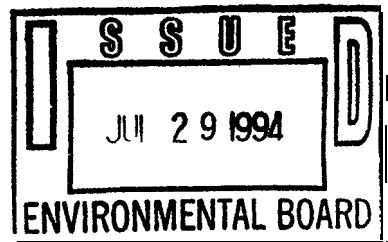


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: Taft Corners Associates, Inc.
Application #4C0696-11-EB (Remand)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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I. SUMMARY OF DECISION

This decision pertains to a case which was remanded by the Vermont Supreme Court to the Environmental Board. The case concerns an appeal of a permit amendment issued for the construction of two buildings consisting of approximately 114,513 and 132,500 square feet, to be used for retail and warehouse sales, in the Taft Corners Commercial and Industrial Park located in Williston (the Park). The permit amendment also approves related roadway and parking improvements, and the reconfiguration of Lots #34, 35, and 36 into Lots #34 and 35, and conceptually approves a 5100-foot recreation path on the reconfigured lots. The permit amendment concerns Land Use Permit #4C0696, issued for Phase I of the Park on July 31, 1987 (the Umbrella Permit), as corrected by the District #4 Commission on September 4, 1987, and as amended by Land Use Permit #4C0696-R-4, approving Phase II of the Park issued on April 27, 1988 (the 1988 Amendment).

As is **explained** below, the Environmental Board concludes that:

- (a) This application complies with those criteria which were left open by the Umbrella Permit for full review, which were remanded to the Board by the Court, and which are not contested in this proceeding: 1 (air pollution), 1(B) (waste disposal), 1(E) (streams), 7 (local governmental services - fire), and 9(F) (energy conservation).
- (b) The proposed project will not have an undue adverse affect on aesthetics and scenic beauty (Criterion 8) **because it** does not violate the aesthetic provisions of the 1990 Williston Town Plan, the average person will not find it shocking or offensive, and the Applicant has taken reasonable mitigation measures.
- (c) This application complies with the conditions of the Umbrella Permit issued under Criteria 1(B) (waste disposal), 2 (sufficient water available), and 9(J) (public utility services).
- (d) This application, which is for a project that will generate as many as 1,400 vehicle trips during peak hour, does not comply with all of the conditions of the Umbrella Permit, as revised by the 1988 Amendment, with respect to Criterion 5 (traffic).

Specifically, the Umbrella Permit and 1988 Amendment were issued based in part on joint representations by the Applicant and other parties that included the construction of significant improvements to area roads by the State of Vermont and the Town of Williston. Most of these improvements have not been performed. For example, they have not widened the approaches of Route 2A to the Taft Corners intersection to three lanes, widened Route 2A to four lanes from I-89 to Route 2, or widened the I-89 off-ramps at Exit #12 to two lanes each.

Moreover, the area roads subject to the planned improvements currently experience unsafe traffic conditions and unreasonable congestion. At a time when an insufficient number of the improvements that formed the basis of the Umbrella Permit have been made, placing a project with this level of trip generation in the area does not comply with the Umbrella Permit.

The Board believes that it is fair and reasonable to require that the Applicant abide by the commitments made to obtain the Umbrella Permit. If the Applicant wishes to obtain the benefits of an umbrella permit - limited review of future applications - it must also bear the burdens. Accordingly, the Board will condition its approval of the project to require that, prior to construction, all of Phases One and Two, and part of Phase Three of the so-called "**Exhibit B**" improvements that formed part of the basis for the Umbrella Permit be in place and operating.

- (e) In the absence of the above permit condition, this application would represent a substantial change to the Umbrella Permit under Criterion 10 (conformance with local or regional plans), and remand to the District X4 Commission for full review under all criteria would be required. Specifically, the construction of the proposed project without sufficient improvements to area roads is a change from the Umbrella Permit. Further, without the "**Exhibit B**" improvements, this change would have the potential for significant impact in that it would not comply with the provisions of the applicable town and regional plans for promoting traffic safety and minimizing traffic congestion.

II. SUMMARY OF PROCEEDINGS

On November 15, 1991, the District #4 Commission issued

Land Use Permit Amendment **#4C0696-11** (Amendment 11) to the Applicant, authorizing the construction of two buildings **consisting** of **approximately** 114,513 and 132,500 square feet, to be used for retail and warehouse sales, in the Park. The permit amendment also approves related roadway and parking improvements, **and** the reconfiguration of Lots **#34, 35, and 36 into Lots #34 and 35**, and "conceptually" approves a **5100-**foot recreation path on the reconfigured lots.

On **December** 13, 1991, the Williston Citizens for Responsible **Gr**owth (WCRG) filed an appeal of Amendment 11 with the Board. Following a prehearing conference, issuance of a prehearing conference report and order, and an opportunity for all parties to submit memoranda of law, on March 31, 1992, the Board issued a memorandum of decision concerning this appeal, remanding the case to the District **#4 Commission**.

The Applicant appealed that decision to the Supreme Court. On April 30, 1993, the Court reversed the Board's 1992 decision **and** remanded the case to the Board with instructions. On May 17, WCRG filed a motion for reargument with the Court.

On May 18, 1993, the Applicant filed a motion to accelerate with the Board. On May 27, the Board issued a memorandum stating that it could not proceed with the remand because jurisdiction still rested with the Court by reason of **WCRG's** motion.

On **September** 2, 1993, the Court issued a decision denying **WCRG's** motion. On September 27, then Board Chair Elizabeth Courtney held a prehearing conference. On October 1, the Chair issued a prehearing conference report and order. That report and order identified various preliminary issues raised **by** the parties and set a schedule for submission of **memoranda** concerning them.

During October and November, 1993, the parties filed memoranda regarding a motion for disqualification filed by the Applicant **and** on the various preliminary issues.

On **October** 15, 1993, the Board issued a memorandum stating that **it** could not review the preliminary issues until it decided the motion for disqualification.

On November 11, 1993, the Board met concerning the motion for disqualification. On November 18, the Board issued a memorandum to parties stating that the decisions **it**

had made with respect to the motion had been treated as an administrative matter, and attached various supporting documents.

On November 22, 1993, the Applicant filed a letter in essence accepting the Board's decision on the motion for disqualification and requesting oral argument on all remaining preliminary issues.

On December 1, 1993, the Board convened oral argument on the remaining preliminary issues, with the Applicant, the Town of Williston, the City of Burlington, and WCRG participating.

On December 20, 1993 the Board issued a memorandum of decision on the preliminary issues, which is incorporated by reference.

During January 1994, parties submitted prefiled testimony, lists of witnesses and exhibits, and objections to prefiled testimony. With its prefiled testimony, the City filed a memorandum of law concerning the merits.

On January 19, 1994, the Applicant filed a "**motion** to alter and/or clarify preliminary decision" and supporting memorandum. In an accompanying cover letter, the Applicant suggested that the Board defer ruling on the motion until after hearing the merits.

On January 20, 1994, WCRG filed a request that the Board take official notice of various documents. On January 24, 1994, the Applicant filed a response to **WCRG's** request to take notice.

Hearings on this matter, initially scheduled for January 26 and 27, and February 2 and 3, 1994 were postponed because of **a/delay** regarding appointments to the Board.

The Board deliberated on February 11, 1994 concerning a motion to quash, a request to take notice, and a motion for a prefiled schedule, which had previously been filed. On February 17, the Board issued a memorandum to parties stating its decisions on the motions and the request. The February 17 memorandum is incorporated by reference.

On February 17, 1994, pursuant to 10 V.S.A. § 6021(a), then-Chair Courtney assigned to this matter alternate members Robert H. Opel to act as chair and Anthony Thompson to sit as a regular member.

The Board convened hearings on February 23 and 24, and March 9, 10, and 23, 1994, with the following parties participating:

The Applicant by Stewart H. **McConaughy**, Esq. and
Phillip C. Linton, Esq.
The Town of Williston by Richard A. Spokes, Esq.
WCRG by Gerald R. **Tarrant**, Esq.
The **City of Burlington** by Francis X. Murray, Esq.
The CCRPC by Herbert A. Durfee III

During the **hearing** on February **23**, the Applicant, WCRG, and the CCRPC each filed a chart in response to a request from Board member Arthur Gibb with respect to stipulations to the Umbrella Permit and 1988 Amendment which are at issue. After taking a site visit and hearing testimony, the Board recessed pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision.

On April 13, 1994, the Applicant, the Town of Williston, WCRG, and the City of Burlington each filed proposed **findings** of fact and conclusions of law. The Town also filed a **separate** memorandum of law.

The Board deliberated concerning this matter **on May 4, 18, and 23, June 15, and July 7, 14, and 27, 1994. This** matter is **now ready** for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

III. ISSUES

1. Whether the proposed project complies with 10 V.S.A. § 6086(a) (1) (air pollution), (1)(B) (waste disposal), (1)(E) (streams), (7) (local governmental services - fire), (8) (aesthetics and scenic beauty), and (9)(F) (energy conservation).

2. Whether the proposed project complies with the conditions of the Umbrella Permit with respect to 10 V.S.A. § 6086(a)(1)(B) (waste disposal), (2) (sufficient water available), (5) (traffic safety and congestion), and (9)(J) (public utility services).

3. Whether, pursuant to Board Rules 2(G) and 34, the amendment application constitutes a substantial change to the project approved in the Umbrella Permit because the

amendment application proposes a change with the potential for significant impact under 10 V.S.A. § 6086(a)(10) (local or regional plan).

Parties have raised several specific questions with respect to these issues which are addressed **below**.¹

IV. FINDINGS OF FACT

For the convenience of the reader, the findings of fact below are organized into a general section followed by sections related to the specific issues. By organizing the findings under "**issue**" headings, the Board in no way means to imply that, with respect to any one issue, only the findings under that heading are relevant. The findings should be read as cumulative.' Where findings from the general category or another specific category are relevant, they are assumed and are not repeated.

A. General

1. The proposed project consists of the construction and use of two buildings consisting of approximately 114,513 and 132,500 square feet. It will be located in the Taft Corners Commercial and Industrial Park (the Park). The proposed buildings are to be used for retail and warehouse sales. The smaller building will house a so-called "**Wal*Mart**" store and the larger building a so-called "**Sam's**." The project also includes roadway and parking improvements, the reconfiguration of Lots f34, 35, and 36 of the Park into Lots #34 and 35, and a **5100-foot** recreation path on the reconfigured lots.
2. The Park is located off of Vermont Routes 2 and 2A and adjacent to Interstate 89 in the Town of Williston. On July 31, 1987, the District #4 Commission issued Land Use Permit #4C0696 and supporting findings of fact and conclusions of law (the Umbrella Permit) pertaining to the Park.

¹Not addressed below is a portion of the Applicant's January 19 motion to alter concerning a petition to revoke filed by the City of Burlington. In the Board's December 20, 1993 decision, the Board **stated** it would docket and hear that petition separately if re-activated, the Applicant may renew **its** motion.

3. **The Umbrella** Permit concerns an application filed by **Taft Corners Associates, Inc.** (the Applicant) on **October 16, 1986**. This application sought approval for the subdivision of 223 acres into 37 commercial and **industrial** lots to be served by 8000 feet of roadway **and by municipal water and sewer systems**.

4. **The Umbrella** Permit approves only part of the 1986 **application**. The Umbrella Permit authorizes the **Applicant**:

[T]o subdivide Phase 1; a maximum of 999 **parking** spaces and **10-14** lots of a planned 37 commercial/industrial lot subdivision and to **construct** approximately 4,400 feet of roads **and utilities** connecting Route 2 to Route 2A.

5. The District Commission limited its approval to **10-14** lots because of its findings under Criteria 1 (air pollution), 5 (traffic safety and congestion), (9)(A) (impact of growth), and (-9)(K) (public investments and facilities). Under these criteria, the District Commission found that, with respect to the impacts of motor vehicle use associated with the Park, it did not have sufficient information to make affirmative **findings for** all 37 lots.

6. The Umbrella Permit includes various conditions. One of these, Condition **#5**, provides:

This subdivision is approved for the following maximum cumulative impacts which may not be exceeded without the prior written approval of the District Environmental Commission:

/ 999 parking spaces;
34,000 gallon per day of sanitary wastewater and water;
1,223 average daily vehicle trips;
145 peak hour vehicle trips; and
3000 **KVA** electricity.

7. The Umbrella Permit also includes Condition **#6**, which provides:

Prior to the commencement of construction on **any** lot within this subdivision the **Permittee**, Taft Corners Associates, and any

purchaser or tenant of any lot shall file an amendment application under criteria **1(Air)**, 1(E), 1(B), 4, 7, (fire services), 8, and **9(F)**. This amendment application shall be accompanied by evidence of conformance to the Findings under criteria 1(B), 2 and 3, 5 and 9(J) and shall file a cumulative impact statement.

