

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

RE: Berlin Associates by Findings of Fact and  
Dana Cole-Levesque, Esq. Conclusions of Law  
P.O. Box 417 Application #5W0584-9-EB  
Bethel, VT 05032

This decision pertains to appeals filed with the Environmental Board by Citizens for Vital Communities (CVC), Central Vermont Hospital, Inc. (the Hospital), and Berlin Associates (the Applicant) from Land Use Permit #5W0584-9 issued by the District #5 Environmental Commission on December 28, 1987. That permit authorizes Berlin Associates to construct a 51,000 square foot food store with related improvements on 6.72 acres of a 66.13 acre tract of land at the Berlin Mall located off Fisher Road and Route 62 in Berlin, Vermont.

The Environmental Board denies the application because it cannot find that the proposed project complies with Criteria 9(K) (public investments) and 10 (regional plan). The Board also finds that the application does not comply with Criterion 5 (traffic safety and congestion).

I. SUMMARY OF PROCEEDINGS

Appeals from the District Commission decision which were filed by CVC and the Hospital in January, 1988 were stayed pending the District Commission's decision on a Motion to Alter Decision filed by the Applicant. On March 17, 1988, the District Commission issued Land Use Permit Amendment #5W0584-9 (Revised). On April 6, 1988 CVC refiled its notice of appeal and on April 8 the Applicant filed a notice of appeal. A prehearing conference was convened by Board Chairman Leonard U. Wilson on May 16. On May 31, the Hospital filed a memorandum in which it contended it should not be required to be a co-applicant. The Board issued a prehearing conference report and order on June 10. At the prehearing, a request for party status was made by the Medical Staff of Central Vermont Medical Center, Inc. (Medical Staff) and the Board of Vermont Emergency Medical Services, District #6 (EMS #6), and on July 1 the Medical Staff and EMS #6 filed a petition for party status. The proceedings were again stayed after the Applicant submitted a request for reconsideration with the District Commission. On October 5, 1988 the District Commission issued Land Use Permit Amendment #5W0584-9 (2nd Revision) and the Applicant notified the Board of its withdrawal of its appeal filed on April 8.

In response to an inquiry from the Board, CVC, the Hospital, and the Medical Staff and EMS #6 informed the Board that they wished to proceed with their appeals. On December 20

the Board issued a decision granting party status to CVC on Criteria 1, 5, 9(K), and 10 pursuant to Board Rule 14(B)(1), and to the Medical Staff and EMS #6 on Criteria 5, 9(K), and 10 pursuant to Board Rule 14(B)(1).

A second prehearing conference was held on December 21, and a second prehearing conference report and order was issued on December 30. At the prehearing, CVC informed the Board that it wished to withdraw its appeal on Criterion 1.

The hearing scheduled for March 15, 1989 was postponed because a witness for the Medical Staff and EMS #6 was not available at that time. On March 10, the Medical Staff and EMS #6 filed a motion to stay the proceedings and require the production of traffic studies. On March 20, the Applicant submitted a letter outlining its position on procedural matters and asking the Board to dismiss the appeal. On March 27, the Board issued a decision staying the effect of Land Use Permit #5W0584-9, requiring the Applicant to file its traffic study, and denying the Applicant's request to dismiss the appeal. On April 5, the Applicant filed a motion asking the Board to reconsider its order staying the permit or, in the alternative, to require CVC, the Medical Staff, and EMS #6 to post a bond to indemnify the Applicant against losses incurred as a result of the stay; to bar CVC from raising the issue of the validity of the permit; and to expedite the hearings. On April 18 CVC and the Medical Staff and EMS #6 filed memoranda in opposition to the Applicant's motions. On April 26 the Board issued a decision denying the Applicant's motions to reconsider the order staying the permit, to require the opponents to post a bond, and to bar consideration of the validity of the permit. The Board scheduled the hearing for June 13 and established dates for filing prefiled testimony.

On May 8, the Applicant filed a motion for removal of the stay and for a hearing on the motion. On May 15 CVC filed a memorandum in opposition to the Applicant's motion, and on May 16 the Medical Staff and EMS #6 filed an opposing memorandum and a motion for sanctions. On May 17 the Board convened a public hearing and heard argument from the parties on the Applicant's motion. On May 31, the Board issued a decision denying both the Applicant's motion to lift the stay and the Medical Staff and EMS #6's motion for sanctions.

