

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

RE: Pilgrim Partnership, Stephen Van Esen, and
Green Mountain Coffee Roasters, Inc.
Land Use Permit #5 W0894-6/5 W 1156-6B-EB
EB Docket #709

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns the construction, use, and maintenance of a 25,000 square foot expansion to an existing building together with parking lots and related improvements located in the Village of Waterbury, Vermont ("Project").

1. PROCEDURAL SUMMARY

On April 18, 1997, the District #5 Environmental Commission ("District Commission") issued land use permit #5 W0894-6/5 W1156-6 ("Dash 6 Permit") together with supporting Findings of Fact, Conclusions of Law, and Order ("Dash 6 Order") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The Dash 6 Permit authorized Pilgrim Partnership and Stephen Van Esen ("Permittees") to construct the Project, which would be leased to Green Mountain Coffee Roasters, Inc. ("GMCR").

On May 28, 1998, the District Commission issued land use permit amendment #5W0894-6/5W1156-6B (the "6B Permit") to permittees and GMCR together with a supporting Memorandum of Decision ("May Order") which includes conditions intended to prevent unreasonable impacts on the interests of residents of Batchelder Street pursuant to 10 V.S.A. § 6086(a)(5) (traffic) ("Criterion 5"). The Commission confirmed the 6B Permit and the May Order by decision issued June 18, 1998 ("June Order").

On June 26, 1998, Permittees filed an appeal from the 6B Permit, the May Order, and the June Order contending that the Project is in compliance with Criterion 5 and that the District Commission had no authority to re-open the application proceeding and impose additional conditions. In addition, Permittees filed a motion requesting the Board to stay the May Order and June Order pursuant to Environmental Board Rule ("EBR") 42 ("Motion for Stay"),

On July 22, 1998, the Vermont Environmental Board ("Board") deliberated concerning Permittees' Motion for Stay.

¹ The 6B Permit was issued by the District #5 Environmental Commission under a caption stating that it is "Case 5W0894-6/5W0056-6B." This scrivener's error is corrected by the issuance of Land Use Permit Amendment #5W0894-6/5W1156-6B-EB on even date herewith.

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On July 23, 1998, Board Chair Marcy Harding convened a prehearing conference with the following individuals and entities participating:

Permittees by Michael Marks, Esq. and Stephen Van Esen
Betty and Ronald Frederick, pro se
Janice and Francis Sherman, pro se
GMCR by Paul Comey

Also present were Keith Morgan and Veronica P. Comtess.

On July 24, 1998, the Board issued a Memorandum of Decision denying the Motion for Stay.

On July 24, 1998, the Chair issued a Prehearing Conference Report and Order. Among other things, the Order concluded that Betty and Ronald Frederick and Janice and Francis Sherman (collectively the "Neighbors") have party status to participate in this proceeding.

On July 30, 1998, Permittees filed a statement of the actions taken pursuant to the 6B Permit.

In September and October, 1998, Permittees and the Neighbors filed direct and rebuttal testimony and exhibits.

On November 3, 1998, Permittees filed Objections to the evidence submitted by the Neighbors.

On November 17, 1998, the Chair issued a Preliminary Ruling concerning Permittees' evidentiary objections ("Preliminary Evidentiary Ruling").

On November 17, 1998, Permittees and the Neighbors filed proposed findings of fact and conclusions of law.

On November 25, 1998, Permittees filed objections to the Preliminary Evidentiary Ruling.

On November 30, 1998, the Chair convened a second prehearing conference with the following individuals and entities participating:

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Permittees by Michael Marks, Esq.
The Neighbors by Betty Frederick and Janice Sherman

On December 2, 1998, a three-member panel of the Board ("Panel") convened a hearing in Waterbury, Vermont with the following individuals and entities participating:

Permittees by Michael Marks, Esq.
The Neighbors by Betty Frederick

The Panel deliberated concerning Permittees' objections to the Preliminary Evidentiary Ruling and announced its affirmation of the Ruling. The Panel conducted a site visit, accepted documentary and oral evidence into the record, and heard opening and closing statements regarding the issues on appeal. After recessing the hearing, the Panel deliberated.

On December 31, 1998, Permittees' attorney filed a letter requesting that the Board refrain from scheduling any hearing or conference in this matter between January 25 and February 8, 1999.

The Panel deliberated again on January 4, 1999.

Based upon a thorough review of the record, related argument, and the proposed findings of fact and conclusions of law, the Panel issued a proposed decision on January 5, 1999 which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before January 20, 1999.