8. On September 4, 1987, the District Commission issued a Corrected Land Use Permit #4C0696. In issuing this correction to the Umbrella Permit, the District Commission did not alter Conditions #5 and #6 and did not change any of the findings referenced in Condition #6.
9. On January 11, 1988, the Applicant filed application #4C0696-R-4 with the District Commission. In relevant part, this application sought approval for "Phase II," consisting of the remainder of the 37-lot subdivision.
10. On April 27, 1988, the District Commission issued Land Use Permit Amendment #4C0696-R-4 (the 1988 Amendment). The 1988 Amendment authorizes the Applicant to "subdivide, as conditioned, 37 commercial and industrial lots of a previously approved subdivision with associated improvements located off of Routes 2 and 2A in Williston, Vermont."
11. The 1988 Amendment made various revisions to the Umbrella Permit. Among these was a revision to Condition #5 of the Umbrella Permit, to read as follows:

This subdivision is approved for the following maximum cumulative impacts which may not be exceeded without the prior written approval of the District #4 Environmental Commission:

999 parking spaces and 4,900 parking spaces upon compliance with condition #6, below;
34,000 gallons per day of sanitary wastewater and water;
1,284 peak hour vehicle trips in 1988;
2,278 peak hour vehicle trips in 1989;
2,825 peak hour vehicle trips in 1990;
and 3000 EVA electricity.

The "condition #6" referred to in the above quote from 1988 Amendment is not Condition #6 of the Umbrella Permit. Rather, the condition referred to is Condition #6 of the 1988 Amendment, which concerns an opportunity for parties to comment on air quality permit which at the time was yet to be issued.

12. The 1988 Amendment did not alter Condition #6 of the Umbrella Permit. Condition #1 of the 1988 Amendment states, in relevant part, that the conditions of the Umbrella Permit "remain in full force and effect except as amended herein."
13. In support of the 1988 Amendment's approval of Phase II, the District Commission made supplementary findings of fact regarding motor vehicle impacts under Criteria 1 (air pollution), 5 (traffic safety and congestion), 9(A) (impact of growth), and 9(K) (public investments and facilities).
14. The Park is bounded on the south by I-89, on the east by Vermont Route 2A and by commercial lands not part of the Park) on the north by U.S. Route 2 and by commercial lands not part of the Park, and on the west by commercial properties not part of the Park and by residential properties.
15. Route 2A begins south of I-89, passes through an intersection with Walker Hill Road, runs north under I-89 at Exit 12, and continues north past lands on which the Park and other land uses are located. Passing the Park, Route 2A goes through an intersection with Marshall Avenue, one of two internal park entrance roads. Further north, Route 2A passes an entrance to a banking Complex which includes the Howard Bank and then reaches an intersection with Route 2 (the so-called "Taft Corners" Intersection). Route 2A then continues further north toward Essex Junction. Just north of the Taft Corners intersection, Route 2A goes through an intersection with Industrial Avenue on the west and Mountain View Road on the east. Further north Route 2A passes through an intersection with River Cove Road.
16. From the Taft Corners intersection, Route 2 goes west toward Burlington, passing lands on which the Park is located. Going west, Route 2 passes through an intersection with Harvest Lane (the other internal park entrance road) on the south, and the entrance to a commercial subdivision known as Blair Park. Continuing

west, Route 2 passes through intersections with Commerce Street, **Brownell** Road, and Industrial Avenue, and Muddy Brook Road. Going east from the Taft Corners intersection, Route 2 goes toward **Bolton** and beyond.

- B. Uncontested Criteria for Full Review: 1 (Air Pollution), 1(B) (Waste Disposal), 1(E) (**Streams**), 7 (Local Governmental Services - Fire), and 9(J) (Public Utility Services)
17. On April 27, 1989, the Agency of Natural Resources (ANR), through its Department of Environmental Conservation, issued Air Pollution Control Permit #AP-88-028 to the Applicant, authorizing the construction of 4,900 parking spaces at the Park. **ANR** conditioned the air pollution control permit to authorize phased approval of the parking spaces, with the Applicant having to obtain further approval from ANR for any phases beyond 2,500 parking spaces.
18. On June 26, 1992, **ANR's** Air Pollution Control Division issued a letter to the Applicant approving an additional increment of 1,000 parking spaces, bringing **ANR's** approved total for the Park to 3,500 parking spaces.
19. On January 13, 1994, **ANR's** Air Pollution Control Division issued a letter to the Applicant stating that the Park is in compliance with Air Pollution Control Permit #AP-88-028.
20. To date, the Applicant has committed 683 of the 4,900 parking spaces at the Park approved by the 1988 Amendment.
21. The proposed project will involve the construction of 1,470 parking spaces. Following such construction, the total number of parking spaces remaining to be allocated at the Park will be 2,747 under the 1988 Amendment and 1,347 under the Air Pollution Control Permit.
22. The proposed project will not create any process emissions, noxious odors, or significant noise pollution. Construction hours will be limited to 7:00 a.m. to 6:00 p.m.
23. The primary fuel source for the proposed project will be natural gas. Heat will be provided by heat

exchangers. Open burning will be prohibited. Dust will be controlled during and after construction by the application of water or calcium chloride until the sites are paved and vegetation is firmly established.

24. On January 26, 1987, ANR issued Subdivision Permit #EC-4-1509 for the Park, approving a water main extension to the Park and the Park's connection to the Essex Junction Wastewater Treatment Facility.
25. On May 22, 1987, ANR issued Discharge Permit #1-0511 for the Park, authorizing the discharge of runoff from the Park to "unnamed wetland tributaries of Muddy Brook."
26. On June 24, 1991, ANR issued a letter to the Applicant stating that the discharge from the proposed project will be in compliance with the terms and conditions of Discharge Permit #1-0511.
27. On September 10, 1991, ANR issued Water Supply and Wastewater Disposal Permit #WW-1-0409 to the Applicant, approving the water supply and sewage disposal plans for the proposed project.
28. There are no streams within the boundaries of Lots #34 and #35 as proposed to be reconfigured. An open seasonal drainage swale is located along the eastern boundary of Lot 34. A 50 foot buffer will be maintained along this swale and no construction will occur within the buffer. Hay bales and snow fences will be used during construction to maintain the buffer strip.
29. The Applicant plans to construct a path for pedestrians and bicyclists which will cross the drainage swale on Lot #34. In Land Use Permit #4C0696-11, from which this appeal is taken, the District Commission required in Condition #26 that an amendment application must be submitted and approval obtained prior to construction of the path. The Applicant agrees to this condition.
30. The Town of Williston Fire Department has the capacity to provide fire protection services for the proposed project. The Applicant will take various measures requested by the Fire Department to improve its ability to provide fire protection, including marking fire hydrants; paving the south side of the buildings, eliminating part of an island to improve the turning

radius, and establishing a minimum asphalt width of 30 feet.

31. The insulation standards for the proposed project will be R-19 (walls), R-30 (ceilings), and R-10 (foundations). No electric resistance heating will be used. Electric service will be limited to lighting and cooling and an energy management system will be used to control electric use and reduce peak period demands. The proposed project will use high efficiency light bulbs, air lock vestibules, insulated and sealed loading dock doors, and **H.V.A.C.** with an economizer.
32. In support of its request for a positive finding under Criterion 9(F) (energy conservation), the Applicant relies on Exhibit A-24, consisting of a memorandum from the State of Vermont Department of Public Service (DPS) concerning the proposed project. In relevant part, that memorandum states that the proposed project is satisfactory under Criterion 9(F) with the exception of two areas: heat recovery and efficiency of hot water heaters. DPS also requests the right to review plans and specifications for the proposed project prior to the ordering of equipment. In Land Use Permit #4C0696-11, the District Commission issued Condition #23, which in part requires the Applicant to submit information to DPS, for its review and approval, "prior to ordering internal energy consuming equipment."
- C. Criterion 8: Aesthetics and Scenic Beauty, Historic Sites, Rare and Irreplaceable Natural Areas**
33. In the Umbrella Permit, the District Commission required that the Applicant take various measures to protect a beaver **flowage** area; tributaries of Allen Brook, the Brook's shorelines, and associated wetlands; and a brick farmhouse located on Lot #28 of the Park. The proposed project will not affect any of these areas or the farmhouse.
34. The project site does not contain, and the proposed project will not affect, any historic sites, rare and irreplaceable natural areas, endangered species, or necessary wildlife habitat.
35. In the findings of fact and conclusions of law supporting the Umbrella Permit, the District **Commission** made several findings of fact concerning the aesthetic

impacts of the Park, including, but not limited to, the following:

25. The project site will be highly visible from public areas. The property slopes to the northwest, away from the Interstate, and is significantly lower in elevation than the Interstate so that travelers will look down upon this development. The easterly portion of this property is very visible from Route 2A and the majority of the property is visible from Route 2.

This property is an important portion of the gateway view into Burlington enjoyed by motorists travelling westerly on the Interstate. These 223 acres of meadowland comprise the foreground of the motorists [sic] view. The middle ground is comprised of vegetation beyond which are distant views of the City of Burlington and the Adirondack Mountains. Westbound motorists have a view of this site for a substantial period of time, whereas the view of the site by eastbound motorists is of short duration.

Within this **viewshed** the existing land uses are generally commercial. ...

26. Three large lots (**#34, #35 and #36**) adjoin the, Interstate right-of-way. These lots contain a 150 foot wide buffer strip (Exhibit **#117**).
27. **The** Applicant has attempted to minimize the visual impact by designing the subdivision so that the large lots are located farthest from view of the Interstate along Route 2 (Exhibit **#25**).

* * *

36. Future construction on all of these lots will be reviewed by the District Environmental Commission.
36. In the findings of fact and conclusions of law supporting the Umbrella Permit, as revised by the 1988

Amendment, the District Commission also found as follows:

The Commission finds that the project lands are an important part of the scenic panorama enjoyed by motorists travelling west on the Interstate and that this subdivision will be a highly visible element in the foreground of this panorama. The subdivision will also have a highly visible local profile and will result in the loss of 223 acres of open space. This subdivision will transform a rural/suburban landscape into a suburban/urban landscape and is the harbinger of major urban growth. This subdivision will have an adverse impact upon the scenic beauty of the area. The subdivision and development of 223 acres of highly visible meadowland will significantly diminish the scenic natural resource qualities of this area. The Commission further finds that this adverse impact will not be undue because it can be adequately mitigated. The Applicant has proposed a number of mitigative measures regarding subdivision design, landscaping, building design, lighting and signs.

a. Subdivision Design:

In general, the Commission has found that 150 foot buffer strips between developments and the Interstate right-of-way, especially when well vegetated, serve to reduce adverse impacts. In this instance, however, such a buffer strip will have less of a beneficial impact because the land slopes away from the Interstate and the motorist's eye is drawn to the large expanse of meadowland below the horizon. In order to buffer or screen the motorist's view of the subdivision this, 150 foot buffer strip would have to be densely inhabited by mature trees of significant height. Although the design which locates the larger lots in the area of the Interstate may provide more flexibility for incorporating open space, the motorist's eye will be drawn to the roofs, parking lots and details of future buildings to be constructed within this subdivision. The smaller lots

will be located adjacent to Routes 2 and 2A and **future** development of these lots will likely create a new and highly visible urban area.

Special care must be taken to mitigate this extreme loss of open space. Given the topography, a significant increase in the width of the buffer area may not offer visual mitigation of the development of Lots #22 and #33 through #36. Therefore, the Commission will offer notice that the development of these lots must be designed to minimize the visual intrusion into the **viewshed** of the Interstate and must include significant open space.

37. In the Umbrella Permit, the District Commission included **Condition #25**, which provides as follows:

25. Prior to the development of any lot, the **Permittees**, and purchaser or tenant shall file complete plans under criterion 8, (Aesthetics), and **shall** receive the approval of the Commission. These plans shall include a minimum of:

- a) a design which minimizes visual intrusion into the **viewshed** of the Interstate;
- b) on Lots #33 through #36, significant open space;
- c) "public profiles" on any side of a building which faces a public road;
- d) a sufficient number of trees 6-8 feet tall at planting to provide a visual buffer during all seasons;
- e) the delineation of all existing vegetation;
- f) the screening of all parking lots from existing public roads;
- g) building elevations, sign design and complete color chips; and
- h) exterior lighting fixtures which are fully downshielded low intensity luminaires no higher than 20 feet from ground level in conformance with Exhibit #26. No ballard fixtures may be installed without the prior written

approval of the District Environmental
Commission.