The Board convened a public hearing on the merits of the appeal on June 13, 1989. The following parties participated in the hearing:

Berlin Associates by Dana Cole-Levesque, Esq. and  
Michael Cyphert, Esq.  
Central Vermont Hospital by James Brock, Esq.

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Town of Berlin by Dave Janawicz  
Central Vermont Regional Planning Commission (CVRPC) by  
Susan Sinclair  
CVC by Andrew Keck  
Medical Staff and EMS #6 by Gerald Tarrant, Esq.

After presentation of evidence by the parties, the Applicant requested the Board to lift the stay of the permit. On June 16, the Board issued a decision ordering the stay lifted.

The hearings were reconvened on June 28, July 19, and August 23, 1989. In response to requests from the Medical staff and EMS #6, on July 5 the Board issued a decision requiring that as a condition of proceeding with construction before resolution of the appeal, Berlin Associates is prohibited from allowing any trucks associated with construction to use the Fisher Road access to the mall.

On August 23 the Board recessed the hearings pending filing of proposed findings by the parties. On September 19, proposed findings and conclusions of law were filed by the Applicant and the Medical Staff and EMS #6, and on September 22 CVC filed an objection, argument, and proposed findings.

The Board conducted deliberative sessions on September 6, 1989, October 18, 1989 and January 10, 1990. On January 10, 1990 the Board reviewed the evidence and determined the record complete. This matter is now ready for decision. To the extent the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise, said requests to find are hereby denied.

## II. ISSUES IN THE APPEAL

CVH claims that it should not be required to be a co-applicant to this application because of its limited interest in the land.

CCV contends that Land Use Permit #5W0584-9 is not a valid permit because after the District Commission denied the application, the Applicant did not comply with the requirements of 10 V.S.A. § 6087(c) and Rule 31(B) in filing for reconsideration. Therefore, CCV argues, the Commission had no basis on which to alter its findings on Criteria 5 and 9(K) and to issue a permit.

CCV, the Medical Staff and EMS #6 believe that traffic generated from the Sun Foods store will create unreasonable congestion and unsafe conditions in the area of the hospital and at nearby intersections. They also contend that the traffic from Sun Foods will endanger the public investment in

the hospital and area roads and interfere with the safety of the roads and safe access to the hospital. They believe that the Fisher Road access to the mall should be closed to traffic.

CVRPC is concerned that the construction and operation of the Sun Foods store may violate the Central Vermont Regional Land Use Plan if the Fisher Road access remains open and results in a mixing of commercial traffic with hospital medical and emergency traffic. The CVRPC recommends that the Fisher Road access be closed and that, in addition, efforts be made to increase the visibility and accessibility of the Route 62 access.

The following issues must be decided by the Board:

1. Whether Central Vermont Hospital should be a co-applicant to this application.
  2. Whether Land Use Permit #5W0584-9 is invalid because it was issued without evidence that the deficiencies relating to traffic safety had been addressed when the Applicant filed its motion to reconsider with the District Commission as required by 10 V.S.A. § 6087(c).
  3. Whether the Applicant's traffic report submitted as required by Condition 28 of Land Use Permit #5W0584-2-EB is sufficient for the Board to evaluate traffic conditions in the area of the Berlin Wall.
  4. Whether the construction and operation of the Sun Foods store at the Berlin Mall:
    - a) will cause unreasonable congestion or unsafe conditions with respect to Fisher Road under Criterion 5;
    - b) will unnecessarily or unreasonably endanger the public investment in the Central Vermont Hospital and area roads or materially jeopardize or interfere with the function, efficiency, or safety of the public's use of or access to the hospital and area roads under Criterion 9(E); and
    - c) is in conformance with the Central Vermont Regional Plan under Criterion 10.
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III. FINDINGS OF FACT