On January 20, 1999, Permittees filed written objections to the proposed decision. No party requested oral argument.

The Board deliberated on January 27, 1999. Following a thorough review of the proposed decision, the record, and Permittees' objections to the proposed decision, the Board declared the record complete and adjourned. The matter is now ready for final decision.

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp., Docket No. 96-369, slip op. at 13 (Vt. Nov. 7, 1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

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II. ISSUES ON APPEAL

1. Whether, prior to commencement of the use of the Project, Permittees did provide or could have provided verification that the Waterbury Village trustees had acted to restrict traffic movements on Batchelder Street.

2. If the answer to Issue #1 is in the negative and if the Waterbury Village trustees acted after commencement of the use of the Project to restrict movements on Batchelder Street, whether the Project's permit can be amended to include additional conditions "to prevent unreasonable impacts on Batchelder Street" pursuant to Condition 13(D) and 10 V.S.A. § 6086(a)(5) (traffic).

3. If the answer to Issue #1 is in the negative and the answer to Issue #2 is in the affirmative, whether the Project fails to comply with 10 V.S.A. § 6086(a)(5) (traffic) such that it is necessary to "impose additional permit conditions to prevent unreasonable impacts on Batchelder Street" pursuant to Condition 13(D).

III. PRELIMINARY MATTERS

A. Evidentiary Objections

The Preliminary Evidentiary Ruling is correct for the reasons stated therein and, therefore, the Ruling is incorporated herein by reference.

B. Official Notice

Under 3 V.S.A. § 810(4), notice **may be** taken of judicially cognizable facts in contested cases. In addition, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases before administrative bodies. Id. § 8 10(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Hanflyc 1441 Vtn 10, 0612 (1984). judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 8 10(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of fact may be based upon offkially noticed matters. 3 V.S.A. § 809(g).

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As the Chair announced at the Panel Hearing, the Board shall take official notice of the Dash 6 Permit and the 6B Permit together with all incorporated orders and exhibits pursuant to 3 V.S.A. § 810(4). No party objected to this exercise of administrative authority.

C. Administrative Amendments Pursuant to EBR 34(D)

The May Order recites that the Commission issued the 6B Permit as an administrative amendment of the Dash 6 Permit pursuant to EBR 34(D). In their Proposed Conclusion of Law #3, Permittees contend that EBR 34(D) does not grant the Commission the authority to reopen the proceeding. Permittees initially raised this issue in their notice of appeal. The Chair determined the issue, *in Permittees' favor*, in the Prehearing Conference Report and Order issued July 24, 1998, which is incorporated herein by reference. No timely objection was made to the Prehearing Order and the rulings made therein are final. As stated in the Prehearing Order: [A]ny authority which the Commission may have had to amend the Dash 6 Permit by issuing the 6B Permit did not derive from EBR 34.”

IV. FINDINGS OF FACT

1. Permittees are the owners of the real property known as the Pilgrim Industrial Park (“Pilgrim Park”) located in the Village of Waterbury, Vermont.
2. Pilgrim Park is located on tracts of land totaling approximately 30 acres. Portions of these tracts have been used for commercial / industrial purposes since the 1920s when Pilgrim Plywood was in operation at the current site of the Pilgrim I building at the southern end of Pilgrim Park. Permittees purchased the property in the early 1980s and began construction on Pilgrim Park in 1985.
3. GMCR is engaged in the manufacture, storage, and distribution of packaged coffee. It leases the Pilgrim I building at which approximately 80 persons are currently employed. It also leases a portion of the Pilgrim II building at which it employs approximately 60 persons.
4. The Project involves the construction, use, and maintenance of a 25,000 square foot expansion to the Pilgrim I building for use by GMCR. It also involves the upgrade and creation of driveways and parking lots for Pilgrim I located to the south of the expansion, including the one-way “loop road” for truck access to the building.