38. Several of the lots in the Park have been developed since the Umbrella Permit and the 1988 Amendment were issued. Examples of such development include a Ponderosa Restaurant and a warehouse for the Digital Equipment Corporation. The warehouse currently is the largest structure in the Park, consisting of approximately 70,000 square feet and being approximately 16 feet high.
39. The Park is in an area of Williston which has become an important commercial district. Going north along Route 2A from Exit 12, there is a gas station, a Susse Chalet Motor Inn, the Ponderosa, a building housing the Vermont Public Power Supply Authority, and other buildings. Presently, the nearby Taft Corners intersection has the bank complex on the southwest corner, a gas station on the northwest corner, the Tafts Corner Shopping Center on the northeast corner, and a Friendly's restaurant and open space on the southwest corner. North of the Park, on the other side of Route 2, there exist several commercial properties, including Blair Park.
40. None of the commercial buildings in the area near the Park has a square footage exceeding 75,000. Examples of the larger buildings in the area are the Taft Corners Shopping Center, approximately 64,900 square feet; and the Susse Chalet Motor Inn, approximately 60,400 square feet.
41. Many of the commercial buildings presently at the Park or in the area near the Park possess large parking areas and are primarily oriented toward serving vehicular traffic.
42. The interstate exit near the Park is Exit 12. Going north from Exit 12, I-89 runs to Burlington and beyond to Colchester (Exit 16) and further. The area between Exits 12 and 16 along the interstate contains a mixture of industrial and commercial buildings. The buildings include the Adams Industrial Park, the Lane Press, New England Telephone, the Sheraton, the Costco Warehouse Sales, and others. Many of the buildings are large and visually prominent from I-89. For example, the Lane Press consists of approximately 128,000 square feet.

43. The industrial and commercial buildings along I-89 between Exits 12 and 16 are interspersed with open areas and at points I-89 in this area retains a rural character.
44. In the vicinity of the proposed project, significant mountain and hill views exist to the east and to the West for the traveler along I-89 and Routes 2 and 2A.
45. The site of the proposed project is open and gently rolling. The topography of the land slopes down from the adjacent I-89 and **Route 2A**. An area of deciduous and coniferous trees exists on the south side of Lot **#35** near I-89.
46. The proposed Wal*Mart will be 22 feet high and the proposed Sam's will be 26 feet high. The tallest point on the proposed Sam's will be approximately 38 feet below I-89. The Applicant has chosen a site for the buildings and parking area approximately 150 feet from I-89. Viewers from **I-89 will** therefore look over the project site to the middle and long views beyond, seeing the buildings in the near view.
47. The proposed buildings will be one-story with flat roofs, resembling large boxes. The roofs will be made of a dark stone ballast of local gravel and the walls of the building will be non-reflective earth-tone colors. In these respects, they are similar to many of the buildings in the surrounding area. To break up the monotony of the design, the Applicant proposes facades for the buildings with dormers, covered walkways, glass entryways, and varied masonry block textures and finishes.
48. The Applicant proposes to **"bench"** and lower the buildings into the slope of the land. This action will minimize the visual prominence of the buildings.
49. Primarily between the proposed buildings, the Applicant will construct a large, paved parking area, which will be broken into sections and landscaped with interior green strips and plantings.
50. The existing vegetation on Lot **#35** along I-89 will provide some screening of the proposed buildings. The Applicant proposes to supplement this screening by building berms on Lot **#34** along I-89 and by planting a mixture of coniferous and deciduous trees on the berms.

The Applicant also proposes to construct a berm on Lot #33, which forms the eastern boundary of Lot #34. The berm will be constructed just east of Lot #34's eastern boundary. A mixture of coniferous and deciduous trees will be planted on the berm. The berm will provide some screening of the proposed project from Route 2A. All proposed trees will be six to eight feet in height when planted.

51. The Applicant has a plan which will maintain the health of trees on the site on a permanent basis and will provide for trimming the trees so that they will not block distant views of mountains and hills for travelers on the area highways. The Applicant will replace dead or dying trees as soon as seasonably possible.
52. Signs for the project will include one pylon mounted sign for each store, to be located at the entry of the parking lot. The entry signs will be three feet by ten and a half feet mounted on a 20-foot pole. They will be externally illuminated and will be visible only to the traveler approaching on the entry road. Each building also will have a sign mounted on it. The sign on the **Wal*mart** store will be approximately 185 square feet in size and internally lit. The sign on the Sam's will be approximately 359 square feet in size. The building signs will be visible only to people close to the buildings.
53. All exterior lighting fixtures, including those in the parking lot, will be fully down-shielded, low intensity, and no higher than 20 feet. This will minimize any perception of glow from the project during the evening or the night.
54. The proposed improvements will cover approximately 51 percent of Lots #34 and #35 following reconfiguration. The Applicant will maintain the remainder of those lots as open space. In addition, the Applicant will place open space easements on adjacent Lots #22 and #33, resulting in an adjacent open space area of approximately 25.32 acres which will exist following project construction.
55. The Town Plan in effect on the date that application #4C0696-11 was filed is the Williston Comprehensive Plan adopted July 23, 1990.

56. The Park is located on land identified in the 1990 Town Plan as commercial. Concerning aesthetic issues in the Taft Corners area, the 1990 Plan states on page 28 that :

Taft Corners should feature quality design, compatible with its setting. Buildings should be architecturally compatible and should be enduring, not transient. Their siting should enhance the setting, and particularly the east-west views. The placement of buildings should define public spaces, such as the streets, courtyards and greens. The area should be well landscaped, and feature green spaces, open spaces, trails and other opportunities for human interaction.

57. On page 27, the Town Plan identifies as "**significant**" the views of the mountains to the east and west and foreground views from I-89 of "**the high ground at the water tower and other open spaces**"

D. Compliance with Uncontested Umbrella Permit Conditions: 1(B) (Waste Disposal), 2 (**Sufficient** Water Available), and 9(J) (Public **Utility** Services)

58. Under Criterion 1(B), in addition to the conditions in the Umbrella Permit cited above, the District Commission included Condition #16, which prohibits the installation of floor drains in any building at the Park without the prior written approval of the District Commission.

59. In the findings of fact regarding **Criterion 1(B)** supporting the Umbrella Permit, the District Commission stated that the Park will be limited to 34,000 gpd of sanitary wastes and that each amendment application will be required to "**detail** the estimated sanitary waste generation. The District Commission also found that specific uses of lots at the Park may involve "**the storage and handling of regulated and/or hazardous materials or processes which may generate polluting water-carried emissions**" and for this reason required full review under Criterion 1(B) for development of individual lots. The District Commission further found that each amendment application must specifically describe the proposed lot coverage in order to ensure compliance with the ANR discharge permit cited above.

60. In the findings of fact regarding Criterion 2 supporting the Umbrella Permit, the District Commission found that the Park will be limited to use of 34,000 **gpd** of water and that amendment applications will be required to detail the estimated water use.
61. This amendment application details the estimated water use and sanitary waste generation and describes the proposed lot coverage.
62. Prior to the current application, the Park was using approximately 16,775 gpd of water and generating approximately 16,775 gpd of sanitary wastes. The proposed project will use or generate approximately 13,100 gpd of water and sanitary waste, bringing the total amount for the Park to approximately 29,875 gpd.
63. The proposed project will not involve the storage or handling of any regulated or hazardous materials or processes. The proposed project will not involve any installation of floor drains.
64. In the findings of fact regarding Criterion 9(J) supporting the Umbrella Permit, the District Commission limited the Park to a maximum electric use of 3000 **KVA**. The total electric demand from the Park, including the proposed project, will be less than 3000 **KVA**.

E. Conditions under Criterion 5: Traffic

65. The Park currently generates approximately 500 vehicle trips during peak hour. The proposed project will generate as many as approximately 1,400 additional trips during the peak hour. In Land Use Permit #4C0696-11, the District Commission issued Condition #10, which provides:
 10. The Permittee shall perform a count of average weekday peak hour vehicle trips no sooner than the 6th month after opening of the two stores in the project and no later than the 18th month after opening. The design and timing of the count shall be prepared in consultation with and with the approval of the Chittenden County Regional Planning Commission's traffic engineer. The District Commission will review the traffic counts and either approve the

count in writing through an administrative amendment or request that the Applicant submit additional information.

66. In the Umbrella Permit, the District Commission found that a new intersection would be created by an entrance road to the Park (now called Harvest Lane) from Route 2, to be sited directly across from an entrance road to Blair Park. Concerning this intersection, the District Commission also found that traffic signals are "warranted at three years, and intersection geometric improvements are warranted at two **years.**" The District Commission further found that the Applicant will construct, at the intersection, a **2-lane, "channelized"** roadway, and a northbound turn lane and a southbound deceleration lane, and that **"a** three-phased traffic signal will be installed when warranted."
67. In the Umbrella Permit, the District Commission found that the Park:
- [I]nvolves** the construction of a 2 lane roadway with traffic islands at the intersection of Route 2A and the project road [now Marshall Avenue]. A westbound turn lane, an eastbound turn lane and an eastbound deceleration lane will be constructed at the intersection of Route 2A and the project road. A four-phased traffic signal will be installed when warranted.
68. Concerning the intersection improvements and traffic signalization cited above, the District Commission stated in the Umbrella Permit:
- The Commission will require that the intersection improvements be completed prior to occupancy of any building on any lot and will require that traffic signalization be installed prior to any development beyond Phase I.
69. In the 1988 Amendment, the District Commission made the following finding with respect to intersection improvements and traffic signalization:

The Applicant will construct the intersection improvements listed in Exhibit #109 (Attachment A of Application #4C0696) in such a manner that the turning lanes can be converted to traveled roadway with minimal new construction. The signalization will be installed when warranted as determined by monitoring.

70. The intersection improvements listed in Attachment A to Exhibit #109 of the Umbrella Permit are those discussed in the Umbrella Permit with respect to the intersections of Route 2 and Harvest Lane and of Route 2A and Marshall Avenue.
71. The Applicant has constructed the intersection improvements described in the Umbrella Permit with respect to the intersections of Route 2 and Harvest Lane and of Route 2A and Marshall Avenue. Presently, there are no traffic signals at those intersections. Pursuant to direction by the State of Vermont Agency of Transportation, the Applicant will install signals at those intersections prior to the opening of the proposed project.
72. The 1988 Amendment requires that the Applicant pay a total of \$670,545 in traffic impact fees to the Town of Williston. With notice to the District Commission, the Town has agreed that the Applicant may defer a portion of these fees. The Applicant will pay the remainder of the fees as the Park increases its trip generation or when the Town of Williston requests payment, whichever comes first.
73. Both the Umbrella Permit and the 1988 Amendment refer to stipulations related to traffic impacts and traffic improvements required within the Park and at other locations in Williston. These stipulations formed a significant part of the basis on which the District Commission issued positive findings under Criterion 5 (traffic safety and congestion).

The 1987 Stipulation

74. In the Umbrella Permit, the District Commission found that the Applicant, local, regional, and state authorities had engaged in a cooperative effort concerning traffic impacts, including a traffic study.

Concerning this cooperative effort, the District Commission found that:

A significant piece of the cooperative traffic effort is the Stipulation entered into by the Applicant, the Town, the Agency of Transportation and the Regional Planning Commission. The parties to this Stipulation have agreed that, based upon this traffic analysis, certain roadway improvements must be made in the Taft Corners areas so as to accommodate the anticipated growth in traffic and have agreed to share in the costs of these improvements (Exhibits #109 and #119). The parties are in the process of refining their cooperative effort.

(Emphasis added.) In part because the above-referenced cooperative effort was not final, the District Commission approved only Phase I, stating that the effort must be finalized **before** the District Commission can issue a positive finding under Criterion 5 for the entire Park.

75. Exhibit #109 to the Umbrella Permit, dated May 6, 1987, is entitled "Stipulation of the Town of Williston and Taft Corners Associates, et al." (The 1987 Stipulation.) It is signed by Jeffrey L. Davis for the Applicant, Glenn Gershaneck for the State of Vermont Agency of Transportation (AOT), and Arthur R. Hogan, Jr. for the Chittenden County Regional Planning Commission (CCRPC). A blank signature space exists for the Town of Williston Board of Selectmen. Based on the evidence presented during the hearings and previously noticed by the Board, the Board finds that the Town signed the 1987 Stipulation.
76. The 1987 Stipulation refers to "criteria 5, 7, 9A and 9K of Title 10 V.S.A., Section 6086(a)."
77. The 1987 Stipulation attaches three exhibits: A, B, and C.
78. Concerning Exhibit A, the 1987 Stipulation states that the Applicant agrees to build, "at its sole expense," improvements "similar to those identified in Exhibit A hereto as being site specific and being the responsibility of the individual developer."