1. The Applicant proposes to construct a 51,000 square foot **"warehouse"** type food store with related improvements involving six acres of a 66-acre tract of land. It will have 307 parking **spaces within** its designated parking lot. The site is located at the Berlin Mall off Fisher Road and Route 62 in Berlin.
  2. The store, known as Sun Foods, will be leased to Hannaford Brothers for operation. It will be the largest grocery store in the State. The store will be open 24 hours a day, seven days a week.
  3. The Berlin Mall opened for business in the summer of 1986. As of that date, the mall structure contained 141,000 square feet of gross leasable floor area, not all of which was leased. In August 1989 the J. C. Penney department store opened at the Berlin Mall; Fay Drugs is expected to open. When fully constructed, the mall will contain 173,700 square feet of total leasable space, including J. C. Penney and Fay Drugs.
  4. The 66.27 acre parcel of land is located on a much larger tract that is triangular in shape. Route 62 is a limited access highway that runs along the southerly boundary of the triangular tract from the Interstate 89 access to the Barre and Montpelier access roads. Route 62 crosses Fisher Road at a major intersection southeasterly of the hospital and the mall. Berlin Street, which begins at River Street in Montpelier, becomes Paine Turnpike after its intersection with Fisher Road. Paine Turnpike runs along the westerly boundary of the triangular tract and intersects with Route 62. Fisher Road begins at Berlin Street and runs along the northeasterly boundary of the tract and crosses Route 62. Several medical office buildings and the Central Vermont Hospital are located on Fisher Road across from an access driveway to the mall. The other access driveway to the mall is located along Route 62 between the Paine Turnpike intersection and the Fisher Road intersection.
  5. Directly across Fisher Road from the mall access road is a driveway to one of three medical office buildings. A traffic signal has been put at this intersection. The Central Vermont Hospital is located across Fisher Road southeast of the mall access road.
  6. In addition to the driveway across from the Berlin Mall access road on Fisher Road that provides access to the hospital and the medical buildings, there are three other
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hospital access driveways along Fisher Road toward Route 62: an "entrance only" driveway, the emergency entrance and exit, and the hospital's main entrance and exit. There are no traffic signals at any of the three driveways.

7. The store will be constructed on lot E of the 66.13 acre tract of land as depicted on Board Exhibit #26. Lot E is close to the Fisher Road access to the existing mall. Access to Sun Foods will be by means of the existing mall access roads from Fisher Road and Route 62.
8. When the Board issued an Act 250 permit amendment to Berlin Associates in 1985 (#5W0584-2-EB), it was concerned that insufficient evidence concerning traffic had been submitted. The Conclusions of Law attached to that permit contain the following statements, at page 8:

[T]he record in this matter is scanty in respect to the general traffic circulation regimen proposed by the Applicant: little evidence was submitted concerning traffic to be generated by the mall proposal, the expected origin of vehicles destined for the mall, the proportion of vehicles using each of the two proposed entrances, and the change, if any, in the operation of the surrounding road network arising from the mall. Furthermore, some traffic safety components recommended by the Applicant's consulting expert have not been incorporated into the project proposal.

9. As a consequence of the shortcomings identified in Land Use Permit #5W0584-2-EB, the Board imposed a number of conditions relating to traffic, including Condition 28, which states:

Prior to the commencement of construction, the Permittee shall submit to the Board for its approval the design for a proposed study of the traffic safety and congestion conditions at the following intersections and the intervening road segments: Route 62/Fisher Road/Airport Road, Route 62/new mall access road, Route 62/Paine Turnpike, Fisher Road/Paine Turnpike/Stewart Road, and Fisher Road/new mall access road. The design shall include:

- a) a methodology for the collection of baseline information for a two year period prior to the opening of the mall;
- b) a methodology for the collection of traffic information for a two year period following the mall's opening;
- c) a description of safety and congestion indices to be studied on a comparative basis;
- d) the identity and credentials of the person or entity retained to perform the study.

Condition 28 further requires the Applicant to submit the design to the other parties as well as the Board, and to file the final traffic report with the District Commission and the parties.

10. After the Board issued Land Use Permit #5W0584-2-EB, the Agency of Transportation and the Applicant requested reconsideration of certain portions of the decision. In response, the Board issued a Memorandum of Decision and Amendment to the permit. With regard to questions about Condition 28 of the permit, the Board stated:

This Condition is a reasonable requirement to assure that actual traffic conditions upon completion and occupancy of the Mall are consistent with factual representations made by the Permittee. The parties submitted extensive evidence concerning accident rates at the intersections surrounding the project site. While we agreed with the Permittee that introduction of a new Route 62 Mall access would not create an unsafe traffic condition, we nonetheless believe this intersection should be monitored to assure no unsafe condition results from operation of the Mall. Furthermore, Paine Turnpike and Fisher Road intersections with Route 62 have a history of high accident rates and the Mall will contribute additional traffic to these intersections. Therefore, a study of limited duration to monitor actual conditions at these intersections is reasonable.

