Operational Management Plan Revised 3-5-2021	Applicant
011	11/13/20	011 State ANR Permits	Applicant
012	11/13/20	012 SMAC Designation Letter 8-7-1998	Applicant
013	11/13/20	013 Waste Management Plan	Applicant
013a	3/5/21	013a Waste Management Plan Revised 3-5-2021	Applicant
014	11/13/20	014 Traffic Impact Study and Technical Appendix 4-23-2020	Applicant
015	11/13/20	015 Additional Information for South Burlington 4-23-2020	Applicant
016	11/13/20	016 Champlain Parkway UpdateMemo 5-11-2020	Applicant

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
017	11/13/20	017 BurtonHub Parking Management Plan 7-7-2020	Applicant
018	11/13/20	018 BurtonHubTraffic Response 8-12-2020	Applicant
019	11/13/20	019 BurtonHub Midday Traffic Analysis 8-17-2020	Applicant
020	11/13/20	020 BurtonHub Revised PM Trip Generation 10-27-2020	Applicant
021	11/13/20	021 DRB Findings of Fact 1-22-2020	Applicant
022	11/13/20	022 RSG Noise Assessment 4-20-2020	Applicant
023	11/13/20	023 Burlington Permits and Approvals	Applicant
024	11/13/20	024 City Council Memo 5-22-2019	Applicant
025	11/13/20	025 Municipal Impact Letters	Applicant
026	11/13/20	026 Architectural Renderings	Applicant
027	11/13/20	027 L100_Layout_Material	Applicant
028	11/13/20	028 L200_Planting_Plan	Applicant
029	11/13/20	029 L300_Details	Applicant
030	11/13/20	030 L500_Photometric Plan	Applicant
031	11/13/20	031 Lighting Cut Sheets	Applicant
032	11/13/20	032 Existing Conditions C1.1 (Dated 3-13-2020 Last Revised 10-15-2020)	Applicant
032a	11/25/20	032a C1.1 Existing Conditions Plan Revised 11-25-2020	Applicant
033	11/13/20	033 EPSC Plan (Dated 3-13-2020)	Applicant
034	11/13/20	034 Demolition Plan 1 of 2 C1.3 (Dated 3-13-2020 Last Revised 10-15-2020)	Applicant
035	11/13/20	035 Demolition Plan 2 of 2 C1.4 (Dated 3-13-2020 Last Revised 10-15-2020)	Applicant
036	11/13/20	036 Site Plans C1.5 (Dated 3-13-2020)	Applicant
037	11/13/20	037 Site Plans-C1.6 (Dated 3-13-2020)	Applicant
037a	11/25/20	037a C1.6 Site Layout Plans Revised 11-25-2020	Applicant
038	11/13/20	038 Grading and Utility Plans C2.1 (Dated 3-13-2020 Last Revised 10-15-2020)	Applicant
038a	11/25/20	038a C2.1 Grading and Utility Plan Revised 11-25-2020	Applicant
039	11/13/20	039 Sewer Profile 1 of 2 C2.2 (Dated 3-13-2020 Last Revised 10-15-2020)	Applicant
040	11/13/20	040 Sewer Profile 2 of 2 C2.3 (Dated 3-13-2020 Last Revised 10-15-2020)	Applicant
041	11/13/20	041 Site Details C3.1 (Dated 3-13-2020)	Applicant
042	11/13/20	042 Site Details 2 C3.2 (Dated 3-13-2020)	Applicant
043	11/13/20	043 Site Details 3 C3.3 (Dated 3-13-2020)	Applicant