79. The improvements identified in Exhibit A to the 1987 Stipulation include those intersection improvements and traffic signals described in Findings 66 through 71, above. Exhibit A also identifies the construction of an "**extension of Shunpike Road**, across site to VT 2A access point, on alignment acceptable to Town of **Williston.**" The Applicant has constructed most of this extension, except for a small portion which the Town has asked the Applicant to defer. When finished, the extension will connect **Shunpike Road**, which is west of the Park with Marshall Avenue.
80. Concerning Exhibit B, the 1987 Stipulation states that the Applicant "**agrees** to cooperate with the Town in paying its fair share of off site improvemenst [sic] identified in the study See Exhibit **B.**" The 1987 Stipulation also states that:

The Town and the State will use their best efforts to accomplish the financing and construction of needed improvements and file said agreement with the District #4 Environmental Commission within two (2) years from the date of this stipulation. They shall file with the DEC #4 reports on progress at intervals of not more than 1 year each of action leading to implementation of needed improvements.

81. Exhibit B is entitled "**Williston Off-Site Improvements.**" It includes four phases of **traffic-related** improvements to occur in Williston, primarily in the Taft Corners area, between 1987 and 2007. The nature of the improvements is such that the involvement of the Town of Williston or the State of Vermont, or both, is necessary to achieve them.

Exhibit B to 1987 Stipulation: Phase One **Improvements**

82. The first phase of improvements, listed in Exhibit B to occur between 1987 and 1990, included:
- a. Improvements at the intersection of Routes 2 and **2A**, including widening the north- and south-bound approaches on Route 2A to three lanes: an exclusive left turn lane, a through lane, and an exclusive right turn lane.

- b. consolidating driveways at the Howard Bank and providing access to them from the entrance road that leads in to the Park from Route 2A.
 - c. At the intersection of Route 2 and Industrial Avenue, widening eastbound Route 2 and westbound Industrial Avenue to two lane approaches.
 - d. At the intersection of Route **2A**, Industrial Avenue, and Mountain View Road, improvement to the sight distance and construction of an eastbound left turn lane.
 - e. Upgrading South **Brownell** Road from Route 2 south to the **Shunpike** Road extension.
83. Concerning the first phase of improvements, Exhibit B states that "[t]he widening of northbound and southbound VT 2A to three lanes should be done **immediately.**"
84. The approaches of Route 2A to the Taft Corners Intersection have not been widened to three lanes. Currently the **north-** and south-bound approaches each have two lanes. One lane on each approach is an exclusive left turn lane which has been constructed since the 1987 Stipulation was signed. The other lane on each approach combines through traffic and **right-**turning traffic.
85. None of the other improvements listed in Exhibit B under Phase One has occurred.

Exhibit B to 1987 Stipulation: Phase Two Improvements

86. The second phase of improvements, listed in Exhibit B to occur between 1990 and 1992, included:
- a. Widening Route 2A from I-89 to Route 2. The recommended design was to be a four lane divided road with turn lanes at driveways.
 - b. Widening Route 2, from Muddy Brook to Industrial Avenue to four lanes, with consolidation of driveways on the south side of Route 2.
 - c. Widening the I-89 off-ramps at Exit **#12** to two lanes each.

- d. Construction of a right-turn lane for southbound Route 2A traffic to turn right onto the on-ramp to Burlington.
 - e. Upgrade **Brownell** Road, from the **Shunpike** Road extension to I-89, to 12 foot lanes with shoulder that are either paved or stone stabilized.
 - f. At the Taft Corners Intersection, widen each of the eastbound and westbound approaches on Route 2 to two lanes in order to create an exclusive left turn lane on each approach.
87. The approaches on Route 2 to the Taft Corners Intersection were widened to two lanes in 1992 to create an exclusive left turn lane on each approach.
88. None of the other improvements listed in Exhibit B under Phase Two has occurred.

Exhibit B to 1987 **Stipulation:** Phase Three **Improvements**

89. The third phase of improvements, listed in Exhibit B to occur between 1992 and 1997, included:
- a. Widening Route 2A from Route 2 to **2A's** intersection with Industrial Avenue and Mountain View Road, with a recommended design of a **four-lane** divided highway.
 - b. Reconstructing Route 2A from I-89 to Walker Hill Road to improve sight distance and provide paved shpolders.
 - c. Widening Route 2A at Exit **#12** (I-89) to provide exclusive left turn lanes and two through lanes for both north- and south-bound traffic.
 - d. Widening Route 2 from Industrial Avenue to Commerce Street to a four- or five-lane section.
90. None of the improvements listed in Exhibit B under Phase Three has occurred.

Exhibit B to 1987 **Stipulation:** Phase **Four** **Improvements**

91. The fourth phase of improvements, listed in Exhibit B to occur between 1997 and 2007, included:

- a. Widening Route 2A to a four-lane divided or **five** lane road from its intersection with Industrial Avenue and Mountain View Road to River Cove Road.
- b. Widening or upgrading Route 2 from its intersection with Route 2A to an intersection with the so-called "Circumferential Highway," including improvements to **"the** eastern approaches of the US **2/Circumferential** Highway intersection.@@

92. None of the improvements listed in Exhibit B under Phase Four has occurred.

The 1988 **Stipulation** and 1989 Prooress **Report**

93. In the findings supporting the 1988 Amendment to the Umbrella **Permit**, the District Commission stated in relevant part:

In Findings of Fact #4C0696 under criterion 5 the Commission found that this subdivision Will generate 12,233 average daily vehicle trips, that the affected intersections must be improved to accommodate normal growth and the traffic from this project, that parties were developing a cooperative traffic methodology for the construction of these improvements, and that Phase II of this subdivision could not be approved until this cooperative effort was finalized. Under criteria 9(A) and 9(K) the Commission found that this subdivision would not create adverse impacts if this cooperative effort was finalized and implemented.

(Emphasis added.)

94. In the 1988 Amendment, the District Commission found that the parties had completed their cooperative traffic study and reached agreement, citing Exhibit #26. The District Commission also found that the Applicant had developed a phasing schedule based on vehicle trips: 1285 p.m. peak hour trips in 1988, with an additional 993 such trips in 1989, and an additional 547 trips in 1990, for a total of 2825 p.m. peak hour trips. The District Commission further found that, "[i]f this phasing schedule is adhered to and the improvements are constructed on schedule, this project

will not result in adverse transportation impacts."
(Emphasis added.)

95. Exhibit #26 to the 1988 Amendment is dated February 17, 1988 and is entitled "**Stipulation** of the Town of Williston and Taft Corners Associates, et al." (The 1988 Stipulation.) It is signed by Jeffrey L. Davis for the Applicant, Douglas Lawson for the Town of **Williston Board** of Selectmen, Glenn Gershaneck for the State of Vermont Agency of Transportation (AOT), and Arthur R. Hogan, Jr. for the Chittenden County Regional Planning Commission (CCRPC).'
96. The 1988 Stipulation has several exhibits attached to it. In the text of the 1988 Stipulation, Item 2 states that "[t]he parties are in agreement that the applicant should go forward with the construction of Exhibit A of its original stipulation dated May 6, 1987. (See Exhibit C hereto.)" Exhibit C to the 1988 Stipulation is the 1987 Stipulation.
97. Item 4 of the 1988 Stipulation concerns the cooperation of the Town of Williston and the State of Vermont in accomplishing needed traffic improvements. Within Item 4, under the heading "**On** the part of the State," paragraph C states:

It is expected, based on a five-year **build-out**, that Exhibit H, as modified today, will be in place consistent with the needs of the area projected and as identified on the build-out schedule attached hereto as Exhibit **I.**
98. Exhibit H is a two-page exhibit. The first page is entitled "**Cost** Summary." That page totals the costs for reconstructing "**(1)** Interstate Ramps, **(2)** Vt. **2A**, **(3)** Vt. **2A/US 2** intersection, **(4)** US 2 West, and US 2 **East.**"
99. The second page of Exhibit H is a map entitled "Necessary 1997 **Geometrics.**" The map is of streets and intersections in the Taft Corners area. The map shows all of the improvements listed as being part of the first three phases delineated in Exhibit B to the 1987 Stipulation, as well as the improvements on Route 2A **up** to the intersection with River Cove Road listed under the fourth phase.

100. Exhibit I is a build-out schedule for the Park. It includes estimates of vehicle trip generation. These estimates are based on the square footage of the proposed uses to be built out. The uses listed in Exhibit I consist of offices, warehouses, light industry, distribution facilities, banking, restaurants, and motel. None of the listed uses is a retail shopping facility.
- a. Exhibit I shows a phasing schedule of 1285 trips in 1988, 993 trips in 1989, and 547 trips in 1990, **for** a total of 2,825 trips.
 - b. For the three lots (34, 35, and 36) proposed by this application to be reconfigured into two, no uses are shown for Lots 34 and 35, and a warehouse is shown for Lot 36 to be built in 1990.
 - c. Exhibit #34 to the 1988 Amendment is a letter from Jeffrey L. Davis dated March 14, 1988, attaching **"a new copy of Exhibit I."** The new copy of Exhibit I is substantially the same as the Exhibit I attached to the 1988 Stipulation. In a footnote, the new copy states:

This exhibit is intended to show peak vehicle trips to be allowed in the given years, and not the use or the order of lots to be developed or the year in which a lot's development will occur. The peak vehicle trips may be used on all 37 lots.
101. The 1988 Stipulation attaches an Exhibit B, which is entitled **"CHITTENDEN COUNTY, Williston/Taft Corners Transportation Study."** It is dated December 1987 and was prepared by the Chittenden County Regional Planning Commission. It is known as the 1987 **"WATS"** Study.
- a. The 1987 WATS Study contains a statement of existing traffic conditions and of future conditions in the Williston area. In stating and projecting conditions, the Study focuses particularly on the Taft Corners area and on the Park. The Study states that future projections of traffic were estimated both with and without the Park. The Study demonstrates no comparable focus on any other proposed development besides the Park.

- b. The 1987 WATS Study recommends a four stage plan for improvements to the roads in Williston, focusing in particular on the Taft Corners area. Concerning this plan, the 1987 WATS Study states that the staged plan was to be @@consistent with the rate and location of expected **development."**
 - c. In Table **6.A**, the 1987 WATS Study recommends a series of improvements to the Taft Corners area that would need to be done by the State of Vermont and the Town of Williston. The text of Figure 6.A to the 1987 WATS **Study is** identical to that of Exhibit B to the 1987 Stipulation.
 - d. The 1987 WATS Study contains a Figure 3-H, entitled "**Recommended** Improvements **1987-1997."** This figure also is labeled "**Necessary** 1997 **Geometrics**" and is in all other respects the same as Exhibit H to the 1988 Stipulation.
 - e. The 1987 WATS Study is based in significant part on trip generation estimates for the Park but does not specifically state how many trips the Park was expected to generate and when such generation was expected to occur.
102. Exhibit D to the 1988 Stipulation is entitled '@(illegible) of Taft Corners Rate **Table."** It was prepared by the CCRPC and is dated April 30, 1987. It shows projected uses at the Park and their square footage. Using that square footage, it arrives at vehicle trip generation estimates for the Park.
- a. The total projected vehicle trips shown on Exhibit D to the 1988 Stipulation is 5043.
 - b. Exhibit D shows a variety of uses, including but not limited to: 157,559 square feet of office uses, 198,372 of light industrial uses, 181,122 of light manufacturing uses, 351,307 square feet of warehouse uses, 15,000 square feet of banks, a 56,543 square foot supermarket, a 350-room hotel, 72,135 feet of hardware, paint uses, 85,000 square feet of general retail uses, a 38,400 square foot "quality restaurant" and a 3,800 square foot "**drive-in**" restaurant.
 - c. In arriving at trip generation rates, Exhibit D multiplies the square footage by a factor. The

factor is the number of trips per thousand square feet the particular use is expected to generate. For the uses enumerated immediately above, the factors are: office, 2.2; light industrial, 1.18; light manufacturing, 0.75; warehouse, 1.63; banks, 25.3; supermarket, 8.82; hotel, .73 per room; hardware and paint, 4.9; general retail, 14.42; quality restaurant, 6.14; and drive-in, 31.6.