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5. Railroad tracks run along the western boundary of Pilgrim Park.
6. The main access to Pilgrim Park is via Park Row. Park Row extends in an easterly direction from Main Street until shortly beyond a railroad crossing, over which vehicles travel at grade. Between the railroad crossing and Main Street, the westbound lane divides into two traveling lanes. In addition, Park Row widens for part of the distance between the railroad crossing and Main Street to provide on-street parking. The railroad station, a park, and commercial buildings including a bank, a shopping center, and a restaurant are located along Park Row to the west of the railroad crossing.
7. There are two sets of railroad tracks at the Park Row railroad crossing, one of which terminates a short distance to the south. The remaining track branches into two tracks further to the south. The Park Row crossing has **signal** lights and a bar that is lowered when a train approaches.
8. To the east of the crossing, Park Row turns sharply south. Railroad Street joins Park Row from the north at this point. **Railroad** Street is a dirt road where it joins Park Row. Railroad Street connects with Stowe Street to the north, which joins Main Street. There is a bridge on Stowe Street ("Bridge") which is currently weight-restricted and cannot accommodate fire trucks or other large vehicles.
9. Park Row continues southerly as a two lane road with sidewalks and bike paths on both sides. A sign stating "No Through Traffic" and another indicating that the speed limit is 25 mph are posted for southbound motorists at the point where Park Row turns sharply to the south. Several **office** and commercial buildings, including the Pilgrim II building, are located on the easterly side of this segment of Park Row. Motor vehicles are parked on at least two sides of the Pilgrim II building. Park Row continues southerly until it reaches the Pilgrim I building at which point it becomes a private road. The road then narrows and there are no sidewalks or bike paths. The private road makes a loop to the south of Pilgrim II, off of which are parking areas. There is new pavement on the private road and throughout the Project area.
10. A stretch of dirt road extends from the southwest portion of the loop road. This road is the beginning of Batchelder Street, which extends to the west to Main Street.
11. The Batchelder Street / Main Street intersection is to the south of the Park Row /

Main Street intersection and does not have a traffic light. There is a traffic light at the intersection of Park Row and Main Street.

12. At its extreme eastern end, a single travel lane of Batchelder Street, approximately 15' wide, crosses two sets of railroad tracks at grade. There are two railroad crossing signs. There are no signal lights or bars restricting traffic.
 13. To the east of the railroad crossing, Batchelder Street is a short, straight, paved street approximately 20-21' wide, with sidewalks on each side. Parking is permitted along both sides of the street and was specifically requested by residents of **Batchelder Street** as a traffic-calming measure. Parking is not permitted within 40' of the Main Street intersection.
 14. Main Street is visible from the point where the Project loop road joins Batchelder Street. Six houses are located on the south side of the street, one of which has between two and four units. The driveway of the most westerly of the six houses is entered **from** Main Street. Four houses are located on the north side of Batchelder Street.
 15. Batchelder Street was reconstructed in 1997. Six-inch curbs were constructed and storm drains were installed. The street is approximately the same width now as it was prior to the reconstruction.
 16. Access to Pilgrim Park via Park Row is sometimes impossible when a train blocks the railroad crossing on that street. Sometimes a train blocking Park Row extends to the south and blocks the Batchelder Street crossing as well. The crossing(s) can be blocked for as long as 10- 15 minutes.
 17. Measured from the Main Street / Batchelder Street intersection, a vehicle would travel approximately 4-5 times the distance to the Project parking areas by traveling north on Main Street and accessing the Project via Park Row as a vehicle would travel if it accessed the parking areas via Batchelder Street.
 18. On April 18, 1997, the District Commission issued the Dash 6 Permit authorizing the Project.
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19. The Dash 6 Permit was issued subject to the following conditions:
 13. The following conditions apply to the mitigation and prevention of unreasonable traffic impacts on Batchelder Street:
 - A) The use of Batchelder Street during the construction phase of the project is expressly prohibited. This prohibition includes trucks hauling earth material from the site, deliveries being made to the site and all other uses such as contractor's employees traveling to and from the site. The Commission reserves the right to halt construction on the project and to attach additional permit conditions should these prohibitions be violated.
 - B) Within 30 days of the issuance of this permit, the [P]ermittees shall file with the District Commission a copy of a written notice to all industrial park tenants regarding the restrictions on the use of Batchelder Street.
 - C) The signs and restrictions on the easterly side of the railroad crossing shall be completed prior to the commencement of use of the 25,000 square foot building addition. This includes the one-way traffic section between parking lot A and Batchelder Street.
 - D) The District Commission retains continuing jurisdiction over this project pending verification that the Waterbury Village trustees have acted to restrict traffic movements on Batchelder Street. If such proof can not be provided by the [P]ermittees prior to the commencement of use of the building expansion, then the Commission will reconvene a hearing in order to consider additional permit conditions to prevent unreasonable impacts on Batchelder Street.
20. The Dash 6 Permit expressly incorporates the Dash 6 Order and the plans and exhibits on file with the District Commission.
21. The findings of fact in the Dash 6 Order addressing Criterion 5 include the following:
 56. The applicants and municipality have proposed modifications and

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restrictions to prevent incompatible traffic movements on Batchelder Street. These measures will include signs and geometric designs on the project roadways to prevent truck and employee traffic from exiting the industrial park via Batchelder Street. (Exhibit 25). The District Commission specifically finds that it is a necessary aspect of the final design of the project that the 50 foot section of the Loop Road between parking lot A and Batchelder Street will be limited to one-way traffic. (Exhibit 25).