Regarding a study of road capacity, the Board stated:

[T]he Permittee failed to furnish the Board with any analysis of trip generation identifying likely points of origin or means of access to the Mall. . . . A study of road capacity is, therefore, reasonable.

11. The proposed design for the traffic study submitted to the Board by the Applicant in 1985 contained the following statements regarding traffic volumes, in pertinent parts:
    1. Manual turning movement counts will be taken at all five intersection locations. These counts will encompass eight weekday and eight weekend hours during the summer/fall of 1985 (the before period) and a similar time period approximately one year after the mall opens. ...
    3. Daily and seasonal variations in mall traffic will be measured by a series of vehicular counts at the mall access drives on selected weekday and weekend days at 3-month intervals in the 2-year period after the mall opens. This series of counts will include the **pre-Christmas** peak period as requested by the Environmental Board.
  12. **The Applicant** failed to prepare or submit the traffic study required by Condition 28 of Land Use Permit #5W0584-2-EB until April 5, 1989, after the Board stayed the construction of the food store.
  13. The "Condition 28" traffic study is deficient in a number of respects: 1) Instead of conducting traffic counts at three month intervals as promised in the 1985 design proposal, the Applicant conducted only six traffic counts. 2) The Applicant had stated in its proposal that traffic counts would be taken on eight weekday and eight weekend hours during the summer and fall the year after the mall opens. The Applicant also admits that traffic is at or above average from May to November and lower than average from January to April. However, the Applicant conducted no traffic counts during the months of May, June, July, August, September, or October. 3) The lowest average weekday traffic, lowest Saturday traffic, and lowest Friday traffic occur during the months December through April. However, five of the six traffic counts were taken
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during these low traffic months. 4) On average, the highest weekday traffic, highest Saturday traffic, and highest Friday traffic occur during the month of October. However, the Applicant took no traffic counts during the month of October in any year. 5) The only Christmas traffic count was taken in 1986, immediately after the mall opened and when it was only partially occupied. 6) The only traffic count taken since the mall has been fully occupied was in March, 1989. March, however, is the month with the lowest average weekday traffic, the second lowest Saturday traffic, and the lowest Friday traffic. The March, 1989 traffic count was the highest of all six counts taken by the Applicant. 7) The study failed to consider the effect of mall traffic on the unsignalized intersections with hospital driveways along Fisher Road.

14. According to the Applicant's six traffic counts, an average of 70 percent of the Friday p.m. peak mall traffic and almost 75 percent of Saturday peak traffic use the Fisher Road driveway. During the hearings in 1985, the Applicant stated that the Route 62 driveway would be the primary access and that the Fisher Road driveway would be secondary. No attempt has been made to direct shoppers to the Route 62 entrance; in fact, radio advertisements for stores at the Berlin Mall have identified the mall in relationship to Fisher Road and the Central Vermont Hospital.
15. The Applicant calculated projected traffic volumes based upon the March, 1989 traffic count figures, and added 20% to all approach volumes and an increment for traffic from J. C. Penney, Fay Drugs, and Sun Foods.
16. A food market can be expected to generate at least 8.82 trips per 1,000 square feet of gross leasable space, or a total of 450 driveway movements in the peak hours. Approximately 20 percent of these trips will also involve shopping at other stores in the mall, so the additional traffic from Sun Foods would be reduced to approximately 360 driveway movements in the peak hour. Ninety percent of this traffic is projected to use the Fisher Road access. It is reasonable to assume that those using the Fisher Road driveway for access to Sun Foods will become accustomed to using that driveway as the primary entrance to the mall and that eventually 90 percent of all mall traffic will use the Fisher Road access.
17. The number of accidents at the Route **62/Paine** Turnpike intersection and the Route **62/Fisher** Road intersection are as follows:

<u>YEAR</u>	<u># OF ACCIDENTS</u> <u>ROUTE 62/PAINE TNPK</u>	<u># OF ACCIDENTS</u> <u>ROUTE 62/FISHER RD.</u>
1979	3	7
1980	4	8
1981	3	3
1982	2	4
1983	2	4
1984	0	3
1985	3	4
1986	5	9
1987	6	9
1988	5	15

During the first quarter of 1989 there were ten accidents on or near the Route **62/Fisher** Road/Paine Turnpike triangle, four of which were at the intersection of Route 62 and Fisher Road.