- d. The general retail category is the third **highest-trip-generating** category of use listed for the Park in Exhibit D. It is exceeded only by the banks and the drive-in restaurant.
- e. As shown on Exhibit D, the majority of the square footage at the Park was to be devoted to uses with trip generation rates significantly less than that of the general retail, banking, or drive-in restaurant categories. As shown on Exhibit D, the trip generation rate for the general retail category is several times that of the majority of the remaining square footage for the Park.
- f. Exhibit D states that "[a]ll numbers are estimates based on Developer's uses and type and/or size of **unit.**"

103. In 1989, **Phillip C. Linton, Esq.** filed a letter with the District Commission on behalf of the Applicant and other developers in the Taft Corners area possessing Act 250 permits. The letter is dated August 11, 1989. It is entitled "**Status Report of Traffic Improvements in the Taft Corners Area.**" The letter attaches a document entitled "Report of Status of Compliance with Permit Conditions Pertaining to Traffic Improvements at the Taft Corners **Area.**" The attached document was signed by Jeffrey L. Davis for the Applicant, by other Act 250 permittees in the Taft Corners area, by Arthur R. Hogan for the CCRPC, by Douglas Lawson for the Town of Williston, and by Glenn Gershaneck for the State of Vermont Agency of Transportation. The attached document was signed by the above parties on August 8, 9, and 10, 1989.

- a. The attached document describes a coordinated effort on the part of public and private entities to mitigate traffic impacts caused by development in the Taft Corners area. It states that this "partnership" became embodied in Stipulations

executed by each of the Permittees, the Town of Williston, AOT, and the CCRPC, which were filed as evidence with each application.

- b. The attached document lists the peak hour vehicle trips associated with each of the developments discussed therein. By far the largest number of peak hour trips listed is that of the Park, which is almost three times as large as the next largest on the list.
- c. On page eight, the attached document includes the following statements:

The approval of each of the projects referenced in this report under Criteria 5, 7, 9(A), and 9(K) relied heavily upon the plan for construction of improvements as outlined in the Stipulations. The findings in each permit indicated that if the cooperative traffic effort is finalized as envisioned in the Stipulation, the contribution of each Permittee, combined with the public efforts. would adequately mitigate the traffic impact of each project.

* * *

The essence of the Stipulations and the permits is that the projects should not be built out more rapidly than the required improvements to the highways could be made through a combination of off-site improvements made by the Permittees, impact fees waived by the Permittees, and improvements made by the State and the Town. The schedule for construction of those improvements is based upon the phased build-out of each project as projected by the Permittees over the five- (5) year period.

(Emphasis added.)

- d. The letter states that "[t]he Commission can require that each minor amendment be accompanied

by evidence of conformance to the permit and
Stipulations"

Compliance with Exhibit B to the 1987 Stipulation

104. The intent of the parties, including the Applicant, in executing the 1987 and 1988 Stipulations, was that the traffic-related improvements to be done by the State and the Town listed in Exhibit B to the 1987 Stipulation were to be in place as needed to ensure that the traffic generated by the Park does not cause unsafe conditions or unreasonable congestion.
105. Under Criterion 5, the District Commission based and conditioned its approval of the Park in the Umbrella Permit and the 1988 Amendment on the commitment of the parties, including the Applicant, that the **traffic-**related improvements to be done by the State and the Town listed in Exhibit B to the 1987 Stipulation were to be in place as needed to ensure that the traffic generated by the Park does not cause unsafe conditions or unreasonable congestion. Under the Umbrella Permit and the 1988 Amendment, each amendment application must comply with this condition.
106. The parties to the 1987 and 1988 Stipulations, and the District Commission in issuing the Umbrella Permit and 1988 Amendment, did not link any of the phases listed in Exhibit B to specific traffic levels to be generated by the Park. Therefore, to effectuate the intent of the parties and the requirements of the District Commission, compliance with Exhibit B to the 1987 stipulation must be evaluated by the Board or District Commission in accordance with those traffic conditions that pertain at the time an amendment application is reviewed.
107. None of the projects listed in the above-described 1989 status report has been fully built-out.
108. Traffic levels in the Taft Corners area have increased significantly in recent years. With respect to several of the intersections slated for improvement as part of Phases One and Two in Exhibit B to the 1987 Stipulation, the following **"level of service"** (LOS) conditions exist:

- a. The Taft Corners Intersection is at LOS D. It would be at LOS E but for the partial implementation of the Phase One improvements for that intersection.
 - b. At I-89 Exit #12, with respect to the on and off ramps on the north side of I-89, all turning movements are at LOS C or better, except that left turns from the off-ramp are at LOS E.
 - c. At I-89 Exit #12, with respect to the on and off ramps on the south side of I-89, left turns from the off-ramp are at LOS F.
 - d. The intersection of Industrial Avenue and Route 2 is at LOS F.
 - e. The intersection of Route 2A, Industrial Avenue, and Mountain View Road is at LOS F.
109. **"Level of service"** is a measure of traffic congestion. LOS is measured on an A to F scale. LOS A refers to freely-flowing traffic with no cause for a driver to slow down or stop unless facing a red signal. As the levels change from A down toward F, there is decreasing freedom of movement and increasing delays. LOS C means a delay of a maximum of 25 seconds for an individual driver. LOS E means a delay to a driver of 40 to 60 seconds. LOS F refers to a failure of a street system and to delays of more than 60 seconds.
110. In urban areas such as Baltimore, Philadelphia, or Washington, DC, LOS A through D are considered acceptable, and regulatory agencies attempt to control deterioration below LOS D.
111. In rural areas, LOS A through C are considered acceptable and LOS D through F are considered unacceptable.
112. The area around the Park is in transition from rural to urban and is not an urban area at this time.
113. Failed intersections typically create hazardous conditions. Failed intersections typically cause drivers to use other roads to avoid the intersections or to engage in hazardous driving maneuvers within the intersections in order to get through them more quickly.

114. Congestion at the I-89 off-ramps presently causes cars to stack up toward I-89 and could cause them to interfere with I-89 traffic.
 115. The following are all high accident locations: the Taft Corners Intersection, the intersections of the I-89 off-ramps at Exit #12 with Route 2A, and the intersection of Route 2A, Industrial Avenue, and Mountain View Road.
 116. The incidence of accidents at the intersection of Route 2 and **Brownell** Road has tripled in recent years.
 117. The proposed project will create a significant level of vehicle traffic which will use I-89, Exit #12, and Route 2A to reach the project.
 118. By generating as many as 1,400 vehicle trips during the peak hour, the proposed project will significantly exacerbate the adverse traffic safety and congestion conditions described immediately above. For example, in 1992, the actual peak hour count of vehicles heading north on Route 2A from Exit #12 was 1908. If only one quarter of the trips generated by this project (350) pass through Route 2A north of Exit #12, this will represent an increase of 18 percent. At the same time, hardly any of the improvements called for in Exhibit B of the 1987 are in place, and left-hand turns from the Exit #12 off-ramps are already at LOS F with occasional stacking toward I-89.
 119. In other jurisdictions, such as the mid-Atlantic states, **it** is usual to require that, if traffic infrastructure improvements are needed to accommodate a proposed project, the applicant must wait to build until those improvements are made, even if the **improvements** are outside of the applicant's control.
 120. An insufficient number of the improvements listed in Exhibit B to the 1987 Stipulation has been made to ensure that the traffic generated by the Park does not cause unsafe conditions or unreasonable congestion.
- F. Substantial Change (Criterion 10)**
121. The municipal plan in effect at the time the application for the Umbrella Permit was filed is the Comprehensive Plan, Town of Williston, Vermont, adopted June 10, 1982 (the 1982 Town Plan).

122. In the 1982 Town Plan, the Taft Corners area, including the site of the proposed project, is identified as **"commercial"** on a map entitled "Future Land Use Plan."
123. The 1982 Town Plan contains many provisions to the effect that growth is likely in the Town because of its location in Chittenden County and the availability of infrastructure to support development; that growth should be encouraged; and that growth should be managed to protect important resources such as scenic beauty and open space and to ensure that such growth occurs at a "reasonable and responsible **rate.**"
124. On page 64, the 1982 Town Plan provides that **"[i]ndustrial** or commercial expansion should not be allowed without a careful review of traffic impact."
125. Concerning the Taft Corners area, the 1982 Town Plan provides on page 60:
- The purpose of this **area** is to reserve space for the provision of retail and service businesses at Taft Corners. Planning in this area will stress minimal curbcuts, generous setbacks, and strict landscaping/screening criteria to preserve as much as possible and uncluttered, open character.
126. The regional plan in effect at the time the application for the Umbrella Permit was filed is **"We Are Not the Last Generation,"** April 26, 1976, Chittenden County **Regional Planning** Commission (the Regional Plan).
127. On March 22, 1976, the CCRPC adopted Resolution **#1** concerning the Regional Plan, consisting of three parts: (a) that the Plan be used as a guideline and not a regulatory document, (b) that the Plan shall not be used by the District **#4** Commission under Criterion 10 unless a proposed project is within a town that does not have a plan, and (c) that, after obtaining an opinion of the Attorney General, the CCRPC will seek an amendment to Criterion 10 specifying that regional plans are only reviewed in the absence of an applicable town plan or capital program.
128. In the Regional Plan, the site of the proposed project is within an area identified as a **"rural area"** on a map entitled "Proposed Land **Use.**"

129. Concerning Rural Areas, the Regional Plan provides on page 90:

The purpose of Rural Areas is to provide for the development of housing to meet the needs of this Region's residents Their second purpose is to provide for the development of vacation homes As a general rule, the Rural Areas will be the most appropriate location for rural home and second home development which uses cluster planning. The continuation of agriculture or the preservation of agricultural potential of the soils shall be encouraged on the more productive agricultural soils in the Rural Areas.

130. The Regional Plan's "Proposed Land Use" map designates as **"the Core"** an area in the western part of Chittenden County between the Winooski River and Lake Champlain. The City of Burlington is within **"the Core."**
131. The Proposed Land Use map contains several land use categories, including but not limited to two separate categories called **"growth center"** and **"regional growth center."** The map shows growth centers located in South Burlington and Essex Junction. The only "regional growth center" shown on the Proposed Land Use map is located within the Core and within the City of **Burlington.** On page 104, the Regional Plan states that this center is in the City of Burlington and is **"[a]n area of land bounded as follows: on the north by Pearl Street and Colchester Avenue, on the east by East Avenue, on the south by Main Street and on the west by Lake Champlain."**
132. On **page 87,** the Regional Plan states that the Core **"should absorb the greatest intensity of development."**
133. On page 95, the Regional Plan states that the following types of land use are appropriate for a regional growth center: **"Residential, Regional Commercial Center, Regional Governmental, Cultural, Industrial and Commerce."** It also provides on page 90:

The purpose of a Regional Growth Center is to provide for housing, regional shopping centers, employment centers, transient housing, public higher educational centers,

health centers, financial centers, governmental centers, cultural centers and necessary support facilities thereof, primarily to serve the needs of the Region, but also to serve the State's residents and visitors.

134. On page 93, the Regional Plan defines "shopping **center**" as follows:

Convenience goods and personal services [such as food, drugs, laundry, drying cleaning, shoe repairing], plus facilities for the sale of soft lines (wearing apparel - men's women's children's) and hard lines (hardware and appliances) and more depth of merchandise available [than in ordinary convenience shopping] - variety sizes, styles, colors and prices.

135. On page 93, the Regional Plan provides for shopping centers to be located in "**growth** centers," allowing for a gross leasable area averaging 150,000 square feet, with a range of 100,000 to 300,000 square feet.

136. On page 93, the Regional Plan states that a regional shopping center means:

Shopping centers, plus providing general merchandise, apparel, furniture and home furnishings in full depth and variety. It is a group of commercial establishments clustered in a contiguous area, usually built around one or more full line department stores.

137. On **page 93**, the Regional Plan provides for regional shopping centers to be located in the regional growth center, allowing for a gross leasable area averaging 400,000 square feet, with a range of 300,000 square feet up.

138. In the Transportation section, on page 66, the Regional Plan demonstrates goals that transportation services be "**safe** and convenient," and that "expressways and arterial highways be planned primarily for through traffic with the capability of handling present and projected traffic volumes."