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
044	11/13/20	044 Storm Details 1 C3.4 (Dated 3-13-2020)	Applicant
045	11/13/20	045 Storm Details 2 C3.5 (Dated 3-13-2020)	Applicant
046	11/13/20	046 Sewer Details C3.6 (Dated 3-13-2020)	Applicant
047	11/13/20	047 Water Details C3.7 (Dated 3-13-2020)	Applicant
048	11/13/20	048 EPSC Details (Dated 3-13-2020)	Applicant
049	11/25/20	049 Memo by John Caulo re Additional Information 11-25-20	Applicant
050	11/25/20	050 Email by Ari Rockland-Miller re Primary Agricultural Soils 3-20-20	Applicant
051	12/2/20	051 Email by John Caulo re Traffic Trips 12-2-20	Applicant
052	1/5/21	052 Notice of Appearance by City of South Burlington City Council (1-5-21)	Municipality
053	1/6/21	053 Notice of Appearance by The Burton Corporation (1-6-21)	Applicant
054	1/6/21	054 Luc Logan Party Status Petition, Party Status Map, and Attachment (1-10-21)	Opponent
055	1/6/21	055 Diane de Terra Party Status Petition, Party Status Map, and Attachment (1-10-21)	Opponent
056	1/8/21	056 Lawrence Smith and Laura Waters Party Status Petition, Party Status Map, and Attachment (1-10-21)	Opponent
057	1/11/21	057 Almy Landauer Party Status Petition, Party Status Map, and Attachment (1-8-21)	Opponent
058	1/11/21	058 Wendy Bratt Party Status Petition, Party Status Map, Attachment, and DPW Letter (1-10-21)	Opponent
059	1/11/21	059 Doug Goodman/364 QCP Road LLC Party Status Petition, Party Status Map, and Attachment (1-5-21)	Opponent
060	1/11/21	060 VTrans Entry of Appearance Comments (1-11-21)	VTrans
061	1/11/21	061 Wendy Copp Party Status Petition, Party Status Map, and Attachment (1-10-21)	Opponent
062	1/12/21	062 Sabrinajoy Milbury Party Status Petition, Party Status Map, and Attachment (1-10-21)	Opponent
063	1/12/21	063 Sharon O'Neill Party Status Petition, Party Status Map, and Attachment (1-11-21)	Opponent
064	1/12/21	064 South Burlington Fire District #1 Party Status Petition and Well and Primary Source Protection Area Map (1-13-21)	Municipality
065	1/13/21	065 Dana Walrath Party Status Petition and Attachment (1-12-21)	Opponent
066	1/13/21	066 Stephanie Herrick Party Status Petition, Party Status Map, and Attachment (1-10-21)	Opponent
067	1/14/21	067 Michael Turner Party Status Petition, Party Status Map, and Attachment (1-10-21)	Opponent
068	1/15/21	068 CCRPC Review Letter (1-15-21)	Regional Planning Commission
069	1/20/21	069 South Burlington City Council Memo (1-19-21)	Municipality
070	1/20/21	070 South Burlington City Council Letter to Burlington DRB (7-1-20)	Municipality
071	2/8/21	071 Letter by James Dumont re Prefiled Testimony (2/8/21)	Opponent
072	2/8/21	072 Entry of Appearance by James Dumont on Behalf of Opponents (2-8-21)	Opponent
073	2/10/21	073 Letter by James Dumont re Witnesses (2/10/21)	Opponent