18. In 1986, the year the Berlin Mall opened, the number of traffic accidents began to increase at both intersections. The number of accidents continued to increase even after a traffic signal was installed at the intersection of the mall driveway and Fisher Road at the end of 1987.
19. An increase in the number of accidents is directly related to an increase in traffic. As traffic volume increases, the number of accidents increases in direct proportion.
20. **The** intersections of Route **62/Fisher** Road and Route **62/Paine** Turnpike are currently considered high accident locations by the VAOT.
21. The amount of traffic at the mall has been less than anticipated in the original studies, but the mall had significantly lower occupancy than anticipated. The original projections were based upon 245,000 square feet of commercial space but as of November 1987 only 130,000 square feet was leased.
22. In estimating the amount of non-mall traffic on the roadways, the Applicant assumed that non-mall traffic would grow at the rate of five percent each year to the end of 1988. However, Table 8 of the Regional Planning Commission's Traffic Element "Transportation Plan Update (1984)" shows growth on Route 62 in Berlin of 88 percent **from** 1974 to **1982**, and a growth of 27 percent projected for 1982 to 1988. Actual 1988 average daily volumes at the VAOT traffic counter on Route 62 showed an average annual increase of approximately 9 percent from 1982 to 1988.

23. The State of Vermont Agency of Transportation and the Town of Berlin have received Land Use Permit #5W0898 authorizing improvements to Fisher Road and to the Route 62/Fisher Road intersection. Separate lanes for various traffic movements will be painted and the traffic signal phasing and timing will be modified. Four lanes may be made on Fisher Road. VAOT believes that improvements are necessary because of the projected growth in traffic volumes and that these improvements will increase the safety of the intersections.
  24. The VAOT also plans to construct major improvements to Berlin Street which will include repaving and widening the road. Thus, in addition to the increases in traffic on Fisher Road that will be generated by the Sun Foods store,, the improvements to Berlin Street may significantly increase the number of vehicles on Fisher Road, since Berlin Street is the most direct route from Montpelier but is frequently avoided now because of the extremely bad road surface.
  25. The level of service for vehicles exiting the main hospital driveway onto Fisher Road would be F (extreme delays) with the addition of Sun Foods to the mall.
  26. Based upon traffic counts on the Friday before Christmas at several malls in Vermont and New Hampshire, level of service at the mall driveway/Fisher Road intersection at the peak hour would be at level of service F, which represents extreme congestion.
  27. Because of the lack of concrete data on the amounts of existing traffic at various times through the year, the Board is unable to make any conclusive findings regarding projected levels of service at the intersections of Route 62/Fisher Road, Route 62/Paine Turnpike, and mall driveway/Fisher Road (except for the peak hour on the Friday before Christmas).
  28. The addition of one or two lanes to Fisher Road will increase the likelihood of accidents because vehicles must cross several lanes of traffic when exiting from the unsignalized intersections.
  29. The Sun Foods store will cause an increase in truck traffic, since as a food store it will sell perishables and must therefore be supplied more frequently than other stores.
  30. Four types of drivers that use the Central Vermont Hospital and adjacent medical offices are at increased risk of involvement in highway accidents: the elderly;
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persons with medical impairments; persons under the influence of alcohol, mind-altering drugs, and prescribed medications; and ambulance drivers.