139. In the Land Use section, the Regional Plan demonstrates goals that the "circulation system - both highway and mass transit ... provide for safe and convenient movement of people, services and goods within our **area**" (page 83) and that "growth be consistent" with all of the goals, objectives, and policies of the Regional Plan-(page 85).
140. In the findings supporting the Umbrella Permit, the District Commission found that the Regional Plan **"does** not contain sufficient current information because it had not been updated every five years." The District Commission did not make findings concerning conformance or non-conformance with the Regional Plan.
141. The proposed project will have a substantial regional impact by generating as many as 1,400 trips during the peak hour which will travel on the region's roads.

v. CONCLUSIONS OF LAW

The Court's order of April 30, 1993, remanding this appeal to the Board, states as follows:

Reversed and remanded to the Board for a de novo hearing on the issues that were before the district commission and raised in the notice of appeal, namely:

(1) whether the amendment application satisfies Criteria **1(air)**, 1(B), 1(E), **7(fire services)**, 8, and 9(F);

(2) whether the development complies with the conditions of the umbrella permit on criteria **1(B)**, **2**, **5**, and 9(J); and

(3) whether the amendment application proposes a significant impact on criterion 10.

The conclusions of law below are organized according to the three sets of issues listed in the Court's order.

A. Criteria for Full Review

The first part of the Court's order directs the Board

criteria left open by Condition #6 of the Umbrella Permit.²

1. Uncontested Criteria

The Applicant is the only party on several of the criteria listed in the first part of the Court's order. Those criteria are 1 (air pollution), 1(B) (waste disposal), 1(E) (streams), 7 (local governmental services - fire), and 9(F) (energy conservation). The text of those criteria is set forth at 10 V.S.A. § 6086(a), which is incorporated by reference.

Concerning Criteria 1 (air pollution) and 1(B) (waste disposal), Board Rule 19(E) provides that presumptions of compliance are created when an applicant submits various permits. Based on the foregoing findings of fact, the Applicant has created presumptions of compliance with these criteria which have not been rebutted. Accordingly, the proposed project complies with Criteria 1 (air pollution) and 1(B) (waste disposal).

Based on the foregoing findings of fact, including specifically the Applicant's agreement as reflected in Finding 29, above, the proposed project complies with Criterion 1(E) (streams).

Based on the foregoing findings of fact, the proposed project also complies with Criterion 7 (local governmental services - fire).

Based on the foregoing findings of fact, the proposed project further complies with Criterion 9(F) only if conditioned **as** requested by DPS and ordered by the District Commission. This is because the evidence submitted by the Applicant in support of a positive finding under Criterion 9(F) depends **on** the inclusion of such a condition. Since the **District Commission** has already included the condition in the permit below, the Board will simply let the condition stand.

²In addition to the criteria cited in the Court's order, Condition #6 of the Umbrella Permit left open Criterion 4 (soil erosion). Since the Court's order does not **list** this criterion, the Board has not reviewed the project's compliance with it.

2. Criterion 8: Aesthetics, Historic Sites, Rare and Irreplaceable Natural Areas

10 V.S.A. § 6086(a)(8) requires that, prior to issuing a permit for the proposed project, the Board must find that the project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas." In addition, 10 V.S.A. § 6086(a)(8)(A) concerns the protection of endangered species and necessary wildlife habitat.

Based on the foregoing findings of fact, the proposed project will not affect a historic site, a rare and irreplaceable natural area, an endangered species, or any necessary wildlife habitat.

Concerning aesthetics and scenic beauty, the Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Onechee Lakes Corn, Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (January 13, 1986).

In analyzing adverse effects on aesthetics and scenic beauty, the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project; the locations from which the project can be viewed, and the potential impact of the project on open space. Id. at 18.

Applying this analysis to the proposed project, the Board members are not in agreement concerning whether the proposed project will have an adverse effect on aesthetics and scenic beauty.

Specifically, members Lixi Fortna, Samuel Lloyd, William Martinez, and Anthony Thompson believe that the project will fit within its context and therefore will not have an adverse aesthetic effect. They point out that the immediate context of the project is an existing commercial and industrial subdivision already approved in the Umbrella Permit and the 1988 Amendment. The larger context is one Of

an already significantly developed commercial area oriented toward highway traffic. The buildings will be similar in design to many in the area, will be only one-story high, will not be part of the far and middle views from I-89, will be constructed with significant screening, and will not intrude into any of the significant views of mountains and hills which still exist in the Taft Corners area. The Applicant's plans include downshielding of all project lights and preservation of approximately 25.32 acres of open space.

Acting Chair Robert H. Opel and members Arthur Gibb and Steve E. Wright believe that the project, as proposed, will not fit within its context. Although that context is an existing commercial subdivision in a developed commercial area, the proposed project consists of two large, one-story buildings which are much bigger than anything which presently exists in the Taft Corners area. This size, located in close proximity to I-89, will serve to emphasize the box-like design of the proposed buildings. Thus, based on the size and bulk of the proposed buildings, Acting Chair Opel and members Gibb and Wright believe that the proposed project will have an adverse effect on aesthetics and scenic beauty.

Although the Board members are not in agreement concerning whether the project's effect on aesthetics will be **adverse**,³ they unanimously agree that any such adverse effect will not be undue.

In evaluating whether adverse effects on aesthetics and scenic beauty are undue, the Board analyzes three factors and concludes that a project is undue if it reaches a positive conclusion with respect to any one of these factors, which are:

- a. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
- b. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

³ It takes a concurrence of five Board members to make a decision.
1 V.S.A. § 172; 10 V.S.A. § 6021(a).

- c. Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Quechee at 19-20.

Based on the foregoing findings of fact, the Board concludes that the 1990 Town Plan is a written community standard which contains provisions regarding aesthetics and is the written community standard applicable to the proposed project under Criterion 8.⁴ The Board also concludes that the proposed project complies with the aesthetic provisions of the 1990 Town Plan.

Based on the foregoing findings of fact, the Board concludes that, even if there were agreement that the proposed project is out of context, the project would not be so significantly out of context that it would be shocking or offensive to the average person. Given that the project site is **within** an approved and existing commercial park and in a larger area which is already commercially developed, the average person will expect to find this type of project in the area.

Based on the foregoing findings of fact, the Board concludes that the Applicant has taken generally available mitigating steps which a reasonable person would take to mitigate any adverse effect on aesthetics. Specifically, the Board's Findings 35 through 37, above detail findings and conditions which the District Commission placed in the Umbrella Permit and the 1988 Amendment regarding aesthetics. These findings and conditions include significant mitigation measures which must be included in amendment applications for approval of specific buildings within the Park. The Applicant's proposal meets the District Commission's requirements/in the Umbrella Permit and the 1988 Amendment for mitigating aesthetic effects, and includes further mitigating measures.

⁴In this regard, the Board notes that Condition #6 of the Umbrella Permit left Criterion 8 open for full review during subsequent amendment applications. Therefore, the Applicant's rights under Criterion 8 to review under the aesthetic provisions of a particular town plan (Or any other potentially applicable community standard regarding aesthetics) cannot be said to have vested.

Accordingly, the proposed project complies with Criterion 8.

B. Compliance with Umbrella Permit conditions

The second part of the Court's order directs the Board to review the proposed project for compliance with permit conditions issued under various criteria specified in Condition #6 of the Umbrella Permit.

1. Uncontested Conditions

The Applicant is the only party on several of the criteria listed in the second part of the Court's order. Those criteria are 1(B) (waste disposal), 2 (sufficient water available), and 9(J) (public utility services). The Board's findings, above, detail the conditions imposed by the District Commission under those criteria. Based on the foregoing findings of fact, the proposed project meets the conditions of the Umbrella Permit under Criteria 1(B), 2, and 9(J).

2. Conditions under Criterion 5: Traffic

The Court's order directs the Board to review the compliance of the amendment application with the conditions of the Umbrella Permit under 10 V.S.A. § 6086(a)(5). Criterion 5 requires that, before issuing a permit, the Board or District Commissions find that a proposed project "will not cause unreasonable congestion or unsafe conditions with respect to use of the highways"

With the exception of the 1987 and 1988 Stipulations, which are discussed below, the conditions of the Umbrella Permit under Criterion 5 (as revised by the 1988 Amendment) include the following: (a) construction of intersection improvements/at the intersections of Route 2 and Harvest Lane and of Route 2A and Marshall Avenue; (b) signalization of those intersections when warranted; and, (c) payment of impact fees to the Town of Williston.

Based on the foregoing findings of fact, including particularly the Applicant's agreement to signalize the pertinent intersections prior to the opening of the proposed project, the amendment application meets the above-listed conditions (except for the Stipulations).

a. The 1987 and 1988 Stipulations

The amendment application's compliance with the **above-** listed conditions of the Umbrella Permit has not been the central issue 'under Criterion 5 in this case. Rather, the central issue under that criterion has been the application's compliance with stipulations that formed part of the basis of the Umbrella Permit and the 1988 Amendment. Those are the 1987 and 1988 Stipulations which are described in the Board's Findings, above.

In a memorandum of decision in this case issued December 20, **1993**, the Board concluded that the scope of review on remand includes review, in the context of Criterion 5, of whether the amendment application complies with the 1987 stipulation. The Board also concluded that such review must be made in the context of Condition **#6** of the Umbrella Permit, the findings supporting that permit, the revisions **made** in the 1988 Amendment, and the 1988 Stipulation. These conclusions are found on pages nine through eleven of the December 20, 1993 memorandum of decision, will not be repeated here, and are incorporated by reference.

The parties have strenuously disagreed concerning the nature of **the obligations** imposed by the 1987 and 1988 Stipulations. The Applicant argues that its sole responsibility is the construction of the various improvements described in Exhibit A to the 1987 Stipulation. These include: (a) intersection improvements at the entrances to the Park **from Routes 2 and 2A**, which the Applicant has performed; (b) signalization at those intersections, which the **Applicant** will put in place **prior** to opening the proposed project; and (c)-construction-of the so-called **Shunpike** Road extension, which the Town has asked the Applicant to defer.

The Applicant also argues that it cannot be made responsible for the list of improvements contained in Exhibit B to the 1987 Stipulation, which consists of major improvements to the traffic infrastructure in the area surrounding the Park and which the Board has found cannot be accomplished without the involvement of the State of Vermont and the Town of Williston. The Applicant contends that it would be unfair to fault it for the failure of the State and the Town to construct improvements which are within their control.

In contrast, WCRG argues that the parties, in **executing** the 1987 and \$988 **Stipulations, made construction of the** Exhibit B improvements a "condition **precedent**" to build-out of the Park, meaning that such construction must occur before build-out. WCRG also argues that the Applicant is barred, **under the doctrine of "estoppel,"** from contending that Exhibit B imposes no limits on the build-out of the Park. Specifically, WCRG contends that the submission of the 1987 and 1988 Stipulations to the District Commission form a representation that the Exhibit B improvements would be constructed, that the District Commission relied on that representation in issuing the Umbrella Permit and the 1988 Amendment, and that the Applicant therefore should be barred from asserting otherwise.

The District Commission incorporated the 1987 and 1988 Stipulations into the findings supporting the Umbrella Permit and 1988 Amendment, relied on those stipulations in issuing those permits, and required that amendment applications comply with the **findings** that discuss the stipulations. However, the stipulations and the District Commission's decisions do not specifically state the manner in which the Exhibit B improvements should be treated in amendment applications.

To resolve this ambiguity, the Board has engaged in a two-fold factual inquiry. First, the Board has inquired into the intent of the parties to the stipulations with regard to the improvements listed in Exhibit B. In doing so, the Board has **reviewed** the stipulations, the exhibits thereto, and extrinsic evidence in the record of this appeal. Cf. United Railway Supply v. Boston & Maine Corp., 148 Vt. **454**, 458 (1987) (if intent of parties is unclear from contract terms, court may allow extrinsic evidence to be taken).

Second/with this intent in mind, the Board has reviewed the findings supporting the Umbrella Permit and 1988 Amendment, and the exhibits to those documents that are in the record of this appeal, to determine the District Commission's intent in incorporating the 1987 and 1988 Stipulations. Cf. In re Denio, 158 Vt. 230, 241 (obligations of Act 250 permits may be ascertained by review of the supporting findings, conclusions, and plans).

Based on this review, the Board has found that the intent of the parties and the requirements of the District Commission regarding the Exhibit B improvements were the same: Such improvements were to be in place as needed to

ensure that the traffic generated by the Park does not cause unsafe conditions or unreasonable congestion. As shown in the Findings, above, the District Commission's findings under Criterion 5, and the exhibits to the stipulations, are replete with language to the effect that development should not occur more rapidly than the required traffic-related improvements can be made by both the public and the private entities involved. Further, the Applicant stated that such is the case in a 1989 statement to the District Commission.

The Board has also found **that,** to effectuate the intent of the parties and the requirements of the District Commission, compliance with Exhibit B to the 1987 stipulation must be evaluated in accordance with those traffic conditions that pertain during the time an amendment application is reviewed. The Board believes that this is a fair and reasonable factual inference. While Exhibit B does contain four phases of improvements, none of these phases is linked to particular levels of vehicle trip generation from the Park, and therefore the phases cannot be used as a guide to determine whether sufficient Exhibit B improvements have been constructed to accommodate the trips to be generated by a particular amendment proposal.