<b>No.</b>	<b>Date Received (Office Use Only)</b>	<b>Document Name/Description</b>	<b>Submitted By (Office Use Only)</b>
074	2/10/21	074 Motion and Memo re Noise Documents (2/10/21)	Opponent
075	2/10/21	075 Rand Acoustics re Hub Project (2/10/21)	Opponent
076	2/10/21	076 Resume of Robert Rand	Opponent
077	2/10/21	077 Letter by Jon Rose re Applicant Response to PHCRO (2/10/21)	Applicant
078	2/10/21	078 Burton Corporation's Memorandum of Law Regarding Consideration of Soil Testing Results (2/10/21)	Applicant
079	2/10/21	079 Exhibit 1 - VHB Email (2/4/21)	Applicant
080	2/10/21	080 Letter by Colin McNeil re City of South Burlington Response to PHCRO (2/10/21)	Municipality
081	2/19/21	081 Letter by South Burlington Fire Department (2/19/21)	Municipality
082	2/22/21	082 Email by Jed Lowy, SBFD re Clarification to 2/19/21 Letter (2/21/21)	Municipality
083	2/24/21	083 Memorandum in Response to Burton Memorandum on Soil Testing (2/24/21)	Opponent
084	2/25/21	084 Burton Corporation's Opposition to Smith et al's Motion for Order Requiring Submission of Noise Documentation (2/25/21)	Applicant
085	2/25/21	085 Exhibit 1 - RSG Memo (Feb. 25, 2021)	Applicant
086	2/26/21	086 SBFD#1 Response To Burton Memorandum Regarding Consideration Of Soil Test Results, Dated Feb. 10, 2021 (2/25/21)	Municipality
087	2/26/21	087 General Electric Potential Hazardous Waste Site Preliminary Assessment - December 1985	Municipality
088	3/1/21	088 Burton Corporation's Consolidated Reply Memorandum Regarding Consideration of Soil Testing Results (3/1/21)	Applicant
089	3/3/21	089 Prefiled Testimony of Deborah Almy Landauer	Opponent
090	3/3/21	090 Prefiled Testimony of Dana Walrath	Opponent
091	3/3/21	091 Prefiled Testimony of Diane de Terra	Opponent
092	3/3/21	092 Prefiled Testimony of Doug Goodman	Opponent
093	3/3/21	093 Prefiled Testimony of Janice Ellis	Opponent
094	3/3/21	094 Prefiled Testimony of Laura Waters	Opponent
095	3/3/21	095 Prefiled Testimony of Lawrence Smith	Opponent
096	3/3/21	096 Prefiled Testimony of Luc Logan	Opponent
097	3/3/21	097 Prefiled Testimony of Michael Turner	Opponent
098	3/3/21	098 Prefiled Testimony of Sharon O'Neill	Opponent
099	3/3/21	099 Prefiled Testimony of Stephanie Herrick	Opponent
100	3/3/21	100 Prefiled Testimony of Wendy Bratt	Opponent
101	3/4/21	101 City of Burlington Notice of Appearance (3/3/21)	Municipality
102	3/5/21	102 SBFD#1 Supporting Documents for March 10 Hearing Memo (3/5/21)	Municipality
103	3/5/21	103 SBFD#1 Property and SPA Map 2	Municipality

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
104	3/5/21	104 December 31, 1985 EPA Site Visit, G.E. Building 41 Plating Shop	Municipality
105	3/5/21	105 January 24, 2001, Environmental Assessment Final Report, General Dynamics Armament Systems, Building 41	Municipality
106	3/5/21	106 October 23, 2020 DEC Letter to Burton Snowboards	Municipality
107	3/5/21	107 Dec. 15, 2020 VHB Proposal Former General Dynamics Facility Investigation Work Plan	Municipality
108	3/5/21	108 Dec 22, 2021 Voisin Letter to VT DEC for SBFD#1	Municipality
109	3/5/21	109 January 12, 2021 DEC Approval with Revised VHB Study Plan	Municipality
110	3/5/21	110 Letter to Commission and List of Exhibits 3-5-21	Opponent
111	3/5/21	111 2009 World Health Organization Night Noise Guidelines for Europe	Opponent
112	3/5/21	112 1999 World Health Organization Guidelines for Community Noise	Opponent
113	3/5/21	113 Burlington Comprehensive Plan	Opponent
114	3/5/21	114 Burlington Ordinances Article 21, including 21-13	Opponent
115	3/5/21	115 Burlington Ordinance Chapter 19, Licenses	Opponent
116	3/5/21	116 South Burlington Comprehensive Plan	Opponent
117	3/5/21	117 Burlington Comprehensive Development Ordinance Definitions	Opponent
118	3/5/21	118 South Burlington Public Nuisance Ordinance	Opponent
119	3/5/21	119 South Burlington Entertainment License Ordinance	Opponent
120	3/5/21	120 South Burlington Land Development Regulations	Opponent
121	3/5/21	121 Arthur Court Photographs	Opponent
122	3/5/21	122 Central Avenue Photographs	Opponent
123	3/5/21	123 Red Rocks Condominium Photographs	Opponent
124	3/5/21	124 Red Rocks Park Parking Photograph	Opponent
125	3/5/21	125 Single Lane Bridge Photographs	Opponent
126	3/5/21	126 Federal Highway Administration, Managing Travel for Planned Special Events (2003) chapter 5	Opponent
127	3/5/21	127 Letter by David White, Burlington Office of City Planning (3/5/21)	Municipality
128	3/5/21	128 Letter by Susan Molzon, Burlington Department of Public Works (3/5/21)	Municipality
129	3/5/21	129 RSG Suppl. Raw Noise Data 8-17-2019	Applicant
130	3/5/21	130 ANR Water Supply Map	Applicant
131	3/8/21	131 Cover Letter by Brian Dunkiel re Wastewater Permits (3/8/21)	Applicant
132	3/8/21	132 Wastewater Permit #WW-4-0489-4 Issued 12/21/20	Applicant
133	3/8/21	133 Wastewater Permit #WW-4-2436-2 Issued 1/7/21	Applicant