31. The elderly have increased problems driving at night, adapting to glare, and responding correctly to traffic at intersections. The elderly also have more accidents per unit of miles driven.
  32. About 25 percent of those seeking care at the CVH emergency room and approximately 33 percent of those visiting doctors' offices are age 60 or older.
  33. Persons with medical conditions such as seizure patterns, diabetes, and heart disease have about a two-fold higher accident risk than do other drivers.
  34. Among patients seen in the emergency room with injury, about 20 to 25 percent are acutely under the influence of alcohol.
  35. Patients frequently arrive at the hospital under the influence of alcohol, mind altering drugs, and various types of prescribed medications. The accident risk of someone under the influence of alcohol ranges from six to 40 times that of a sober driver. Patients frequently drive to the hospital when they are drunk, injured, in severe pain, or otherwise medically distressed. People visiting patients at the hospital are also in a high risk accident group due to stress created by the hospital environment and concern about the patient.
  36. The accident risk for ambulances during emergency runs is 13 times greater than that of ambulances in ordinary driving. About half of the accidents occur at intersections.
  37. Neither the Applicant's "Condition 28" traffic study nor any other evaluation of traffic conditions in the area of the Berlin Mall takes into account the higher risk drivers typically using the roads near hospitals.
  38. The tract of land on which the Berlin Mall is located contains undeveloped sites, some of which may be closer to Route 62 than Lot E, on which the Sun Foods store could be constructed.
  39. The mall entrance on Route 62 is not very visible and is sometimes missed by shoppers unfamiliar with its location.
  40. The Central Vermont Hospital is a public facility within the meaning of Criterion 9(K).
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41. The Central Vermont Regional Land Use Plan contains the following statement as one of its goals: "[T]o promote the public health, safety and welfare of the Region." The Regional Plan also states that "[r]egional transportation policies should correspond to and enhance land use, economic and environmental quality polices .... The nature and character of land use governs the type and amount of traffic that is generated, and roadway efficiency and safety is an overall priority."
42. The District Commission initially denied a permit for the construction of Sun Foods because it found that the project would cause an undue adverse effect on the aesthetics of the area (Criterion 8) and that it had insufficient evidence to conclude that the project would not have an impact on the public's safe access to and use of the hospital (Criterion 9(K)). The District Commission also found that the food store would create unreasonable congestion and unsafe traffic conditions under Criterion 5.
43. The Applicant subsequently filed a motion for reconsideration pursuant to 10 V.S.A. § 6087(c). This motion included an affidavit that the deficiencies had been corrected and a report by the Applicant's traffic expert addressing the Commission's concerns under Criteria 5 and 9(K).
44. On December 28, 1987, the District Commission issued a permit to Berlin Associates to construct the Sun Foods store. The Applicant had redesigned and relocated the building and proposed extensive landscaping plantings to satisfy Criterion 8. With respect to Criteria 5 and 9(K), the District Commission stated the following:

The Commission's major concern ... was that the food store would result in unreasonable safety and congestion problems at the intersection of the Mall access road and Fisher Road. The Commission now concludes that the identified shortcomings have been corrected or mitigated by subsequent changes in circumstances.

Most importantly, Land Use Permit **5W0898** is issued as of the same date as this decision. That permit authorizes significant reconstruction of Fisher Road, Paine Turnpike and Berlin Street. It should be noted that the applicant is making a financial contribution to the Fisher Road portion of that

project. These physical improvements will assist in the reduction of unreasonable conditions identified in our original decision. The Commission also notes the installation of traffic signals at the Mall access road and Fisher Road/Hospital Access intersection. This improvement also reduces the potential for unreasonable impacts.

To further reduce the potential for unsafe conditions and unreasonable congestion at the Fisher Road mall driveway, the District Commission imposed a condition requiring that all new or renewed leases (including the one with the Hannaford Brothers for the Sun Foods store) must require that the tenants' advertising identify their location in relation to Route 62 and not in relation to Fisher Road or proximity to the hospital.

IV. CONCLUSIONS OF LAW

A. Co-Applicantcy of Central Vermont Hospital

Board Rule 10(A) requires that "[t]he record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement."

In 1966 Berlin Associates' predecessor in title conveyed a parcel of land on the property now owned by Berlin Associates to the Central Vermont Medical Center, Inc. (now CVH) on which to build a water tower. CVH then granted a 50-foot wide right-of-way to Berlin Associates' predecessor in title for limited purposes. The District Commission required CVH to be a co-applicant to this application because the Applicant intends to use the right-of-way for a substantial fill area and for planting trees to provide an aesthetic buffer. Since the District Commission's decision to require CVH to be co-applicant, CVH granted to Berlin Associates an aesthetic easement over the existing 50-foot right of way for CVH to use "for the placement of fill and the installation and maintenance of drain pipes and landscaping material . . . ."

CVH argues that it should not be required to be a co-applicant to this project, thereby acquiring responsibility for compliance with all aspects of the permit over which it has no control. The Board believes that the execution of the quit-claim deed results in granting the Applicant full control over the right-of-way for the purposes necessary to comply with the conditions in the District Commission's permit and effectively eliminates any control by CVH over the project.

Therefore, good cause exists for a waiver of the requirement that CVH be co-applicant even though it owns an interest in the project land, pursuant to Rule 10(A).