57. The applicants further represented that they will inform all industrial park tenants that Batchelder Street is not an acceptable exit or entrance for employee and delivery truck traffic. (Exhibit 25).

58. The applicants also represent that the trustees for the Village of Waterbury are amenable to taking steps to ensure that Batchelder Street will be closed to through traffic. The District Commission recognizes that emergency vehicles would still be able to use the street as an alternative access to the project tracts. (Exhibits 25 and 27).

22. District Commission Exhibit 25 is a letter dated March 19, 1997 from Charles Grenier, PC, Permittees' engineer for the Project, to the District Commission, which states in pertinent part:

4. We have revised the project site plan to show a plan to restrict traffic on Batchelder Street. Pilgrim Partnership will install a sign directing trucks to the right at the southeast corner of the new addition, and "no left turn" signs at the exits to parking lots A, B, and C. "Do not enter" signs will be installed on the north side of the Batchelder Street and on the south side of the Davio house. ...

Pilgrim Partnership **further** agrees to inform Green Mountain Coffee Roasters, and all of its other tenants, that Batchelder Street is not an acceptable entrance or exit, nor are any delivery trucks allowed to use Batchelder Street. Furthermore, the William Shepeluk letter [see Finding #23 below] states that the Trustees are amenable to prohibiting entry onto Batchelder Street as long as it is agreeable to industrial park users. These changes will effectively eliminate the use of the Batchelder Street as an exit from the Industrial Park and its parking lots. The Trustees will agree to closing the street to through traffic.

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23. District Commission Exhibit 27 is a letter dated March 18, 1997 from William Shepeluk, the Manager for the Town / Village of Waterbury, to Charles Grenier which provides in pertinent part:
- Item 4: The Village Trustees are willing to work with the developers and neighbors to help keep use of Batchelder Street to a minimum. It is likely the Trustees will restrict commercial vehicles on Batchelder Street. They will also consider closing the street to "Through Traffic." In addition, the Trustees would likely agree to make the .03 mile of class 4 road one way into the industrial park, if all parties with rights to use that crossing agree. This would effectively eliminate Batchelder Street as an exit from the industrial park.
24. No timely appeal was filed from the Dash 6 Permit and Dash 6 Order.
25. Occupation of the Project commenced in December, 1997 and January, 1998. GMCR employs approximately 20 additional employees as a result of the Project.
26. The Village Trustees did not act "to restrict traffic movements on Batchelder Street" prior to commencement of use of the Project. No verification of such action was, or could have been, provided to the District Commission pursuant to Condition 13(D) of the Dash 6 Permit.
27. On May 28, 1998, the District Commission issued the 6B Permit and the supporting May Order which includes conditions intended to prevent unreasonable impacts on the interests of residents of Batchelder Street pursuant to Criterion 5. The Commission's June Order confirmed the 6B Permit and the May Order.
28. The permitted parking area and driveways lie to the south of the expanded Pilgrim I facility. Although some parking existed in this area before approval of the Project, the roadways were dirt and parking was less extensive.
29. As part of the Project, Permittees created a one-way circular flow of truck traffic by installing one "Trucks Only" and two "Do Not Enter" signs along the roadway and by erecting "No Left Turn" signs at the two southerly parking lots. At some point after issuance of the May Order, Permittees painted "One Way - No Entry" striping on the travel surface of this loop road on both sides of the driveway's

outlet onto Batchelder Street. In addition, after issuance of the May Order Permittees painted the words "No Thru Traffic" on the southbound driveway at the northern entrance to the Pilgrim I parking area.