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
134	3/8/21	134 Letters by Jon Murad and Jennifer Morrison, Burlington Police Department (2/9/21; 4/17/20; 4/30/20)	Municipality
135	3/9/21	135 City of South Burlington Notice of Appearance (3/9/21)	Municipality
136	3/11/21	136 Burton Merits Hearing Presentation 3-10-2021	Applicant
137	3/11/21	137 Red Rocks Park Management Plan 2014	Applicant
138	3/11/21	138 Red Rocks Park Management Study 5-01-2013	Applicant
139	3/12/21	139 Cover Letter by Brian Dunkiel re Hearing Record (3/11/21)	Applicant
140	3/12/21	140 Email correspondence between Paul Connor, City of South Burlington, and Shaleigh Draper, City of Burlington, Dec. 17, 2018	Applicant
141	3/12/21	141 City of Burlington Notice of Comprehensive Development Ordinance Amendments, Dec. 17, 2018	Applicant
142	4/26/21	142 ANR Hearing Recess Order Comments (4/26/21)	ANR
143	4/26/21	143 City of Burlington Department of Public Works Responses to Hearing Recess Order (4/23/21)	Municipality
144	4/27/21	144 Letter by Brian Dunkiel re Supplemental Evidence in Response to HRO of March 26, 2021 (4/26/21)	Applicant
145	4/27/21	145 Burton Proposed FOF and COL	Applicant
145a	10/29/21	145a Burton Corporation's Revised Proposed Findings of Fact and Conclusions of Law	Applicant
146	4/27/21	146 RSG Response to 3/26/21 HRO (4/14/21)	Applicant
147	4/27/21	147 VHB Memo re 3/26/21 HRO - Traffic (4/26/21)	Applicant
148	4/27/21	148 VHB Scope of Work for Burton Soil Pre-Characterization (4/3/21)	Applicant
149	4/27/21	149 South Burlington Fire District #1 Proposed Findings, Conclusions, Conditions (4/26/21)	Municipality
150	4/27/21	150 Cover Letter by Carol Engvall, Law Office of James Dumont, Esq. (4/27/21)	Opponent
151	4/27/21	151 Lawrence Smith et al Proposed Findings and Conclusions Dated 4/26/21	Opponent
152	5/5/21	152 Response by Smith et al. to New Evidence Submitted by ANR, the City of Burlington, and Burton on 4/26/21 (5/5/21)	Opponent
153	5/11/21	153 Burton Letter Regarding Proposed Conditions (5/11/21)	Applicant
154	5/13/21	154 Response by Smith et al. to Letter Submitted by Burton on 5-11-21 (5/12/21)	Opponent
155	6/11/21	155 VHB Memo re Second HRO (Jun. 10, 2021)	Applicant
156	6/18/21	156 VTrans Response to Second HRO (6/18/21)	VTrans
157	6/18/21	157 Cover Letter by Brian Dunkiel re Second HRO (6/18/21)	Applicant
158	6/18/21	158 VHB Letter regarding Soil Borings (Jun. 17, 2021)	Applicant
159	6/18/21	159 RSG Response to Second Hearing Recess Order (Jun. 15, 2021)	Applicant
159a	8/3/21	159a RSG Response to Second HRO (Original Jun. 15, 2021, Revised Aug. 3, 2021)	Applicant
160	6/29/21	160 Motion and Memorandum in Response by Smith et al. to Burton and VTrans Submissions Dated 6-11-21 and 6-18-21	Opponent