**B. Validity of the Permit**

CVC contends that Land Use Permit #5W0584-9 is invalid because the District Commission reconsidered its denial of the permit after the Applicant filed a motion for reconsideration that did not include an affidavit that the deficiencies were corrected, as required by 10 V.S.A. § 6087(c). According to the documents in the District Commission's file, the Applicant did file an affidavit. The sufficiency of the information included with the affidavit may be questioned, but it appears that there was at least technical compliance with the statute.

Moreover, although applicants are required to follow the requirements of the law in-regard to filing motions for reconsideration, nothing in the statute precludes a district commission from addressing additional issues. Rule 31(B)(Z), which is entitled "Scope of review," states: "The district commission may, but need not necessarily, limit its scope of review to those aspects of the project or application which have been modified to correct deficiencies noted in the prior permit decision." The Board interprets this language to allow a district commission to reconsider issues other than those raised by the Applicant in its reconsideration motion and affidavit. The Board finds that the District #5 Commission had the authority to alter its findings on Criteria 5 and 9(K) based upon evidence different from that provided by the Applicant in an affidavit, and that Land Use Permit #5W0584-9 was validly issued.

**C. Criteria 5, 9(K), and 10**

Criterion 5 of Act 250 requires the Board to find that a project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to the use of highways . . . ." Although 10 V.S.A. § 6088(b) provides that the burden of proof is on parties opposing the applicant on Criterion 5, the applicant nevertheless has the burden of producing sufficient evidence for the Board to make a positive finding. See Re: Pratt's Propane, Findings of Fact and Conclusions of Law and Order, Application #3R0486-EB at 5-6 (January 27, 1987).

The evidence provided by the parties regarding the level of service at the intersection of Fisher Road and the mall driveway was confusing and contradictory, in no small part because the Applicant did not do the traffic counts previously **required** by the Board which would have provided definitive data regarding the amount of traffic generated by the mall at

various times of the year. In reviewing a Application #5W0584-2-EB: in 1985, the Board **found** that inadequate **information** had been submitted regarding traffic in the area of the mall. Therefore, the Board's granting of Land Use Permit #5W0584-2-EB was partially conditioned upon the Applicant's taking a number of traffic counts for two years after the mall's opening and on specific high-traffic days such as before Christmas and during the busier summer season. The Applicant ignored the condition and only submitted the required traffic study when the Board stayed the permit for construction of Sun Foods until the study was submitted.

Further, the traffic counts reported in the Applicant's study were not done in accordance with the Board's requirements and do not provide adequate data: Only six traffic counts were taken and reported in the study; none of the traffic counts was taken during the summer months when mall traffic is heavier than from January through April; no traffic counts were taken in any October, when traffic is typically the heaviest; no traffic counts were taken between November 1987 and March 1989; and no traffic counts were taken on the Friday before Christmas to determine the worst case conditions since the mall was fully occupied. **Although the Applicant based its projections upon the March 1989 traffic figures, which were substantially higher than any others, and added 20% to all approach volumes and an increment for traffic from J. C. Penney; Fay Drugs, and Sun Foods, the Board believes that no reliable traffic projections can be based upon just one day, particularly in an admittedly low traffic month.**

We believe that the confused and contradictory evidence in this record regarding the level of service at the pertinent intersections, as well as the prolonged hearings, were due in large part to the lack of adequate information regarding current traffic around the mall. A great deal of time was spent by the parties arguing over the base information and the methodologies used to determine current traffic levels and projections with the construction of the Sun Foods store, because the information simply does not exist. Had the Applicant complied with the condition of its permit and followed through on the traffic study proposal as required, the Board would have the information needed to properly evaluate whether the Sun Foods store will create unsafe traffic conditions and undue congestion. Without knowing how many vehicles currently use the mall, it is impossible to project with any accuracy the future traffic conditions once Sun Foods is built.

The Board is also disturbed to find out that the Fisher Road access to the mall has become the primary access (see Finding 14, above). In previous proceedings, both the District

Commission and the Board have consistently found that in order to prevent unsafe conditions, Fisher Road would have to be the secondary access to the mall, with Route 62 the primary one. But the evidence is clear that this has not happened, and that in fact Fisher Road is the principal means of access to the mall. It was not seriously disputed that 90 percent of the vehicles going to and leaving Sun Foods will use the Fisher Road access. It is reasonable to assume, therefore, that the existence of the food store so close to Fisher Road will increase the use of the Fisher Road driveway for all mall traffic. Even the approximately 70 percent current level of use of that driveway is not acceptable, based upon the findings and conditions of both the Board and the District #5 Commission in previous proceedings regarding this mall.