30. In December, 1997, the Village Trustees passed an ordinance prohibiting commercial through-traffic on Batchelder Street. In approximately May, 1998, the Village Trustees posted a sign on each end of Batchelder Street stating "No Thru Commercial Vehicles;" In late July or early August, 1998, the Village Trustees posted two signs on Main Street prohibiting commercial through-traffic on Batchelder Street.
 31. Prior to the construction of Pilgrim Park, Batchelder Street extended across to the east side of the railroad tracks to a house located there. Since the development of Pilgrim Park beginning in the mid-1980s, the property on the east side of the railroad tracks has been logged and excavated and the house on the east side of the tracks has been replaced by parking areas for Pilgrim Park.
 32. Traffic began to increase on Batchelder Street when Pilgrim Park was developed. Persons traveling to or from destinations to the south of the Batchelder Street / Main Street intersection began to use Batchelder Street as an access to Pilgrim Park. United Parcel Service, Federal Express, and Kingsbury delivery trucks, garbage trucks, and other commercial vehicles accessed Pilgrim Park via Batchelder Street.
 33. When there are special events or construction on Main Street, traffic often re-routes itself or is re-routed onto Batchelder Street to avoid congestion on Main Street.
 34. Vehicles wishing to avoid traffic lights or potential congestion on Main Street sometimes take a "short-cut" through Pilgrim Park via Batchelder Street.
 35. Now that the house on the east side of the Batchelder Street railroad crossing has been demolished, the Village no longer plows across the crossing to the eastern end of Batchelder Street. Passenger vehicles do not use the crossing until a truck has driven through the snow and created a path.
 36. Paul Comey is the vice president of facilities at GMCR. He has worked in Pilgrim Park since 1980. He resides in Warren. Prior to issuance of the Dash 6 Permit, Mr. Comey customarily drove to and from Pilgrim Park on Batchelder
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Street because it is the most convenient way for a vehicle traveling on Main Street to the south of the Batchelder Street intersection to access the Park. Mr. Comey traveled along Batchelder Street several times each day. Since the issuance of the Dash 6 Permit, Mr. Comey has driven to and from the Park via Park Row.

37. During construction of the Project in 1997, municipal and/or commercial trucks used Batchelder Street to haul earth from the Project site to other locations. Commercial vehicles entered and exited Pilgrim Park via Batchelder Street on a regular basis. In order to eliminate this traffic, the contractor for the Project moved boulders to the eastern end of Batchelder Street. No evidence was provided as to the length of time that the boulders remained there.
38. The number of passenger cars and commercial vehicles increased on Batchelder Street once the boulders were removed. Since that time, GMCR has taken several measures to persuade its employees, contractors, and vendors to avoid Batchelder Street and to access the Project via Park Row. Mr. Comey requested GMCR managers to post notices alerting employees to access Pilgrim Park via Park Row. A notice to this effect was included in the envelopes with employee paychecks on one occasion. GMCR would be willing to repeat the inclusion of the notice in pay envelopes on a quarterly basis. Mr. Comey has spoken personally with employees, contractors, and vendors whom he discovered were still using Batchelder Street. On several occasions, he has posted his car at the railroad crossing to stop vehicles from using Batchelder Street. Mr. Comey has spoken only with GMCR employees, vendors, and contractors. He has not spoken with individuals associated with other businesses in Pilgrim Park or persons using Pilgrim Park as a "short-cut."
39. Although some GMCR employees initially failed to comply with GMCR's requests to discontinue use of Batchelder Street, the traffic on Batchelder Street has diminished.
40. There is no evidence that notice was provided to tenants (other than GMCR employees) as required by Dash 6 Permit Condition 13(B).
41. GMCR leases approximately 75% of the total square footage available in Pilgrim Park. Therefore, successful mitigating efforts taken by GMCR alone would have an overall mitigating effect on the Pilgrim Park-related traffic using Batchelder Street.

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42. Some vehicles do not stop at the Batchelder Street railroad crossing before traveling across the tracks.
 43. Many of the vehicles that continue to travel on Batchelder Street do so at high rates of speed. The Village Trustees have not posted a speed limit on Batchelder Street because the lowest speed for which it is permissible to post a sign would be excessive on this street.
 44. In addition to Permittees, other persons may have a deeded right to use the railroad crossing on Batchelder Street to access Pilgrim Park.
 45. The Village Trustees have considered whether Batchelder Street should be closed to **through-traffic** other than emergency vehicles. They have declined to do so. Although Permittees had discussions with the Trustees regarding the Batchelder Street residents' desire that the street be closed to through-traffic, Permittees never requested the Trustees to close Batchelder Street.
 46. The Village Trustees have never considered constructing speed bumps along Batchelder Street to discourage its use as a through-street and to decrease vehicular speed.
 47. Pilgrim Park can be accessed via Park Row, Batchelder Street, and Railroad Street. The current condition of the Bridge precludes use of Railroad Street by large vehicles such as fire trucks. The most direct route from the tire station to Pilgrim Park is via Park Row. The next most direct routes in decreasing order of preference are (i) via Stowe Street to Railroad Street; (ii) via Union Street to Railroad Street; and (iii) via Batchelder Street.
 48. The Village Trustees are engaged in ongoing talks with the railroad company **concerning upgrade** of the Bridge. If the Bridge is upgraded or if another access road is constructed to Pilgrim Park, the Trustees will be amenable to reconsidering whether to close Batchelder Street.
 49. Permittees' traffic expert conducted traffic counts on Batchelder Street for a period of two and one-half hours on Wednesday, January 22, 1997, which was before construction or occupancy of the Project. During the study period, 12 vehicles used Batchelder Street to enter or exit Pilgrim Park. An additional 5 vehicles used Pilgrim Park as a "short-cut" to other destinations. Seventeen
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vehicles in a two and one-half hour period translates into an average of 6.8 vehicles per hour. The study period was chosen to reflect the time during which the highest traffic volume would be expected on Batchelder Street due the change from first to second shift at GMCR. Permittees' traffic expert conceded that there was one or more errors in the report's charts depicting current vehicular use of Batchelder Street.