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
161	8/3/21	161 Cover Letter by Malachi Brennan re Third HRO and Memorandum (8/3/21)	Applicant
162	8/3/21	162 RSG Response to Third HRO (Jul. 29, 2021)	Applicant
163	8/3/21	163 Duncan Affidavit (Aug. 3, 2021)	Applicant
164	8/3/21	164 Noise Modeling Data	Applicant
165	8/3/21	165 Noise Modeling Data - Lfmax	Applicant
166	8/3/21	166 Noise Modeling Data - Lsmax	Applicant
167	8/10/21	167 Letter by James A. Dumont re Prefiled Testimony (8/10/21)	Opponent
167a	8/10/21	167a Corrected Letter by James A. Dumont re Prefiled Testimony (8/10/21)	Opponent
168	8/10/21	168 Email by Caroline Engvall re CORRECTED Letter from Intervenors	Opponent
169	8/17/21	169 Burton Motion and Memo by Brian Dunkiel (8/17/21)	Applicant
170	9/15/21	170 Letter by James A. Dumont re Prefiled Testimony (9/15/21)	Opponent
171	9/15/21	171 Prefiled Testimony of Gregory E. Tocci, P.E.	Opponent
171a	9/16/21	171a Prefiled Testimony of Gregory E. Tocci, P.E. with CV	Opponent
172	9/15/21	172 Prefiled Testimony of Alan Margulius	Opponent
173	9/15/21	173 Noise Modeling Data - Lfmax gct 2021.09.14	Opponent
174	9/20/21	174 Burton Corporation's Motion to Strike Prefiled Testimony of Alan Margulius (9/20/21)	Applicant
175	9/23/21	175 Letter by James A. Dumont re Burton's Motion to Strike Prefiled Testimony (9/22/21)	Opponent
175a	9/23/21	175a Revised Letter by James A. Dumont re Burton's Motion to Strike Prefiled Testimony (9/22/21)	Opponent
176	9/29/21	176 Response by Smith et al. to Motion to Strike Alan Margulius Testimony (9/28/21)	Opponent
177	9/30/21	177 Harris Cite Excerpt (Exh. 9 fn 10) for 9 30 21 Hearing	Opponent
178	10/29/21	178 Cover Letter by Brian Dunkiel re Proposed Findings (10/29/21)	Applicant
179	10/29/21	179 Supplemental Proposed Findings of Fact and Conclusions of Law Based on September 30, 2021 Hearing Submitted by Smith et al.	Opponent
180	11/5/21	180 Burton Corporation's Response to Opponents' Supplemental Findings of Fact and Conclusions of Law (11/5/21)	Applicant
181	11/12/21	181 Smith Motion to Strike Applicants' Response to Smith's Proposed Supplemental Findings and Conclusions and Motion for Permission to File Reply (11/11/21)	Opponent
182	11/16/21	182 Burton Corporation's Response To Opponents' Motion To Strike Ex. 180 (11/16/21)	Applicant
183		183	
184		184	
185		185	
186		186	

## CERTIFICATE OF SERVICE

I hereby certify on this 3<sup>rd</sup> day of March, 2022, a copy of the foregoing ACT 250 MEMORANDUM OF DECISION AND ORDER, LAND USE PERMIT, & FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER #4C0174-6.4C0368-3(Altered), was sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note: any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes. All email replies should be sent to [NRB.Act250Essex@vermont.gov](mailto:NRB.Act250Essex@vermont.gov)

The Burton Corporation  
Justin Worthley, Mike Fialko-Casey, Eric Bergstrom  
180 Queen City Park Road  
Burlington, VT 05401  
[justinw@burton.com](mailto:justinw@burton.com); [MikeF@burton.com](mailto:MikeF@burton.com);  
[ericb@burton.com](mailto:ericb@burton.com)

John Caulo  
LandPlan Development Services, LLC  
61 Central Avenue  
Burlington, VT 05401  
[John.caulo@gmail.com](mailto:John.caulo@gmail.com)

Alex Crothers, Alan Newman, Mark Balderston  
Higher Ground  
1214 Williston Road  
South Burlington, VT 05403  
[alex@highergroundmusic.com](mailto:alex@highergroundmusic.com);  
[alan@highergroundmusic.com](mailto:alan@highergroundmusic.com);  
[m.j.balderston@gmail.com](mailto:m.j.balderston@gmail.com)