Moreover, if the intent and requirement is to ensure that build-out does not occur more rapidly than the **traffic-**related improvements can be made to handle the impacts, then the best and most logical means of review is to determine what improvements have been constructed and whether those improvements are adequate to handle those impacts at the time an actual construction project is proposed.

Evaluating the amendment application's compliance with Exhibit B **in light** of current conditions, the Board's Findings, above, may be summarized as follows:

- (a) The State and the Town have constructed very few of the traffic-related improvements to the Taft Corners area listed in Exhibit B the 1987 Stipulation to the Umbrella Permit. For example, they have not widened the approaches of Route 2A to the Taft Corners intersection to three lanes, widened Route 2A to **four lanes from I-89 to Route 2, or widened the I-89 off-ramps at Exit #12 to two lanes each.**⁵

⁵This example is meant to be illustrative and not **exhaustive.**

- (b) Many of the intersections in the Taft Corners area which are slated for improvement in Exhibit B currently suffer **from** unsafe traffic conditions and unreasonable traffic congestion.
- (c) The proposed project will generate as many as 1,400 vehicle trips during the peak hour, many of which will pass through the above intersections.
- (d) The proposed project will significantly exacerbate the **existing unsafe** conditions and unreasonable congestion.
- (e) Therefore, an insufficient number of the Exhibit B improvements have been constructed to ensure that the proposed project does not cause unsafe conditions or unreasonable congestion.

Accordingly, the amendment application does not comply with the **cond**itions of the Umbrella Permit under Criterion 5.

Under the law, the Board may not deny an application under Criterion 5 but may impose reasonable conditions and requirements to alleviate the burdens created. 10 V.S.A. § 6087(b). Further, 10 V.S.A. § 6086(c) authorizes such conditions as are appropriate to the criterion.

After careful review, the Board concludes that it should issue a permit condition which requires that, prior to construction of the proposed project, the following portions of the improvements listed in Exhibit B must be constructed and operating: (a) all improvements listed under Phases One and Two, (b) the Phase Three improvements pertaining **to widening** Route 2A from Route 2 to **2A's** intersection with Industrial Avenue and Mountain View Road, and (c) the Phase Three improvements pertaining to widening Route 2A at Exit #12 to provide exclusive left turn lanes and through lanes. See Findings 82 through 88, and 89a. and **89c.**, above. The Phase One and Two improvements will be required because, under Exhibit B, they were slated to have been done by **1992**. Further, most of the Phase One and Two improvements, and the portions of the Phase Three improvements listed above, will improve traffic conditions at intersections which the Board has found to be unsafe or unreasonably congested, and therefore will cause the proposed project to exacerbate those conditions to a much lesser degree.

The completion of the remainder of the Phase Three improvements will not be required because they do not appear linked to the ability of the area roads to accommodate the traffic to be generated by the proposed project. In addition, the Phase Four improvements will not be required because they were slated to be done between 1997 and 2007.

The above condition is reasonable and appropriate under the circumstances of this case. In this matter, the Applicant seeks to benefit from limited review under an Umbrella Permit which was issued in part based on a stipulation, signed by the **Applicant**, which included the future construction of major traffic infrastructure improvements in the area of the project site. It is true that the construction of those improvements is largely outside of the Applicant's control. It is also possible that such construction may not happen for many years. But the Applicant was not required to sign or submit the 1987 Stipulation and chose to submit an agreement that included construction by the State and the Town. The Board believes that it is proper to require the Applicant to abide by commitments made to receive the Umbrella Permit, and to bear the burdens of that permit if it wants to receive the **benefits.**⁶

It may be argued that the Board's condition is not reasonable or appropriate because the District Commission, in the 1988 Amendment, set a total trip limit for the Park of 2825, and the Park will be within that limit after the proposed project is constructed. However, the Board has found that the District Commission's approval was also predicated on the construction of a sufficient number of the Exhibit B improvements to accommodate the traffic impacts of the Park. The Board therefore considers the allowance of up to 2825 vehicle trips to be based on the representations of sufficient off-site improvements.

It also may be argued that build-out has not occurred on all of the projects listed in the 1989 statement to the District Commission concerning the 1987 and 1988 Stipulations. But the Park is by far the largest traffic generator of any of those projects. In addition, the 1987 WATS Study, which recommended the Exhibit B improvements, focused particularly on the Park and the trips it would

⁶The Board notes that the Applicant possesses the legal alternative of filing an entirely new application, not under the Umbrella Permit, for review under all ten criteria.

generate. Accordingly, the need for the Exhibit B improvements was and is based largely on the Park's potential traffic impacts.

Finally, the purpose of the District Commission's conditions under Criterion 5 was to ensure, as required by statute, that the Park does not create unsafe traffic conditions or unreasonable traffic congestion. To allow a project of this magnitude to go forward without requiring that sufficient improvements to the area roads and intersections be constructed would contravene the purpose of the District Commission's approval, of its incorporation of the 1987 Stipulation, of the parties in executing that stipulation, and of the statute itself. It would mean allowing the project to exacerbate already unsafe and unreasonably congested conditions by adding as many as 1,400 peak hour vehicle trips to those roads and intersections.

The Supreme Court previously has stated that the Board may impose conditions to prevent a development from exacerbating existing traffic conditions. In re Pilarim Partnership, 153 Vt. 594, 596-97 (1990). As the Court stated in that case, "It would be absurd to allow a hazardous condition to become more hazardous." Id. at 596.

b. Construction and Expiration Dates

10 V.S.A. §§ 6090(b) and 6091, and Board Rules 32, 35, and 38 contain requirements concerning: (a) when a permitted project is abandoned by non-use, (b) the setting of construction completion dates, and (c) expiration dates. Because the Board is requiring that construction on the proposed project cannot begin until the State and the Town complete significant road improvements, it is fair to adjust the relevant dates.

In Act §32 of the last biennium, the General Assembly amended 10 V.S.A. § 6090(b) (effective June 21, 1994) to provide that a permit is abandoned by non-use unless, within three years of issuance, construction commences and substantial progress toward completion has occurred. The Board or District Commission may, at the time a permit is issued or in a subsequent proceeding, allow more time. Because of the condition regarding State and Town improvements, the Board will set a period of five years in which the permit must be used and allow for extension of this period by the District Commission.

Concerning the date construction must be completed, the Board will set a date of three years following the date on which the required Exhibit B improvements are completed. The Board reaches this decision after considering the factors enumerated in 10 V.S.A. § 6091(d) (as added effective June 21, 1994 by Act 232 of the last biennium) and Rule 32(B)(1). To ensure that the affidavit is filed on a timely basis and is accurate, the Board will require that the Applicant, AOT, and the Town file with the District Commission a sworn affidavit within 30 days of completion, with a copy to all parties.

Regarding expiration dates, in Act 232 the General Assembly amended 10 V.S.A. § 6090(b) (effective June 21, 1994) to require that most "permits issued under this chapter shall be for an indefinite term, as long as there is compliance with the conditions of the **permit.**" The General Assembly also added 10 V.S.A. § 6090(b)(2), which indefinitely extends expiration dates for most permits issued before July 1, 1994, provided there is compliance with the permit conditions. These provisions apply to the proposed project and the Board will include them in the permit.

C. Substantial Chancre (Criterion 10)

The third part of the Court's order directs the Board to determine whether the amendment application proposes a significant impact under 10 V.S.A. § 6086(a)(10). Criterion 10 requires that, before issuing a permit, the Board or district commission find that a project **"is** in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24."

The third part of the Court's order is grounded in the Board's rules regarding **"substantial change."** Specifically, on page 10 of the Court's opinion, it cites Board Rule 34(B), which provides as follows:

Substantial changes to a permitted project or permit. If a proposed amendment involves substantial changes to a permitted project or permit, it shall be considered as a new application subject to the application, notice and hearing provisions of sections 6083, 6084 and 6085 and the related provisions of these Rules.

Rule 34(B) was ratified by the General Assembly in 1985 and therefore has the force and effect of a legislative

enactment. 1985 Vt. Laws No. 52 § 5; In re Spencer, 152 Vt. 330, 336 (1989).

The Court's order also cites the Board's Rule 2(G), which defines the term "substantial change" as follows:

"Substantial change" means any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through **(a)(10)**.

This rule was ratified by the General Assembly at the same time Rule 34(B) was ratified. In addition, the Court has previously affirmed the validity of Rule 2(G). In re Orzel, 145 Vt. 355, 360-61 (1985).

After citing the above rules, the Court goes on to conclude that, because the only criterion raised before the District Commission in connection with substantial change was Criterion 10, **"the** question of substantial change was limited to consideration of the project's impact on criterion **10"** before the Board.

Concerning the evaluation of substantial change, the Board previously has stated that it applies a two-part test. First, there must be a change to the development. Second, if a change is found, an Act 250 permit is required if the change has the potential for significant impact under one or more of the ten criteria. Re: Robert and Barbara Barlow, Declaratory Ruling #234 at 10 (Sep. 20, 1991), affirmed In re Robert and Barbara Barlow, ___ Vt. __ I 4 Vt. Law Week 199 (Aug. 13, 1993).

Accordingly, under the third part of the Court's order, the Board must examine, under the two-part test articulated in prior cases, whether the proposed project constitutes a substantial change to the Park as permitted. The Board also must limit that examination to the project's impact under Criterion 10.

1. Chanee

The first part of the substantial change test is to determine whether a cognizable change is proposed. WCRG and the City of Burlington have argued that, for several different reasons, the proposed project represents a cognizable change from the Park as permitted. The Board has considered these arguments carefully. The Board concludes

that in only one manner does the proposed project constitute a change.

WCRG and the City contend that the proposed project is a change because it represents an increase in retail space at the Park, and because lots are being reconfigured to accommodate the proposed project. The Board does not believe that these are changes because the Umbrella Permit, the 1988 **Amendment**, and the exhibits which describe the square footage and types of businesses for the Park, are drafted to allow some flexibility in exactly what type of businesses **are** located at the Park and on what lots the businesses will be sited. Thus, the Applicant may, under the Umbrella Permit, concentrate retail square footage on a few lots. This may cause the Applicant to use up, in one bite, a large amount of the various parameters set up in the Umbrella Permit, with the consequence that other lots may be undeveloped unless and until the parameters are increased. For example, the Umbrella Permit allows a total of 2,825 peak hour trips from the Park. With this one project, the Applicant may use up as much as half that allocation. This may prevent later development of other lots because this one project will cause the Park to reach the trip allocation more quickly. But this is a choice the Umbrella Permit allows the Applicant.

Although **the** increase in retail square footage and the lot reconfiguration are not changes, the Board concludes that, due to its size and potential for significant generation of vehicle trips, the proposed project will be a change to the Park as permitted if it is allowed to be built without the prior construction of a sufficient number of the improvements, to area roads listed in Exhibit B to the 1987 Stipulation to the Umbrella Permit.

The Umbrella Permit and the 1988 Amendment, were based on the 1987 **and** 1988 Stipulation. Thus, the allowance in those permits **of** up to 2,825 vehicle trips is dependent on those stipulations as well.

The Board has found above that, in incorporating the 1987 and 1988 Stipulations, the District Commission intended that sufficient Exhibit B improvements be in place to ensure that amendment applications for projects in the Park do not cause unsafe traffic conditions or unreasonable congestion. Since an insufficient number of those improvements has been constructed to enable the area roads to accommodate the traffic impacts of the proposed project, then the

construction of the proposed project must be considered a cognizable change to the Park as permitted.

2. 1982 Town Plan

Under the second part of the "substantial change" test, the Board must determine, in relevant part, whether the change discussed above has the potential for significant impact on the town plan. The Applicant argues that the plan which the Board should apply under Criterion 10 is the 1982 Town Plan because that plan was the one in effect when the application for the Umbrella Permit was filed in 1986.

The Court's opinion states that "the Board must determine de novo whether the amendment application complies with town and regional plans in effect in 1987." By referring to 1987 instead of 1986, this statement could be read to allow application of a plan that was enacted later than the application date.

However, the statement is part of a discussion which refers to the law of vested rights. With respect to vested rights, the Court has previously stated that the usual rule is that the regulations which govern are those in effect when an application is filed. Smith v. Winhall Planning Commission, 140 Vt. 178, 183 (1981). The Board believes that the Court did not intend to overrule Smith, and also that there are no circumstances in this case which would justify applying a later plan. Cf. In re Ross, 151 Vt. 54, 56 (1989) (Court will not interpret Smith as an open-ended right to freeze applicable regulations). Accordingly, the Board applies the 1982 Town Plan.