50. The Central Vermont Regional Planning Commission ("CVRPC") conducted traffic counts on Batchelder Street in July, 1988 after the Project was constructed and occupied.
51. The traffic counter was installed sufficiently far from the railroad tracks so that automobiles slowing down at the tracks would not be mistaken by the counter as trucks. Because of its location, the counter registered some traffic associated with residents of Batchelder Street as well as traffic entering and exiting Pilgrim Park.
52. The counter was installed on June 30, 1998. Several days later, CVRPC discovered that the counter was producing inaccurate data due to the shifting of one of the tubes. The installation was corrected and remained properly installed. Accurate data from the traffic count is available for the eight days beginning July 7, 1998 and ending July 14, 1998.
53. In order to obtain the most accurate information, CVRPC tries to gather data for one full week. It is theoretically possible to gather information for a "typical" traffic count by collecting twenty-four hours of data on a Tuesday, Wednesday, or Thursday.
54. The CVRPC traffic study provides a total of all vehicular trips by hourly intervals and also classifies these figures by vehicle type.
55. On Monday, July 13, 1998, which was during the study period, the Park Row rail grade crossing was blocked by construction of a storm drain. On that day, there were 151 more inbound trips and 160 more outbound trips than on the next highest day of the study. Because the Park Row access is ordinarily open, the data from July 13 is excluded from the calculation of Average Daily Traffic ("ADT") volumes. In addition, on Tuesday, July 7, 1998 and Tuesday, July 14, 1998, the counter collected data for only twelve and nine hours, respectively. Therefore, data from those days shall be excluded as well.

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56. With data from July 7, 13, and 14 excluded, it is impossible to calculate the ADT based upon seven days of data, as CVRPC prefers to do in order to obtain the most accurate indication of traffic. The individual counts for the five remaining days are as follows:

Total Number of Vehicles

Wednesday 7/8	100
Thursday 7/9	99
Friday 7/10	136
Saturday 7/11	101
Sunday 7/12	88
	524

57. After construction and occupancy of the Project, the ADT on Batchelder Street at the point where the counter was installed was 105 for the five days in which 24 hours of accurate, representative data was collected ($524 / 5 = 104.8$).
58. Some of the **traffic** counted was that of local residents. It can be estimated that there are approximately **8-10** one-way trips per household per day for each of the four residences within the counter area. Using a conservative estimate of 6 one-way trips per day per household, or 24 residential trips total, there were an average of **8.1** non-residential vehicular trips per day during the five days in which 24 hours of accurate, representative data was collected ($105 - 24 = 8.1$).
59. During the five days in which 24 hours of accurate, representative data was collected, the largest number of vehicles using Batchelder Street during any one hour was on Sunday July 12, 1998 when 14 vehicles were counted between 7:00 and 8:00 p.m. Some of the trips may have been attributable to the four residences within the counter area.
60. During the five days in which 24 hours of accurate, representative data was collected, there were never more than an average of nine vehicular trips on Batchelder Street during any one hour. Some of the trips may have been attributable to the four residences within the counter area.
61. The CVRPC has not taken a position on whether the Project conforms with **Criterion 5**.
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62. Two full shifts of GMCR employees work at the Project on weekdays. The first shift arrives at 5:45 a.m. and the second shift leaves at 1:00 a.m. Some employees work on the weekend as well. Vacations are staggered throughout the year, with the greatest number occurring in September before the close of the fiscal year. There is no plant shut-down in the summer months.
63. Betty and Ronald Frederick have lived on Batchelder Street for fifteen years. They bought their home at this location because Batchelder Street was a quiet neighborhood. Frances and Janice Sherman have lived on Batchelder Street for 24 years.
64. The Neighbors have contacted Village officials on several occasions since the development of Pilgrim Park began in the mid-1980s to discuss the number and speed of non-residential vehicles using Batchelder Street.
65. On August 20, 1998, an informal traffic count revealed that approximately 43 vehicles traveled on Batchelder Street to access Pilgrim Park between 5:00 and 7:00 p.m. On this date, work was being done on the existing water main at the intersection of Main Street and Park Row. Due to the congestion caused by the construction, Main Street traffic was diverted through Pilgrim Park. On all other days, the Neighbors' informal counts were roughly comparable to the CVRPC **traffic** study.
66. On more than one occasion when Betty Frederick **has stopped** at the end of Batchelder Street before traveling onto Main Street, she has been required to back up in order to create sufficient room for a vehicle to turn from Main Street onto Batchelder Street.
67. Even though the Village Trustees erected signs prohibiting commercial traffic on Batchelder Street, the residents of Batchelder Street continue to observe commercial vehicles entering and exiting Pilgrim Park via Batchelder Street. The use is particularly heavy in the early morning and in the evening.
68. The Neighbors concede that traffic on Batchelder Street has decreased since GMCR began the educational effort with its employees, contractors, and vendors.