Kurt Muller, Jennifer Conley  
VHB  
40 IDX Drive  
Building 100, Suite 200  
South Burlington, VT 05403  
[kmuller@vhb.com](mailto:kmuller@vhb.com); [jconley@vhb.com](mailto:jconley@vhb.com)

Eddie Duncan  
RSG  
55 Railroad Row  
White River Junction, VT 05001  
[eddie.duncan@rsginc.com](mailto:eddie.duncan@rsginc.com)

Tyler Barnard, Paul Boisvert  
Engineering Ventures  
208 Flynn Ave, Suite 2A  
Burlington, VT 05401  
[tylerb@engineeringventures.com](mailto:tylerb@engineeringventures.com);  
[paulb@engineeringventures.com](mailto:paulb@engineeringventures.com)

Brian Dunkiel, Jonathan Rose, Malachi Brennan  
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC  
91 College Street, P.O. Box 545  
Burlington, Vermont 05402-0545  
[bdunkiel@dunkielsaunders.com](mailto:bdunkiel@dunkielsaunders.com);  
[rose@dunkielsaunders.com](mailto:rose@dunkielsaunders.com);  
[mbrennan@dunkielsaunders.com](mailto:mbrennan@dunkielsaunders.com)

Katherine Schad, Town Clerk  
Joan Shannon, Kimberlee Sturtevant  
City of Burlington  
149 Church Street  
Burlington, VT 05401  
[burlingtontownclerk@burlingtonvt.gov](mailto:burlingtontownclerk@burlingtonvt.gov);  
[lolberg@burlingtonvt.gov](mailto:lolberg@burlingtonvt.gov);  
[jshannon@burlingtonvt.gov](mailto:jshannon@burlingtonvt.gov);  
[ksturtevant@burlingtonvt.gov](mailto:ksturtevant@burlingtonvt.gov)

Burlington Department of Public Works  
645 Pine Street  
Burlington, VT 05401  
[dpw-pinecustomerservice@burlingtonvt.gov](mailto:dpw-pinecustomerservice@burlingtonvt.gov)

Colin McNeil, City Attorney  
City of South Burlington  
180 Market Street  
South Burlington, VT 05403  
[cmcneil@southburlingtonvt.gov](mailto:cmcneil@southburlingtonvt.gov)

Donna Kinville, City Clerk  
Andrew Bolduc, Paul Conner, Meaghan Emery  
City of South Burlington  
180 Market Street  
South Burlington, VT 05403  
[dkinville@sburl.com](mailto:dkinville@sburl.com); [abolduc@sburl.com](mailto:abolduc@sburl.com);  
[pconner@sburl.com](mailto:pconner@sburl.com); [memery@sburl.com](mailto:memery@sburl.com)

Stephen Crowley, Sharon Behar, Steve Cafilisch  
South Burlington Fire District #1  
12 Pleasant Ave  
South Burlington, VT 05403  
[steve.crowley1@gmail.com](mailto:steve.crowley1@gmail.com);  
[sharon.behar@gmail.com](mailto:sharon.behar@gmail.com);  
[steve.cafilischvt@gmail.com](mailto:steve.cafilischvt@gmail.com)

Taylor Newton  
Chittenden County Regional Planning Commission  
110 West Canal Street, Suite 202  
Winooski, VT 05404  
[permitting@ccrpcvt.org](mailto:permitting@ccrpcvt.org);  
[TNewton@ccrpcvt.org](mailto:TNewton@ccrpcvt.org)

Jennifer Mojo  
Agency of Natural Resources  
1 National Life Drive, Davis 2  
Montpelier, VT 05602-3901  
[ANR.Act250@vermont.gov](mailto:ANR.Act250@vermont.gov);  
[jennifer.mojo@vermont.gov](mailto:jennifer.mojo@vermont.gov)

Dept. of Public Service  
112 State Street, Drawer 20  
Montpelier, VT 05620-2601  
[barry.murphy@vermont.gov](mailto:barry.murphy@vermont.gov);  
[PSD.VTDPS@vermont.gov](mailto:PSD.VTDPS@vermont.gov)

VTrans Policy, Planning & Research  
Bureau  
Barre City Place  
219 N. Main Street  
Barre, VT 05641  
[AOT.Act250@vermont.gov](mailto:AOT.Act250@vermont.gov)