Based on the foregoing findings of fact, the building of the proposed project without the construction of sufficient **Exhibit B** improvements will have the potential for significant impact under the Town Plan in that it will not comply with the Town Plan's provision regarding careful traffic review.

The 1982 Town Plan provides that "[i]ndustrial or commercial expansion should not be allowed without a careful review of traffic **impact.**" Clearly, careful traffic review of the Park occurred at the time the Umbrella Permit and the 1988 Amendment were issued. This careful review was embodied in the 1987 and 1988 stipulations to those permits which were the result of a cooperative traffic study and negotiation by the relevant public and private entities. Those stipulations included the improvements to area roads

listed in Exhibit B to be accomplished by the State and the Town.'

Thus, the only careful review of traffic impacts which has occurred in connection with the Park was one which encompassed major improvements to area roads. At no point in the Act 250 process has there been any other careful review of the traffic impacts of the Park or of the proposed project. The proposal of a project of this size and magnitude, without sufficient improvements to area roads in place to accommodate the traffic impacts, therefore does not conform to the Town Plan.

In other respects, the construction of the proposed project without sufficient Exhibit B improvements does not have the potential for significant impact under the Town Plan.

3. 1976 Regional Plan

Under the second part of the "**substantial change**" test, the Board must also evaluate whether the change discussed above has the potential for significant impact on the regional plan.

In the **Board's** memorandum of decision issued December 20, 1993, the Board concludes that the scope of its review under the Court's order includes a de novo determination and if so, whether the proposed project has the potential for a significant impact on such regional plan. These conclusions are found on pages eight and nine of the memorandum of decision, will not be repeated here, and are incorporated by reference.

With respect to the Board's conclusion, the Applicant raises a number of legal arguments:

- (a) that the Board is barred from applying any regional plan to the proposed project because of the doctrine of res judicata;
- (b) the Board is barred from applying any regional plan to the proposed project because WCRG did not raise the regional plan before the District Commission;
- (c) that the plan which the Board should apply under Criterion 10, if any, is the 1976 Regional Plan because that plan was the one in effect when the application for the Umbrella Permit was filed in 1986; and

- (d) that the 1976 Regional Plan on its own terms precludes its use in this proceeding.

The Applicant's res iudicata argument is based on two sources. The first source is a sentence in the findings supporting the Umbrella Permit which states that the 1976 Regional Plan "**does** not contain sufficient current information because it had not been updated every five years." The second source of the Applicant's argument is a section on page 11 of the Court's opinion in this matter, which reads:

The arguments for upholding the remand would require rewriting the Board's decision. The order to remand the amendment application to the commission was not based on EBR 40(D) or a finding of a significant change but rather on the conclusions that umbrella permits can be "**reopened**" and that "**many** of the potential impacts from this project were never **considered.**" We find no authority that allows the Board to "**reopen**" an umbrella permit. An umbrella permit is a final decision unless appealed within thirty days of issuance. See 10 V.S.A. § 6089(a). Because neither the 1987 umbrella permit nor the 1988 amendment was appealed to the Board, the findings, conclusions and permits are final and are not subject to attack in a subsequent application proceeding, whether or not they were properly granted in the first instance.

Based on these two sources, the Applicant argues that the District Commission made a final decision that there is no applicable regional plan and that the Board, under the law of res iudicata, cannot review whether there is an applicable regional plan.

The Board disagrees with the Applicant for the following separate and independent reasons:

- (a) The District Commission did not state that there is no applicable regional plan but rather that the 1976 Regional Plan did not, in its view, contain sufficient current information.
- (b) The Court's decision expressly states, in discussing which plans apply, that the Board must determine de novo whether the amendment application complies **with** the town and regional plans in effect in 1987.

- (c) The discussion in the Court's opinion referred by the Applicant is part of a holding that the Board may not reopen a final permit. The Board is not reopening the Umbrella Permit by addressing the regional plan. Regardless of the Board's decision in this matter, that permit will stand, and further amendment applications may be proposed.
- (d) The law of res iudicata is inapplicable because, for the doctrine to apply, the subject matter and parties to this proceeding must be identical or substantially identical with that of the Umbrella Permit proceeding. Berisha v. Hardy, 144 Vt. 136, 138 (1984). Such is not the case. The subject matter of these proceedings is the current amendment application. The subject matter of the Umbrella Permit proceedings was the application for the entire Park. Moreover, neither WCRG nor the City were parties to the Umbrella Permit proceeding.
- (e) Res iudicata may be applied to proceedings before administrative agencies but may be relaxed in the face of important policy or practical considerations. Town of Springfield, Vermont v. Environmental Board, 521 F.Supp. 243 (1981).⁷ In 10 V.S.A. § 6086(a)(10) and 24 V.S.A. § 4348(h), the General Assembly has demonstrated an intent the regional plans are to be applied in Act 250 proceedings. Thus, even if the Board interpreted the District Commission's decision in the manner suggested by the Applicant, and even if it were to find the law of res iudicata applicable, it would conclude that res iudicata should be relaxed due to a policy of giving effect to regional plans.

The Applicant's next argument, that the issue of the regional plan was not raised before the District Commission in this proceeding, is based on the following section from page nine of the Court's opinion in this matter:

The Board's jurisdiction is limited, however, by the scope of proceedings below. It has no jurisdiction to decide issues regarding criteria that were not before the district commission and not ruled upon by it. [Citation omitted.] The

⁷The Vermont Supreme Court has stated that res iudicata and its variant, collateral estoppel, may be applied to zoning applications but not as "inflexible rules of law." In re Application of Carrier, 155 Vt. 152, 157, 158 (1990).

district commission ruled on the criteria specified in condition 6 of the 1987 permit: 1 (air), 1(B) (waste disposal), 1(E) (streams), 4 (soil erosion), 7 (fire services), 8 (aesthetics) and 9(F) (energy conservation), as well as criteria 1(B), 2, 5 and 9(J) to determine compliance with the sewer, water, traffic and energy conditions of the umbrella permit. Ultimately, it decided there had been no showing of a significant impact on criterion 10 and thus no showing of a substantial change to the development as previously approved. As these were the issues before the commission, these are the issues that could properly be raised before the Board.

In interpreting this passage, the Applicant gives particular emphasis to the sentence stating that the Board **"has** no jurisdiction to decide issues regarding criteria that were not before the district commission and not ruled upon by **it."** The Applicant believes that this sentence bars the Board from reviewing issues that were not before the District Commission.

The Board disagrees with the Applicant. The relevant passage states that the Board may not decide issues regarding criteria which were not before the District Commission. The issue of substantial change under Criterion 10 was before the District **Commission.**⁸ The Court's opinion earlier states that "[o]nce an Act 250 criterion is noticed for appeal, however, issues generally within the scope of the criterion are properly before the Board." The issue of compliance with the Regional Plan is within the scope of Criterion 10. Further, if the Board accepted the Applicant's argument, Act 250 appeals would degenerate into contests over what is an **"issue"** and what was specifically raised below/under each appealed criterion.

The Board agrees with the Applicant's argument concerning which regional plan applies to the proposed project. For the reasons discussed above with respect to the 1982 Town Plan, the Board applies the 1976 Regional Plan.

⁸The Board also notes that, in the last few sentences of the quoted passage in question, the Court appears to equate the term "issues" and "criteria."

In applying the 1976 Regional Plan, the Board disagrees with the Applicant's argument that this plan, on its own terms, precludes its use in this proceeding. This argument is based on Resolution #1 to the 1976 Regional Plan, which is described in the Findings, above. The resolution does contain a portion which states it shall not be used in Act 250 proceedings. However, the resolution also contains a portion which **states** that CCRPC will ask the General Assembly to amend state law to conform to the **CCRPC's** wishes. No such amendment has occurred.

Instead, **the** General Assembly has enacted 24 V.S.A. § 4348(h), which provides that regional plans "shall be given effect" in Act 250 proceedings, unless the provisions of a regional plan conflict with the provisions of a town plan. In the event of such conflict, the town plan shall be given effect unless the proposed project will have a substantial regional impact.

A statute passed by the General Assembly, mandating application of regional plans; overrides a resolution of a regional planning commission that its plan not be applied. Further, the Applicant has not alleged, and the Board has not found, any conflict between the provisions of the 1982 Town Plan and the 1976 Regional Plan.

Based on the foregoing findings of fact, the building of the proposed project without the construction of sufficient Exhibit B improvements will have the potential for significant impact under the Regional Plan in that it will not comply with the Regional Plan's provisions in the Transportation and Land Use sections regarding traffic impacts. For example, the Transportation section of the Regional Plan states that regional roads should be **"safe and convenient," "expressways**

presenting

the proposed project is built in the absence of **sufficient Exhibit B** improvements.

The construction of the proposed project without the Exhibit B improvements does not otherwise have the potential for significant impact under the Regional Plan. In making this statement, the Board is not stating that the proposed project in general conforms or does not conform to the Regional Plan, The Board is referring only to project construction without the Exhibit B improvements, because that is the only change which the Board has found.

4. Effect of Determinations

The Board has concluded, above, that the proposed project, without sufficient Exhibit B improvements, represents a change which has the potential for significant impact in that it does not comply with the 1982 Town Plan or the 1976 Regional Plan. The Board therefore concludes that the proposed project, in the absence of sufficient improvements to area roads, constitutes a substantial change under Criterion 10.⁹

As quoted above, under Board Rule 34(B), a conclusion of substantial change ordinarily means that a proposed project must be handled as a "new application." This means that the application is reviewed under all ten criteria found at 10 V.S.A. § 6086(a). There is a strong policy reason for this rule: An application which has the potential for significant impact on one criterion may have the potential for such impact on others. In this case, for example, the noncompliance with the Town and Regional Plans, since it results from traffic **impacts** and the failure to construct sufficient infrastructure as contemplated by the Umbrella Permit, could also have a significant impact under Criteria 9(A) (impact of growth) and 9(K) (public investments and facilities), which have not been reviewed in these proceedings, as well as under Criterion 5 (traffic safety and congestion), for which there has only been limited review thus far.

In its order in this matter, the Court recognized the consequence of a "substantial **change**" conclusion. On page 10, in discussing the determination of substantial change, the Court stated: "In such circumstances, review under all ten **criteria would** be required before the commission in the first instance." Similarly, on page twelve, the Court states:

If the Board finds that the application is not in compliance with [the applicable town and regional] plans, and that it constitutes a substantial

⁹The Board has found a change with the potential **for** significant impact under ~~both~~ the Town and Regional Plans ~~es~~ that a finding of potential for significant impact under either plan is sufficient to support a conclusion of substantial change under 10 V.S.A. § 6086(a)(10) because that criterion requires conformance with both plans. See also 24 V.S.A. § 4348(h).

change to the development approved in the umbrella permit, then it may remand the application to the district commission to consider as a new application, which would be subject to the town and regional plans in effect at the time it was filed.

However, the Supreme Court has cautioned that, in applying "**substantial change**," the potential impacts must be significant. Barlow, supra, 4 Vt. Law Week at 201. **Further, under** Criterion 5, above, the Board has ordered a permit condition which requires that, prior to construction, most of the Exhibit B improvements to area roads be built and operating. If this condition is issued, then clearly the potential for significant impact under Criterion 10 is removed. This is because the Board's finding of substantial change under Criterion 10, as discussed above, is based in part on the lack of sufficient Exhibit B improvements."

Accordingly, because it is requiring the construction of all Exhibit B improvements to area roads, the Board need not order a remand to the District Commission for consideration of this application as a new one under Rule 34(B). If the Board were not issuing this permit condition, it would order such a remand.

"Unlike a case such as Barlow involving a substantial change to an exempt, **pre-existing** development, this case presents the unique possibility of avoiding a substantial change through issuance of an enforceable **permit** condition.

Taft Corners Associates, Inc.
Findings of Fact, Conclusions of Law, and Order
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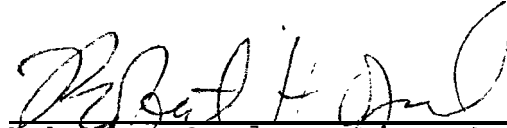
VI. ORDER

Based on the foregoing findings of fact and conclusions
#4C0696-11-EB Use Permit Amendment

#4stEnvironmental Commission.

Dated at Montpelier, Vermont, this 29th day of July,
1994.

ENVIRONMENTAL BOARD



Robert H Opel, Acting Chair
Fortna

Arthur Gibb
Samuel Lloyd
William Martinez
Anthony Thompson
Steve E. Wright

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