V. CONCLUSIONS OF LAW

A. Scope of Review

When a party appeals from a District Commission determination, the Board provides a “de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard.” 10 V.S.A. § 6089(a)(3). Board rules provide for the de novo review of a District Commission’s findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the District Commission in this matter. Rather, it must regard the Dash 6 Permit, the 6B Permit, the May Order, and the June Order as evidence before the Board.

B. Verification

The first issue that the Board must address is whether, prior to commencement of the use of the Project, Permittees did provide or could have provided verification that the Village Trustees had acted to restrict traffic movements on Batchelder Street. Permittees concede that the Trustees did not act to restrict **traffic** prior to the commencement of occupation, and therefore, Permittees could not have provided the required verification. Accordingly, the Board answers the first question in the negative.

C. Permissibility of Amendment

Because the Board answers the first question in the negative, it must determine whether the Dash 6 Permit can be amended to include additional conditions “to prevent unreasonable impacts on Batchelder Street” pursuant to Condition 13(D) to the Dash 6 Permit and Criterion 5 (traffic). Condition 13(D) states:

The District Commission retains continuing jurisdiction over this project pending verification that the Waterbury Village trustees have acted to restrict traffic movements on Batchelder Street. *If such proof can not be provided by the [P]ermittees prior to the commencement of use of the building expansion, then the Commission will reconvene a hearing in order to consider additional permit conditions to prevent unreasonable impacts on Batchelder Street.*

(emphasis added).

Permittees argue that “[w]hile it is clear that the Waterbury Village Trustees did

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Criterion 5 does not require that proposed development be the principal cause or the original source of traffic problems. Several causes may contribute to a particular effect or result. [In another proceeding involving access to Pilgrim Park, t]he Board found that the development would contribute to [an] existing traffic problem. It would be absurd to permit a hazardous condition to become more hazardous.

One purpose of Act 250 is to insure that "lands and environment are devoted to uses which are not detrimental to the public welfare and interests." Safe travel ... is in the public interest. Exacerbating [an] existing traffic hazard by allowing additional travel on [a] road would be detrimental to the public interest.

In re Pilgrim Partnership, 153 Vt. 594, 596-97 (1990) (citations omitted) (affirming Board decision that proposed project did not satisfy Criterion 5).

A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created. Id. §6087(b). The burden of proof is on the Neighbors under Criterion 5, id. § 6088(b), but Permittees must provide sufficient information for the Board to make affirmative findings.

Permittees have presented the January 22, 1997 traffic report which includes information concerning Batchelder Street. The Board cannot rely upon the study as an accurate depiction of pre-construction traffic, however, because the study is based upon only two and one-half hours of data. It is theoretically possible to gather information for a "typical" traffic count by collecting twenty-four *hours* of mid-week data, although the most accurate reports rely upon a full week of data. In addition, the proponent of the study conceded that the study contained one or more errors concerning vehicular use of Batchelder Street. Therefore, it is impossible to determine based upon the traffic reports whether traffic has increased, decreased, or remained the same since completion and occupation of the Project.