Agency of Agriculture, Food & Markets  
116 State Street, Drawer 20  
Montpelier, VT 05620-2901  
[AGR.Act250@vermont.gov](mailto:AGR.Act250@vermont.gov)

Division for Historic Preservation  
National Life Building, Drawer 20  
Montpelier, VT 05620  
[scott.dillon@vermont.gov](mailto:scott.dillon@vermont.gov);  
[james.duggan@vermont.gov](mailto:james.duggan@vermont.gov);  
[ACCD.ProjectReview@vermont.gov](mailto:ACCD.ProjectReview@vermont.gov)

### FOR YOUR INFORMATION

District #4 Environmental Commission  
Thomas Little, Chair  
Monique Gilbert/Pam Loranger  
111 West Street  
Essex Junction, VT 05452  
[nrb.act250essex@vermont.gov](mailto:nrb.act250essex@vermont.gov)

James Dumont  
Law Office of James A. Dumont  
15 Main St., P.O. Box 229  
Bristol, VT 05443  
[dumont@gmavt.net](mailto:dumont@gmavt.net)

Michael Santos  
BSC Group  
[msantos@bscgroup.com](mailto:msantos@bscgroup.com)

Luc Logan  
39 Central Ave  
South Burlington, VT 05403  
[LALogan@hotmail.com](mailto:LALogan@hotmail.com)

Diane de Terra  
39 Central Ave  
South Burlington, VT 05403  
[deterrafirma@gmail.com](mailto:deterrafirma@gmail.com)

Lawrence Smith & Laura Waters  
50 Central Ave  
South Burlington, VT 05403  
[wbsmithvt@gmail.com](mailto:wbsmithvt@gmail.com);  
[watersl@gmail.com](mailto:watersl@gmail.com)

Almy Landauer  
303 Redrock Drive  
Burlington, VT 05401  
[almy.landauer@gmail.com](mailto:almy.landauer@gmail.com)

Wendy Bratt  
52 Central Ave  
South Burlington, VT 05403  
[wbratt@gmavt.net](mailto:wbratt@gmavt.net)

Doug Goodman/364 QCP Road LLC  
66 Central Ave  
South Burlington, VT 05403  
[douggoodmanphoto@gmail.com](mailto:douggoodmanphoto@gmail.com)

Wendy Copp  
11 Maple Ave  
South Burlington, VT 05403  
[WendyCopp@msn.com](mailto:WendyCopp@msn.com)

Sabrinajoy Milbury  
8 Maple Ave  
South Burlington, VT 05403  
[sabrinajoymilbury@gmail.com](mailto:sabrinajoymilbury@gmail.com)

Sharon O'Neill  
20 Arthur Court  
Burlington, VT 05401  
[grayoak2@msn.com](mailto:grayoak2@msn.com)

Dana Walrath  
42 Central Ave  
South Burlington, VT 05403  
[dana.walrath@gmail.com](mailto:dana.walrath@gmail.com)

Stephanie Herrick  
161 Austin Drive, Unit #151  
Burlington, VT 05401  
[stephherrick@myfairpoint.net](mailto:stephherrick@myfairpoint.net)

Michael Turner  
110 Central Ave  
South Burlington, VT 05403  
[comittina@comcast.net](mailto:comittina@comcast.net)

Janice Ellis  
161 Austin Drive #83  
Burlington, VT 05401  
[redosier@comcast.net](mailto:redosier@comcast.net)

Kerry Anderson  
3 Maple Ave  
South Burlington, VT 05403  
[28sabre@comcast.net](mailto:28sabre@comcast.net)

Lori Hayes  
3 Lyons Ave  
South Burlington, VT 05403  
[lorihayes151515@gmail.com](mailto:lorihayes151515@gmail.com)

Harris Roen  
46 Scarff Avenue  
Burlington, VT 05401  
[harris@roen.net](mailto:harris@roen.net)

Mark Furnari  
[mark.furnari@gmail.com](mailto:mark.furnari@gmail.com)

Dated at Essex Junction, Vermont, this 3<sup>rd</sup>  
day of March, 2022.



Jessica Mason  
Natural Resources Board Technician  
802-879-5614  
[Jessica.Mason@vermont.gov](mailto:Jessica.Mason@vermont.gov)