Considerable evidence regarding the high accident risk in the area of hospitals due to medically impaired, injured, or highly stressed drivers was submitted to the Board, along with statistics on the number of accidents at two intersections in the area of the mall and the hospital. Although there is no dispute that these intersections experience higher than average accident rates and are therefore considered high accident areas, comprehensive information regarding the causes of the accidents and the destinations of the drivers is lacking. Moreover, apparently no studies have been done or are available that address the question whether more accidents than average actually occur in areas near hospitals. As a consequence, it is difficult for the Board to evaluate whether the high accident rates at the two intersections are due to drivers associated with the hospital. Nonetheless, the testimony presented by representatives of the Medical Staff and EMS #6 about the various impairments experienced by persons driving to the hospital was disturbing, and to the extent that an increase in traffic will increase the likelihood of accidents, the Board has serious questions about the wisdom of substantially increasing the traffic in the area of the hospital by allowing the use of the Fisher Road access to the Food Store. Moreover, the evidence regarding the projected level of service F at the intersection of the main hospital driveway with Fisher Road presented by CVC was not disputed.

With no clear evidence that the increase in traffic from Sun Foods will not create unsafe conditions or unreasonable congestion, **and with** some evidence that unsafe conditions and unreasonable congestion will occur along Fisher Road in the area of the mall driveway and the entrances to the hospital, the Board is not able to make a positive finding on Criterion 5.

According to 10 V.S.A. § 6087(b), the Board may not deny a permit for lack of compliance with Criterion 5, but may impose conditions to alleviate unsafe traffic conditions or

unreasonable congestion. Therefore, were the Board to issue a permit, it would impose a condition requiring that the Fisher Road access to the mall not be used except by emergency vehicles.

Criterion 9(K) requires the Applicant to demonstrate that a development adjacent to public lands and facilities, including highways and hospitals, "will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility . . . or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility . . . or lands." The hospital is a public facility within the meaning of this Criterion. We conclude that the Applicant has not met its burden of proof in demonstrating that the traffic generated by Sun Foods will not unnecessarily or unreasonably endanger the public investment in the highways and the Central Vermont Hospital or materially interfere with the safety of the roads and access to the hospital. As explained above, the Applicant has not submitted sufficient information on existing traffic in the area of the mall to make accurate projections of future traffic with the Sun Foods store constructed. Therefore, the Board cannot find that the safety of the roads and access to the hospital will not be materially jeopardized. Furthermore, the Board is not convinced that construction of Sun Foods at the designated site is "necessary," as other sites closer to Route 62 exist at the mall on which the Sun Foods store may be constructed. Even if this site were the only one possible for construction of the store, the Fisher Road access is not necessary, since the Route 62 driveway exists and was, in fact, intended to be the primary access to the mall. The Board concludes, therefore, that this project as proposed does not comply with Criterion 9(K). This conclusion is based solely upon the proposed use of the Fisher Road driveway for access to the Sun Foods store.

Criterion 10 requires that the Board find that the project conforms with the regional land use plan. The Central Vermont Regional Land Use Plan contains policies that require safe roads. To the extent that the Board cannot find that the use of the Fisher Road access to the mall will not cause unsafe traffic conditions, we also cannot find that the project conforms with the Regional Plan. As explained above it is only with regard to the use of Fisher Road access that the Board concludes that the project violates the Regional Plan.

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V. ORDER

1. The requirement of Rule 10(A) that CVH as owner of an interest in the land be co-applicant is waived.
2. Land Use Permit #5W0584-9 was validly issued.
3. Land Use Permit Application #5W0584-9-EB is hereby denied.
4. Land Use Permit #5W0584-9 is voided.

Dated at Montpelier, Vermont this 9th day of February, 1990.

ENVIRONMENTAL BOARD

  
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Leonard U. Wilson, Acting Chair  
W. Philip Wagner  
Elizabeth Courtney  
Sam Lloyd  
Ferdinand Bongartz  
Arthur Gibb

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