The Dash 6 Permit required Permittees to take certain actions to restrict traffic on Batchelder Street including (i) providing written notice to all tenants of Pilgrim Park within 30 days of the Permit's issuance, (ii) installing "signs and restrictions" in the Project parking area including a one-way section in the loop road prior to use of the Project, and (iii) ensuring, indirectly, that the Village Trustees "acted to restrict traffic movements on Batchelder Street" prior to use of the Project.

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GMCR has provided personal and written notice to its employees that access to and from Pilgrim Park is prohibited via Batchelder Street. There is no evidence that Permittees have provided notice regarding Batchelder Street restrictions to their **non-GMCR** tenants. Permittees installed some “signs and restrictions” in the parking area in connection with the Project and have installed additional ones at some time after issuance of the 6B Permit and May Order. In approximately May, 1998 and July or August, 1998, the Village Trustees installed signs on Batchelder Street and Main Street prohibiting commercial **through-traffic**.

Permittees, GMCR, and the Village Trustees have taken many positive measures to restrict traffic on Batchelder Street. Indeed, even the Neighbors concede that traffic has reduced since the commencement of these measures.* The Board is concerned, however, that unless Permittees and the Village maintain the existing signs and unless GMCR continues its verbal and written warnings, there will be unreasonable congestion or unsafe conditions on Batchelder Street. The Board bases this concern on a number of factors. First, Batchelder Street is a short, straight road. In contrast to Park Row, it has no **traffic** signal at its intersection with Main Street and no signal lights or restrictive bars at the railroad crossing. It provides more direct and rapid access to Pilgrim Park, particularly for vehicles traveling to and from the south. Second, traffic is sometimes re-routed onto Batchelder Street to avoid congestion on Main Street and some motorists take a “short-cut” through Pilgrim Park via Batchelder Street.

Since the **mid-1980s**, Batchelder Street has been transformed into a street with the potential to be used to avoid congestion on Main Street. Applying new pavement to dirt driveways throughout the Project site created an even more enticing “short-cut,” via Batchelder Street. The narrowness and residential nature of Batchelder Street and the narrow, un-signalized railroad crossing create a situation in which additional use, particularly at high speeds, will be an ongoing potential safety concern pursuant to Criterion 5. “Exacerbating [an] existing traffic hazard by allowing additional travel on [a] road would be detrimental to the public interest.” In re Pilgrim Partnership, 153 Vt. at 596-97.

² It is not clear **from** the Dash 6 Permit and its supporting Dash 6 Order whether the District Commission intended that the required actions would minimize access to Pilgrim Park via Batchelder Street or stop such traffic entirely. Although the Village Trustees have not prohibited *all* through-traffic on Batchelder Street, they have decreased the overall volume of traffic on the street by prohibiting commercial through-traffic.

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Although the Board cannot determine whether traffic has increased, decreased, or remained the same since completion and occupation of the Project, the Board cannot conclude that the Project currently "cause[s] unreasonable congestion or unsafe conditions with respect to the use of" Batchelder Street. The Board is able to reach this conclusion, however, only if it ensures that the steps already taken (some of which did not occur until after the issuance of the 6B Permit and May Order) together with two additional measures which it will require, are included as conditions in the Permit that issues with this Order. The two additional conditions the Board will require are: (i) within 60 days after issuance of this Permit and at least once annually thereafter, Permittees shall provide written notice to *all* of their Pilgrim Park tenants that the Park shall not be accessed via Batchelder Street and (ii) beginning no later than March 3 1, 1999, GMCR shall include a notice prohibiting use of Batchelder Street in its employee paychecks on a quarterly **basis**.³

The Board concludes that the Project, as conditioned, will not cause unreasonable congestion or unsafe conditions with respect to the use of Batchelder Street in violation of Criterion 5.

VI. ORDER

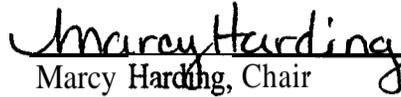
1. The Preliminary Evidentiary Ruling is correct for the reasons stated therein and the Ruling is hereby incorporated.
2. Official notice is hereby taken of the Dash 6 Permit and the 6B Permit together with all incorporated orders and exhibits.
3. Land Use Permit #5 W0894-6/5 W1156-6B-EB is hereby issued.
4. Jurisdiction is returned to the District #5 Environmental Commission.

³ The Village Trustees may wish to consider the construction of speed bumps or other traffic calming measures to discourage the use of Batchelder Street by through-traffic. The Trustees may also wish to reconsider closing the street to all through-traffic if the Bridge is fortified and/or if an alternate access to Pilgrim Park is created.

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Dated at Montpelier, Vermont this 28th day of January, 1999.

ENVIRONMENTAL BOARD



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